

## Articles

# Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act

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Because Section 5 of the Fourteenth Amendment vests in Congress “power to enforce, by appropriate legislation, the provisions of this article,”<sup>1</sup> the great rights contained in Section 1 of the Fourteenth Amendment are enforced by both Congress and the Court. How to conceive of the relationship between the legislative power established in Section 5 and the judicial power authorized by Section 1 is one of the deep puzzles of American constitutional law. This Article argues that Section 5 is a structural device that fosters the democratic legitimacy of our constitutional order. It links the legal interpretations of courts to the constitutional understandings of the American people, as expressed through their chosen representatives.

The history of Section 5 doctrine has been one of turmoil and revision. In the early years of the Fourteenth Amendment the Court was quite hostile to Section 5 power, fearing that it might “authorize Congress to create a code of municipal law for the regulation of private rights” that would displace “the domain of State legislation.”<sup>2</sup> In the 1960s, during the so-called Second Reconstruction, the Court adopted a deliberately permissive stance and began to review Section 5 legislation with the same deference that it extended to every other exercise of national authority in the aftermath of the New Deal.<sup>3</sup> In recent years the Rehnquist Court has turned the tables once again. In addition to reviving concerns about federalism, it has discovered an entirely new reason to renew judicial hostility to Section 5 authority: separation of powers.

The Rehnquist Court now views Section 5 power as a potential threat to the Court’s role as “the ultimate expositor of the constitutional text.”<sup>4</sup> Beginning with its 1997 decision in *City of Boerne v. Flores*,<sup>5</sup> the Court has repeatedly<sup>6</sup> affirmed that Section 5 does not authorize Congress “to determine what constitutes a constitutional violation”<sup>7</sup> or “to rewrite the Fourteenth Amendment law laid down by this Court.”<sup>8</sup> The Court has held that authority to pronounce constitutional law lies exclusively with the judicial branch of the federal government, which possesses “the duty to say

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1. U.S. CONST. amend. XIV, § 5.

2. The Civil Rights Cases, 109 U.S. 3, 11 (1883). The Reconstruction Court waged a campaign of “virtual nullification” on Section 5 legislation. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 205-06 (1970) (Brennan, J., concurring in part and dissenting in part). “Key provisions were declared unconstitutional or given an unduly narrow construction wholly out of keeping with their purposes.” *Id.* at 206.

3. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

4. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

5. 521 U.S. 507 (1997).

6. For some subsequent cases, see *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Morrison*, 529 U.S. 598; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); and *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

7. *City of Boerne*, 521 U.S. at 519.

8. *Garrett*, 531 U.S. at 374.

what the law is.”<sup>9</sup> Condemning Section 5 legislation that might establish Congress as an independent interpreter of the Constitution, the Court has announced that “Congress’ power under § 5 . . . extends only to ‘enforc[ing]’ the provisions of the Fourteenth Amendment,” and that “Congress does not enforce a constitutional right by changing what the right is.”<sup>10</sup>

We call this view of separation of powers the “enforcement model.” The Rehnquist Court has used the enforcement model to strike down path-breaking civil rights legislation enacted under the quite different understanding of Section 5 that prevailed during the thirty years that preceded *Boerne*.<sup>11</sup> The enforcement model draws authority from *Cooper v. Aaron*,<sup>12</sup> from the Court’s bold claim that the federal judiciary must be “supreme in the exposition of the law of the Constitution”<sup>13</sup> if it is to protect precious constitutional rights from the depredations of majoritarian politics. Disagreement with the enforcement model would seem possible only on the basis of a popular constitutionalism that would virtually abandon judicial review.<sup>14</sup> It is no surprise that the enforcement model presently enjoys widespread support on all sides of the political spectrum.

We contend, however, that there is no need to choose between judicial review and innovative Section 5 legislation based on congressional interpretations of the Fourteenth Amendment. Both are possible, but only if we can break the hold that the enforcement model has on our common sense. The model seeks to exclude Congress from the process of constitutional lawmaking because it regards the integrity of our system of constitutional rights as dependent upon its complete insulation from the contamination of politics. Although we agree that there are many circumstances when constitutional law requires separation from politics, we also believe that a legitimate and vibrant system of constitutional law requires institutional structures that will ground it in the constitutional culture of the nation.<sup>15</sup> Our Constitution contains a variety of structures and arrangements that facilitate these necessary connections between constitutional law and constitutional culture. These mechanisms range from

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9. *City of Boerne*, 521 U.S. at 536 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

10. *Id.* at 519 (second alteration in original).

11. The Rehnquist Court’s new jurisprudence of Section 5 has led it to strike down such significant Section 5 legislation as Title I of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 330, in *Garrett*, 531 U.S. 356, and provisions of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, in *Morrison*, 529 U.S. 598.

12. 358 U.S. 1 (1958).

13. *Id.* at 18.

14. See, e.g., MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

15. For a full discussion, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17-29 (2003).

the amendment procedures of Article V to the political appointment of Article III judges. Section 5 is best conceived as another such mechanism.

We therefore propose an account of Section 5 power that would enable it to perform this function. We call this account the model of policentric constitutional interpretation. The policentric model holds that for purposes of Section 5 power the Constitution should be regarded as having multiple interpreters, both political and legal. The model attributes equal interpretive authority to Congress and to the Court. The model thus entails (1) that Congress does not violate principles of separation of powers when it enacts Section 5 legislation premised on an understanding of the Constitution that differs from the Court's, and (2) that Congress's action does not bind the Court, so that the Court remains free to invalidate Section 5 legislation that in the Court's view violates a constitutional principle requiring judicial protection. This account of Section 5 power combines a robust legislative constitutionalism with a vigorous commitment to rule-of-law values.

In advancing the policentric model of Section 5 authority, we do not understand ourselves to be proposing some novel or innovative constitutional regime. To the contrary, the policentric model more accurately reflects the understandings and practices that make up our constitutional practice than does the enforcement model. During the period between the Second Reconstruction and *Boerne*, for example, Section 5 doctrine actually fostered a policentric practice of Section 5 authority. Our thesis in this Article is that Section 5 jurisprudence has been, and ought to remain, policentric. We draw on both history and theory to show that Section 5 legislation has in the past helped to establish democratic foundations for the Court's own articulation of constitutional rights.

We develop the history and theory of Section 5 power in the context of a specific case, *Nevada Department of Human Resources v. Hibbs*,<sup>16</sup> which the Court will decide in its 2002 Term. At issue in *Hibbs* is the question of whether the family leave provisions of the Family and Medical Leave Act of 1993 (FMLA)<sup>17</sup> are a valid exercise of Section 5 power. The question arises because Congress cannot abrogate the Eleventh Amendment immunity of states except when it acts pursuant to its authority under Section 5.<sup>18</sup> The family leave provisions at issue in *Hibbs* require employers to permit eligible employees to take (unpaid) leave totaling twelve weeks

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16. *Hibbs v. Dep't of Human Res.*, 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom. Nev. Dep't of Human Res. v. Hibbs*, 536 U.S. 938 (2002).

17. 29 U.S.C. § 2612(a)(1)(C) (2000).

18. *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Thus private litigants cannot enforce the FMLA against states that have not waived their Eleventh Amendment immunity if the FMLA is a statute enacted pursuant only to federal Commerce Clause power.

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per calendar year to care for ill family members.<sup>19</sup> Congress believed that the FMLA was a valid exercise of its Section 5 authority. It announced that the purpose of the FMLA was

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for . . . the care of a child, spouse, or parent who has a serious health condition;

. . . .

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for . . . compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.<sup>20</sup>

The essential question posed by *Hibbs* is whether the right to employment leave to care for a sick family member established by the FMLA is “appropriate legislation” to enforce the Equal Protection Clause of the Fourteenth Amendment. The difficulty is that the family leave provisions of the FMLA do not seem to resemble any Section 1 right that the Court currently enforces. The Court now interprets the Equal Protection Clause to prohibit state action that discriminates on the basis of sex;<sup>21</sup> it

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19. The statute provides that an eligible employee shall be entitled to a total of twelve work weeks of leave during any twelve-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1).

20. *Id.* § 2601(b).

21. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985).

The Court describes the Section 1 right in this way:

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. “[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)

does not read the Clause as a means to “promote the goal of equal employment opportunity.” The family leave provisions of the FMLA are thus an ideal vehicle to explore the basic question posed by the enforcement model: What is the relationship between legislative and judicial enforcement of the Fourteenth Amendment?

Our discussion proceeds in five Parts. In Part I, we describe the enforcement model on which Section 5 doctrine currently rests. The model does not require Congress to enact Section 5 legislation containing rights that are identical to judicially enforceable rights. But it does require that Section 5 legislation create rights that can be explained as efforts to remedy or deter violations of judicially enforceable rights. In this way the enforcement model seeks to maintain symbolic judicial control over the articulation of constitutional law. The model asserts that Congress can use its Section 5 power only to enforce constitutional meanings that the Court itself is prepared to enforce pursuant to Section 1.

We subject the enforcement model to two kinds of critique. We show, first, that the model does not offer a coherent framework for distinguishing between Section 5 laws that unconstitutionally “interpret” the Fourteenth Amendment and Section 5 laws that merely “enforce” it. Without guidance from the enforcement model itself, the decisions of the Rehnquist Court have been driven by implicit policy preferences. We argue, second, that even if it were possible to repair the internal inconsistencies of the enforcement model, it would be a mistake to do so because the model misconceives the systemic conditions that conduce to the well-being of our constitutional order.

We begin this critique in Section II.A, where we argue that the ambition of the enforcement model to require Congress to enforce the “same” rights as courts enforce is theoretically incoherent. Rights articulated within an adjudicatory context are not readily transposed to the circumstances of a legislature. Because the enforcement model does not acknowledge the many ways in which the nature of rights depends on the institutional context in which they are articulated, the model cannot explain when legislative rights are sufficiently similar to judicial rights that they can be counted as “enforcing” them. The enforcement model can resolve this question only by invoking principles that are extrinsic to the model itself.

We illustrate these points in Section II.B, which discusses how the enforcement model might be applied in the case of the FMLA. The model is consistent either with the Court upholding the family leave provisions of

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(plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.  
*Id.* (alterations in original).

the FMLA because they “enforce” Section 1 rights that can be asserted in adjudication, or with the Court invalidating the family leave provisions of the FMLA because they improperly “interpret” these rights. The theoretical indeterminacy of the enforcement model has great practical significance, for it leaves the Court ample room to decide cases on the basis of implicit and unexamined concerns like federalism, distrust of Congress, or hostility to the substantive agenda of the FMLA.

Even if it were possible to rehabilitate the enforcement model, however, we argue in Parts III and IV that the Court would weaken our constitutional order if it prevented Congress from enacting Section 5 statutes based upon legislative interpretations of the Fourteenth Amendment. Although legislative constitutionalism is assuredly fraught with risk, it also provides an indispensable resource for maintaining the legitimacy of our constitutional order, including the institution of judicial review itself.

In Section III.A, we address the fundamental premise of the enforcement model, which is that the Court must keep constitutional law wholly isolated from politics. We argue that this premise misconceives the nature of constitutional law, which requires forms of democratic legitimation that cannot be confined to the rare moments when constitutional text is ratified. The American Constitution is not merely a limitation on popular will, but also its deepest expression. Questions of constitutional law involve profound issues of national identity that cannot be resolved merely by judicial decree.

History demonstrates that constitutional law is in continual dialogue with the constitutional culture of the nation.<sup>22</sup> Congress and the Court each possess distinct institutional perspectives, competencies, and purposes, and these differences affect how each branch responds to constitutional culture. Because of Congress’s democratic responsiveness, it has at times expressed shifts in the way the nation understands the Constitution through legislation premised on constitutional interpretations that differ from the Court’s. Although the enforcement model would condemn such legislation as a threat to separation of powers, we argue that congressional lawmaking of just this sort can serve positive systemic purposes, and that it has in fact played a significant role in the development of core understandings of our modern constitutional tradition.

We develop this claim in Section III.B, where we recount how a social movement seeking equal citizenship for women prompted sustained constitutional lawmaking by Congress in the early 1970s, which in turn influenced the development of the Court’s own sex discrimination

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22. See, e.g., H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002).



jurisprudence. The feminist movement at that time argued that women could be recognized as equal to men only if the family and other basic social institutions were reformed so as to allow all adult members of society to participate equally in activities that mark full citizenship: work, education, and politics. Congress responded to the movement's advocacy with the legislative enactment of the ERA, Section 5 legislation, and a variety of other statutes. It was only after Congress used its lawmaking powers to validate the movement's understanding of equality that the Court proved willing to modify its own Section 1 doctrine to protect citizens against state action that discriminates on the basis of sex. The Court altered its jurisprudence to reflect the evolving constitutional culture of the country, as that culture was evidenced by congressional lawmaking.

While Section III.B demonstrates the important structural role that congressional lawmaking can play in informing the nation's, and the Court's, understanding of the Equal Protection Clause, Section III.C considers how legislative enforcement of the Equal Protection Clause may vary from adjudicative enforcement. It examines some of the distinctive features of legislative constitutionalism by extending our case history over the next two decades, until it ultimately culminates in passage of the FMLA. Repeatedly over this twenty-year period, the claims of citizens seeking to alleviate conflicts between work and the family collided with the concerns of other citizens, who resisted federal regulation of the workplace or of the family. These conflicts influenced the institutional form in which Congress chose to vindicate the value of sex equality. By reconstructing debates about the ways in which federal law would structure childcare, define pregnancy discrimination at work, and provide a right to family leave in employment, Section III.C illustrates how Congress can give practical content to constitutional values through processes that differ from adjudication and that reflect the distinct institutional capacities and perspectives of a legislature. We argue that the difference between legislative and judicial constitutionalism strengthens, rather than weakens, our constitutional order, because it connects constitutional law to the changing constitutional understandings of the American people.

The need for such structural linkage is at the core of our case for the model of policentric constitutional interpretation. In Part IV we propose the policentric model as the best historical and normative account of congressional Section 5 power. Our discussion of constitutional history suggests that the Court is misguided to depict judicial control of constitutional meaning as an unalloyed systemic good and contamination of constitutional interpretation by politics as an unalloyed systemic harm. To the contrary, Section 5 legislation based upon policentric interpretation can substantially contribute to the well-being of our constitutional order. The development of Fourteenth Amendment sex discrimination jurisprudence,

for example, was stimulated by acts of legislative constitutionalism, which illustrates how the structural connection between judicial and legislative interpretation can actually enhance the Court's ability to construe the Constitution.

We argue that there are both legal and political dimensions of the American Constitution, and that these must remain in dynamic tension if the legal Constitution enforced by courts is to retain legitimacy and authority. The enforcement model would suppress this tension, whereas the policentric model would facilitate it. The policentric model poses no threat to judicial protections for individual constitutional rights or for other constitutional principles. Instead the model authorizes courts to impose the same restrictions on Section 5 power that they would impose on any otherwise legitimate exercise of federal power. The model fully preserves the values of the rule of law while liberating Congress to deploy its broad range of legislative competence to interpret and enforce the Fourteenth Amendment.

We conclude our discussion in Part V by briefly addressing the challenge to the policentric model posed by the Rehnquist Court's commitment to the values of federalism. The enforcement model has been justified almost entirely in terms of separation of powers, but the theoretical incompleteness of the model gives good reason to believe that the Court's decisions have also been driven by a silent and unaccountable agenda that sounds in federalism. Although we ourselves strongly disagree with this agenda, we argue that the federalism principles that propel the Court's decisions should explicitly be named and defended. This would most easily be accomplished if the Court were sharply to distinguish the question of whether Congress has power to enact Section 5 legislation from the question of whether Section 5 legislation impermissibly infringes on essential postulates of federalism. Requiring the Court to justify federalism limitations on Section 5 power in this way would force greater accountability on the Court.

#### I. THE ENFORCEMENT MODEL AND SECTION 5 LEGISLATION

The enforcement model is a recent innovation. In the nineteenth century the Court severely restricted Section 5 power in order to maintain what it believed were proper principles of federalism.<sup>23</sup> But in 1997 the Rehnquist Court added an entirely new chapter to the interpretation of Section 5.<sup>24</sup> It declared that the reach of Section 5 power was constrained not merely by federalism, but also, and primarily, by the requirements of separation of

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23. *The Civil Rights Cases*, 109 U.S. 3, 13 (1883).

24. The key decision is *City of Boerne v. Flores*, 521 U.S. 507 (1997).

powers.<sup>25</sup> Because the Court understood Section 5 to regulate the relationship between Congress and the Court, it held that Congress had power to “enforce” the provisions of the Fourteenth Amendment, but not to “interpret” their meaning:

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. *It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation.* Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”<sup>26</sup>

We call this account the “enforcement” model. At the heart of the enforcement model lies a particular view of separation of powers, which holds that the constitutional function of courts is to declare the substance and nature of Fourteenth Amendment rights, whereas the constitutional function of Section 5 legislation is to “enforce” those rights. The central premise of the enforcement model is that courts are the only legitimate source of authoritative constitutional meaning. Courts hold this privilege because the Constitution is a form of law and “the province of the Judicial Branch . . . embraces the duty to say what the law is.”<sup>27</sup>

To evaluate the enforcement model, we will be using a nomenclature that clearly distinguishes among the different kinds of rights that are relevant to the new Section 5 jurisprudence of the Rehnquist Court:

$R_j$ : Rights established in the Constitution, as the judiciary interprets the Constitution.

$R_c$ : Rights established in the Constitution, as Congress interprets the Constitution.

$R_s$ : Rights established in congressional Section 5 statutes, which “enforce” constitutional rights (which are either  $R_c$  or  $R_j$ ).

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25. The modern origins of this view of Section 5 probably lie with Justice Harlan’s dissent in *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

26. *City of Boerne*, 521 U.S. at 519 (emphasis added, alteration in original).

27. *Id.* at 536.

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Using these terms, we can succinctly restate the enforcement model: Under Section 5, Congress has authority to enact  $R_s$  that enforce  $R_j$ , but Congress may not enact  $R_s$  that enforce  $R_c$ .

The simplest example of Section 5 legislation that fits the enforcement model is 42 U.S.C. § 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>28</sup>

Section 1983 contemplates that courts will define the “rights, privileges, or immunities secured by the Constitution.” The statute adds to these judicially defined rights both federal court jurisdiction and enumerated judicial remedies, like damages or injunctive relief. Although § 1983 assumes that Congress can specify the appropriate remedies for constitutional violations, the statute makes no effort to define the rights whose violation will trigger these remedies.<sup>29</sup>

Section 1983 is unusual in this regard because most Section 5 legislation enacted in the twentieth century specifies statutory rights that differ from rights that courts will enforce directly under Section 1 of the Fourteenth Amendment. The Rehnquist Court accordingly does not require that rights created by Section 5 legislation ( $R_s$ ) be identical to constitutional rights enforced by courts ( $R_j$ ). It does not assume that Congress is “limited to merely providing a forum in which aggrieved plaintiffs may assert rights under the Civil War Amendments.”<sup>30</sup> To the contrary, it is the very object of the enforcement model to regulate the scope of Section 5 power in a world in which legislative and judicial enforcement of the Fourteenth Amendment diverge.

In this sense the enforcement model preserves the conclusions of the most significant decisions of the twentieth century addressing the nature of

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28. 42 U.S.C. § 1983 (2000). On the status of § 1983 as Section 5 legislation, see *Monroe v. Pape*, 365 U.S. 167, 171 (1961) (“[Section 1983] came onto the books as § 1 of the Ku Klux Act of April 20, 1871. . . . It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment.” (citation omitted)).

29. 18 U.S.C. § 242 (2000), which imposes criminal penalties for the willful deprivation, under color of state law, “of any rights, privileges, or immunities secured or protected by the Constitution,” has a similar structure, attaching criminal sanctions to judicially defined rights. In *Screws v. United States* the Court held that 18 U.S.C. § 52, an earlier version of § 242, was not unconstitutionally vague. 325 U.S. 91, 100 (1945). On the Section 5 status of § 52, see *id.* at 98.

30. *City of Rome v. United States*, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting).

Congress's power under the Reconstruction Amendments. These decisions were promulgated by the Warren Court during the 1960s. At that time the Court exercised the same deference toward congressional Section 5 power as it did to the exercise of all federal power. When the Warren Court encountered a variance between legislative and adjudicative enforcement of the Reconstruction Amendments, it asked whether Congress might have had a rational basis for enacting the statute in question.

Consider, for example, the first major case of the twentieth century to address Congress's enforcement powers under the Reconstruction Amendments, *South Carolina v. Katzenbach*.<sup>31</sup> Although *South Carolina* technically concerned Congress's enforcement power under Section 2 of the Fifteenth Amendment,<sup>32</sup> "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."<sup>33</sup> At issue in *South Carolina* were provisions of the Voting Rights Act of 1965 (VRA)<sup>34</sup> that prohibited the use of literacy tests and similar devices to restrict voting.<sup>35</sup> The constitutional puzzle posed by these provisions was that the Court had itself already held that such literacy tests were not "in themselves contrary to the Fifteenth Amendment."<sup>36</sup>

*South Carolina* solved this problem by explicitly rejecting the idea "that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts."<sup>37</sup> Instead, the Court announced that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."<sup>38</sup> Because the Court itself had acknowledged that literacy tests could be applied in ways that perpetuated the "discrimination which the Fifteenth Amendment was designed to uproot,"<sup>39</sup> and because Congress had found that the literacy tests banned by the VRA in fact were used in this way, the rule prescribed by the VRA "was clearly a legitimate response to the problem."<sup>40</sup> *South*

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31. 383 U.S. 301 (1966).

32. Section 2 of the Fifteenth Amendment provides, "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. Section 1 of the Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* amend. XV, § 1.

33. *City of Rome*, 446 U.S. at 208 n.1 (Rehnquist, J., dissenting).

34. 42 U.S.C. §§ 1973b(a)-(d), 1973c, 1973d(b), 1973g, 1973l(b) (2000). The Act was passed pursuant to Congress's power under Section 2 of the Fifteenth Amendment.

35. *South Carolina*, 383 U.S. at 319.

36. *Id.* at 333; see also *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

37. *South Carolina*, 383 U.S. at 327.

38. *Id.* at 326.

39. *Id.* at 333 (quoting *Lassiter*, 360 U.S. at 53).

40. *Id.* at 328.

*Carolina* characterized the statutory prohibitions of the VRA as a “rational means”<sup>41</sup> of satisfying “the clear commands of the Fifteenth Amendment.”<sup>42</sup>

The logic of *South Carolina* is that Congress can enact Section 5 legislation establishing statutory rights ( $R_s$ ) that differ from rights that the judiciary would enforce under Section 1 ( $R_j$ ), so long as  $R_s$  can be characterized as a means of enforcing  $R_j$ . Congress has Section 5 power to enact  $R_s$  if such rights are a “rational means to effectuate the constitutional prohibition of racial discrimination in voting” ( $R_j$ ).<sup>43</sup> Fourteen years later, in *City of Rome v. United States*,<sup>44</sup> the Burger Court reiterated the conclusion that  $R_s$  could diverge from  $R_j$ , so long as Congress “could rationally”<sup>45</sup> conclude that  $R_s$  were an “appropriate method of enforcing the Fifteenth Amendment,”<sup>46</sup> holding:

41. *Id.* at 324.

42. *Id.* at 309.

43. *Id.* at 324 (emphasis added); see also *id.* at 331. The language of “rational means” was meant to signal the theoretical equivalence of Congress’s power under Section 2 of the Fifteenth Amendment and its power under any other clause of the Constitution, including Section 5 of the Fourteenth Amendment. The same kind and quality of deference were due to every exercise of congressional power:

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 4 Wheat. 316, 421.

The Court has subsequently echoed his language in describing each of the Civil War Amendments:

“Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.” *Ex parte Virginia*, 100 U. S., at 345-346.

This language was again employed, nearly 50 years later, with reference to Congress’ related authority under § 2 of the Eighteenth Amendment. *James Everard’s Breweries v. Day*, 265 U. S. 545, 558-559.

*Id.* at 326-27. In assessing the constitutionality of the VRA, *South Carolina* demonstrated how thoroughly it meant to rely on the analogy to congressional commerce power by relying on cases like *Williamson v. Lee Optical*, 348 U.S. 483 (1955), and *Railway Express Agency v. New York*, 336 U.S. 106 (1949). See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 359-67 (2001).

44. 446 U.S. 156 (1980).

45. *Id.* at 177.

46. *Id.* at 175. *City of Rome* also stressed the equivalence of Congress’s power under Section 2 of the Fifteenth Amendment and Congress’s power under Section 5 of the Fourteenth Amendment because of “Congress’ broad power to enforce the Civil War Amendments.” *Id.* at 176; see also *id.* at 175 (“Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is

It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are “appropriate,” as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia*.<sup>47</sup>

The Court in the 1960s applied this same logic to Section 5 of the Fourteenth Amendment. In *Katzenbach v. Morgan*<sup>48</sup> the Warren Court explicitly rejected the proposition that “an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce.”<sup>49</sup>

A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the “majestic generalities” of § 1 of the Amendment.<sup>50</sup>

At issue in *Morgan* was the validity of section 4(e) of the VRA, which prevented the state of New York from applying its literacy requirements to prohibit persons from voting who had successfully completed a sixth-grade education in a Puerto Rican school in which the language of instruction was not English.<sup>51</sup> The Court held that the question before it was not whether

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brought within the domain of congressional power.” (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)) (alteration in original)).

47. *Id.* at 177 (citation omitted). The Court reached the same conclusion in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a fractured and complex case. For a discussion, see *City of Rome*, 446 U.S. at 176-77.

48. 384 U.S. 641 (1966).

49. *Id.* at 648.

50. *Id.* at 648-49 (footnote omitted). At issue in *Morgan* was whether Congress could prohibit the use of a literacy test. The Court framed the question this way:

Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York’s English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

*Id.* at 649-50.

51. *Id.* at 643-44.

this application of the New York literacy requirements violated the Equal Protection Clause, but rather whether section 4(e) was “appropriate legislation to enforce the Equal Protection Clause.”<sup>52</sup> The Court reasoned about this question in a manner that self-consciously tracked *South Carolina*. It announced that the test for determining “appropriate legislation” was the “*McCulloch v. Maryland* standard,”<sup>53</sup> which authorized “Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>54</sup>

52. *Id.* at 650.

53. *Id.* at 651. The Court explained:

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

*Ex parte Virginia*, 100 U. S., at 345-346, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

“Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”

*Strauder v. West Virginia*, 100 U. S. 303, 311; *Virginia v. Rives*, 100 U. S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by “appropriate legislation” the provisions of that amendment; and we recently held in *State of South Carolina v. Katzenbach*, 383 U. S. 301, 326, that “[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.” That test was identified as the one formulated in *McCulloch v. Maryland*. See also *James Everard’s Breweries v. Day*, 265 U. S. 545, 558-559 (Eighteenth Amendment). Thus the *McCulloch v. Maryland* standard is the measure of what constitutes “appropriate legislation” under § 5 of the Fourteenth Amendment.

*Id.* at 650-51 (footnote omitted, alteration in original). These passages virtually reproduce the logic and language that the Court had adopted three months previously in *South Carolina*. See *supra* note 43. *Morgan* cited both the *Shreveport Case*, 234 U.S. 342 (1914), and *United States v. Darby*, 312 U.S. 100 (1941), to emphasize that the deference extended by the Court to Congress in defining the scope of congressional Commerce Clause power should also be the measure of the deference extended by the Court to Congress in defining the scope of congressional Section 5 power. *Morgan*, 384 U.S. at 652 n.11.

54. *Morgan*, 384 U.S. at 651. *Morgan* offered two explanations of how the  $R_5$  contained in section 4(e) of the VRA might be connected to  $R_1$  so as to render them a constitutional exercise of Section 5 power. The first was that Congress “might well have questioned,” *id.* at 654, whether “the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause,” *id.* at 656. The Court reasoned:

We are told that New York’s English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English



language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs. Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *South Carolina v. Katzenbach*, *supra*, to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

*Id.* at 654-56 (footnotes omitted). The second was that "§ 4 (e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement." *Id.* at 652. The Court explained:

Section 4 (e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4 (e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U. S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4 (e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4 (e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.

*Id.* at 652-53 (footnotes omitted). In explaining this second rationale, the Court referred to the settled principle applied in the *Shreveport Case* (*Houston, E. & W.T.R. Co. v. United States*, 234 U. S. 342), and expressed in *United States v. Darby*, 312 U. S. 100, 118, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . ." Accord, *Atlanta Motel v. United States*, 379 U. S. 241, 258.

*Id.* at 652 n.11 (alteration in original).

In *City of Boerne v. Flores*<sup>55</sup> and subsequent cases, the Rehnquist Court reinterpreted precedents like *South Carolina, Rome*, and *Morgan* in light of its new concern with separation of powers. The Rehnquist Court accepted the holdings of these cases that rights established by Section 5 legislation ( $R_s$ ) can diverge from rights that a Court will enforce in litigation under Section 1 of the Fourteenth Amendment ( $R_j$ ).<sup>56</sup> But the Rehnquist Court sought to limit this divergence in ways that established the Court's symbolic and practical control over the articulation of constitutional rights. The Rehnquist Court was determined to prevent Congress from enacting Section 5 legislation that enforced Congress's independent interpretation of constitutional rights ( $R_c$ ).

In marked contrast to the Warren Court, which repeatedly deferred to Congress in ways that blurred the relationship between  $R_s$  and  $R_j$ ,<sup>57</sup> the Rehnquist Court has aggressively deployed the enforcement model to measure and monitor discrepancies between  $R_s$  and  $R_j$  in order to affirm the Court's role as "the ultimate expositor of the constitutional text."<sup>58</sup> As the Court explained in *Boerne* and subsequent cases, there are at least three forms of connection between  $R_s$  and  $R_j$  that can justify divergence between statutory and judicial rights in this way. We call the principles underlying these forms of connection the "remedial," "prophylactic," and "identity" principles.

The *remedial* principle is satisfied if  $R_s$  are justified as curing "the effects of prior discrimination."<sup>59</sup> Just as a federal court enforcing Section 1 of the Fourteenth Amendment retains authority to issue remedies "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,'"<sup>60</sup> so Congress has analogous remedial power in exercising its Section 5 authority to enforce Section 1.<sup>61</sup> Congress can establish  $R_s$  that diverge from  $R_j$  if their purpose and function is to repair the present "effects"<sup>62</sup> of past violations of  $R_j$ .<sup>63</sup> The *prophylactic* principle, by contrast, is satisfied if  $R_s$

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55. 521 U.S. 507 (1997).

56. *See id.* at 518.

57. For a discussion, see Post & Siegel, *supra* note 15, at 34-38.

58. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

59. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (plurality opinion of Burger, C.J.).

60. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

61. *Fullilove*, 448 U.S. at 483 ("It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.").

62. *Id.* at 510 (Powell, J., concurring) ("I conclude . . . that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination.").

63. Thus in *Gaston County v. United States*, the Court upheld provisions of the VRA prohibiting the use of literacy tests on the grounds that "[i]mpartial' administration of the literacy

are justified as “detering” or “preventing” future violations of  $R_j$ . “The power to ‘enforce’ may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.”<sup>64</sup> The *identity* principle is satisfied if facts establish that  $R_s$  are actually equivalent to  $R_j$ . Because  $R_j$  are rules promulgated to decide specific cases, they frequently take the form that particular practices, although not unconstitutional on their face, are unconstitutional if definite factual circumstances obtain.  $R_s$  satisfy the identity principle if they are based upon legislative findings that establish these circumstances.<sup>65</sup>

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test today would serve only to perpetuate” the effects of past constitutional violations that compelled “black children . . . to endure a segregated and inferior education.” 395 U.S. 285, 297, 295 (1969); *see also* *City of Rome v. United States*, 446 U.S. 156, 176 (1980) (reasoning that the *South Carolina* “holding makes clear that Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination”). In *Fullilove v. Klutznick*, the Court upheld a federal statute requiring that at least ten percent of federal funds granted for local public works projects must be used to procure services or supplies from minority-owned businesses on the grounds that the set-aside was necessary “to eradicate [the] continuing effects” of past “unlawful discriminatory practices.” 448 U.S. at 502 (Powell, J., concurring).

64. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O’Connor, J., joined by Rehnquist, C.J., and White, J.). Thus in *City of Rome v. United States*, the Court considered Congress’s power under Section 2 of the Fifteenth Amendment to enact the preclearance provisions of the VRA, which applied to jurisdictions with a history of discrimination, and which prohibited changes in the electoral practices or procedures of such jurisdictions that had a racially disparate impact unless these changes had been approved by the Department of Justice. 446 U.S. 156. Although the Fifteenth Amendment itself barred only electoral practices or procedures enacted with a discriminatory purpose, the Court nevertheless held that “Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.” *Id.* at 177; *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999) (“Recognizing that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions, we find no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law that may have just such an effect in a covered county.”); *City of Rome*, 446 U.S. at 178 (“We find no reason . . . to disturb Congress’ considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from undo[ing] or defeat[ing] the rights recently won by Negroes.” (internal quotation marks and citation omitted, alterations in original)); *id.* at 202 (Powell, J., dissenting) (stating that Congress has power under Section 2 of the Fifteenth Amendment to enact “a prophylactic measure”). Similarly, in *Katzenbach v. Morgan*, the Court upheld Congress’s Section 5 power to prohibit New York’s literacy requirements on the ground that  $R_s$  were a means to ensure future “nondiscriminatory treatment in public services for the entire Puerto Rican community.” 384 U.S. 641, 652 (1966); *see also supra* note 54.

65. So, for example, although the Court has held that literacy tests and similar devices are not unconstitutional on their face, it has also held that in particular circumstances they can “be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.” *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959). Whether such circumstances obtain is a question of fact. In *South Carolina* the Court upheld Congress’s prohibition of literacy tests on the ground that Congress had found that these circumstances existed because “in most of the States covered by the Act” literacy tests and similar devices “have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years.”

