

Congressional Statutory Responses to Supreme Court Precedent:

Comparing the Breadth and Potency of Statutes Invalidated by the Rehnquist Court and Analogous Statutes Subsequently Repassed by Congress

Justin N. Goldberger

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Committee Chair: Wayne Moore
Committee Member: Karen Hult
Committee Member: Luke Plotica

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Abstract

Many people assume that when the U.S. Supreme Court invalidates a federal statute as unconstitutional, the Court's decision establishes binding precedent that narrows the U.S. Congress's available options. This thesis examines whether Congress has in practice been able to effectively circumvent Supreme Court precedents while still acting consistently with such precedents in a narrow sense by not repassing an identical statute. More specifically, this work explores whether the U.S. Congress was able to repass new statutes *similar* to those previously invalidated by the Rehnquist Court (1986-2005). To more fully probe this issue, this study examines how often Congress has responded in such a manner, how successful Congress was in replicating the initial invalidated statute's *breadth* and *potency*, the success of the amended statute's subsequent implementation or whether the new statutes survived judicial scrutiny, and lastly, whether legislative policy goals or Court precedents prevailed. The research focused on the Rehnquist Court because it invalidated an unprecedented 34 federal statutes. This analysis found that Congress offered 11 proposals, but only repassed four statutes attempting to replicate the initial invalidated statutes. Nevertheless, in the four instances of successful reenactment, Congress was able to achieve, in practice, indistinguishable potency and breadth in two statutes and identical potency with significantly narrower breadth in one statute. This work is significant because it demonstrates that occasionally Congress has utilized available tools—in this case repassing analogous statutes—to effectively counter Supreme Court precedents. The Supreme Court is not always the exclusive or irrevocable arbitrator of constitutional controversies.

Dedication

This work is dedicated to my parents, Michael and Maureen. Words cannot express the gratitude and appreciation I have for your continued support and unconditional love. At times I know I appeared intransigent to your comments and suggestions, but after, I would always return to your ideas and (begrudgingly) come to the realization you were right. Not once have you doubted me and, during those times where I began to doubt myself, you were there to push me. This thesis is just as much yours as it is mine.

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Chapter 1: Introduction

Predominant American constitutional theories, whether advanced by the Supreme Court, non-judicial actors, or academics, seemingly reinforce a fundamental divide separating “law”—fundamental norms viewed as the exclusive province of the courts (occasionally occupied by periodic non-judicial involvement during extraordinary times of higher lawmaking)—and “politics”—the making of policy regarding fundamental norms viewed as the sphere of Congress and the president.¹ However, this divide is a normative product that constitutional theorists have promulgated over time; in practice, judicial and non-judicial actors alike regularly traverse this divide. Non-judicial actors routinely work to shape and determine constitutional norms, rather than only under extraordinary circumstances. Concurrently, the Supreme Court acts not only as a legal institution, but also as a player in national policymaking.

Of the aforementioned law-politics divide, in *Constitutional Rights and Powers of the People*, Wayne Moore describes the different ways ‘the people’ shape constitutional norms. He begins, “[c]onstitutional politics in the United States extends beyond the practices of judges enforcing fundamental norms made in the past or creating new ones to deal with changed circumstances. It is also a function of commitments and actions within the polity at large.”² Moore continues: “Creating and maintaining constitutional meaning and authority are ongoing and normal processes, not periodic or extraordinary... The law

¹ Although I focus on Congress in this article, I leave open the notion that constitutional politics is also drastically shaped by the president, social movements, political parties, states, scholars, and others.

² Wayne Moore, *Constitutional Rights and Powers of the People* (Princeton, New Jersey: Princeton University Press, 1996), 3.

of the land is richly textured not capable of being reduced to either-or propositions of the sort that drive constitutional litigation.”³

Moore continues with a helpful analogy likening conventional models of American constitutionalism to viewing aerial coastline photographs. Conventional constitutionalism models, like aerial coastline photographs, outline the boundaries between rights of the people and the governmental powers—the boundaries between the land and the sea. He argues judges interpret the snapshots, ensuring those engaged in “politics” do not cross the normative boundaries established during periodic bursts of higher lawmaking.

However, as Moore concludes, these aerial photos showing boundaries between sea and land do not capture gradations, layers, height, depth, or incremental change: “Dichotomies are inadequate to account for the land’s rich texture: gradations of constitutional meaning and authority, with complex configurations of political power. As riverbanks direct the course of water to the sea, constitutional structures channel popular choices...As water comes from and returns to the sea, activities of American constitutionalism are ongoing and cyclical processes which intersect variously and at different stages with choices by ‘the people’ and their representatives.”⁴

Moore’s book goes on to elaborate on how ‘the people’ shape and determine constitutional norms within constitutional politics in the face of discordant Supreme Court constitutional interpretations; however, he also alludes to an important conduit through which ‘the people’ act: their representatives. This thesis takes a different, though

³ *Id.* at 3

⁴ *Id.* at 3-4

parallel, route than Moore in focusing on ‘the people’s’ representatives: more specifically, the U.S. Congress.

This thesis also considerably departs from Moore and comparable works in another way. Unlike Moore’s model, this work does not claim to describe the ways Congress has responded to the Court’s constitutional interpretations voiced in cases with conflicting constitutional views—articulated and embedded in legislation—in working to establish new fundamental constitutional norms.⁵ Rather, this thesis examines Congress, in instances where—in working towards its policymaking goals— it did not necessarily take contradicting constitutional interpretations inconsistent with the Court, but instead worked to circumvent the Court’s constitutional interpretations to achieve similar legislative effects as legislation previously invalidated by the Court. In other words, this thesis examines instances where Congress, relying on new (albeit, analogous) constitutional interpretations—interpretations implicit in congressional legislation—repassed or repropose new legislation regulating similar legislative niches as previous statutes invalidated by the Supreme Court.

It’s important to emphasize at the outset, again, this thesis has no intentions of fashioning a normative theory relating to *how* Congress has shaped constitutional norms

⁵ Originally, this thesis began as an analysis of how Congress, like the president or the people, had in the past repassed identical legislation in response to the Supreme Court invalidating initial congressional legislation—repassed legislation contradictory to the precedent set in the case, and therefore rejecting judicial supremacy and embodying departmentalism (both defined later). However, in examining the material in the Rehnquist Court, I found that Congress had not explicitly attempted to go against the Supreme Court in such a direct manner (by repassing identical legislation), but Congress had attempted to repass very similar legislation, based on new constitutional interpretations implicit within new legislation, all whilst adhering to Supreme Court precedent. For me, the logically the next step was to see how successful these congressional repassages were at replicating the provisions in the initial legislation that had been invalidated by the Court.

in the face of competing Supreme Court interpretations, or even, within said occurrences, *whether* Congress has shaped constitutional norms at all.⁶ Prevalent accounts examining these questions form theorizations of occurrences of non-judicial actors creating norms—theorization, albeit backed by empirical evidence, that assumes a normative tone when identifying these instances and addressing the *why*, *how*, or even the *whether* a norm was created.⁷ Furthermore, when fashioning these accounts of non-judicial norm creation, authors of such accounts conceptualize non-judicial actors’ interpretations in reference to the Court’s interpretations. These accounts truncate the available interpretive positions open to non-judicial actors in working towards their policy goals by characterizing responses as either accepting the Court as setting precedent in a case (i.e. accepting judicial interpretive supremacy; further defined within Chapter 2) or rejecting the Court precedent to push their own constitutional interpretations (i.e. rejecting judicial interpretive supremacy and embodying interpretive departmentalism). This bifurcation is not inaccurate; however, this conceptualization creates a false dichotomy, omitting the multitude of other responses available to actors when they do not wish to facially accept

⁶ Such an analysis would involve normative theorization of *how* or *whether* Congress has shaped constitutional norms in the face of competing Supreme Court interpretations and if so, *what* those new fundamental norms were. In other words, it would involve the my dictating, “Legislation introduced a new fundamental norm and here’s how it happened.” Rather, the more empirical analysis—has Congress repassed similar laws? How often has repassage occurred? And how successful had Congress been in repassage in attempting to replicate the initial statutes’ provisions invalidated by the Supreme Court?—seems a less speculative route. All of these questions are addressed later in-text.

⁷ I do not mean to assert that these theorizations related to norm creation are completely biased. Most of these accounts offer cogent and insightful empirical historical evidence in fashioning these accounts. However, at one point or another, the author usually identifies an instance of norm creation and then expounds upon said norm; however, the identification of a norm and how non-judicial actors built construct their own norms is usually formed by the author, even if backed with empirical evidence. This work simply aims to identify instances of congressional responses without necessarily making any claims related to norm creation.

the Court precedents' associated legislative consequences, but do not or cannot necessarily reject the Court precedent and consequentially, Court interpretive authority.⁸ Intuitively, why would Congress take on the onerous task of rejecting the Court interpretations concurrently justifying its interpretations over the Supreme Court's, if it could simply achieve similar legislative effects as the effects of the legislation invalidated by the Court all while acting consistent with Court precedent in the narrow sense of avoiding repassing the exact same legislation previously invalidated by the Court?⁹

Following this logic, I examined the other possible responses available for achieving Congress's policymaking goals; in particular, instances where Congress repassed/ repropose legislation with similar provisions as legislation invalidated by the Court. In these instances, rather than focusing on acceptance or rejection of Court decisions as setting precedent with constitutional constraints, this research simply examines whether Congress was able to achieve similar legislative effects by repassing

⁸ This conceptualization rests on a major assumption: that the Court leaves open interpretive apertures following a case. The Court could decide a case broadly or narrowly and, depending on how the Court chooses to decide, Congress could have more or less available options. However, in expounding upon these instances, I assume that Congress has at least a few options available following a judicial ruling.

⁹ The distinction between deferring to but not necessarily following a Court precedent is described on page 33 with Frederick Schauer and Larry Alexander's "On Extrajudicial Constitutional Interpretation" *Harvard Law Review*, Vol. 110, No. 7 (May, 1997): "Non-deference can be contrasted with deference to judicial authority, but it is important to emphasize that deference need not be absolute. An agent who defers to the decision of another does not necessarily follow it, for what we have a *reason* to do is different from what we should *actually do*, all things considered." Schauer and Alexander, with this example, refer to a more direct type of nondeference (though similar) than the type examined in this work (the differences are further discussed within Chapter 2).

new legislation reinterpreting the same clause to pass new similar, though distinctive, legislation without rejecting the Court's precedents.¹⁰

This work addresses several empirical questions: has Congress been able to effectively circumvent Supreme Court precedents—specifically the Rehnquist Court's precedents—by repassing similar statutes to those statutes previously invalidated without necessarily rejecting Court precedent and consequentially Court interpretive authority? If so, how often has Congress repassed or attempted to (re)pass, statutes with similar legislative effects as the statutes invalidated by the Rehnquist Court? Furthermore, when Congress repasses similar legislation, how successful—operationalized by the similarities of a statute provision's *breadth* and *potency*—were the repassed/reproposed statutes' provisions in replicating the initial statutes' provisions invalidated by the Court? Similarly, how successful were the amended statutes' subsequent implementation? How successful were the statutes under further judicial scrutiny (if it came under further judicial scrutiny)? And lastly, in these instances, did Congress's policy goals or the Court precedents prevail?

I hypothesized that Congress was able in some instances to effectively circumvent Supreme Court precedent by repassing similar statutes with analogous policy effects as those invalidated by the Court. Furthermore, I hypothesized that although Congress has not been able to repass statutes frequently, when Congress has reenacted statutes, Congress's new statutes successfully replicated the initial invalidated statutes' provisions

¹⁰ It is essential to note Congress is not repassing the very *same* statute in these instances, but a variation of the invalidated statute. If Congress were to repass the very same law invalidated by the Supreme Court, they would be rejecting the Court's precedent dictating the law as unconstitutional, therefore rejecting judicial interpretive supremacy and pushing interpretive departmentalism (both defined and described later).

so that the new statute achieved either slightly narrower, but very similar, potency and breadth. Furthermore, in these instances of successful replication, the implementation of the statute successfully achieved Congress's main legislative thrust as the initial statute invalidated by the Court. Further still, I hypothesized that those revised statutes, despite their resemblance to the previous invalidated statutes, also enjoyed success in not avoiding invalidation when, and if, under further judicial scrutiny.

The next chapter, *Chapter 2: Literature Review*, provides a review of relevant literature including past scholarship conceptualizing the Court as a political institution and, as a political institution, how it interacts with the coordinate branches in national policymaking; and how other scholars have refocused Court interactions as conflict over constitutional interpretive positions and the ensuing analysis of one scholar in particular—Keith Whittington—who fashioned an account normatively theorizing historic presidents' interpretive authority in denying Court precedent (and supremacy) to push their own constitutional interpretations (*Political Foundations of Judicial Supremacy*). Lastly, this section denotes ways in which this work builds on Whittington and traditional literature. It includes, further explication upon congressional-Court interactions (departing from Whittington's presidential focus) as well as expounding upon the differences between non-judicial actors responding on a dimension of constitutional interpretive positions subsequent judicial invalidation in working towards their policymaking goals, versus non-judicial actors responding in the dimension of revised policy subsequent judicial invalidation in working towards their policy making goals. It also suggests that there are further interpretive implications for the latter (building on Dinan whose conventional account articulates congressional responses to

Court decisions, but does not make the step to argue there are interpretive implications). It also addresses reasons for focusing on the Rehnquist Court's cases.

Chapter 3: Theoretical Boundaries and Methodology provides theoretical limits—what this work examines and what it omits—and methodology. The methodology section summarizes how congressional success in replicating invalidated statutes is operationalized—via legislative *breadth* and *potency*—and also outlines how each Court case and corresponding proposal/bill will be examined within the results section.

Chapter 4: Results includes the eleven Court cases as well as the seven bill proposals and four bills that garnered congressional support for repassage. In each instance, this section first provides the background of passage and main provisions of the initial invalidated bill/proposal that the Court invalidated. Second, it summarizes the case in which the initial legislation was invalidated including the case decision(s), the Court's reasoning(s), and the justices' vote count. Third, it goes over attempts within Congress to repass new legislation and the similarities between the new proposal's provisions and the invalidated provisions by the Court (measured by *breadth* and *potency*). Lastly, this section touches upon subsequent developments involving the implementation or further court proceedings (whether at a lower court or the Supreme Court) surrounding the new statute. This section is only provided with the four bills that were actually passed into law.

Chapter 5: Analysis and Conclusion summarizes and discusses the findings and analyzes the potential implications of these instances within the larger literature (literature such as Whittington's account). It also outlines potential future works related to Congress overcoming Court precedent's effects moving forward.

The significance of this work lies not with who determines constitutional meaning or who creates constitutional norms by examining the acceptance or rejection of Court precedent in attempting to garner authority for norm creation. Rather than normatively argue that a norm has been created and theorize how or why non-judicial actors were able to do so, this work's significance shows how Congress can work to accomplish its legislative agenda in the face of Court opposition, without ever explicitly, or directly, contradicting Supreme Court precedent, and consequentially, interpretive supremacy, (without ever claiming whether a new constitutional norm was created or not). If Congress is able to achieve virtually similar policy effects as those invalidated by the Court, it seems plausible that Congress might follow a similar route in future instances. In these instances, Court precedent is reduced to a symbolic boundary—returning to Moore's analogy—between rights and powers (since Congress can simply overcome the precedent policy effects) in that specific legislative niche. Future work will build off this work in determining whether or not a norm was created and the implications, if any, for interpretive supremacy with these instances of congressional responses.

Chapter 2: Literature Review

Chapter 2 addresses and summarizes the relevant literature and how I build off of, as well as depart from, existing scholarship. Many analyses framing conflicts between the U.S. Congress and the Supreme Court adhere to the boundary of politics and law mentioned in the opening paragraph. The result is literature that bifurcates judicial-congressional impasses into either discord over policy outcomes or disagreement over the meaning of constitutional clauses or meaning. Robert Dahl, in his article “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” frames Court-non-judicial conflicts as disagreement over policy. In doing so, Dahl equates national majorities’ preferences to national law-making majorities’ preferences in Congress and minorities’ preferences as Court policy preferences. He then measures whether the Court, as an institution, really acts in its conjectured anti-majoritarian capacity. On the other hand, Keith Whittington, in his book *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, reframes conflicts between the Court and non-judicial players—he mainly focuses on the presidency—as disagreement over constitutional interpretations. In doing so, he attempts to politically explain judicial interpretive supremacy, as well as those renowned departmentalist presidents who were able to upend the judiciary’s interpretations to establish constitutional meaning. Both offer cogent insight into their related analyses; however, both also concede to the bifurcation of either the Court acting as a policymaking institution *or* a legal institution—a concession, this work intentionally does not address. After I summarize both Dahl’s and Whittington’s work, I outline how this work departs from their work with the help of Larry Alexander and Frederick Schauer

and their analysis of extrajudicial constitutional interpretations as well as Walter Murphy with his review of *Political Foundations of Judicial Supremacy*. Departure from related work also includes, and thus addresses, Rehnquist Court specific literature. Mainly, I describe John Dinan and his article “Congressional Responses to the Rehnquist Court’s Federalism Decisions”. Dinan engages in the same analysis of congressional responses during the Rehnquist Court, however while Dinan addresses failures to overcome Court cases via repassage as an inability to build and hold political coalitions, this work reframes the analysis and examines the success and failure of repassage based on the constraints placed on Congress through relevant Court precedent.¹¹

A. *The Court as a Political Institution: Dahl and Whittington*

In 1957, Robert Dahl, in his pioneering article “Decision Making in a Democracy: The Supreme Court as a National Policy-Maker,” became one of the first political scientists to conceptualize the Supreme Court as not only a legal institution, but also a political institution. In the article, Dahl aimed to empirically test the role of the Court as guardian and defender of minority rights against the lawmaking majorities in Congress (representative—or so he claimed—of national lawmaking preferences). He prefaced his argument by beginning, “[t]o consider the Supreme Court of the United States strictly as

¹¹ Also important, this work does not claim that the inability of Congress to repass or repropose amended legislation is a result of constraints placed on Congress through Court precedent; nor do I claim that constraining precedent could be or is the only factor limiting Congress. Rather, just as Dinan addresses Congress in its political coalition building in responding to the Court, this account addresses Congress responding to the constitutional interpretations voiced by the Court in a case. It also does not address the extent to which Court precedent is constraining upon Congress; only whether Congress was able to propose ample constitutional statutory justification in the language of their revised statute.

a legal institution is to underestimate its significance in the American political system. For it is also a *political* institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy.”¹²

Dahl continued to articulate his key conceptualization of the political Court: “What is critical is the extent to which a court can and does make policy decisions by going outside established ‘legal’ criteria found in precedent, statute, and constitution. Now in this respect the Supreme Court occupies a most peculiar position, for it is an essential characteristic of the institution that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task... Very often, then, the cases before the Court involve alternatives about which there is severe disagreement in the society, as in the case of segregation or economic regulation; this is, the setting of the case is ‘political.’ Moreover, they are usually cases where competent students of constitutional law, including the learned justices of the Supreme Court themselves, disagree; where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedent may be found on both sides; and where experts differ in predicating the consequences of the various alternatives or the degree of probability that the possible consequences will actually ensue.”¹³

In these cases, Dahl argued, the Court—logistically speaking—has a few options in which to decide a case, dependent upon the intricacies of said case: “[A] case will hardly come before the Supreme Court unless at least one person prefers an alternative that is opposed by another person. Strictly speaking, then, no matter how the Court acts in

¹² Robert Dahl, “Decision Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law*, Vol. 6 (1957): 279-95.

¹³ *Id.* at 280

determining the legality or constitutionality of one alternative or the other, the outcome of the Court’s decision must either (1) accord with the preferences of a minority of citizens and run counter to the preferences of the majority; (2) accord with the preferences of a majority and run counter to the preferences of a minority; or (3) accord with the preferences of one minority and run counter to the preferences of another minority, the rest being indifferent.”¹⁴

In the rest of his article, Dahl empirically tests the myth of the Court as the antimajoritarian institution protecting minorities’ rights by equating national majorities to law-making majorities and measuring the frequency with which the Court’s policy positions—inherent in the decisions of Court cases invalidating federal legislation throughout U.S. history—won out against the policy preferences of the national lawmaking majority of Congress and the president—again, which he held as representative of a national majority. Dahl controlled for the waning of a lawmaking majority by cutting off his study of Court invalidations at four years; he also differentiated between “legislation that could be reasonably regarded as important *from the point of view of the lawmaking majority* and those involving minor legislation.”¹⁵ In doing so, Dahl’s findings went against the conventional narrative of the Court as independent and protective of fundamental rights. He found that the Court seldom went against the major policy preferences of the national lawmaking majority;¹⁶ furthermore, when the Court did stray and invalidate major federal policy legislation, Congress passed

¹⁴ *Id.* at 282

¹⁵ *Id.* at 287

¹⁶ *Id.* at 292

new legislation reversing the Court's decisions approximately seventy four percent of the time.¹⁷

Of his results, he argued, "National politics in the United States, as in other stable democracies, is dominated by relatively cohesive alliances that endure for long periods of time. One recalls the Jeffersonian alliance, the Jacksonian, the extraordinarily long-lived Republican dominance of the post-Civil War years, and the New Deal alliance shaped by Franklin Roosevelt...Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance."¹⁸

In concluding, Dahl contended that even though the Court was part of the national lawmaking alliance, the Court was not simply an agent of this alliance: "[The Court] is an essential part of the political leadership and possess some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance...It follows that within the somewhat narrow limits set by the basic policy goals of the dominant alliance, the Court *can* make national policy. Its discretion, then, is not unlike a powerful committee chairman in Congress who cannot, generally speaking, nullify the basic policies substantially agreed on by the rest of the

¹⁷ *Id.* at 290 (Table 6); when minor legislation is included within the analysis, Congress only reversed the Court's position fifty percent of the time (still a significant percentage).

¹⁸ *Id.* at 293

dominant leadership, but who can, within these limits, often determine important questions of timing, effectiveness, and subordinate policy.”¹⁹

Dahl concedes that the Court can intervene during certain times when conditions are right: “There are times when the coalition is unstable with respect to certain key policies; at very great risk to its legitimacy powers, the Court can intervene in such cases and may even succeed in establishing policy. Probably in such cases it can succeed only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership; norms which are not strong enough or are not distributed in such a way as to insure the existence of an effective lawmaking majority but are, nonetheless, sufficiently powerful to prevent any successful attack on the legitimacy powers of the Court.”²⁰

Although Dahl’s article was groundbreaking in examining the Court as a political institution, almost more importantly, it was pioneering in that it opened up a plethora of other research trajectories. As Gerald Rosenberg points out in his analysis of the influence of Dahl’s article, the article influential nature cannot be attributed to the article’s veracity: “Dahl made several questionable assumptions, excluded from his analysis a great deal of data arguably relevant to his research question, and reached some conclusions that were neither supported by the data he presented nor by the subsequent literature.”²¹ Rather, as Rosenberg’s thesis articulates, “the points that Dahl makes can be

¹⁹ *Id.* at 294

²⁰ *Id.* at 294

²¹ Gerald Rosenberg, “The Road Taken: Robert A. Dahl’s *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*,” *Emory Law Journal*, Vol. 50, Issue 2 (2001): 613-630; to see a critical analysis of Dahl’s work see generally Jonathan Casper, “The Supreme Court and National Policy Making,” *The American Political Science Review*, Vol. 70, No. 1 (March 1976), 50-63

seen as precursors of, or contributors to, a plethora of research trajectories. In many ways, he suggested the research road to be taken by future generations of judicial scholars.”²²

One of such scholars was Keith Whittington.

Keith Whittington, writing half a century later, rather than conceptualizing these disputes between non-judicial branches and the Court as only conflicting policy positions, in his book *Political Foundations of Judicial Supremacy*, Whittington reframes these conflicts as conflicts over constitutional meaning in attempting to explain the political roots of the judiciary’s dominance in the realm of constitutional interpretation. He writes, “Dahl framed conflicts between political actors and the courts in terms of divergent policy preferences. One alternative is to reframe those conflicts in terms of substantive disputes over constitutional meaning. Although political scientists have been quick to accept Dahl’s portrait of judges as policymakers, there is an intuitive appeal to regarding them as at least as concerned with perceived constitutional transgressions of political majorities as with their policy agenda. Rather than judges stooping to battle elected officials over policy, perhaps elected officials rise up to battle judges over the Constitution.”²³

Relying on this conception, Whittington attempted to sketch out the relative success of the Court’s constitutional interpretations versus non-judicial branch interpretive positions; Whittington attempts to politically explain the foundations of judicial supremacy.

²² *Id.* at 615

²³ Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007), 45

Departing from Whittington for a brief moment, in its most elementary capacity, judicial supremacy is the notion that the Supreme Court, when it interprets the constitutional text utilizing judicial review, sets binding precedent upon the coordinate branches via its holdings and reasonings—precedent, the coordinate branches are obligated to comply with and adhere to when faced with parallel circumstances in the future. Currently, many—including governmental officials, citizenry, scholars, and others—seem to view judicial interpretive supremacy as synonymous with judicial review, however, the two are distinctive concepts.

At its most fundamental level, judicial review, amongst the national institutions, is defined as the concept “that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch.”²⁴ Following its legal procurement²⁵ in *Marbury v. Madison*²⁶, judicial review has become more common in practice within American government despite its explicit absence in the constitutional text. However, among other actors, for one reason or another, there seems to be an even more significant conception of the Supreme Court’s decisions and constitutional reasonings when the Court decides a case. A presupposition has evolved

²⁴ “Wex Legal Dictionary: Judicial Review,” *Cornell University Law School: Legal Information Institute (LII)*, https://www.law.cornell.edu/wex/judicial_review

²⁵ The use of “legal procurement” is to differentiate between judicial review’s origination, its preliminary pragmatic application, and its firm establishment. The concept of judicial review, within the U.S. had originated long before the U.S. Constitution’s ratification. In *Marbury v. Madison*, the U.S. Supreme Court first made the claim that the judiciary has the power of judicial review including the invalidation of a statute, ‘procuring’ it within the U.S. legal system. However, the establishment of judicial review as a firm judicial practice occurred as a result of the Court and other actors constructing it over time via a continuing constitutional dialogue, among the three branches and other actors, defining and redefining the doctrine of judicial review. See: Edward S. Corwin, *The Doctrine of Judicial Review*, (Princeton, New Jersey: The University Press, 1914), vi-177.

²⁶ *Marbury v. Madison* (1803), 5 U.S. 137, 2 L. Ed. 60.

among the coordinate branches, governmental actors, citizens, and other players, that when the Court decides a case through its practice of judicial review, its decisions and constitutional reasoning set binding precedent obligatory for other governmental branches to follow in future actions and similar constitutional impasses.

The late Walter Murphy and his co-authors in their book *American Constitutional Interpretation* concisely articulate what distinguishes judicial interpretive supremacy from judicial review. Murphy et al explain: “This authority of a court—the authority to refuse enforcement to an act thought to be unconstitutional—may be all that is meant by judicial review. If so, judicial review can leave elected officials free to act on their own interpretations of the Constitution in future cases—free, that is, to reject judicial interpretations as precedents that bind their future conduct.”²⁷ Murphy et al continues, explicating on the “transformation” of judicial review to judicial supremacy: “[F]rom the narrow power to refuse enforcement to an act, many observers have inferred something more: the obligation of coordinate officials not only to obey that particular ruling but to accept that ruling as legal precedent binding their future conduct. This additional something transforms judicial review into judicial supremacy: the Court decides what the constitution means not only for the case at hand but for future judgments of all other officials...As outrageous as this result has appeared to politicians from Jefferson to

²⁷ Walter Murphy, James Fleming, Sotirios Barber, and Stephen Macedo, *American Constitutional Interpretation: 4th Edition* (New York, New York: Foundation Press, 2008), 284; Murphy, when writing that judicial review leaves elected officials free “to reject judicial interpretations as precedents” is referencing interpretive departmentalism—which he continues on to define later in “ACI”.

Reagan and beyond, the practice of judicial supremacy has achieved informal but apparently firm constitutional status with the American people.”²⁸

Returning to *Political Foundations of Judicial Supremacy*, Whittington prefaces his book by facially rejecting the embedded existence of judicial supremacy: “Treating judicial supremacy simply as a legal doctrine, justified by the authority of precedent, does little to advance our understanding of judicial supremacy and how it might fit within the constitutional order. Once we move beyond the mere assertion that the Constitution somehow ‘requires’ judicial supremacy and that the judiciary always determines constitutional meaning, we are left with difficult problems explaining the relative success of judicial supremacy over competing possibilities and the consequences for our constitutional system of both judicial supremacy and the challenge to it.”²⁹

Continuing along this analytical vein, Whittington explicates the importance of comportment among political actors in allowing the political construction of judicial interpretive supremacy. He argues, “[j]udicial supremacy itself rests on political foundations. The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate...A coherent theory of judicial supremacy must somehow explain how this long tradition of political constitutional discourse is consistent with the model of the Court as the ultimate constitutional interpreter.”³⁰

²⁸ *Id.* at 285

²⁹ Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007), 10

³⁰ *Id.* at 9-10

In beginning to introduce his own theories on the political construction of judicial supremacy, Whittington’s key conceptualization is the notion of interpretive authority in constitutional interpretation. He theorizes that rather than having a “correct and stable answer to the question ‘Who shall interpret?’ that can be deduced from the structure, purpose, or specific provisions of the Constitution...[o]ver the course of American history, there has been no single, stable allocation of interpretive authority. Rather, various political actors have struggled for the authority to interpret the Constitution.”³¹ He argues that actors have competed to displace other potential constitutional interpreters to assert their own authoritative primacy to decide contested constitutional principles—principles typically essential to their own substantive policy agenda. Even so, Whittington holds that “[q]uite often, [political actors] have chose to defer to the judiciary and have been willing to support claims of judicial supremacy”.³² Despite the trend of political actor deference, Whittington embraces that other actors have also chose not to defer to the judiciary’s interpretive authority, arguing “[a]t times, others who have been able to make a compelling case that they understand the Constitution better than the courts have displaced the judiciary as the authoritative interpreter of the Constitution.”³³ And in doing so, said actors embody interpretive departmentalism.

For Whittington, “[c]hallenges to judicial supremacy can come from several directions, from Congress or the president, from state officials or private citizens.”³⁴

Although Whittington allows for the possibility for other actors to challenge the

³¹ *Id.* at 15

³² *Id.* at 15

³³ *Id.* at 15

³⁴ *Id.* at 15

interpretive authority of the Court, he claims—not without dissension³⁵—that other claims non-presidential actors have “relatively little effect”: “Given the status and power of the presidency, executive challenges to judicial supremacy are likely to represent the most important ones.”³⁶

Whittington continues by explaining his logic for consigning legislative challenges to judicial supremacy as “inherently limited”: “Unable to develop explicit theories of legislative supremacy, congressional challenges to judicial authority are more likely to take the form of criticisms of particular judicial decisions... Congress is more likely to try to enter into a dialogue with the Court over a particular constitutional interpretation than to challenge the Court’s authority as the ultimate interpreter... Congress can readily deny the exclusivity of judicial constitutional interpretation, but it cannot easily challenge the claim that the Court is the ultimate constitutional interpreter.”³⁷

Having narrowed his focus to presidential challenges to judicial interpretive authority, Whittington continues by positing the concept of constitutional regimes, or the established ideological constitutional order. He argues that these regimes are either crumbling or concrete, and presidents—depending on their coalition’s political strength

³⁵ Whittington’s Princeton predecessor, Walter Murphy disagreed with Whittington and voiced is discord in a review of *Political Foundations of Judicial Supremacy* in a 2008 American Society for Legal History article (the article and Murphy’s disagreement is reviewed more in-depth later). I also agree with Murphy in that presidents, albeit very important for their constitutional leadership, are not the only important actors in constitutional articulation. My model also allows interpretive apertures for which Congress, as well as states and the general populace, articulate and help shape the constitutional landscape through their reactions to Court decisions. However, this work will focus on those reactions of Congress and presidents.