South Carolina v. Katzenbach, 383 U.S. 301, 333-34 (1966); see also *Gaston County*, 395 U.S. at 295-97. Because of Congress's factual findings, the  $R_s$  of the VRA were equivalent to the  $R_j$  enforced by courts. *Morgan* similarly relied upon congressional fact-finding to determine that Congress was authorized to employ its Section 5 power to set aside New York's literacy requirement because Congress might have found that "prejudice played a prominent role in the enactment of the requirement." 384 U.S. at 654; see also *supra* note 54. The existence of this prejudice would itself constitute a violation of  $R_j$ . A splintered but unanimous Court upheld Congress's ban on literacy tests in *Oregon v. Mitchell* on the analogous grounds that Congress had found facts establishing that the actual application of literacy tests was a violation of  $R_j$ . 400 U.S. 112 (1970). Thus Justice Black concluded:

There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement. . . . Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments.

*Id.* at 133; see also *id.* at 146-47 (Douglas, J., concurring in part and dissenting in part). Similarly, Justice Stewart explained:

Because literacy and illiteracy are seemingly neutral with respect to race, creed, color, and sex, we upheld a literacy requirement against a claim that it was invalid on its face under the Fifteenth Amendment. But . . . we made it clear that Congress has ample authority under § 2 of the Fifteenth Amendment to determine that literacy requirements work unfairly against Negroes in practice because they handicap those Negroes who have been deprived of the educational opportunities available to white citizens. . . .

. . . In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests.

*Id.* at 283-84 (Stewart, J., concurring in part and dissenting in part) (citations omitted). The most explicit and systematic theoretical attention to the question of congressional fact-finding may be found in Justice Brennan's opinion:

[Q]uestions of constitutional power frequently turn in the last analysis on questions of fact. This is particularly the case when an assertion of state power is challenged under the Equal Protection Clause of the Fourteenth Amendment. For although equal protection requires that all persons "under like circumstances and conditions" be treated alike, *Hayes v. Missouri*, 120 U. S., at 71, such a formulation merely raises, but does not answer the question whether a legislative classification has resulted in different treatment of persons who are in fact "under like circumstances and conditions."

. . . The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable." . . .

Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. See *Katzenbach v. Morgan*, 384 U. S. 641, 654-656 (1966). It should hardly be necessary to add that if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means. *Id.*, at

The Rehnquist Court has incorporated the remedial, prophylactic, and identity principles into its construction of the enforcement model. It has repeatedly affirmed that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>66</sup> It has announced that

Congress’ § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress’ power “to enforce” the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.<sup>67</sup>

Rehnquist Court decisions have also reiterated that sufficiently persuasive congressional fact-finding can establish that  $R_s$  are equivalent to  $R_j$ .<sup>68</sup>

The remedial, prophylactic, and identity principles derive from opinions authored by the Court in the period between *South Carolina* and

656-657; *Fay v. New York*, 332 U. S., at 282-283; *Ex parte Virginia*, 100 U. S. 339, 347-348 (1880).

The scope of our review in such matters has been established by a long line of consistent decisions. “It is not for the courts to re-examine the validity of these legislative findings and reject them.” *Communist Party v. Control Board*, 367 U. S., at 94. “[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary . . . our investigation is at an end.” *Katzenbach v. McClung*, 379 U. S. 294, 303-304 (1964); *Katzenbach v. Morgan*, 384 U. S., at 653; see *Galvan v. Press*, 347 U. S. 522, 529 (1954).

*Id.* at 246-49 (Brennan, J., concurring in part and dissenting in part) (footnote omitted, fifth, sixth, and seventh alterations in original). By contrast, Justice Harlan’s opinion in *Oregon* seemed to turn not on the conclusion that Congress’s factual findings had established that  $R_s$  were equivalent to  $R_j$ , but instead on the fact that these findings had established that  $R_s$  were necessary to prevent future violations of  $R_j$ . Justice Harlan wrote:

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

*Id.* at 216 (Harlan, J., concurring in part and dissenting in part).

66. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). For references to the “remedial and preventive nature of Congress’ enforcement power,” see *id.* at 524, 532.

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

68. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-70 (2001) (“The legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”); *Kimel*, 528 U.S. at 89 (finding that Congress can constitutionally enact Section 5 legislation prohibiting age discrimination if it can identify “any pattern of age discrimination by the States” that rises “to the level of constitutional violation”).

*Boerne*,<sup>69</sup> but they serve a purpose that is entirely alien to the spirit and intention of earlier precedents. During the Second Reconstruction the Court assumed that Congress was a coequal branch of the federal government whose “broad power to enforce the Civil War Amendments”<sup>70</sup> warranted respect and deference. The Court was not concerned to determine why legislative and adjudicative enforcement of Section 1 rights varied; it was content to apply a rational basis standard to Section 5 legislation and hence to speculate about possible justifications for that legislation.<sup>71</sup> These speculations were not intended to serve a regulatory purpose; if anything, the Warren Court’s open-ended observations about the multifaceted character of the enforcement power liberated rather than restrained Congress in legislating under Section 5. Although the Rehnquist Court has drawn the remedial, prophylactic, and identity principles from language contained in these early speculations, it has fashioned the principles to serve a new objective, which is to constrain the exercise of Section 5 power in order to maintain judicial control over constitutional meaning. It has deployed the principles to prevent Congress from enacting  $R_s$  unless  $R_s$  can be justified in terms of their subordination to  $R_j$ .

As the Rehnquist Court has begun to insist that the term “enforce” excludes the power to “interpret,” it has also begun decisively to repudiate the deferential *McCulloch* standard.<sup>72</sup> In its place, the Rehnquist Court has adopted a new standard of review that requires Section 5 legislation containing  $R_s$  to be congruent and proportional to  $R_j$ .<sup>73</sup> The Court created the congruence-and-proportionality test to determine if congressional

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69. See *supra* notes 37-54 and accompanying text.

70. *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

71. See *supra* notes 43-54 and accompanying text. In the words of the modern Court, rational basis review requires that “legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). “Where there are ‘plausible reasons’ for Congress’ action, ‘our inquiry is at an end.’” *Id.* at 313-14 (quoting *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). The one exception to the generalization in the text is *Oregon v. Mitchell*, in which the Court found that a statute authorizing eighteen- to twenty-one-year-olds to vote in state elections was beyond the Section 5 power of Congress. 400 U.S. 112 (1970). The Court’s vote on this question was five to four. Although there was no opinion for the Court in *Oregon*, the decisive opinion was by Justice Black, who rested his judgment on the federalism implications of the statute. See *id.* at 128-30 (Black, J.). We discuss the complex interrelationship between federalism and separation of powers *infra* Part V.

72. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 958-59 (3d ed. 2000).

73. “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). The Court explained:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

*Id.* at 530 (citation omitted).

judgments are supported by more than a rational basis.<sup>74</sup> The test authorizes the Court independently to determine whether  $R_s$  are sufficiently connected to  $R_j$  to satisfy the remedial, prophylactic, or identity principles. Refusing to defer to Congress on this question, the Court has explained that  $R_s$  without congruence and proportionality to  $R_j$  “may become substantive in operation and effect”<sup>75</sup> and hence violate the separation-of-powers requirement that Congress refrain from exercising “a substantive, non-remedial power” to define the nature of Fourteenth Amendment rights.<sup>76</sup> The function of the congruence-and-proportionality test is to prohibit Congress from enforcing  $R_c$ .<sup>77</sup>

Four years after *Boerne* the Court emphasized its repudiation of the *McCulloch* standard by holding in *Board of Trustees of the University of Alabama v. Garrett*<sup>78</sup> that Congress could not rely on the remedial, prophylactic, or identity principles to create  $R_s$  unless it had first “identified a history and pattern of unconstitutional . . . state transgressions.”<sup>79</sup> The Court would not assume the existence of such a history or pattern; it instead required Congress to document these transgressions in its legislative deliberations. *Garrett* seems to suggest that the Court will recognize  $R_s$  as

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74. Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 523-35 (2002). Section 5 legislation must pass the congruence-and-proportionality test even if Congress has documented extensive violations of  $R_j$ . See *United States v. Morrison*, 529 U.S. 598, 625-26 (2000); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 475 (2000).

75. *City of Boerne*, 521 U.S. at 520. The complete passage reads:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

*Id.* at 519-20.

76. *Id.* at 527.

77. To the extent that the congruence-and-proportionality test was meant to protect constitutional values other than separation of powers, like federalism, it would also apply to Article I legislation. But the Court has refused to apply the congruence-and-proportionality test “outside the § 5 context; it does not hold sway for judicial review of legislation enacted . . . pursuant to Article I authorization.” *Eldred v. Ashcroft*, 123 S. Ct. 769, 788 (2003). The Court declared:

Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment. Amdt. 14, § 5 (“The Congress shall have power to *enforce*, by appropriate legislation, the provisions of this article.” (emphasis added)). The Copyright Clause, in contrast, empowers Congress to *define* the scope of the substantive right. Judicial deference to such congressional definition is “but a corollary to the grant to Congress of any Article I power.” It would be no more appropriate for us to subject the CTEA to “congruence and proportionality” review under the Copyright Clause than it would be for us to hold the Act unconstitutional *per se*.

*Id.* (citations omitted).

78. 531 U.S. 356 (2001).

79. *Id.* at 368.

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enforcing  $R_j$  only if Congress develops a record establishing infringements of  $R_j$ . This inverts the *McCulloch* standard because it explicitly places the burden of proof for establishing the constitutionality of Section 5 legislation squarely on Congress.

The upshot of both the congruence-and-proportionality test and the *Garrett* requirement is that Section 5 legislation is now as a practical matter far more closely tied to the Court's interpretation of judicially enforceable Fourteenth Amendment rights than at any previous time in the nation's history. The Rehnquist Court has explicitly and repeatedly explained the necessity for such a stringent connection in terms of the need to maintain judicial control over the meaning of the Constitution.

## II. THE ENFORCEMENT MODEL AND INSTITUTIONAL DIFFERENTIATION

The enforcement model directs courts to uphold Section 5 legislation that "enforces" Fourteenth Amendment rights, and to invalidate Section 5 legislation that seeks to "interpret" those rights. The model seeks to ensure that Section 5 legislation enforces  $R_j$  but not  $R_c$ . The enforcement model accordingly requires criteria for determining whether Congress is enforcing  $R_j$ . In this Part of our Article we closely examine the possible nature of such criteria. In Section II.A we argue that institutional distinctions between legislatures and courts render the notion of Congress's "enforcing  $R_j$ " so crude and abstract as to undermine the theoretical coherence of the enforcement model. The result is that courts applying the model will be able to decide cases only by deploying supplemental principles, like federalism, that are logically distinct from the model itself. The model disguises the use of these principles and renders their application implicit and unaccountable. We illustrate this point in Section II.B by discussing the application of the enforcement model to the family leave provisions of the FMLA.

### A. *Institutional Differentiation and Constitutional Interpretation*

Both the Court and Congress interpret the Constitution from the perspective of a particular institution. The point is not immediately obvious only because we tend to accept uncritically the fiction that the Constitution speaks abstractly, as though pronounced on high by some ideal interpreter in some unspecified space. When we accept this fiction, we ask whether the Court or Congress is more likely to read the Constitution accurately, to ascertain its "true" meaning. But once we see that interpretation is always practiced by particular persons who seek to understand the Constitution in



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particular institutional settings and for particular institutional purposes, we can see that claims about constitutional meaning are always embedded in contexts.

This insight allows us to recognize a deep confusion in the enforcement model. The model requires Congress to enact Section 5 legislation that will implement constitutional meaning as that meaning is determined from the institutional perspective of a court. Courts construe the Constitution in order to pursue the practice of adjudication, which accordingly establishes the pragmatic framework within which courts conceive and articulate constitutional rights. The essential thesis of the enforcement model is that this framework should dominate and control the exercise of congressional power under Section 5. We can begin to sense the implausibility of this thesis when we notice the circumstances in which it leads to patent absurdity. In two recent decisions, for example, the Court addressed the question of whether Congress can exercise its Section 5 power to prohibit discrimination on the basis of classifications that the Court has held should in adjudication receive only rational basis review.<sup>80</sup> The Court has applied the standards of rational basis review to determine if Congress was redressing constitutional violations.

Rational basis review, however, explicitly defines a constitutional right in terms of the specific institutional purposes of the judiciary. The Court has explained that rational basis review is “a paradigm of *judicial* restraint”<sup>81</sup> because it reflects the principle that courts should be “very reluctant . . . in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices.”<sup>82</sup> Rational basis review thus articulates the substance of the right to equal protection of the law by reference to the deference that the judiciary should adopt vis-à-vis the democratically accountable branches of government. It does not define the substance of the right in a way that can coherently be applied to Congress.

It is easy to see that the thesis of the enforcement model makes little sense when it requires Congress to enforce rights that are defined in terms of institutional values pertinent to courts, but logically irrelevant to Congress. The fundamental cause of this anomaly is the failure of the enforcement model to account for the pervasive ways in which constitutional meaning is determined by reference to what we may call the pragmatic horizon of institutions. Rights are not abstract statements of principle, but constitutional conclusions articulated in ways designed to

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80. *Id.* at 356 (concerning discrimination based on disability); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (concerning discrimination based on age).

81. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (emphasis added). For a discussion, see Post & Siegel, *supra* note 74, at 462-63.

82. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); *see also* Post & Siegel, *supra* note 74, at 459-67.

make sense within particular institutional frameworks. We can, therefore, ask how rights defined in terms of the specific institutional characteristics of courts *can* be translated into the distinct institutional framework of a legislature. And we may further ask why a legislature *should* be constrained by the distinct institutional purposes of courts. Both questions are well illustrated by the *Garrett* requirement that Congress cannot exercise its Section 5 power to remedy or deter violations of constitutional rights until it has first “identified a history and pattern of unconstitutional . . . state transgressions.”<sup>83</sup>

The analytic question of translation becomes visible if we ask what the *Garrett* requirement means by the term “transgressions.” It is clear enough what this term means for a court. It signifies that particular state actions are unconstitutional. Courts make such determinations by holding adversarial hearings designed to ascertain all facts that are legally relevant to the characterization of the particular actions alleged to be unconstitutional. This procedural framework pervasively informs judicial definitions of what it means to violate a constitutional right. So, for example, courts define a constitutional right in terms of what a full evidentiary record will reveal about the purpose or motivation of a particular government action. Or they define a constitutional right in terms of whether a plaintiff has overcome his burden of proof to negate “any reasonably conceivable state of facts that could provide a rational basis” for a classification.<sup>84</sup> Courts thus characterize the substance of constitutional rights in ways that are thoroughly intertwined with the procedural context of adjudication. Constitutional meaning and institutional function are utterly interdependent.

For this very reason, however, it is fundamentally unclear what it might mean for Congress as a legislature to find that there is a pattern of “state transgressions.” Congress does not investigate specific incidents. It does not create complete evidentiary records about particular actions. Instead, like any legislature, Congress makes general findings about social conditions and trends. We would actually regard it as both infeasible and improper for Congress to conduct the mini-trials that would be necessary to find constitutional violations in the technical sense ordinarily required in the framework of litigation.<sup>85</sup> Given the distinct institutional characteristics of courts and legislatures, it is difficult to know what it would actually mean to require Congress to enact Section 5 statutes that enforce constitutional rights as courts conceive and enforce those rights in the context of adjudication.

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83. 531 U.S. at 368.

84. *Id.* at 367 (internal quotation marks omitted).

85. These points are discussed in detail in Post & Siegel, *supra* note 15, at 7-17.

The analytic deficiency exposed by this reasoning goes very deep. The Court's recent decisions speak as if the question of Section 5 power can be settled by the application of the enforcement model. The application of the model is supposed to determine whether Congress has rewritten "the Fourteenth Amendment law laid down by this Court."<sup>86</sup> But if the fact of institutional differentiation means that Congress must (in some nontrivial sense) always rewrite the Court's version of Fourteenth Amendment law, then the model is not going to be particularly helpful in deciding which forms of  $R_s$  should survive constitutional scrutiny. Because the whole point of the enforcement model is to suppress the fact of institutional differentiation, and because distinctions between  $R_s$  and  $R_j$  are commonly caused by institutional differentiation, the model cannot itself create an account of when such distinctions are acceptable.

The determination of whether  $R_s$  should count as the enforcement of  $R_j$  will therefore be heavily influenced by perspectives that are extrinsic to the model, like the values of federalism, or the Court's confidence in congressional bona fides, or the Court's attitude toward the substantive civil rights agenda reflected in Section 5 legislation.<sup>87</sup> That is why the enforcement model is capable of justifying such radically different results depending upon which supplementary principles a court is willing to bring to bear in its application. The model could even duplicate the outcomes of policentric constitutional interpretation if it were to be applied with sufficient deference, as for example by using the *McCulloch* standard that the Court employed in the years between *South Carolina* and *Boerne*. The enforcement model is thus theoretically incomplete. The heavy lifting in deciding the constitutionality of Section 5 legislation must be done by supplemental principles that are typically tacit and unarticulated.

Even if we could clarify the analytic confusions at the heart of the enforcement model, moreover, we would face a second and more fundamental normative question: Why should the specific procedural framework of adjudication control and limit Congress's Section 5 power? This question is also raised by the *Garrett* requirement, which expresses a principle that makes perfect sense in the context of litigation. We all understand that courts are not authorized to remedy past constitutional violations or to deter future constitutional violations unless they have first determined that a plaintiff is entitled to redress. A plaintiff is entitled to redress by the judiciary only if a court has found that her constitutional rights have been infringed.<sup>88</sup> We take this limitation on judicial authority for granted because it is rooted in the "case or controversy" requirement of

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86. *Garrett*, 531 U.S. at 374.

87. See, e.g., Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

88. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992).

Article III<sup>89</sup> that expresses our fundamental understanding of judicial power.<sup>90</sup> We do not conceive courts as freestanding boards of inquiry, but as institutions designed to adjudicate disputes between parties.<sup>91</sup> This function underlies our understanding of the scope and nature of judicial authority.<sup>92</sup>

By prohibiting Congress from using its Section 5 power to remedy or deter violations of constitutional rights until it has first “identified a history and pattern of unconstitutional . . . state transgressions,”<sup>93</sup> *Garrett* essentially subjects Congress to this paradigm of judicial power. *Garrett* holds that Congress has no power to deter future constitutional violations unless it first finds that constitutional rights have been violated. We may ask, however, why Congress should be constrained by limitations that derive from the particular institutional function of courts. What principle of legislative power would prohibit Congress from preventing future violations of constitutional rights, even if the record of actual or potential violations were inadequate to authorize a court to exercise equitable jurisdiction to order declaratory or injunctive relief? Congress does not derive its legitimacy from the practice of adjudication; it is not an institution designed to settle disputes between parties. Congress is instead a legislature that derives legitimacy from its democratic responsiveness to the values and commitments of the nation. Section 5 is a grant of legislative power, not a grant of judicial power. Why, then, should congressional authority under Section 5 be constrained by the limitations that reflect the specific institutional characteristics of Article III courts?

The enforcement model, in short, is rendered highly vulnerable once we understand that constitutional interpretation always proceeds within specific institutional contexts that inform both the substance of constitutional rights and the procedural framework within which they are enforced. The thesis of the enforcement model is that Section 5 power should be circumscribed by the pragmatic horizon of adjudication. But because Section 5 is a grant of legislative power, rather than of judicial power, it is puzzling why the

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89. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990).

90. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989).

91. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487-90 (1982); *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

92. As the Court explained in *Bell v. Wolfish*:

[U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of “judgment calls” that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

441 U.S. 520, 562 (1979).

93. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

enforcement model would limit Section 5 authority by the institutional norms applicable to courts, rather than by the institutional norms applicable to legislatures. Even if this normative constraint could be justified, moreover, there would remain the conceptual difficulty of articulating exactly what it might mean for a legislature to act according to norms appropriate for courts. In many circumstances it may be both incoherent and improper to require Congress to behave in this way. Because it does not take account of institutional differentiation, the enforcement model will typically import extrinsic principles to determine when legislative action is sufficiently “like” judicial action to count as the enforcement of judicially defined rights.

B. *The Enforcement Model, Institutional Differentiation, and the FMLA*

The analytic and normative deficiencies of the enforcement model become apparent if we attempt to apply the model to the family leave provisions of the FMLA at issue in *Hibbs*. The FMLA establishes a right to employment leave to care for sick family members<sup>94</sup> that no court would likely recognize under Section 1 of the Fourteenth Amendment. The statute thus contains  $R_s$  that significantly diverge from  $R_j$ . The enforcement model requires courts to decide whether this variance is constitutionally permissible because justified by the remedial, prophylactic, or identity principles,<sup>95</sup> or instead constitutionally forbidden because based upon an independent congressional interpretation of the Constitution. In Section II.A we argued that the enforcement model provides no coherent way of answering this question. In this Section we illustrate the point by demonstrating how a court, appealing to the remedial or prophylactic principles, could either uphold or invalidate the family leave provisions of

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94. See *supra* note 19 and accompanying text.

95. This point may be elementary, but it suffices to demonstrate the patent inadequacy of at least two district court opinions holding that the family leave provisions of the FMLA cannot be justified under Congress's Section 5 power. In *McGregor v. Goord* a court held that because the provisions create a right to twelve weeks of leave, and because “no such entitlement is found in any of the provisions of the Fourteenth Amendment,” the provisions went beyond Congress's authority under Section 5. 18 F. Supp. 2d 204, 208 (N.D.N.Y. 1998). In *Thomson v. Ohio State University Hospital* a court held that because “the FMLA does not merely make it illegal for employers to treat requests for leave differently on the basis of gender, but instead mandates that employers provide employees with a new and valuable benefit,” it is “patently the sort of substantive legislation that exceeds the proper scope of Congress' authority under § 5.” 5 F. Supp. 2d 574, 579-80 (S.D. Ohio 1998), *aff'd*, 238 F.3d 424 (6th Cir. 2000). Both *McGregor* and *Thomson* seem to assume that if Section 5 legislation creates rights that differ in any way from  $R_j$ , the legislation is beyond the Section 5 power of Congress. But this assumption is false. All Section 5 legislation need not resemble § 1983. The dispositive question is instead whether the FMLA creates rights that can be justified under the remedial, prophylactic, or identity principles.

the FMLA, depending upon which tacit extrinsic principles it brings to bear.

Even if the family leave provisions of the FMLA at issue in *Hibbs* establish  $R_s$  that diverge from  $R_j$ , they might nevertheless be constitutional under the enforcement model if they are understood to remedy violations of  $R_j$ . The provisions of the FMLA can in fact be justified in this fashion, because during the first two-thirds of the twentieth century there were in place “state-imposed systemic barriers to women’s equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional.”<sup>96</sup> These barriers sustained, and were intended to sustain, “stereotypical beliefs about the appropriate roles of men and women.”<sup>97</sup> Although the legislative history of the FMLA does not inventory the existence and nature of these constitutional violations, as *Garrett* might seem to require, they were nevertheless open and notorious, a matter of uncontroversial history. Congressional documentation would seem superfluous.

The question, therefore, is whether the family leave provisions of the FMLA can properly be characterized as redressing the ongoing effects of these past violations, which reinforced traditional gender roles that conceived of men as workers and women “as the center of home and family life.”<sup>98</sup> When it enacted the FMLA, Congress explicitly found that these stereotypical roles persisted into the 1990s: “[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>99</sup> The persistence of these roles means that women feel more compelled than men to care for sick family members. The failure of employers to offer adequate family leave consequently affects women more harshly than men because it forces women, more than men, to choose between work and the family. Any cure for the present effects of past unconstitutional gender stereotyping, therefore, must require that employers offer their employees *adequate* family leave.

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96. *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 860 (9th Cir. 2001), *cert. granted sub nom. Nev. Dep’t of Human Res. v. Hibbs*, 536 U.S. 938 (2002). The Ninth Circuit specifically invoked this account of the remedial principle to uphold the family leave provisions of the FMLA as an exercise of Section 5 power “that recognizes and seeks to cure the continuing negative impact of pervasive past *unconstitutional* state discrimination.” *Id.* at 869. For a summary of this discrimination, see Brief of Women’s History Scholars Alice Kessler-Harris, Linda Kerber et al. at 18-30, *Nev. Dep’t of Human Res. v. Hibbs* (U.S. Oct. 25, 2002) (No. 01-1368).

97. *Hibbs*, 273 F.3d at 864.

98. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); *see also Hibbs*, 273 F.3d at 865-67.

99. 29 U.S.C. § 2601(a)(5) (2000). “Two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse.” H.R. REP. NO. 103-8(I), at 24 (1993); *see also* S. REP. NO. 103-3, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 9.

These effects cannot be redressed by offering adequate family leave only to women. Apart from the fact that such a gender-specific remedy might itself violate the Equal Protection Clause, Congress also found that “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.”<sup>100</sup> Extending leave only to women makes women more expensive employees, and hence less desirable. Any cure for the present effects of past unconstitutional gender stereotyping, therefore, must be gender-neutral, rather than sex-specific. The FMLA meets these prerequisites because it mandates that employers extend *adequate* family leave to *all* employees.

Under the *McCulloch v. Maryland* standard, which the Court used in the years between 1964 and 1997, the family leave provisions of the FMLA would certainly have been upheld as a constitutional exercise of Section 5 power. The provisions are rationally related to the purpose of undoing the present effects of past constitutional transgressions. The modern Court, however, does not employ this standard. It asks instead whether  $R_s$  are “congruent and proportional to the targeted violation.”<sup>101</sup> Whether  $R_s$  are “congruent and proportional” to  $R_j$ , however, is not a question that can be answered in the abstract. Once it is agreed that  $R_s$  can diverge from  $R_j$ , the decision of how much divergence is acceptable can be made only in light of the impact of  $R_s$  on the constitutional values that the congruence-and-proportionality test is meant to protect. The Court has so far articulated two such values: separation of powers and federalism.<sup>102</sup>

With respect to federalism, the family leave provisions of the FMLA require “state employers” to “provide a valuable benefit to their employees that is entirely foreign to the employment agreement reached between the individual and the state.”<sup>103</sup> It therefore imposes a financial burden directly upon states. The congruence-and-proportionality test, however, does not inquire into the nature and extent of this burden. Instead, it asks about the nexus between past constitutional violations and the FMLA’s family leave provisions. The congruence-and-proportionality test can therefore appeal to federalism only as an *implicit* principle of decision that is silently incorporated into the very definition of Section 5 power. This illustrates how the enforcement model will typically be supplemented by principles that are external to the model. We shall defer a full discussion of the complicated issues posed by this doctrinal structure to Part V, where we

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100. 29 U.S.C. § 2601(a)(6).

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

102. In *Boerne* the Court referred to the congruence-and-proportionality test as designed to protect the “vital principles necessary to maintain separation of powers and the federal balance.” *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

103. *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574, 581 (S.D. Ohio 1998), *aff’d*, 238 F.3d 424 (6th Cir. 2000).

shall argue that the Court's Section 5 jurisprudence would be better served if federalism concerns were instead conceived as independent limitations on the exercise of an otherwise existing and valid congressional power. Only in this way can federalism values be openly named and adequately assessed.

With respect to separation of powers, the congruence-and-proportionality test allows Congress to justify  $R_s$  by the remedial principle only if  $R_s$  are closely enough connected to violations of  $R_j$  to count as enforcing  $R_j$ . The enforcement model articulated in *Boerne* locates the separation-of-powers values at stake in this determination in the need to prevent Congress from enacting Section 5 legislation that enforces its own independent interpretation of constitutional rights ( $R_c$ ). But in contrast to cases like *Kimel* or *Boerne*, where there was a real question whether  $R_j$  had actually been violated, the version of the remedial principle that we have sketched seeks to cure the effects of statutes that were undoubtedly unconstitutional.

The formal requirements of the enforcement model would thus appear to be satisfied.<sup>104</sup> The family leave provisions of the FMLA ( $R_s$ ) can be logically explained as redressing the ongoing effects of past judicially redressable violations of Section 1 ( $R_j$ ). Yet the normative and analytic ambiguities of the enforcement model persist. Do the family leave provisions of the FMLA constitute a "remedy" in any sense in which a court might order relief? An overpowering barrage of objections would crush any plaintiff brash enough to sue for redress for the ongoing effects of the sex stereotyping caused by the long-deceased statutes that sustain this version of the remedial principle. A court would in all likelihood find that her claim was barred by statutes of limitations, or that the imposition of twelve weeks of unpaid family leave for all workers was too intrusive and far-reaching to be regarded as a plausible judicial remedy, and so on. Thinking of the family leave provisions of the FMLA as a remedy demonstrates how the very concept of "remedy" has a different meaning in the context of legislation than in the context of adjudication. Within adjudication, the notion of a remedy is infused with norms that reflect our understanding of the "permissible scope of federal judicial power."<sup>105</sup>

The enforcement model thus faces a dilemma. The Court can interpret the model to invalidate legislative remedies that are beyond the equitable

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104. We might ask the slightly different question of whether Congress, in enacting the family leave provisions of the FMLA, *intended* to remedy the present effects of past violations of  $R_j$ . As to this question, Part III demonstrates that Congress plainly intended to ameliorate the disproportionate harm to women caused by employment practices based upon stereotypical beliefs about gender. These stereotypical beliefs both caused and were caused by the unconstitutional state statutes that violated  $R_j$ .

105. *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976); *see also Spallone v. United States*, 493 U.S. 265, 276 (1990).



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power of courts, in which case it must address the normative question of why standards appropriate to Article III courts should limit the legislative power created by Section 5. Or the Court can embrace the holdings of precedents like *City of Rome v. United States*<sup>106</sup> and interpret the model to permit legislative rights that plainly surpass anything that a court might order, in which case the Court must offer some principle of decision to determine whether  $R_s$  are sufficiently congruent and proportional to  $R_j$  to “count” as enforcing  $R_j$ . Because the enforcement model is dedicated to suppressing the very fact of institutional differentiation, it lacks the resources to generate any such principle. Whatever principle the Court ultimately adopts, therefore, must come from a source external to the enforcement model itself.

One such principle that seems to be driving the Rehnquist Court’s Section 5 decisions is a distrust of Congress’s good faith in upholding constitutional values.<sup>107</sup> This suspicion of Congress may well explain the Court’s recent decisions more cogently than any of the separation-of-powers values that the enforcement model purports to protect. The legal subordination of women in the United States has been explicit and pervasive for centuries, so that it is exceedingly easy to characterize any contemporary disparity between women and men as caused by past constitutional violations.<sup>108</sup> Because the remedial principle is so indeterminate, and because the scope of accumulated constitutional violations is so great, it is unclear how a court can possibly determine whether Congress is enforcing or interpreting constitutional rights. The question can only be resolved by reference to some supplemental principle, like a mistrust of Congress’s bona fides.

If the Court suspects that Congress is not remedying past constitutional violations but is instead creating new rights that respond to Congress’s

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106. 446 U.S. 156 (1980).

107. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 87, 136 (2001); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 719-27 (2000). Justice Antonin Scalia, for example, has recently taken the extraordinary step of publicly accusing Congress of “increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution.” Editorial, *A Shot from Justice Scalia*, WASH. POST, May 2, 2000, at A22. Scalia added:

My court is fond of saying that acts of Congress come to the court with the presumption of constitutionality. . . . [But] if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.

*Id.*; see also Tony Mauro, *Court Declares Constitutional War on Congress*, LEGAL INTELLIGENCER, May 22, 2000, at 5; Robert Stacy McCain, *Scalia Disses Congress*, WASH. TIMES, Apr. 19, 2000, at A6.

108. For a discussion of this logic in the context of race, see Charles Lawrence, “*One More River To Cross*”—Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 63 (Derrick Bell ed., 1980).

independent interpretation of Section 1, it might be tempted to apply the congruence-and-proportionality test with the kind of strictness that it has used in the context of suspect classifications to flush out improper motivations.<sup>109</sup> Such a result would be truly ironic. Not only would the Court be treating Section 5 as a form of judicial power, it would be treating Congress as less trustworthy than lower federal courts, which are accorded broad discretion to remedy the current effects of past discrimination.<sup>110</sup>

The family leave provisions of the FMLA can also be justified by reference to the prophylactic principle. This is because “the legislative history of the FMLA contains substantial evidence of gender discrimination with respect to the granting of leave to state employees, and . . . it therefore justifies the enactment of the FMLA as a prophylactic measure.”<sup>111</sup> Unlike the remedial principle, which justifies  $R_s$  as an effort to redress the effects of past violations of  $R_j$ , the prophylactic principle justifies  $R_s$  as an effort to prevent or deter future violations of  $R_j$ .

The violations of  $R_j$  that would be at issue in applying the prophylactic principle are not the old-fashioned, sex-based, labor-protective statutes that we have discussed in the context of the remedial principle. The relevant violations of  $R_j$  would instead be unconstitutional policies and practices that extend maternity and early childcare leave to women, but not to men. These practices make women more expensive as employees than men, and they

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109. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-36 (1995).

110. The Court's decisions concerning remedies for school segregation hold that if a school district has been found guilty of a constitutional violation, persisting racial separation that is otherwise constitutionally inoffensive is *presumed* to constitute an ongoing effect of the original violation. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16-18 (1971); *cf. Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537-38 (1979) (discussing the “affirmative duty” to rebut the *Swann* “continuing systemwide effects” presumption (internal quotation marks omitted)); Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3 (1974) (observing that the burden to rebut the *Swann* presumption “is a most difficult one”). Although the Court in recent years has signaled that it will not penalize district courts for rebutting this presumption, *see, e.g., Freeman v. Pitts*, 503 U.S. 467 (1992), it has never repudiated either the *Swann* presumption or the “affirmative duty” established in *Brinkman*. The Court has also accorded great remedial discretion to lower-court judges to find ways to locate and eradicate prejudice and stereotyping. *See Milliken v. Bradley*, 433 U.S. 267, 279, 288 (1977); *Swann*, 402 U.S. at 15-16, 19, 25, 27, 30. If the Court were to recognize a similar need in the context of Section 5 legislation, it would uphold the family leave provisions of the FMLA on the remedial principle. It would presume the existence of a causal nexus between past unconstitutional state statutes and subsequent disparate impacts, and it would accord Congress great remedial discretion to find ways to locate and eradicate these impacts. But if the Court were to apply the congruence-and-proportionality test to screen Section 5 legislation for inappropriate motivation, it would deny Congress the very generous remedial authority that the Court has ceded to federal courts. The irony of such an outcome would well illustrate the theoretical inadequacy of the enforcement model.