³⁶ *Id.* at 15

³⁷ *Id.* at 16

and whether they acquire multifarious support from other political actors as well as widespread popular support—during a crumbling constitutional regime, can challenge the current regime in order to reconstruct the constitutional regime, usually in order to push their own substantive policies. Whittington terms these presidents “reconstructive presidents” and claims few presidents have taken on such a difficult task, but those who have, are renown for doing so: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and less strongly, Ronald Reagan.³⁸

In contrast to judicial supremacy, these “reconstructive” presidents reject judicial interpretive eminence, pushing their own interpretations and epitomizing interpretive departmentalism. Departing from Whittington again, interpretive departmentalism, or simply departmentalism, is the concept that each of the three branches share the task of constitutional interpretation and may interpret the constitutional text for themselves and determine constitutional meaning detached from other branches’—particularly the Court’s—constitutional interpretations. Generally, interpretive departmentalists do not deny the Court’s ability to practice judicial review and the finality of its decisions regarding a specific case or the decision for those parties involved in the case; however, they do deny that the Supreme Court’s decisions and reasonings extend beyond said case and set precedent that is binding upon future action in its rulings.

Relying again on Walter Murphy—despite his claims of the current perception of judicial supremacy—claims departmentalism is the assertion of interpretive “equality” or that every coordinate branch reigns supreme within their own authoritative spheres: “No

³⁸ *Id.* at 23

president has ever pressed a claim to supremacy in constitutional interpretation. On the other hand, some presidents, like many legislators, have asserted equality.”³⁹

Murphy, in describing departmentalism, cites two archetypal early presidential departmentalists with James Madison and Thomas Jefferson: “Madison’s position shifted as he faced various crises, but in the early days of the Republic he was clearly a departmentalist.”⁴⁰ In addressing the First Congress, Madison argued, “[t]here is not one Government...in the United States, in which provision is made for particular authority to determine the limits of the constitutional division of power between the branches of the Government. In all systems, there are points which must be adjusted by the departments themselves, to which no one of them is competent.”⁴¹

When he became president, Jefferson, a “more consistent” departmentalist, pardoned many people who had been convicted under the Sedition Act—a statute passed by a Federalist Congress.⁴² In doing so, he argued that some “seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than the Executive to decide for them...The judges, believing the law constitutional, had a right to pass a sentence...But the Executive, believing the law to be unconstitutional, were bound to remit the execution of it because that power had been confined to them by the Constitution...”⁴³

³⁹ Walter Murphy, “Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter,” *The Review of Politics*, Vol. 48, Issue 3 (1986): 401-423, 411.

⁴⁰ *Id.* at 412 (“more consistent” is Murphy’s terminology)

⁴¹ *Annals of Congress* (1789), I: 520, originally cited in Murphy, *supra* note 27, at 411

⁴² *Id.* at 412

⁴³ Lipscomb, *Writings of Thomas Jefferson*, 11: 50-51, originally cited in Murphy, *supra* note 27, at 412

Since Jefferson and Madison, other presidents, though infrequent, have made similar departmentalist challenges to Supreme Court interpretations. Renowned examples of presidential departmentalists include Andrew Jackson, and his veto of the bill re-chartering the national bank on constitutional grounds—in the face of the Court upholding the Bank in *McCulloch*;⁴⁴ Abraham Lincoln, and his denial that *Dred Scott* had irrevocably decided the case of slavery in the territories—pushing back against the Taney Court’s decision by urging Congress to act;⁴⁵ and Franklin Roosevelt, after having his New Deal legislation struck down multiple times by the *Lochner Court*, mounting an offensive to increase the justices on the Court through his proposed Court-packing plan.⁴⁶

It is important to note, in each of these cases no president denied the Supreme Court’s finality in issuing the decisions for the individual cases involving the statutes and litigants involved in said case. Jackson held that the Supreme Court upheld the Second Bank in *McCulloch* and, in his veto of bill re-chartering the national bank, never denied the decision regarding the Second Bank’s constitutionality; Jackson did deny *McCulloch* had set precedent in regards to the notion of a national bank’s constitutionality, however not the individual Second Bank’s constitutionality. Likewise, Lincoln never denied the Taney Court’s decision in *Dred Scott* as applied to Dred Scott and the original Missouri

⁴⁴ *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 & “Andrew Jackson’s Veto of the Bank Bill” (1832): James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents: Vol. II*, (Washington, DC: Bureau of National Literature and Art, 1908) 581-582.

⁴⁵ *Dred Scott v. Sandford* (1856), 60 U.S. (19 How.) 393, 15 L.Ed. 691 & “Abraham Lincoln’s First Inaugural Address” (March 4, 1861): Roy P. Basler, *The Collected Works of Abraham Lincoln: Vol. IV* (New Brunswick, N.J: Rutgers University Press, 1953), 262-271

⁴⁶ *A.L.A. Schechter Poultry Corp. v. United States* (1935), 297 U.S. 1; *United States v. Butler* (1936), 295 U.S. 495; and others & “Franklin D. Roosevelt’s Speech on Reorganizing the Federal Judiciary” (1937): Speech of March 9, 1937. Senate Report No. 711, 75th Cong., 1st Sess., 41-44.

Compromise (1820); Lincoln only denied that the *Dred Scott* case had set precedent in finally resolving the issue of slavery in the territories. Lastly, Roosevelt, like his departmentalist predecessors, never denied the individual decisions striking down his New Deal legislation (such as the National Industrial Recovery Act (NIRA) of 1933 in the case *Schechter Poultry Corp. v. United States* (1935)⁴⁷ or the Agricultural Adjustment Act (AAA) of 1933 in the case *United States v. Butler* (1936)⁴⁸); Roosevelt did however, deny that the *Lochner* Court had irrevocably decided, via precedent through cases, the scope of Congress's commerce power.

Returning to Whittington, the more common presidency, Whittington argues, is when the constitutional regimes are stable and produce the "oppositional" or "preemptive president," and the "affiliated president." Preemptive presidents win office despite their hostility to a constitutional regime that remains "vibrant, popular, and resilient to pressure."⁴⁹ "Such oppositional candidates may manage to win election, but they come to the office with relatively little authority and few resources with which to increase their authority."⁵⁰ This lack of authority, as well as the resilience of the current constitutional regime, prevents these presidents from becoming reconstructive. These presidents include Grover Cleveland⁵¹, Richard Nixon⁵², and Bill Clinton.⁵³ Often these presidents are

⁴⁷ *Schechter Poultry Corp. v. United States* (1935), 295 U.S. 495

⁴⁸ *United States v. Butler* (1936), 297 U.S. 1

⁴⁹ *Id.* at 161

⁵⁰ *Id.* at 161

⁵¹ *Id.* at 198

⁵² *Id.* at 190

⁵³ *Id.* at 206

helped to election via third party spoilers, such as Theodore Roosevelt in 1912 or Ross Perot in 1992; they often also face opposition from both sides of the aisle.⁵⁴

Affiliated presidents are members of the same political party who originally articulated the current constitutional regime, and hence, further elaborate or strengthen the regime: Presidents such as James Monroe for Jefferson,⁵⁵ Theodore Roosevelt for Lincoln,⁵⁶ and Lyndon B. Johnson for FDR.⁵⁷ Whittington argues: “Presidents may be positioned to reconstruct the inherited constitutional order, in which case they will seek to maximize their own interpretive authority. More likely, they will operate within that established order, whether in affiliation with or in opposition to the dominant regime. In such cases they will be forced to share the interpretive task with the courts and will have a variety of reasons to defer to judicial authority. When the political debate begins to focus on ‘constitutional baseline’ itself, judicial authority becomes more tenuous and other political actors make stronger claims to interpretive primacy. When the baseline is itself fairly stable and constitutional debates become more diffuse and focused on more marginal disputes, the political incentives to displace the primary interpretive authority of the Court are weak.”⁵⁸

In asserting his ‘usurpation-and-acquiescence’ model, he holds that over time, most presidencies—despite those aberrant reconstructive presidents—have accepted the “priority of the judicial voice” by deferring to the judiciary’s constitutional decisions when politically convenient or because of a lack of coalitional support. He concludes,

⁵⁴ *Id.* at 206

⁵⁵ *Id.* at 172-173

⁵⁶ *Id.* at 261-264

⁵⁷ *Id.* at 152

⁵⁸ *Id.* at 22-23

“[t]he judiciary has been able to sustain its claims to interpretive predominance primarily because, and when, other political actors have had reasons of their own to recognize such claims. Powerful political figures have often found such reasons and have determined that judicial supremacy has been in their own best interests. Occasionally, political leaders reject the Court’s claim for its own superiority and have advanced their own claims for interpretive authority.”⁵⁹

This deference, Whittington claims, has led to the growth and securitization of judicial supremacy, however, it has not led to judicial monopolization of constitutional interpretation. Whittington holds that political actors, including the Courts, have and continue to compete for authority to interpret the constitutional text: “As the previous chapters indicates, judicial authority must be constantly nurtured within the political arena. When judicial ambitions are too disruptive to the plans of other powerful political actors, then those ambitions are likely to encounter serious resistance. Under normal circumstances, however, and given a modicum of political sense on the part of the judges, the authority of the Court is likely to actually be enhanced by judicial interventions. In the politics of affiliation, the justices generally swim with the political current and they can make a substantial progress as a result.”⁶⁰

Whittington theorizes that currently (writing in 2007) the political coalitions are much too fractious and political parties too intransigent compared to those of the past, to the point where judicial supremacy now holds a firm status in American government: “We now live in a time in which political leaders simultaneously defer to the authority of the Court to say what the Constitution means and criticize the justices in the strongest

⁵⁹ *Id.* at 27

⁶⁰ *Id.* at 160

terms for how they exercise that authority... In the twentieth century, precisely when the Court's efforts at constitutional interpretation became more frequent and its perceived need to rein in the increasingly active political branches of government grew, judicial supremacy acquired new dimensions."⁶¹

In conclusion, Whittington reflects back on the political construction of judicial interpretive supremacy: "Judicial supremacy, like the powerful presidency, the centralized state, or myriad other features of constitutional landscape, has been carved out by accumulated political actions of judges, politicians, and citizens over the course of more than two centuries."⁶² Continuing, he argues: "Judicial supremacy is established by political invitation, not judicial putsch. Judges become prominent and trusted interpreters of the Constitution, gaining authority over other possible interpreters who have more dubious claims and less desire to articulate and uphold fundamental commitments of the regime... Within its sphere, the judiciary has enjoyed a remarkable success... They have asserted the right to say what the Constitution means, and political leaders have generally chose to respect that right. Judicial supremacy is not intrinsic to the constitutional scheme, but it has often emerged out of it."⁶³

B. Departing from Whittington and Dahl:

i. Congress Achieving Similar Policy Effects Through Statutory Responses

⁶¹ *Id.* at 283-284

⁶² *Id.* at 291

⁶³ *Id.* at 294-296

In concluding his book, Whittington claims “in the twentieth century...judicial supremacy acquired new dimensions” to the point where “[w]e now live in a time in which political actors simultaneously defer to the authority of the court to say what the Constitution means and criticize the justices in the strongest terms for how they exercise that authority.” Whittington, publishing in 2007, in writing “we now live in a time...” must have been referencing, at least partially, the Rehnquist Court, a period where Court-Congress relations were far from harmonious (with an unprecedented 34 federal statutes invalidated). However, his claims of simultaneous deference to the Court seem to truncate the micro-politics at play between the Rehnquist Court and Congress (and the president). Congress responded to the Rehnquist Court in numerous ways to the invalidation of its legislation, without necessarily challenging Court precedent—and thus the court’s interpretive authority—but without necessarily deferring to the policy outcomes of the Congress-Court impasses.

This dichotomy of actors either accepting the Supreme Court’s precedents, therefore accepting judicial supremacy, or rejecting the Supreme Court’s precedents in pushing one’s own constitutional interpretations—rejecting judicial supremacy and embodying departmentalism—is not inaccurate. However, this dichotomous narrative abbreviates the multidimensional nature of available options open to Congress, as well as the president, in the wake of a Supreme Court precedent. There are instances where actors accept the Supreme Court precedent, but rather than placidly accept the legislative consequences of said precedent, work within the precedent to achieve virtually similar effects as those within legislative policymaking goals. In these outcomes, where Congress is able to achieve virtually similar policy effects as those effects invalidated by

the Supreme Court, why would congressional members take on the onerous task of attempting to garner appropriate interpretive authority to challenge the Court's supremacy? Rather, actors can simply achieve virtually indistinguishable policy effects with the same outcome as if a departmentalist actor were to deny Court precedent—at least in said specific legislative niche.⁶⁴

Imagine, for a second, the Supreme Court and Congress as a parent and a child. The child—Congress—climbs a tree in order to see out over a forest. The parent—the Court—sees the child climb the tree and tells the child “Do not *climb that* tree again. I forbid you to *climb that* tree to see out over the forest.” In commanding the child not to *climb that* particular tree, from the perspective of the child, the parent sets a precedent not to *climb any* tree to see out over the forest.⁶⁵ Within a case, the Supreme Court, in invalidating a specific statute, not only invalidates that individual statute, but also sets a precedent with their decision and reasoning related to constitutional clause—assuming, at

⁶⁴ I do not mean to claim that these instances where Congress is able to overcome the Court precedent's policy effects and instances of departmentalist actors are identical. Departmentalist claims are focused on what Whittington terms the ‘constitutional baseline’ whereas the former are focused simply on the policy. However, I mean to argue that sometimes overcoming the Court precedent's policy effects have similar implications as those departmentalist actors. In other words, sometimes overcoming the Court precedent's policy effects has a more permanent effect that can be utilized by future actors that can be likened to the permanency of departmentalist constitutional interpretations such as FDR's interpretation expanding the commerce clause, for example.

⁶⁵ This analogy is working under the assumption that Congress assumes the Supreme Court sets precedent when it decides cases. This is not something I am assuming, but something I found within the cases I examined. If, within the cases I examined, Congress believed the Court not to be setting precedent with their decisions, they would have worked to repass identical legislation as the legislation invalidated by the Court. However, in each instances of response, I found slight variations leading me to believe Congress was accepting that the Court set precedent, but still working to circumvent said precedent. Therefore, for this analogy, I also assume the Court is setting precedent with its decisions.

least until an actor pushes departmentalists claims, judicial interpretive supremacy. In other words, the Court sets a precedent that Congress may not pass another identical statute and also sets precedent related to the constitutional clause (and/or aspect) Congress relied on to pass the statute.

Predominant accounts (including Whittington's), addressing who determines constitutional meaning, in this analogy, concentrate on whether or not the child—Congress—disobeyed the parent's—the Court's—precedent not to climb a tree: whether they accept or reject judicial supremacy or departmentalism. However, these accounts miss an important point: the actual tangible product that took place—the policy decision. Accounts such as Dahl's, simply focus on the policy decisions—on *who enacts* policy. However, accounts such as Dahl's fall short and fail to address how successful Congress was in overcoming the Court precedent—with the focus on constraining Court precedent rather than political coalition-building constraints—in achieving its original policy goals.

Imagine, the child, respecting parental authority and precedent, instead of climbing or not climbing that tree, or any tree, grabs a ladder, places it against the tree, climbs the ladder, and still looks out over the forest. One can liken this to Congress, without ever questioning or rejecting the Court precedent or interpretive authority, trying to enact legislation—through new constitutional clauses or working within the Court's interpretations of the same clause—offering new interpretations, implicit within said legislation, with the same regulatory effects as the statute invalidated by the Court.

In these instances, as Whittington suggests, it may very well be the case that Congress (and/or the president) does not have the interpretive authority to uproot the Court's interpretations; it may be that “the constitutional issues alive today are too

various, the political coalitions that dominate politics too diverse, and the grip of the parties on political power too tenuous.” Nevertheless, it may also be the case that actors need not challenge Court authority and precedents to achieve their policymaking goals.

Predominant accounts focusing on substantive constitutional meaning disputes during these Court-Congress impasses would consign these congressional instances of overcoming Court policy as simply accepting judicial supremacy unimportant to questions of who shapes constitutional meaning. For example, Whittington—although he believes Congress’ actions are not as important as the presidents—would relegate such responses to his oppositional or affiliated regimes, and then simply leave it at that (i.e. he would not investigate further to see if oppositional or affiliated regimes have significance for constitutional politics). However, even without questioning the Court’s precedent or authority, there are implications for these instances. How significant would the Supreme Court’s arbitration power of interpreting the constitutional text be if Congress (and/or the president) could simply work within its precedents with virtually indistinguishable substantive policy results? One could argue that the Supreme Court, in future instances, would be able to draw the line, saying we allowed non-judicial branches in the past to substantively overcome our precedents’ policy positions, but this time we are standing our ground. However, in these instances, who’s to stop Congress (again, and/or presidents) from once more overcoming said Court precedents’ policy effects?⁶⁶

⁶⁶ Overcoming Court precedents’ policy effects also rests on an assumption that Congress and/or the president have options available to them following Supreme Court precedent; this is not always the case. Sometimes Court precedents are so expansive and/or intrusive that they prove to be impossible to circumvent. In these instances, Congress may only have the option of accepting the Court precedent or embodying departmentalism. However, this thesis relies on this assumption—that Congress always has the option to at least attempt to overcome the Court’s precedents’ effects. Another study could expound

There have been times where actors, inherent in their reactions to Court cases, accept the Court's ability to set precedent, and accept the case precedent, but find ways to work within the precedent to achieve very similar substantive policy outcomes;⁶⁷ Larry Alexander and Frederick Schauer, expound upon these particular instances in their article *On Extrajudicial Constitutional Interpretation* (1997).⁶⁸

Alexander and Schauer, in creating a normative argument on how non-judicial actors *should* act towards Supreme Court interpretations, conceptualize different types of what they term “non-deference”: “When nonjudicial constitutional interpretation occurs against the background of judicial inaction, no conflict exists between the interpretive acts of nonjudicial officials and those of judges...because those officials are not doing anything that the courts have said they may not do.”⁶⁹ They continue: “Non-deference occurs when a nonjudicial official who disagrees with a judicial decision on a constitutional question does not conform her actions to that decision and perhaps even actively contradicts it. The nonjudicial official thus makes decisions according to her own, rather than the court's, constitutional interpretation.”⁷⁰

They continue expounding upon degrees of non-deference: “Non-deference can be contrasted with deference to judicial authority, but it is important to emphasize that

upon the circumstances and availability of overcoming; however, such an account would involve normatively addressing questions, such as how constraining was the precedent? and what was the political environment (e.g. popular support, congressional support, etc.) that allowed Congress to attempt to overcome the precedents' policy effects?

⁶⁷ For all the options Congress has following a Court decision see generally Neal Devins, *Congressional Responses to Judicial Decisions* (2008), Faculty Publications, Paper 1633. Unlike this work, Devins, within his article, outlines Article V processes, taking away jurisdiction from the Courts, impeaching justices, as well as statutory responses.

⁶⁸ Larry Alexander and Frederick Schauer, “On Extrajudicial Constitutional Interpretation” *Harvard Law Review*, Vol. 110, No. 7 (May, 1997): 1359-1387

⁶⁹ *Id.* at 1360

⁷⁰ *Id.* at 1362

deference need not be absolute. An agent who defers to the decision of another does not necessarily follow it, for what we have a *reason* to do is different from what we should *actually do*, all things considered.”⁷¹ “When the question is not non-compliance with an order addressed directly to a specific official, but rather the propriety of taking actions inconsistent with the general resolution of a constitutional question extending beyond the boundaries of a particular case, the politics and incentives are strikingly different. We live in a constitutional world in which legislators are penalized neither legally nor politically for knowingly enacting laws inconsistent with constitutional caselaw, and in which Presidents are similarly not penalized for signing them.”⁷²

Alexander and Schauer also provide a helpful historical example: “Consider *Branzburg v. Hayes* [*Branzburg v. Hayes*, 408 U.S. 665 (1972)] which held that reporters have no First Amendment right to keep sources confidential in the face of a subpoena. One way of interpreting our argument is that the values of coordination and authoritative settlement would be well served by legislatures taking *Branzburg* as authoritatively settling in the negative the question whether the First Amendment mandates journalistic privileges. Does this not imply that a legislature should refuse to create such a privilege, even though creating it would not directly conflict with the Supreme Court decision?”⁷³

⁷¹ *Id.* at 1363

⁷² *Id.* at 1365

⁷³ *Id.* at 1385; the aforementioned scenario is different than the type of pushback I am attempting to study in that Congress, in passing legislation protecting journalistic privileges to keep sources confidential in the face of a subpoena, is simply extending a right that the Court has ruled the First Amendment does not protect itself. In comparison, I am attempting to describe scenarios where statutes attempt to regulate a policy niche that the Court has already ruled in, cannot based on a specific constitutional clause. These cases are different, however this example is helpful in that it shows that despite Congress technically adhering to and abiding by the Court’s ruling, they are still able to act in a way inconsistent to the Court’s interpretive tenor.

Although Alexander and Schauer's example is different from the instances this thesis examines, it provides a helpful backdrop in explaining how non-judicial actors can act inconsistently or consistently with the court's precedent without ever necessarily being in conflict with the Court and challenging their precedent and/or interpretive authority.

ii. Walter Murphy's Review of Whittington: Congress and the Court

In 2008, Walter Murphy reviewed Whittington's latest book in an article published by American Society for Legal History. In the article, Murphy praises Whittington's *Political Foundations of Judicial Supremacy* as "...stand[ing] out as the best and most sophisticated study of the problem of 'who interprets' in the American context."⁷⁴ However, Murphy's praise was not absent of criticism; the majority of the article reviews Whittington's shortcomings.

One of Murphy's criticisms references Whittington's narrowed focus on the presidency: "[A]lthough Whittington's focus on the presidency is subtle, cogent, and intelligent, he does not sufficiently attend to Congress's sometimes very active role as constitutional interpreter, competing with both president and Supreme Court." Murphy then cites an example of the latter shortcoming: "The very first Congress, by broadly interpreting the 'sweeping clause' of Article I and its own authority under Article III as well as by refusing, despite concerted Anti-Federalist efforts, to include the word 'expressly' in what became the Tenth Amendment, set the tone for much constitutional

⁷⁴ Walter Murphy, "Political Foundations of Judicial Supremacy: The Presidents, the Supreme Court, and Constitutional Leadership in U.S. History by Keith Whittington's Review," *Law and History Review*, Vol. 26, Issue 3 (2008): 727-729.

development...later claims to legislative equality or even supremacy have been bitterly contested, most dramatically after the Civil War and during the late 1950s when Southern Democrats and ultra-conservative Republicans tried to overturn the Warrens Court's decisions regarding segregation and internal security.”⁷⁵

Although, Murphy refers to a different type of congressional response, there are still important implications for congressional responses responding in the dimension of policy to overcome Court precedents' effects. Whittington's analysis that “Congress is more likely to try to enter into a dialogue with the Court over a particular constitutional interpretation than to challenge the Court's authority as the ultimate interpreter,” is rational; even so there are important implications for when Congress does enter into a dialogue with the Court.⁷⁶ More specifically, even though “the Court at least formally can always have the last word” and “Congress can readily deny the exclusivity of judicial constitutional interpretation, but cannot easily challenge the claim that the Court is the ultimate constitutional interpreter,” when Congress denies the exclusivity of the judiciary's interpretive authority, sometimes the Court has capitulated. This raises a vital question that Whittington's account overlooks. Murphy criticizes Whittington for exclusion of Congress when they attempt to deny judicial precedent and therefore judicial supremacy (citing the very first Congress as an example); however this thesis examines Congress and its responses during periods where it attempts to overcome precedents' effects rather than directly challenge judicial precedent.

⁷⁵*Id.*; Although Murphy alludes to Congress explicitly participating in constitutional politics, this thesis examines Congress participating in ordinary politics, but agrees with Murphy that Congress can also respond to the Court within constitutional politics.

⁷⁶ Whittington (2007), *supra* note 29, at 16

In these instances, substantive policy agendas drive Congress in attempts to overcome precedents' legislative effects because, as the Court takes a constitutional position, it invalidates the legislative ambitions of political actors. These instances occur most often when the Court partially or wholly invalidates legislation backed by Congress and the president; and again, the Rehnquist Court is notorious for its copious invalidations of congressional statutes.

iii. The Rehnquist Court

Lori Ringhand, in her article, “The Rehnquist Court: A ‘By the Numbers’ Retrospective,” building off the Harold Spaeth *Supreme Court Database*, calculated the Rehnquist Court invalidated an unparalleled 34 federal statutes.⁷⁷ In comparison, the two

⁷⁷ Lori A. Ringhand, “The Rehnquist Court: A ‘By the Numbers’ Retrospective,” *University of Pennsylvania Journal of Constitutional Law*, Vol. 9, No. 4 (2007): 1033-1081; Ringhand uses Harold Spaeth’s *U.S. Supreme Court Judicial Database*: St. Louis, Washington University, as a basis for her article, but amends the data—relying on Thomas Keck’s *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago, IL: University of Chicago Press, 2004)—to add the cases of *Denver Area Educational Telecommunications Consortium v. FCC* (1995), 518 U.S. 727 as well as *Alden v. Maine* (1998), 527 U.S. 706. Spaeth does not categorize the former as an “act of Congress declared unconstitutional”, however, following Ringhand’s lead, this thesis will categorize the case as partially invalidating §§ 10(b) and 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 (the Act). Similarly Ringhand categorizes *Alden v. Maine* as a “case invalidating federal statutes”, whereas Spaeth does not. After reviewing the case, this thesis sides with Ringhand in that the challenged governmental act in question that is eventually decided, the Fair Labor Standards Act of 1938 (as amended 1966), is altered—even if only a little via not allowing private parties to sue in suits involving an unconsenting state for violating the overtime compensation provisions—despite the main question of power pertaining to whether Congress, under Article I, can abrogate a state’s sovereign immunity from private suits. Additionally, Spaeth includes *Kimmel v. Florida* and *Alabama v. Garrett*, both of which also involve abrogation of state sovereign immunity with the Age Discrimination in Employment Act of 1967 (ADEA) and Title I of the Americans with

most recent courts before Rehnquist, the Warren and Burger Courts invalidated 19 and 21 federal statutes, respectively. Even though the Rehnquist Court had one of the longest tenures—with 19 years compared to the Burger Court’s 17 years and the Warren Court’s 16 years—it also invalidated more federal statutes per term than both its predecessors. The Rehnquist Court invalidated federal statutes at a rate of 1.79 invalidations per term compared to the Warren Court’s 1.18 invalidations per term and the Burger Court’s 1.24 invalidations per term. The Rehnquist Court is also notorious for their powerful assertions of judicial supremacy, in rhetoric, and in practice.⁷⁸

Table 1: Invalidations of Federal Statutes

	Warren	Burger	Rehnquist
Number of Federal Invalidations	19	21	34
Rate of Invalidations per term	1.18	1.24	1.79

*Table from *The Rehnquist Court: A ‘By the Numbers’ Retrospective*, pp. 1036

Disabilities Act of 1990 (ADA) respectively; to include those two and omit *Alden* would be inconsistent.

⁷⁸ *United States v. Morrison* (2000), 529 U.S. 598, 616 (“[E]ver since *Marbury*, this Court has remained the ultimate expositor of the constitutional text.”); see also *Nev. Dep’t of Human Res. V. Hibbs* (2003), 538 U.S. 721, 728 (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.”); *Id.* (““The ultimate interpretations and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch””) (quoting *Kimel v. Fla. Bd. Of Regents* (2000), 528 U.S. 62, 81; *Bd. Of Trs. Of Univ. of Ala. V. Garrett* (2001), 531 U.S. 356, 365 (“[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees”). Note, the above cases do not all involve federal legislation, but are being cited to show the rhetoric asserting judicial interpretive supremacy. See generally, Dawn Johnsen, “Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?” *Law and Contemporary Problems*, Vol. 67, No. 3, Conservative and Progressive Legal Orders (Summer, 2004), 105-147

Furthermore, as *Table 2* demonstrates, the Rehnquist Court also has one of the most diverse collections of issues when compared to the Warren and Burger Courts. This provided a wide range of substantive issues to see how actors, following Court decisions, reacted to different issues (such as a right versus a power). In addition, because a majority of the invalidated legislation in the cases was pertaining to either First Amendment issues (usually addressing whether some legislation has gone against or is inconsistent with a person’s First Amendment right) or Federalism issues (usually addressing whether the federal government has the power to do something or other), the Rehnquist Court also provides a good sample of rights and powers with invalidated legislation.

Table 2: Federal Invalidation Issue Areas

	Crim. Proced.	Civil Rights	1st Amend.	Due Process	Feder- alism	Federal Tax	Misc
Warren	21%(4)	47%(9)	26%(5)	5%(1)	0%(0)	0%(0)	0%(0)
Burger	5%(1)	38%(8)	33%(7)	5%(1)	0%(0)	0%(0)	9.5%(2)
Rehnquist	9%(3)	0%(0)	44%(15)	6%(2)	26%(9)	9%(3)	6%(2)

* Table from *The Rehnquist Court: A ‘By the Numbers’ Retrospective*, pp. 10

Yet another reason for focusing on the Rehnquist Court—again, traditionally thought of as a period notorious for the Court’s claims of judicial supremacy in rhetoric, as well as in practice— is simple: if one can upend, or at least loosen, the conventional

narrative of non-judicial inaction within a period where the judiciary's interpretations are seen as dominating⁷⁹—a conventional narrative also accepted by Whittington⁸⁰—it may spark a reinvestigation of additional periods where the conjectured account of non-judicial inaction is not as firmly recognized.

For the above reasons—and because the Rehnquist Court is the last Court chronologically before the current Roberts Court, which is still ongoing—the Rehnquist Court will offer insight into potential congressional responses that most parallels those instances potentially experienced by future members of Congress (and/or presidents).⁸¹ Lastly, this work will examine the coordinate branches reactions within the Rehnquist Court as one sample of the types of reactions to the judiciary's authority; statutory responses aiming to circumvent judicial precedent are not the decisive and only types of rejections and acceptances within ordinary politics; nor does this thesis claim this is the only route available to Congress.

⁷⁹ See previous *supra* note (78) for examples of the Rehnquist Court asserting interpretive dominance. Also Whittington, in his analysis of strong departmentalist reconstructive presidents, does not include any actors within the Rehnquist Court.