111. *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 858-59 (9th Cir. 2001), *cert. granted sub nom. Nev. Dep't of Human Res. v. Hibbs*, 536 U.S. 938 (2002). This was also the reasoning of Judge Dennis's dissenting opinion in *Kazmier v. Widmann*, 225 F.3d 519, 549 (5th Cir. 2000) (Dennis, J., dissenting) (“[T]he FMLA was a rational means of deterring and preventing sex discrimination by governmental employers and thus was enacted pursuant to [Congress's] section 5 powers.”).

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also reinforce the traditional stereotype that women ought to care for their families more than men. These practices are almost certainly unconstitutional.<sup>112</sup>

Insofar as the congruence-and-proportionality test is designed to protect the separation-of-powers values advanced by the enforcement model, the test should be applied to ask whether there is a sufficiently close connection between  $R_j$ , which prohibit sex discrimination, and  $R_s$ , which include twelve weeks of unpaid family leave, to permit the conclusion that Congress was actually trying to deter future violations of  $R_j$ . We believe that  $R_s$  and  $R_j$  are sufficiently connected to authorize this conclusion. Congress may reasonably have concluded that it was not effective to deter future violations of  $R_j$  simply by prohibiting sex discrimination in the provision of family leave. Such prohibitions might encourage employers to provide less leave to all employees or to eliminate their leave policies altogether, which would disproportionately harm women. Persistent role stereotyping means that women feel more compelled than men to care for ill family members, and thus leave policies that are sex-neutral but inadequate would aggravate the difficulties of women by forcing them more than men to choose between family and work. If it is proper for Congress to prevent future violations of  $R_j$  in a way that does not disproportionately harm women, then it is proper for the FMLA to require a decent minimum amount of leave, like twelve weeks.

Although this application of the prophylactic principle is consistent with the abstract logic of the enforcement model, the same normative and analytic difficulties arise as we have already discussed in the context of the remedial argument. It is questionable whether a court, if confronted by a plaintiff alleging unconstitutional sex discrimination in the distribution of family leave, could order the FMLA's requirement that twelve weeks of unpaid leave be extended to all employees.<sup>113</sup> We are therefore brought face to face with the disparity between a court's equitable power to deter future violations<sup>114</sup> and a legislature's power to deter such violations. This disparity not only raises the normative question of why constraints applicable to Article III courts should be used to limit the legislative power of Section 5, but also the analytic question of exactly when legislative power should count as "detering" violations of  $R_j$ .

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112. Technically speaking, such classifications are unconstitutional unless supported by "an exceedingly persuasive justification" to which they are "substantially related." *United States v. Virginia*, 518 U.S. 515, 531-33 (1996) (internal quotation marks omitted).

113. *See, e.g., Pathways Psychosocial v. Town of Leonardtown*, 223 F. Supp. 2d 699, 717 (D. Md. 2002) (finding that equitable relief must be "necessary to prevent . . . harm"). Something like this insight must underlie the easy conclusion of *McGregor* and *Thomson* that the  $R_s$  of the FMLA cannot be justified as an exercise of Section 5 power. *See supra* note 95.

114. On a court's equitable power to deter future constitutional violations, see, for example, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

The analytic indeterminacy of the enforcement model is most clearly shown in the context of the *Garrett* requirement, which prevents Congress from prophylactically preventing future violations of *R<sub>j</sub>* unless it can first identify “a history and pattern of unconstitutional . . . state transgressions.”<sup>115</sup> There is evidence in the legislative record of the FMLA that shows that both private- and public-sector employers offered maternity leave policies about twice as frequently as they did paternity leave policies.<sup>116</sup> Given the heavy burden of proof that must be overcome to

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115. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001). We should note at the outset that the FMLA was enacted long before *Garrett*'s remarkable doctrine was announced, and indeed before the Court had overturned its own precedent to hold that Congress could no longer abrogate Eleventh Amendment immunity when acting pursuant to its commerce power. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996). When the FMLA was enacted, any judicial requirement that “Congress . . . make specific factual findings” would have been regarded as “an unprecedented imposition of adjudicatory procedures upon a co-ordinate branch of Government,” warranted neither by “the Constitution nor our democratic tradition.” *See Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring); *see also Bryant & Simeone*, *supra* note 43, at 362-67. The Congress that enacted the FMLA could have had no inkling that the constitutionality of its legislation would subsequently be made to turn on legislative findings of state constitutional violations. The legislative record of the FMLA is accordingly quite sparse when measured by the rule set forth in *Garrett*.

116. The *Hibbs* court summarized the legislative record regarding parental leave in this way:

The FMLA's legislative history reflects that a 1990 Bureau of Labor Statistics (the “BLS”) survey found that 37 percent of surveyed private-sector employees were covered by “maternity” leave policies, while only 18 percent were covered by “paternity” leave policies. S.Rep. No. 103-3, at 14-15, *reprinted in* 1993 U.S.C.C.A.N. 3, 17. The numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. *Id.* Thus, while these data show that a larger percentage of employees were covered in 1990 than in 1989, they also show a widening of the gender gap in leave policy during the same period. In addition, while the BLS surveyed only private employers, an extensive study of the private and public sectors done by the Yale Bush Center Infant Care Leave Project revealed that “[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.” *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor*, 99th Cong. 33 (1986) (prepared statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); *see also id.* at 29-30 (“We did a survey of the public sector, a survey of Federal employees, all 50 States, and of the military. We have studied small businesses, mid-size businesses and large businesses to find out what they are offering. . . . We found that public sector leaves don't vary very much from private sector leaves.”) (testimony of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project).

*Hibbs*, 273 F.3d at 859 (alterations in original). In a dissenting opinion, Judge Dennis of the Fifth Circuit also surveyed the relevant legislative record:

It appears clear from the legislative history that Congress perceived sex discrimination in the granting of family and medical leave, notably in favor of granting such leave to women, and was acting accordingly in enacting the FMLA. . . . Testimony in hearings throughout the legislative process demonstrated that such discrepancies occurred in both the private and public sectors. *See, e.g., Parental and Medical Leave Act of 1986: Hearings on H.R. 4300 Before the Subcomm. on Labor Management Standards*, 99th Cong., 30, 147 . . . (statement of the Washington Council for Lawyers that “men, both in the public and private sectors, receive notoriously discriminatory treatment in their request for such leave.”); *Parental and Medical Leave Act of 1987: Hearings on S.249 Before the Subcomm. on Children, Family, Drugs and*

sustain overt gender classifications, this explicit distinction between men and women by state employers would most probably violate the Constitution.

The difficulty, however, is that the FMLA provides leave for employees who are new parents and those who need to care for sick family members in separate statutory sections.<sup>117</sup> Whether or not the *Garrett* requirement has been satisfied therefore requires a determination of whether infringements of  $R_j$  documented in the legislative record of the FMLA should be characterized as constitutional violations only in the provision of parental leave, or instead as constitutional violations in the provision of family-related leave more generally. This is not a question that can be settled either by the *Garrett* requirement or by the enforcement model. It is not a question that involves, much less imperils, any principle of separation of powers.

It is, to put the matter bluntly, a question that turns on the sympathy with which a court applying the enforcement model will regard Congress's efforts to combat sex discrimination. Because the enforcement model does not supply a basis for determining whether the prophylactic argument is adequate, it is possible that the Court will decide the case on the basis of its attitude toward the substantive civil rights agenda advanced by the FMLA. The issue is whether the hostility to national antidiscrimination norms expressed in *Kimel* and in *Garrett* will extend to the core area of sex discrimination.<sup>118</sup> The scope of congressional power will depend upon whether the Court applies to Section 5 legislation the same generous

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*Alcoholism*, 100th Cong., 364-74 (testimony of Elaine Gordon, Member of the Florida House of Representatives, that leave is only granted to female [public] employees in Florida and that Florida rejected extending such leave to men); *id.* at 385 (testimony of Gerald McEntee, International President, American Federation of State, County and Municipal Employees that "the vast majority of our [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave. And this is so key to the bill that it opens up the eyes of employers and opens up the eyes of America."); *Family and Medical Leave Act of 1993: Hearings on H.R. 770 Before the Subcomm. on Labor-Management Relations*, 101st Cong. 271 (statement of the Concerned Alliance of Responsible Employers that 13 states grant family leave to women and not men).

The House Report on the 1993 FMLA indicates that Congress was aware of such testimony and at least partially relied on this testimony in enacting provisions of the current FMLA. *See, e.g.*, H.R.Rep. No. 103-8(I) (1993) ("Meryl Frank, director of the Infant Care Leave Project of the Yale Bush Center in Child Development and Social Policy, reported to the committee on the 1986 conclusions and recommendations of the Project's Advisory Committee on Infant Care Leave.").

*Kazmier*, 225 F.3d at 548 (Dennis, J., dissenting) (footnote omitted, third and fourth alterations in original).

117. The question of parental leave is addressed in § 2612(a)(1)(A), whereas the family leave provisions are found in § 2612(a)(1)(C). *See* 29 U.S.C. § 2612(a)(1)(A), (C) (2000).

118. *See* Rubinfeld, *supra* note 87 (arguing that many recent Rehnquist Court opinions that are ostensibly rooted in constitutional doctrine may actually be motivated by an underlying hostility to antidiscrimination law).

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presumptions that justify heightened scrutiny in the Court's own Section 1 jurisprudence, or instead expresses skepticism toward new forms of antidiscrimination law and toward Congress's capacity to make constitutional judgments.

### III. THE FMLA AND THE RISE OF SEX DISCRIMINATION LAW: A SOCIAL MOVEMENT HISTORY

We have so far argued that the enforcement model suffers from grave, one might almost say fatal, analytic deficiencies. Without offering a theoretically cogent basis for decision, the model instructs courts to invalidate Section 5 legislation that "interprets" the Constitution, but to uphold Section 5 legislation that "enforces" the Constitution. It thus not only allows unexamined policy preferences an unacceptably large role in determining the constitutionality of the nation's civil rights laws, but it also fails to implement the separation-of-powers values that are its own *raison d'être*.

Our primary case against the enforcement model, however, is more fundamental. Even if judges *could* distinguish among Section 5 statutes as the enforcement model directs, imposing such restrictions on legislative constitutionalism would not conduce to the systemic well-being of our constitutional order. This is because the connections between politics and constitutional law that the enforcement model seeks to expunge have great structural value.

To test the systemic assumptions of the enforcement model, we reconstruct a recent chapter in modern constitutional history in which the ERA was proposed by Congress to the states, the Court created modern Fourteenth Amendment sex discrimination doctrine, and Congress passed the FMLA. By considering the connections among mobilized citizenry, Congress, and the Court that gave rise to modern sex equality jurisprudence, we demonstrate that core elements of the modern equal protection tradition grew out of the kind of structural relationships the Court now condemns. An encounter with this history suggests that the enforcement model rests on a simplistic and sociologically implausible conception of constitutional rights, and that it inadequately appreciates the kinds of institutional relationships required to preserve the legitimacy of constitutional governance in a democratic state.

#### A. *The Enforcement Model and American Constitutionalism*

The enforcement model would entrust the articulation of constitutional law exclusively to courts. The model imagines constitutional law as divorced from the project of democratic self-government except during the

rare moments of ratification contemplated by Articles V and VII. The model holds that once the political process has exhausted itself by ratifying constitutional text, the authoritative meaning of that text should be determined solely by the legal discipline and professional integrity characteristic of courts. Constitutional law should not be corrupted by the ephemeral and self-interested desires characteristic of legislative processes.<sup>119</sup> At the root of the enforcement model thus lies a stark dichotomy between constitutional law and politics. The model prohibits congressional interpretation of the Constitution because it seeks to preserve constitutional law from the contamination of politics.

There are circumstances when constitutional law requires protection from politics, as we discuss in Part IV of our Article. But the enforcement model is misguided to believe that constitutional law can or should be hermetically insulated from constitutional politics. By examining the genesis of the sex equality norm in our modern equal protection tradition, we seek to demonstrate that the actual relationship between constitutional law and constitutional politics is more complex and dialectical than the enforcement model imagines.

Although the Constitution is a form of law, it is a very special kind of law. Americans understand the Constitution to be both the kind of law that courts declare and also the kind of law that conveys our deepest national commitments. When the Court speaks for the Constitution, it often speaks for the identity of the nation itself. Constitutional issues frequently involve questions of profound political moment and controversy. This has important consequences for understanding the relationship between constitutional law and constitutional politics, for questions like school desegregation or

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119. Thus we read in *City of Boerne v. Flores*:

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

521 U.S. 507, 529 (1997) (first alteration in original). Justice Scalia has expressed this idea quite succinctly:

A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). For a full discussion, see Post & Siegel, *supra* note 15, at 17-29.

abortion are not to be settled merely by judicial decree.<sup>120</sup> As Woodrow Wilson put it, “[T]he Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”<sup>121</sup> Wilson reminds us that constitutional law is not solely a limit on democratic will, but also its truest expression, and not merely at rare moments of ratification.

That is why in America elected officials and ordinary citizens, as well as judges and courtroom lawyers, regularly make claims about constitutional law. Sometimes they follow the Court’s reading of the Constitution, and sometimes they mobilize vigorously to contest it.<sup>122</sup> The enforcement model prohibits Congress from exercising its Section 5 power to represent the considered constitutional views of the American public on a subject about which citizens may, and often do, have strong beliefs. The model is premised on the juricentric assumption that passionate political engagement is inconsistent with constitutional deliberation, rather than one of its paradigmatic forms.<sup>123</sup>

While Americans revere the Court and respect its authority to pronounce constitutional law, they also expect their own constitutional beliefs to matter, and will, in extraordinary circumstances, mobilize to secure recognition of their views. In the American tradition, the authority of

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120. For a discussion of how the Court’s school desegregation decisions required the active support of the political branches of the federal government in order to ensure their full realization, see Post & Siegel, *supra* note 15, at 27-31. For a discussion of how the Court’s constitutional understandings in the area of abortion have been modified in response to developments in the nation’s political culture, see NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* (1996).

121. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (1908).

122. “In our constitutional tradition, a network of understandings about the Constitution as text authorizes nonjuridical speakers to make claims about the Constitution that diverge from the Court’s. Americans act on these understandings through a variety of practices, including, but not limited to, Article V amendments.” Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299-300 (2001). Sanford Levinson describes this body of understandings as the “Protestant” strain in the American constitutional tradition. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27 (1988) (discussing “the legitimacy of individual (or at least relatively nonhierarchical communitarian) interpretation as against the claims of a specific, hierarchically organized institution”). Hendrik Hartog describes these understandings as “a faith that the received meanings of constitutional texts will change when confronted by the legitimate aspirations of autonomous citizens and groups.” Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1014 (1987); see also Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000) (“What the American People have said and done in the Constitution is often more edifying, inspiring, and sensible than what the Justices have said and done in the case law.”).

123. For a contrasting view of the Constitution, as arising out of the political life of the nation, see, for example, 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); TUSHNET, *supra* note 14; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); and Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5 (2001).



the Constitution is sustained through attitudes of veneration and deference, but it is also sustained through the quintessentially democratic attitude in which citizens know themselves as authorities, as authors of their own law.<sup>124</sup> When citizens engage in constitutional interpretation, they enact the Constitution's democratic authorship. Mobilizing over questions of constitutional meaning performs the understanding that the Constitution is yet, in fact, the People's.

Paradoxically, this form of decentered participation may well be an important dimension of the Constitution's democratic authority—or at least it may play as important a role in establishing the Constitution's authority as the forms of top-down control that the Court would assert in its role as “the ultimate expositor of the constitutional text.”<sup>125</sup> Contesting constitutional questions may well produce fidelity to constitutional values in ways that passive obedience to the Court will not. Constitutional contestation is an immensely generative practice in which the nation explores conflicting claims about the evolving meaning of its constitutional values. Constitutional contestation is a bridge that links the constitutional law enforced by officials in the legal system to norms that emerge from institutions, understandings, and practices that are outside the formal legal system but that are nevertheless part of the nation's constitutional culture.<sup>126</sup>

The enforcement model imagines the Court as the sole expositor (or, perhaps latently, as the sole author or sole arbiter) of constitutional law. But in fact the Court's articulation of constitutional law is in continual dialogue with the developing norms of American constitutional culture.<sup>127</sup> In Section

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124. Siegel, *supra* note 122, at 320.

125. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

126. One of us has previously argued:

Polyvocality in matters of constitutional interpretation regularly occurs in our constitutional culture. When citizens engage in constitutional interpretation, they enact and reinforce understandings of the Constitution's democratic authorship. The fact that elected officials and ordinary citizens are making multiple and conflicting claims about the Constitution's meaning need not be a threat to the Court's authority and, in our democratic constitutional culture, may well be a necessary condition of it. If citizens and elected officials concern themselves with constitutional questions, they are engaged in a common enterprise with the Court, even when they are in disagreement with the Court. *Active engagement with constitutional questions may well produce fidelity to constitutional values in ways that passive obedience to the Court's authority cannot. Further, when the Constitution has multiple and socially dispersed interpreters, the Court is likely to interpret the Constitution in ways that are informed by evolving popular judgments about the Constitution and issue judgments that find support among a diverse array of social actors.* The fact that the Court must often decide cases in ways that run against popular sentiment does not mean that it can dispense with the need for popular support. In matters that genuinely arouse popular passions, the Court requires popular engagement with constitutional questions to secure its authority.

Siegel, *supra* note 122, at 350-51 (emphasis added).

127. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002) (“[M]ost twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements . . . of the twentieth century.”).

III.B we offer a case study of exactly how a mobilized citizenry can generate changes in the nation's understanding of its own constitutional law. Although no one case study can adequately address the full range of relationships between constitutional law and politics, our hope is that the history recounted in Section III.B will raise questions about the specific structural implications of the enforcement model. Our purpose is to ask what it would actually mean to shut down Congress as a focal point for constitutional claims. The belief and expectation that a system is open underwrites fidelity, energizes mobilization, funds creativity, and creates a dynamic and responsive constitutional order. The enforcement model puts these values at serious risk.

To understand how this might be so, we offer in Sections III.B and III.C a case study of the FMLA that explores the Constitution as it lives outside the courts, in social movements and in Congress. Our history is not organized merely to answer the doctrinal question posed by the enforcement model, which is whether Congress was enforcing the Court's interpretation of the Constitution when it enacted the FMLA. Instead we look behind that question, at the institutional relationships that give rise to constitutional law, in order better to understand the connections between constitutional law and constitutional politics.

Whereas the enforcement model would begin the constitutional story of the FMLA in 1986, when Congress first held legislative hearings on the statute, we instead locate the FMLA in the constitutional mobilization of the second-wave feminist movement. Breaking the periodization that the enforcement model would impose on the history of the FMLA gives us a much richer picture of the constitutional claims to which the statute was responsive; it also provides a highly relevant genealogy of the sex equality norm that the FMLA seeks to vindicate. Examining this history allows us to see how constitutional norms can migrate across institutions in our constitutional order, from social movements to Congress to the Court. It makes visible how the FMLA and *Frontiero*<sup>128</sup> are each responses to the same constitutional mobilization, but whereas the latter speaks in the distinct accents of judicially enforceable rights, the former involves Congress working out the meaning of a constitutional principle of equal citizenship from a distinctly legislative standpoint.

### B. *Equal Citizenship and the Family*

Although Americans have long understood themselves as committed to principles of equality, they hold this commitment in the form of a long-running debate about its practical implications. In what follows we offer a

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128. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

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brief glimpse of events that changed the ways that Americans understood constitutional values of equality during the 1970s and thereafter. These events remind us that the nation's constitutional convictions are dynamic because regularly contested, and they suggest the many ways in which constitutional contestation can become a rich source of creativity in constitutional culture.

Today the sex equality norm is so central a part of our Fourteenth Amendment jurisprudence as to be unremarkable; but, of course, it only came to be so as the result of a remarkable act of jurisgenesis that transformed the way the nation understood its own constitutional commitments. Working with a variety of resources inside and outside the formal legal system—with principles, precedent, collective memory, social movement organizing, the party system, congressional legislation, constitutional lawmaking, and litigation—feminism in the 1970s helped to change the meaning of the Constitution. Although constitutional theorists endlessly debate the sources of constitutional law, searching for a rule of recognition in official locations like Article V amendments or judicial precedents that supply criteria for heightened scrutiny, we demonstrate in this Section that constitutional law has also arisen from shifts in fundamental constitutional values held by dominant segments of the population and registered by legislative constitutionalism. These shifts are propelled by common practices of popular political debate and mobilization.

The change in constitutional law effected by the women's movement in the 1970s represented a remarkably creative reinterpretation of existing constitutional principles. This may be difficult to recognize in retrospect, because the Court has since revised its understanding of the Equal Protection Clause to incorporate so many of the movement's key claims. But we can begin to appreciate the innovative quality of the movement's constitutional advocacy when we focus on the aspects of its constitutional vision that the Court has refused to incorporate into law. Few now recall that in the 1960s and 1970s, even the so-called liberal wing of the women's movement understood equal citizenship in terms of an antidiscrimination principle that authorized far-reaching structural change in the name of "equal opportunity." In advancing the claim that women should be treated as equals of men, the movement argued that those with family responsibilities should be entitled to participate on the same terms as all others in the core activities of citizenship, including work, education, and politics.

Although the Court has never been particularly receptive to this constitutional vision of equal opportunity, it did prove highly influential with Congress, which in the last twenty-five years of the twentieth century repeatedly legislated to support it. This constitutional vision in fact

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ultimately gave rise to the FMLA itself. Reconstructing the history that links the FMLA to the constitutional advocacy of second-wave feminism illuminates the multifaceted process through which the nation considers and revises its constitutive understandings of equality; at the same time, it demonstrates the institutionally differentiated ways in which Congress and the Court engage in constitutional lawmaking.

We begin our story in the 1960s, when longtime women's rights advocates made common cause with a new generation of activists emerging out of the labor movement, the civil rights movement, and the antiwar movement.<sup>129</sup> In conversations at work, on campuses, and at dinner tables across the United States, feminists often disagreed about the conditions of women's subordination, but there were certain matters about which they spoke with near unanimity. A core premise of the emergent feminist movement was that women's claim to equal rights with men entailed a challenge to the social organization of the family.<sup>130</sup>

In 1966, for example, when the National Organization for Women (NOW) first formed to secure enforcement of the sex discrimination provisions of the nation's new employment discrimination laws,<sup>131</sup> it adopted an inaugural *Statement of Purpose* that expressed the organization's commitment to "true equality for all women in America, and

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129. On the labor movement, see SUSAN M. HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 14-52 (1998) [hereinafter HARTMANN, *OTHER FEMINISTS*]. On the civil rights movement, see SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* 24-101 (Vintage Books 1980) (1979). See also FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960*, at 69-75 (1991); SUSAN HARTMANN, *FROM MARGIN TO MAINSTREAM: AMERICAN WOMEN AND POLITICS SINCE 1960*, at 24-41 (1989); RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 95-115 (Penguin Books 2001) (2000). On the antiwar movement, see DAVIS, *supra*, at 76-77; ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-1975*, at 103-37 (1989); JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 56-62 (1975); and ROSEN, *supra*, at 115-24.

130. This critique of the family is visible in foundational movement texts, such as Betty Friedan's *The Feminine Mystique*, first published in 1963. On Friedan's account, the work of family maintenance presupposes the dependence, exclusion, and nonparticipation of half the society's adult members. Friedan observed:

A woman cannot find her identity through others—her husband, her children. She cannot find it in the dull routine of housework. . . . The feminine mystique prescribes just such a living death for women. . . .

. . . .  
The feminine mystique has succeeded in burying millions of American women alive. There is no way for these women to break out of their comfortable concentration camps except by finally putting forth an effort—that human effort which reaches beyond biology, beyond the narrow walls of the home, to help shape the future.

BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 336-37 (Dell Publ'g 1983) (1963).

131. See CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968*, at 192-96 (1988).

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toward a fully equal partnership of the sexes.”<sup>132</sup> Although at that time there were many overtly discriminatory practices that an organization seeking sex equality in employment might target for protest,<sup>133</sup> NOW chose to emphasize that genuine equality of opportunity in employment would require new and innovative approaches to family life. NOW’s founding documents invited Americans to reimagine the social organization of the family so that women’s participation in family relations would no longer constitute an impediment to their participation in public life:

*WE BELIEVE that this nation has a capacity at least as great as other nations, to innovate new social institutions which will enable women to enjoy true equality of opportunity and responsibility in society, without conflict with their responsibilities as mothers and homemakers. . . . We do not accept the traditional assumption that a woman has to choose between marriage and motherhood, on the one hand, and serious participation in industry or the professions on the other. We question the present expectation that all normal women will retire from job or profession for 10 or 15 years, to devote their full time to raising children, only to reenter the job market at a relatively minor level. This in itself, is a deterrent to the aspirations of women, to their acceptance into management or professional training courses, and to the very possibility of equality of opportunity or real choice, for all but a few women. Above all, we reject the assumption that these problems are the unique responsibility of each individual women, [sic] rather than a basic social dilemma which society must solve. True equality of opportunity and freedom of choice for women*

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132. NAT’L ORG. FOR WOMEN, STATEMENT OF PURPOSE (1966), reprinted in FEMINIST CHRONICLES, 1953-1993, at 159, 159 (Toni Carabillo et al. eds., 1993) [hereinafter FEMINIST CHRONICLES] [hereinafter NOW STATEMENT OF PURPOSE].

133. It was, after all, only three years after Congress enacted the Equal Pay Act, see DAVIS, *supra* note 129, at 37, prohibiting the common practice of paying men and women different amounts for the same work. The EEOC had yet to enforce the sex discrimination provisions of the newly enacted Civil Rights Act, *id.* at 22-24, employers still openly advertised jobs by sex, *id.* at 59-60, and state labor-protective laws commonly required employers to treat male and female workers differently in a wide variety of employment contexts, *id.* at 31-32. State legislation still regulated the kinds of jobs women could hold, the number of hours they could work, the conditions in which they worked (barring night work for example), and the wages they received. This tradition of regulation greatly amplified the gender segregation of the labor force. See JUDITH A. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN’S LABOR LEGISLATION 42-69 (1978); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 19-63 (2001); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 180-214 (1982); SUSAN LEHRER, ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925, at 41-93 (1987); see also LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 72 (1998) (discussing how racial exclusions made protective labor legislation mark the different identities and positions of white and black women with respect to wage labor). For a history of the debate over sex-based protective labor legislation between progressive female reformers and feminist advocates of the ERA, see NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 117-42 (1987).

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*requires such practical, and possible innovations as a nationwide network of child-care centers, which will make it unnecessary for women to retire completely from society until their children are grown, and national programs to provide retraining for women who have chosen to care for their own children full-time.*<sup>134</sup>

Remarkably, even as women were organizing to demand equal enforcement of Title VII's employment discrimination provisions, NOW insisted that antidiscrimination laws alone were insufficient to secure "true equality of opportunity" for women. True equality of opportunity required institutional innovation of the sort that could alleviate the conflict "between marriage and motherhood, on the one hand, and serious participation in industry or the professions on the other." This conflict, NOW argued, was not the "responsibility of each individual woman," but instead was "a basic social dilemma which society must solve" with institutional innovations such as childcare and programs for retraining caregivers who have withdrawn from the labor force. Society needed to eliminate structural impediments to women's participation in the labor market before it could make good on its claim to give women an equal opportunity to compete for market opportunities with men.

NOW's *Statement of Purpose* thus tied a claim of right to a claim about social structure: Vindicating women's right to equality with men required transforming the social organization of the family. The bundling of the two claims is characteristic. As Jane Mansbridge has observed of the women's movement in this era, "Most . . . women's groups . . . pushed for reforms—like day-care centers, shared housework, and legal abortion—that would help women cast off their traditional role of full-time homemaker and join the paid labor force."<sup>135</sup> For the second-wave feminist movement, women's emancipation required fundamental changes in the structure of family life.<sup>136</sup>

The movement made this vision the centerpiece of its inaugural demonstrations. On August 26, 1970, the movement staged a mass strike on the fiftieth anniversary of the ratification of the Nineteenth Amendment,

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134. NOW STATEMENT OF PURPOSE, *supra* note 132, at 161-62 (emphasis added).

135. JANE J. MANSBRIDGE, WHY WE LOST THE ERA 99-100 (1986). On the range of women's groups advocating that the polity assume some form of collective responsibility for childcare in the late 1960s and early 1970s, see LAURI UMANSKY, MOTHERHOOD RECONCEIVED: FEMINISM AND THE LEGACIES OF THE SIXTIES 46-50 (1996).

136. For example, when the women in Students for a Democratic Society set out an advocacy agenda in the summer of 1967, the agenda included: "communal childcare, wide dissemination of contraceptives, easily available abortions, and equal sharing of housework." FREEMAN, *supra* note 129, at 58. For a widely circulating critique of the family of the era, see Pat Mainardi, *The Politics of Housework*, in SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT 447 (Robin Morgan ed., 1970). For a rich account of the many voices in which the second-wave movement addressed the institution of motherhood, see UMANSKY, *supra* note 135.

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which it dubbed a Women's Strike for Equality. The one-day strike was staged in some forty cities across the nation under the rallying cry of "Equal Rights Now!"<sup>137</sup> to publicize three core movement claims: "(1) free abortion on demand, (2) free 24-hour childcare centers, and (3) equal opportunity in jobs and education."<sup>138</sup>

The strike demands were structurally interconnected. Their functional interrelationship was so transparent that even *Newsweek's* contemporaneous account of the strike emphasized as much: "job and educational equality, *free child-care to allow them to take advantage of that*, and free abortions on demand."<sup>139</sup> Eleanor Holmes Norton, then chairwoman of the New York City Commission on Human Rights, explained the logic of the strike's demands in this way: "My mandate to enforce the law against sex discrimination is an empty mandate unless women can have twenty-four-hour day-care centers to leave their children while they work."<sup>140</sup> The strike's three-prong demands communicated the simple message that equal educational and employment opportunity required for its realization transformation of the conditions in which women bore and raised children.<sup>141</sup>

137. Haynes Johnson, "Equal Rights Now," *Exhort Women Protesters*, WASH. POST, Aug. 27, 1970, at A1.

138. Judy Klemesrud, *A Herstory-Making Event*, N.Y. TIMES, Aug. 23, 1970, § 6 (Magazine), at 6, 14. On the strike, see FREEMAN, *supra* note 129, at 84-85; ROSEN, *supra* note 129, at 92-93; and Bonnie J. Dow, *Spectacle, Spectatorship, and Gender Anxiety in Television News Coverage of the 1970 Women's Strike for Equality*, 50 COMM. STUD. 143 (1999).

139. *The Women Who Know Their Place*, NEWSWEEK, Sept. 7, 1970, at 16, 18 (emphasis added); see also DAVIS, *supra* note 129, at 114-16.

140. *The Talk of the Town: Liberation*, NEW YORKER, Sept. 5, 1970, at 25, 27.

141. The same understandings structure the *Bill of Rights* that NOW promulgated in 1968, which opens with a demand for ratification of the ERA and closes with demands for reproductive rights:

I. That the United States Congress immediately pass the Equal Rights Amendment to the Constitution to provide that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" and that such then be immediately ratified by the several States.

II. That equal employment opportunity be guaranteed to all women, as well as men by insisting that the Equal Employment Opportunity Commission enforce the prohibitions against sex discrimination in employment under Title VII of the Civil Rights Act of 1964 with the same vigor as it enforces the prohibitions against racial discrimination.

III. That women be protected by law to insure their rights to return to their jobs within a reasonable time after childbirth without loss of seniority or other accrued benefits and be paid maternity leave as a form of social security and/or employee benefit.

IV. Immediate revision of tax laws to permit the deduction of home and child care expenses for working parents.

V. That child care facilities be established by law on the same basis as parks, libraries and public schools adequate to the needs of children, from the pre-school years through adolescence, as a community resource to be used by all citizens from all income levels.

VI. That the right of women to be educated to their full potential equally with men be secured by Federal and State legislation, eliminating all discrimination and segregation by sex, written and unwritten, at all levels of education including college, graduate and professional schools, loans and fellowships and Federal and State training programs, such as the job Corps.

The structure of the movement's constitutional argument was, however, more complex. Its decision to stage its inaugural strike on the fiftieth anniversary of the Nineteenth Amendment's ratification located strike demands in a constitutional framework. In an era when the Court had not yet recognized sex discrimination claims under the Fourteenth Amendment, or accorded constitutional protections to the abortion right, the strikers invoked the Nineteenth Amendment to assert that women had a constitutional right to equal citizenship with men. The Nineteenth Amendment represented an especially crucial source of constitutional authority because it was the *only* constitutional text or history that explicitly recognized men and women as equal citizens. Yet even as the strikers invoked the collective memory of the Nineteenth Amendment's ratification, they did not specifically appeal to the Nineteenth Amendment as law. Instead they pointed to the suffrage Amendment as a frame of reference, a point of origin, the beginning of a journey.<sup>142</sup> The strike's message was that a half-century after the Nineteenth Amendment's ratification, the right to vote had not proven adequate to make women equal citizens with men.

The strike embraced such a demanding vision of equal citizenship that not even the Equal Rights Amendment, whose ratification the movement now sought,<sup>143</sup> could satisfy it. As strike organizer Betty Friedan observed,

I assumed that [the ERA] would pass by Aug. 26 . . . . They had to throw us some kind of bone. But if they think that this means they can keep us quiet and off the streets, they're wrong. The amendment doesn't begin to deal with the three demands of the strike.<sup>144</sup>

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VII. The right of women in poverty to secure job training, housing and family allowances on equal terms with men, but without prejudice to a parent's right to remain at home to care for his or her children; revision of welfare legislation and poverty programs which deny women dignity, privacy and self respect.

VIII. The right of women to control their own reproductive lives by removing from penal codes the laws limiting access to contraceptive information and devices and laws governing abortion.

NAT'L ORG. FOR WOMEN, BILL OF RIGHTS IN 1968, *reprinted in* FEMINIST CHRONICLES, *supra* note 132, at 214, 214.

142. For contemporaneous reports on the strike that interpreted its use of collective memory in such terms, see, for example, Claudia Levy & Ken Ringle, *Women Resume Old Fight for Equality*, WASH. POST, Aug. 26, 1970, at A10; and Myra MacPherson, *A Half-Century of Suffrage for Women*, WASH. POST, Aug. 26, 1970, at B1.

143. The House enacted the ERA in the weeks before the strike, but at the time of the strike its fate in the Senate remained unclear. *The Women Who Know Their Place*, *supra* note 139, at 18. President Nixon issued a statement in which he was described as "prepared to sign an equal rights amendment if it reach[ed] his desk." Johnson, *supra* note 137.

144. Klemesrud, *supra* note 138, at 16.



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In demanding “Equal Rights Now” in childcare and abortion,<sup>145</sup> as well as in education and employment, the strike emphasized that women would not secure equal citizenship with men until family life was organized on terms that presupposed the equal participation of both its adult members in public life.

The movement argued that ratifying the ERA was not itself enough to secure equal citizenship for women, just as enforcing Title VII was not

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145. The movement talked about abortion in the language of equal rights throughout the late 1960s and into the era of the strike. Once the ERA was reported out of Congress, feminists seemed primarily to talk about abortion in the discourse of privacy, in order to litigate the question under *Griswold v. Connecticut*, 381 U.S. 479 (1965), and to protect the ERA from the abortion controversy. In this early period, however, plaintiffs and amici made sex equality arguments in several cases challenging abortion statutes. See Brief of Amici Curiae Human Rights for Women, Inc. at 11-12, *United States v. Vuitch*, 402 U.S. 62 (1971) (No. 84) (arguing that the statute denies women, as a class, the equal protection of the law guaranteed by the Fifth Amendment in that it restricts their opportunity to pursue higher education, to earn a living through purposeful employment, and, in general, to decide their own future, as men are so permitted, and also arguing that the abortion statute violates the Thirteenth Amendment, on grounds that “[t]here is nothing more demanding upon the body and person of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later”); Brief of Amici Curiae Joint Washington Office for Social Concern et al. at 10-11, *Vuitch* (No. 84) (arguing that the abortion statute discriminates against women in violation of their right to equal protection).

Then-attorney Nancy Stearns offered an especially sophisticated rendering of the equality claim, in Nineteenth Amendment as well as Fourteenth Amendment terms:

[T]he Nineteenth Amendment sought to reverse the previous inferior social and political position of women: denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life. The Nineteenth Amendment recognized that women are legally free to take part in activity outside the home. But the abortion laws imprison women in the home without free individual choice. The abortion laws, in their real practical effects, deny the liberty, and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment.

First Amended Complaint at 6-7, *Women of Rhode Island v. Israel* (D.R.I. June 22, 1971) (No. 4605) [hereinafter *Women of Rhode Island Complaint*]. In *Roe v. Wade* itself Stearns submitted an amicus brief challenging the Georgia and Texas abortion statutes in explicit sex equality terms on Fourteenth Amendment, due process, equal protection, and Eighth Amendment grounds. There she argued, with respect to the due process claim, that “restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife.” See Brief of Amici Curiae New Women Lawyers et al. at 24, 32, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). She further argued, with respect to the equal protection claim, that “laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives,” *id.* at 32, and she contended, with respect to the Eighth Amendment claim, that

[s]uch punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person . . . [and] great physical hardship and emotional damage “disproportionate” to the “crime” of participating equally in sexual activity with a man . . . but is punishment for her “status” as a woman and a potential child-bearer.

*Id.* at 42; see also Brief for Plaintiffs, *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969) (No. 69 Civ. 4469) (attacking New York abortion laws under a Fourteenth Amendment Due Process claim, and asserting that abortion laws are “both a result and symbol of the unequal treatment of women that exists in this society”), cited in DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION RAP* 218 (1971).

itself enough to secure equal employment opportunity for women. The movement's insistence that it was not possible to secure equality for women without fundamental changes in family life reverberated within the debates over the ERA—so much so that in the imagination of contemporaries, the ERA was sometimes identified with the changes in family structure feminists were seeking. Opponents of the ERA, like opponents of the Nineteenth Amendment, often understood themselves as defending traditional family roles.<sup>146</sup> In the end, the movement grounded its vision of equal citizenship in the memory of the Nineteenth Amendment's ratification and in the hope of the ERA's ratification, all the while making plain that *more* was required to realize equal citizenship between the sexes.

By staging the strike and then reconvening successive mass actions to memorialize the occasion,<sup>147</sup> the movement succeeded in marking August

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146. Popular discussion of the ERA was conducted as a debate over the traditional family form. See MANSBRIDGE, *supra* note 135, at 105-12. It was not only Phyllis Schlafly who viewed the ERA as threatening traditional family roles. Senator Samuel James Ervin, Jr., Democrat of North Carolina, led opposition to the ERA in the Senate. He defended traditionalist views of womanhood, claiming that the ERA was a "declaration of war on homemakers," would leave women unprotected in the workplace, and would lead to such horrible results as integrated restrooms and women serving in combat. DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA 47-50* (1990).

In an internal Justice Department memorandum authored in 1970, then-Assistant Attorney General William Rehnquist advised Leonard Garment, a special consultant to President Nixon, that the ERA would threaten the family. Rehnquist observed that the "consequences of a doctrinaire insistence upon rigid equality between men and women cannot be determined with certainty, but the results appear almost certain to have an adverse effect on the family unit as we have known it," characterizing the "overall implication" of the ERA as "nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable." Memorandum from William Rehnquist, Assistant Attorney General, to Leonard Garment, Special Counsel to the President, *reprinted in Rehnquist: ERA Would Threaten Family Unit*, LEGAL TIMES, Sept. 15, 1986, at 4. Discussing the impact of the ERA on coverture domicile rules, Rehnquist warned that the ERA threatened the transformation of "holy wedlock" into "holy deadlock." *Id.* Rehnquist seemed to derive an understanding of the ERA's legal effects at least in part from a judgment about the aims of the movement supporting the constitutional amendment. Of the ERA's supporters, he advised Garment:

I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard.

*Id.* Rehnquist testified ambivalently in support of the ERA for the Nixon Administration. See *infra* note 177.

There are remarkable structural similarities in the ways that the family figured in debates over the ERA and the Nineteenth Amendment. In each case opponents of constitutional reform argued that amending the Constitution to recognize women as equal citizens with men would undermine traditional family relationships. In both debates, opponents of constitutional reform were more insistent about the connections between Constitution and family than were proponents of reform, who tended to speak (whether for reasons of prudence or principle) in terms of the equal citizenship principle. For an analysis of debates over the family in the legislative history of the Nineteenth Amendment, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 977-1006 (2002).

147. See *infra* note 151.

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26th as a day of historic moment in the struggle for constitutional equality between the sexes. Remarkably, Nixon's presidential proclamation recognizing Women's Rights Day<sup>148</sup> captures the complex character of the movement's "Nineteenth Amendment" claim. It emphasizes that "[a]s significant as the ratification of the Nineteenth Amendment was, it was not cause for ending women's efforts to achieve their full rights in our society. *Rather, it brought an increased awareness of other rights not yet realized.*"<sup>149</sup> The Proclamation also cautiously endorses movement demands for reforms that would alleviate conflicts between work and the family: "Although every woman may not desire a career outside the home, every woman should have the freedom to pursue whatever career she wishes."<sup>150</sup>

Bella Abzug forcefully invoked these themes when she sought to have Congress recognize a Women's Equality Day,<sup>151</sup> which it did in 1973 and

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148. On August 26, 1972, President Nixon issued Proclamation 4147, Women's Rights Day, which stated, in part:

Fifty-two years ago the Secretary of State issued a proclamation declaring the addition of the Nineteenth Amendment to our Constitution. That act marked the culmination of a long struggle by the women of this country to achieve the basic right to participate in our electoral process.

*As significant as the ratification of the Nineteenth Amendment was, it was not cause for ending women's efforts to achieve their full rights in our society. Rather, it brought an increased awareness of other rights not yet realized.*

In recent years there have been great strides in extending the protection of the law to the rights of women, and in promoting equal opportunities for women. Today more women than ever before serve in policy-making positions in the executive branch of our Government. Throughout the Nation, in State and local government and in the private sphere women are playing a more active role.

*Although every woman may not desire a career outside the home, every woman should have the freedom to pursue whatever career she wishes. Although women today have a greater opportunity to do that, we still must do more to ensure women every opportunity to make the fullest contribution to our progress as a Nation.*

Proclamation No. 4147, reprinted in 8 WEEKLY COMP. PRES. DOC. 1286, 1286-87 (Aug. 26, 1972) [hereinafter Proclamation No. 4147] (emphasis added). That Nixon memorialized ratification of the Nineteenth Amendment through proclamation was most immediately due to the work of Virginia Allan, who chaired the President's Task Force on Women's Rights and Responsibilities, a committee charged with "review[ing] the present status of women in our society and recommend[ing] what might be done in the future to further advance their opportunities." 117 CONG. REC. 30,158 (1971). The committee issued a report in April 1970, entitled *A Matter of Simple Justice*, the many recommendations of which included one directing the President to "[c]all a White House conference on women's rights and responsibilities in 1970, the fiftieth anniversary of the ratification of the suffrage amendment and establishment of the Women's Bureau." PRESIDENTIAL TASK FORCE ON WOMEN'S RIGHTS & RESPONSIBILITIES, *A MATTER OF SIMPLE JUSTICE*, at iv (1976).

149. Proclamation No. 4147, *supra* note 148, at 1287 (emphasis added).

150. *Id.*

151. In 1972, the House and Senate were considering a joint resolution requesting President Nixon to mark August 26th as a national holiday, which he did. *See supra* note 148 and accompanying text. During floor debates in the House, Abzug talked about the importance of commemorating the occasion as one crucial victory in the continuing journey toward women's equality:

August 26 has a dual significance. It is the anniversary of the date 52 years ago when women, a majority of the Nation, won the right to vote after a struggle that took

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1974.<sup>152</sup> Abzug celebrated enactment of the ERA, called for its ratification, but then warned, “[W]e are not deluding ourselves that mere passage of an amendment or declaration of a special day will wipe out discrimination. We know this is a continuing struggle.”<sup>153</sup> Abzug thereupon described the project of “wip[ing] out discrimination” in terms that included a long list of family-related reforms—with her list of equal citizenship demands functioning as a working agenda for the Ninety-Second Congress:

Women are rightly concerned with elimination of all forms of discrimination, with equal pay and job opportunity, equal job training and promotion, professional recognition and advancement, with universally available child care programs that are so necessary for the millions of working women who have young children, with the accessibility of birth control information, repeal of antiquated abortion laws, elimination of inequalities from the social security system and divorce and credit laws, and with equal representation in the political institutions of the Nation, including this Congress.<sup>154</sup>

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three-fourths of a century. It is also the date that marks the renaissance of a national women’s movement. Two years ago, on the 50th anniversary of women’s suffrage, women declared a nationwide strike to dramatize their demands.

In New York next Friday, thousands of women will gather for the third successive year to march down Fifth Avenue in a women’s strike for justice and equality. . . . All over the country, similar actions will be taking place.

118 CONG. REC. 29,139 (1972) (statement of Rep. Abzug).

152. Congress enacted Public Law 93-105, a joint resolution “[a]uthorizing the President to proclaim August 26, 1973, as Women’s Equality Day”:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That August 26, 1973, is designated as “Women’s Equality Day,” and the President is authorized and requested to issue a proclamation in commemoration of that day in 1920 on which the women of America were first guaranteed the right to vote.

Women’s Equality Day Designation Authorization, Pub. L. No. 93-105, 87 Stat. 350, 350 (1973).

The following year Congress enacted Public Law 93-382, a resolution that tracked the language of Public Law 93-105. Women’s Equality Day Designation Authorization, Pub. L. No. 93-382, 88 Stat. 633 (1974).

153. 118 CONG. REC. 29,139 (1972) (statement of Rep. Abzug) (emphasis added).

154. *Id.* (emphasis added). Abzug was instrumental in pushing the Ninety-Second Congress’s women’s rights agenda. Inserted at the conclusion of her address in the *Congressional Record*, at her request, is a list of women’s rights bills that she had introduced. These bills illustrate the character of the movement’s constitutional equality claim in this era, and the extent to which it focused on the family. *Id.* at 29,140. In particular, Abzug’s H.R. 14,715, the Abortion Rights Act of 1972, illustrates contemporary views of the constitutional rights at stake in the abortion debate, as well as Congress’s power to enforce constitutional rights more generally. As constitutional grounds for the bill that would have “finally and completely affirm[ed] the right of every American woman to choose whether or not she will be the mother of a child,” Abzug emphasized both autonomy and equality values. *Id.* at 15,327 (statement of Rep. Abzug). Abzug located women’s fundamental right to choose within “a constitutional right of privacy,” one of the penumbras emanating from the Bill of Rights, and concluded that this right is “fundamental and binding upon the States under the due process clause of the 14th amendment.” *Id.* at 15,330. Moreover, “[e]ven if such a right does not exist, State abortion laws are applied in a manner which

Here as elsewhere, Abzug hammered home the strike's core message: The ERA alone could not secure equal citizenship for women. For women to participate as men's equals in the traditional relations of citizenship—in work, in education, and in politics—it was necessary to change the conditions in which Americans bore and raised children.

During its Ninety-Second Session, Congress responded to the constitutional demands of the women's movement by enacting a bundle of federal protections for women's rights that were without precedent in American history. Not only did Congress pass the ERA in March 1972,<sup>155</sup> but it also drew upon its Section 5 power to apply the employment discrimination provisions of the Civil Rights Act of 1964 to the states, emphasizing the urgency of combating sex discrimination<sup>156</sup> although the Court had not yet declared such discrimination subject to heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause.<sup>157</sup> The Ninety-Second Congress also prohibited sex discrimination in all educational programs receiving federal funds,<sup>158</sup> and it enacted a veritable

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violates the equal protection clause" by discriminating against the poor. *Id.* Invoking *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in a detailed exploration of the robust nature of Congress's power under Section 5 to enforce the guarantees set forth in the Section, Abzug concluded:

Thus, Congress has the power to enact this legislation, which would strike down State criminal abortion laws, if it can reasonably find that those laws, either on their face or as applied, violate the constitutional rights of individuals subject to them. I believe that State abortion statutes violate both the due process and the equal protection clauses of the 14th amendment.

118 CONG. REC. 15,329 (1972) (statement of Rep. Abzug). It bears observing that Abzug's abortion argument is predominantly cast in the language of privacy, not equality (except insofar as she is discussing class inequality); in the years before the ERA was reported out of Congress, the movement seems to have spoken more confidently about abortion in the language of equality. *Cf. supra* note 145 and accompanying text.

155. The Senate passed the ERA by a vote of 84-8 and sent it on to the states for ratification on March 22, 1972. 118 CONG. REC. 9598 (1972); *see also* MANSBRIDGE, *supra* note 135, at 12.

156. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (extending Title VII's prohibition of sex discrimination in employment to the states); H.R. REP. NO. 92-238, at 5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 ("Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."); *see also* S. REP. NO. 92-415, at 7-8 (1971).

157. *See infra* notes 267-269 and accompanying text.

158. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373-74 (adding Title IX, which prohibited sex discrimination in all education programs receiving federal funds). Title IX was enacted to expand the protections of both Titles VI (access to educational opportunities) and VII (employment) of the Civil Rights Act of 1964. Specifically, Title IX extended Title VI's antidiscrimination protections to cover discrimination on the basis of sex and closed a loophole in Title VII, extending its sex discrimination in employment protections to educational facilities receiving federal funds. The Supreme Court has interpreted Title IX to track and extend Titles VI and VII of the Civil Rights Act of 1964. *See* *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-30 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-96, 704 (1979). While Congress invoked the Spending Clause to authorize Title IX, the Supreme Court has since left open the possibility that Congress was also relying on powers derived from Section 5 of the Fourteenth Amendment. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992) (choosing not to reach the question of whether Congress relied on its Section 5 powers in addition to its Spending Clause powers when it enacted Title IX). For a recent treatment of Title IX's

cornucopia of legislation prohibiting sex discrimination in public- and private-sector transactions.<sup>159</sup> In this same session, Congress enacted childcare legislation plainly responsive to movement demands for reforms that would alleviate conflicts between work and family.<sup>160</sup>

It was to this burst of lawmaking that a plurality of the Court pointed when it took the first steps toward declaring sex a “suspect” classification under the Equal Protection Clause in the 1973 case of *Frontiero v. Richardson*:

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of “race, color, religion, sex, or national origin.” Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act “shall discriminate . . . between employees on the basis of sex.” And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” *Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question*

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legislative history, see Christopher Paul Reuscher, *Giving the Bat Back to Casey: Suggestions To Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 119-21 (2001).

159. See, e.g., State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, § 122, 86 Stat. 919, 932 (prohibiting discrimination on the basis of sex in the disbursement of federal funds for fiscal assistance to state and local governments); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 13, 86 Stat. 816, 903 (prohibiting sex discrimination in any program or activity receiving federal funds under the Federal Water Pollution Control Act or the Environmental Financing Act); Act of Oct. 14, 1972, Pub. L. No. 92-496, § 3, 86 Stat. 813, 813-14 (expanding the mandate of the U.S. Commission on Civil Rights, a study group on the problems faced by minorities established by Congress in 1957, to include sex discrimination); Act of Dec. 15, 1971, Pub. L. No. 92-187, §§ 1-3, 85 Stat. 644, 644 (amending 5 U.S.C. §§ 2108, 5924, and 7152 of Title 5 of the United States Code so as to equalize employment benefits for married female federal employees); Nurses Training Act of 1971, Pub. L. No. 92-158, § 11, 85 Stat. 465, 479-80 (amending Title VIII of the Public Health Services Act to prohibit sex discrimination in admissions to all training programs for health professionals receiving funds under these Titles); Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, § 101, 85 Stat. 431, 461 (amending Title VII of the Public Health Services Act to prohibit the Secretary from providing grants, loan guarantees, interest subsidy payments, or other contracts under the title to medical and health-related schools and training centers that discriminate in admissions on the basis of sex); Act of Aug. 5, 1971, Pub. L. No. 92-65, §§ 112, 214, 85 Stat. 166, 168, 173 (prohibiting sex discrimination in access to all programs or activities funded under the Public Works and Economic Development Act of 1965 and the Appalachian Regional Development Act of 1965). For further discussion of these and other sex equality legislative initiatives of the Ninety-Second Congress, see FREEMAN, *supra* note 129, at 202-04.

160. See *infra* Subsection III.C.1.

*presently under consideration. Cf. Oregon v. Mitchell*, 400 U. S. 112, 240, 248-249 (1970) (opinion of Brennan, White, and Marshall, JJ.); *Katzenbach v. Morgan*, 384 U. S. 641, 648-649 (1966).<sup>161</sup>

From the standpoint of traditional, court-focused constitutionalism, nothing of moment happened until a plurality of the Court made this pronouncement in *Frontiero*—or perhaps until a full Court ratified the need for elevated scrutiny in *Craig v. Boren*.<sup>162</sup> Indeed, from the standpoint of a certain kind of constitutional formalism, nothing of moment *ever* happened; the Burger Court's interpretation of the Fourteenth Amendment's Equal Protection Clause was no substitute for the failed ratification of the ERA. From the standpoint of constitutional culture, however, something momentous did happen before *Frontiero* and *Craig*—a mobilization that generated a historic shift in the nation's constitutional beliefs.

As the legislative record of the Ninety-Second Congress testifies, Americans came to understand differently the meaning of equal citizenship between the sexes, and they associated this changed understanding of the equal citizenship norm with certain reforms in the structure of work and family life. How did the movement generate this new constitutional understanding of men and women as equal citizens? The women's movement demanded "Equal Rights Now" with resources to hand: It invoked the collective memory of the struggle for enfranchisement to give its equal rights claims constitutional foundation,<sup>163</sup> drawing on the Nineteenth Amendment until its constitutional vision had sufficient authority to generate new forms of positive constitutional law.<sup>164</sup> And it

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161. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion) (footnotes omitted, third emphasis added, alterations in original).

162. 429 U.S. 190 (1976).

163. On the concept of collective memory, see Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "The Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* 131, 163-66 (Austin Sarat & Thomas R. Kearns eds., 1999). See generally JACK M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 203-15 (1998); IWONA IRWIN-ZARECKA, *FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY* (1994); Susan A. Crane, *Writing the Individual Back into Collective Memory*, 102 *AM. HIST. REV.* 1372 (1997); Special Issue, *Memory and Counter-Memory*, *REPRESENTATIONS*, Spring 1989. Feminists pointed toward the Nineteenth Amendment as a basis for asserting that women were on a journey toward equal citizenship with men—a journey feminists evoked by diverse means. They referenced this journey by recovering the oral histories and personal testimonials of surviving suffragists, see, e.g., *supra* note 142 and accompanying text, by staging the strike on August 26th, securing recognition of August 26th as a national holiday called Women's Equality Day, and performing parades in suffrage whites.

164. The movement tended to view the Nineteenth Amendment within an incrementalist or stage theory of history, as but the first constitutional acknowledgment that women were equal citizens. See *supra* note 142 and accompanying text. Consistent with this historicist approach, the movement typically invoked the Nineteenth Amendment within a collective memory framework. Through the strike and iconography of the parades and other narrative and performative devices, the movement enacted a constitutional sisterhood across the generations. In this way the movement sought to draw on the Nineteenth Amendment's constitutional authority and extend it

used techniques of mass action, staged for visual and print media,<sup>165</sup> to endow its constitutional claims with persuasive force.<sup>166</sup>

The Strike for Equality transformed the commemoration of women's enfranchisement into a wide-ranging and provocative commentary on relations between the sexes. The threat of women engaging in a nationwide strike on the anniversary of the Nineteenth Amendment's ratification seems initially to have prompted mirth tinged with anxiety (what if women simply stopped doing what women do?)—a tonal instability for which the movement itself bears some responsibility. In this constitutional

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into new forms of constitutional law—an endeavor in which the movement would seem to have succeeded. There were, however, some who viewed the Nineteenth Amendment as a source of law that was adequate to support the second-wave movement's constitutional claims. See, e.g., W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 46-53 (1970) (arguing that the Nineteenth Amendment itself supplies a textual basis for the constitutional sex-equality norm); see also Women of Rhode Island Complaint, *supra* note 145, at 6 (invoking the Nineteenth Amendment in a challenge to a criminal abortion statute).

165. On the coverage of the strike on television, see Dow, *supra* note 138. Dow complains about the ways TV commentators condescended to and objectified the strikers in their coverage of the issues. In retrospect, however, it is remarkable how savvy the women's movement was in anticipating such treatment and in packaging its message about the strike's three demands in simple "sound bite" units that could survive even the rudest coverage. In surveying major newspaper and magazine accounts of the strike, we were impressed to discover the extent to which there was a "standard line" about the strike's message: That is, there was a message that was communicated to reporters about the strike's three demands that appeared in every story about the event. This suggests that the strike's organizers saw the media as a major audience for the strike itself.

166. Betty Friedan recalls the origins of the strike as follows:

The media was still treating the women's movement as a joke . . . . And fear of ridicule still kept a lot of women from identifying themselves as feminist, identifying with the women's movement—especially if they were isolated, in all those cities and suburbs and offices and universities where there weren't any NOW chapters, or consciousness-raising groups. . . . [D]espite the new consciousness, and the media attention, our real demands weren't being taken seriously as yet, by politicians, employers, church or state.

We needed an action to show them—and ourselves—how powerful we were. And if I was right, and all those women across the country were ready to identify with the women's movement, we needed an action, an issue women could do something about, originate, without much central organization. A woman from Florida had written me about a general strike of women that had been proposed in the final stages of the battle for the vote, reminding me that the fiftieth anniversary of the vote was August 26, 1970.

On the plane to Chicago, I decided to propose such a strike for August 26, 1970 on all the major issues of the unfinished business of women's equality. . . . [W]e were a very small organization still to mount such a huge action—but I sensed that the women "out there" were ready to move in far greater numbers than even we realized[,] that a loose sort of strike encouraging any women anywhere to get together in their own place, and strike would give scope to all the ingenuity surfacing in the women's movement, channel the energies into action, transcend the differences—and kindle a chain reaction among women that would be too powerful to stop, or divert, or manipulate—or laugh at, or ignore.

Betty Friedan, Introduction: Call to Strike, in *Herstory Part II*, at 1, 10-12 (n.d.) (unpublished manuscript on file in the Betty Friedan Papers, Schlesinger Library, Harvard University, Carton 30, Folder 1010).



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mobilization, stories of bra burning may have been apocryphal,<sup>167</sup> but plans “to distribute 4,000 cans of contraceptive foam” were not.<sup>168</sup> The movement deliberately exploited tonal and semantic ambiguities in the strike—about what could or would be withheld and why<sup>169</sup>—cultivating the element of

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167. See Barbara Mikkelson & David P. Mikkelson, Urban League Reference Pages, at <http://www.snopes.com/history/american/burnbra.htm> (last visited Jan. 31, 2003) (quoting Susan Brownmiller, the author of *American Feminine*, recounting the genesis of the bra-burning myth); see also ROSEN, *supra* note 129, at 160-61 (clarifying that, although no fire had been lit, “[i]nto a large ‘Freedom Trash Can’” protesters had thrown “‘instruments of torture’—girdles, curlers, false eyelashes, cosmetics of all kinds, wigs, issues of both *Cosmopolitan* and *Playboy*, and, yes, bras”).

168. 116 CONG. REC. 22,216 (1970) (reprinting Margaret Crimmins, *Drum-Beating for Women’s Strike*, WASH. POST, June 30, 1970, at D3). Crimmins emphasized the national and international character of the event, writing:

“It’s like a tribal drum—it’s beating all over the country,” chortled NOW (National Organization for Women) founder Betty Friedan after today’s press conference announcing details of the Women’s Strike for Equality Day called for August 26.

Mrs. Friedan . . . said women in Boston plan to distribute 4,000 cans of contraceptive foam on the Boston Common and Buffalo, N.Y., women are saying they won’t iron on that day, which marks the 50th anniversary of the amendment giving women the vote.

“We want women to get ideas from others and do their own thing, wherever they see a need for equality. . . .”

“We’re going to bring babies for a baby-in to sit on the laps of city fathers to show the need for child care centers in New York.” . . .

. . . .  
Karen DeCrow of Syracuse, N.Y., one of the plaintiffs in the case against McSorley’s saloon (an all-male bar in which women won seating) said friends in Finland are planning projects to “support their American sisters.”

“Freedom trash cans will be set up all over the country, so that women can bring items that oppress, like aprons, curlers, and hairpins.”

*Id.* at 22,216-17.

169. Betty Friedan’s official proclamation of the strike read in major part:

I propose that on Wednesday, August 26, we call a 24-hour general strike, a resistance both passive and active, of all women in America against the concrete conditions of their oppression. On that day, 50 years after the amendment that gave women the vote became part of the constitution, I propose we use our power to declare an ultimatum on all who would keep us from using our rights as Americans. I propose that the women who are doing menial chores in the offices cover their typewriters and close their notebooks and the telephone operators unplug their switchboards, the waitresses stop waiting, cleaning women stop cleaning, and everyone who is doing a job for which a man would be paid more—stop—every woman pegged forever as assistant to, doing jobs for which men get the credit, stop. In every office, every laboratory, every school, all the women to whom we get word will spend the day discussing, analyzing the conditions which keep us from being all we might be. And if the condition that keeps us down is lack of a child care center we will bring our babies to the office that day and sit them on our bosses’ laps. We do not know how many will join our day of abstention from so-called women’s work, but I expect it will be millions. We will then present concrete demands to those who so far have made all the decisions.

And when it begins to get dark, instead of cooking dinner or making love, we will assemble, and we will carry candles symbolic of that flame of the passionate journey down through history—relit anew in every city—to converge the visible power of women at city hall—at the political arena where the larger options of our life are decided. If men want to join us, fine. If politicians, if political bosses, if mayors and governors wish to discuss our demands, fine, but we will define the terms of the dialogue. And by the time these 24 hours are ended, our revolution will be a fact.

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carnival and of the spontaneous in the event. The strike was exemplary of the movement's method; it sought to make norms of equal citizenship speak to the struggles of women's everyday lives.<sup>170</sup> Feminists were able to move the electorate in a way that Congress could not ignore because the movement talked about the meaning of equal citizenship concretely, in terms of the difficulties and indignities women encountered negotiating conflicts in their work and family lives, and then moved to organize both inside and outside the party system.<sup>171</sup>

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Betty Friedan, Call to Women's Strike for Equality (Aug. 26, 1970) (on file in the Betty Friedan Papers, Schlesinger Library, Harvard University, Carton 35, Folder 1186). One female journalist reported:

Here are some of the things that will happen Wednesday, if Miss Friedan and her committee have their way: Wives will refuse to cook for husbands. Waitresses will stop waiting, and cleaning women will stop cleaning. Secretaries will keep their typewriters covered and close their notebooks, and telephone operators will unplug their switchboards. . . .

. . . The issues are so much at the heart of the whole movement, in fact, that lighthearted attempts by male newsmen to equate the strike with the women's sex strike in the Greek play "Lysistrata" (411 B.C.) often result in a flurry of four- and 12-letter words from strike leaders' mouths. . . .

Although some of the feminists have vowed to withhold sex from their men on Wednesday, most regard abstention as an unimportant part of the day's activities.

Klemesrud, *supra* note 138, at 14 (interviewing Friedan about the strike).

170. This form of advocacy is "a normal phase of mobilization, which social movement theorists refer to as frame alignment: a movement's attempt to represent or reinterpret daily life in terms calculated to move individuals to action." Siegel, *supra* note 122, at 340; see also David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986) (defining "frame alignment" as "the linkage of individual and [social movement organization (SMO)] interpretive orientations, such that some set of individual interests, values and beliefs and SMO activities, goals, and ideology are congruent and complementary"). For an overview of recent scholarship that explores how social movements produce meaning as a predicate to collective action, see FRONTIERS IN SOCIAL MOVEMENT THEORY (Aldon D. Morris & Carol McClurg Mueller eds., 1992). For an analysis of the women's movement that draws on several branches of this scholarship, see Verta Taylor & Nancy Whittier, *Analytical Approaches to Social Movement Culture: The Culture of the Women's Movement*, in SOCIAL MOVEMENTS AND CULTURE 163 (Hank Johnston & Bert Klandermans eds., 1995).

The first-wave feminist movement also invoked women's daily lives as it sought to mobilize women in the quest for constitutional rights. In this earlier period, the women's movement emphasized that voting would enable women to secure marital property rights and rights in their unpaid family labor. See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994). Later, in the Progressive Era, suffragists argued that women needed the vote for "enlarged housekeeping," to secure public policies that would promote the health and well-being of their families. AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 66-71 (W.W. Norton & Co. 1981) (1965).

171. On women's efforts to negotiate the party system in the postsuffrage era, see JO FREEMAN, *A ROOM AT A TIME: HOW WOMEN ENTERED PARTY POLITICS* (2000); and ANNA L. HARVEY, *VOTES WITHOUT LEVERAGE: WOMEN IN AMERICAN ELECTORAL POLITICS, 1920-1970* (1998). For a study of women in partisan and electoral politics before the New Deal, see KRISTI ANDERSEN, *AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL* (1996). On forms of movement organizing outside the party system in the 1970s, see STEVEN M. BUECHLER, *WOMEN'S MOVEMENTS IN THE UNITED STATES: WOMAN SUFFRAGE, EQUAL RIGHTS, AND BEYOND* (1990); and Taylor & Whittier, *supra* note 170.

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The movement thus forged constitutional meaning out of a variety of resources: constitutional text, collective memory, mass action, the techniques of social movement organizing, the beginnings of a litigation campaign,<sup>172</sup> the apparatus of the party system, and, finally, the lawmaking resources of Congress itself. These lawmaking efforts, too, were various. Looking back, we see not one form of lawmaking, but multiple kinds of statutes, with varying relationships to the constitutional agenda of the movement.

Versed in judicial constitutionalism, we have long understood the paradigmatic form of constitutional lawmaking to be Congress's use of Article V lawmaking procedures to propose the ERA to the states. If adventuresome, we might also add to the list of Congress's constitutional lawmaking Section 5 statutes like the 1972 Amendments to the 1964 Civil Rights Act and possibly Title IX (a Spending Clause statute that the Court itself has ruled might qualify as a Section 5 statute<sup>173</sup>). Considered from the perspective of history, we can see that the Ninety-Second Congress also used many other dimensions of its lawmaking power to establish a new constitutional understanding of men and women as equal citizens.

The ERA provides a surprisingly rich illustration of this point. We now recall the ERA simply as a proposed Article V amendment. But in the 1970s the relationship between Article V amendments and legislative

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172. At the same time that NOW was founded during the 1960s to seek enforcement of the sex discrimination provisions of Title VII, *see* ROSEN, *supra* note 129, at 74-81, the movement was conducting a long, wrenching internal debate about whether to pursue constitutional rights by means of an amendment or through litigation. The movement ultimately adopted a dual strategy pursuing constitutional reform through both amendment and litigation, just as nineteenth-century feminists once had. *See* Serena Mayeri, *Strategic Feminism and the Constitution, 1960-1972* (2003) (unpublished manuscript, on file with authors); *cf.* Siegel, *supra* note 122, at 334-35 (discussing interpretive and amendatory claims of the first-wave movement). Because many members of the movement were deeply skeptical about whether constitutional reform of a magnitude necessary to vindicate women's rights as equal citizens could ever come through the judiciary unassisted by further acts of lawmaking, efforts at organized constitutional litigation did not get underway until the ERA was close to passage in Congress.