⁸⁰ Whittington, *Political Foundations of Judicial Supremacy* (2007), 284: “In the twentieth century, precisely when the Court’s efforts at constitutional interpretation became more frequent and its perceived need to rein in the increasingly active political branches of government grew, judicial supremacy acquired new dimensions. The Court routinely spoke out on issues of national political salience, and those who sought to lead unruly legislative and electoral coalitions were ill positioned to assume the responsibility for settling those constitutional controversies. Hemmed in by conflicting commitments and demand, presidents have ceded ground to the justices.” I do not mean to argue that 20th century presidents and members of Congress have not ceded ground to justices, only that in some instances, they vehemently fought back against the interpretations of the Court to push their substantive policy agendas previously invalidated by the Court.

⁸¹ Obviously the Roberts Court is the most modern, but it seems ill advised to analyze a Court during its tenure for fear of new decisions reshaping the constitutional landscape, and consequently, one’s research.

An overview of all federal legislation invalidated by the Rehnquist Court can be found in *Appendix A*. The Appendix includes the term, the case name/ citation number, the specific challenged governmental act within the case, the constitutional issues at hand, the ideological direction of the decision of the case, the Supreme Court justices' vote count, any justice changes, and whether or not there was a statutory response.⁸²

iv. John Dinan: Congressional Responses to the Rehnquist Court

John Dinan, in his article “Congressional Responses to the Rehnquist Court’s Federalism Decisions,” similar to Whittington’s presidential coalition building departmentalism account, describes the different ways in which the Congresses, in responding to the Rehnquist Court’s federalism decisions, were able to build and hold coalitions to enact statutory responses in attempts to overcome the Court precedent’s policy effects. Unlike Whittington’s account (and similar to this account) in all of the responses Dinan outlines he focuses on whether Congress was able to overcome the Court precedent; however, he does not explicitly address the types of success (i.e. potency and breadth; both described in the methodology section) or specific degrees of success (e.g. indistinguishable or significantly narrower; again, all degrees identified within the methodology). Furthermore, Dinan treats the difficulties associated with overcoming Court precedent in terms of the difficulties in rebuilding political coalitions rather than the difficulties with overcoming the substantive constitutional interpretations adduced, Dinan only examines the Rehnquist Court’s federalism cases, with

⁸² Within *Appendix A*, ideological direction and constitutional issue were codified by Spaeth’s *U.S. Supreme Court Judicial Database* (see *supra* note 77).

interpretations involving the commerce clause, Section 5 of the Fourteenth Amendment, the Tenth Amendment, and the Eleventh Amendment.

Dinan, in each of the congressional proposals responding to the Court, describes the legislative intent of the proposals, the differences between the proposed and invalidated statutes, and the coalitions leading to their enactment or failure. In summary (without getting into the specifics yet, since this thesis so closely corresponds to his analysis) he argues, “[a]lthough the Court’s constitutional doctrines have generally not stood in the way of congressional efforts to respond to these decisions, the rulings have nevertheless proved to be difficult to overcome, primarily because the Court’s decisions have altered the political balance of power in regard to the invalidated statutes. Thus, in some cases, given the difficulty in building a coalition in support of reenacting a statute—especially when intervening elections have reconfigured the balance of power between the parties in Congress—Court decisions have given an advantage to groups that are strongly opposed to the invalidated legislation and who have thereby been presented with another opportunity to defeat it.”⁸³

Similar to the Whittington’s conclusion, Dinan argues, “that the Rehnquist Court’s federalism decisions have been most influential, insofar as they have forced supporters of the invalidated provisions to try to build and hold political collations for the reenactment of these laws. In the majority of cases, these efforts have not been successful, whether due to a lack of enthusiasm for such an effort, conflicts with other policy goals, or oppositions from other groups.”⁸⁴

⁸³ John Dinan, “Congressional Responses to the Rehnquist Court’s Federalism Decisions,” *Publius* Vol. 32, No. 3 (2002), 1- 24, 24

⁸⁴ *Id.* at 24

This work takes Dinan's analysis, and similar scholarship (including Dahl's), a step further, in the sense that it does not focus on articulating the roadblocks and reasons for proposals dying in committee or failing on the floor. Rather, like Dinan, this work examines Congress's successes in these instances as well as the significance of the success in reference to the Court's interpretive positions. This work closely resembles Dinan's analysis, but, unlike his work (and other similar scholarship), this thesis's roots lie in the ongoing discussions and literature—such as Whittington's—addressing constitutional interpretive authority and discordant substantive constitutional interpretations between the Court and Congress. Although this work does not go as far to theorize claims for what or how these instances of congressional statutory responses fit into models such as departmentalism and judicial supremacy, these models fuel the analysis. Rather than existing literature that simply looks at these judicial-congressional disagreements in terms of discordant policy, this thesis—like Whittington—reframes said disagreements about disagreements over constitutional interpretations and empirically examines these policy outcomes in terms of constitutional interpretations and which institution wins out.

Chapter 3: Theoretical Boundaries and Methodology

Chapter 3 addresses the focus of this analysis as well as the methodology comparing statutes in operationalizing Congress's success or lack thereof in repassing statutes similar to those invalidated by the Court. The theoretical boundaries section discusses what this research covers and what it does not. It also goes over reasons for choosing limiting variables when picking statutes and cases (i.e. examining federal not State legislation, choosing cases involving constitutional rather than statutory interpretation). The comparison of statutes section addresses the methodology followed in comparing the statutes. It includes definitions and explanations of the variables *breadth* and *potency* as well as an outline of how each individual Court case and congressional reproposal/repassage is laid out in the results and analysis section.

A. Theoretical Boundaries

There are some crucial theoretical boundaries—limits in what this analysis examines and what it does not—to this thesis. Criteria for case selection included an invalidation of federal legislation; Court invalidation based on constitutional, not statutory interpretation; and lastly, congressional repassage, or attempted repassage, of a similar statute as the invalidated statute in the corresponding case. Invalidation of federal legislation was a prerequisite because when the Court invalidates a piece of congressional legislation—legislation enacted with the president's signature—a degree of incongruity is present between the coordinate branches. Congress and the president, implicitly if not explicitly take a position that said legislation was constitutional; the Court, in invalidating that statute, takes an inconsistent position finding the law to be unconstitutional. When

state legislation is invalidated, Congress is not in a position to repass such legislation attempting to overcome the precedent's effects (since it was State law); with the invalidation of a federal statute, Congress is well positioned to respond with new federal legislation.⁸⁵

In the same vein, this thesis did not examine Supreme Court cases involving the invalidation of executive orders or other executive action. Legislation, unlike executive orders or action, involves Congress and the president, whereas executive action is for the most part unilateral. When a piece of legislation is invalidated, the Court is taking a contrary position against both non-judicial branches. Similar to the State-Court conflict, analyzing these cases and responses would make for a fascinating study, just not this study.⁸⁶ Finally, the Court's avoidance of taking on a case or the Court upholding a piece of legislation also has sizeable implications related to the inter-branch constitutional dialogue; however, these instances will be reserved for another study.

Another specification for choosing cases was invalidation based on constitutional, rather than statutory, interpretation. A majority of statutory interpretation cases involve

⁸⁵ Moreover, the conceptions of federalism in the U.S. make a Supreme Court-Congressional constitutional battle more evenly matched than, for example, a Court-state legislature scuffle, in which the Court often turns out the victor. Omitting state laws invalidated by the Court misses a number of cases that have national implications (e.g. *Texas v. Johnson*) (for more on the significance of cases involving state law omission see Jonathan Casper, "The Supreme Court and National Policy Making," *supra* note 21 regarding the shortcomings of Dahl's analysis in omitting cases involving the invalidation of state law). Even so, research elucidating these state-Court conflicts would make an interesting study, but because all research needs boundaries, this work omitted these types of conflicts and statutory responses.

⁸⁶ Furthermore, this is an attempt to build on Whittington's work with a focus on Congress rather than the president. Another interesting account could delineate presidential responses trying to circumvent the Supreme Court precedent without challenging precedent based on presidential, rather than congressional, powers (e.g. the veto power, executive orders, etc.).

the language of the statute where the Court rules on the applicability of the statute or clarifies ambiguous language. On the other hand, cases based on constitutional interpretation involve constitutional position taking on the constitutional interpretations—implicit within congressional legislation—of Congress.

Lastly, and importantly, this work only analyzes cases in which a Court decision produced an attempted, or successful, statutory response. All 34 invalidated federal statutes are included in *Appendix A*; however, only the 11 cases in *Appendix B*—cases in which Congress and/or the president mounted a statutory response—are analyzed in the text.

This analysis examined only certain types of responses: congressional statutory responses, where Congress and the president acted to pass legislation regulating a similar policy niche. In other words, the analysis only examined those responses that involved a statutory response to the Court’s precedent. Other responses are available to Congress such as the removal of Court jurisdiction, a formal Article V amendment, and the confirmation or rejection of new justices; however, these responses have distinctive implications for constitutional politics; as such, this thesis did not included them.⁸⁷ Similarly, this work only analyzed repassed statutes’ provisions addressed in a Court case.

⁸⁷ For more on historic examples of available congressional responses to judicial decisions instead of statutory responses, see Neal Devins, “Congressional Responses to Judicial Decisions,” *Faculty Publications, William & Mary Law School*, Paper 1633 (2008): <http://scholarship.law.wm.edu/1633>. Again, along the same vein, considerable implications related to the determination of constitutional meaning exist in cases where states respond with state legislation or refuse to obey a Court case (or citizenry, or a federal actor that is not the president or Congress), but these instances will be reserved for another study.

For the analysis, I set the deadline for a congressional statutory response to a Court decision at eight years: two presidential cycles, four House cycles, and one Senate cycle. This allows issues to percolate throughout the general populace via grass-roots social movements and more formal campaigns, become salient, and then candidates—congressional and presidential—can campaign on said issues and act on them once in office. Eight years is also a sufficient amount of time for the waxing and waning of popular support behind specific issues the Court has acted upon. If within that time no action has been taken to circumvent the decision, the general passions about the issue have most likely subsided.⁸⁸

B. Comparison of Statutes: Breadth and Potency

In order to grasp Congress's success (or lack thereof) in reproposing/ repassing new legislation with similar policy effects as previous legislation invalidated by the Supreme Court, I examined the initial policy's provisions—those provisions addressed in the respective Court case—compared to the repassed legislation's provisions. In comparing the two statutes' provisions, I looked for regulatory completeness; in other words, how close the repassed statute came to replicating the initial statute's invalidated provisions. To do so, I used the variables *breadth* and *potency* to compare the statutes' provisional comprehensiveness. *Breadth* encompasses regulatory scope of the statutes. The initial invalidated statute could have applied to a wide regulatory range; the repassed

⁸⁸ To be candid, eight years is also simply a cut-off point. The expiration of responses could have just have easily been set at 10 or 14 years if this thesis sought to research the changes that came about more incrementally (such was the case with the desegregation of schools or same-sex marriage). Even though these changes are important, this thesis will cut off the time window for responses at eight years subsequent the Court's decision.

statute, in attempting to adhere to the Court precedent (or for other reasons), could only apply to half of the initial regulatory scope. On the other hand, Congress could have passed a statute with different and narrower statutory language, however the revised language, when applied in practice, may have indistinguishable policy effects as compared to the initial policy's breadth. The breadth of repassed statute's provisions, in relation to the initial invalidated provision's breadth is denoted in the far right "Potency/Breadth" column in *Appendix B*. Those provisions that are narrower than the original statute's breadth, are coded as either *slightly narrower* or *significantly narrower*—the degree to which the repassed statute was narrower is described in-text when describing the statute in the results section. There were some instances where the repassed statutory adoption was slightly narrower, however, the facts of the individual repassed statute, in effect, translated to indistinguishable potency and/or breadth.⁸⁹ These instances were coded in *Appendix B* as *indistinguishable* and the results section offers explanations as to how, in practice, the repassed statute is indistinguishable from the initial statute despite its slightly narrower statutory adoption. *Identical* was used if the two provisions shared identical statutory language and were—for the most part—the same provision.

Similarly, *potency* includes the degree to which the statute attempts to achieve the legislation's main thrust. For example, if Congress attempts to regulate or deter some object or activity, potency describes the extent of the statutory language Congress uses to

⁸⁹ The best example of such cases is the repassed Gun Free School Zones Act (analyzed and discussed in-depth further on) where the addition of the jurisdictional element in the statutory language, ostensibly, slightly narrowed the statute; however, the notion that in a modern economy most commerce has, at one point or another, moved interstate, produced, in effect, an indistinguishable statute from the initial statute invalidated.

achieve the statute’s primary focus. For criminal and civil statutes, it may be increasing or decreasing the severity of punishment in deterring said activity (e.g. reducing or increasing prison sentences or monetary fines). For regulatory statutes, it may be that rather than directly regulating a good, Congress uses its spending power to condition federal funding for states based on their passage of state law regulation. For others, it may be watered-down language in definitions of obscenity. In some cases, lacking potency will also contribute to decreases in breadth as well. Potency, like breadth, is denoted in the “Potency/Breadth” column in Appendix B as well. Similar to breadth, potency was *significantly narrowed*, *slightly narrowed*, *indistinguishable* (for cases where statutory adoption is slightly narrower but, in practice, the provisions are indistinguishable), or *identical*.

Furthermore, beyond measuring congressional successes with repassed statutory adoption in potency and breadth, subsequent developments—including the implementation of the statute as well as further lower court and/or Supreme Court proceedings—are just as vital to measuring Congress’s success circumventing the Court precedent. A repassed statute in which Congress *slightly* narrows its potency in its language, could *significantly* narrow the statute’s potency when implemented. For example, Congress could condition federal funds on passage of a regulatory State law, which in language, may only slightly narrow a statute’s potency. It could be that all states succumb to the new statute’s conditional demand in exchange for federal funds; it could be that no states accept federal funds and as such, refuse to pass relevant State law. In these instances, implementation goes further than whether Congress was able to achieve the same statutory language. Implementation gets at the outcomes of the statute and

whether Congress, in repassing a new statute, was able to pursue their policy goals with the same ardor and vigor as the previously invalidated statute.⁹⁰

In comparing the initial and repassed statute's potency and breadth, I first analyzed (a) the initial statute provision's—the provision(s) to be invalidated in the respective Court case—potency and breadth as well as statute's background in passage. Statute background encompasses the political and social climate associated with statute's passage (i.e. public or congressional concern associated with the passage of the statute), the purpose(s) in passing the legislation and the legislation's main thrust (e.g. regulating a certain activity or object), as well as congressional members' rhetoric surrounding its passage—rhetoric, conventionally used to convey the goal(s), reasons for passing said legislation at that particular moment (whether that be a ripe political climate or societal events dictating a congressional response), as well as pathos-driven appeals to other members of Congress and/or the polity at large (e.g. a congressional member shows disturbing pornographic material on the Floor/in the media, or relays the contents of pornographic depicts in an appeal for legislative support). Some statutes—for example, statutes that regulate a narrow and inconsequential policy niche or whose reason for

⁹⁰ Implementation was mostly analyzed at the lower court level. Intuitively, because previous challenges arose with lower courts, further challenges are likely to arise from judicial actors. Therefore, this work attempts to articulate and analyze courts either complying with or again, overturning repassed statutes. Even still, one main limitation with this analysis is that it does not an entirely accurate representation of the implementation of the statute. If a prosecutor cannot make a case they will most likely not bring the case to court. For example, with the repassed Gun-Free School Zones Act of 1995, if a prosecutor cannot prove that the possession of a firearm in a school zone involved a firearm that had crossed interstate boundaries, they will not bring the case. However, this analysis simply looks at cases that were brought up in court and examines whether prosecutorial claims that the firearms—or whatever the statute involved—had crossed interstate boundaries were accepted by the lower court judges—and, in doing so, effectively enforcing the law.

passage is fairly self-explanatory—did not have as elaborate narratives explaining their passage.).

It's also important to note that due to the constitutional focus of this thesis, I organized, in a chronological order, the 11 statutes that garnered a congressional response using the different constitutional policy issues at hand. In other words, cases and responses are organized so that the Supreme Court jurisprudence and relevant past precedent and congressional action/reaction are ordered in a linear manner within specific constitutional issue arenas; nevertheless, not all the policies' provisions related to the constitutional issues are correlated, and hence, are not meant to be read as chronologically sequential.⁹¹ For purposes of this thesis, I only outlined the statute's provisions that were relevant to the Rehnquist Court case, omitting analysis of any other statutory provisions that may have reached the Court in a different case or era.

Once I summarized the background and primary provisions of the original piece of legislation, I described **(b)** the legislation's judicial challenges in the specific Supreme Court case by providing an outline of the Court's decision(s) and reasoning(s). The decision analysis includes the majority's decision, the justice vote, and the constitutional basis and reasoning for invalidating the specific provision in question. The reasoning

⁹¹ Here, for example, the 1st Amendment analysis in *United States v. National Treasury Employees Union* and the Ethics in Government Act Amendment of 1995 is unrelated to *Reno v. American Civil Liberties Union* and the Child Online Protection Act (COPA) of 1998; they should not be read as a continuous chronological narrative of 1st Amendment jurisprudence. On the other hand, the cases involving abrogation of state sovereign immunity (*Boerne v. Flores*, *Seminole Tribe v. Florida*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*) are interrelated and can, and should be, read in a chronologically sequential manner; not only is the jurisprudence from the prior cases important to the decision and reasoning of the successive case, the justices also cite precedent from *Boerne* and *Seminole Tribe* in both *College Savings Bank* as well as *Florida Prepaid*.

analysis covers the Court’s interpretation of the constitutional text and the application of constitutional limits as related to the statute.⁹²

Once I described the provisions of the statute and the Supreme Court cases invalidating the statute and reasoning(s) for doing so, I analyzed (c) the statutory responses.⁹³ This section describes how the invalidated statute’s policy effects are similar or dissimilar to the repropose/repassed statutory response by measuring the responses *breadth* and *potency* compared to the invalidated statutes breadth and potency (utilized as described above). This analysis extends to and passed bills as well as failed proposals.⁹⁴ In both instances of failed and successful repassage—and for the original provisions of the initial invalidated statutes—I used chiefly *Congress.gov* as well as *Govtrack.us* and

⁹² Occasionally, this analysis also includes past Court constitutional interpretations cited as precedent in cases

⁹³ Supplemental to statutory responses analysis, I also included rhetoric of politicians—presidents and members of Congress—responding to the Courts decisions and their legislative plans (if they have any) for moving forward. Rhetoric consists of speeches made on the floor of Congress, remarks given to reporters, quotations within reputable publications, or any correspondences on which their positions or thoughts towards a Court decision were expressed. Rhetoric reprimanding decisions as ‘erroneous’ or condemning the Court does not necessarily constitute a statutory response. A reactor could simply express their discontent with the decision, but believe that they are obligated to defer and follow the precedent in future similar circumstances. Therefore, only rhetoric in movement toward a statutory response was analyzed. I found presidential and congressional rhetoric by searching through the archives of major news publications (e.g. *The New York Times*, *The Washington Post*, etc.), the indices of the *Congressional Record*, the *Public Papers of the President*, and in sources cited in existing peer-reviewed articles found through *LexisNexis*.

⁹⁴ There is something to be said of a proposed bill reacting to a Court decision that enjoys extensive congressional support, but fails to make it to a floor vote because of disruptive special interests’ lobbying efforts, or an obstinate subcommittee member adding bill-killing amendments. Similarly, a bill that passes the House, but is rejected by a three-vote differential in the Senate (or some variation), is also indicative of an attempted statutory pushback to circumvent the Court decision, besides its failure to pass due to quotidian politics. These instances of failed bills will also be accounted for, though, because they were not passed and cannot be applied, the analysis will simply compare the *potency* and *breadth* of the proposed bill with its predecessor bill, describe the effort put forth, and why the bill may have failed (if available).

Thomas.gov, in a supplemental respect, to analyze the provision details of the bills and proposals, the most recent actions on bills (e.g. referred to committee, made it to the floor), sponsors and cosponsors, and related bills. If there was a floor vote, I used *Clerk.house.gov* to view the roll call votes and examine the votes to see how close the statute came to repassage, or the number of votes by which it passed.⁹⁵

Lastly, I tracked **(d)** the subsequent development(s) of passed statutory responses. This included further court proceedings—either at the Supreme Court level or in lower courts—as well as the implementation of the statute after its passage (again, utilized as described above). Subsequent development(s) of passed legislation is important because a court could have invalidated the revised statute, or the statute’s implementation via the court’s or other actor’s (e.g. states in conditional funding cases) could be severely limited compared to its actual language. Only four out of the 11 statutory responses were actually passed, and as such, only four individual instances appear.

Although subsidiary to the analysis of responses—this work does not address, or suggest, correlation or causation of variables in instances of repassage—more invalidations and chances to respond could arise if a new justice gives the Court a voting bloc of five votes or more responses could occur if a party is able to gain a majority in Congress, or wins the presidency, or both. In these instances, it’s important to note these changes and, as such, they are accounted for in the *Appendix A* and *Appendix B* as well as analyzed in-text. Furthermore, *Appendix B* outlines all of the cases from *Appendix A* that garnered a reproposal or repassage. *Appendix B* includes the corresponding case number

⁹⁵ Committee and subcommittee votes, although important for why a bill may have died in committee, are not relevant to how close the pushback came to passage since, if it died in committee, it most likely would not have enjoyed wide support on the floor.

from *Appendix A*, the date of the new legislation, the Congress in which the legislation surfaced, the name of the repassed or repropounded statute, the party division in the House of Representatives as well as the Senate, the President and presidential party, the latest action of the proposal/bill, and the coding of the breadth and potency of the repassed statutes compared to the initial invalidated statute.

The main analysis of this work—described in the next chapter—is the comparison of the initial invalidated statute to the repropounded/repassed statute. The variables *potency* and *breadth* are used to describe the regulatory completeness of the repassed statutes compared to the initial statutes. Furthermore, the subsequent developments of the repassed statutes—including implementation and further court proceedings—articulate how effective Congress was in successfully replicating its initial previously invalidated legislative agenda. The respective Court cases are analyzed to examine the constitutional interpretations adduced and, consequentially, the constitutional constraints Congress must somehow circumvent when repassing legislation.

Chapter 4: Results

Chapter 4 is organized chronologically within each constitutional issue. Section *A* addresses the 1st Amendment cases; Section *B* goes over the congressional regulation of interstate commerce; Section *C* deals with Congress's enforcement power under Section 5 of the Fourteenth Amendment; Section *D* focuses on the Eleventh Amendment and the abrogation of State sovereign immunity; and lastly, section *E* discusses non-delegation. Each case and subsequent repassed/reproposed legislation is organized in the manner described in the methodology section above: (a) background and original statute's provisions, (b) case decision(s) and reasoning(s), (c) statutory responses and comparison to original statute's provisions, and (d) subsequent developments in implementation and further court proceedings (for those statutes that were actually reenacted).

A. The 1st Amendment

i. United States v. National Treasury Employees Union and the Ethics in Government Act Amendment of 1995

A. Background and Original Statute

Despite the Rehnquist Court's invalidation of three federal legislative acts in its opening three years,⁹⁶ the first case to amass a response in the form of a congressional

⁹⁶ The first two Supreme Court cases invalidated fairly narrow regulatory policies based on 1st Amendment jurisprudence: The first was §441b of the Federal Election Campaign Act (1971) was invalidated as applied to non-profit, non-shareholder corporations (*FEC v. Mass. Citizens for Life Inc.* (1986), 479 U.S. 238) and the second involved a D.C. Code restricting displays of signs near foreign embassies (*Boos v. Barry* (1988), 485 U.S. 312).

statute came in 1994 following the invalidation of provisions of the Ethics in Government Act of 1978⁹⁷ (as amended by Ethics Reform Act of 1989⁹⁸) in *United States v. National Treasury Employees Union (NTEU)*.⁹⁹ The case involved §501(b), which amended the Ethics in Government Act to “prohibit a Member of Congress, federal officer, or other Government employee from accepting an honorarium for making an appearance or speech or writing an article.”¹⁰⁰

However, in the third Court case, *United States v. Eichman* (1989), 496 U.S. 310, the Court invalidated the hugely popular Flag Protection Act of 1989—originally enacted as a response to the Court’s invalidation of the Texas flag protection statute in *Texas v. Johnson* (1989), 491 U.S. 397. Following the decision, President Bush, in a *New York Times* interview (Linda Greenhouse, “High Court to Rule Quickly on Flag-Burning Law,” *The New York Times*, published: March 31, 1990), opined, “[a] constitutional amendment is the only way to insure that our flag is protected from desecration.” Congress agreed, and in the subsequent years made numerous attempts to pass the Flag Desecration Amendment under the Article V formal amendment process (U.S. Constitution, Article V: two-thirds of both Houses of Congress for proposal and three-fourths of all states for ratification). Between the 104th and 109th congresses (1995-2006), a proposal for the amendment surfaced in each Congress, always passing the House, but never receiving the two-thirds vote required in the Senate. Although the formal Article V amendment process is not included within the conceptualization of my theorized statutory pushback for purposes of this thesis, this response seems too important to not at least note—though further analysis will be omitted for fear of being too tangential to my central analysis. Article V processes also hold different implications than ordinary simple-majority-passed legislation—implications that, again, will be reserved for another study.

⁹⁷ “Ethics in Government Act of 1978,” Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at various sections of Titles 2, 5, 18, and 28 of the U.S.C. (1994))

⁹⁸ “Ethics Reform Act of 1989,” Pub. L. No. 101-94, 103 Stat. 1716 (codified in scattered sections of 5 U.S.C. (1994))

⁹⁹ *United States v. National Treasury Employees Union* (1994), 513 U.S. 211

¹⁰⁰ *Id.*; 5 U.S.C. app. § 501(b) (1994), prior to the Ethics Reform Act, numerous regulations limiting and overseeing honorariums were already in place. Existing legislation held employees of all three branches to a \$2000 limit per individual activity for which one could receive honoraria. Furthermore, different honoraria caps were placed on different branches’ higher-level employees so that aggregate income earned from honoraria could not eclipse a certain percentage of said employee’s salary (GS-16 and above executive employees could only earn less than 15% of their income from honoraria; House members up to 30%; Senators up to 40%; and judiciary members had no maximum percentage.) On top of these regulations, executive branch employees were

Twenty two years prior to the passage of the Ethics Reform Act, in 1967, Congress authorized the appointment of a special Commission on Executive, Legislative, and Judicial Salaries (the Quadrennial Commission), which, every four years, would recommend appropriate changes in government officials' compensation at the top tier positions for all three federal branches.¹⁰¹ Each of the first five Quadrennial Commission reports went largely ignored, however, the 1989 report was instrumental in the enactment of the Ethics Reform Act.

In this report, the Quadrennial Commission noted inflation had caused a 35% decrease in the salary levels for top-level government officials.¹⁰² Furthermore, and more troubling, these officials were now “supplementing their official compensation by accepting substantial amounts of 'honoraria' for meeting with interest groups which desire to influence their votes.”¹⁰³ Based on the reports' findings, between 1989 and 1990, a House Subcommittee held a series of hearings—hearings featuring research conducted by the Bipartisan Task Force on Ethics, which relied heavily on the Quadrennial and Wilkey and Commissions' reports—investigating scientific misconduct and conflicts of interest

also subject to a pre-determined Office of Government Ethics (OGE) questionnaire for which if they answered all in the negative, they could receive honoraria. The result was greater freedom for legislative branch members receiving honoraria. This greater freedom eventually lead to call for the necessity of conformity, leading to the formation of the Bipartisan Task Force on Ethics, whose report would culminate in the passage of the Ethics Reform Act of 1989. For an in-depth analysis and history of honoraria law and bans see Lisa Malloy Nardini, “Dishonoring the Honorarium Ban: Exemption for Federal Scientists,” American University, American University Law Review, Vol. 45, Issue 3 (1996): 885-928 (the above information in this footnote is based from this article; 905, outlining the OGE ethics questionnaire).

¹⁰¹ *U.S. v. NTEU* (1994)

¹⁰² Fairness for Our Public Servants: Report of The 1989 Commission on Executive, Legislative and Judicial Salaries vi (Dec. 1988) cited in *U.S. v. NTEU* (1994).

¹⁰³ *Id.*; Subsequent the release of the report, the President's Commission on Federal Ethics Law Reform (Wilkey Commission) published their own report endorsing the Quadrennial Commission's report, while providing similar policy recommendations.

amongst researchers receiving federal funding.¹⁰⁴ The ten cases profiled in the investigation found numerous and diverse forms of financial conflict of interests: “One case involved researchers at a [public] university who examined the effects of antibiotics on children's ear infections. The study concluded that drug treatment was effective, thereby increasing prescriptions and sales of the antibiotics. When one of the researchers questioned the positive results of the study, an investigation revealed that the principal [university] researcher had received more than \$50,000 in honoraria from the three pharmaceutical companies producing the antibiotics.”¹⁰⁵

Coupled with increased media attention given to the cases of alleged misconduct and based on evidence gathered from the Task Force’s report, Congress decided to reform the Ethics in Government Act to include §501(b): a government-wide honorarium ban. Contemporaneously, §703 of the Ethics Reform Act also compensated federal employees with a 25% salary increase to offset the harmful financial consequences of the honorarium ban; however, within the executive branch, these salary increases only extended to high-level political appointees above GS-15, subjecting other executive branch employees to the ban without the supplemental salary increase.¹⁰⁶

Following its passage, numerous lower level executive employees, harmed by the ban without the pay increase, challenged the constitutionality of §501(b) in federal district court; their cases were consolidated into a single class action suit. Litigants, composed of Executive Branch employees—with union representation—below grade

¹⁰⁴ Committee on Government Operations, Are Scientific Misconduct and Conflicts of Interest Hazardous to Our Health, H.R. Rep. No. 688, 101st Congress, 2nd session (1999) [Scientific Misconduct Report] cited in *U.S. v. NTEU* (1994).

¹⁰⁵ Nardini, *supra* note 101, at 892

¹⁰⁶ Pub. L. No. 101-194, § 703(a), 103 Stat. 1716, 1768 (codified at 5 U.S.C. § 5318 (note) (1994)) cited in *U.S. v. NTEU* (1994).

GS-16 who, but for §501(b), would have received honoraria for speeches and articles, filed suit challenging the statute as an unconstitutional abridgement of their freedom of speech under the First Amendment. Furthermore, and significant to the Court’s decision, “[t]he speeches and articles for which respondents had received honoraria in the past concerned matters such as religion, history, dance, and the environment; with few exceptions, neither their subjects nor the persons or groups paying for them had any connection with respondents’ official duties.”¹⁰⁷

After a major reshuffling of justices sitting on the Court in the years leading up to *U.S. v. NTEU* (Lewis Powell retired from duties in Jun. 1987 and Anthony Kennedy—a Reagan nominee—was confirmed Feb. 1988; William Brennan retired in Jul. 1990 and David Souter—a H.W. Bush nominee—was confirmed Oct. 1990; Thurgood Marshall retired Oct. 1991 and Clarence Thomas—a H.W. Bush nominee—was confirmed Oct. 1991; Bryon White retired Jun. 1993 and Ruth Bader Ginsburg—a Clinton nominee—was confirmed Aug. 1993; and Harry Blackmun retired in Aug. 1994 and Stephen Breyer—a Clinton nominee—was confirmed Aug. 1994, two months before the *U.S. v. NTEU* decision in the October term of 1994), the Court, in a 6-3 decision, invalidated §501(b)’s blanket prohibition on honorariums.

B. Case Decision(s) and Reasoning(s)

Justice Stevens authored the majority opinion in *NTEU*, in which he held that the First Amendment protects the rights of government employees to discuss matters of public concern as ordinary citizens. Stevens applied the precedent set in *Pickering*,

¹⁰⁷ *U.S. v. NTEU* (1994)

arguing the Court must “arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁰⁸

In his reasoning, Stevens argued that §501b’s ban was overly broad—in that it applied to all speech and all government employees—and not narrowly tailored—in that there was no nexus requirement linking the employer’s job and the subject matter of the expressive activity—toward the government’s interest of protecting the integrity of public service. As such, the ban placed a significant burden on employer’s freedom of speech by prohibiting protected as well as unprotected speech. The Court enjoined enforcement of the ban as applied to executive employers below the GS-16 pay scale, however, the Court refused to rule on the ban’s applicability to those executive employees above GS-16, members of Congress, federal judges, and top executive branch officials.¹⁰⁹ The Court also declined an invitation to impose its own subject nexus requirement into the statute citing avoidance of judicial legislating.¹¹⁰ In his reasoning, Stevens did note, however, “the Government conceivably might advance a different justification for an honoraria ban limited to more senior officials, thus presenting a different constitutional question than the one we decide today.”¹¹¹

¹⁰⁸ *Pickering v. Board of Education* (1968), 391 U.S. 563; again, for a more detailed discussion and history (though at times normative) on honorariums and honoraria bans see Nardini, *supra* note 101, at 919-917

¹⁰⁹ Walter Dellinger (U.S. Assistant Attorney General), “Legality of Government Honoraria Ban Following *U.S. v. National Treasury Employees Union*,” Memorandum Opinion for the Attorney General, Feb. 26, 1996

¹¹⁰ *U.S. v. NTEU* (1994)

¹¹¹ *Id.*

Writing after the decision, Assistant Attorney General Walter Dellinger authored a memorandum to the Attorney General in which he attempted to save §501(b)'s applicability to those employees above GS-16—applicability, which the Court refused to make a decision on. In the end, Dellinger concluded §501(b) could not be saved by severance from the original statute since it would be altering Congress's original intent with the initial passage of the original statute. As such, for all intensive purposes, Dellinger argued, “§501(b) does not survive the Supreme Court's ruling in *NTEU*.”¹¹² Following Dellinger's memorandum and the advice of the Attorney General, the executive branch did not pursue enforcement of the honorarium ban at any employment level post-*NTEU*.¹¹³

Following the *NTEU* decision, a non-profit organization, Common Cause, whose mission included restoring core democratic principles and accountability to American government, maintained that conflicts of interest were still a problem within the U.S. government bureaucracy. In line with their mission statement, Common Cause President, Fred Wertheimer, lobbied Congress “to ban honoraria for federal employees when the moonlighting relates to government duties,”¹¹⁴ and as a result of their efforts, Rep. Barney Frank [D-MA-4] proposed H.R. 1639, the Ethics in Government Act Amendments of 1995.¹¹⁵

C. Statutory Response(s)

¹¹² Dellinger, *supra* note 101, at 84

¹¹³ *Id.*

¹¹⁴ Joan Biskupic, “1st Amendment Applies To Internet, Justices Say,” *Washington Post*, published: June 27, 1997, A01

¹¹⁵ Congress.gov, “H.R. 1639-The Ethics in Government Act Amendments of 1995, 104th Congress (1995-1996)”: <https://www.congress.gov/bill/104th-congress/house-bill/1639>

Prior to the *NTEU* decision, as early as 1991, Congress attempted to pass amendments to include a nexus requirement to §501(b)'s flat honorarium ban.¹¹⁶ Although most of these attempts failed, two narrower bills—one amending the definition of honorarium to include a nexus requirement for employers participating in a series of expressive activities (but, oddly, not a single expressive incident)¹¹⁷ and one lifting the ban for employees or students at United States military academies (the Department of Defense (DOD) exception)¹¹⁸—were enacted into law, providing for nexus requirements, albeit in narrow policy niches.

Replicating elements of the DOD exception and the series of expressive activities bills, Rep. Frank's bill, H.R. 1639, attempted to amend the Ethics in Government Act of 1978 to specify “the circumstances in which federal officers and employees, other than Members of Congress and noncareer officers and employees whose basic rate of pay is equal to or greater than that for Level V of the Executive Schedule, may receive an honorarium for an article in a bona fide publication, a speech, or an appearance.”¹¹⁹

¹¹⁶ Two days after the honorarium ban went into effect under §501(b) (January 1991: pre-*NTEU*) Congress began consideration of proposals to add a nexus requirement for executive branch employees. In 1991, four separate bills—H.R. 109, 102d Cong., 1st Sess. (1991); H.R. 325, 102d Cong., 1st Sess. (1991); H.R. 414, 102d Cong., 1st Sess. (1991); H.R. 474, 102d Cong., 1st Sess. (1991)—sought to lift the honorarium restriction for career executive branch employees who engaged in income-producing activities unrelated to their official duties; however, none of these received a vote. Cited by Nardini, *supra* note 101.

¹¹⁷ Legislative Branch Appropriations Act (1992), Pub. L. No. 102-90, § 314(b), 105 Stat. 447, 469 (codified at 5 U.S.C. app. § 505(3) (1994)) cited in Nardini, *supra* note 101.

¹¹⁸ National Defense Authorization Act, Pub. L. No. 102-484, § 542, 106 Stat. 2315, 2413-14 (1992) (codified at 10 U.S.C. § 2161 (note) (1994)) (authorizing personnel at military schools to accept honoraria under limited circumstances and creating exception to honorarium ban for faculty members and students at qualified Department of Defense schools) cited in Nardini, *supra* note 101.

¹¹⁹ Congress.gov, “H.R. 1639-The Ethics in Government Act Amendments of 1995”; Rep. Frank proposed a nearly identical bill in Congress in 1993, however, the bill was not

Rep. Frank laid out three criteria in order for an employee to receive honorarium: the first, stipulated that the subject activity could not relate primarily to the government agencies’ “responsibilities, policies, or programs” and should not involve government recourses or nonpublic information.¹²⁰ Second, the honorarium could not be paid based on the government employee’s official duties or status.¹²¹ And third, the party providing the honorarium could not have interests that would be substantially affected by either the performance or nonperformance of said employee’s duties.¹²² Furthermore, the proposed statute would prohibit the amount these employees could receive in an honorarium from exceeding the usual and customary fee for the services for which the honorarium is paid, up to \$2,000.¹²³ It also provided disclosure requirements to respective ethics offices within agencies before accepting any honoraria, for which failure to comply would result in specified penalties.¹²⁴

By prefacing the three-criteria nexus requirements, the disclosure and financial limit requirements, as well as requiring those government employees to first approve the honoraria with their ethics offices—the failure to do so resulting in the possibility of financial penalties—Congress proposed a statutory response that was far less potent in its application (the new proposed statute only applied to those honoraria in which there was a nexus between the employee’s official capacity and the speech/article/appearance, whereas the initial statute did not specify a nexus) and concurrently, had a much narrower

enacted. A similar 1991 bill mustered support to pass the House, but fell short in the Senate by a single vote.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

policy breadth (the proposed statute only applied to those employees ‘whose rate of basic pay is equal to or greater than that for the level of Level V of the Executive Schedule’ (\$148,700),¹²⁵ whereas the initial statute did not differentiate between pay levels and applied government-wide).

Furthermore, despite its tapered potency and breadth, the bill never made it through subcommittee hearings. Introduced into the 104th House of Representatives by Rep. Barney Frank [D-MA-4] May 15, 1995, the bill was referred to the House National Security Committee, the House Government Reform Committee, the House Oversight Committee, and the House Judiciary Committee, where, within the Judiciary Committee, it was further consigned to the Subcommittee on the Constitution July 18, 1995. Since then, it has not been acted upon—effectively dying in committee.¹²⁶

ii. Reno v. American Civil Liberties Union and the Child Online Protection Act (COPA) of 1998

A. Background and Original Statute

In the early-to-mid 1990s, increased usage and accessibility to the Internet in United States was on the rise; and with the Internet’s ascendance, came ‘substantial threats’ towards American youth: the proliferation of Internet pornography. The rise of Internet, and consequently Internet pornography, sparked a debate in Congress about the

¹²⁵ Office of Personnel Management, “Salary Table No. 2015-EX Rates of Basic Pay for the Executive Schedule (EX)”; it’s important to note that this salary amount has most likely changed since 1989: <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2015/EX.pdf>

¹²⁶ Congress.gov, “H.R. 1639-The Ethics in Government Act Amendments of 1995”

role of the U.S. government in regulating this new forum of indecency. Leading those calls for Internet decency regulation was soon-retiring Senator James Exon [D-NE].¹²⁷

Adducing a recently published and widely promulgated academic article outlining the epidemic of Internet pornography,¹²⁸ Sen. Exon, spewing fiery warnings of “[b]arbarian pornographers...using the Internet to gain access to the youth of America” proposed the Communications Decency Act (CDA) of 1996 in February of 1995.¹²⁹ In doing so he exclaimed, “[this] information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency, which have protected telephone users to new telecommunications devices. Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions. The Decency Act will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies.”¹³⁰

The CDA’s main thrust was extending the anti-harassment, anti-indecency, and anti-obscenity regulations already in place for telephone communications—enacted via

¹²⁷ Robert Cannon, “The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway,” *Federal Communications Law*, Vol. 49, Journal 1 (1996): 51-94

¹²⁸ See Marty Rimm, “Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories (Rimm Study),” *Georgetown Law Journal* Vol. 8 (1995): 1849; it was later found out that Rimm’s study, apart from not being peer-reviewed, suffered from a litany of ethical problems *inter alia* a conflict of interest in that Rimm also authored *The Pornographer's Handbook: How to Exploit Women, Dupe Men, & Make Lots of Money*, an account assisting pornographers.

¹²⁹ Congressional Record, vol. 141 at S8339 (daily ed. June 14, 1995)

¹³⁰ Congressional Record, vol. 141 at S1953 (daily ed. Feb. 1, 1995)

the Communications Act of 1934 (§223) and enforced by the Federal Communications Commission (FCC)—to other telecommunications devices, including the Internet and computer.¹³¹ The CDA, Title V of the larger Telecommunications Act of 1996,¹³² extended these regulations by amending the language of 47 U.S.C. 223 (originally the Communications Act of 1934) to include, among other things, the so-called “indecent transmission” provision and the “patently offensive display” provision.

The “indecent transmission” provision, §223(a)(I)(B), criminalized, “by means of a telecommunications device” the “knowing’ transmission of ‘obscene or indecent’ messages to any recipient under 18 years of age.”¹³³ On the other hand, the “patently offensive display” provision, Title 47 U. S. C. §223(d) prohibited, via interactive computer services or otherwise, the “knowin[g]’ sending or displaying to a person under 18 of any message ‘that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.’”¹³⁴ The CDA also provided affirmative defenses for those who take “good faith, . . . effective . . . actions” to restrict access to minors to the prohibited communications, §223(e)(5)(A),¹³⁵ and those who restrict access by requiring proof of age via a “verified

¹³¹ See *The Communications Act of 1934*, which established the Federal Communications Commission and provided obscenity and indecency provisions (Sec. 223. [47 U.S.C. 223]—*Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications*) cited in *Reno v. American Civil Liberties Union* (1997), 521 U.S. 844.

¹³² Congress.gov, “S.652 - Telecommunications Act of 1996, 104th Congress (1995-1996),” <https://www.congress.gov/bill/104th-congress/senate-bill/652/text>

¹³³ *Reno v. ACLU* (1997); Title 47 U. S. C. § 223(a)(I)(B)(ii)

¹³⁴ *Id.* Title 47 U. S. C. §223(d)

¹³⁵ *Id.* § 223(e)(5)(A)

credit card, debit account, adult access code, or adult identification number”, §223(e)(5)(B), or the like.¹³⁶

In 1997, thanks to the efforts of the American Civil Liberties Union, both the “indecent transmission” and “patently offensive display” provisions of the CDA came under judicial assault in *Reno v. American Civil Liberties Union*.¹³⁷ In a unanimous decision, the Court ruled in favor of the ACLU, holding ‘[t]he CDA’s ‘indecent transmission’ and ‘patently offensive display’ provisions abridged ‘the freedom of speech’ protected by the First Amendment.’¹³⁸

B. Case Decision(s) and Reasoning(s)

Justice Stevens wrote for the unanimous Court in which he reasoned the CDA was inherently different in numerous ways from past cases and precedents such as *Ginsberg v. New York* (1968, 390 U. S. 629),¹³⁹ *FCC v. Pacifica Foundation*, (1978, 438 U. S. 726),¹⁴⁰ and *Renton v. Playtime Theatres, Inc.* (1986, 475 U. S. 41).¹⁴¹ He first

¹³⁶ *Id.* §223(e)(5)(B)

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ A New York law criminalized selling, to a minor under 17 years of age, any picture depicting nudity, any pictures harmful to minors, or any magazine, taken as a whole, deemed harmful to minors. The Supreme Court held the statute constitutional, reasoning just because the material may not be obscene to adults, it may still be classified, and thus regulated, as harmful to minors.

¹⁴⁰ The FCC tried to censure *Pacifica Foundation* after it had aired George Carlin’s “Filthy Words” and received a complaint from a viewer whose young son had heard the content. The Court ruled in favor of the FCC, holding the FCC could censure radio programs they deemed indecent during periods where children were more likely to hear the inappropriate content (this included giving the FCC leeway to decide definitions of indecent in certain contexts).

¹⁴¹ A case in which the Supreme Court held localities could impose regulations prohibiting adult theaters from operating in certain areas (the specific regulation in question involved a theater within 1,000 feet of a residential zone). See *Reno v. ACLU*

argued there were inherent problems with the CDA’s language, arguing the substantive difference between “indecent” and “patently offensive as measured by contemporary community standards” will inevitably “provoke uncertainty among speakers about how the two standards relate to each other and just what they mean.”¹⁴² Furthermore, because the CDA was content-based regulation, its vagueness and breadth offered constitutional problems linked to unintended chilling effects on protected speech by suppressing a large amount of speech adults have a right to send and receive. This chilling effect, coupled with the CDA’s criminal nature—and the severity of the punishment (“up to two years in prison for each act violation”)—had the possibility of increased deterrence, dismaying potential speakers from even speaking arguably unlawful words, images, or ideas.¹⁴³

In response, the government argued the CDA’s provisions were no more vague than the standard the Court established in *Miller*, however, Stevens rejected this argument. He held the CDA’s “patently offensive” provision inconsistent with *Miller*’s second limiting prong because the provisions did not require prohibited material be “specifically defined by the applicable state law”.¹⁴⁴

(1997) for how the CDA was different from these cases: “The CDA differs from the various laws and orders upheld in those cases in many ways, including that it does not allow parents to consent to their children’s use of restricted materials; is not limited to commercial transactions; fails to provide any definition of “indecent” and omits any requirement that “patently offensive” material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium’s unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech. These precedents, then, do not require the Court to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions. Pp. 864-868.”

¹⁴² *Id.* at 870-874

¹⁴³ *Id.* at 872

¹⁴⁴ *Id.* at 873 (referencing *Miller v. California* (1973), 413 U. S. 15, 24)

Lastly, Stevens also held the two affirmative defenses §223(e)(5)(A), providing for a ‘good faith’ defense, and §223(e)(5)(B), providing age verification via a verified credit card (or another form of verification) did not save the statute. The Court argued the ‘tagging’ software the government alluded to with ‘good faith’ defenses was illusory and did not yet exist,¹⁴⁵ and the credit card verification, exempted adults without credit cards while also placing burdens on noncommercial website which may cause them to shut down.¹⁴⁶

In summation, Stevens reiterated that “[t]he CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, e. g., *Ginsberg*, 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, e. g., *Sable*, 492 U. S., at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes... Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored.”¹⁴⁷

¹⁴⁵ *Id.* at 851-852

¹⁴⁶ *Id.* at 856

¹⁴⁷ *Id.* at 874-879; Stevens also opined the affirmative defense—provided in §223(e)(5), which provided those convicted a “good faith” defense by allowing transmitters to tag their content as indecent, allowing permitting recipients a chance to block their reception with appropriate software— “do[es] not constitute the sort of ‘narrow tailoring’ that would save the CDA.” He argued that the filtering software suggested did not yet exist, but even if it did, there would be no way of knowing whether the recipient actually blocked the transmission. However, in a win for the government, Stevens upheld the rest of the CDA by honoring its severability clause (§608) (879-882). A judgment on 5th Amendment challenges was not necessary and not reached (864).

C. Statutory Response(s)

Following *Reno*'s decision, legal pundits described the decision as “the legal birth certificate of the Internet”¹⁴⁸ and the “Bill of the Rights for the 21st Century”,¹⁴⁹ however, not everyone was as exuberant by the extension of 1st Amendment protections to this new potentially precarious—and easily accessible to children—forum of indecency.

Almost immediately following the decision in *Reno*, Sen. Daniel Coats [R-IN]—a cosponsor of the original CDA—took to the floor of the Senate and introduced S. 1482, which had similar provisions as the invalidated CDA and was informally referred to as the “CDA II.”¹⁵⁰ Of its proposal, Sen. Coats exclaimed, “[t]his battle is about protecting children from access to that material which most of us would turn our heads from, or say that is enough, were we given the opportunity to look at it.”¹⁵¹

Another version of the bill, entitled the Child Online Protection Act (COPA), was introduced in House.¹⁵² Although the COPA title stuck, it was Coats's language that finally made it through both houses and was signed by President Clinton in 1998 as a

¹⁴⁸ Edward Felsenthal & Jared Sandberg, “High Court Strikes Down Internet Smut Law,” *Wall St. Journal*, published: June 27, 1997, BI (quoting statement made by attorney Bruce Ennis, who represented groups challenging the law)

¹⁴⁹ Biskupic and Schwartz, “1st Amendment Applies To Internet, Justices Say” (quoting statement made by Jerry Berman of Center for Democracy and Technology, a policy group opposing the CDA).

¹⁵⁰ [Congress.gov](https://www.congress.gov/bill/105th-congress/senate-bill/1482), “S.1482 - A bill to amend section 223 of the Communications Act of 1934 to establish a prohibition on commercial distribution on the World Wide Web of material that is harmful to minors, and for other purposes, 105th Congress (1997-1998),” <https://www.congress.gov/bill/105th-congress/senate-bill/1482>

¹⁵¹ *Congressional Record*, vol. 144 at S 8450, *Cong. Rec.* July 17, 1998

¹⁵² [Congress.gov](https://www.congress.gov/bill/105th-congress/house-bill/3783), “H.R.3783 - Child Online Protection Act, 105th Congress (1997-1998),” <https://www.congress.gov/bill/105th-congress/house-bill/3783>

largely overlooked amendment to a much larger omnibus appropriations bill.¹⁵³ Similar to the invalidated CDA, the COPA attempted to limit and restrict access to harmful pornographic material from getting into the hands of minors; however, its revised language, in tailoring its provisions to *Reno*, limited the bill.

Lawmakers restricted COPA in four main ways. First, COPA applied to the transmissions of communications only accessible “by means of the world wide web,” thus limiting its scope to only publicly accessible sites.¹⁵⁴ The CDA had extended to “cyberspace” and included within its scope “email, mail exploders, newsgroups, [and] chatrooms.”¹⁵⁵ However, the *Reno* Court found the CDA had no way to screen the recipients and participants of such forums for age (i.e. anyone, at any age, can transmit emails with pornographic material). As such, the COPA required only to publicly accessible sites to restrict their sites to minors.¹⁵⁶ Secondly, where the CDA had extended to all transmissions, the COPA only required “commercial distributors” of “material harmful to minors” to restrict site access to minors,¹⁵⁷ as suggested by the *Reno* Court.¹⁵⁸ Third, in *Reno*, the Court argued the CDA’s 18-and-under provision provided an

¹⁵³ Government Printing Office, “Omnibus Appropriations Bill FY99, PL, 105-277, Title XIV ‘Child Online Protection Act,’” <http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf> (originally found in Robert Klotz, *The Politics of Internet Communication* (Rowman and Littlefield Publishers: 2003),146; see also Anna Forslund, “Protecting America’s Youth Online: A Legal and Ethical Analysis,” Graduate Program of Mass Communication & Media Arts in the Graduate School, UMI Microform, Millikin University (Copyright 2008); though the House bill’s short title — the “Child Online Protection Act”—stayed the same under the Omnibus Appropriations Bill FY99. Congress.gov, “H.R.4328 - Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 105th Congress (1997-1998),” <https://www.congress.gov/bill/105th-congress/house-bill/4328/related-bills>

¹⁵⁴ *Reno v. ACLU* (1997); 47 U.S.C. §231(a)(1)

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* §231(a)

¹⁵⁸ *Id.*

inconsistency with the Court’s jurisprudence in *Ginsberg*, in which the N.Y. statute applied to those under 17.¹⁵⁹ In response, the COPA defined a minor as “any person under the age of 17” narrowing the statute’s applicable scope.¹⁶⁰

Lastly, and most significantly, lawmakers switched the “indecent” and “patently offensive” provisions—provisions the Court had labeled overly vague and inconsistent with *Miller*—to “material that is harmful to minors,” defining harmful material under the exact same three-prong language voiced by the *Miller* Court in 1973.¹⁶¹ The criminal penalties were also less than the CDA—a \$50,000 fine and six-month sentence under the COPA versus up to two years imprisonment and fines upwards \$250,000 under the CDA.¹⁶²

D. Subsequent Developments

Despite the attempts to narrow the scope of the law, almost immediately the ACLU again had constitutional qualms with the COPA and moved to challenge it in court. The ACLU and 16 other plaintiffs filed for declaratory and injunctive relief from

¹⁵⁹ *Ginsberg v. State of New York* (1968), 390 U.S. 629, 646

¹⁶⁰ Congress.gov, “S.1482 - A bill to amend section 223 of the Communications Act of 1934 to establish a prohibition on commercial distribution on the World Wide Web of material that is harmful to minors, and for other purposes”

¹⁶¹ *Reno v. ACLU* (1997); Quoting *Miller v. California* (1973): “(a) whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically define by the applicable state law; (c) whether the work, take as a whole, lacks serious literary, artistic, political or scientific value.” For more see Steven D. Burt, “Strict Scrutiny in Cyberspace: The Invalidation of the Communications Decency Act and the Slow Demise of the Child Online Protection Act,” *Journal of Law and Family Studies*, Vol. 8. Issue 1 (2006): 241-264

¹⁶² Congress.gov, “S.1482 - A bill to amend section 223 of the Communications Act of 1934 to establish a prohibition on commercial distribution on the World Wide Web of material that is harmful to minors, and for other purposes”

the COPA's provisions in the United States District Court for the Eastern District of Pennsylvania,¹⁶³ where Judge Lowell Reed issued a temporary injunction based on the COPA's suspect constitutionality. Clinton Attorney General Janet Reno's office appealed the ruling and on June 20, 2000, the Third Circuit Court of Appeals affirmed the trial court's ruling.¹⁶⁴

When President Bush took office, the Attorney General's office, now under John Ashcroft, appealed the Third Circuit's ruling to the Supreme Court and in *Ashcroft v. ACLU* (2002) the Court narrowly held COPA's reliance on community standards to identify 'material that is harmful to minors' does not by itself render the statute substantially overbroad for purposes of the First Amendment."¹⁶⁵ The Supreme Court refused to facially invalidate the COPA and the case was vacated and remanded to the Third Circuit. In March of 2003, the Third Circuit Court reaffirmed its original holding, reasserting its concern that the COPA's 'community standards' had not sufficiently remedied the Supreme Court's concern with the CDA voiced in *Reno*.¹⁶⁶

Ashcroft again appealed the case to the Supreme Court, and the Court, in the identically-titled *Ashcroft v. ACLU* (2004), decided the District Court was correct in enjoining the enforcement of COPA due to the likelihood the statute violated the First Amendment.¹⁶⁷ This time, the Court sent the case back down to the District Court, adducing it had been five years since the District Court had heard the hearing. In those five years, Congress has enacted two less-restrictive congressional laws—the Dot Kids

¹⁶³ Complaint, *ACLU v. Reno*, 31 F. Supp.2d 473 (E.D.Pa. 1999) (No. 98 Civ. 5591).

¹⁶⁴ *ACLU v. Reno*, 217 F.3d 162 (3d. Cir. 2000).

¹⁶⁵ *Ashcroft v. ACLU* (2002), 535 U.S. 564, 585

¹⁶⁶ *Id.* at 585-586

¹⁶⁷ *Ashcroft v. ACLU* (2004), 542 U.S. 656; not to be confused with *Ashcroft v. ACLU* (2002), 535 U.S. 564

Implementation and Efficiency Act of 2002,¹⁶⁸ creating a child-safe ‘.kids’ domain, and the Truth in Domain Names Act (TDNA) of 2003,¹⁶⁹ which prevented the use of misleading domain names. Furthermore, Internet usage had mushroomed in those years, and with its increased usage came developments including improvements in filtering software. For all these reasons, the Court sent the case back down to the District Court to be reargued.

In 2007, Judge Reed again enjoined implementation of the COPA, writing, “[p]erhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.”¹⁷⁰ Again the litigants appealed to both the Third Circuit and then the Supreme Court; however, this time when the Third Circuit upheld Judge Reed’s enjoinder in 2008, the following year the Supreme Court refused to hear appeals, effectively permanently enjoining enforcement of the COPA.¹⁷¹

Despite Congress’s limited legislative success in circumventing *Reno*—limited in both potency (\$50,000 and six months versus \$250,000 and two years of prison) and scope (only applied to ‘commercial distributors’, publicly accessible sites, those under 17 years of age, all with more lax ‘harmful to minors’ standards)—the bill never went into

¹⁶⁸ Congress.gov, “H.R.3833 - Dot Kids Implementation and Efficiency Act of 2002, 107th Congress (2001-2002),”<https://www.congress.gov/bill/107th-congress/house-bill/3833>

¹⁶⁹ Congress.gov, “S.151 - PROTECT Act, 108th Congress (2003-2004),”<https://www.congress.gov/bill/108th-congress/senate-bill/151>; the TDNA was part of the larger PROTECT Act (TDNA: ‘Title V, Subtitle B, Sec. 521)

¹⁷⁰ Associated Press, “Judge Strikes Down ’98 Law Aimed at Online Porn,” published: March 22, 2007, http://www.mercurynews.com/breakingnews/ci_5494735

¹⁷¹ Declan McCullagh, “Supreme Court Deals Death Blow to Antiporn Law,” CNET (updated: 2009), <http://www.cnet.com/news/supreme-court-deals-death-blow-to-antiporn-law/>

effect thanks to the ACLU's efforts to enjoin COPA's enforcement—even if it took a decade of litigation in courts for it to be permanently enjoined and effectively invalidated.

During the litigation involving the COPA, a multitude of much narrower statutes were enacted with a similar goal of protecting children from Internet pornography. Mentioned above, the Dot Kids Implementation and Efficiency Act was enacted in 2003 and created a child-safe '.kids.' domain.¹⁷² Similarly, the Truth in Domain Names Act (TDNA) was enacted in 2003, and attempted to prevent the use of misleading domain names.¹⁷³ Both statutes, though nowhere near as broad or potent (in terms prosecutorial potency—criminal versus non-criminal) as COPA, still accomplished their goal of limiting children's access to pornographic material.

Passed a year prior to the above acts, the Child Internet Protection Act (CIPA) of 2002, required K-12 schools and libraries receiving federal library funds and discounts ('E-Rate' and Library Services and Technology Act (LSTA) funds) to operate "a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene, child pornography, or harmful to minors."¹⁷⁴ A year following its enactment, the American Library Association, with the help of the ACLU, challenged the CIPA's constitutionality in the Supreme Court as applied to public libraries. In *United States v.*

¹⁷² Congress.gov, "H.R.3833 - Dot Kids Implementation and Efficiency Act of 2002"; in response to declining usage, '.kids' registration was suspended in 2012. At that time, 651 domains were registered as '.kids'. See Kids.us, "Final Report of the Kids.us Education Advisory Committee Pursuant to Contract Modification NO. SB1335-14-CN-0016 MOD 0001," Presented by *Neustar Inc.* October 27, 2014: <http://www.neustar.us/wp-content/uploads/2014/10/education-advisory-committee-final-report.pdf>

¹⁷³ Congress.gov, "S.151 - PROTECT Act, 108th Congress (2003-2004)." <https://www.congress.gov/bill/108th-congress/senate-bill/151>; the TDNA)

¹⁷⁴ *Reno v. ACLU* (1997); 47 U.S.C. §254(1)(B)

American Library Association (2003) by plurality decision the Court held the Congress's stipulation of Internet filtering for federal funds under the CIPA constitutional.¹⁷⁵

Nonetheless, since then, many libraries have fought against the requirements of CIPA claiming they violate the principles of librarians to provide equal access to information. In 2007, one-third of public libraries refused to apply for E-rate discounts or LSTA discounts because of CIPA requirements, drastically reducing CIPA's efficacy in prohibiting children's access to pornographic materials—at least in public libraries.¹⁷⁶

iii. Ashcroft v. Free Speech Coalition and the PROTECT Act of 2003

A. Background and Original Statute

In 1996, in the midst of the Internet pornography inquisition, Congress passed the Child Pornography Prevention Act (CPPA) of 1996. Unlike the CDA and the COPA and their attempts to regulate children's access to Internet pornography, the CPPA's two main provisions attempted to criminalize the distribution of child pornography on the Internet. The core provisions, §2256(8)(B) and §2256(8)(D), respectively, provided for an extended prohibition on the distribution of pornographic images encompassing "any visual depictions, including any photograph, film, video, picture, or computer-generated image or picture that is or appears to be of a minor engaging in sexually explicit conduct," as well a prohibition on any sexually explicit image that is "advertised, promoted, presented, described, or distributed in a such a manner that conveys the

¹⁷⁵ *United States v. American Library Association* (2003), 539 U.S. 194

¹⁷⁶ Charles McClure and Paul Jaeger, "Public Libraries and Internet Service Roles: Measuring and Maximizing Internet Services," *American Library Association* (published: 2009): 79

impression it depicts ‘a minor engaging in sexual conduct.’¹⁷⁷ What's more, §2256(8)(A) of the act defined depictions of computer—or otherwise—generated material as child pornography, even if a physical child was not portrayed.¹⁷⁸

Similar to the CDA and COPA, the CPPA also amended the Communications Act to provide affirmative defenses for distributors, §2252A(c), “allowing a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children.”¹⁷⁹

In 2002, the Act’s main provisions, §2256(8)(B) and §2256(8)(D), came under judicial attack in the Supreme Court case *Ashcroft v. Free Speech Coalition* (2002). In a 6-3 decision, over yet another skirmish over the constitutional balance between free speech and the potentially harmful effects of child pornography, the Court struck down the CPPA as overly broad and unconstitutional.