The ERA first passed the House of Representatives by a vote of 350 to 15 in June 1970 and again, following further debate, by a vote of 354 to 23 in October 1971. In March 1972, the Senate passed the ERA 84 to 8, sending it to the states for ratification. *See* MANSBRIDGE, *supra* note 135, at 10-12. It was only in the spring of 1971 that the ACLU enlisted Ruth Bader Ginsburg to draft the Supreme Court brief in *Reed v. Reed*, which she did, building upon the work of Pauli Murray and Dorothy Kenyon. *See* Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4); Mayeri, *supra* (manuscript at 71). The Court decided *Reed* unanimously in November 1971, on narrow "rational basis" grounds; apart from ruling that the state's use of sex distinctions to distribute the opportunity to administer a decedent's estate was irrational, the Court adopted none of the brief's path-breaking argument. *See* *Reed*, 404 U.S. 71.

In March 1972, the ACLU responded to the ERA's passage by creating the Woman's Rights Project and appointing Ginsburg to head it. *See* HARTMANN, *OTHER FEMINISTS*, *supra* note 129, at 82. It was not until January 1973, ten months after the Senate sent the ERA to the states for ratification, that Ginsburg argued the second major women's rights case, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), before the Supreme Court in her capacity as head of the ACLU Women's Rights Project. *See* Mayeri, *supra* (manuscript at 73-74).

173. *See supra* note 158.

constitutional change was a live and controverted question. Prominent opponents of the ERA argued that a constitutional amendment was unnecessary precisely because Congress could use legislation to achieve the same ends. (Defenders of this position included Professor Paul Freund,<sup>174</sup> Professor Philip Kurland,<sup>175</sup> Senator Sam Ervin,<sup>176</sup> and then-Assistant Attorney General William Rehnquist—who, in this earlier period, recognized a much greater role for Congress in interpreting the Constitution than he does today.<sup>177</sup>) In 1971, for example, House Judiciary Committee hearings covered *both* the ERA *and* House Bill 916, The Women’s Equality Act of 1971, which reflected the recommendations of the President’s Task Force on Women’s Rights and Responsibilities.<sup>178</sup> Although Representative

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174. *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong. 79 (1970) [hereinafter *Senate Hearings*] (statement of Paul A. Freund, Professor of Law, Harvard University) (“It remains, then, to suggest alternative approaches. A great deal can be done through the regular legislative process in Congress.”).

175. *Id.* at 87 (statement of Philip B. Kurland, Professor of Law, University of Chicago) (“[T]he most appropriate means for securing the desired results on [women’s] behalf would be by way of appropriate legislation rather than constitutional amendment.”).

176. *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35,208, and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong. 66 (1971) [hereinafter *House Hearings*] (“Mr. Edwards: You believe apparently that whatever qualification may exist in equality, be it in education or employment, will be taken care of by law. Senator Ervin: By statutes.”).

177. *Id.* at 324 (statement of Assistant Attorney Gen. William H. Rehnquist) (“I think one could do it by statute.”). Though testifying on behalf of the Nixon Administration position that Congress should pass both the ERA and supplemental legislation (he proposed modifications to House Bill 916), Rehnquist ultimately conceded that he thought a statute was enough to remedy sex inequality. He was pressed to admit this view when Representative Wiggins asked him directly, “Do you feel the constitutional amendment is necessary to implement the Federal policy you have enunciated, that is, no discrimination on the basis of sex?” *Id.* Rehnquist responded, “No, I don’t. I think one could do it by statute.” *Id.* At no point did Rehnquist indicate under what constitutional authority he thought Congress could enact such legislation. Rehnquist never clarified the jurisdictional basis of his claim that Congress could enact House Bill 916—whose wide-ranging provisions covered both public and private actors in a range of practical situations from market to family. Several years thereafter, on the Court, then-Justice Rehnquist authored *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), upholding the 1972 Amendments to Title VII (EEOA) on Section 5 grounds.

178. On the President’s Task Force, see *supra* note 148. House Bill 916 provided for: amending Title II of the Civil Rights Act of 1964 to add sex as a prohibited basis for denying any rights guaranteed by that title; amending Title VI to prohibit sex discrimination among beneficiaries of any federal program; amending Title VII to cover hiring by state and local governments, remove the exemption of educational institutions in hiring instructional employees, and empower the EEOC to issue cease-and-desist orders; amending Title VIII of the 1968 Civil Rights Act to prohibit sex discrimination in the rental, sale, or financing of housing; amending the Federal Fair Labor Standards Act to apply its equal pay provisions to women in executive, administrative, and professional positions; authorizing the Attorney General to bring suits to end sex discrimination in public facilities and public education; prohibiting intimidation of any citizen for exercising rights to be free from sex discrimination; enlarging the jurisdiction of the U.S. Commission on Civil Rights to include sex discrimination; authorizing grants by the Secretary of Health, Education, and Welfare (HEW) to State Commissions on the Status of Women; requiring legislative recommendations from the Secretary of HEW to equalize treatment of men and women as dependents and survivors of social security beneficiaries, as recipients of childcare services under the Family Assistance Act, and as taxpayers under the Internal Revenue Code; and requiring the Commissioner of Education to conduct a nationwide survey of denials of educational

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Mikva, the principal sponsor of House Bill 916, proposed the bill as a supplement to the ERA,<sup>179</sup> some ERA opponents regarded the legislation as a substitute for it.<sup>180</sup>

Today, as we assess this debate in retrospect, what is striking is that *all sides* assumed that Congress could act as an agent of constitutional change. All participants believed that Congress possessed ample authority, either by reason of its commerce<sup>181</sup> or Section 5 power,<sup>182</sup> to legislate a new application of equal citizenship principles to women. Those engaged in debate differed among themselves about whether, and where, federal power ran out.<sup>183</sup> But all assumed Congress's interpretive power was substantial enough for it to articulate constitutional norms of sex equality at a time when the Court had yet to subject sex discrimination to heightened scrutiny.

It was to the constitutional deliberations and lawmaking activities of this Ninety-Second Congress that a plurality of the Court looked in

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opportunity to women and to submit to Congress legislative recommendations to eliminate such denials. *See House Hearings, supra* note 176, at 96.

179. *House Hearings, supra* note 176, at 85 (statement of Rep. Mikva).

180. *See supra* notes 174-177.

181. Discussion seems to have focused exclusively on regulating employment discrimination. *See, e.g., Senate Hearings, supra* note 174, at 84 (statement of Paul A. Freund, Professor of Law, Harvard University) (“[L]egislation by Congress could do the job so far as the private conduct is concerned, either under the commerce clause as we now have it, or conceivably under other clauses of the Constitution, spending power, and so on.”).

182. *See House Hearings, supra* note 176, at 68-69 (statement of Rep. Wiggins) (discussing *Katzenbach v. Morgan* and the Section 5 power, and stating: “[B]ecause it is there I think that the conclusion might be drawn that there is literally plenary power in the Congress under the fifth section.”); *Senate Hearings, supra* note 174, at 82 (statement of Sen. Ervin) (“I will say that Congress could enact laws to counteract any laws which make an invidious discrimination between men and women. I don’t think the 14th amendment intended to give the Congress the power to supersede State legislation in all areas, it only gave it the power to counteract violations of the 14th amendment of the States because the first section puts certain prohibitions on the State, says State shall do not certain things.”); *id.* at 85 (statement of Paul A. Freund, Professor of Law, Harvard University) (“[I]n my view, though perhaps not in yours, Senator [Ervin], Congress has the power under the 14th amendment to deal with discriminatory State laws in the field of family relationships as they have exercised it in the field of voting rights.”); *id.* at 88 (statement of Philip B. Kurland, Professor of Law, University of Chicago) (“Section 5 of the 14th amendment plus the commerce clause gives the Congress an almost unlimited reach in commanding equality between the sexes.”).

183. It is remarkable to appreciate just how differently from the modern Court contemporaries at that time understood the scope of the “*Morgan* power.” For an example in the hearings, see *House Hearings, supra* note 176, at 68-69 (statement of Rep. Wiggins) (“[I] think that the conclusion might be drawn that there is literally plenary power in the Congress under the fifth section.”). *See also* Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 119 (1966) (“Here then, as under the commerce clause, in place of the question, what will the Court permit, the principal issue becomes, how widely should Congress choose to extend federal regulation. Political opinions upon the wisdom of that transfer of responsibility [to determine federalism limits under the Commerce Clause] differ widely. In my view it gave the federal system as a whole the flexibility . . . to satisfy the material needs of its citizens, without significantly lessening the power of the states to respond. The recent decisions express a parallel view of congressional responsibility in the area of human rights.”); Post & Siegel, *supra* note 74, at 500 & n.274 (locating the views expressed in the Cox *Foreword* in the understandings of the era in which Congress had just enacted the Civil Rights Act of 1964).

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deciding *Frontiero*, observing that “Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”<sup>184</sup> The exchange is simply unimaginable today, when the Court conceives of legislative politics as so debased as to preclude the possibility that Congress is capable of responsibly deliberating about the meaning of the Fourteenth Amendment. But in *Frontiero* the Burger Court openly acknowledged it was following Congress’s lead.

The burst of legislative constitutionalism in the Ninety-Second Congress represents an important shift in the way the nation understood what it meant for men and women to participate in the American polity as equal citizens. By no means was there social consensus about the change or its practical reach. But the legislative record of the Ninety-Second Congress demonstrates that the mobilizations of the late 1960s and early 1970s had produced substantial support for the sex equality principle. This record evidenced a widening gap between the nation’s understanding of its constitutional values and the official equal protection doctrine of the Court. The Court’s decision to close this gap is especially striking because it incorporated into Fourteenth Amendment doctrine not only the understanding of sex equality that underlay Section 5 legislation amending the nation’s civil rights laws, but also many of the most important ideas of the unratified ERA.<sup>185</sup> Evidently the transformation of the nation’s constitutional culture, as evidenced by the legislative constitutionalism of the Ninety-Second Congress, was more significant to the Court than the formal procedures of Article V.

Legislative constitutionalism can thus play a powerful role in coordinating constitutional politics and constitutional law. Although Congress can use many of its lawmaking powers to transform constitutional culture, Section 5 legislation is especially important in this process because it allows Congress unambiguously to speak the law of the Constitution and hence directly to express the evolving constitutional beliefs of the nation. Section 5 statutes are for this reason a precious symbolic resource for those seeking to transform constitutional culture. They are a particularly valuable object of social mobilization. When the enforcement model attempts to block Section 5 legislation based on Congress’s independent interpretation of the Constitution, the Court risks stifling forms of social mobilization and constitutional contestation that periodically function to align constitutional law with the lived experiences of the American people.

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184. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion).

185. See *supra* notes 155-156 and accompanying text.

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C. *The FMLA as Legislative Constitutionalism:  
Statutory Aims and Antecedents*

In 1993 Congress announced that it was invoking its Section 5 power to enact the FMLA.<sup>186</sup> It declared that the statute was designed “to promote the goal of equal employment opportunity for women and men, pursuant to” the Equal Protection Clause.<sup>187</sup> But in what sense exactly was the FMLA designed to enforce a provision of the Constitution?

To address this issue we need first to consider the nature of legislative constitutionalism. Section 5 statutes stand in a very different relationship to constitutional rights than do judicial opinions or remedies. We are accustomed to imagining judicial judgments as required by constitutional principles, but no one would contend that the FMLA is required by the Fourteenth Amendment in the same sense that a judicial judgment vindicating a right is. The FMLA can be repealed without constitutional difficulty. How then can the FMLA be said to enforce the higher and binding law of the Constitution?

Two discrete questions underlie this inquiry. The first concerns the nature of constitutional rights, the second the distinction between legislative and judicial power. With regard to the first question, we ordinarily conceive constitutional rights as possessing definite and mandatory entailments. So, for example, there are specific requirements that flow from the First Amendment’s prohibition of viewpoint discrimination,<sup>188</sup> or from the Due Process Clause’s mandate that government offer medical care to suspects in police custody who have been injured while being apprehended by the police.<sup>189</sup> A court must strike down a statute that is improperly viewpoint discriminatory, and Congress may not enact it; a court must order the provision of such medical care, and Congress must authorize it. But the FMLA does not seem to bear this kind of relationship to the Equal Protection Clause. It is implausible to claim that twelve weeks of unpaid leave to care for sick family members is required by the Constitution.

Constitutional rights, however, do not always possess specific entailments. When a court seeks to apply the Eighth Amendment’s prohibition of cruel and unusual punishment to a prison, for example, it will typically examine the conditions of confinement “taken as a whole”<sup>190</sup> to see if they correspond to constitutional values; a finding that prison conditions violate the Constitution will not ordinarily yield a judicial decree

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186. *See supra* note 20 and accompanying text.

187. 29 U.S.C. § 2601(b)(5) (2000).

188. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

189. *Deshaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 199 (1989); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

190. *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

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that is “logically derived from the substantive liability,” but instead will justify a remedy that is “forward looking, fashioned ad hoc on flexible and broadly remedial lines.”<sup>191</sup> It is generally acknowledged that structural injunctions require “broad discretionary powers”<sup>192</sup> and that this discretion is necessary to “give meaning to” the “public values” contained in the Constitution.<sup>193</sup> Because many different school desegregation plans are constitutionally compatible with the redress of any given constitutional violation, the particular elements of any specific judicial plan are not ordinarily understood to be mandated by the Equal Protection Clause.<sup>194</sup>

In the context of structural injunctions, therefore, constitutional rights function as values that courts seek to realize, rather than as principles that mandate specific remedial entailments. It is in this sense that Section 5 legislation seeks to enforce constitutional rights. The relationship of the FMLA to the Equal Protection Clause is roughly the same as the relationship between a particular element of a judicially ordered school desegregation plan and the Equal Protection Clause. Neither is specifically required by the Clause, but both are efforts to “give meaning” to the Clause.

Of course there is also a significant difference between judicial remedies and Section 5 legislation. Although the particular provisions contained in any given judicial remedy may not be mandated by the Constitution, courts can issue structural injunctions only if *some* remedy is required to vindicate the Constitution. We do not understand Section 5 legislation as required in this same sense. The FMLA is in this respect no different than the Voting Rights Act or even § 1983, although these statutes unambiguously enforce the Constitution.

Analysis of this point brings us to our second question, which is the distinction between legislative and judicial power. The exercise of judicial power is justified and circumscribed by the need to resolve a particular case or controversy, which means that courts enforce constitutional rights if and only if it is necessary in order to decide a case. Legislative power is not circumscribed in this same way. Congress enacts Section 5 statutes because, all things considered, such statutes will protect, enhance, or fulfill the constitutional values that Congress wishes to vindicate. Legislative

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191. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976). For a discussion of the prison cases, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

192. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982).

193. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

194. *See, e.g.,* Milliken v. Bradley, 433 U.S. 267 (1977).



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constitutionalism is thus inherently aspirational in ways that judicial constitutionalism is not.<sup>195</sup>

This distinction explains many of the differences between legislative and judicial constitutionalism. Unlike a court, Congress may act incrementally and incompletely realize its constitutional commitments, or it may realize its commitments in a course of legislation that evolves over time, or it may apply constitutional values in a manner that coordinates multiple and potentially competing commitments.<sup>196</sup> Legislative constitutionalism can be more temporizing or more detailed than judicial constitutionalism, which is always obligated to provide a remedy that is legally justified. In addition, because Section 5 statutes derive legitimacy from Congress's democratic accountability, and because they can establish comprehensive schemes of regulation and administration, Section 5 statutes can also address polycentric problems of redistribution that would be quite beyond the bounds of judicial remedies.<sup>197</sup> In all these ways, legislative constitutionalism assumes forms that differ from constitutional rights and remedies that are premised on models of judicial power.

In this Section, we shall argue that the FMLA was an attempt to work out the meaning of the constitutional principle of equal citizenship from the distinct standpoint of a legislature. We begin by locating the statute's origins in the explosion of constitutional lawmaking that occurred in the Ninety-Second Congress. Congress initially responded to movement demands for legislation alleviating conflicts between work and family by enacting a federal childcare program that was twice vetoed during the 1970s. Congress then developed a different framework for alleviating conflicts between work and family. It turned to legislation that directly regulated the employment relationship itself. During the 1970s, Congress enacted the Pregnancy Discrimination Amendment (PDA), which provides that employment discrimination on the basis of pregnancy is discrimination

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195. As William Forbath argued:

Congress' constitutional duties were not only to safeguard the constitutional bounds and fairness of social and economic legislation, but also to interpret and secure these new positive social and economic rights. By contrast, safeguarding the noneconomic rights inscribed in the Bill of Rights, as well as the rights of racial, ethnic, and religious minorities, would remain (or become) the special responsibility of the courts. In championing this vision, the New Dealers carried forward a long tradition of congressional constitutional argument, interpretation, rights recognition, and precedent-making—what I shall call the political Constitution.

William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 167 (2001).

196. Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 112; Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1898-99 (2001); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975).

197. See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 308-15 (1994); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 420-22 (1993).

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on the basis of sex for purposes of Title VII. In the 1980s and 1990s Congress decided to deploy its power under Section 5 and the Commerce Clause to enact a statutory scheme enabling workers to take time off to care for their families without losing the right to retain their jobs.

The FMLA is detailed and redistributive in ways that do not easily correspond to the forms characteristically employed by the judiciary to enforce constitutional rights. But the history of the FMLA demonstrates that the statute emerged from a long and slow process in which Congress coordinated multiple and conflicting normative commitments and in the process accumulated democratic support for a far-reaching statutory reform of the workplace. Understanding the historical processes that gave rise to the FMLA allows us to appreciate the many ways in which a legislature's efforts to vindicate constitutional equality principles inevitably differ from a court's work.

### 1. *The Comprehensive Child Development Act*

The Comprehensive Child Development Act (CCDA)<sup>198</sup> was a key piece of sex equality legislation enacted by the Ninety-Second Congress, but vetoed by President Nixon—despite the fact that federal legislation providing childcare assistance to households across the income spectrum was originally proposed by President Nixon's own Task Force on Women's Rights and Responsibilities.<sup>199</sup> The CCDA would have authorized \$2 billion for Head Start, day care, and supportive education to be provided free to families below an income threshold and on a sliding scale basis for families above the threshold.<sup>200</sup> The CCDA was born of feminism's constitutional vision of equal citizenship. In making childcare available to families above the poverty line, the bill was responsive to the demand for "universally available, publicly supported child care," as NOW explained on behalf of the Act.<sup>201</sup> While nearly all the organizations that testified on behalf of the

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198. The Comprehensive Child Development Act, H.R. 6748, 92d Cong. (1971), was added as a new title to the Economic Opportunity Amendments of 1971, H.R. 10,351, 92d Cong. Nixon vetoed the entire set of amendments, including the CCDA.

199. See 117 CONG. REC. 30,158 (1971) (reprinting excerpts from the President's Task Force on Women's Rights and Responsibilities, which proposed "[a]doption of the liberalized provisions for child care in the family assistance plan and authorization of Federal aid for child care for families not covered by the family assistance plan").

200. HOUSE COMM. ON EDUC. & LABOR, COMPREHENSIVE CHILD DEVELOPMENT ACT, H.R. REP. NO. 92-1570, at 8, 20-21 (1972) [hereinafter HOUSE REPORT ON CCDA]; Marjorie Hunter, *14 Senators Back a Child Care Bill*, N.Y. TIMES, Feb. 25, 1972, at 12.

201. *Comprehensive Child Development Act of 1971: Joint Hearings on S. 1512 Before the Senate Subcomm. on Employment, Manpower, and Poverty and the Subcomm. on Children and Youth of the Comm. on Labor and Public Welfare, Part 3*, 92d Cong. 752 (1971) (statement of Vicki Lathom, Member, National Board of Directors, Child Care Task Force, National Organization for Women) ("Although NOW is committed to work for universally available,

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statute emphasized its benefits for the nation's children, NOW instead emphasized the legislation's emancipatory potential for women:

The National Organization for Women believes that widespread availability of child care facilities is essential if women are to have true choice of lifestyles. Child care is also desperately needed to permit mothers to work who must do so for the survival of their families, and to provide millions of children with better care than they are now receiving.

Perhaps the greatest cause of women's second-class status is the traditional belief that anatomy is destiny. Women will never have full opportunity to participate in America's economic, political, or cultural life as long as they bear the sole responsibility for the care of children—entirely alone and isolated from the larger world.<sup>202</sup>

The low-key presentation of the statute adopted by most of its supporters did not succeed in quelling objections. President Nixon vetoed the CCDA in December 1971, criticizing “the fiscal irresponsibility, administrative unworkability, and family-weakening implications of the system it envisions” and complaining that any response to children's needs must be “consciously designed to cement the family in its rightful position as the keystone of our civilization.”<sup>203</sup> The President emphasized that “[t]here is a respectable school of opinion that this legislation would lead toward altering the family relationship” and urged that the nation adopt policies that “enhance rather than diminish both parental authority and parental involvement with children.”<sup>204</sup> He concluded that “for the Federal Government to plunge headlong financially into supporting child development would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach.”<sup>205</sup>

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publicly supported child care, we are in accord with flexible fees on a sliding scale, as an interim step, to reflect the urgent needs and varied resources of families.”).

202. *Id.* at 751.

203. Veto of the Economic Opportunity Amendments of 1971, 1971 PUB. PAPERS 1174, 1176 (Dec. 10) [hereinafter Nixon Veto Message].

204. *Id.* at 1178.

205. *Id.* Evidence suggests that Nixon vetoed the CCDA and framed his veto message in such conservative tones in order to win favor with the right wing of the Republican Party. Charles Colson, Chief of Staff H.R. Haldeman, and speechwriter Pat Buchanan reminded Nixon that his election depended on his reaffirmation of traditional values following the social change and upheavals of the 1960s. They knew that some of his constituency would perceive the CCDA as an attack on the traditional family. Colson advised Nixon to oppose childcare on principle: “[I]t may be precisely what we need to buy ourselves maneuvering room with the right wing.” See MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* 138 (1993).

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When the House Committee on Education and Labor tried to respond to Nixon's veto with revised legislation, minority dissenters cited multiple editorials branding the child development bill as a corrosive threat to the nation. Columnist James J. Kilpatrick approved of childcare centers that provided "places where welfare mothers could leave their children while they went off to work," but he called the proposed bill "the boldest and most far-reaching scheme ever advanced for the Sovietization of American youth".<sup>206</sup>

In the context of a Sovietized society, in which children are regarded as wards of the state and raised in state-controlled communes, the scheme would make beautiful sense. But it is monstrous to concoct any such plan for a society that still cherishes the values (however they may be abused) of home, family, church, and parental control. This bill contains the seeds for destruction of Middle America.<sup>207</sup>

Despite the fact that in hundreds of pages of testimony only NOW had uttered a few sentences suggesting that reforming the family might be a positive aim of the CCDA, the statute was opposed as if its supporters had mounted a full-scale attack on the traditional family form. In part, opponents of the CCDA were responding to feminist critiques of the family well known to those involved in the debate over federal childcare legislation, even if such critiques had been carefully excluded from the CCDA's legislative record; in part, they were responding to the provisions of the CCDA itself. The legislation was understood to make family reform an aim in its own right precisely because it reached beyond poor households to offer daycare services to families of Middle America. Nixon's veto statement made a point of distinguishing the CCDA from Head Start and other nutritional, medical, and health services targeting poor children:

[U]nlike these tried and tested programs . . . this legislation would be truly a long leap into the dark for the United States Government and the American people. I must share the view of those of its supporters who proclaim this to be the most radical piece of legislation to emerge from the Ninety-second Congress.<sup>208</sup>

Congress enacted additional childcare legislation within a few years,<sup>209</sup> but in 1976 President Ford vetoed it on federalism grounds.<sup>210</sup> The

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206. HOUSE REPORT ON CCDA, *supra* note 200, at 45.

207. *Id.*

208. Nixon Veto Message, *supra* note 203, at 1177.

209. SONYA MICHEL, CHILDREN'S INTERESTS/MOTHERS' RIGHTS: THE SHAPING OF AMERICA'S CHILD CARE POLICY 252 (1999). There was considerable support for federal childcare legislation in this era. A *New York Times* editorial responded to the CCDA veto: "[T]his

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presidential vetoes of the 1970s proved decisive in shaping the federal government's role in childcare. Although the federal government continued to enact childcare legislation in the years after Ford's veto, the programs were designed to serve only the nation's poorest households.<sup>211</sup>

After 1976, Congress changed its regulatory focus. Rather than reform the ways that families arranged to care for their dependent members, Congress sought to alleviate conflicts between work and family by reforming aspects of the employment relationship. In the early 1970s, a few federal courts had ruled that the Equal Protection Clause prohibited discrimination on the basis of pregnancy,<sup>212</sup> and the Equal Employment Opportunity Commission (EEOC) had issued guidelines stating that exclusion from hiring, denial of fringe benefits, and discharge based on pregnancy amounted to discrimination on the basis of sex in violation of Title VII.<sup>213</sup> The EEOC's guidelines translated feminism's vision of equal employment opportunity into practical legal form. But the Supreme Court bluntly repudiated the EEOC, ruling in 1974 that states could exclude pregnancy from disability benefits programs without engaging in sex-based discrimination within the meaning of the Equal Protection Clause,<sup>214</sup> and two years later ruling in *General Electric Co. v. Gilbert* that this

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attack cannot obscure the fact that the concept of child care and development enjoys broad popular support across most of the traditional divisions of politics, class, economics and race." Editorial, *Abandoned Commitment*, N.Y. TIMES, Dec. 11, 1971, at 30. Women's support for childcare crossed political lines: The National Women's Political Caucus proposed comprehensive childcare programs as well as abortion on demand to the Republican Platform Committee in 1972. *Abortion and Child Care Planks To Be Proposed to the G.O.P.*, N.Y. TIMES, Aug. 11, 1972, at 8.

210. Veto of Child Day Care Bill, 1976-1977 PUB. PAPERS 981 (Apr. 6, 1976).

211. MICHEL, *supra* note 209, at 251-52.

212. See, e.g., *Cohen v. Chesterfield County Sch. Bd.*, No. 71-1707, 1972 WL 2594, at \*2 (4th Cir. Sept. 14, 1972) (invalidating a school board regulation requiring a pregnant teacher to take an unpaid leave of absence for four months before birth and to continue on leave until she submitted a doctor's note declaring her fitness), *rev'd en banc*, 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds sub nom.* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating the regulation on due process and irrebuttable presumption grounds); *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972) (invalidating a school-board rule requiring pregnant teachers to take unpaid leaves of absence for five months before birth and to continue on that status until the beginning of the first school term after the child was three months old), *aff'd*, 414 U.S. 632 (1974).

In this era, Ruth Bader Ginsburg filed a path-breaking brief for the ACLU Woman's Rights project arguing that pregnancy discrimination was sex discrimination. In *Struck v. Secretary of Defense*, plaintiffs challenged an air force regulation providing for the termination of pregnant women on equal protection grounds. See Brief for Petitioner at 7, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178) (arguing that the regulation "reflects arbitrary notions of a woman's place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments"). The plaintiffs lost below, *Struck v. Sec'y of Def.*, 460 F.2d 1372 (9th Cir. 1971), and they settled immediately prior to argument in the Supreme Court on mootness grounds.

213. 29 C.F.R. § 1604.10 (1972).

214. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

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constitutional reasoning should apply to the Civil Rights Act of 1964.<sup>215</sup> Congress, however, simply refused to accept the Court's grudging understanding of the constitutional transformation that had been driving Congress's legislative efforts to reconstruct the relationship between work and family.

## 2. *The Pregnancy Discrimination Amendment*

Without explicitly contradicting the Court's interpretation of the Constitution, Congress made clear that the Court had mistakenly interpreted the meaning of the 1964 Civil Rights Act.<sup>216</sup> Two years after *Gilbert* Congress amended Title VII to declare its understanding that discrimination on the basis of pregnancy was discrimination on the basis of sex.<sup>217</sup> While Congress was careful to confine its dispute with the Court to the statutory question posed by *Gilbert*, the debate over the meaning of sex equality in the pregnancy context had clear constitutional overtones.<sup>218</sup> This was in part

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215. The Court reasoned in *Gilbert*:

While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term "discrimination," which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII. We think, therefore, that our decision in *Geduldig v. Aiello*, *supra*, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex.

429 U.S. 125, 133 (1976) (Rehnquist, J.).

216. A congressional report argued:

The purpose of H. R. 6075 is to amend Title VII . . . [to] clarif[y] that the prohibitions against sex discrimination in the act include discrimination in employment based on pregnancy, childbirth or related medical conditions.

.....  
In enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment.

H.R. REP. NO. 95-948, at 1-3 (1978).

217. The Act provided:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000).

218. See, e.g., *To Amend Title VII of the Civil Rights Act of 1964 To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 5 (1977) [hereinafter *Title VII Hearings*]

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because the Court had already held that the application of Title VII to the states was a legitimate exercise of Section 5 power,<sup>219</sup> so that the PDA, insofar as it was applied to the states, was also an exercise of Section 5 power. And it was in part because Congress's decision to enact a statute reversing the Court's reasoning in *Gilbert* provided yet another context for Congress to endorse the movement's constitutional vision of equal citizenship and to affirm that it was normal and necessary for women to combine work and parenting.<sup>220</sup> Women were entitled to participate in the core pursuits of citizenship in work, education, and politics, equally with men. As one advocate explained the PDA:

The contradictions are striking: We revere motherhood, but only in its place. We romanticize the Madonna at the hearth, but when the mother-to-be is in the workplace, she is actually punished for her pregnancy. For the kind of "labor pains" that trouble the pregnant worker, an obstetrician will not help. This legislation is her only delivery.<sup>221</sup>

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(statement of Sen. Javits) ("I personally regret very much that the ERA has not been enacted. I think it is a shocking thing that we have not yet ratified this amendment. But legislation like this is one way in which, to some extent, to make up for the fact that we have not ratified the ERA.").

219. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

220. One movement activist testifying on behalf of the PDA bitterly referenced the CCDA's defeat as she discussed women's struggle to combine work and family responsibilities:

In 1971, . . . then-President Nixon vetoed a child care bill on the grounds that it would "weaken" the family. He imagined that without child care centers, women would remain at home in their proper role. Invisible were the millions of mothers who worked not to weaken the family, but to strengthen it, to stave off poverty and the indignity of welfare. Invisible too, were the children, cheated of adequate care and left to fend for themselves.

Th [sic] diehard myth that mothers stay home masks the fact that millions cannot afford that option. Moreover, the notion that pregnancy automatically signals full-time motherhood and an end to job and career is not a female reality; it is a male fantasy.

*Title VII Hearings*, *supra* note 218, at 451 (statement of Letty Cottin Pogrebin, Editor and Writer, Ms. magazine). Similarly, the League of Women Voters critiqued the *Gilbert* decision as based on the myth that working women can depend on their husband's income, and participate in the labor force on a temporary and marginal basis . . . [when in] 1974, 70 percent of all working women worked to provide financial support which is essential to support their families . . . [and in] 1975, 13 percent of all families were headed by women.

*Legislation To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 267 (1977) (statement of the League of Women Voters of the United States).

221. *Title VII Hearings*, *supra* note 218, at 450 (statement of Letty Cottin Pogrebin, Editor and Writer, Ms. magazine).

### 3. *The Family and Medical Leave Act*

The PDA was in some respects an easier statute to enact than the CCDA: Amending the nation's antidiscrimination laws to make clear that employers could not discriminate against pregnant workers seemed to affirm parenting—and thus family values—in a way that the day-care reform did not. When Congress again attempted to vindicate equal citizenship values by enacting legislation alleviating conflicts between work and family, it adhered to the model of regulating the employment relationship established by the PDA, endeavoring to provide forms of employment protection that the PDA did not.

Pregnant women and individuals with family caretaking responsibilities encounter employment conflicts in many forms. Job descriptions and personnel rules of general applicability, inflexibly imposed, can exclude employees just as effectively as a rule providing, “No pregnant women or parents with primary caretaking responsibilities need apply.” Although federal and state antidiscrimination laws provided workers with some resources for challenging such employment arrangements, the effectiveness of these laws in the years immediately after the PDA was not clear. In part this was because disparate impact claims able to address facially neutral policies that especially harmed pregnant women,<sup>222</sup> much less facially neutral policies that especially harmed workers who assumed caretaking responsibilities at home, had not yet been recognized under either the PDA or Title VII.<sup>223</sup> Although the Supreme Court in 1987 upheld a California

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222. Courts have now increasingly allowed plaintiffs to bring Title VII challenges to facially neutral employment policies that have a disparate impact on pregnant employees. But, plaintiffs did not begin to prevail in many of these cases until after the Supreme Court's decision in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). When Congress first began hearings on the FMLA in 1986, only one federal court had recognized a disparate impact claim under the PDA. See *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981). See generally Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940-42 (1985) (analyzing the case for a disparate impact cause of action in the period just prior to the *Cal Fed* decision). For some recent cases recognizing the disparate impact claim under the PDA, see, for example, *Scherr v. Woodland Sch. Comm. Consol. Dist. No. 50*, 867 F.2d 974 (7th Cir. 1988); and *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647 (N.D. Ill. 1991). But cf. *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579 (7th Cir. 2000) (Posner, C.J.); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (Posner, C.J.). For further discussion of disparate impact analysis under the PDA, see Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 39-48 (1995) (arguing that “the majority of courts addressing this issue have correctly concluded that disparate impact analysis is available under the PDA,” and examining the elements of a successful claim); and Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994) (analyzing protections against pregnancy discrimination in the United States and the European Community).