B. Case Decision(s) and Reasoning(s)

Justice Kennedy authored the opinion in which he first applied the *Miller* test to §2256(8)(B), “which requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value, 413 U. S., at

¹⁷⁷ “Legal Information Institute (LLI): 18 U.S. Code §2256,” *Cornell University Law School*, <https://www.law.cornell.edu/uscode/text/18/2256>

¹⁷⁸ *Id.* at §2256(8)(A)

¹⁷⁹ *Id.* at §2252A(c), quoting *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234

24.”¹⁸⁰ Kennedy held, under the CPPA, any materials that depict any sexual explicit activity of a minor, not just those appealing to prurient interests, are prohibited and could lead to severe criminal punishment without the consideration of the work’s artistic merit holistically: “Under *Miller*, redeeming value is judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.”¹⁸¹

Having found no merit in *Miller* to uphold the CPPA, the Court moved on to consider the government’s argument on the CPPA’s constitutionality based on precedent from *New York v. Ferber* (1982).¹⁸² In *Ferber*, the Court “upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were ‘intrinsically related’ to the sexual abuse of children in two ways.”¹⁸³ First, the continued circulation of the specific pornographic depiction harmed the child who participated and second, the traffic of child pornography was an economic motive for its production, and the State had an interest in closing such a cyclic distribution network.

In *Free Speech Coalition*, Kennedy reasoned the virtual production of child pornography does not harm children, rejecting the government’s argument that the distribution of virtual pornography could whet pedophiles’ demand leading to a market involving the actual abuse of children. The Court argued the government’s market deterrence rationale argument relied on the assumption that the market in question was comprised of solely illegal and unprotected materials; in other words, the state cannot

¹⁸⁰ Quoted in *Ashcroft v. Free Speech Coalition* (2002) in reference to *Miller v. California* (1973), 413 U.S. 15

¹⁸¹ *Id.*

¹⁸² *New York v. Ferber* (1982), 458 U. S. 747, 758

¹⁸³ *Ashcroft v. Free Speech Coalition* (2002)

prohibit protected speech—in this case adults simulating child pornography that is neither obscene nor causes actual children harm—in efforts to strike at unprotected speech.

Rather, Kennedy reasoned, "[t]he Constitution requires the reverse. '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted...'"¹⁸⁴

Similarly, Kennedy also found the §2256(8) provisions overly broad in that both §2256(8)(B)'s "appears to be" caveat and §2256(8)(D)'s "conveys the impression" required little judgment on the image's substantive content. He argued "[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on how the speech is presented, not on what is depicted."¹⁸⁵

The *Free Speech Coalition* Court also held the affirmative defense—§2252A(c), providing for avoidance of conviction by showing the material were produced by adults—attempting to over compensate for an overbroad law, did not save the CPPA from its unconstitutionality. The affirmative defense, placing the burden of proof on the defendant rather than the government, may not be applicable to all defendants if said possessor did not, for instance, produce the material and hence does not know if adults are depicted or not. Furthermore, "[i]t leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real

¹⁸⁴ *Ashcroft v. Free Speech Coalition* (2002), 255 (quoting *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 612)

¹⁸⁵ *Id.* at 257

children from virtual ones.”¹⁸⁶ Thus, by holding the CPPA invalid under the First Amendment, the *Free Speech Coalition* Court proscribed virtual child pornography First Amendment protections.

C. Statutory Response(s)

Following *Free Speech Coalition*, many legislators were left worried that the Court had sided with pedophiles over children, prioritizing abstract First Amendment principles instead of the practical protection of children and prosecution of criminals.¹⁸⁷ Rep. Mark Foley of Florida, co-chairman of the Congressional Missing and Exploited Children's Caucus, led a renewed congressional charge: “Whether in movies or photographs, it doesn't make a difference whether or not the person engaged in sex is actually a child. If it looks like a child and is said to be a child, pedophiles have found their fix—and their search for true child pornography will only be enhanced.”¹⁸⁸ Less than a year following *Free Speech Coalition* calls for renewed regulatory legislation culminated in the PROTECT Act.¹⁸⁹

Enacted in 2003, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act altered the invalidated language of the CPPA “in a deliberate effort to survive post-*Free Speech Coalition* judicial scrutiny while

¹⁸⁶ *Id.* at 256

¹⁸⁷ See Rosalind Bell, “Reconciling the PROTECT Act with the First Amendment,” *New York University Law Review*, Vol. 87, Issue 6 (2012): 1878-1897 (fn. 93)

¹⁸⁸ Charles Lane, “Law Aimed at “Virtual” Child Porn Overturned: High Court Says Ban Too Broadly Worded”, *Washington Post*, published: Apr. 17, 2002, A1 (emphasis added) (quoting Rep. Mark Foley of Florida, co-chairman of the Congressional Missing and Exploited Children's Caucus).

¹⁸⁹ Government Printing Office, “S.151, 108th Congress-The PROTECT Act of 2003,” <http://www.gpo.gov/fdsys/pkg/BILLS-108s151enr/pdf/BILLS-108s151enr.pdf>

strengthening law enforcement's tools in the fight against child pornography."¹⁹⁰ The Act prohibited the receiving, distributing, and possessing of child pornography—redefined as any visual depiction of sexually explicit conduct involving the use of a real minor *or* a “digital image, computer image, or computer-generated image that is, or is *indistinguishable from,*” that of a real minor.¹⁹¹ Moreover, the language “indistinguishable from” was further defined as “such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct,” excluding drawings, cartoons, sculptures, or paintings.¹⁹² The Act, similar to the CPPA, also provided an affirmative defense for defendants who could prove no minors were used in the actual or virtual alleged child pornography.¹⁹³

The core amended language—from CPPA’s “appears to be” and “conveys the impression” provisions to “indistinguishable from”—seemingly satisfied the Court’s jurisprudence in *Free Speech Coalition* by narrowing the statute’s definition of child pornography.¹⁹⁴ Even so, questions raised in *Free Speech Coalition* regarding CPPA’s “appears to be” and “conveys the impression” provisions’ consistency with *Ferber* (specifically the arguments made regarding overbreadth), seemed similarly at question with many legal and political pundits with the PROTECT Act’s “indistinguishable from”

¹⁹⁰ Bell, *supra* note 188 at 1898, quoting Fn. 99, (Congressional Record, vol. 149 at 4227 (2003) (statement of Sen. Leahy) (“It is important that we do all we can to end the victimization of real children by child pornographers, but it is also important that we pass a law that will withstand First Amendment scrutiny. We need a law with real bite, not one with false teeth.”))

¹⁹¹ Government Printing Office, “S.151, 108th Congress-The PROTECT Act of 2003”

¹⁹² *Id.* at Sec. 502(c)(11)

¹⁹³ *Id.* at Sec. 502(d)

¹⁹⁴ “Indistinguishable from” has a narrower policy breadth than simply “appears to be” in that only virtual obscene minor material that cannot be distinguished from actual obscene minor material is captured versus virtual obscene material that simply appears to be actual obscene minor material.

provision.¹⁹⁵ Just as the *Ferber* Court reasoned, a film director may cast an actress over the age of eighteen to portray a younger girl, and audiences may not be able to distinguish the difference; under the PROTECT Act, such a depiction would be prohibited without ever weighing the film's holistic merit.¹⁹⁶

The PROTECT Act's affirmative defense, for those who could prove adults and not minors were depicted in alleged pornographic material, also closely resembled the CPPA's affirmative defense provision that the *Free Speech Coalition* Court ruled could not save the statute from its invalidation. The PROTECT Act's defense, §502(c), like the CPPA's defense, placed the burden of proof upon the defendant, requiring proof each person(s) was an adult at the time of filming and the material was not produced using any actual minor(s).¹⁹⁷

Furthermore, the PROTECT Act's scope was also expanded with its controversial 'pandering' provisions. Pandering, which early obscenity cases introduced as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers," had been established as serving as determinative evidence of obscenity—someone's deliberate representation (advertising) of material as obscene is arousing in itself, appealing to said customers prurient interests.¹⁹⁸ Section 503 of The PROTECT Act made the pandering of such material criminal in itself, punishing anyone who:

¹⁹⁵ See Bell, *supra* note 188, at 1897 (fn. 93)

¹⁹⁶ *New York v. Ferber* (1982), 458 U.S. 747, 763

¹⁹⁷ Government Printing Office, "S.151, 108th Congress-The PROTECT Act of 2003," §502(c)

¹⁹⁸ *Ginzburg v. United States*, 383 U.S. 463, 467 n.7 (1966) (citing *Roth v. United States*, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring)).

[A]dvertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains-

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct . . .¹⁹⁹

With both the PROTECT Act's "indistinguishable from" and pandering provisions, Congress was able to successfully replicate the CPPA's main provisions with only slightly narrowed breadth and potency. However, in practice, the PROTECT Act's provisions seemed indistinguishable from the CPPA's "appears to be" and "conveys the impression" seeing as Congress's only main change was a stronger nexus with the "indistinguishable from" provision.

D. Subsequent Developments

In 2008, the Supreme Court addressed the PROTECT Act in *United States v. Williams* (2008).²⁰⁰ Specifically at question were the Act's pandering provisions related to virtual child pornography. The Court, in a 7-2 decision, upheld the statute, but argued the pandering provisions required a scienter: "A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed

¹⁹⁹ Government Printing Office, "S.151, 108th Congress-The PROTECT Act of 2003," §503

²⁰⁰ *United States v. Williams* (2008), 553 U.S. 285

transaction depicts real children."²⁰¹ In 2008, in another case, Chase Handley was convicted not under the pandering provisions of the PROTECT Act, but under the general prohibitions of possession for possessing comics depicting child pornography. Rather than challenging the charges—constitutionally or otherwise—in the District Court case *United States v. Handley*, Handley, facing 15 years imprisonment, entered into a plea bargain.²⁰² Since then, others have been convicted under the PROTECT Act’s provisions, though none have reached the Supreme Court through the appeal process.²⁰³

B. Regulation of Interstate Commerce

i. United States v. Lopez and the Gun-Free School Zones Act of 1995

A. Background and Original Statute

In 1990, Congress enacted the original Gun-Free School Zones Act (GFSZA) of 1990, which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone (§922(q)).”²⁰⁴ Five years later, in the Supreme Court case *United States v. Lopez* (1995),

²⁰¹ *Id.*; albeit, 2008 is outside of the Rehnquist Court’s tenure—and hence will not be analyzed—*U.S. v Williams* seem worth mentioning in that it depicts the PROTECT Act’s subsequent implementation after its passage.

²⁰² Justice.gov, “Iowa Man Pleads Guilty to Possessing Obscene Visual Representations of the Sexual Abuse of Children,” DOJ (published: May 20, 2009), <http://www.justice.gov/opa/pr/iowa-man-pleads-guilty-possessing-obscene-visual-representations-sexual-abuse-children>

²⁰³ *United States v. Whorley* (No. 06-4288) was heard in the 4th Circuit Court of Appeals, but did not reach the Supreme Court:

<http://www.ca4.uscourts.gov/Opinions/Published/064288.P.pdf>

²⁰⁴ *United States v. Lopez* (1995), 514 U.S. 549; 18 U.S. Code § 922, L 114-19

the Court addressed its constitutionality in a 5-4-federalism decision. Chief Justice Rehnquist delivered the opinion of the Court: “The Act neither regulates a commercial activity nor contains a requirements that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress ‘[t]o regulate Commerce...among the several States...’”²⁰⁵

B. Case Decision(s) and Reasoning(s)

In his reasoning, Rehnquist applied gun possession to the Court-determined “three broad categories of activity that Congress may regulate under its commerce power”: channels of interstate commerce, instrumentalities of interstate commerce, and activities substantially affecting interstate commerce.²⁰⁶ Having quickly found no authority to enact §922(q) under the first two categories, Rehnquist concluded that if Congress were to have the authority, the authority to regulate gun possession must be sustained under the third category: activities substantially affecting interstate commerce.

Within the “substantial effect” vein, Rehnquist reasoned “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”²⁰⁷ However, Rehnquist argued, the GFSZA did not fall within this ‘economic’ categorization: “Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic

²⁰⁵ *United States v. Lopez* (1995), 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626, 551

²⁰⁶ *Id.* at 558

²⁰⁷ *Id.* Rehnquist also cites “inns and hotels catering to interstate guests, *Heart of Atlanta Motel* [(1964), 379 U.S. 241], and production and consumption of homegrown wheat, *Wickard*,” as examples of cases where congressional acts regulating economic activity substantially affecting interstate commerce were upheld; however, *Lopez* was distinct from these cases.

activity in a way that the possession of a gun in a school zone does not....Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define that terms.’²⁰⁸ Furthermore, Rehnquist argued, “§ 922(q) contains no jurisdictional element which would ensure, through case-by- case inquiry, that the firearm possession in question affects interstate commerce.”²⁰⁹ The majority did not find the government’s arguments linking gun violence to the national economy convincing either: “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce clause to a general police power of the sort retained by the States... This we are unwilling to do.”²¹⁰

C. Statutory Response(s)

Immediately following *Lopez*’s decision, President Clinton, who strongly disagreed with the decision of the largely conservative Court,, took his dissension to the people. In a radio address on April 26th 1995 following the decision, Clinton argued, “[t]his Supreme Court decision could condemn more of our children to going to schools where there are guns.” He concluded: “I am determined to keep guns out of our schools. That’s what the American people want, and it’s the right thing to do.”²¹¹

²⁰⁸ *Id.* at 560

²⁰⁹ *Id.* at 561

²¹⁰ *Id.* at. 568; The government argued that guns negatively affected the national economy by inhibiting the educational process by threatening learning environments and through the mechanism of insurance.

²¹¹ Quoted in Todd S. Purdum, “Clinton Seeks Way to Retain Gun Ban in School Zones”, *New York Times* (published: April 30, 1995), A1; Original Source: John Dinan, “Congressional Responses to the Rehnquist Court’s Federalism Decisions,” *Publius* Vol. 32, No. 3 (2002), 1-24 ** This section relies heavily on the cogent analysis and deft

With the gauntlet laid, the President considered how best to accomplish this goal. John Dinan, in his article *Congressional Responses to the Rehnquist Court's Federalism Decisions*, writing in 2002, outlined the potential options available to Clinton at the time: "One option was to rely on the spending power and to condition the states' receipt of federal education funds on their enactment of gun-free school zone laws. Congress had taken this approach just the previous year when it enacted the Gun Free Schools Act of 1994, which threatened states with the loss of a portion of federal education funding unless they enacted a policy providing for the year-long expulsion of any student who brought a gun to school."²¹² In the very same radio address, Clinton mentioned that he had directed Attorney General Janet Reno to brief him within a week on possible responses, with the leading option "link[ing] Federal funds to the enactment of school-zone gun bans."²¹³ Of the plan, Clinton argued "[a]t least we could tie the money we have for safe schools to such a ban."²¹⁴

phrasing presented by Dinan in his article. An asterisk (*) represents an article originally found within Dinan's article. Within his article, Dinan outlines instances where Congress has responded to Court decisions invalidating congressional legislation through whatever means available to them; however, unlike this analysis, he does not compare the degree of success with which Congress was able to achieve similar legislative effects as the initial invalidated statute. Furthermore, and drastically, he does not employ the implications tied to constitutional interpretive supremacy. He also only examines cases involving the commerce clause, the Tenth Amendment, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment. This work relies on Dinan only to identify instances of congressional reproposals for those areas he examined (he does not touch on the First Amendment or Non-Delegation cases or subsequent reproposed legislation). Furthermore, Dinan does not always identify failed attempts at statutory repassage (i.e. those reproposals that failed to pass Congress).

²¹² Dinan (2002), 5; not to be confused with the Gun-Free School Zones Act of 1990 or 1995

²¹³ Quoted in Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*,

²¹⁴ *Id* A1. See also Ann Devroy and Al Kamen, "Clinton Says Gun Ruling Is a Threat; President Will Seek To Renew Ban on Schoolyard Firearms," *Washington Post* (published: April 30, 1995), A1*

After consultation with Reno, Clinton eventually decided to take an alternative approach and encouraged Congress to redraft another bill that included a jurisdictional element.²¹⁵ In an address to Congress, Clinton argued the new statute changed the gravamen of the offense to individuals who possessed firearms “that [have] moved in or that otherwise affects interstate or foreign commerce” in a school zone rather than prosecution for simple gun possession in a school zone. Clinton also believed that the revised language satisfied the Court’s commerce-clause jurisprudence in *Lopez*.²¹⁶ In addition to the revised language, the new statute would also include more legislative findings establishing a firmer nexus between gun violence near schools and the affect it has on interstate commerce.²¹⁷ However, it was the new jurisdictional caveat that,

²¹⁵ *Id.* at A23*

²¹⁶ Congressional Record, “The Gun-Free School Zones Amendments Act of 1995—Message from the President of the United States,” *U.S. Congress, House, 104th Cong., 1st sess., 1995*, vol. 141 at H4680*

²¹⁷ See 18 U.S.C. § 922(q)(1) (Supp. IV 1998): “The findings were originally added between the time when Mr. Lopez was prosecuted and the time when the Supreme Court issued its opinion. See *id.*; *Lopez*, 514 U.S. at 618 (Breyer, J., dissenting) (noting that Congress made findings after *Lopez* was prosecuted). The findings are enumerated in subparagraphs A through I:

- (A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
- (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
- (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the House of Representatives and the Committee on the Judiciary of the Senate;
- (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
- (E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

notionally at least, ensured consistency—again, at least facially—with the Court’s interstate commerce decision in *Lopez*. Despite adopting language satisfying Court jurisprudence, Clinton explicitly claimed there would be little to no effect on the actual ability to prosecute the offense.²¹⁸

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- (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
 - (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
 - (H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
 - (I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation’s schools by enactment of this subsection.

18 U.S.C. § 922(q)(1) (Supp. IV 1998)”*

Even so, the addition of simply these findings without the jurisdictional element, applying the reasoning from *Lopez*, would not have made the new statute constitutional for the majority who focused on the aspect that gun possession was not a commercial activity. For more see Donald Regan, “How to Think about the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez* (Symposium: Reflections on *United States v. Lopez*)” *Michigan Law Review*, Vol. 94, Issue 3 (1995): 554-614: “Of course, if we are interested in purely behavioral hypotheses, it seems quite possible that if Congress had made these findings the first time around, the Court would have come out differently. Some Justice in the majority, most likely Justice Kennedy or Justice O’Connor, might have reacted differently to the case if there had been evidence that Congress had given this bill serious thought. For that matter, if Congress had made these findings the first time around, the Fifth Circuit might not have had the nerve to strike down the law, see *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *affd*, 115 S. Ct. 1624 (1995); if the Fifth Circuit had upheld the law, the Supreme Court might well not have granted certiorari. So, these findings might well have made a practical difference. It is true nonetheless that they are irrelevant under the theories the majority ended up putting forward in deciding the case as it came before them.”

²¹⁸ See Message to Congress Transmitting Proposed Legislation to Amend the Gun-Free School Zones Act of 1990, 1995 PUB. PAPERS 678 (May 10, 1995).* See Seth J. Safra, “The Amended Gun-Free School Zone Act: Doubt As to Its Constitutionality Remains” *Duke Law Review*, Vol. 50, Issue 2 (2000): 637-662 “Moreover, to be convicted, a defendant must “know only that he or she possesses the firearm” and not that the firearm ever moved in interstate commerce. *Id.*”

On June 7, 1995 with the law rewritten, Senator Herb Kohl (D-WI) introduced the Gun-Free School Zones Act of 1995 into the Senate Judiciary Committee's Subcommittee on Youth Violence: "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection. It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."²¹⁹ Furthermore, and most importantly, Kohl argued the revised language would "not greatly hamper prosecutions, since virtually every gun in transport or composition travels in interstate commerce."²²⁰

The bill languished in the Senate for over a year, but eventually made it out of committee, where Kohl proposed it be added to an omnibus appropriations bill.²²¹ On September 13th, 1996, a motion was made to strike the GFSZA amendment from the bill, but the proposition failed by a 27-72 margin.²²² Eventually, the Omnibus Consolidated Appropriations Act of 1997 made it out of both congressional houses, and seventeen days later reached the Oval Office where President Clinton signed the appropriations bill making the revised GFSZA law.²²³

²¹⁹ Congressional Record, *U.S. Congress, Senate*, Subcommittee on Youth Violence of the Committee on the Judiciary, "Hearing on S. 890, A Bill to Amend Title 18, United States Code, with respect to Gun Free Schools, and for other purposes," 104th Cong., 1st sess., 18 July 1995, 5

²²⁰ *Id.*

²²¹ Congressional Record, *U.S. Congress, Senate*, 104th Cong., 2nd sess., 1996, vol. 142 at S10383

²²² *Id.*

²²³ Congress.gov, "H.R. 3610-The Omnibus Consolidated Appropriations Act of 1997, 104th Congress (1995-1996)," <https://www.congress.gov/bill/104th-congress/house-bill/3610>

Despite the bill’s identical potency to the initial invalidated GFSZA—in that bill still had the same effect in criminalizing the possession of guns in school zones—the breath of the amended GFSZA’s applicable scope, under statutory adoption, was slightly truncated under the jurisdictional caveat. The main difference between the amended and initial GFSZA was the requirement that in each individual criminal prosecution, “in or affecting commerce” required a minimal nexus to interstate commerce. In other words, prosecutors, in every case, must show the firearm in question, at the very least, previously traveled in interstate commerce at one time or another.²²⁴ Intuitively, however, this prosecutorial stipulation most likely had little to no effects on a prosecutors’ actual ability to prosecute under the amended GFSZA given that in a modern economy, almost every firearm, or parts of a firearm, has previously crossed interstate boundaries at one point or another, bringing it under the purview of the statute.²²⁵ Under the assumption that most firearms have at one point or another crossed interstate boundaries, despite the bill’s slightly narrowed statutory adoption breadth, in effect, the breadth was indistinguishable from the initial GFSZA’s breadth. One can imagine a scenario where a person possesses

²²⁴ See *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996) at 811 (asserting that “in or affecting commerce” requires a minimal nexus to interstate commerce); see also *United States v. Pierson*, 139 F.3d 501, 503 (5th Cir. 1998) at 503-04 (asserting that the minimal nexus required is a showing that the firearm previously traveled in interstate commerce. Furthermore, in *Pierson*, 18 U.S.C. § 922(g), which makes it a crime for convicted felons to “possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”, was upheld and distinguished from the originally invalidated §922(q) in *Lopez* because it had a jurisdictional element.

²²⁵ Unfortunately, the actual empirical numbers of how many guns or gun parts have crossed interstate state boundaries versus those that remain instate is unavailable to the public. The ATF’s National Tracing Center’s data is only available to law enforcement agencies. Intuitively, in a modern economy, most guns and/or gun parts, have at one time or another crossed interstate boundaries making them eligible for federal regulation under the new law.

a gun that has not traveled interstate commerce and thus is outside the scope of the revised statute. However, the modernization of the economy—and in particular the United States economy—makes those exclusively intrastate guns, the exception rather than the norm. As such, the revised GFSZA, in practice, seemingly covers an indistinguishable degree of breadth as the initial GFSZA breadth. The amended GFSZA also kept some of the provisions in the original law including criminalizing the discharging of a firearm on school premises as well as some of the exceptions under the law.²²⁶

D. Subsequent Developments

Opponents of the repassed bill's constitutionality have since then argued “previous movement in interstate commerce has nothing to do with whether a particular act of possession affects interstate commerce; the item's history, therefore, should not affect the statute's constitutionality.”²²⁷ However, despite opposition, following the amended GFSZA's enactment there have been numerous convictions as well as challenges under the law at the circuit and district court level—albeit none of these challenges have reached the Supreme Court.

²²⁶ See §922(q)(2)(B): exceptions include possession (i) on private property not part of school grounds; (ii) if the individual holds a license to carry permitted by the state in which the school resides; (iii) allows possession if firearm is (I) not loaded and (II) in a locked container; (iv) by an individual for use in a program approved by the school; (v) by an individual in accordance with a contract entered into between the school and the individual; (vi) by a law enforcement officer acting in his or her official capacity; (vii) or a gun that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

²²⁷ Safra, *supra* 219 at 644.

Out of the ten challenged convictions under the GFSZA that have reached the circuit court level, three of them were overturned; however, none of these cases was overturned on the grounds that the prosecutor could not prove a gun had traveled across interstate boundaries.²²⁸ Among the seven convictions that were confirmed by appellate courts, in 2005, the U.S. Appeals Court for the 9th District received a case explicitly addressing the amended language of the GFSZA in *United States v. Dorsey* (2005).²²⁹ In

²²⁸ See *United States v Tait*, 202 F.3d 1320 (11th Cir. 2000) (“The Gun-Free School Zone Act dictates that Tait violated federal law via possessing a handgun in a school zone unless Tait was licensed by Alabama, and either Alabama or Escambia County verified that Tait was qualified to receive the license.” Tait was found to be licensed to carry a firearm by Alabama, and Alabama verified Tait was qualified to receive said license); *United States v. Haywood* 280 F.3d 715, 721 (6th Cir. 2002)(Haywood and White participated in an armed robbery in which they robbed a bar and were then later caught escaping the crime scene in their vehicle by the Virgin Islands Police. The police found the firearms and Haywood and White were charged on ten counts including “Count Seven possession of a firearm within 1000 feet of a school zone” However, under §922(q)(2)(A) and 2 (the GFSZA) an individual may not possess a firearm “at a place that the individual knows, or has reasonable cause to believe, is a school zone.” As such, the court held that “the only evidence that the government produced to support this conviction is that the school is, in fact, within 500 feet of the bar. However, that is not sufficiently conclusive to enable a reasonable juror to draw the inference that Haywood knew or should have known of that proximity.” Hence, Count Seven was dropped); *United States v Guzman-Montanez* No. 13-1070 (1st Cir. Jul 10, 2014)(“ A jury in the District of Puerto Rico convicted Marcelino Guzmán–Montañez (“Guzmán”) for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (‘count one’), and for possession of a firearm in a school zone in violation of 18 U.S.C. §§ 922(q)(2)(A) & 924(a)(4) (‘count two’). On appeal, the court closely followed the decision in *Haywood*: In *United States v. Haywood*, 363 F.3d 200 (3rd Cir.2004), the Court of Appeals for the Third Circuit reversed a conviction under § 922(q)(2)(A) on insufficiency grounds. As in the case before us, appellant similarly argued that providing evidence of a school's distance was insufficient to establish his knowledge of a school zone. The court agreed. ‘[T]he only evidence that the government produced to support this conviction is that the school is, in fact, within 500 feet of the [locale where Haywood was found armed]. However, that is not sufficiently conclusive to enable a reasonable juror to draw the inference that Haywood knew or should have known of that proximity.’ *Haywood*, 363 F.3d at 209. We find said ruling to be squarely on point.”

²²⁹ *United States Court of Appeals, Ninth Circuit., U.S., Plaintiff-Appellee, v. Nikos Delano Dorsey, Defendant-Appellant., No. 04-30152. Decided: August 10, 2005; not to be confused with *Dorsey v. United States* (2012).*

Dorsey, the Appeals Court ruled that the revised jurisdictional language of the GFSZA was indeed sufficient to correct the 1990 statute’s constitutional infringements voiced by the Supreme Court in *Lopez* and upheld Dorsey’s conviction under the statute. Even so, a challenge to the constitutionality of the amended language has yet to reach the Supreme Court.²³⁰

ii. United States v. Morrison and the Violence Against Women Civil Rights

Restoration Act

A. Background and Original Statute

In 1994, Congress passed the Violence Against Women Act (VAWA). The VAWA among other provisions provided \$1.6 billion in grant programs (to state, tribal, and local governments; nonprofits; and universities) to target crimes of domestic abuse, sexual assault, and partner violence, as well as improve response to and recovery from these incidents. The VAWA also set up new programs within the Department of Justice (DOJ) and Health and Human Services (HHS) with the same goal (e.g. Office of Violence Against Women within the DOJ) of reducing violence against women.²³¹ The grants also went toward the investigation and prosecution of violent crimes against women.

²³⁰ Another challenge to the revised GFSZA surfaced more recently in 2011, albeit this challenge arose not from the judicial branch, but rather Congress. In July of 2011, U.S. Representative Rand Paul proposed H.R. 2613, which would repeal the amended GFSZA, however, the proposal quickly died in committee. See Congress.gov, “H.R. 2613-Citizens Protection Act of 2011, 112th Congress (2011-2012),” <https://www.congress.gov/bill/112th-congress/house-bill/2613/all-info>

²³¹ Lisa N. Sacco, “The Violence Against Women Act: Overview, Legislation, and Federal Funds” *Congressional Research Service*, (published: May 26, 2015), <https://www.fas.org/sgp/crs/misc/R42499.pdf>; Morrison could have been classified under

Among its provisions, §13981 of the VAWA provided those who had been victims of gender-motivated violence with a federal civil remedy in addition to the criminal statutes (at the State, local level, and federal) already in place (though no criminal prosecution must occur for a criminal remedy suit to be pursued).²³² In 2000, the Supreme Court, in *United States v. Morrison*, took up the question of §13981's federal civil remedy's constitutionality when a petitioner, who was allegedly raped while at Virginia Tech, sought civil relief under the VAWA.²³³

B. Case Decision(s) and Reasoning(s)

In a close 5-4 decision, *Morrison*, authored by Chief Justice Rehnquist, closely followed the Court's commerce clause jurisprudence set in *Lopez* a few years prior. Applying the same logic, Rehnquist reasoned, similar to the possession of firearms in school zones, "gender-motivated crimes of violence are not, in any sense, economic activity" and as such Congress lacks the authority to regulate such non-economic activity under the commerce clause.²³⁴ Furthermore, Rehnquist reasoned similar to the original GFSZA, "§13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce."²³⁵

Lastly, Rehnquist turned toward the line of reasoning establishing the effect of gender-motivated violence upon interstate commerce. §13981, unlike the GFSZA in

the Fourteenth Amendment's Section 5 Enforcement power as well, however I simply chose to classify it under Interstate Commerce because of its close relation to *Lopez* and the parallel reasonings.

²³² "Legal Information Institute (LLI): 42 U.S. Code §13981-Civil Rights," *Cornell University Law School*, <https://www.law.cornell.edu/uscode/text/42/13981>

²³³ *United States v. Morrison* (2000), 529 U.S. 598

²³⁴ *Id.* see 607-619

²³⁵ *Id.* at 613

Lopez, was supported with numerous causal findings establishing a serious impact of gender-motivated crime on victims and their families; however, the causal-chain establishing gender-motivated violence and its affect on interstate commerce was the very same line of reasoning rejected by the Court in *Lopez*: “If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption.”²³⁶ As such, the Court refused to uphold the civil remedy provisions based on the Congress’s commerce clause.²³⁷

Rehnquist also rejected the government’s defense of the civil remedy provisions under Section 5 of the Fourteenth Amendment, upholding past precedent articulating the Fourteenth Amendment protects against State action, not individual action: “Petitioners’ assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record. However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state actions, not private conduct.”²³⁸

C. Statutory Response(s)

²³⁶ *Id.* at 615

²³⁷ *Id.* In conclusion, Rehnquist argued “[t]he Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims.” See *U.S. v. Morrison* at 599.

²³⁸ *Id.* see 619-627; Rehnquist cites *United States v. Harris* (1883), 106 U.S. 629 and *Civil Rights Cases* (1883), 109 U.S. 3 as examples of cases where the 14th Amendment was decided to only prohibit state action not private conduct.

Following the decision, Representative John Conyers Jr. [D-MI] introduced the Violence Against Women Civil Rights Restoration Act (VAWCRRRA) in the 106th, 107th, and 108th Congresses.²³⁹ The main provision of the revised VAWCRRRA aimed “[t]o restore the Federal civil remedy for crimes of violence motivated by gender,”—exactly the VAWA provision that was invalidated by the Court in *Morrison*.²⁴⁰ However, the bill failed to make it out of the Judiciary Committee on all three occasions; when Conyers et al attempted to add the VAWCRRRA to a bill reauthorizing the VAWA’s funding, the amendment was deemed non-germane, and the civil-remedy provision was not included in the bill that was reported out of committee.²⁴¹

Moreover, even if the VAWCRRRA had made it to the floor for a vote, the revised goals of the statute were watered down compared to the original VAWA. Specifically, it included “both a jurisdictional element requiring a commercial link in each case and the authority for Department of Justice intervention upon a showing that local authorities discriminated based on gender in their response to gender-based crimes.”²⁴² Similar to *Lopez* and the revised GFSZA, the new VAWCRRRA attempted to remedy those constitutional violations found in the original VAWA—outlined by the Court in *Morrison*—by adding language requiring a nexus between gender-related violence and

²³⁹ Congress.gov, “H.R. 5021- Violence Against Women Civil Rights Restoration Act, 106th (1999-2000),” <https://www.congress.gov/bill/106th-congress/house-bill/5021/text>; Congress.gov, “H.R. 429 - Violence Against Women Civil Rights Restoration Act of 2001, 107th Congress (2001-2002),” <https://www.congress.gov/bill/107th-congress/house-bill/429>; Congress.gov, “H.R. 394 - Violence Against Women Civil Rights Restoration Act of 2003, 108th Congress (2003-2004),” <https://www.congress.gov/bill/108th-congress/house-bill/394>

²⁴⁰ *Id.*

²⁴¹ Julie Goldscheid, “*United States v. Morrison* and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism,” *Cornell Law Review*, Vol. 86, Issue 1 (2000): 109-138

²⁴² *Id.*

interstate commerce.²⁴³ Though the language was intended to be similar to the nexus in the GFSZA, compared with the ease prosecutors had proving a firearm had crossed state boundaries, it would have proven much more difficult for prosecutors to make the connection between gender-related violence and interstate commerce.²⁴⁴

In the end, the revised language was likely to apply to only a fraction of the cases originally contemplated under the VAWA.²⁴⁵ Legislators, unsure of how often the new civil-remedy provision would apply, and timorous that pushing the civil-remedy provision would possibly jeopardize the pending reauthorization of VAWA funding on the table, chose not to call attention to the bill—attention that might have also cast doubt in the popular mind of the overall legitimacy of the statute. Since then, the VAWA has

²⁴³ Congress.gov, “H.R. 5021- Violence Against Women Civil Rights Restoration Act, 106th (1999-2000),” Section 2; Specifically, the proposal required proof that:

“(1) in connection with the offense-

- (A) the defendant or the victim travels in interstate or foreign commerce;
- (B) the defendant or the victim uses a facility or instrumentality of interstate or foreign commerce; or
- (C) the defendant employs a firearm, explosive, incendiary device, or other weapon, or a narcotic or drug listed pursuant to section 202 of the Controlled Substances Act, or other noxious or dangerous substance, that has traveled in interstate or foreign commerce;

(2) the offense interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(3) the offense was committed with intent to interfere with the victim's commercial or other economic activity.”

²⁴⁴ Though this is purely speculation based from Julie Goldscheid and Sally Goldfarb’s cogent analyses.

²⁴⁵ Sally Goldfarb, “No ‘Civilized System of Justice’: The Fate of the Violence Against Women Act,” *West Virginia Law Review*, Vol. 102, Issue 3 (Spring 2000): 499-544.

been amended and reauthorized numerous times; however, no civil remedy provisions have ever been included in the reauthorization of funds.²⁴⁶

C. Fourteenth Amendment’s Enforcement Power

City of Boerne v. Flores and the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000

A. Background and Original Statute

In 1990, in *Employment Division v. Smith* (1990), the Supreme Court upheld an Oregon statute stipulating a generally-applicable ban on the use of peyote—a drug commonly used in Native American rituals—against a First amendment challenge.²⁴⁷ Religious groups, concerned of the inauspicious outlook for future religious freedom cases, lobbied Congress for federal protection resulting in the enactment of the Religious Freedom Restoration Act (RFRA) of 1993.²⁴⁸

The RFRA prohibited any government from “substantially burdening” an individual’s First Amendment free exercise of religion, unless the substantial burden could be shown to satisfy “a compelling governmental interest” and to be “the least restrictive means” of furthering said interest.²⁴⁹ The RFRA applied to all laws, prior and

²⁴⁶ See for example: Congress.gov, “S.47 - Violence Against Women Reauthorization Act of 2013, 113th Congress (2013-2014),” <https://www.congress.gov/bill/113th-congress/senate-bill/47/>

²⁴⁷ *Employment Division v. Smith* (1990), 494 U.S. 872

²⁴⁸ Congress.gov, “H.R.1308 - Religious Freedom Restoration Act of 1993, 103rd Congress (1993-1994),” <https://www.congress.gov/bill/103rd-congress/house-bill/1308>

²⁴⁹ *Id.* at Sec. 3

future, passed by Congress and, in addition, also extended to state and local laws and ordinances.²⁵⁰ It provided a strict scrutiny standard requiring whichever body of government to ensure any law substantially burdening the exercise of religion, was narrowly tailored towards a compelling governmental interest—the intent and general applicability of said law was irrelevant.²⁵¹ In passing the RFRA, Congress relied upon the Fourteenth Amendment, specifically §1, which guarantees that no State shall make or enforce any law depriving any person of “life, liberty, or property, without due process of law”, or denying any person the “equal protection of the laws,” as well as §5, which empowers Congress “to enforce” those guarantees by “appropriate legislation.”²⁵²

In 1997, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied him the permit, the Archbishop brought suit under, *inter alia*, the RFRA. In a 6-3 decision in its 1997 term, the Rehnquist Court struck down the RFRA as exceeding Congress’s Section 5, 14th Amendment enforcement power.²⁵³

B. Case Decision(s) and Reasoning(s)

Justice Kennedy delivered the opinion of the Court: “Although Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion, see, e. g., *Cantwell v. Connecticut*, 310 U. S. 296, 303, its § 5 power ‘to enforce’ is only preventive or ‘remedial,’ *South Carolina v. Katzenbach*, 383 U. S. 301, 326. The Amendment's design and § 5's text are inconsistent with any suggestion that Congress has

²⁵⁰ *Id.* at Sec. 5

²⁵¹ *Id.* at Sec. 3

²⁵² *Id.* at Sec. 2; *The United States Constitution, 14th Amendment, Sections 1 and 5.*

²⁵³ *City of Boerne v. Flores* (1997), 521 U.S. 507

the power to decree the substance of the Amendment's restrictions on the States.”²⁵⁴

Furthermore, Kennedy also argued “[t]here 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.”²⁵⁵

However, Kennedy’s focal constitutional qualm routed from congressional intent in the RFRA’s passage versus its actual proscriptions:

RFRA's most serious shortcoming, however, lies in the fact that it is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit. Its sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. Its restrictions apply to every government agency and official, § 2000bb2(1), and to all statutory or other law, whether adopted before or after its enactment, § 2000bb-3(a). It has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who claims a substantial burden on his or her free exercise of religion... Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. 494 U. S., at 888... All told, RFRA is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens, and is

²⁵⁴ *Id.* at 508

²⁵⁵ *Id.* at 516-529

not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.²⁵⁶

The Court struck down the RFRA as applied to the states, but explicitly left untouched the law's applicability to the federal government. In 2006, almost a decade later, the Court, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, confirmed the RFRA's constitutionality when applied to the federal government.²⁵⁷ Even still, legislators yearning for religious protection remained far from satisfied.

C. Statutory Response(s)

Following *Boerne*, the U.S. House Judiciary Committee began a series of hearings²⁵⁸ to enact a statutory response to *Boerne*: "These hearings gathered factual evidence of state laws that were discriminatory or burdensome with respect to religion, and considered legal theories for passing a protective statute consistent with the Court's City of Boerne decision."²⁵⁹ The hearings' products were the proposal of three bills in

²⁵⁶ *Id.* at 529-536

²⁵⁷ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418; although this case is outside the 8 year window, it seems important to mention, though it will not be analyzed.

²⁵⁸ Congressional Record, "Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary," 104th Congress (July 14, 1997); Congressional Record, "Protecting Religious Freedom after Boerne v. Flores (II): Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary," 105th Congress (Feb. 26, 1998); Congressional Record, "Protecting Religious Freedom after Boerne v. Flores (III): Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary," 105th Congress (Mar. 26, 1998).

²⁵⁹ Roman P. Storzer & Anthony R. Picarello, Jr., "Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices," *George Mason Law Review*, Vol. 9, Issue 4 (2001): 929-1000, 943

three successive years: the Religious Liberty Protection Act (RLPA) of 1998,²⁶⁰ 1999,²⁶¹ and 2000.²⁶²

Of the three bills, the House bill, RLPA of 1999, received the largest congressional support.²⁶³ Rep. Charles Canady [R-FL-12] introduced H.R. 1691 on May 5th, 1999. The main provisions of the act, similar to the RFRA, prohibited any government (“defined as a State, an entity created under State authority, the United States, an instrumentality or official of the United States, or any person acting under color of State or Federal law”) from substantially burdening any person’s religious exercise in any government program or activity receiving federal financial assistance or in any case in which the burden would affect international, interstate, or Indian commerce.²⁶⁴ Similar to the RFRA, the provisions also contained a caveat that if the government could prove it had acted in the least restrictive means towards a compelling governmental interest in acting, a substantial burden on religious exercise could exist.²⁶⁵ The RLPA also provided a section—Section 3—on land use regulation that provided prohibitions on State land use regulation or exemptions that treats “on less equal terms [than] a nonreligious assembly

²⁶⁰ Congress.gov, “H.R. 4019-Religious Liberty Protection Act of 1998, 105th Congress (1997-1998)”;
and Congress.gov, “S.2148- Religious Liberty Protection Act of 1998, 105th Congress (1997-1998),” <https://www.congress.gov/bill/105th-congress/house-bill/4019>, (identical Senate bill)

²⁶¹ Congress.gov, “H.R. 1691 - Religious Liberty Protection Act of 1999, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/house-bill/1691>

²⁶² Congress.gov, “S. 2081 - Religious Liberty Protection Act of 2000, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/senate-bill/2081>

²⁶³ Congress.gov, “H.R.1691 - Religious Liberty Protection Act of 1999”; H.R. 4019 (1997) was forwarded by subcommittee to full committee (amended) by voice vote where it died; S. 2148 (identical to H.R. 4019) was referred to the committee on the judiciary—hearings were held, but action ceased after hearings (hearings printed: Senate Hearing 105-997); S. 2081 was read twice and placed on Senate Legislative Calendar under General Orders (Calendar No. 436), but was never made it to a vote.

²⁶⁴ Congress.gov, “H.R.1691 - Religious Liberty Protection Act of 1999”

²⁶⁵ *Id.*

or institution”, discriminates, or unreasonably excludes from a jurisdiction, religious institutions.²⁶⁶ Lastly, the proposed bill also provided respondents with remedy by allowing those seeking relief to assert violation in court under the RLPA to obtain relief from said government.²⁶⁷ H.R. 1691 passed in the House 306-118 with 10 representatives not voting;²⁶⁸ however, the RLPA did not receive the same reception once it reached the Senate: it was read twice and referred to the Committee on the Judiciary, effectively dying in committee.²⁶⁹

Less than a year later, February 22nd, 2000, Sen. Orrin Hatch [R-UT] introduced the RLPA of 2000: S. 2081. Besides a few textual changes, S. 2081 was nearly identical to its predecessors, and similarly, met the same fate in the Senate as H.R. 1691: it was read twice and placed on Senate Legislative Calendar under General Orders (Calendar No. 436).²⁷⁰

Despite the failed attempts of passing legislation in the Senate, Sen. Hatch remained resolute in his fight for religious liberty. Having surmised he could not take on this task alone, Hatch recruited help from a colleague across the aisle—a colleague who held similar positions on religious liberty and with whom Sen. Hatch had worked with in the past: the influential and senior Senator, Sen. Edward Kennedy.

²⁶⁶ *Id.* at Sec. 3.

²⁶⁷ *Id.* at Sec. 4; Section 7 of the RLPA also amended the RFRA to only apply to the federal government even though the Court only struck down the RFRA as applied to the states.

²⁶⁸ Clerk.house.gov, “Final Vote Results for Roll Call 299,” <http://clerk.house.gov/evs/1999/roll299.xml>

²⁶⁹ Congress.gov, “H.R.1691 - Religious Liberty Protection Act of 1999”

²⁷⁰ Congress.gov, “S.2081 - Religious Liberty Protection Act of 2000, 106th Congress (1999-2000),”; changes included a caveat clarifying no intentions to abrogate sovereign state immunity, as well as some other minor changes. However, the overall substantive aspects of the law remained the same as H.R. 1691.

Both Senators Hatch and Kennedy had worked diligently for almost ten years enacting the RFRA, and with Kennedy's help, Hatch was able to garner support from Democrats and Republicans for a new bill: S. 2869—the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.²⁷¹ With Kennedy as a cosponsor, Hatch introduced the bill into the Senate on July 7th, 2000. Concurrently, an identical House bill, H.R. 4682 (identically named) was introduced, again, by Rep. Charles Canady.²⁷² This time, Canady's bill reached its demise in the House committee on the Constitution; however, its Senate counterpart survived.²⁷³

The potency of the bill remained relatively the same in the realm of any government (defined as “any State, (i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law”²⁷⁴) placing substantial burdens on religious expression: ensuring no substantial burdens absent the “furtherance of a compelling governmental interest” as well as ensuring the burden was “the least restrictive means of furthering” said interest.²⁷⁵ The bill also provided sections prohibiting the discrimination

²⁷¹ Congress.gov, “S. 2869-Religious Land Use and Institutionalized Persons Act of 2000, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/senate-bill/2869>

²⁷² Congress.gov, “H.R.4862 - Religious Land Use and Institutionalized Persons Act of 2000, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/house-bill/4862>

²⁷³ Congress.gov, “H.R.4862 - Religious Land Use and Institutionalized Persons Act of 2000”

²⁷⁴ Congress.gov, “S. 2869-Religious Land Use and Institutionalized Persons Act of 2000,” Sec. 8

²⁷⁵ *Id. Text*, §2(a) and §3(a); see also Jason Z. Pesick, “RLUIPA: What's the Use,” *Michigan Journal of Race and Law*, Vol. 17, Issue 2 (2012): 359-386: “In addition to limiting RLUIPA's scope, Congress also gave RLUIPA more secure footing than RFRA

and exclusion of religious institutions, as well as prohibitions on differentiated treatment “on less equal terms [than] a nonreligious assembly or institution”, of religious groups.²⁷⁶ Lastly, similar to its predecessors, it also provided a section on judicial relief so a person could assert a violation of the act as a claim or defense in judicial proceedings.²⁷⁷

Though the policy’s potency was roughly the same as the RFRA, the “RLUIPA’s drafters intended the legislation to apply the same standard as RFRA, but in a more limited set of cases.”²⁷⁸ S. 2869 only applied to governmental implementation of land use regulations against religious institutions and prohibited governmental substantial burdens on the religious exercise of persons residing in or confined to an institution.²⁷⁹

In a joint statement with Sen. Kennedy in the Congressional Record, Sen. Hatch went on record regarding the bill’s deficient breadth: “Our bill deals with just two areas where religious freedom has been threatened—land use regulation and persons in prisons, mental hospitals, nursing homes and similar institutions. Our bill will ensure that if a government action substantially burdens the exercise of religion in these two areas, the government must demonstrate that imposing the burden serves a compelling public

by giving it three jurisdictional bases. The land-use provisions apply in any cases in which 1) the substantial burden is imposed by a program that receives federal funding, even if the rule imposing the burden is of general applicability; 2) the burden or removal of the burden would affect interstate commerce, even if the burden is the result of a rule of general applicability; and 3) the burden is imposed through land-use regulation in which the government engages in procedures that allow it to make ‘individualized assessments of the proposed uses of the property involved.’ *Id.*; RLUIPA 42 U.S.C. § 2000cc(a)(2)(A)-(C). These jurisdictional hooks are based on the spending clause, the commerce clause, and the Fourteenth Amendment. 146 CONG. REC. at S7775-76.”

²⁷⁶ *Id.* at *Text*, §2(b)

²⁷⁷ *Id.* at *Text*, §4

²⁷⁸ Congressional Record, vol. 146 at S7774 Ex. 1 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

²⁷⁹ Congress.gov, “S. 2869-Religious Land Use and Institutionalized Persons Act of 2000,” *Text*, §2(a) & (b) and §3

interest and does so by the least restrictive means. In addition, with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion. It is no secret that I would have preferred a broader bill than the one before us today. Recognizing, however, the hurdles facing passage of such a bill, supporters have correctly, in my view, agreed to move forward on this more limited, albeit critical, effort.”²⁸⁰

Moreover, the RLUIPA also contained two jurisdictional caveats under Sec. 3(b). The first, (b)(1), provided that the substantial burden only applied to cases where “a program or activity receives Federal financial assistance.”²⁸¹ This stipulation, passed under spending clause justification, limited the number of cases individuals could claim citing the RLUIPA. Section 3(b)(2) limited the RLUIPA further by stipulating the law only applied in cases where “the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.”²⁸²

Despite the significantly limited breadth, Senators Hatch and Kennedy, with the help of a large, diverse, and powerful coalition (including the lobbying support of ACLU, People for the American Way, Prison Fellowship, and others), the Senate bill received unanimous consent in both the House and the Senate.²⁸³ The potency of the statute remained the same

²⁸⁰ Congressional Record, vol. 146 at S7774 Ex. 1

²⁸¹ “S. 2869-Religious Land Use and Institutionalized Persons Act of 2000,” § 2000cc-3(b)(1)

²⁸² *Id.* § 2000cc-3(b)(2)

²⁸³ *Id.* For more on the passage, applicability, litigation, and constitutionality discussion regarding the bill and its passage see Derek L. Gaubatz, “RLUIPA at Four: Evaluating

D. Subsequent Developments

On the implementation and subsequent developments regarding the prisoner provisions, after its enactment the RLUIPA was challenged several times in Court regarding its constitutionality;²⁸⁴ however, when the provisions reached the Supreme Court, the Court ruled in favor of the law.²⁸⁵ Despite the RLUIPA's contested constitutionality, petitioners have sought relief from government burden under the prisoner provisions in largely four types of cases: (1) challenges to dietary restrictions; (2) challenges to grooming restrictions; (3) challenges to group worship restrictions; (4) challenges to restrictions on access to religious literature and devotional items.²⁸⁶ Prison restrictions regarding prisoner's diets almost unanimously had success under the RLUIPA, with little dispute classifying denial of religious diets as a substantial burden.²⁸⁷

the Successes and Constitutionality of RLUIPA's Prisoners Provisions," *Harvard Journal of Law and Public Policy*, Vol. 28, Issue, 2 (2004): 501-607

²⁸⁴ This section will briefly glimpse the implementation of RLUIPA. Both the land use and institutionalized persons provisions are very complex and have had entire law review articles devoted to their application. However, this section will only provide the highlights and direct readers to read Derek L. Gaubatz, for more information on RLUIPA's prisoner provisions and the Harvard Law Review, "Religious Land Use in the Federal Courts under RLUIPA," *Harvard Law Review*, Vol. 120, No. 8 (2007): 2178-2199. For a more robust account on the land use provisions in federal court under the RLUIPA.

²⁸⁵ See for example *Cutter v. Wilkinson* (2005), 544 U.S. 709, where the Court upheld a RLUIPA claim by two white supremacists of the Church of Jesus Christ Christian claiming the government was burdening their "non-mainstream" religion. The government argued the RLUIPA was improperly advanced religion in violation of the First Amendment's Establishment clause. The Court held the RLUIPA made an accommodation allowed by the First amendment. However, the Court did not extend the holding to the RLUIPA's land use provisions.

²⁸⁶ Gaubatz, *supra* note 284.

²⁸⁷ See *Id.* at 557-560 (see e.g. *Gordon v. Pepe*, No. Civ. A 00-10453-RWZ, 2004 WL 1895134; *Agrawal v. Briley*, No. 02 C 6807, 2003 WL 22839813; but see *Washington v.*

Similarly, cases regarding challenges to grooming,²⁸⁸ challenges to group worship restrictions,²⁸⁹ and challenges to restriction on access to religious literature and items, have largely resulted in the success of petitioners in proving a substantial burden—though with more mixed results with challenges to restrictions on religious literature and items.²⁹⁰ Overall, the RFRA had a seventy-five percent dismissal rate on proving a substantial burden before *Boerne* invalidated it as applied to the states, whereas the RLUIPA, four years after its passage, only had seven of forty-six cases where a substantial burden could not be proved.²⁹¹ The law, though greatly narrowed to institutionalized persons, seemed successful at accomplishing Congress’s initial goals, again, in a narrower policy niche.

In terms of the land use provisions, the courts began to rule in favor of religious institutions in land use cases; however, the courts were not always adducing the RLUIPA as justification in free exercise cases, but rather the Fourteenth Amendment.²⁹² Of this new trend, the Harvard Law Review posited, “[f]or years [the courts] invoked a strict

County of Santa Barbara, Civ. No. B 168091, 2004 WL 1926131, as a case where prison’s diet restrictions was not a substantial burden) * Originally found in Gaubatz.

²⁸⁸ See *Id.* at 560-562 (See e.g. *Collins-Bey v. Thomas*, No. 03 C 2779, 2004 WL 2381874, at *2 (N.D. Ill. Oct. 25, 2004); *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004); *Toles v. Young*, No. 7:00-CV-210, 2002 WL 32591568, at *9 (W.D. Va. Mar. 6, 2002))*

²⁸⁹ See *Id.* at 562-566 (See e.g. *Greybuffalo v. Bertrand*, No. 03-C-559-C, 2004 WL 2473250, at *5 (W.D. Wis. Nov. 1, 2004); *Fenelon v. Riddle*, No. S-95-954, slip op. 18-20 (E.D. Cal. Apr. 29, 2003))*

²⁹⁰ See *Id.* at 566-569 (see e.g. *Charles v. Verhagen*, 220 F. Supp. 2d 937, 948-49 (W.D. Wis. 2002) aff’d 348 F.3d 601 (7th Cir. 2003); *Marria v. Broaddus*, No. 97 Civ.8297, 2003 WL 21782633 (S.D.N.Y. July 31, 2003); two cases where a substantial burden were not found include *Charles v. Frank*, 2004 WL 1303403, at *2 (7th Cir. 2004) and *Ulmann v. Anderson*, 2004 WL 883221, at *8 (D. N.H. Apr. 26, 2004))*

²⁹¹ *Id.* at 569

²⁹² Harvard Law Review, *supra* note 285 (See e.g. *Fifth Avenue Presbyterian Church v. City of New York*, 293F.3d570 (2dCir.2002))

constitutional test but applied it with great deference. But when RLUIPA wrote that test into the United States Code and told the courts to apply it as they had in the past, land use plaintiffs began to win lawsuits. RLUIPA thus appears to be an unusually striking vindication of the popular constitutionalist notion that changing context and ongoing dialogue among the branches of government may impact legal doctrines and outcomes without any change in the relevant text.²⁹³

No matter the reasoning behind the influx of religious group claimants' successes in land use cases, this trend pointed to a restoration of religious exemptions to land use laws to a pre-*Smith* positioning: the result—whether direct or indirect—of a congressional statutory response.²⁹⁴

D. Eleventh Amendment and the Abrogation of State Sovereign Immunity

i. Seminole Tribe of Florida v. Florida and the Indian Gaming Regulatory

Improvement Act and the Intergovernmental Gaming Agreement

A. Background and Statute

In 1988, pursuant to the Indian commerce clause, legislators passed, and President Reagan signed, the Indian Gaming Regulatory Act (IGRA) of 1988.²⁹⁵ The IGRA, *inter alia*, allowed Indians to conduct certain gaming activities once a compact was negotiated

²⁹³ *Id.* at 2193-2194

²⁹⁴ *See Id.*

²⁹⁵ *The U.S. Constitution, Article I, Sec. 8, Clause 3*; “Indian Gaming Regulatory Act of 1988, 25 U.S. Code § 2710,” *Cornell University Law School*, <https://www.law.cornell.edu/uscode/text/25/2710>

and agreed upon between the tribe and the State in which the gaming activities were to reside. Under the Act, states have an obligation to enter into negotiations, and/or negotiate in good faith with a tribe towards the formation of a compact, §2710(d)(3)(A).²⁹⁶ A tribe, if the State refuses to enter into negotiations, and/or did not negotiate in good faith, may sue the State in a federal court to compel reasonable compact negotiations, §2710(d)(7).²⁹⁷

Under §2710(d)(7) of the IGRA, the Seminole Tribe of Florida sued the state of Florida as well as Florida Governor at the time, Lawton Chiles, for the State's refusal to enter into compact negotiations for Class III, casino-style games. In response, Florida and Chiles moved to dismiss the claims on the grounds that the suit violated Florida's sovereign immunity from suit in federal court based on the 11th Amendment.²⁹⁸ The case made its way to the Supreme Court where the justices, in a 5-4 decision, invalidated the IGRA's authorization of tribal-State suits in *Seminole Tribe of Florida v. Florida* (1995).²⁹⁹

B. Case Decision(s) and Reasoning(s)

In the first of many state immunity abrogation Court decisions, Chief Justice Rehnquist authored the opinion striking down the provision as inconsistent with the 11th Amendment and Court abrogative precedent. In his reasoning, Rehnquist first looked to past precedent stipulations for which Congress can abrogate State immunity as well as

²⁹⁶ *Id.* Tribal gaming ordinances, §2710(d)(3)(A) and §2710(d)(7)
<https://www.law.cornell.edu/uscode/text/25/2710>

²⁹⁷ *Id.* §2710(d)(7)

²⁹⁸ *The U.S. Constitution, 11th Amendment*

²⁹⁹ *Seminole Tribe of Florida v. Florida* (1995), 517 U.S. 44

the where the authority can be derived: “...Congress may abrogate the States' sovereign immunity if it has ‘unequivocally expresse[d] its intent to abrogate the immunity’ and has acted ‘pursuant to a valid exercise of power.’ *Green v. Mansour*, 474 U. S. 64, 68.”³⁰⁰ Rehnquist held Congress made its intent to abrogate ‘unmistakably clear’, and hence, the case shifts to the other aspect to satisfy *Mansour*: “Was the Act in question passed pursuant to a constitutional provision granting Congress such power?”³⁰¹

Rehnquist continued: “This Court has found authority to abrogate under only two constitutional provisions: the Fourteenth Amendment, see, e. g., *Fitzpatrick v. Bitzer*, 427 U. S. 445, and, in a plurality opinion, the interstate commerce clause, *Pennsylvania v. Union Gas Co.*, 491 U. S. 1. The *Union Gas* plurality found that Congress' power to abrogate came from the States' cession of their sovereignty when they gave Congress plenary power to regulate commerce. Under the rationale of *Union Gas*, the Indian commerce clause is indistinguishable from the interstate commerce clause.”³⁰²

However, Rehnquist refused to adhere to stare decisis regarding the plurality of *Union Gas*, holding that the 11th Amendment restricts judicial power under Article III, and Article I powers cannot be used to circumvent the limits placed on Court jurisdiction. He concluded, asserting, “[t]hus, *Union Gas* was wrongly decided and is overruled” and thus, Congress cannot abrogate under the commerce clause.³⁰³

³⁰⁰ *Id.* at 54-57; see also *Green v. Mansour* (1985), 474 U. S. 64, 68

³⁰¹ *Id.* at 57-63

³⁰² *Id.* See also *Fitzpatrick v. Bitzer* (1976), 427 U. S. 445 and *Pennsylvania v. Union Gas Co.* (1989), 491 U. S. 1

³⁰³ *Id.* at 63-73; Rehnquist also argued the *Ex Parte Young* doctrine did not apply to this case because Congress, in passing §2710(d)(7) remedial procedures intended to create a distinct process with more modest sanction than *Ex Parte Young* remedies—remedies that would allow the Court the possibility of its most severe remedies such as contempt (see *Ex Parte Young* (1908), 209 U.S. 123).

C. Statutory Response(s)

After the ruling, Indian tribes tried to remedy their ability to file suit if tribal-State negotiations came to an impasse—the IGRA provision struck down in *Seminole*—through various political avenues. Their first approach was to lobby Secretary of Interior under President Clinton, Bruce Babbitt, to promulgate an administrative ruling allowing tribes to negotiate directly with the interior secretary if negotiations between the tribe and state reached a stalemate. On April 12th, 1999 Babbitt issued such a proclamation, “allow[ing] the Secretary to authorize gaming activities in the absence of a compact - and in the absence of any determination that a state failed to negotiate for a compact in good faith - if the state has blocked federal litigation by invoking its Eleventh Amendment immunity.”³⁰⁴ Within hours of the announcement of the new regulations, Florida and Alabama immediately filed suit challenging the authority of Babbitt’s rule; the suits were not resolved during Babbitt’s tenure, continuing on for a number of years following Babbitt’s original announcement of regulations.³⁰⁵

³⁰⁴ *Id.* § 2710 (d) (7) (vii) and implementing regulations of 25 CFR part 291

³⁰⁵ The New York Times, “Florida Sues Government to Block High-Stakes Indian Casinos,” (published: April 13th, 1999), <http://www.nytimes.com/1999/04/13/us/florida-sues-government-to-block-high-stakes-indian-casinos.html>; the suit *State of Florida and State of Alabama v. U.S.* was finally resolved in 2007 when the Secretary’s actions were dismissed. Since, there has been more litigation at the state and federal level—albeit no suits have yet reached the Supreme Court. However, in November of 2007, then-Governor Charlie Crist negotiated the Seminole Tribe of Florida and State of Florida Gaming Compact, in which Crist, on behalf of the state, authorized Class III gaming activities in accordance with the IGRA. However, this compact will not be analyzed because (1) it is outside the eight-year cutoff for a response, and (2) said response did not come in the form of a statutory response from Congress and/or the president. For these reasons, this compact will not be analyzed further in-text (albeit, it is important to note because the state negotiated a compact, federal legislative responses ceased their attempts) (for more on background since then see *PPI Inc. v. Kempthorne* (2008), Civ.