223. Important recent work on the meaning of equality and discrimination in the area of work and family conflicts includes Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 644-45 (2001) (“The relationship between antidiscrimination and accommodation is of course a very large topic. In one form or another, it has been the subject of an old and expansive debate spanning several decades, dating back at least to the early feminist argument that



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statute that guaranteed pregnant women unpaid maternity leave,<sup>224</sup> many in the feminist movement by this time had become concerned about the wisdom of a gender-specific strategy for restructuring the workplace so as to ameliorate conflicts between work and family.<sup>225</sup> These concerns played a prominent role in the genesis of the gender-neutral provisions of the Family and Medical Leave Act and left a deep impress on the statute that ultimately resulted.<sup>226</sup>

In undertaking to regulate the employment relationship, Congress envisioned a workplace in which employees with primary responsibility for caretaking at home—who were of course most likely to be women—could work without penalty or disadvantage. The FMLA approached this problem in a gender-neutral way because Congress was determined to avoid the discrimination against women that a gender-specific entitlement might trigger. Congress specifically found that “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of

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antidiscrimination includes an accommodation component related to pregnancy.”) and Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. (forthcoming 2003).

224. *Cal. Fed. Sav. & Loan Ass’n*, 479 U.S. 272.

225. Even as the *Cal Fed* Court gave voice to the feminist aims of the PDA, the feminist community was divided about whether, as a matter of principle or prudence, it was wise to allow gender-specific regulation of pregnancy of the sort that the California law countenanced. Critics of the California statute argued that even if the aim of such regulation was to enhance, rather than to restrict, women’s employment opportunities, a gender-specific entitlement would encourage employers to discriminate against women in hiring and promotion decisions; gender-specific entitlements might also tend to entrench gender-conventional assumptions that women are responsible for child rearing. For a sampling of this debate, see Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); and Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 323 (1984-1985).

226. See BERRY, *supra* note 205, at 159-61. For one quite critical account of the role that the *Cal Fed* debates played in shaping the gender-neutral entitlement of the FMLA, see Christine A. Littleton, *Does It Still Make Sense To Talk About “Women”?*, 1 UCLA WOMEN’S L.J. 15, 32 (1991) (questioning the “content of inclusion and exclusion contained in the FMLA”). Christine Littleton also states:

[B]y self-consciously shifting the focus from debates over female employees’ needs for, among other things, pregnancy disability leave, to a focus on female and male needs for family and medical leave, feminist supporters ironically ended up supporting the same kind of “half a loaf” measure that they had criticized in the litigation arena—only it was a different “half.” My assertion is that, had the bill focused on all women, it would have included many more people among its beneficiaries. Thus what looked like more inclusion (“let’s add men”) could, from a women-centered perspective, be seen as exclusion (“what about the women we’ve left out?”).

*Id.* (footnote omitted).

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that gender.”<sup>227</sup> At the same time, Congress was concerned that “[l]eave for fathers . . . is rarely available.”<sup>228</sup> A number of states offered extended “maternity” leave that greatly exceeded the period of physical disability due to pregnancy and childbirth,<sup>229</sup> while granting no paternity leave at all. Such arrangements offered a de facto form of childcare leave to women, not men, effecting benefits discrimination against men, creating incentives for discrimination against women in hiring and promotions, and entrenching stereotypical gender-role expectations about family/work obligations. For these reasons, Congress was determined to craft a gender-neutral leave entitlement:

While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater

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227. Congress worried:

A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. H.R. 1, by addressing the needs of all workers, avoids such a risk. Thus H.R. 1 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

H.R. REP. NO. 103-8, pt. 1, at 29 (1993). Congress described the gender-neutral design of the legislation in the following way:

The parental leave provided under H.R. 1 is available to any parent. A father as well as a mother may be granted parental leave so long as the leave is requested to respond to one of the circumstances specified in the statute. *The committee recognizes that a special “maternity leave” requirement may have the effect of denying women job opportunities. The knowledge that job-protected leaves were required for working mothers, and working mothers only, may encourage employing agencies to be reluctant to hire or promote women of child-bearing age. However, since employers would be required under H.R. 1 to provide job-protected leave for all employees, they would have little incentive to discriminate against women.*

*Id.* pt. 2, at 14 (emphasis added).

228. S. REP. NO. 102-68, at 33 (1991); *see also* S. REP. NO. 103-3, at 14-15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 16-18 (citing Bureau of Labor Statistics figures for 1990 where thirty-seven percent of employees were covered by maternity policies, while only eighteen percent were covered by paternity policies). Congress was also aware that a fifty-state survey had established that “public sector leaves don’t vary very much from private sector leaves.” *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 99th Cong. 29-30 (statement of Meryl Frank, Director, Yale Bush Center Infant Care Leave Project); *see also id.* at 147 (statement of Washington Council of Lawyers) (“Parental leave for fathers or adoptive parents is rare. . . . Where child-care leave policies do exist, men, both in the public and in private sectors, receive notoriously discriminatory treatment in their requests for such leave.”); Kathleen Makuen, *Public Servants, Private Parents: Parental Leave Policies in the Public Sector*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 195, 202-03 tbl.11.1 (Edward F. Zigler & Meryl Frank eds., 1998) (providing a table of results of the 1985 Survey of Parental Leave Policies for State Employees, which reveals that 19 out of the 36 states studied provided only mothers with leave without pay for parenting).

229. *See* S. REP. NO. 103-3, at 15, *reprinted in* 1993 U.S.C.C.A.N. at 17.

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responsibilities in providing immediate physical and emotional care for their families.<sup>230</sup>

Thus the FMLA sought both to remedy sex discrimination in the allocation of leave benefits in a way that would deter sex discrimination in hiring and promotion, and to disrupt and transform gender expectations about the allocation of responsibility for family-care obligations as between men and women. With respect to both ends, the FMLA functioned as a classic antidiscrimination statute.

Yet in other ways the FMLA was not a conventional antidiscrimination statute, or so it seemed by the 1980s when it was common to reason about antidiscrimination statutes as requiring equal treatment only<sup>231</sup> (despite the fact that Title VII allowed plaintiffs to challenge facially neutral practices if such practices had a disparate impact on the Act's protected classes). The FMLA required employers to provide their employees more than equal treatment; it required employers to provide their workers a fixed number of weeks of unpaid leave for personal health and family-care reasons.<sup>232</sup> It thus exacted a far more substantial accommodation than a federal court was then (or is now) likely to require under Title VII.<sup>233</sup> This may account for the

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230. H.R. REP. NO. 103-8, pt. 2, at 14. The FMLA sought to provide benefits to men, as a form of equal treatment to which they were entitled, as an emotional good from which they might benefit, and as a means to women's emancipation. In one senator's words:

The act does not just apply to women, but to men and women, to fathers, as well as to mothers, to sons as well as to daughters. So to say that women will not be hired by business is a specious argument, unless you assume that men are not caring parents and men are not loving sons. I believe that they are.

139 CONG. REC. 1697 (1993) (statement of Sen. Boxer).

231. Cf. S. REP. NO. 102-68, at 39 ("The PDA expanded the rights of pregnant women to childbirth-related disability leave, but it imposed no requirement on employers to provide leave in the first place."). The House Report adds:

As important as Title VII and the Pregnancy Discrimination Act have been, they do not address all of the employment related problems of pregnancy and childbirth. Title VII, as amended, is an anti-discrimination law. Its aim is to prohibit employers from treating persons differently on the basis of race, sex, religion, or national origin. Compliance with Title VII requires only that employers treat all employees equally.

Specifically, if an employer grants sick leave and provides disability and health insurance coverage to employees in general, it must, under the Pregnancy Discrimination Act, provide equal coverage to pregnant wage earners who become sick or disabled. If an employer denies benefits to its workforce, it is in full compliance with antidiscrimination laws because it treats all employees equally. Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has required that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an antidiscrimination law by its nature cannot fill. H.R. 770 is designed to fill those gaps.

H.R. REP. NO. 101-28, pt. 2, at 8-9 (1989). For contrary law on the PDA, see *supra* notes 222-223 and accompanying text.

232. See *supra* note 19 and accompanying text.

233. FMLA leave could theoretically be derived under Title VII using disparate impact principles. But no federal court has required an employer to provide accommodation of that degree. For sources exploring the possibility for accommodation under Title VII in pregnancy and childcare areas, see sources cited *supra* notes 222-223. See also Deborah Vagins, Note,

vigorous resistance the FMLA aroused; in the end, Congress enacted the law only after a lengthy national debate in which constituencies mobilized in campaigns to block and support the legislation.

Congress debated the equities and scope of FMLA policy during the very same period that it turned back a major challenge to Title VII's disparate impact cause of action.<sup>234</sup> The business community vigorously resisted the family leave statute as an unwise intervention in the market,<sup>235</sup> and President Bush twice vetoed the bill.<sup>236</sup> But the FMLA was nonetheless enacted despite President Bush's vetoes. President Clinton campaigned on the need for the legislation, and it was one of the first bills he signed upon taking office.<sup>237</sup>

The FMLA created minimum federal leave standards for employers of a certain size, on the model of traditional labor-protective legislation.<sup>238</sup> Congress sought to bring into being a new kind of workplace norm that would fuse family values and equal opportunity norms. As was the case with the CCDA, Congress testified to the importance of family values in the act of altering the relationship between work and the family. But Congress

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*Occupational Segregation and the Male-Worker Norm: Challenging Objective Work Requirements Under Title VII*, 18 WOMEN'S RTS. L. REP. 79 (1996).

234. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 5, 9, 28, 29, and 42 U.S.C.) (reversing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and restoring the disparate impact cause of action). For a brief history of the debate in Congress over the restoration of the disparate impact cause of action in the Civil Rights Act of 1991, see Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 304-11 (1993); and William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 640-41 (1991).

235. See BERRY, *supra* note 205, at 162-64 (discussing cost concerns raised by small businesses resulting in restrictions on leave for medical care and birth and raising of the employer exemption from 5 to 15 to 50 employees); Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 78 (2000) (discussing business opposition to the Act); Lisa L. Tharpe, Comment, *Analysis of the Political Dynamics Surrounding the Enactment of the 1993 Family and Medical Leave Act*, 47 EMORY L.J. 379, 382-83, 394-96 (1998) (same); see also COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 144-46 (1996) (discussing the actual costs of the FMLA to employers).

236. See Message to the Senate Returning Without My Approval the Family and Medical Leave Act of 1992, 1992-1993 PUB. PAPERS 1625 (Sept. 22, 1992); Veto of H.R. 770: Message from the President of the United States Transmitting His Veto of H.R. 770, The "Family and Medical Leave Act of 1990," H.R. DOC. NO. 101-209 (1990); see also BERRY, *supra* note 205, at 193, 211 (describing Bush's 1990 and 1991 vetoes of the bill).

237. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 2 U.S.C., 3 U.S.C., 5 U.S.C. & 29 U.S.C.).

238. Congress reasoned about the need for minimum federal standards in these terms:

However, H.R. 1 is not just a bill for women; men need the same minimum protection in our society. Clearly a minimum standard is needed, similar to child labor laws, the minimum wage, and health and safety standards. The United States is the only industrialized western nation that still does not offer this minimum protection to its workers. America's strongest competitors, Japan and West Germany, guarantee three months paid family leave with full job guarantees.

H.R. REP. NO. 103-8, pt. 2, at 37 (1993).

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was also clear that the prevailing relationship between work and the family disproportionately harmed women, and that it was adopting the new law to advance both the goal of family welfare and the goal of equal opportunity.

As Congress understood the problem, workplace norms were premised on the assumption that employees had someone at home to care for family members. Employment policies tended to penalize workers who had no family members to provide care for household dependents, and who, therefore, tried to juggle competing work and family-care responsibilities. Such workers were far more likely to be women. Thus, in enacting the FMLA, Congress used its Section 5 power to bring into being a workplace structured on premises that would give women an equal opportunity to compete with men. Pat Schroeder explained this focus on equal opportunity on the floor of the House:

Madam Chairman, in the workplace we have never established a family-friendly standard, and we have never recognized anyone's care-giver role in the workplace. The answer is always, "If you are a care-giver, you shouldn't be in the workplace. You should be able to afford somebody full time to stay home." *In other words, get a wife.*

*I mean I would like a wife; I think most of the Congresswomen would like a wife. My husband would like a wife. We are [sic] going to get one, so let us get real about that and let us realize that we do have to be both care-givers and good employees. If every other country can get it, we can get it.*<sup>239</sup>

Congress expressed this same understanding in more formal terms when it found that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."<sup>240</sup> "In the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings."<sup>241</sup>

In creating a statutory right that allowed employees to take unpaid family leave, Congress was vindicating equal citizenship values that the movement had been advancing since the late 1960s. It created a legislative right that protected workers against classic forms of sex-based disparate treatment in hiring, promotion, and benefits. Conceivably, Congress might have protected workers by prohibiting employers from discriminating on the basis of sex in the award of family leave and thus exercised its Section 5

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239. 139 CONG. REC. 1981 (1993) (statement of Rep. Schroeder) (emphasis added).

240. 29 U.S.C. § 2601(a)(5) (2000).

241. S. REP. NO. 102-68, at 28 (1991).

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power in a manner that would have more closely resembled rights a court would enforce in litigation. But instead Congress exercised its Section 5 power to confer on employees a gender-neutral right to family leave, inhibiting disparate treatment in hiring, promotion, and benefits, while at the same time restraining the operation of employment policies having a disparate impact on employees with family-care responsibilities. No court could or would implement equal protection values as Congress did, but then again Congress was exercising its distinctively legislative power under Section 5 of the Fourteenth Amendment. Courts, which have only judicial power, are of course likely to implement constitutional rights in a quite different manner.

Two decades of social movement activism passed between NOW's inaugural *Statement of Purpose* and Congress's initial hearings on the FMLA. Another seven years of intense opposition and anxiety over the bill's provisions would pass before the FMLA was enacted into law. In the end, the nation proved willing to face the practical entailments of its new understanding of the equal citizenship principle. The lived implications of these constitutional commitments had become increasingly clear as the nation struggled to vindicate the sex equality norm in matters of work and family. As one senator explained Congress's decision to enact the FMLA: "Mr. President, the days of Ozzie and Harriet are over."<sup>242</sup>

#### IV. BEYOND THE ENFORCEMENT MODEL: POLICENTRIC CONSTITUTIONAL INTERPRETATION

The history we have just recounted illustrates the complex and turbulent process by which constitutional law can be created in America. Although courts play an important part in that process, they are by no means the only actors. Our equal protection jurisprudence began to address questions of sex discrimination because a mobilized citizenry advocated a new understanding of constitutional values, because Congress was responsive to this new vision, and because, last of all, the Court was willing to learn from the nation's changing constitutional culture that it was important to prohibit sex discrimination.

The thrust of this history runs exactly counter to the central premise of the enforcement model, which claims that constitutional meaning should be

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242. Senator Mikulski stated:

Women are usually the ones who must take time off to care for a family member. The United States depends on women in the work force more than any other Western democracy except Scandinavia and Canada. *But we pretend these women still live in an Ozzie and Harriet world.*

.....

Mr. President, the days of Ozzie and Harriet are over.  
139 CONG. REC. 1705 (1993) (emphasis added).

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segregated from politics and exclusively controlled by the judiciary. Something is profoundly wrong with a framework that asks the Court to closely scrutinize Section 5 legislation addressing issues of sex equality to ensure that it adequately matches the Court's own jurisprudence of sex discrimination, when the Court has derived its own jurisprudence from congressional and popular understandings in the first instance. Yet the enforcement model requires the Court to do just that.

The history we have examined is strong evidence that the enforcement model misconceives relationships that are fundamental to our constitutional order. It also suggests that the Court has imposed unwarranted constraints on the exercise of Section 5 power. This impression is sharpened by our historical reconstruction of the origins of the FMLA, which indicates that its family leave provisions derive from efforts to realign the relationship between work and family so as to establish what NOW called "true equality of opportunity for women."<sup>243</sup> This purpose seems to reach beyond the antidiscrimination agenda of the Court's contemporary sex equality jurisprudence. The enforcement model would prohibit Congress from enacting Section 5 legislation to advance this purpose, forcing Congress to justify the FMLA in terms of the Court's current antidiscrimination doctrine.

In Section II.B we attempted to sketch such a justification, which is noteworthy for the extent to which it must ignore or suppress the texture and richness of the constitutional values that Section III.C demonstrates actually moved advocates to propose the FMLA. After debating for years how the nation's normative commitments might practically be embodied, Congress drew upon its lawmaking powers to vindicate the sex equality principle in an institutional form that would seem to reach well beyond the Court's current doctrine. If the creation of constitutional law in the United States is historically bound up in complex and politically charged processes of the kind that we have described in Section III.B, why then should Section 5 power be confined to the enforcement of specifically judicial constitutional understandings?

The instinctive and immediate answer of lawyers brought up on *Marbury v. Madison*<sup>244</sup> is that Section 5 authorizes Congress to enforce the Constitution, and the Constitution is what courts say it is. There is an important sense in which this answer is true, if trivially so. Courts enforcing the Constitution necessarily act on their view of what the Constitution requires. This follows from the fact that courts are obligated to decide cases according to law and hence according to their view of the law of the Constitution. In the context of adjudication, therefore, the Constitution

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243. NOW STATEMENT OF PURPOSE, *supra* note 132, at 161-62.

244. 5 U.S. (1 Cranch) 137 (1803).

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necessarily and properly is what courts say it is, even if courts say that a particular constitutional provision is a political question that is best interpreted by another branch of government.<sup>245</sup>

There is another sense, however, in which the lawyer's instinctive answer is plainly false. Any historian or political scientist will tell you that the Constitution lives a vibrant and consequential life outside the courts. Not only do the popular branches of the federal government actively participate in the construction of constitutional law,<sup>246</sup> but American politics is permeated by constitutional claims of all kinds.<sup>247</sup> The "Constitution" which thrives in American culture, which is a crucible for national values and commitments, and for which Americans fought a civil war, is assuredly not merely what courts say it is. The American Constitution far transcends the legal Constitution construed in adjudication.

It is an open question, therefore, to which Constitution Section 5 refers. The enforcement model answers this question by requiring Section 5 power to enforce only the Constitution that courts would implement in adjudication. Not only is this answer inconsistent with our history, where Section 5 power has regularly been used to enforce the Constitution as it exists within the general constitutional culture of the nation, but there are also strong independent reasons for affirming Congress's authority to employ Section 5 power to enforce its own constitutional understandings. We thus argue in this Part that the Court ought to reject the enforcement model and embrace an alternative account of Section 5 power. We call this account the model of poliocentric constitutional interpretation.

By "poliocentric" we do not refer to the "polycentric" tasks analyzed by Lon Fuller,<sup>248</sup> which concern problems that contain multiple and interdependent solutions. We use the term "poliocentric" instead to refer to

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245. See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

246. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 207-28 (1999).

247. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE*, at xi (1986) (exploring the cultural significance of the U.S. Constitution in terms of "the perceptions and misperceptions, uses and abuses, knowledge and ignorance of ordinary Americans"). For another account that analyzes nonjuridical constitutional claims, see Siegel, *supra* note 122, at 321 ("Beliefs about the Constitution's democratic authorship authorize and empower citizens to make claims about the Constitution's meaning that diverge from the ways judges have interpreted it. The text of the Constitution thus elicits and channels dispute about the forms of freedom and unfreedom in American life."); and *id.* at 345 ("In our constitutional culture, elected officials and ordinary citizens understand themselves as authorized to make claims about the Constitution's meaning and regularly act on this understanding in a wide variety of social settings and through an array of practices, only some of which are formally identified in the text of the Constitution itself. Considered from this positive standpoint, courts are not the Constitution's sole expositors; instead, as judges interpret the Constitution they are regularly informed by, and intervene in, controversies about the Constitution that are proceeding outside of the courts.").

248. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-405 (1978) (written in 1961).



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the distribution of constitutional interpretation in our legal system across multiple institutions, many of which are political in character. A central premise of the policentric model is that both Congress and the Court should be regarded as having independent authority to ascertain constitutional meaning for purposes of delineating the parameters of Section 5 power. The policentric model holds that Congress can exercise Section 5 power to enact legislation establishing statutory rights ( $R_s$ ), even when Congress is acting to enforce an understanding of constitutional rights ( $R_c$ ) that differs from judicial interpretations of constitutional rights ( $R_j$ ).<sup>249</sup> The policentric model holds that courts can also act upon their own constitutional understandings ( $R_j$ ) to subject Section 5 legislation to judicial review. Courts can invalidate Section 5 legislation that violates judicially enforceable rights or that impermissibly impairs other constitutional values such as federalism.<sup>250</sup> The policentric model insists, however, that congressional enforcement of  $R_c$  is not itself a sufficient reason to render Section 5 legislation unconstitutional as a violation of separation of powers.

#### A. *The Model of Policentric Constitutional Interpretation*

The mere mention of independent congressional authority to interpret the Constitution raises the specter of constitutional anarchy and collapse. Justice Rehnquist's early and influential dissent in *City of Rome v. United States*<sup>251</sup> expressed this fear: To permit Congress to employ its Section 5 power to remedy its own interpretation of constitutional rights ( $R_c$ ), where  $R_c$  differ from "judicially established substantive" interpretations of the Constitution ( $R_j$ ), would authorize "Congress by a legislative Act . . . effectively [to] amend the Constitution."<sup>252</sup> Seventeen years later the full Court adopted this reasoning, holding in *Boerne* that allowing Congress to enforce  $R_c$  would undermine the Constitution's status as "superior paramount law, unchangeable by ordinary means," relegating it to the same "level with ordinary legislative acts . . . alterable when the

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249. This nomenclature is explained *supra* text accompanying notes 27-28.

250. The policentric model, in other words, emphasizes the importance for Section 5 jurisprudence of Larry Kramer's distinction between allowing the Court to have "the *last* word" in a particular constitutional controversy, and granting the Court authority to pronounce "the *only* word" about the Constitution's meaning. Kramer, *supra* note 123, at 13. Kramer correctly observes that there is "a world of difference" between these two positions, which he identifies as that "between judicial supremacy and judicial sovereignty." *Id.* Kramer offers a wide-ranging history of the doctrinal arrangements that have accommodated the twin ideals of judicial supremacy and popular constitutionalism, observing, "We may choose to accept judicial supremacy. . . . But it does not follow either that the Court must wield its authority over every question or that, when it does, the Court can dismiss or too quickly supplant the views of other, more democratic institutions." *Id.*

251. 446 U.S. 156, 206-10 (1980) (Rehnquist, J., dissenting).

252. *Id.* at 210.

legislature shall please to alter it. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.”<sup>253</sup>

There are at least two aspects to this fear of constitutional disintegration. The first is a concern that congressional power to interpret the Constitution would reduce the Constitution to the status of a mere legislative act, without paramount authority. This conclusion, however, does not follow. The Constitution is a form of higher law for Congress, just as it is for the Court. Whatever interpretation Congress makes of the Constitution is binding on Congress, just as whatever interpretation the Court makes of the Constitution is binding on the Court. We do not think that the Constitution is demoted to the same status as “ordinary legislative acts” merely because courts retain the authority to interpret Article III restrictions on their own power. By parity of reasoning, Congress’s authority to interpret the constitutional nature of its own power does not logically relegate the Constitution to that inferior status. Along similar lines, potential changes of congressional interpretation no more “amend” the Constitution than do potential changes of judicial interpretation.<sup>254</sup> In either case, the Constitution remains theoretically paramount and binding.

There is, however, a second aspect to the fear of congressional authority to interpret the Constitution. There is an intuitive sense that such authority may be practically inconsistent with constitutionalism, as we have come to know it. This point sounds in the mechanics of practical government. It has been argued that the undisciplined nature of a legislature

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253. *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (internal quotation marks and citations omitted).

254. It is true that judicial interpretations of Article III may follow the form of *stare decisis* and thus be law in a different sense than congressional interpretations of the Constitution, which do not on the whole understand themselves to be bound by precedent in the same way. But *stare decisis* is only one form of constitutional interpretation. Originalism, for example, is “fundamentally inconsistent” with *stare decisis* because it requires a court in each case to make a new judgment about the question of original intent. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 925 (1998). If one were a thoroughgoing originalist, therefore, there would be no difference between congressional and judicial judgments of constitutional meaning. This suggests that *stare decisis* is not essential to constitutional interpretation, but instead to rule-of-law values, which can reach no further than our commitment to the Constitution as law. Even within judicial interpretations of the Constitution, however, rule-of-law values are limited by a fidelity to the Constitution itself. Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13, 27. For a discussion of the tension between originalism and *stare decisis*, see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1772-74 (1997); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1998); Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1591 (1997); Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION 129, 139-40 (Amy Gutmann ed., 1997); Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 491-94 (1998); and Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 674 n.274 (1994).

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(as distinct from a court) would lead Congress to interpret the Constitution in self-serving and political ways that would (in Justice Rehnquist's careful choice of words) "effectively" reduce the Constitution to the status of ordinary legislation. We agree that there are circumstances in which courts should vindicate constitutional values by imposing on congressional action an external restraint like judicial review. But we vigorously contest the Court's premise that politics is a sphere so debased that it can only corrupt constitutional deliberation. As we demonstrated in Part III, it is misguided to believe that it *always* serves our constitutional order to keep constitutional law and constitutional politics rigorously segregated.

Our contention in this Part is that there are important advantages to establishing a relationship between constitutional law and constitutional politics in the specific context of Section 5, and that this can be accomplished without harm to the rule-of-law values that are traditionally protected by the institution of judicial review. We propose a model of policentric constitutional interpretation that does not disable courts from interpreting the Constitution in ways that are binding on Congress. The fact that Congress is authorized to pass Section 5 legislation enforcing  $R_c$  does not mean that courts are also required to enforce  $R_c$ . To the contrary, courts are obligated to enforce the law of the Constitution, as courts understand that law. The policentric model holds only that courts applying the law of the Constitution should interpret Section 5 as authorizing Congress to act on its own independent understanding of the Constitution. Courts remain free to strike down Section 5 legislation that violates judicially enforceable rights or that impermissibly infringes other constitutional values like federalism.

Our discussion proceeds in four stages. First, we advance the positive case for congressional interpretive authority in the context of Section 5 power. This case depends upon the important advantages of institutionalizing what we have previously called "the subtle but fundamental interconnections between the constitutional dimensions of our political life and the democratic dimensions of our constitutional culture."<sup>255</sup> We next discuss the potential disadvantages of explicitly recognizing independent congressional authority to interpret the Constitution in the exercise of Congress's Section 5 power. We then evaluate the limitations that ought to circumscribe Congress's power to interpret the Constitution when exercising its authority under Section 5 to enforce the Fourteenth Amendment. Finally, we discuss how the family leave provisions of the FMLA would be analyzed under the policentric model.

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255. Post & Siegel, *supra* note 15, at 3.

B. *The Affirmative Case for Policentric Constitutional Interpretation*

There are several distinct grounds on which one can build the affirmative case for independent congressional interpretive authority in the context of Section 5 power. There is strong evidence, for example, that the Framers of the Fourteenth Amendment intended for Congress to possess something like this authority.<sup>256</sup> There is, moreover, a forceful textualist argument for such authority. The Court's own claim to the prerogative of constitutional interpretation in *Marbury v. Madison*<sup>257</sup> rests on the premise that courts must decide cases, and hence that courts must interpret and apply pertinent law, including the law of the Constitution. Judicial power to interpret the Constitution thus derives from the judicial obligation to enforce the law.<sup>258</sup> But if judicial authority to interpret flows from judicial power to enforce, the explicit text of Section 5, which authorizes Congress "to enforce" the provisions of the Fourteenth Amendment, would seem to endow Congress with equal interpretive authority. In the context of Section 5, the judicial prerogative to interpret the Constitution asserted in *Marbury* stands on exactly the same footing as a congressional prerogative to interpret the Fourteenth Amendment.

We do not in this Article pursue either of these lines of argument. Instead, building on work we have previously published<sup>259</sup> and on the history recounted in Part III, we argue that attributing independent interpretive authority to Congress in the context of Section 5 is an important way of ensuring that constitutional law remains in touch with the constitutional beliefs and experience of the American people. Like Article V, legislative constitutionalism is a structural mechanism of democratic accountability. Among other functions, it serves to underwrite the

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256. See, e.g., Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 794-817 (2002); James W. Fox Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67 (2002); Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 174-83 (1997); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 141-45 (1999); cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-25 (1999) (arguing that a broad understanding of Section 2 of the Thirteenth Amendment throws into question *City of Boerne's* narrow reading of Section 5 of the Fourteenth Amendment, and positing that the legislative history of the latter supports an intermediary congressional power of interpretation located between a plenary and remedial power); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1158-66 (2001).

257. 5 U.S. (1 Cranch) 137 (1803).

258. *Id.* at 177 ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.")

259. The discussion of this Section draws heavily on the reasoning and evidence presented in Post & Siegel, *supra* note 15, at 17-33.

continuing legitimacy of the very constitutional law that courts seek to enforce.

The enforcement model justifies restrictions on legislative constitutionalism by appealing to the common intuition that the Constitution will suffer if it is contaminated with politics. The sources of this intuition are various. Congressional authority to interpret the Constitution threatens the idea that the Constitution is singular, so that its “real” provisions must inhere in the judgments of one branch of government. The fear is that authorizing Congress to enforce  $R_c$ , when  $R_c$  differ from  $R_j$ , will shatter the unity of the Constitution and thus undermine the legitimacy of constitutional law. Congressional interpretive authority would also seem to legitimate Congress’s inherently more fluid and political perspective on constitutional meaning, which may seem to undercut the stability required by the rule-of-law values associated with judicial review. Our point, however, is that these various objections fundamentally misconceive the nature of our constitutional order, which is neither narrowly legal nor singular and static.

The Constitution is not an exclusively legal document. It is not addressed only to courts. From the very founding of the republic, the Constitution has been viewed by Americans as the preeminent and all-encompassing symbol of American nationhood. Part III demonstrated how Americans of all political persuasions, ranging from mobilized citizens to government officials, have debated the most profound and divisive questions of national identity and purpose through the medium of constitutional law.<sup>260</sup> “For us,” Franklin Roosevelt observed, “the Constitution is a common bond.”<sup>261</sup> It is the compendium of values and commitments that holds us together despite our diversity and differences. As a matter of simple historical fact, the Constitution has been subject to policentric interpretation, meaning that it has been the subject of widespread interpretive controversy and debate, through the full range of our legal and political institutions.

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260. For work exploring the constitutional advocacy of the labor movement, see William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Forbath, *supra* note 195; Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE L. REV. 49 (2000); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997); and James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002). On the constitutional advocacy of the women’s movement, see Siegel, *supra* note 146; and Siegel, *supra* note 122. On the constitutional advocacy of the civil rights movement, see William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); and Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

261. Franklin D. Roosevelt, *The Constitution of the United States Was a Layman’s Document, Not a Lawyer’s Contract* (Sept. 17, 1937), *reprinted in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 367 (1941).

Nor is the Constitution a static document that possesses only a single, unchanging meaning. Although the text of the Constitution has remained relatively fixed, its import has evolved continuously throughout our history. This is true even of technical judicial interpretations of the Constitution. Neither the First Amendment, nor the Equal Protection Clause, nor the Due Process Clause, mean the same thing today as they meant in 1903. As they apply constitutional text to novel and unanticipated situations, courts continuously reinterpret the Constitution through the lens of new experiences and values. Policentric interpretations of the Constitution are an important dimension of that lens. Judicial understandings of the Constitution are constantly in “dialogue” with alternative interpretations of the Constitution, including the interpretations of Congress<sup>262</sup> and social movements.<sup>263</sup> As Keith Whittington has explained:

The authority to interpret the Constitution is shared by multiple institutions and actors within our political system, and tends to flow among them over time rather than remain fixed in a stable hierarchical or segmented distribution. The question is less whether we should have extrajudicial constitutional interpretation, than how we should evaluate it and how various constitutional interpreters should relate to one another as they engage in their common task.

... Once we recognize that extrajudicial constitutional interpretation can co-exist with judicial review, then the normative case for and against extrajudicial constitutional interpretation primarily goes to the question of how much deference the judiciary should show to other political actors in formulating doctrine and evaluating the constitutionality of legislation and how much deference nonjudicial actors should show the judiciary in articulating constitutional understandings and taking political actions.<sup>264</sup>

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262. See DEVINS, *supra* note 120, at 233-47; William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28-29 (1994); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 11-12 (2000) (“[T]he process of constitutional interpretation benefits from the thoughtful participation of the elected representatives of the people in the public dialogue about the meaning of the Constitution.”). For an “institutional competition conception of constitutional meaning,” see PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 178-81 (1983). For a general account that emphasizes some of the ways congressional constitutional “construction” differs from judicial constitutional interpretation, see WHITTINGTON, *supra* note 246.

263. See Eskridge, *supra* note 127; *supra* note 260.

264. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848 (2002). Louis Fisher has argued:

The courts find themselves engaged in a “continuing colloquy” with political institutions and society at large, a process in which constitutional principle is “evolved

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The plain historical fact is that judicial and nonjudicial interpretations of the Constitution frequently coexist and contend for the allegiance of the country. The unity of the Constitution is a perception sustained by intricate webs of institutional relationships, rather than by any faux singularity of meaning. Precisely because the Constitution has political as well as legal dimensions, we expect it to be a site of contestation and disagreement where Americans confront and negotiate over competing visions of the Nation. Judicial interpretations of the Constitution participate in this ongoing cultural struggle. Sometimes they influence the constitutional understandings of other actors, and sometimes they are influenced by them.

Nonjudicial constructions of the Constitution may thus importantly affect the development of judicial doctrine. The history we have recounted in Part III is a perfect case in point. In response to an emergent feminist vision of the Constitution, Congress not only proposed the ERA, but in 1972 used its Section 5 power to enact the Equal Employment Opportunity Act (EEOA), thereby extending Title VII's prohibition of sex-based employment discrimination to the states.<sup>265</sup> Congress announced, "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."<sup>266</sup> Yet in 1972 the Court was still interpreting the Equal Protection Clause to require that sex-based classifications receive only rational basis review.<sup>267</sup> In the end, the Court not only approved the EEOA as an exercise of Section 5

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conversationally and not perfected unilaterally." It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society.

LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 273 (1988) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 240, 244 (1962)). Neal Devins has also emphasized political aspects of constitutional dialogue:

Most landmark Supreme Court decisions . . . cannot be understood without paying attention to the politics surrounding them. First, justices pay attention to a case's social and political context when crafting their decisions. Second, political responses to a decision often serve as a benchmark for measuring the correctness of Supreme Court fact finding. Third, political judgments shape Court doctrine, especially decisions concerning the constitutional grounds on which to base legislative or administrative initiatives. Fourth, the willingness of governmental actors to support or resist judicial decision-making contributes to the ultimate meaning of Court action. And fifth, once the Supreme Court has decided a case, a constitutional dialogue takes place between the Court and elected government, often resulting in a later decision more to the liking of political actors.

DEVINS, *supra* note 120, at 7.

265. Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972).

266. H.R. REP. NO. 92-238, at 5 (1971), *reprinted in* 1972 U.S.C.A.N. 2137, 2141; *see also* S. REP. NO. 92-415, at 7-8 (1971) (emphasizing the Committee's view that discrimination against women is just as serious as other forms of discrimination by discussing parallels and correlation between racial discrimination and discrimination based on sex).

267. *See, e.g.,* *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

power,<sup>268</sup> but it also modified its own understanding of the Equal Protection Clause to conform to the vision of Congress.<sup>269</sup>

We can learn a good deal from this story. The EEOA was an outgrowth of the constitutional mobilization that we described in Part III. That mobilization, in turn, was importantly oriented toward the goal of changing the law of the Constitution. Although the First Amendment ensures that all Americans can express their beliefs about the Constitution, the activists of the 1960s and 1970s came together not merely to speak and to persuade, but positively to alter the American constitutional order. This objective endowed their activism with focus and direction. The enforcement model, which would deprive Congress of the authority to speak the law of the Constitution as it did when enacting the EEOA, would have stripped this activism of its very telos. It would have eviscerated the political sources of the Court's own constitutional innovation and development.

Once the EEOA was enacted, moreover, Congress and the Court each continued to act on a different understanding of whether the Constitution prohibited sex discrimination.<sup>270</sup> This did not produce constitutional chaos or anarchy, however, in part because our constitutional culture uses a wide variety of techniques for managing and dissipating the cognitive dissonance and institutional conflict that disagreement about the Constitution's meaning might engender.<sup>271</sup> The prevalence of these techniques no doubt reflects the value to our constitutional order of tolerating interpretive heterogeneity. During the 1970s, for example, the discrepancy between  $R_j$  and  $R_c$  created a rich and complex constitutional environment that would eventually become an important resource for the Court's efforts to reshape its own equal protection jurisprudence. The institutionally divergent constitutional perspectives of Congress and the Court proved to be generative and constructive.<sup>272</sup>

If the Court has particular strengths in explicating the Constitution as a rule of law, Congress is especially well-situated to respond to changes in constitutional culture.<sup>273</sup> Congress's advantage in this regard follows from its political accountability, which over the course of the nation's history has often made it more attentive than the Court to the evolving constitutional

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268. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

269. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion).

270. Congress had first employed its Section 5 authority to prohibit sex-based discrimination in the momentous Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 2000(a) (2000)). On Congress's use of its Section 5 power to enact the Civil Rights Act, see Post & Siegel, *supra* note 74, at 447.

271. See *infra* notes 304-312 and accompanying text.

272. See Siegel, *supra* note 122, at 350-51 (discussing the various ways that such interpretive heterogeneity can strengthen the constitutional order); see also *supra* note 126.

273. For an important discussion of the ethical and jurisprudential distinctions between the Constitution as interpreted from the perspective of the Court and the Constitution as interpreted from the perspective of Congress, see WEST, *supra* note 197, at 308-15.



aspirations and ideals of the American people—even the aspirations and ideals of relatively disempowered groups of citizens. That is why Congress was able to sense the country's changing ideas of sex equality long before the Court. Congress's ability to deploy its Section 5 power to translate these ideas into constitutional terms proved helpful and instructive to the Court's efforts to grapple with the question of gender.

This history suggests that the dynamic tension between judicial and legislative enforcement of the Fourteenth Amendment is important to maintain because the Court's understanding of constitutional law must remain in touch with the constitutional aspirations and ideals of the American people.<sup>274</sup> When judicial doctrine grows too detached from the constitutional culture of the nation, a crisis is likely to emerge, as during the time of *Dred Scott* or the New Deal.<sup>275</sup> That is why the Constitution creates institutional structures that ensure that the political and legal dimensions of our Constitution remain roughly interlocked.<sup>276</sup> There are numerous structural devices that facilitate communication between the political and legal dimensions of the Constitution. Joint legislative and judicial enforcement of the Reconstruction Amendments is one such mechanism.

Just as courts possess forms of authority that legislatures do not enjoy, so too Congress possesses forms of authority that courts can never achieve. Congress can draw on its distinctive capacity democratically to elicit and articulate the nation's evolving constitutional aspirations when it enforces the Fourteenth Amendment. Because of the institutionally specific ways that Congress can negotiate conflict and build consensus, it can enact statutes that are comprehensive and redistributive, and so vindicate constitutional values in ways that courts cannot. The special authority of Congress allows it to endow the nation's constitutional commitments with practical life in legislation that is not constrained by the institutional

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274. This point carries especial force for the equality norms of the Fourteenth Amendment. For an account of these norms as rooted in evolving social practices, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

275. We do not mean to imply that the Court must follow these aspirations and ideals if its legal conclusions dictate otherwise. We need only make the milder point that the nation's political apprehension of the Constitution is relevant to the Court's legal understanding. We discuss in detail the relationship between the two in Post & Siegel, *supra* note 15, at 25-26.

276. See, e.g., Balkin & Levinson, *supra* note 123, at 1068 ("Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment."); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285-91 (1957) (arguing that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States," and examining cases in which the Court has held federal legislation unconstitutional to confirm this contention); Robert C. Post, *Sustaining the Premise of Legality: Learning To Live with Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 96, 102 (Bruce Ackerman ed., 2002) ("By specifying that the president shall appoint justices, rather than the reverse, the Constitution signifies that the political choice collectively made by the American people should inform the Court's vision of law.").

limitations associated with Article III courts. The FMLA itself illustrates just how deeply legislative constitutionalism can differ from judicial enforcement of the Fourteenth Amendment.

The distinct political dimensions of legislative constitutionalism enable Congress to articulate constitutional aspirations in a manner that consolidates constitutional values, and hence that enhances the likelihood that judicial interpretations of the Constitution will receive the political allegiance that is frequently necessary for their full legitimation. As we have shown elsewhere, for example, even so profound a constitutional vision as *Brown v. Board of Education*<sup>277</sup> was not “firmly law” until it was able to inspire the political support of Congress and the President.<sup>278</sup> Similarly, the vibrant legislative constitutionalism of the Ninety-Second Congress helped to ensure the legitimacy of the Court’s new constitutional doctrine of sex equality.

The affirmative case for authorizing Congress independently to interpret the Constitution in the context of Section 5 power is therefore that our Constitution has both political and legal dimensions that must remain linked to each other in order to maintain the democratic accountability of our constitutional order. This linkage is necessary not only to avoid constitutional crises but also to facilitate the legitimacy and wisdom of the Court’s legal interpretations of the Constitution. As Part III demonstrated, Congress’s authority independently to interpret the Constitution in the exercise of its Section 5 power provides an important focus for forms of political mobilization that tie the Constitution to the nation’s evolving commitments and purposes. Explicit recognition of this authority would give members of Congress confidence in the legitimacy of their efforts to use Section 5 power to enforce *R<sub>c</sub>*, and thus not only to reflect democratic constitutional aspirations, but also to offer significant evidence to the Court about the developing constitutional culture of the United States.

### C. *The Case Against Policentric Constitutional Interpretation*

The major objection to the policentric model of interpretation sounds in separation of powers. Authorizing Congress to enact Section 5 legislation to enforce its independent interpretation of the Constitution is said to threaten “the duty of the judicial department to say what the law is.”<sup>279</sup> The nature of this threat, however, is quite obscure.

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277. 347 U.S. 483 (1954).

278. Post & Siegel, *supra* note 15, at 30-31; *see also* Cox, *supra* note 183, at 94.

279. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); Scalia, *supra* note 119, at 854.

No one doubts that Americans of all political perspectives constantly advance interpretations of the Constitution or that Americans in all stations of life continuously mobilize to advocate for these interpretations. Popular mobilization on behalf of a constitutional vision is ordinarily considered evidence of healthy political engagement rather than as a threat to judicial authority. We do not regard the continual streams of constitutional interpretation that percolate through American culture as inconsistent with the judiciary's ability to maintain the Constitution as law. Congressional interpretations of the Constitution, by contrast, are more controversial because they have the force of law and hence seem to pose a direct challenge to the Court's ultimate control over constitutional meaning.

In this Section we argue that the mere fact that Section 5 legislation seeks to enforce an understanding of the Constitution that differs from the Court's does not threaten principles of separation of powers. We emphasize, however, that under the policentric model Section 5 legislation remains subject to judicial review, so that it can be challenged if it threatens individual rights or other rule-of-law values. In Section IV.D we discuss the circumstances in which courts may invalidate such legislation.

The potential inconsistency between policentric constitutional interpretation and judicial review was first and perhaps most forcefully articulated by the second Justice Harlan in his dissent in *Katzenbach v. Morgan*.<sup>280</sup> Harlan famously charged that if Congress were permitted to employ its Section 5 power in a way that effectively defined "the substantive scope of the" Fourteenth Amendment, Congress could also "exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."<sup>281</sup> Harlan's objection, however, has no application to the model of policentric constitutional interpretation.

Justice Harlan's separation-of-powers objection fails because the proposition that Congress has power to enforce  $R_c$  does not logically or practically imply that courts must enforce  $R_c$  or, differently put, that courts cannot enforce  $R_j$ . To the contrary, it is only on the assumption that Congress and the Court must enforce the same understanding of the Constitution that Section 5 legislation poses any potential threat to judicial protection for individual rights. Thus it is only if one accepts the premise of the enforcement model that judicial approval of Section 5 legislation binds courts to congressional understandings of  $R_j$ .

Under the policentric model, by contrast, judicial interpretations of the Constitution are institutionally distinct from legislative understandings. Courts are therefore free to exercise their interpretive autonomy to decide

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280. *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).

281. *Id.* at 668 (emphasis omitted).

whether to reject the normative understandings that inform  $R_c$  or instead to accept these understandings and incorporate them into  $R_j$ . So, for example, even if the Ninety-Second Congress believed that the Equal Protection Clause required legislation to provide childcare in order to allow women to become fully participating members of society, the Court need not itself recognize any such affirmative entitlement in litigation to enforce Section 1 rights. Conversely, the fact that Congress has employed its Section 5 power to enact explicit legislative classifications based upon race should not preclude the Court from independently determining whether such classifications violate the Court's own interpretation of the equal protection component of the Due Process Clause.<sup>282</sup>

If the policentric model does not impair the institution of judicial review, it is not clear why it would pose a threat to the values protected by separation of powers. Principles of separation of powers do not require that the “branches of Government ‘operate with absolute independence’”;<sup>283</sup> they instead guarantee “that practice will integrate the dispersed powers into a workable government.”<sup>284</sup> Policentric constitutional interpretation would violate separation of powers only if it undermined the capacity of courts to perform their assigned function of adjudication.

It is almost certainly the case that policentric constitutional interpretation, as such, will not have this effect. We know this because we have lived in a world of independent congressional interpretive authority for more than 130 years, as can be seen in the history of Congress's enforcement of the Thirteenth Amendment. Section 1 of the Amendment prohibits “slavery” and “involuntary servitude . . . within the United States.” Section 2 provides that “Congress shall have power to enforce this article by appropriate legislation.” The Court has been quite circumspect in declaring what rights it will itself enforce pursuant to Section 1, so much so that it has repeatedly refused to decide “whether the Thirteenth Amendment . . . accomplished anything more than the abolition of slavery.”<sup>285</sup> Yet the Court has expansively interpreted Congress's power to

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282. *Cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny of classifications based on race in federal law is necessary to ensure that constitutional rights have not been infringed). In our view, the failure of *Adarand* does not lie in the Court's refusal to defer to Congress, but rather in the Court's misapprehension of the Fifth Amendment.

283. *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

284. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

285. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 n.17 (1982); *see also* *City of Memphis v. Greene*, 451 U.S. 100, 125-26 (1981) (leaving open the question whether Section 1 of the Thirteenth Amendment “by its own terms did anything more than abolish slavery,” “because a review of the justification for the official action challenged in this case demonstrates that its disparate impact on black citizens could not, in any event, be fairly characterized as a badge or incident of slavery”); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (“By its own unaided force and effect, the Thirteenth Amendment ‘abolished slavery, and

enact legislation regulating the “badges and incidents of slavery.”<sup>286</sup> Such legislation, which includes 42 U.S.C. §§ 1981-1982 enacted during Reconstruction,<sup>287</sup> goes far beyond anything that could plausibly be justified as enforcing the *R*, that the Court has attributed to Section 1.

In defining Congress’s authority under Section 2, therefore, the Court has pointedly observed that Senator Trumbull of Illinois, the Chairman of the Judiciary Committee that recommended the Thirteenth Amendment to the Senate in 1864, was “surely . . . right” to argue that under Section 2 Congress would

have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.<sup>288</sup>

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established universal freedom.’ *Civil Rights Cases*, 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed ‘Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*’ *Ibid.* (Emphasis added.); cf. *Arnold v. Bd. of Educ.*, 880 F.2d 305, 315 n.12 (11th Cir. 1989) (“[I]t appears that when only the [Thirteenth] amendment itself is concerned, absent any statute, the amendment is given a very narrow interpretation as to what constitutes the badges and incidents of slavery.”); *Flowers v. Tjx Cos.*, No. 91-cv-1339, 1994 U.S. Dist. LEXIS 10453, at \*12 (N.D.N.Y. July 15, 1994) (“The Supreme Court has narrowly construed the direct, self-executing meaning of the [Thirteenth] Amendment.”); *Atta v. Sun Co.*, 596 F. Supp. 103, 105 (E.D. Pa. 1984) (“[C]ourts have declined to hold that the [Thirteenth] Amendment *itself* reaches forms of discrimination other than slavery and involuntary servitude.”).

286. The phrase “badges and incidents of slavery” originated in the *Civil Rights Cases*. 109 U.S. 3, 20 (1883). The Court has used the phrase at least once in the context of judicially enforceable rights under Section 1. See *Bailey v. Alabama*, 219 U.S. 219, 241 (1911). Most frequently, however, the phrase denotes the measure of congressional power under Section 2. See, e.g., *Gen. Bldg. Contractors Ass’n*, 458 U.S. at 390 n.17; *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); cf. *Channer v. Hall*, 112 F.3d 214, 217 n.5 (5th Cir. 1997) (“Appellees contend that there is no direct private right of action under the [13th] Amendment because Congress acting under § 2 is the creator and definer of 13th Amendment rights. While it is true that suits attacking the ‘badges and incidents of slavery’ must be based on a statute enacted under § 2, suits attacking compulsory labor arise directly under prohibition of § 1, which is ‘undoubtedly self-executing without any ancillary legislation’ and ‘[b]y its own unaided force and effect . . . abolished slavery and established universal freedom.’” (quoting *Civil Rights Cases*, 109 U.S. 3, 20) (second and third alterations in original)); *Holland v. Bd. of Trs. of the Univ. of D.C.*, 794 F. Supp. 420, 424 (D.D.C. 1992).

287. 42 U.S.C. § 1981(a) (2000) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

42 U.S.C. § 1982 also provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

288. *Jones*, 392 U.S. at 440. *Jones* glossed Trumbull’s remarks in terms of the same “rational basis” methodology that the Court had employed four years earlier in *South Carolina* and

In none of the Court's decisions expansively interpreting congressional authority under Section 2 has the Court made any effort to apply the enforcement model by connecting the rights established in congressional legislation to rights that the Court was itself willing to enforce in Section 1 litigation.<sup>289</sup> Congress has thus been free to establish  $R_c$ , and it has done so at least since 1870. The Court has explicitly blessed this practice since 1968.<sup>290</sup> Throughout this long period there has been no discernible impairment of separation-of-powers values.

A similar point can be made about the history of the Fourteenth Amendment. During the period (roughly) between *Morgan* and *Boerne*, Congress aggressively exercised independent constitutional interpretive authority, and yet the capacity of the judicial branch to perform its assigned functions was never impaired. Congress was able to exercise such authority because the Court during that period explicitly deferred to Congress's

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*Morgan*: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one." *Id.* at 440-41. *Jones*, like *South Carolina* and *Morgan*, went on to describe Section 2 enforcement in terms of the test of *McCulloch v. Maryland*. *Id.* at 443-44. But *Jones*, unlike *South Carolina* and *Morgan*, made no effort whatsoever to connect the  $R_c$  in the statute it was considering (§ 1982) to the  $R_f$  that the Court was willing to enforce in applying Section 1. Indeed, *Jones* expressly refused to address the question of what  $R_f$  a court would enforce under Section 1. *Id.* at 439.

289. Typical in this regard is the Court's decision in *Palmer v. Thompson*, in which the Court refused to conclude that the decision of a Southern city to close a swimming pool that had been ordered desegregated violated Section 1 of the Thirteenth Amendment:

Finally, some faint and unpersuasive argument has been made by petitioners that the closing of the pools violated the Thirteenth Amendment which freed the Negroes from slavery. The argument runs this way: The first Mr. Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U. S. 537, 552, (1896), argued strongly that the purpose of the Thirteenth Amendment was not only to outlaw slavery but also all of its "badges and incidents." This broad reading of the amendment was affirmed in *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968). The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred H. Mayer Co.* could empower Congress to outlaw "badges of slavery." The last sentence of the Amendment reads:

"Congress shall have power to enforce this article by appropriate legislation."

But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

403 U.S. 217, 226-27 (1971).

290. See *Jones*, 392 U.S. 409.

judgment about whether  $R_s$  were actually attempts to enforce  $R_j$ .<sup>291</sup> This deference ceded to Congress such broad discretion that as a practical matter there was simply no way to know whether Congress was enforcing  $R_j$  or instead enforcing  $R_c$ .<sup>292</sup>

The result was a doctrinal structure that, as Justice Stewart asserted in his opinion in *Oregon v. Mitchell*, effectively empowered Congress “not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause.”<sup>293</sup> A decade later, then-Justice Rehnquist dissented in *Rome* on identical grounds, arguing that judicial deference effectively ceded to Congress the power to “determine as a matter of substantive constitutional law what situations fall within the ambit” of the Equal Protection Clause.<sup>294</sup>

There was truth in Stewart’s and Rehnquist’s dissents. Although during the period from *Morgan* to *Boerne* the Court asserted a formal supremacy in the interpretation of the Constitution,<sup>295</sup> it in fact tolerated a wide range of Section 5 legislation effectively enforcing distinct legislative constructions of the Constitution.<sup>296</sup> The Court did not regard this legislation as a threat to its authority. Indeed, virtually the same Court that decided *Cooper v. Aaron*<sup>297</sup> also decided *Katzenbach v. Morgan*, which tells us that the Court itself saw no inconsistency between, on the one hand, judicial supremacy over interpretations of judicially enforceable rights lodged in Section 1 of the Fourteenth Amendment, and, on the other hand,

291. See *supra* notes 31-42 and accompanying text.

292. See *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (“[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.”); see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (“Congress could rationally have concluded that . . . it was proper to prohibit changes that have a discriminatory impact.”).

293. 400 U.S. 112, 296 (1970) (Stewart, J., concurring in part and dissenting in part).

294. *City of Rome*, 446 U.S. at 221 (Rehnquist, J., dissenting) (quoting *Oregon*, 400 U.S. at 296 (Stewart, J., concurring in part and dissenting in part)); see also *id.* at 219-20 (“The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group’s ability to elect a candidate of their race violates the Fourteenth or Fifteenth Amendment.”).

295. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (finding that the Court must be “supreme in the exposition of the law of the Constitution”).

296. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12,101(b)(3) (2000); Violence Against Women Act of 1994, 42 U.S.C. § 13,981(a); Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694, 694; Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. §§ 1971, 2000(a)); Equal Employment Opportunity Act of 1972, H.R. REP. NO. 92-238, at 19 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154; Civil Rights Act of 1968, S. REP. NO. 90-721, at 7 (1967), reprinted in 1968 U.S.C.C.A.N. 1837, 1843.

297. 358 U.S. 1.

allowing Congress effectively to exercise independent constitutional interpretive authority for the purpose of enacting Section 5 legislation. Certainly no one now suggests that the Warren Court was somehow compromised in its ability to perform its judicial functions by the Section 5 jurisprudence of *Morgan*. We take this as powerful evidence that, contrary to the Court's reasoning in *Boerne*, the mere fact of independent congressional interpretive power in the enforcement of the Reconstruction Amendments works no adverse effect on the judicial power of the United States.

The separation-of-powers objection to congressional enforcement of  $R_c$  thus does not hold. Our constitutional order is not harmed by legislative constitutionalism, and it may well be strengthened by it. It might be argued, however, that the same reasons that would lead courts to recognize Congress's authority to enforce  $R_c$  when Section 5 legislation is challenged as inconsistent with separation of powers might also lead courts to defer to  $R_c$  when courts interpret constitutional provisions safeguarding individual rights, and that such deference would undermine essential rule-of-law values. But this argument fails, because the policentric model specifically contemplates that courts will enforce their own interpretations of  $R_j$ , even when Congress is exercising its Section 5 power to enforce  $R_c$ . A fortiori the model does not imply that courts must or should defer to congressional interpretations of the Constitution when the Court is called upon to protect individual rights. Under the policentric model, courts may consider  $R_c$  as they interpret the Constitution, but courts remain autonomous in judgment and must ultimately enforce their own understandings of  $R_j$ .

Courts typically address the relationship between legislative and judicial judgment when they formulate the substantive contours of a judicial right. Courts establish constitutional rights to define and protect their understanding of constitutional principles,<sup>298</sup> and these principles normally entail a vision of how rule-of-law values should be coordinated with political judgment. Each of the notorious three tiers of scrutiny within equal protection doctrine, for example, purports to establish a different relationship between political judgment and the rule of law, and these distinct relationships are in turn justified by reference to the principles that the Equal Protection Clause is understood to safeguard. An analogous point can be made about the distinction between content-neutral and content-based regulations of speech within First Amendment doctrine: Courts defer to legislative judgments far more readily for content-neutral regulations than for content-based regulations, and this difference is justified by

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298. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT I (1995).



reference to the constitutional principles protected by the First Amendment.<sup>299</sup>

When courts theorize the substance of rights, therefore, they also theorize the relationship between judicial and legislative judgment. The nature of this relationship will reflect diverse factors, which may include the character and importance of the constitutional values protected by the right, the connection between the right and democratic processes, the distinct functions and competencies of courts and legislatures, and so forth. The model of policentric constitutional interpretation represents our best account of how such factors should be analyzed when courts are called upon to evaluate separation-of-powers challenges to the exercise of Section 5 power. Asking courts to respect Congress as a body that engages in constitutional deliberation when enacting Section 5 legislation may incline courts to respect Congress's constitutional judgments in other contexts, but the argument we have advanced does not require it. Our analysis has no necessary implications for how the relationship between judicial and legislative judgment ought to be analyzed in the context of specific rights.

#### *D. Policentric Constitutional Interpretation and Constitutional Validity*

The model of policentric constitutional interpretation does not imply that all Section 5 legislation is constitutional. The model asserts only that Section 5 legislation should not be deemed unconstitutional merely because it enforces  $R_c$  as distinct from  $R_j$ . The model leaves open any and every other reason to find Section 5 legislation unconstitutional.

The most obvious reason for striking down Section 5 legislation is that it violates constitutional rights. The model of policentric constitutional interpretation attributes to Section 5 legislation the same structural relationship between power and rights as that which obtains for every other form of federal legislation. Courts assessing a federal statute normally ask two logically distinct questions: (1) Does Congress have the power to enact the statute? (2) Does the statute violate any constitutional rights? Thus Congress may have power to enact a statute under the Commerce Clause, but the existence of this power does not settle the question whether the statute violates a distinct constitutional provision like the First Amendment.

The same structure of analysis applies to the model of policentric constitutional interpretation. The model asks, first, whether Congress has the power to enact Section 5 legislation. The answer to this question turns on whether Congress intends to enforce its understanding of Section 1 of

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299. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991).

the Fourteenth Amendment, and not upon whether Congress has correctly anticipated how courts will enforce Section 1 of the Fourteenth Amendment. The model thus addresses the question of power through ordinary techniques of statutory interpretation. The model then asks a second and logically distinct question, which is whether Section 5 legislation violates any rights that courts will enforce against Congress. The source of congressional power is not generally determinative of this question. If legislation enacted pursuant to the Commerce Clause violates the First Amendment, so will that same legislation if enacted under Section 5.<sup>300</sup>

The Court sometimes invalidates federal statutes not because they violate rights, but because they infringe what the Court has called “essential postulates” that define “the structure of the Constitution.”<sup>301</sup> One such postulate is federalism, which the Court has used to strike down statutes that Congress would otherwise have power to enact. An objection to the policentric model might be that independent congressional authority to interpret the Constitution might transform Section 5 power into a vehicle of unlimited power, capable of imposing boundless burdens on states. If one were inclined to fear such an outcome because one did not trust the political safeguards of federalism,<sup>302</sup> then the policentric model might seem unacceptable. It is therefore important to stress that nothing in the policentric model prevents the Court from using postulates of federalism in appropriate circumstances to strike down a statute that Congress would otherwise have power under Section 5 to enact. Although we defer until Part V a full analysis of how the values of federalism ought to be integrated with the prerogatives of Section 5 power, we note at this point that requiring the Court explicitly to justify such holdings by articulating the scope and nature of these values in fact would work a positive improvement over current doctrine.

A second constitutional postulate that can invalidate legislation is separation of powers. The model of policentric constitutional interpretation holds that separation of powers is not violated by the mere fact that Congress has chosen to enforce  $R_c$ , as distinct from  $R_j$ . This does not imply,

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300. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (“[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (“[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”).

301. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

302. *But see* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); Larry D. Kramer, *Putting Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 228-33 (2000).

however, that Section 5 legislation is otherwise exempt from the requirements of separation of powers. The poliocentric model would apply these requirements according to the same logic we have already considered. Statutes that Congress otherwise has power to enact would be scrutinized to determine if they are so incompatible with principles of separation of powers as to be unconstitutional. If Congress were to use its Section 5 power to enact a statute containing a one-house veto, for example, the poliocentric model would not insulate the legislation from constitutional review.<sup>303</sup>

There are questions of separation of powers, however, that seem distinctive to the particular context of Section 5 legislation. There is no gainsaying the potential for friction when Congress gives the force of law to one understanding of Section 1 of the Fourteenth Amendment ( $R_c$ ) and the Court gives the force of law to a different understanding ( $R_j$ ). A strict theory of departmentalism might hold that no variance between judicial and congressional understandings of the Fourteenth Amendment could ever violate separation of powers, because each branch enjoys plenary constitutional authority to interpret the Constitution “*independently*.”<sup>304</sup> But we disagree. The poliocentric model recognizes that there are times when interbranch disagreements can erupt into confrontation and hostility that in fact might threaten the principles of separation of powers. From the perspective of the Court, separation of powers might well prohibit congressional legislation that directly undermines or erodes judicial authority to interpret the Constitution.

The essential premise of the poliocentric model is that judicial authority is not threatened by the mere fact that Congress and the Court differ in their understandings of the Fourteenth Amendment. Such differences are endemic and have persisted since the enactment of the Reconstruction Amendments. The potentially adverse effects of such differences are usually muffled by the ambiguity, equivocation, indirection, and deference that ordinarily characterize the relationship between judicial and congressional interpretive authority. Both the Court and Congress normally seek to defuse potential tension that may arise from the poliocentric nature of constitutional interpretation.

In the period between *Morgan* and *Boerne*, for example, the Court articulated doctrine that systematically blurred the distinction between statutory and constitutional rights. The thrust of this doctrine, which we have elsewhere called the “*Katzenbach* approach,” affirmed Section 5

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303. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

304. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994).

legislation without ever squarely resolving the question of how  $R_s$  were related to  $R_j$ . As we have observed:

During the period between *Brown* and *Boerne*, Congress responded to the Court's encouragement by using its Section 5 power to enact civil rights statutes that transformed the enforcement of antidiscrimination norms into a major responsibility of the national government. The Court, in turn, systematically refused to clarify the status of this legislation, reserving the question on so many occasions that its decisionmaking appears to have been deliberate. For ease of nomenclature, we can call this apparent policy of maintaining ambiguity about the constitutional status of statutory norms the "*Katzenbach* approach."<sup>305</sup>

The ambiguity of the *Katzenbach* approach dampened whatever tension might possibly result from two competing legal understandings of constitutional rights.

During this same period Congress also sought to avoid direct confrontation with the Court. It enacted the Civil Rights Act of 1964, for example, using *both* its power under Section 5 *and* its power under the Commerce Clause, thus blurring the exact parameters of its Section 5 power.<sup>306</sup> The Court subsequently participated in this equivocation by holding that the specifically constitutional reasoning of *Geduldig v. Aiello*<sup>307</sup> applied directly to Title VII of the Act,<sup>308</sup> seeming to conclude that discrimination on the basis of pregnancy was not discrimination on the basis of sex for Title VII because it was not discrimination on the basis of sex for the Equal Protection Clause.

Congress disagreed with this interpretation, responding swiftly and decisively to amend Title VII by enacting the PDA to provide that discrimination based upon pregnancy was discrimination based upon sex for purposes of the Civil Rights Act of 1964.<sup>309</sup> But because the Court had already upheld Congress's efforts to use its Section 5 authority to impose the sex discrimination provisions of Title VII directly upon states,<sup>310</sup> the PDA effectively legislated an understanding both of Title VII and of the Fourteenth Amendment. The PDA revealed an important disagreement

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305. Post & Siegel, *supra* note 15, at 38 (footnotes omitted).

306. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). For a discussion, see Post & Siegel, *supra* note 74, at 447 & n.22.

307. 417 U.S. 484 (1974).

308. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976).

309. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (recognizing that by enacting the PDA, Congress sought to establish that the exclusion of disabilities caused by pregnancy from an employer's disability plan constitutes discrimination based on sex).

310. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); see also *supra* notes 265-269 and accompanying text.

between Congress and the Court about the constitutional meaning of sex discrimination. Yet Congress defused the potential tension of this difference by characterizing the PDA as a simple statutory amendment,<sup>311</sup> thus allowing the logical inconsistency between judicial and congressional views of Section 1 rights to remain politically latent. This discrepancy between Congress's and the Court's understanding of the constitutional nature of sex discrimination persists to this day without causing perceptible damage to either institution.<sup>312</sup>

The story of the PDA illustrates how poliocentric constitutional interpretation can proceed in the American polity without threatening either the perceived unity of the Constitution or the authority of the Court. The indirection and ambiguity that envelops the PDA is not unusual. Since the days of the Warren and Burger Courts, the relationship between congressional and judicial understandings of constitutional rights has been messy and confused. Even in the absence of ambiguity, moreover, overt and persistent congressional efforts to enforce  $R_c$ , in flat contradiction to  $R_j$ , have not harmed either the perceived unity of the Constitution or the authority of the Court. That is the lesson of congressional legislation enacted pursuant to Section 2 of the Thirteenth Amendment.<sup>313</sup> The only plausible sense in which such legislation has injured the authority of the Court is the tautological sense in which the Court's authority is *defined* as including the prerogative to monopolize constitutional interpretation. The history of Section 2 legislation demonstrates that no other separation-of-powers values are necessarily at stake in simple congressional enforcement of  $R_c$ .

We do not mean to deny, however, that Section 5 legislation can sometimes cause conflict between the Court and Congress that is so corrosive as to damage either the perceived unity of the Constitution or the authority of the Court. We agree that such conflict can raise legitimate separation-of-powers concerns. Consider, for example, the case of *City of Boerne v. Flores*,<sup>314</sup> the decision that first prompted the Court to formulate the enforcement model. *Boerne* was an exceptional case because it concerned the constitutionality of the Religious Freedom Restoration Act (RFRA),<sup>315</sup> which could be read as a direct congressional challenge to the Court's competence in performing its core task of adjudicating

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311. See *supra* note 216.

312. The contemporary Court still stands by *Geduldig*. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993).

313. See *supra* notes 284-290 and accompanying text.

314. 521 U.S. 507 (1997).

315. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

constitutional rights.<sup>316</sup> “The very purpose of RFRA was to overturn a decision of the U.S. Supreme Court that interpreted the meaning and reach of the Free Exercise Clause.”<sup>317</sup> Unlike the PDA, which avoided a frontal confrontation with the Court by posing as a simple statutory amendment, RFRA threw down a symbolic gauntlet to the Court.

Such stark defiance is quite rare in American politics, and it raises distinctly different questions than does a simple divergence between Congress and the Court about the meaning of the Constitution. Whether one views *Boerne* as rightly or wrongly decided, it raised issues of separation of powers that were simply not present in statutes like the Patent and Plant Variety Protection Remedy Clarification Act,<sup>318</sup> or amendments to the Age Discrimination in Employment Act of 1967,<sup>319</sup> or Title I of the Americans with Disabilities Act of 1990,<sup>320</sup> all of which the Court has recently struck down as inconsistent with the enforcement model. Before the Rehnquist Court’s recent decisions, no one at any time understood these statutes as in any way directly challenging the Court’s capacity correctly to interpret the Constitution.