While litigation over executive administrative and individual State remedies was ongoing, tribes also sought to circumvent *Seminole* through numerous congressional proposals. For a short while—at least during the Clinton administration—these statutory responses also enjoyed the support of the executive branch.³⁰⁶ The first of these statutes arose in the 105th Senate: S. 1870, Indian Gaming Regulatory Improvement Act of 1998.³⁰⁷ Proposed by Sen. Ben N. Campbell [R-CO] on March 26th, 1988, Section 10 of S.1870 provided avenues for State-tribal negotiation impasses as well as alternative sources of authority other than State-tribal compacts for Class III gaming on Indian lands.³⁰⁸ §10(a)(1) lays out the when Class III gaming is lawful authorized by a compact that (A) is approved by a tribal governing body with jurisdiction over the land, meets the requirements of Class II gaming, and is approved by the Secretary; (B) located within a State that permits gaming for any purpose by any person, organization, or entity; as well as (C) conducted in conformance with a compact that is (I) entered into by a State and tribe and approved by the Secretary (II) *OR* issued by the Secretary under paragraph (2).³⁰⁹

Inter alia, the following paragraph 2 includes a section (iii), entitled Mediation in which “[i]n general—The Secretary shall initiate mediation to conclude a compact governing the conduct of class III gaming activities on Indian lands upon a showing by

No. 4:08cv248-SPM/WCS (<https://turtletalk.files.wordpress.com/2008/07/federal-opposition.pdf>)

³⁰⁶ See Congressional Report, *U.S. Congress, Senate*, Committee on Indian Affairs, “Hearing on S. 1870, The Proposed Indian Gaming Regulatory Improvement Act of 1998,” 105th Cong., 2nd sess., 1 April 1998; quoted and discussed below.

³⁰⁷ Congress.gov, “S. 1870-Indian Gaming Regulatory Act of 1998, 105th Congress (1997-1998),” <https://www.congress.gov/bill/105th-congress/senate-bill/1870>

³⁰⁸ *Id.*

³⁰⁹ *Id.* §10(a)(1)(A), (B), (C)(ii)

an Indian tribe that, within the applicable period specified in clause (ii), a State has failed-- ``(aa) to respond to a request by an Indian tribe for negotiations under this subparagraph; or ``(bb) to negotiate in good faith.”³¹⁰ Unlike the original IGRA that allowed tribes to file suit in federal court, if a State declined negotiations or did not negotiate in good faith, the repropoed IGRIA gave the Secretary authority to mediate compact impasses, or circumvent the State-tribal compact altogether.

S.1870 enjoyed executive branch support from the Clinton administration. In 1998, during hearings on the proposed bill, Assistant Secretary of Indian Affairs Kevin Gover testified in front of the Senate Indian Affairs Committee: “Although, the problem created by *Seminole* may be addressed through either legislative or administrative means, any attempt to do so administratively will draw legal challenges—challenges that may take years to resolve in the courts. Congress, however, could definitively resolve this problem, thereby obviating years of litigation.”³¹¹

Despite executive and legislative support, hearings were held on S.1870 in the Senate Committee on Indian Affairs, but since then, it has not been acting upon—effectively dying in committee. Sen. Campbell introduced three more versions of the Indian Gaming Regulatory Improvement Act—S. 399, S.2920, and S.832—in the 106th (S. 399 and S.2920) and 107th (S.832) Congresses, however all met similar fates as S.1870, dying in the Committee in Indian Affairs.³¹²

³¹⁰ *Id.* §10(a)(2)(B)(iii)

³¹¹ Congressional Record, *U.S. Congress, Senate, Committee on Indian Affairs, Hearing on S. 1870*, “The Proposed Indian Gaming Regulatory Improvement Act of 1998,” 105th Cong., 2nd sess., 1 April 1998.

³¹² Committee hearings were held (Hearings printed: S.Hrg. 106-20, Pt.1) for S.399 (Congress.gov, “S.399 - Indian Gaming Regulatory Improvement Act of 1999, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/senate->

Similar to S. 1870, S. 985, the Intergovernmental Gaming Agreement Act of 1999, also had provisions providing the Secretary with mediation authority if the State refused to negotiate for a tribal-State Class III gaming compact, or state officials did not negotiate in good faith. Similar to the initial invalidated IGRA provision giving federal courts jurisdiction in these types of mediation cases, the amended language provided for the same: “[VIII] (aa) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the Secretary, the Commission, a State, or an Indian tribe to challenge the Secretary's decision to complete a compact or initiate mediation or to challenge specific provisions of procedures issued by the Secretary for the operation of class III gaming under clause (iii)(V) or (iii)(VII).”³¹³

The very same Sen. Campbell introduced the bill on May 6th, 1999 and, like its Indian-gaming-regulatory cousin, S. 985 was referred to the Senate Indian Affairs Committee where hearings were held; in the end, S.985 reached a similar fate dying in the Indian Affairs committee.

Despite the numerous avenues—administrative and congressional—available to tribes and organizations looking to respond to the effects of *Seminole Tribe*, Congress did not draft a statutory response. Many observers attribute the lack of congressional support to State opposition; the National Governor Association (NGA), was the strongest opponent, vocalizing State opposition to congressional responses. NGA Executive Director, Raymond Scheppach testified at nearly all of the congressional hearings for the

bill/399/all-actions) and S. 2920 was placed on the legislative calendar (Calendar No. 948) but also died in committee (Congress.gov, “S.2920 - Indian Gaming Regulatory Improvement Act of 2000, 106th Congress (1999-2000),”

<https://www.congress.gov/bill/106th-congress/senate-bill/2920/actions>)

³¹³ Congress.gov, “S. 985-Intergovernmental Gaming Agreement Act of 1999, 106th Cong (1999-2000),” <https://www.congress.gov/bill/106th-congress/senate-bill/985/text>

congressional proposals. On each occasion, he made clear that “[t]he Governors oppose any efforts by Congress or the administration that would allow a tribe to avoid negotiations with a willing state in favor of compact negotiations with another entity, such as the Secretary of the U.S. Department of the Interior.”³¹⁴ Whereas state lobbying groups commonly remained silent on matters of congressional responses to federalism decisions, because of the gravity and import of the matter at hand, state interests were prominently asserted in the realm of State-tribal compact negotiation for Indian gaming—most likely abetting the defeat, within the committee stage, of the numerous congressional responses to *Seminole Tribe*.³¹⁵

ii. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board and the Intellectual Property Protection Act

A. Background and Original Statute

During the 102nd (1991-1992), Sen. Dennis DeConcini [D-AZ] introduced two successive bills into the Senate, both with the same purpose, albeit applying to different policy arenas: S. 758, the Patent and Plant Variety Protection Remedy Clarification Act

³¹⁴ Congressional Record, *U.S. Congress, Senate*, Committee on Indian Affairs, “Hearing on the Intergovernmental Gaming Agreement Act of 1999,” 106th Congress, 1st session, July 21, 1999; *See also* Scheppach’s testimony at Congressional Record, *U.S. Congress, Senate*, Committee on Indian Affairs, “Hearing on S.1870, The Proposed Indian Gaming Regulatory Improvement Act of 1998,” 105th Congress, 2nd session, April 1, 1998; Congressional Record, *U.S. Congress, Senate*, Committee on Indian Affairs, “Hearing on S.399, The Indian Gaming Regulatory Improvement Act of 1999,” 106th Congress, 1st session, March 24, 1999 (original source: John Dinan, “Congressional Responses to the Rehnquist Court’s Federalism Decisions” (2002))

³¹⁵ *Id.*

(PRA),³¹⁶ and S.759, the Trademark Remedy Clarification Act (TRCA).³¹⁷ Both bills attempted to provide the same remedies that are available against any private entity, and apply said remedies to State entities.

Specifically, the PRA amended “Federal patent law and the Plant Variety Protection Act to provide that neither the States, their officers, nor their instrumentalities are immune from patent or plant variety protection infringement liability.”³¹⁸ Whereas the TCRA amended “the Trademark Act of 1946 to provide that neither the States, their officers, nor their instrumentalities are immune from trademark infringement liability;”³¹⁹ in other words, it “subject[ed] States to suits brought under § 43(a) of the Trademark Act of 1946 (Lanham Act) for false and misleading advertising.”³²⁰ Both statutes served the purpose of providing individuals harmed by State infringement of intellectual property law, with civil remedies in addition to the injunctive relief already in place; both also came under judicial scrutiny in the similarly-named Supreme Court cases, issued seriatim (concurrently with another State sovereign immunity case, *Alden v. Maine* (1999), 527 U.S. 706), *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999), 527 U.S. 666—involving the TRCA—and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), 527 U.S. 627—involving the PRA.

³¹⁶ Govtrack.us, “S. 758 (102nd): Patent and Plant Variety Protection Remedy Clarification Act,” <https://www.govtrack.us/congress/bills/102/s758>

³¹⁷ Govtrack.us, “S. 759 (102nd): Trademark Remedy Clarification Act,” <https://www.govtrack.us/congress/bills/102/s759/summary>

³¹⁸ Govtrack.us, “S. 758 (102nd): Patent and Plant Variety Protection Remedy Clarification Act,”

³¹⁹ Govtrack.us, “S. 759 (102nd): Trademark Remedy Clarification Act”

³²⁰ *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank* (1999), 527 U.S. 627, 641-648 (outlining *College Savings Bank* at 627)

B. Case Decision(s) and Reasoning(s)

In *College Savings Bank* (527 U.S. 666), the Supreme Court found no jurisdiction to entertain the suit, arguing Florida’s sovereign immunity was neither voluntarily waived nor validly abrogated by the TCRA.³²¹ Justice Scalia delivered the 5-4 opinion of the Court. Following the Court’s precedent in *Boerne*, Scalia reasoned Congress could only legislate under §5 of the Fourteenth Amendment to enforce provisions of a statute if said legislation’s objective is remedial or preventative of possible constitutional violations. Scalia rejected the government’s argument that the TCRA was preventing the State from depriving individuals of two property interests—the “right to be free from a business competitor's false advertising about its own product” and the “right to be secure in one's business interests”—without due process, arguing the so-called property rights were not constitutionally protected property rights.³²² As such, the abrogation was remedial/preventative of an unprotected right, and the case was dismissed.

In *Florida Prepaid* (527 U.S. 627), issued seriatim, the Court again applied past abrogative jurisprudence; having found Florida did not voluntarily waive its immunity, the Court attempted to determine whether Congress had unequivocally expressed its intent to waive State immunity, and whether it had done so pursuant to a valid exercise of power (following the jurisprudence *Seminole Tribe*) with the passage of the PRA. The Court answered in the affirmative to the former precedential proviso, but again, focused on whether Congress had abrogated immunity pursuant to a valid exercise of power.

³²¹ *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999), 527 U.S. 666, 666

³²² *Id.* at 672-675

Once more, the Court relied on *Boerne*, this time arguing that although Congress's interest in preventing patent infringements by states may be considered within the confines of the due process clause—in that patents constitute property—there was not ample congressional findings of states infringing upon patents, let alone constitutional violations. The Court reasoned “a State's infringement of a patent violates the Constitution only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent. Congress, however, barely considered the availability of state remedies for patent infringement.”³²³

In concluding, the Court found “[t]he legislative record thus suggests that the Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic § 5 legislation. Because of the lack of legislative support for Congress' conclusion, the Act's provisions are so out of proportion to the supposed remedy or preventive object that they cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”³²⁴

C. Statutory Response(s)

State-law remedies already existed for injured patentees seeking relief; however, patentees who sought to enforce their rights against state infringers *post-Florida Prepaid*, would have to rely on State law for redress: a conflict-of-interest quagmire with

³²³ *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 641-648

³²⁴ *Id.* at 641-648

numerous other legal complications (related to different State court interpretations of federal patent law).³²⁵ However, Congress believed State redress was not sufficient.

Despite a tepid response from Congress overall, the *Florida Prepaid* decision landed on the radar of a select few congressmen, and those members sought to enact a statutory response. Following the Court’s decision, Senator Patrick Leahy [D-VT] came down hard, calling the decision “deeply disturbing,”³²⁶ and decrying the Court’s “breathtaking lack of respect for a co-equal branch of Government.”³²⁷ He continued, “Congress is not an administrative agency, and it should not be required to dot every ‘i’ and cross every ‘t’ before taking action in the public interest.”³²⁸ Senator Arlen Specter [D-PA] agreed, saying he was surprised by the decision, but “even more surprised by the

³²⁵ See Robert C. Wilmoth, “Toward a Congruent and Proportional Patent Law: Redressing State Patent Infringement After *Florida Prepaid v. College Savings Bank*,” *Southern Methodist University Law Review*, Vol. 55, Issue. 2 (2002): 519-589. Although Wilmoth assumes a normative position on patentee redress post-*Florida Prepaid*, he also outlines a Texas statute—the Texas Tort Claims Act (TTCA)—relevant to tort claims and IP Law; he also address the difficulties with competing state interpretations and lack of experience dealing in patent law (especially federal patent law): (“[T]he State would argue that the plaintiff’s patent is invalid and thus represents no compensable property right. The state judge would be forced to conduct a *Markman*-type hearing to determine the validity of the patent. Because modern Texas judges have not been required to apply federal patent law, they face a steep learning curve, one federal judges often have trouble climbing. Regardless the outcome of this hearing, appeals will work their way through the system, forcing the Texas Court of Appeals and the Supreme Court of Texas to interpret federal patent law. Ultimately, the disappointed party will seek relief not at the Court of Appeals for the Federal Circuit (the judicial body most familiar with the intricacies of patent law) but at the Supreme Court of the United States. Even if the Nation’s highest court denies the petition for certiorari and the claim is duly tried or dismissed, the question remains whether the state court’s construction of the patent claims is binding on other courts. If not, the potential for inconsistent interpretations introduces significant uncertainty into the federal patent regime. This uncertainty is only exacerbated by the potential for inconsistent interpretation of patent law.”

³²⁶ Congressional Record, vol. 145 at S8069 (daily ed. July 1, 1999) (statement of Sen. Leahy).

³²⁷ *Id.* at S8070

³²⁸ *Id.*

lack of reaction by Members of the House and Senate to this usurpation of Congressional authority.”³²⁹

In 1999, Sen. Leahy reacted; during the 106th Congress, he singularly sponsored S. 1835, the Intellectual Property Protection Restoration Act (IPPRA) of 1999.³³⁰ The main thrust of the act “[p]rohibit[ed] any State or State instrumentality from acquiring a Federal intellectual property right unless such State opts into the Federal intellectual property system by assuring to waive State sovereign immunity from an action arising under, or seeking a declaration with respect to, a Federal intellectual property law or right.”³³¹ Of the bill’s purpose, Sen. Leahy contended, “[e]quity and common sense tell us that one who chooses to enjoy the benefits of a law-whether it be a federal grant or the multimillion-dollar benefits of intellectual property protections-should also bear its burdens.”³³²

Leahy’s bill was a three-pronged blueprint to ““provide States an opportunity to participate in the Federal intellectual property system on equal terms with private entities.”³³³ Its main provision outlined an “op-in” procedure, whereby a State would provide assurances to the Commissioner of Patents and Trademarks that the State will “waive sovereign immunity from suit in Federal court in any action against a State” as a

³²⁹ *Id.* at S10359 (daily ed. Aug. 5, 1999) (statement of Sen. Specter).

³³⁰ Congress.gov, “S.1835 - Intellectual Property Protection Restoration Act of 1999, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/senate-bill/1835>

³³¹ *Id.*

³³² Congressional Record, vol. 145 at S13555, S13557 (daily ed. Oct. 29, 1999) (statement of Sen. Leahy).

³³³ Congress.gov, “S.1835 - Intellectual Property Protection Restoration Act of 1999,” §2(b)(1)-(4) (1999)

condition of receiving the protection of federal intellectual-property laws.³³⁴ Should the State assert its sovereign immunity "any application by or on behalf of a State ... [would] be regarded as abandoned and ... not be subject to revival..."³³⁵ Furthermore, the statute provided consequences for such breaches of the State's assurances, retroactively barring the state from recovering damages or any other monetary relief in any action enforcing intellectual property rights owned by the State in a five-year window preceding the wrongful assertion of immunity,³³⁶ whilst also barring State participation in federal systems ranging from the trademark system, plant variety protection system, copyright system, mask work system, and other federal patent systems, for a period of one year.³³⁷

S.1835's second prong was a statutory reassertion of the Court's *Ex Parte Young* doctrine, securing individuals the right to sue a State official, in his individual capacity, for violation of federal intellectual property law.³³⁸ Lastly, the third prong of S. 1835 provided restitution for those who felt their constitutional rights had been violated by a State's infringement—infringement of the takings and due process clauses—by abrogating State immunity in limited circumstances dealing with the 14th and 5th Amendments.³³⁹

Unlike the PRA (or even the TRCA), the IPPRA conditioned a State's intellectual property right in federal court (i.e. the right of a State to seek redress when an individual, another State, another State citizen, the federal government, etc. infringe upon a patent

³³⁴ *Id.* §111(b) See also §131(a) (identifying the Commissioner as the person to whom such assurances shall be delivered).

³³⁵ *Id.* §113(a)

³³⁶ *Id.* §113(b)

³³⁷ *Id.* §113(c) and §101(1) (defining the different system)

³³⁸ *Id.* §296(b)(1)

³³⁹ *Id.* §296(b)(2)(A)

secured by the State) upon the State's waiving of its sovereign immunity in federal patent law; comparatively, the PRA and TCRA simply abrogated State sovereign immunity. With the amended conditional language, also surfaced questions regarding its application and constitutionality of its application, however, the bill never came to a vote.³⁴⁰ There was a House subcommittee hearing held in July of 2000,³⁴¹ but the bill was referred to the Committee on Judiciary and read twice, yet never brought to the floor.³⁴²

Following Sen. Leahy's failed proposal, Sen. Orin Hatch requested data from the General Accounting Office detailing state infringement of intellectual property in an attempt to establish—as the *Florida Prepaid* Court had suggested—extensive congressional data proving an influx of states infringing on intellectual property laws coupled with limited State remedies. The Hatch Report revealed only 58 infringement suits against states had taken place since 1985: hardly a profusion of overwhelming violations demonstrating the need for federal action. Even so, Leahy acted again, this time proposing a milder bill in 2001: S.1611 similarly titled the Intellectual Property Protection Restoration Act of 2001.³⁴³

Unlike the previous IPPRA—which conditioned all IP rights on a waiver of immunity—S.1611 denied states the right from recovering monetary damages from suits enforcing its own IP rights unless said State waived sovereign immunity in infringement suits in federal courts. The goal of providing relief for constitutional violations remained

³⁴⁰ Wilmoth, *supra* note 326, at 582-583

³⁴¹ House Panel Hears from Experts on State Immunity from IP Suits, 60 PAT. Trademark & Copyright (BNA) 257 (July 28, 2000), cited in *Id.*

³⁴² Congress.gov, “S.1835 - Intellectual Property Protection Restoration Act of 1999,”

³⁴³ Congress.gov, “S.1611 - Intellectual Property Protection Restoration Act of 2001, 107th Congress (2001-2002),” <https://www.congress.gov/bill/107th-congress/senate-bill/1611>

the same as well as *ex parte* liability for individual actors; however, in hopes a milder version would be passed, the condition-and-waiver legislation was now lukewarm compared to the Leahy's original bill. Robert Wilmoth, writing for the Southern Methodist University Law Review, following the failure of S. 1835 and during the proposal for S. 1611, of the revised bill contended, "[f]rom a policy perspective, however, it is unlikely to be as effective an incentive to induce waiver. Some States are absolutely prohibited from waiving immunity (by their state constitution or other legislation)."³⁴⁴ Wilmoth continued: "In addition, the very existence of the so-called constitutional remedy might actually discourage States from waiving immunity. Under S. 1611, a nonwaiving State can be sued for acts amounting to violations of the Takings and Due Process Clauses. With respect to direct infringement, a statutory takings or due-process claim will differ only slightly from an ordinary infringement claim. But the remedies are substantially different. Waiving States expose themselves to treble damages. Nonwaiving States do not."³⁴⁵

However, despite the potential downfalls of the new moderate bill, S.1611 was referred to Committee on the Judiciary where hearings were held without any further actions taken.³⁴⁶ In 2003, in his last effort, Sen. Leahy again introduced another IPPRA to

³⁴⁴ Wilmoth, *supra* note 326, at 585

³⁴⁵ *Id.* at 585

³⁴⁶ Congress.gov, "S.1611 - Intellectual Property Protection Restoration Act of 2001"; S. 1611 also had an identical House counterpart, H.R.3204, which, like S. 1611 was referred to the Subcommittee on Courts, the Internet, and Intellectual Property, and promptly died in Subcommittee. *See* Congress.gov, "H.R.3204 - Intellectual Property Protection Restoration Act of 2001, 107th Congress (2001-2002)," <https://www.congress.gov/bill/107th-congress/house-bill/3204/related-bills>

the 108th Congress; the bill was read twice, referred to the Committee on the Judiciary, and has not been acted upon.³⁴⁷

iii. Kimel v. Florida Board of Regents and the Older Workers Right Restoration Act of 1967 and the FAIRNESS Act

A. Background and Original Statute

Following the passage of the momentous Civil Rights Act of 1964—Title VII of which prevented all discrimination in employment on the basis of race, color, religion, sex, or national origin—age remained an unprotected class. A growth of Title VII, Congress looked to pass legislation remedying age discrimination in employment: first, however, Congress looked to prove such discrimination existed. Congress directed the Secretary of Labor to produce a report outlining the state of age discrimination in the workplace; the results were staggering.³⁴⁸

According to the report job applicants over the age of 55 were barred from half of all job openings in the private sector; applicants over 45 were barred from a quarter of them; and those over 65 were excluded from almost all of them. Concurrent with the report, Congress also found there was no adequate remedies for age discrimination at the

³⁴⁷ Congress.gov, “S.1191 - Intellectual Property Protection Restoration Act of 2003, 108th Congress (2003-2004),” <https://www.congress.gov/bill/108th-congress/senate-bill/1191>; S.1191, also had an identical House counterpart, H.R.2344, which was read twice and referred to the Committee on the Judiciary, where, after subcommittee hearings were held, the bill died. See Congress.gov, “H.R.2344 - Intellectual Property Protection Restoration Act of 2003, 108th Congress (2003-2004),” <https://www.congress.gov/bill/108th-congress/house-bill/2344/related-bills>

³⁴⁸ Jeremy J. Glenn and Katelan E. Little, “A Study of the Age Discrimination in Employment Act of 1967,” *GP Solo*, Vol. 31, No. 6, (2014): 40-45

State level: only ten states had such laws and in most that did, only about half of complaints filed led to findings age discrimination laws were violated.³⁴⁹

In 1967, in attempting to redress the Labor Secretary's findings, Congress passed the Age Discrimination Act in Employment Act (ADEA) of 1967, which, among other things, made it unlawful for an employer, including a State, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual...because of such individual's age."³⁵⁰ The ADEA also included procedures for its enforcement, stipulating its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."³⁵¹ In particular, §216(b) authorizes employees to maintain actions for back pay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction..."³⁵² while §203(x) defines "public agency" to include "the government of a State or political subdivision thereof," and "any agency of ... a State, or a political subdivision of a State."³⁵³

³⁴⁹ *Id.*

³⁵⁰ *Kimel v. Florida Board of Regents* (2000), 528 U.S. 62; citing 29 U. S. C. §623(a)(I); the ADEA's full text states: "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . [or] (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

³⁵¹ *Id.* 29 U. S. C. §626(b)

³⁵² *Id.* 29 U.S. C. §216(b)

³⁵³ *Id.* 29 U.S.C. §203(x); upon the ADEA's passage, Senator Stephen Young articulated the need for the law: "[T]he view that a man or woman is so old at 65 as to warrant compulsory retirement from industry stems from an era before the turn of the century and comes to us from a period when life expectancy was about half of the life expectancy of Americans and Europeans at the present time. . . . In fact, today [people] are not as old at 65 [in] thought, action, physical and mental ability as men and women . . . were at the age of 40 in the 1880's. Yet, for some reason or other, we Americans have adhered to this

In 1995, former and current faculty and librarians of Florida State University, including J. Daniel Kimmel Jr., filed suit against the Florida Board of Regents, claiming the Board failed to require the two Universities (employees from Florida International University were also involved in the suit; the numerous employees' cases were consolidated on appeal³⁵⁴) to allocate funds to increase the respondent salaries to previously agree upon market adjustments.³⁵⁵ In 2000, the Supreme Court granted *certiorari* and heard the case in *Kimel v. Florida Board of Regents* (2000).

B. Case Decision(s) and Reasoning(s)

Justice O'Connor, in a close 5-4 decision, opined that despite Congress's clear intention to abrogate states' sovereign immunity, that abrogation exceeded congressional authority under §5 of the Fourteenth Amendment. O'Connor, first addressed the veracity of Congress's abrogative clarity, concluding that §216(b)'s language made Congress's intent to abrogate and jurisdictional grants to State and federal courts clear. Following past Court jurisprudence, she addressed congressional constitutional authority to abrogate. She first discounted the ADEA's abrogation under Article I powers citing the *Seminole Tribe* decision, claiming §5 of the Fourteenth Amendment is Congress's only

view of 65 as being the proper age for retirement notwithstanding the fact that this concept is today as outdated as are flint-lock muskets and candle dips of the eighteenth century.”

³⁵⁴ *Kimel v. Florida Board of Regents* (2000); other respondents included Roderick MacPherson and Marvin Narz, who were associate professors at the University of Montevallo in Alabama, and Wellington Dickson, who sued his employer, the Florida Department of Corrections. All cases were consolidated on appeal to the 11th Circuit.

³⁵⁵ *Id.*

source of authority for State sovereign immunity abrogation.³⁵⁶ However, O'Connor argued the ADEA went beyond constitutional authority.

Following the Court precedent set in *Boerne*, O'Connor argued, "Congress cannot decree the substance of the Fourteenth Amendment's restrictions on the States. The ultimate interpretation and determination of the Amendment's substantive meaning remains the province of the Judicial Branch. This Court has held that for remedial legislation to be appropriate under § 5, '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,' [City of Boerne v. Flores, 521 U. S. 507, 517]."³⁵⁷

O'Connor explained age is not a suspect classification and as such the State may discriminate on the basis of age if accompanied by a more lax legitimate governmental interest rationally related to said discrimination, rather than compelling governmental interest.³⁵⁸ The ADEA, in its broad restrictions on the use of age discriminating factor, goes beyond and prohibits substantially more state employment practices than would likely be held unconstitutional when applying equal protection rational basis standard. However, the Court did hold that under remedial intentions backed by evidentiary action Congress can—and has—enacted prophylactic legislation going beyond §5 protections; however, the ADEA did not constitute this type of exception: "A review of the ADEA's legislative record as a whole reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age... That failure confirms that Congress had no reason to

³⁵⁶ *Id.* at. 79

³⁵⁷ *Id.* at 80-82

³⁵⁸ *Id.* at 82-88; O'Connor cites *Gregory v. Ashcroft* (1991), 501 U. S. 452, 470 as one example of precedent where age was not classified as a suspect classification.

believe that broad prophylactic legislation was necessary in this field... Today's decision does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. Those employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”³⁵⁹

C. Statutory Response(s)

Senator James Jeffords [R-VT],³⁶⁰ in the course of introducing responsive legislation, argued the decision in *Kimel* deprived state employees—older employees like Kimel—the “remedies that are available to individuals who work in the private sector, for local governments or for the federal government. Indeed, unless a state chooses to waive its sovereign immunity or the Equal Employment Opportunity Commission decides to bring a suit, state workers now find themselves with no federal remedy for their claims of age discrimination.”³⁶¹

Jeffords decided to rely on the spending clause to induce states to waive their sovereign immunity, and introduced the Older Workers’ Rights Restoration Act (OWRRA) of 2000.³⁶² Of the bill, S.3008, Jeffords explained, “[OWRRA] requires the states to waive their sovereign immunity as a condition of receiving federal funds for their program activities. Under this framework, immunity is only waived with regard to the

³⁵⁹ *Id.* at 91-92

³⁶⁰ Sen. Jeffords was a Republican from 1989 until 2001 when he left the party, became an Independent, and began caucusing with Democrats.

³⁶¹ Congressional Record, vol. 146 at 8109 (Cong. 106th, 2nd sess.) (statement of Sen. Jeffords)

³⁶² Congress.gov, “S.3008 - Older Workers Rights Restoration Act of 2000, 106th Congress (1999-2000),” <https://www.congress.gov/bill/106th-congress/senate-bill/3008>

program or activity actually receiving federal funds. States are not obligated to accept such funds; and if they do not they are immune from private ADEA suits.”³⁶³

Piggybacking off Sen. Leahy’s ‘opt-in’ strategy use in the IPPRA, the OWRRA was introduced in both the 106th and 107th,³⁶⁴ S.928—introduced after the failure of S. 3008 the year prior³⁶⁵—was reported out of the Senate Committee on Health, Education, Labor, and Pensions by a 12-9 vote in the 107th Congress; however, the bill failed to receive a floor vote—and there was no consideration of the bill in the House.³⁶⁶

A few years later in 2004, following the failure of OWRRA, Rep. John Lewis [D-GA-5] and Sen. Edward Kennedy [D-MA] concomitantly introduced the Fairness and Individual Rights Necessary to Ensure a Stronger Society (FAIRNESS) Act of 2004 into the House and Senate; it soon became known as the Civil Rights Act of 2004.³⁶⁷ Title IV of the FAIRNESS Act included amendments to the ADEA, identically entitled and structured

³⁶³ Congressional Record, Vol. 146, at 8109 (Cong. 106th, 2nd sess.)(Sen. Jeffords comments)

³⁶⁴ Congress.gov, “S.3008 - Older Workers Rights Restoration Act of 2000” and Congress.gov, “S.928 - Older Workers' Rights Restoration Act of 2001, 107th Congress (2001-2002),” <https://www.congress.gov/bill/107th-congress/senate-bill/928>

³⁶⁵ The bill was read twice and referred to the Senate Committee on Health, Education, Labor, and Pensions; it has not been acted upon since.

³⁶⁶ Congress.gov, “S.928 - Older Workers' Rights Restoration Act of 2001”; The minority report, which represented nine out of ten of the Republican Committee members views on the bill, argued in favor of a middle-ground compromise that “ensures a remedy for State employees while preserving the sovereign immunity of the States.” This OWRRA minority counter proposal would apply “only to those States that have no age discrimination law with remedies and enforcement procedures in State court equal to those provided in the Age Discrimination in Employment Act.” (Committee report, including minority compromise proposal: “Older Workers’ Rights Restoration Act of 2001,” 107th Congress, 2nd sess., 2002, Senate Report 107-142)

³⁶⁷ Congress.gov, “S. 2088 - Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, 108th Congress (2003-2004),” <https://www.congress.gov/bill/108th-congress/senate-bill/2088/related-bills>; and Congress.gov, H.R. 3809 - Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, 108th Congress (2003-2004),” <https://www.congress.gov/bill/108th-congress/house-bill/3809/related-bills>

after the Older Workers' Rights Restoration Act of 2004. Despite numerous cosponsors in both houses—26 in the Senate and 102 in the House—both versions of the bill failed to make it out of its respective committees, ending Congress's litany of statutory responses attempting to respond to *Kimel*.³⁶⁸

E. Non-Delegation

i. Clinton v. City of New York and the Legislative Line-Items Veto Act

A. Background and Original Statute

In 1996, following the Republican Revolution of 1994 midterm elections, Congress, in congruency with the Contract for America platform, passed the Line Item Veto Act of 1996.³⁶⁹ The Contract for America, authored by Newt Gingrich and signed by more than 300 Republican congressional candidates, was a “pledge to enact ten specific bills within the first hundred days of the 104th Congress.”³⁷⁰ Among these bills

³⁶⁸ H.R. 3809 died in the House Subcommittee on Education Reform and S. 2088 was read twice, but eventually died in the Senate Committee on Health, Labor, Education, and Pensions.