There is a world of difference between Section 5 legislation that directly impugns and erodes judicial authority, and Section 5 legislation that simply enforces an understanding of the Constitution that is distinct from the Court’s. Although the former may raise issues of separation of powers, the latter does not. The distinction is important to keep in mind. It implies that although the simple divergence of  $R_j$  from  $R_c$  does not harm judicial authority in a manner that would violate separation of powers, Congress can nevertheless enact Section 5 legislation enforcing  $R_c$  that does damage this authority, that in particular cases the damage might be so extensive as to violate separation of powers, and that the question of

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316. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469 (1994). Neal Devins has observed:

Congress’s consideration of the RFRA focused exclusively on protesting the wrongness of *Employment Division, Department of Human Resources of Oregon v. Smith*, a 1990 Supreme Court interpretation of the Free Exercise Clause. Congressional hearings showcased witnesses from religious and other interest groups, nearly all of whom attacked *Smith* . . . and calling upon the Justices to reverse it. In the end, with virtually no interest group opposition to the measure, Congress gave shortshrift to fact-finding in order to do precisely what RFRA’s interest group sponsors asked for, that is, repudiate *Smith*.

Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1196-97 (2001).

317. Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1211 (2002).

318. 35 U.S.C. §§ 271(h), 296(a) (2000); see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

319. 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

320. Pub. L. No. 101-336, 104 Stat. 330; see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

whether any particular Section 5 legislation is unconstitutional on these grounds depends upon a specific case-by-case assessment.

E. *Policentric Constitutional Interpretation and the FMLA Family Leave Provisions*

The enforcement model forces us to justify the constitutionality of the FMLA as an exercise of Section 5 power by reference to the forms of antidiscrimination law that courts will enforce. In Section II.B we demonstrated that the FMLA can be justified in this way. The history recounted in Section III.C shows that concerns about stereotyping and the disparate treatment of family caregivers in the workplace helped to motivate and structure the statute. But Section III.C also suggested that a narrow focus on such concerns obscures important aspects of the FMLA's history, which has its roots in the ambitions of second-wave feminism to create a constitutional principle of "true equality of opportunity"<sup>321</sup> that would restructure the relationship between work and the family so as to ameliorate the relative disadvantages of women.

To the extent that these considerations played a role in Congress's decision to enact the FMLA, Congress drew on its Section 5 power to enforce an understanding of the Equal Protection Clause that diverged in part from understandings which the Court has enforced in its recent Section 1 cases. Especially since *Washington v. Davis*,<sup>322</sup> the Court has interpreted the Equal Protection Clause primarily to prohibit disparate treatment based upon sex. It has not viewed the Clause as a vehicle by which to restructure the relationship between work and family, even if such restructuring would promote equal opportunity to participate in the basic activities of citizenship. Although this disparity might be fatal under the enforcement model, it is of no concern under the model of policentric constitutional interpretation. The policentric model precisely celebrates Congress's independent view of the Clause, which it regards as a living and necessary link between the law of the Constitution and the aroused constitutional beliefs of the American public.

The policentric model asks only if Congress intended to enforce the Fourteenth Amendment when it enacted the FMLA.<sup>323</sup> This question is easy

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321. NOW STATEMENT OF PURPOSE, *supra* note 132, at 161-62.

322. 426 U.S. 229 (1976).

323. This point suggests the possibility of a third model of Section 5 power, which we may call the model of institutional differentiation. Under this model courts would retain control over the character of constitutional rights that can be protected by Section 5 power, but courts would interpret Fourteenth Amendment rights differently depending upon whether they were being enforced by courts or by Congress. Using the model of institutional differentiation, for example, the Court might hold that even though judicial enforcement of Section 1 of the Fourteenth Amendment requires a showing of purposeful discrimination, congressional Section 5 power can

because Congress announced this intention in the very text of the statute.<sup>324</sup> The policentric model does not seek to discipline Congress's constitutional views by assessing them in light of the Court's jurisprudence; it does not, like the enforcement model, seek to force congressional legislation to abide by institutional norms and procedures that make sense only in the context of Article III courts. By the same token, however, the policentric model does not require the Court to enforce Congress's views of the Fourteenth Amendment in adjudication. That Congress may exercise the prerogative of a legislature to remove conditions in the workplace that disproportionately harm women in order to achieve a constitutional ideal of equal citizenship does not imply that the Court must similarly enforce this ideal in litigation involving Section 1.

The policentric model does not insulate the FMLA from constitutional review. To assess the constitutionality of the FMLA, therefore, we must ask whether the family leave provisions of the FMLA violate any constitutional rights. The answer to this question is plainly negative. If these provisions were inconsistent with constitutional rights, they would be unconstitutional as an exercise of Commerce Clause power as well as of Section 5 power.

The policentric model also asks whether the family leave provisions of the FMLA violate any constitutional postulates powerful enough to invalidate otherwise constitutional exercises of congressional power. One such postulate is separation of powers. In our view the relevant inquiry is whether the family leave provisions of the FMLA gravely erode or impugn the ability of courts to perform their constitutionally assigned role. The mere fact that these provisions enforce  $R_c$  does not imply that courts must also enforce  $R_c$  in litigation under Section 1. Courts remain free to define  $R_j$  in ways that either incorporate or exclude Congress's understanding of the Constitution. The family leave provisions of the FMLA do not pose any unique or special difficulties sounding in separation of powers; they do not directly challenge the Court's competence or authority, as RFRA might be regarded as having done.

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prohibit state action that causes a disparate impact on protected groups. For a discussion of this point, see Post & Siegel, *supra* note 74, at 468-73. If the Court were to accept the model of institutional differentiation, it would decide whether the  $R_s$  created by the FMLA were a constitutionally appropriate means of enforcing the Fourteenth Amendment, given the forms of institutional differentiation that distinguish legislative from judicial constitutionalism. We regard the model of institutional differentiation as superior to the enforcement model because it acknowledges the functional differences that distinguish courts from legislatures. We regard the model of institutional differentiation as inferior to the model of policentric constitutional interpretation, however, because it maintains judicial control over the scope of Section 5 power, and it therefore prevents Section 5 legislation from mediating between the legal and political dimensions of the Constitution in ways that promote the democratic accountability of our constitutional order.

324. 29 U.S.C. § 2601(b)(5) (2000).



Applying the policentric model to the family leave provisions of the FMLA illustrates the almost willful perversity and arbitrariness of the enforcement model. The family leave provisions of the FMLA have been on the books for almost a decade, and to date no one has noticed even the slightest impairment of the federal judicial function. This point remains unaltered even if it is argued that the FMLA raises more general concerns about Congress's power to enact statutes enforcing  $R_c$ . Even if the FMLA is added to Title I of the ADA, and to the Patent and Plant Variety Protection Remedy Clarification Act, and to the civil remedy provisions of the Violence Against Women Act, and indeed to the long line of federal civil rights legislation enacted under the Section 5 jurisprudence of the Warren Court and now awaiting execution under the enforcement model, what becomes clear is that for decades we have been living under a regime in which Congress has deployed its Section 5 power to enforce  $R_c$ , and that there has been no apparent negative impact on federal judicial power. Considered without the ideological premise of juricentrism, it seems to us highly implausible to claim that the family leave provisions of the FMLA are inconsistent with fundamental principles of separation of powers.

The matter is somewhat different if we ask whether the family leave provisions of the FMLA are inconsistent with the postulate of federalism. These provisions do indeed impose serious burdens on the states. The question is whether these burdens are sufficient to render the provisions unconstitutional. This question is never explicitly addressed under the Court's present construction of the enforcement model. We argued in Part II that considerations of federalism are instead incorporated silently into the application of the congruence-and-proportionality test. By eliminating that test, the policentric model would require the Court directly to face this issue.

We wish to be clear that the policentric model does not itself contain any implications about the relationship between Section 5 legislation and federalism. The model addresses only issues of separation of powers. The model would thus not require the Court to ignore the effects of Section 5 legislation on the values of federalism. But because the model would abandon the congruence-and-proportionality test, and because it would substitute a rather easy and clear set of tests for the establishment of Section 5 power, it would require the Court explicitly to articulate and defend the conclusion that particular Section 5 statutes, which are otherwise legitimate, so compromise essential principles of federalism as to be unconstitutional.

If the Court believes that the family leave provisions of the FMLA are unconstitutional because of their impact on federalism, the question is whether the Court will so find covertly under the enforcement model, or overtly under the policentric model. The primary effect of the policentric model will be to prevent the Court from smuggling its federalism analysis

into an enforcement model that is meant to safeguard separation of powers. We believe that this would improve the Court's doctrine, and it is to that subject that we now turn.

#### V. FEDERALISM AND POLICENTRIC CONSTITUTIONAL INTERPRETATION

The *rationes decidendi* of the Court's recent decisions limiting Section 5 power almost entirely concern the requirements of the enforcement model. They have barely mentioned federalism. There is an off-hand reference in *Boerne* to the "vital principles necessary to maintain separation of powers and the federal balance,"<sup>325</sup> but not much else. Nevertheless the context of the Court's decisions has powerfully implicated issues of federalism. There are two such issues. The first arises because Section 5 legislation abrogates Eleventh Amendment immunity, which the Court believes protects "dual sovereignty" as "a defining feature of our Nation's constitutional blueprint."<sup>326</sup> The second arises because the breadth of Section 5 has the potential to endow Congress with a general police power, which would, in the Court's view, "obliterat[e] the Framers' carefully crafted balance of power between the States and the National Government."<sup>327</sup>

It is not surprising, therefore, that many commentators have taken the Court's recent Section 5 jurisprudence to address primarily issues of federalism rather than of separation of powers.<sup>328</sup> If the enforcement model is indeed theoretically incomplete, so that its application must be supplemented by extrinsic principles, the circumstances of the Court's recent Section 5 decisions strongly suggest that the Court has used values of federalism to inform judgments that purport to rest entirely on separation of powers. The Court has used these values implicitly to set the baseline by which the Court determines whether  $R_s$  are congruent and proportional to  $R_j$ .

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

326. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). For recent decisions of the Court dealing with Eleventh Amendment immunity, see *Alden v. Maine*, 527 U.S. 706 (1999); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). For cases discussing Section 5 power in the context of the abrogation of Eleventh Amendment immunity, see *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); and *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

327. *United States v. Morrison*, 529 U.S. 598, 620 (2000). For a discussion of how federalism functions in the *Morrison* opinion, see Post & Siegel, *supra* note 74, at 473-509.

328. See, e.g., JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 454-59 (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002).

The Court's Section 5 decisions implicate roughly two distinct principles of federalism. The first involves the independent integrity of states as sovereign entities. The Court reads Eleventh Amendment immunity as safeguarding the "sovereign status of the States . . . together with the dignitary and essential attributes inhering in that status," which serve to secure "the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people.'"<sup>329</sup> The second principle of federalism requires Congress to remain within its enumerated powers, so that the "distinction between what is truly national and what is truly local" is not lost.<sup>330</sup>

As we have elsewhere argued, we do not believe that these two principles should carry much weight in the context of Section 5 legislation designed to enforce civil rights.<sup>331</sup> We are of the view, however, that if the Court is to vindicate these values in its Section 5 jurisprudence, there are better and worse ways in which it may do so. In this Part we discuss how values of federalism may best be implemented in Section 5 doctrine by a Court that cares deeply about their importance.

The fundamental difficulty is that the Court's contemporary doctrine incorporates principles of federalism in an essentially arbitrary manner. Virtually any Section 5 statute can potentially compromise values of federalism. Whether this tension ripens into a conclusion of unconstitutionality depends upon the extent to which particular Section 5 statutes impair principles of federalism. The congruence-and-proportionality test gives the Court the flexibility necessary to make such a determination. It allows the Court to conclude that  $R_i$  that too greatly impair federalism values are not tailored closely enough to  $R_j$ . The upshot of this doctrinal structure is that the Court can use values of federalism to define the scope of Section 5 power without ever explicitly articulating these values or the precise degree of their impairment. In the name of implementing the enforcement model, the Court is actually able to pursue a federalism agenda that is silent and commensurately without accountability.

The structure of the Court's contemporary Eleventh Amendment doctrine creates especially powerful incentives to transform the congruence-and-proportionality test into an unaccountable instrument of federalism. The Rehnquist Court has revived the Eleventh Amendment as a primary guarantor of state sovereignty. It has held that Eleventh Amendment immunity cannot be abrogated by congressional legislation

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329. *Alden*, 527 U.S. at 714 (quoting *Printz v. United States*, 521 U.S. 898, 919-20 (1997)).

330. *Morrison*, 529 U.S. at 617-18.

331. See Post & Siegel, *supra* note 74, at 486-513.

enacted under Article I powers, like the Commerce Clause, but only when Congress acts pursuant to its enforcement authority under the Reconstruction Amendments.<sup>332</sup> Legislation that is a valid exercise of Section 5 power is said automatically to trump Eleventh Amendment immunity and hence to override the federalism values protected by that immunity:

[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce “by appropriate legislation” the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.<sup>333</sup>

The result of this doctrinal structure is that once the Court finds that legislation is authorized by Section 5, it can no longer protect the federalism value of state sovereignty safeguarded by the Eleventh Amendment. The national prerogative of Section 5 power overrides this value, no matter what impact Section 5 legislation might have on states. For a Court committed to protecting state sovereignty, this doctrinal structure creates enormous pressure to find some doctrinal pathway to shield states from overly burdensome Section 5 legislation. The obvious solution is to use the congruence-and-proportionality test as a tool for this purpose. A test articulated to safeguard separation of powers is thus employed to protect federalism values, even though the test neither names nor evaluates the variables that are relevant for assessing relevant issues of federalism. The test does not even require a court to consider the actual impact on states of Section 5 legislation.

This is not healthy doctrine. A Court committed to protecting state sovereignty ought to do so in an informed and nuanced way, without hijacking doctrinal formulations designed for completely different

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332. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

333. *Fitzpatrick*, 427 U.S. at 456 (Rehnquist, J.) (citation omitted).

purposes. Analytic clarity as well as accurate decisionmaking suggest that the question of federalism be conceptually distinguished from the question of separation of powers. This can be achieved if the postulates of federalism are conceived to function in the context of Section 5 legislation as they do in other areas of federal law, as limitations on otherwise legitimate congressional power. We shall call this the “states’ rights” view of federalism. The best example of the states’ rights view of federalism is then-Justice Rehnquist’s opinion in *National League of Cities v. Usery*.<sup>334</sup>

At issue in *Usery* was a federal statute applying requirements concerning minimum wages and maximum hours to state employees. Although the Court freely conceded “the breadth of authority granted Congress under the commerce power” to enact the statute,<sup>335</sup> it conceived the postulates of federalism as “an affirmative limitation on the exercise” of congressional commerce power, analogous to the limitations on this power imposed by the Fifth and Sixth Amendments.<sup>336</sup> The statute, “while undoubtedly within the scope of the Commerce Clause,” would have to surmount the “constitutional barrier” raised by its direct regulation of “the States and subdivisions of States as employers.”<sup>337</sup> *Usery* thus sketched an approach that foreshadowed the Court’s contemporary understanding of federalism as one of the “essential postulates”<sup>338</sup> of the Constitution that function to limit what would otherwise be valid extensions of national power.

Applied to the question of Section 5 legislation, the states’ rights view of federalism would separate the question of Congress’s power to enact Section 5 legislation from the question of whether a statute’s impact on the postulates of federalism is so damaging as to render the statute unconstitutional. The Court’s peculiar opinion in *Garrett* seems to be groping toward some such approach, for it basically finds that Congress is without power under Section 5 to enact Title I of the ADA insofar as it applies to state entities that enjoy Eleventh Amendment immunity, even though Congress might well have Section 5 power to enact Title I as applied to cities and counties, which do not receive such immunity.<sup>339</sup> If the

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334. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

335. *Id.* at 840-41.

336. *Id.* at 841.

337. *Id.*

338. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

339. In holding that Congress had failed to demonstrate a pattern of state transgressions that would justify the enactment of Title I, *Garrett* considered evidence only of transgressions by “the States themselves,” which would not include evidence of unconstitutional discrimination by “units of local governments, such as cities and counties,” that do not receive Eleventh Amendment immunity. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69 (2001). The strange implication of this reasoning is that Congress might well have had Section 5 power to enact Title I as applied to units of local government. Thus at least one circuit court has concluded that

scope of Eleventh Amendment immunity is taken as a measure of the essential concerns of federalism, the implicit message of *Garrett* seems to be that Congress has Section 5 power to enact Title I except where its application to states so especially violates basic postulates of federalism as to render it invalid.

If the Court insists upon limiting Section 5 power based upon this solicitude for federalism, we believe that it should do so by making the implicit message of *Garrett* explicit. The question of the existence vel non of Section 5 power is distinct from the question of the constitutionality of that power when exercised to burden core concerns of federalism. The Court can distinguish these questions either by holding that Eleventh Amendment immunity is not automatically trumped by valid Section 5 legislation, or by holding that Section 5 legislation is always to be measured against its impact on the essential postulates of federalism. We believe it is reasonable to require the Court to articulate and defend the concerns of federalism it believes are so significant as to justify overruling otherwise valid federal civil rights legislation. This is no doubt a difficult task. The Court attempted it in the years after *Usery*, and its effort collapsed in confusion.<sup>340</sup> But it is a challenge that ought to be squarely faced by a Court determined to limit congressional power on federalism grounds.

Distinguishing the question of Section 5 power from the constraints of federalism would allow the Court to apply the model of policentric constitutional interpretation without fear that it would lead to the oppression of the states or to the loss of indispensable aspects of their sovereignty. The Court could protect the values of federalism it thought essential, while nevertheless authorizing Congress to participate in the formation of constitutional culture through the enactment of Section 5 legislation reflecting a legislative vision of constitutional meaning. Even if the Court were to strike down such legislation on federalism grounds, the recognition of Congress's authority to articulate its underlying constitutional beliefs would still contribute to the ongoing dialogue between Congress and the

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a determination that a statute is not a valid abrogation of Eleventh Amendment immunity does not necessarily mean that the statute is not a valid exercise of Congress' power to enforce the Fourteenth Amendment. Because the Fourteenth Amendment applies to local government entities not entitled to Eleventh Amendment immunity, the analysis of whether Congress has the power to enact legislation requires inquiry into constitutional violations by these entities in addition to entities entitled to Eleventh Amendment immunity.

Thompson v. Colorado, 258 F.3d 1241 (10th Cir.), *opinion substituted*, 278 F.3d 1020, 1032 n.7 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002); *see also* Reickenbacker v. Foster, 274 F.3d 974, 982 n.60 (5th Cir. 2001) ("This narrowing of the analysis in *Garrett* means that Title II of the ADA could still be a valid exercise of Congress' § 5 power, but simply not provide the basis for a use of that power to abrogate . . .").

340. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Court that in the past has proved so important for the development of our understanding of the Constitution.

We can also apply this analysis to cases in which the Court has used the congruence-and-proportionality test to protect the second value of federalism that we have identified—the preservation of the national government as one of enumerated and limited powers. This value was at stake in *United States v. Morrison*,<sup>341</sup> in which the Court struck down a provision of the Violence Against Women Act of 1994 (VAWA)<sup>342</sup> that created a civil cause of action for victims of gender-motivated violence against their abusers.<sup>343</sup> Conceding that a “voluminous congressional record” had established a pattern of violations of  $R_j$  because of “pervasive bias in various state justice systems against victims of gender-motivated violence,”<sup>344</sup> the Court nevertheless ruled that VAWA established  $R_s$  that were not congruent and proportional to  $R_j$ , because VAWA created a cause of action that was “directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”<sup>345</sup>

VAWA did not impose any burdens on states, but it did expand the scope of Section 5 power to private individuals, which in the Court’s view threatened to obliterate “the Framers’ carefully crafted balance of power between the States and the National Government.”<sup>346</sup> The Court in *Morrison* thus used the congruence-and-proportionality test to allay its fear that Section 5 power might potentially expand the federal government into an entity of virtually unlimited power. Although this fear has little to do with separation of powers, it does express a major theme of the Court’s federalism jurisprudence, articulated most clearly in the Court’s Commerce Clause cases.<sup>347</sup>

Whereas the value of federalism that seeks to shield states from overly burdensome federal legislation articulates a relatively definite principle, the concerns at issue in a case like *Morrison* are less concrete. The case summons a diffuse fear that the federal government is somehow about to overspill its proper boundaries. There is no “precise”<sup>348</sup> definition of these boundaries; there is no clear account of the “distinction between what is

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341. 529 U.S. 598 (2000).

342. Pub. L. No. 103-322, 108 Stat. 1902.

343. 42 U.S.C. § 13,981 (1994).

344. *Morrison*, 529 U.S. at 619-20.

345. *Id.* at 626.

346. *Id.* at 620.

347. In *Morrison*, the Court also held that the provision of VAWA establishing the civil cause of action was beyond Congress’s Commerce Clause power. The Court stressed that it had to interpret the limits of Commerce Clause power in a way that would not “effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” *Id.* at 608; *see also* *United States v. Lopez*, 514 U.S. 549, 557 (1995).

348. *Lopez*, 514 U.S. at 567.

truly national and what is truly local.”<sup>349</sup> There is no effort to analyze how such a distinction might correspond to the realities of governance in America today.<sup>350</sup> Instead there is an indistinct but urgent apprehension that the Court must draw “real limits” that have “substance” and that it must be able “to identify” an “activity that the States may regulate but Congress may not.”<sup>351</sup>

The cases in which the Court has expressed concern to prevent Congress from acquiring a general police power thus do not propose an exact account of the nature of federal authority; instead they forcefully assert the necessity of imposing judicial limits on that authority. This focus is evident in *Morrison*, which does not offer a carefully articulated explanation of the nature of Section 5 power. *Morrison* seems rather to argue that if the  $R_s$  established by VAWA are not identical to  $R_j$ , Section 5 power might lead to an unstoppable slide into boundless federal authority. It is striking that *Morrison*, in contrast to *Boerne*, *Kimel*, and *Garrett*, makes no effort to announce or apply the remedial or prophylactic principles. It does not ask whether the cause of action created by VAWA could redress or prevent the violations of  $R_j$  documented in the legislative record. Instead *Morrison* seems simply to hold that because  $R_j$  require state action, and because the  $R_s$  created by VAWA do not involve state actors, VAWA is beyond Congress’s Section 5 power.<sup>352</sup>

The model of policentric constitutional interpretation poses a much deeper challenge to the methodology of *Morrison* than it does to the Court’s decisions involving Eleventh Amendment immunity. This is because *Morrison* does not overtly appeal to the states’ rights view of federalism, but seems instead to summon a tradition in which federalism is conceived as a zero-sum game where every act of the national government beyond its

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349. *Morrison*, 529 U.S. at 617-18. For a discussion, see Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 30-32, 55-66 (2000); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 132-37 (2002); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621 (2001); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000); and Louis J. Virelli III & David S. Leibowitz, “*Federalism Whether They Want It or Not*”: *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 926, 958, 965-73 (2001).

350. See, e.g., MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 8 (Daniel J. Elazar ed., 1966) (“No important activity of government in the United States is the exclusive province of one of the levels, . . . not even the most local of local functions, such as police protection and park maintenance.”).

351. See *Lopez*, 514 U.S. at 564-65.

352. There is considerable ambiguity about the extent to which *Morrison* meant to announce a general rule prohibiting Section 5 legislation from reaching private actors, as distinct from announcing a holding that the particular provisions of VAWA at issue in the case were not congruent and proportional to the  $R_j$  disclosed in its legislative record. See Post & Siegel, *supra* note 74, at 503-09.



constitutionally allotted power constitutes ipso facto an intrusion on the domain of state authority. We shall call this tradition the “zero-sum” view of federalism. The zero-sum view locates the essence of federalism in judicial restraints that limit national authority to the enumerated powers allocated to the federal government in the Constitution. Because the policentric model authorizes Congress to define its own Section 5 power, it would appear incompatible with the “judicially enforceable outer limits”<sup>353</sup> to national power that the zero-sum view identifies with federalism itself.

On closer analysis, however, the policentric model is not incompatible with the zero-sum view of federalism. This is because the logically fundamental question within the zero-sum view is the proper definition of federal power. So long as the national government is exercising power that has been actually allocated to it by the Constitution, the zero-sum view does not regard it as violating principles of federalism. If our argument is correct that the best interpretation of Section 5 power is that Congress is authorized to enforce its own interpretations of the Fourteenth Amendment, congressional exercise of such power is not inconsistent with the zero-sum view of federalism.

Because the zero-sum view of federalism requires as its logical first step a precise definition of the exact scope of national power, it is apparent that even *Morrison* itself does not truly exemplify it. *Morrison* lacks any clear account of the proper extent of Section 5 power. This failure is characteristic of the Section 5 jurisprudence of the Rehnquist Court, which has never specified the nature of Section 5 power in a manner adequate to the requirements of the zero-sum view.<sup>354</sup> *Morrison* obscures this failure by seeming to adopt the simple line that  $R_s$  must be identical to  $R_j$ , a line that draws surface plausibility from the premise of the enforcement model that Section 5 power must enforce only  $R_j$ .

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353. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 566.

354. The congruence-and-proportionality test does not formulate the nature of Section 5 power in a manner that is compatible with the zero-sum view. The test instructs courts to invalidate Section 5 statutes establishing  $R_s$  that are not “closely enough” tied to  $R_j$ . If the test is deployed to protect values of federalism, *but see supra* note 77, the standard of “closely enough” can plausibly be defined only in terms of the impact of  $R_s$  on federalism. In such circumstances, therefore, the test explicitly appeals to the states’ rights view of federalism. The congruence-and-proportionality test can therefore define the scope of congressional power in a manner that satisfies the requirements of the zero-sum view of federalism only if it measures the relationship between  $R_s$  and  $R_j$  in terms of criteria that are independent of the effects of  $R_s$  on federalism. The only plausible candidate for such a criterion is the impact of  $R_s$  on the values of separation of powers, which is to say the enforcement model. We argued in Parts II and IV that this understanding of the congruence-and-proportionality test is analytically incoherent, because it fails to account for how institutional differentiation distinguishes legislative from judicial efforts to articulate and enforce rights, and that this understanding of the test is also normatively misguided, because it assesses the effect of  $R_s$  on separation of powers in terms of the divergence between  $R_s$  and  $R_j$  rather than in terms of the impact of  $R_s$  on the actual functioning of the judicial branch.

We know, however, from cases like *Boerne*, *Kimel*, and *Garrett*, that this is an inaccurate definition of Section 5 power, even under the enforcement model. Indeed, if Section 5 authorized Congress only to enact  $R_s$  that were the same as  $R_j$ , almost every Section 5 statute enacted during the twentieth century would be unconstitutional. Since this is not a plausible position for the Court to adopt, and since it is therefore clear that Congress can enact  $R_s$  that diverge from  $R_j$ , it follows that *Morrison* does not appeal to the zero-sum view of federalism. It does not seek to confine Congress to the power actually allocated to it by the Constitution. The case instead reflects a states' rights view, because it restricts otherwise existing national power in order to safeguard values of federalism.

The importance the Court attaches to locating some "real" limit on Section 5 power, however, suggests a second reason why adherents of the zero-sum view might decide to reject the policentric model. The model creates a form of federal authority in which Congress seems to be the judge of its own power, and in which national authority appears to be unlimited by the Court. Whatever advantages the policentric model might otherwise offer, therefore, those committed to the zero-sum view might nonetheless repudiate it, because they would regard endowing Congress with authority independently to interpret the Fourteenth Amendment as having the unacceptable implication of authorizing Congress to exercise a general police power, which would violate an essential principle of federalism.

The difficulty with this objection is that it rests on a false premise. Even if the policentric model were accepted, the states' rights version of federalism would still permit the Court to strike down Section 5 legislation that trenches too dramatically on essential postulates of federalism. The Court could still impose judicially enforceable outer limits on Section 5 power. It could still strike down Section 5 legislation that unduly burdens states or that threatens to undermine "the Framers' carefully crafted balance of power between the States and the National Government."<sup>355</sup> When carefully examined, the Section 5 decisions of the Rehnquist Court actually use the states' rights view of federalism, rather than the zero-sum view, to establish just such limitations. *Morrison* itself tacitly deploys the states' rights view to strike down legislation that might well otherwise have been valid under the account of Section 5 power advanced in *Kimel* and *Garrett*.<sup>356</sup>

Even if the Court in *Morrison* had adopted the policentric model, therefore, it could nevertheless have held that  $R_s$  established by Section 5 legislation must address state actors, rather than private parties. But under

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355. *Morrison*, 529 U.S. at 620.

356. For a discussion of how *Garrett* appeals to the states' rights view, see *supra* note 339 and accompanying text.

the policentric model *Morrison* could not have used an inaccurate account of separation of powers to disguise an unexplained commitment to federalism. The opinion would instead have had to articulate and defend the position that the postulate of federalism prohibiting Congress from exercising a “general police power of the sort retained by the States”<sup>357</sup> also bars Section 5 legislation from regulating private parties.

No doubt this would be an exceedingly difficult position to defend. Not only does Congress routinely exercise such power in its Commerce Clause legislation, but there is no particular reason to believe that extensive congressional authority to prohibit private discrimination will generalize into a plenary police power. The events of the Second Reconstruction transformed the regulation of private discrimination into a national concern, just as the events of the Great Depression transformed relationships of private employment into a national concern.<sup>358</sup> Authorizing Section 5 legislation to address these distinctly national concerns does not obviously translate into plenary police power.

Although we regard the federalism values at issue in *Morrison* to be weak and ultimately indefensible, the Court evidently disagrees. It so strongly believes in these values that it is willing to use them to limit congressional power. We contend that in such circumstances it is especially important that the Court conceive federalism according to the states’ rights approach, as a limitation on otherwise legitimate Section 5 power. The Court ought to be put to the test of explicitly articulating and defending the values of federalism that it believes are significant enough to circumscribe Section 5 power. Perhaps the Court in *Morrison* might have contended, along with Chief Justice Rehnquist, that VAWA contravenes postulates of federalism because it constitutes a federal intrusion into the family.<sup>359</sup> Or perhaps it might have believed that, despite the nearly forty-year history of Title VII of the Civil Rights Act of the 1964, regulating private discrimination is inconsistent with proper limitations on federal authority. Whatever reasons the Court might ultimately develop, they ought to be explicitly articulated and defended. They ought to be persuasive enough to

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357. *Lopez*, 514 U.S. at 567.

358. For a discussion, see Post & Siegel, *supra* note 74, at 486-502.

359. Speaking for the Judicial Conference of the United States, Chief Justice Rehnquist objected to the provision of VAWA struck down in *Morrison* on the ground that the “new private right of action [is] so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes.” William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 1, 3; see also Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 269-77 (2000). The Conference of Chief Justices announced its opposition to VAWA on the ground that “the federal cause of action . . . would impair the ability of state courts to manage criminal and family law matters traditionally entrusted to the states.” *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 83-84 (1993).

withstand clear and crisp formulation, and they ought not to be allowed to masquerade as principles of separation of powers.

## VI. CONCLUSION

In the past six years the Rehnquist Court has developed an innovative and compelling account of Section 5 power. It has drawn upon separation of powers principles to claim that Congress may not independently “interpret” the Fourteenth Amendment in the course of exercising its undoubted power to “enforce” the provisions of Section 1. In the nineteenth century the Supreme Court was far too weak ever to claim such a monopoly of interpretive authority over Congress, and it therefore used principles of federalism to circumscribe Section 5 power. In the mid-twentieth century the Warren Court worked collaboratively with Congress, deferring to exercises of Section 5 power in such a way as to allow each branch of the federal government to enforce the Fourteenth Amendment without binding the other. The Warren Court understood Section 5 as a structural device that would integrate legal and political constitutionalism. But the contemporary Court is no longer willing to tolerate political enforcement of the Fourteenth Amendment, and it has unabashedly asserted a prerogative to act as “the ultimate expositor of the constitutional text.”<sup>360</sup>

The theoretical engine of the Rehnquist Court’s recent Section 5 decisions is the enforcement model, which we have attempted to define and evaluate. The model has powerful appeal because it draws on rule-of-law values affirmed in *Cooper v. Aaron*<sup>361</sup> to restrain Congress in the exercise of its Section 5 power, although, as we demonstrate, the model extends *Cooper* in ways that are inconsistent with the actual jurisprudence and practice of the Warren Court itself. The enforcement model is theoretically confused because it requires courts to distinguish between Section 5 statutes that interpret and Section 5 statutes that enforce constitutional rights, yet it cannot explain when legislative rights are sufficiently similar to judicial rights as to count as “enforcing” them. The model is accordingly susceptible to abuse because extraneous concerns like federalism or a hostility to civil rights can implicitly drive decisions in ways that are never openly named or defended.

More fundamentally, we argue that even if judges *could* distinguish between enforcement and interpretation of the Fourteenth Amendment, imposing the restrictions of the enforcement model would impair the well-being of our constitutional order. The model presupposes that Congress’s efforts independently to articulate constitutional meaning are contaminated

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360. *Morrison*, 529 U.S. at 616 n.7.

361. 358 U.S. 1 (1958).

with politics and hence that they threaten to corrupt the Court's own obligation to declare constitutional law. We recount the rise of modern sex discrimination jurisprudence to demonstrate just how false this presupposition is.

Classifications based upon sex now receive elevated scrutiny in judicial decisions enforcing the Fourteenth Amendment because citizens mobilized to create a new constitutional norm of sex equality; because Congress responded to this mobilization with lawmaking, including Section 5 legislation; and, finally, because the Court was able to learn from these events about a better way to interpret the Constitution. The enforcement model would have deprived Congress of the confidence and authority to enact legislation expressing its evolving understanding of the equal citizenship principle. The model would have deflated the possibilities of citizen mobilization and pro tanto deprived the Court itself of the ability to declare judicial doctrine adequately grounded in the developing constitutional culture of the nation.

Because we believe that such grounding is essential to constitutional legitimacy, we have advanced an alternative model of Section 5 power, which we have called the model of policentric constitutional interpretation. The model draws on the nation's experience during the period between *Morgan* and *Boerne*, when the Court itself established a doctrinal regime that combined strong judicial protections for constitutional rights with far-ranging legislative authority to enact Section 5 legislation. The advantage of the model is that it would permit Congress to serve the function of articulating popular understandings of the Constitution and yet it would not impair in any way the Court's ability to safeguard constitutional rights. The account of Section 5 power we propose thus draws on the distinctive strengths of our tradition. It preserves both the nation's rich legacy of legislative constitutionalism and the judicially enforced constitutional rights on which we have come to depend.