³⁶⁹ See Adam Clymer, “The 1994 Elections: Congress the Overview; G.O.P. Celebrates Its Sweep to Power; Clinton Vows to Find Common Ground,” *N.Y. Times*, (published: Nov. 10, 1994), <http://www.nytimes.com/1994/11/10/us/1994-elections-congress-overview-gop-celebrates-its-sweep-power-clinton-vows.html>; The 1994 midterm elections, or the Republican Revolution, resulted in a net gain of 54 republican representatives in the House (total: 232 Republicans -202 Democrats with one independent) as well as 8 republican senators in the Senate (53 Republicans-46 Democrats with one independent) largely based on the promise of reform with Newt Gingrich's “Contract with America”.

³⁷⁰ Newt Gingrich, “The Capitol Steps Contract and Cynicism in Washington, DC,” *Congressional Record*, September 22, 1994, Vol. 140 (Washington: Government Printing

was the proposal for the Fiscal Responsibility Act.³⁷¹ The act provided two key provisions: the first was a balanced budget/tax limitation constitutional amendment, and the second was a line-item veto statute. The balanced budget amendment required Congress to keep a balanced budget unless otherwise permitted by three-fifths of Congress; however, the balanced budget amendment did not receive the required two-third of Congress to propose the amendment under formal Article V processes.³⁷² On the other hand, the line-item veto legislation—the only Contract with America legislation President Clinton supported on record—passed both houses of Congress and was signed by President Clinton.³⁷³

The purpose of the bill was to allow the president to veto specific spending provisions of a bill, without having to veto the bill in its entirety, thus eliminating unnecessary spending.³⁷⁴ Once Congress passed the bill, in 1997 President Clinton exercised his authority under the bill to cancel §4722(c) of the Balanced Budget Act of 1997, which “waived the federal government’s statutory right to recoupment of a much as \$2.6 billion in taxes that the State of New York had levied against Medicaid providers.” President Clinton also canceled §968 of the Taxpayer Relief Act of 1997, which “permitted the owners of certain food refiners and processors to defer recognition of

Office, 1994), H9526–H9527; also included a promise of eight governmental operational reforms (e.g. “Cut one out of every three congressional staffers”).

³⁷¹ *Id.*

³⁷² Clerk.house.gov, “Final Vote Results for Roll Call 51” (1995), <http://clerk.house.gov/evs/1995/roll051.xml>; Line Item Veto Act (Act), 2 U. S. C. § 691

³⁷³ Jeffrey Gayner, “The Contract with America: Implementing New Ideas in the U.S.,” The Heritage Foundation (updated: 1995), <http://www.heritage.org/research/lecture/the-contract-with-america-implementing-new-ideas-in-the-us>

³⁷⁴ *Id.*

capital gains if they sold their stock to eligible farmer's cooperatives."³⁷⁵ The City of New York and Snake River Potato Growers, Inc. both negatively affected by the Line Item Veto Act, filed suit against President Clinton; their cases were consolidated, eventually reaching the Supreme Court in *Clinton v. New York* (1998).³⁷⁶

B. Case Decision(s) and Reasoning(s)

In a 6-3 decision, the Supreme Court held that the Line Item Veto Act's cancellation procedures were inconsistent with the "Presentment Clause" (Article I, Section 7; specifically clauses 2 and 3, which outlines the federal legislative process by which bill become law via Congress as well as veto procedure) of the Constitution.³⁷⁷

Justice Stevens, who authored the majority opinion, first began by differentiating *Raines*, a failed constitutional challenge to the Line Item Veto Act, and the case before the Court currently: "These cases differ from *Raines*, not only because the President's exercise of his cancellation authority has removed any concern about the dispute's ripeness, but more importantly because the parties have alleged a 'personal stake' in having an actual injury redressed, rather than an 'institutional injury' that is 'abstract and widely dispersed.'"³⁷⁸

Having addressed the "ripeness" of the case before them, Stevens moved on to discuss the effect of the line item veto. He argued the president, in having the ability to delete specific items from appropriations, in effect, is amending a bill—a power the

³⁷⁵ *Clinton v. City of New York* (1998), 524 U.S. 417

³⁷⁶ *Id.*

³⁷⁷ *Id.* In the initial suit *Raines v. Byrd* (1997), 521 U. S. 811 the Court determined through expedited review that the members of Congress did not suffer particularized injury and hence had no standing to sue in Court.

³⁷⁸ *Id.* at 428-436

Constitution does not expressly confer anywhere in its text. He continued: “Statutory repeals must conform with Art. I, *INS v. Chadha*, 462 U. S. 919, 954, but there is no constitutional authorization for the President to amend or repeal. Under the Presentment Clause, after a bill has passed both Houses, but “before it become[s] a Law,” it must be presented to the President, who “shall sign it” if he approves it, but “return it,” i. e., “veto” it, if he does not.”³⁷⁹ Furthermore, Stevens contended that there were vital differences between a “return” and a cancelation of the act. For one, the return of a bill via the veto power is a return of the entire bill before it becomes law; the cancelation of the bill occurs after the bill becomes law and affects it only in part.³⁸⁰

In conclusion, Stevens argued “[i]f this Act were valid, it would authorize the President to create a law whose text was not voted on by either House or presented to the President for signature... If there is to be a new procedure in which the President will play a different role, such change must come through the Article V amendment procedures.”³⁸¹ However, following the Court’s decision in *Clinton*, Congress proposed a new procedure with a different presidential role.

C. Statutory Response

Eight years following *Clinton*, in his 2006 State of the Union, President George W. Bush asked Congress to return the line item veto to the Executive.³⁸² Following the State of the Union, President Bush sent a proposal for the Legislative Line Item Veto Act

³⁷⁹ *Id.* at 438

³⁸⁰ *Id.* at 436-439

³⁸¹ *Id.* at 447-449

³⁸² Congressional Quarterly, “President Bush's State of the Union Address,” CQ Transcripts Wire (published: January 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/31/AR2006013101468.html>

to both houses of Congress for them to enact.³⁸³ Unlike the invalidated Line Item Veto Act, the new proposal's breadth remained the same—it still provided the same authority for presidential cancellation of specific bill provisions; however, its potency was greatly reduced from the original bill's presidential unilateral line item veto power. Instead, the new proposal allowed the President to “propose the rescission of any dollar amount of discretionary budget authority or the rescission, in whole or in part, of any item of direct spending” to Congress for congressional approval.³⁸⁴ It also set forth procedures for expedited up-or-down congressional consideration of such proposed recessions.³⁸⁵

Two versions of the revised bill were proposed in the House and the Senate. In the Senate, S. 2381 enjoyed the greatest support of the many variants of legislative line item veto proposals;³⁸⁶ it was introduced March 7th, 2006 by Sen. Bill Frist [R-TN] with the bipartisan support of congressional leaders like Sen. John McCain [R-AZ], then-Majority Whip Sen. Mitch McConnell [R-KY], and Sen. John Kerry—one of two Democratic co-sponsors. Despite the 45-55-Republican controlled Senate, the revised bill did not enjoy

³⁸³ See Congress.gov, “S. 2381 - Legislative Line Item Veto Act of 2006, 109th Congress (2005-2006),” <https://www.congress.gov/bill/109th-congress/senate-bill/2381> and also Congress.gov, “H.R. 4890-Legislative Line Item Veto Act of 2006, 109th Congress (2005-2006),” <https://www.congress.gov/bill/109th-congress/house-bill/4890>

³⁸⁴ Congress.gov, “S.2381 - Legislative Line Item Veto Act of 2006”

³⁸⁵ The president already had the authority to propose rescissions of enacted law to Congress under the Congressional Budget and Impoundment Control Act of 1974 (“Impoundment Control Act”), however the Impoundment Control Act did not include provisions requiring Congress to vote on said recessions; the new Legislative Line Item Veto Act would require a congressional vote in a timely manner.

³⁸⁶ Other proposals included Congress.gov, “S. 2443- The Separate Enrollment and Line Item Veto Act of 2006, 109th Congress (2005-2006),” <https://www.congress.gov/bill/109th-congress/senate-bill/2443> (zero co-sponsors); Congress.gov, “S. 2372-The Expedited Budget Item Veto Review Act of 2006, 109th Congress (2005-2006),” <https://www.congress.gov/bill/109th-congress/senate-bill/2372> (zero co-sponsors); and Congress.gov, “S. 3521-The Stop Over Spending Act of 2006, 109th Congress (2005-2006),” <https://www.congress.gov/bill/109th-congress/senate-bill/3521> which received 28 co-sponsors—one less than S. 2381.

broad Senate support.³⁸⁷ The main opposition to the bill came from within the Senate Budget Committee with Sen. Robert Byrd [D-WV] who, along with his five other colleagues, originally filed suit in *Raines v. Byrd* questioning the constitutionality of the original Line Item Veto Act (the suit was dismissed due to a lack of “particularized injury”).³⁸⁸ S. 2381 was referred to the Committee on the Budget where hearings were held; however, Sen. Byrd, a leading member of the Senate Budget Committee, was able to effectively kill the bill in committee.³⁸⁹

The identical House bill, H.R. 4890, received a more auspicious start in the House. Rep. Paul Ryan [R-WI-I] with 110 co-sponsors introduced the bill on March 7th, 2006 where it was referred to both the House committees on Rules and the Budget.³⁹⁰ Three months later both committees reported an amended bill, agreed upon a version to take to the floor, and on June 22nd, 2006 held a recorded vote. H.R. 4890 passed the House with 247 votes for, 172 vote against, and 14 representatives abstaining.³⁹¹ However, in the Senate, the bill received a similar fate as S. 2381. A day after the bill passed the House, H.R. 4890 was received in the Senate: the bill was read twice, and three months after its introduction in the Senate, was placed the Senate Legislative

³⁸⁷ Congress.gov, “S.2381 - Legislative Line Item Veto Act of 2006”

³⁸⁸ See *Raines v. Byrd* (1997); the other five congressmen in the suit included Senators Carl Levin [D-MI] and Daniel Patrick Moynihan [D-NY] as well as Representatives David Skaggs [D-CO-2], Henry Waxman [D-CA-29], and retired Sen. Mark Hatfield [R-OR]

³⁸⁹ Congress.gov, “S. 2381 - Legislative Line Item Veto Act of 2006”: (hearings printed: S.Hrg. 109-650)

³⁹⁰ Congress.gov, “H.R. 4890-Legislative Line Item Veto Act of 2006”

³⁹¹ Clerk.house.gov, “Final Vote Results for Roll Call 317” (2006): <http://clerk.house.gov/evs/2006/roll317.xml>

Calendar (Calendar No. 589)—it never received a floor vote and has not been acted upon since.³⁹²

In four instances—the Religious Land Use and Institutionalized Persons Act, the Gun Free School Zones Act, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, and the Child Online Protection Act—Congress was able to repass similar legislation with similar potency and breadth to those statutes invalidated by the Court. Even so, the Court permanently enjoined the COPA’s enforcement after its passage and it never went into effect. The RLUIPA, despite its drastically narrowed breadth, successfully achieved similar statutory potency as well as successful implementation in the areas of prisons and land use cases. The PROTECT Act and GFSZA both successfully replicated, in both potency and breadth, the previous statutes invalidated by the Court. The next chapter, Chapter 5, analyzes the significance of the reenacted statutes, as well as the possible implications related to interpretive authority (to be researched in future work).

³⁹² Congress.gov, “H.R. 4890-Legislative Line Item Veto Act of 2006”

Chapter 5: Analysis and Conclusion

Chapter 5 includes an analysis of the above results—with a focus on the four instances of successful reenactment—as well as a summarization of the significance of this work and potential future work building on its findings. The analysis section summarizes how successful Congress was in repassing legislation replicating the initial invalidated statute’s breadth and potency and analyzes the significance of Congress’s successful replications in terms of the specific constitutional interpretations. The conclusion links the findings back to the existing constitutional interpretive scholarship; it also addresses the significance of congressional repassage; and lastly, it poses an important question for research moving forward.

A. Analysis

Of the 34 cases invalidating congressional legislation, 11 garnered congressional statutory reproposals. Of the 11 reproposals, four passed into law. Two of the statutes—the Gun-Free School Zone Act and the PROTECT Act—successfully replicated the initial invalidated statute’s *potency* and *breadth*, with tapered statutory adoption, but indistinguishable in practice, repassed statutes. Following *Lopez*, the 104th Congress—in spite of divided government (a 230-204 Republican House (1 Independent), a 52-48 Republican Senate, and Democratic President Clinton)—with presidential leadership, was able to pass the Gun Free School Zones Act (GFSZA) of 1995. The amended GFSZA, besides omitting the small amount of firearms that did not travel interstate at one point or another, succeeded in achieving the same legislative effects as the initial GFSZA invalidated in *Lopez*. With a lexical sleight of hand—the additive jurisdictional

element—for the most part Congress was able to regulate firearms within school zones as effectively in practice both in potency and—despite the slightly narrowed statutory adoption—breadth as the initial invalidated statute.

Even though Congress at least acted consistent with the precedent in *Lopez*—that the possession of guns was a non-economic activity and therefore unable to be regulated under Congress’s commerce power—Congress was able to overcome the precedent’s policy effects by adding a jurisdictional element conditioning gun regulation on past interstate movement; the result was a slightly narrowed statutory adoption, but with virtually the same policy effects as initially invalidated by the Court—since, in a modern economy, most, if not all things, have at one point or another moved across interstate boundaries. Within this vein of reasoning, what is preventing future Congresses from adding a jurisdictional element conditioning whatever objects regulation on past interstate movement subsequent Court invalidation of an initial policy? One can imagine a scenario where Congress can regulate virtually every object under its commerce power as long as past interstate movement has occurred. *Morrison* and the attempted repassage of the VAWCRRRA, unlike the GFSZA, involved a concept with a subjective subject—violence against women—rather than a concept with concrete objective subject—possession of guns near school zones—whose past interstate travel can definitively be demonstrated. Furthermore, congressional leadership worried that if Congress attempted to repass a civil remedy provision, supporters of the rest of the bill would lose funding and other means of preventing violence against women.

Since Congress overcame the policy effects of *Lopez*, in effect, it sets a practical standard for future Congresses in which if the Court invalidates a congressional

regulation of interstate commerce, adducing infringement of the commerce clause, Congress, in practice, can simply amend and reenact a statute with an added jurisdictional element. In this sense, although the Court's precedent is still intact—the meaning of the commerce clause as interpreted by the Court still stands within constitutional law—but now Congress can regulate non-economic commerce previously viewed as not included under the purview of Congress's interstate commerce regulation.

The same can be said of the PROTECT Act. The 108th Congress, with the signature of President Bush (229-205 Republican House (1 Independent), a 51-48 Republican Senate (1 Independent), and Republican President Bush), rallied around the protection of children, and was successful in passing the PROTECT Act after the Child Pornography Prevention Act (CPPA) of 1996 was invalidated in *Ashcroft v. Free Speech Coalition* (2001). The narrowing of the CPPA's "appears to be" and "conveys the impression" provisions to the PROTECT Act's "indistinguishable from" provision, seemingly followed the *Free Speech Coalition* Court's jurisprudence with slightly narrowed prosecutorial potency and breadth as the CPPA. However, the PROTECT Act's pandering provisions went further than the CPPA's in criminalizing the advertising or solicitation of a visual depiction in a way to make someone believe minors were involved in sexually explicit conduct. Even though the PROTECT Act's "indistinguishable from" provision was narrower than "appears to be" or "conveys the impression" the pandering provisions seemingly replicate the CPPA's broader nexus.

Although, the PROTECT Act's stronger "indistinguishable from" nexus replaced the CPPA's unconstitutional provisions, the Act had analogous prosecutorial potency as those under the cases that would have come under CPPA's purview. In other words, the

PROTECT Act is still striking at all speech—including protected speech of pornographic material involving adults that is indistinguishable from minors—in trying to prevent the distribution of pornographic material in which actual minors are involved. By simply changing the nexus from “appears to be” and “conveys the impression” to “indistinguishable from”, the statutory adoption was slightly narrower, albeit Congress is still prohibiting protected material.

Similar to the amended GFSZA, the PROTECT Act sets a practical standard for future Congresses in which if Congress wishes to prohibit the distribution of obscene speech—in the case of the CPPA and the PROTECT Act, child pornography—by restricting the protected speech—pornography involving adults—and unprotected speech—pornography involving minors—Congress need only establish a more distinguishing guideline more clearly identifying the protected and unprotected speech (e.g. change statutory language from “appears to be” to “indistinguishable from”).

The 106th Congress (223-211 Republican House (1 Independent), 55-45 Republican Senate, and Democratic President Clinton) was able to repass the RLUIPA with a significantly narrowed breadth—but with identical potency—compared to the invalidated RFRA in *Boerne v. Flores* (1997). Unlike the RFRA, which extended to every governmental policy and government, the RLUIPA only extended to religious land use exceptions and religious restrictions on institutionalized persons. Even despite its curtailed scope, the RLUIPA was more successful in securing free religious exercise at the lower court levels than courts pre-*Smith*, signaling a congressional success—again, even despite its narrower scope.

In the instance of the RLUIPA, the Court struck down, as applied to the states, an unprecedented statute of gargantuan scope because there was no remedial or preventative evidence potential State constitutional infringements. However, when Congress responded with evidence of State constitutional religious burdens in the areas of institutionalized persons and land use regulation cases coupled with a statute preventing such infringements, the implementation by subsequent Courts, in those specific substantive niches, resulted in increased prosecutions.³⁹³ What is to stop Congress, if there is available evidence of constitutional infringements, from doing the same in other legislative areas? Ostensibly, if Congress could find evidence of infringement upon the principle of freedom of religion, they could expand to other policy areas.

In the last instance, the 105th Congress (226-207 Republican House (2 Independents), 55-45 Republican Senate, and Democratic President Clinton) was able to pass the Child Online Protect Act (COPA) of 1998 after the Court invalidated the “indecent transmission” and “patently offensive” provisions of the Communications Decency Act (CDA) of 1996 in *Reno v. ACLU* (1996). The COPA obscenity provisions tailored its language to the three-pronged test established by the *Miller* Court, narrowing the statute’s scope as compared to the CPPA, but still accomplishing the same overall

³⁹³ As the anonymously-written Harvard Law Review article claims: “RLUIPA thus appears to be an unusually strikingly indication of the popular constitutionalist notion that changing context and ongoing dialogue among the branches of government may impact legal doctrines and outcomes without any change in the relevant text,” (*supra* note 285). I do not mean to accept this narrative, but only present it as a theoretical alternative to the conventional dichotomous narrative in which Congress accepted the judicial precedent and judicial supremacy and the Court allowed the RLUIPA rather than Congress shaping constitutional meaning.

goal of preventing minor's access to Internet pornography.³⁹⁴ Supplementary to the main revised obscenity standards, the COPA also applied to those under 17 years of age (the CDA applied to those under 18 years of age), only applied to publicly accessible sites (not chatrooms, emails, mail exploders, etc.), and only those sites who were commercial distributors (CDA applied to all transmissions). The repassed statute's potency was also slightly lessened from \$250,000 and two years imprisonment under the CDA to a \$50,000 fine and six-month sentence under the COPA. However, even with its tapered scope and potency, before the COPA could go into effect the ACLU enjoined its enforcement; following years of litigation, the COPA was permanently enjoined from being implemented.

B. Conclusion

In two out of four of these instances (the amended GFSZA and the PROTECT Act), Congress was able to successfully repass a new statute with approximately all of the same—though with a slightly narrower statutory adoption—legislative potency and breadth as the invalidated statute. In one these instances, Congress repassed a statute that was slightly narrower in comparison to the initial Court-invalidated statute; however, implementation of the new statute was blocked by further litigation: the COPA. In the last instance, Congress was able to pass a quite truncated version—truncated in its applicable scope—of a bill invalidated by the Court: the RLUIPA. However, the

³⁹⁴ See *Miller v. California* (1973): “(a) whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically define by the applicable state law; (c) whether the work, take as a whole, lacks serious literary, artistic, political or scientific value.”

RLUIPA actually proved more potent in its implementation, and was more successful in the narrowed fields of land use and institutionalized persons than pre-*Smith* religious exercise cases in the lower courts.

The remaining 11 statutes garnered legislative support for a congressional response, but could not amass the political support to pass the proposals. For one reason or another, twenty-three of the cases did not produce a statutory response—either a proposal or a bill—in any form. Some of the cases involved very small policy niches—e.g. *Boos v. Barry* (1987) invalidated a federal statute regulating signs promoting ‘public odium’ within D.C. near foreign embassies for which Congress—and, intuitively, Congress may have felt that a response was not of great import. Some cases may have provoked responses, just not within this study’s narrow focus—e.g. Congress responded to *United States v. Eichman* (1989) invalidating the Flag Protection Act of 1989 with a plethora of constitutional amendment proposals via formal Article V processes in numerous years.

Out of those statutes that provoked a statutory response, three concerned the First Amendment, two involved the commerce clause, one regarded the Fourteenth Amendment’s enforcement power, four considered, in one form or another, the Eleventh amendment and the abrogation of state sovereignty, and one concerned non-delegation. Two statutory responses were passed regarding the First Amendment (though one was immediately enjoined), one statutory response was passed concerning the commerce clause, and one statute was passed related to the Fourteenth Amendment’s enforcement power—though the repassed statute was significantly limited in scope. Thus, not much

can be said of whether either rights or powers garner congressional statutory response more or less than the other.³⁹⁵

The normative implications of these congressional responses for constitutional politics and who determines constitutional meaning will not be expounded upon here. Rather, the significance of this study shows that when the Supreme Court sets precedent, Congress and the president may have not repassed identical legislation, but they have repassed very similar legislation. Sometimes they attempt to overcome the Court precedent's policy outcomes without ever necessarily challenging the precedent or the Court's interpretive authority. These instances have normative implications that dichotomous accounts delineating non-judicial actors' acceptance or rejection of judicial supremacy or departmentalism overlook. In particular, these normative implications are related to the possibility that despite the Court's ability to determine the Constitution's meaning, Congress has the option of overcoming the policy effects of that meaning through distinctive, though parallel, interpretations implicit in legislation. Again, an analysis of the extent of this congressional ability to overcome—including an analysis of the extent of precedent, particular circumstances and environments for which congressional responses are available—will be reserved for another study. Non-judicial actors can, and have, responded to Supreme Court decisions in ways that have similar legislative effects as those famed presidential departmentalists. These scenarios are just as important—if not more important—than direct, stronger departmentalist challenges. As such, hopefully this thesis will act as a spark to kindle discussions and more research about the normative implications for constitutional politics inherent in instances of where

³⁹⁵ A larger sample size would have helped, however with only four repassed statutes not much can be said of power versus rights statutory responses.

Congress is able to overcome the Supreme Court precedent's policy effects, whilst acting consistent—in the narrow sense of not repassing the same statute—with Court precedent. In the meantime, I leave readers with this thought: In these instances of Congress overcoming Supreme Court precedent's policy effects, is the Court determining constitutional meaning in the original case which then constrains Congress or is Congress, in effect, expanding—incrementally or otherwise—constitutional conceptions of certain clauses, articulated in new reenacted congressional policies? If the latter, what are the interpretive implications for these isolated instances of congressional statutory response for future instances regarding different constitutional areas?

Appendix A: The Rehnquist Court: Cases Invalidating Federal Statutes

Term	Case Name/ Citation	Challenged Governmental Act	Issue	Ideological Direction	Supreme Court Vote	Justice(s) Change	Statutory Pushback
1986	FEC v. Massachusetts Citizens for Life, Inc. 479 U.S. 238	§316 of the Federal Election Campaign Act (FECA)	1 st Amendment	Liberal	5-4	--	(N)
1987	Boos v. Barry 485 U.S. 312	District of Columbia Code restricting displaying signs near foreign embassies	1 st Amendment	Liberal	5-3 (Kennedy DNP)	--	(N)
1989	United States v. Eichman 496 U.S. 310	Flag Protection Act of 1989	1 st Amendment	Liberal	5-4	Anthony Kennedy (Feb.1988) replaces Lewis Powell (Jun.1987)	(N)
1994	United States v. National Treasury Employees Union 513 U.S. 454	Ethics in Government Act of 1978 (as amended by Ethics Reform Act of 1989)	1 st Amendment	Liberal	6-3	David Souter (Oct.1990) replaces William Brennan (Jul.1990)	(Y) 1
1994	Plaut v. Spendthrift Farm, Inc. 514 U.S. 211	FDIC Improvement Act (1991)	Misc.	Unspecified	7-2	Clarence Thomas (Oct.1991) replaces Thurgood Marshall (Oct.1991)	(N)
1994	Rubin v. Coors Brewing Co. 514 U.S. 211	§5(e)(2) of the Federal Alcohol Administration Act	1 st Amendment	Liberal	9-0	Ruth Bader Ginsburg (Aug. 1993) Replaces Bryon White (Jun. 1993)	(N)
1994	United States v. Lopez 514 U.S. 549	Gun-Free School Zones Act of 1990	Federalism	Conservative	5-4	Stephen Breyer (Aug.1994) replaces Harry Blackmun (Aug.1994)	(Y) 2

1995	Seminole Tribe of Florida v. Florida 517 U.S. 44	Indian Gaming Regulatory Act (1988)	Federalism	Conservative	5-4	--	(Y) 3
1995	United States v. International Business Machines Corp. 517 U.S. 843	§4371 of the Internal Revenue Code (tax on insurance premiums paid to foreign insurers)	Federal Taxation	Conservative	6-2 (Stevens DNP)	--	(N)
1995	Colorado Republican Federal Campaign Committee v. FEC 518 U.S. 604	The "Party Expenditure Provision" of the Federal Election Campaign Act of 1971 (FECA)	1 st Amendment	Liberal	7-2	--	(N)
1995	Denver Area Educational Telecommunications Consortium v. FCC 518 U.S. 727	§10(a), §10(b), and §10(c) of the 1992 Cable Television Consumer Protection and Competition Act	1 st Amendment	Conservative	7-2	--	(N)
1996	Babbitt v. Youpee 519 U.S. 234	§207 of the Indian Land Consolidation Act	Due Process	Conservative	8-1	--	(N)
1996	City of Boerne v. Flores 521 U.S. 507	Religious Freedom Restoration Act (RFRA) of 1993	1 st Amendment	Conservative	6-2	--	(Y) 4
1996	Reno v. American Civil Liberties Union 521 U.S. 844	§223(a)(1) and §223(d) of the Communications Decency Act (1996)	1 st Amendment	Liberal	9-0	--	(Y) 5

1996	Printz v. United States 521 U.S. 898	Brady Handgun Violence Prevention Act (Brady Bill)	Federalism	Conservative	5-4	--	(N)
1997	United States v. United States Shoe Corp. 523 U.S. 360	The Harbor Maintenance Tax (HMT)	Federal Taxation	Conservative	9-0	--	(N)
1997	United States v. Bajakajian 524 U.S. 3211997	18 U.S.C. §982 §5316	Criminal Procedure	Liberal	5-4	--	(N)
1998	Clinton v. City of New York 524 U.S. 417	Line Item Veto Act	Misc.	Unspecified	6-3	--	(Y) 6
1998	Eastern Enterprises v. Apfel 524 U.S. 498	Coal Industry Retiree Health Benefit Act (Coal Act)	Due Process	Conservative	5-4	--	(N)
1998	Greater New Orleans Broadcasting Ass'n v. United States 527 U.S. 173	§316 of the Communications Act of 1934 §1304	1 st Amendment	Liberal	9-0	--	(N)

1999	Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank 527 U.S. 627	Patent and Plant Variety Protection Remedy Clarification Act (Act)	Federalism	Conservative	5-4	--	(Y) 7
1999	College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board 527 U.S. 666	Trademark Remedy Clarification Act (TRCA)	Federalism	Conservative	5-4	--	(Y) 8
1999	Alden et al. v. Maine 527 U.S. 706	Fair Labor Standards Act of 1938 Overtime Provision (Article I powers to abrogate state sovereign immunity)	Federalism	Conservative	5-4	--	(N)
1999	Kimel v. Florida Board of Regents 528 U.S. 62	The Age Discrimination in Employment Act of 1967 (ADEA)	Federalism	Conservative	5-4	--	(Y) 9
1999	United States v. Morrison 529 U.S. 598	The Violence Against Women Act of 1990	Federalism	Conservative	5-4	--	(Y) 10

1999	United States v. Playboy Entertainment Group, Inc. 529 U.S. 803	Communications Decency Act of 1996 §505	1 st Amendment	Liberal	5-4	--	(N)
1999	Dickerson v. United States 520 U.S. 428	18 USC §3501 ('Miranda' warning rights)	Criminal Procedure	Liberal	7-2	--	(N)
2000	Board of Trustees of the University of Alabama v. Garrett 531 U.S. 356	Title I of the Americans with Disabilities Act of 1990 (ADA)	Federalism	Conservative	5-4	--	(N)
2000	Legal Services Corp. v. Velazquez 531 U.S. 533	The Omnibus Consolidated Rescissions and Appropriations Act of 1996	1 st Amendment	Liberal	5-4	--	(N)
2000	United States v. Hatter 532 U.S. 557	Medicare and Social Security taxes levied on sitting federal judges	Federal Taxation	Liberal	5-2 (Stevens & O'Connor DNP)	--	(N)
2000	United States v. United Foods, Inc. 533 U.S. 405	Mushroom Promotion, Research, and Consumer Information Act	1 st Amendment	Liberal	6-3	--	(N)

2001	Thompson v. Western States Medical Center 535 U.S. 357	Food and Drug Administration Modernization Act of 1997 (FDAMA)	1 st Amendment	Liberal	5-4	--	(N)
2002	Ashcroft v. Free Speech Coalition 535 U.S. 234	Child Pornography Prevention Act of 1996 (CPPA)	1 st Amendment	Liberal	6-3	--	(Y) 11
2004	United States v. Booker 543 U.S. 220	Federal Sentencing Guidelines (U.S.S.G. § 2D1.1(c)(2),(4))	Criminal Procedure	Liberal	5-4	--	(N)

Appendix B: Statutory Responses to Court Invalidations

Case #/ Date	Congress	Repassed/Proposed Statute Name	Party Makeup of House	Party Makeup of Senate	House Vote	Senate Vote	President/ Party	Latest Action	Potency/ Breadth
1-1995	104 th	Ethics in Government Act Amendments (H.R. 1639)	Dems 204 Reps 230 Other 1	Dems 48 Reps 52	No vote	No vote	Clinton Dem	Referred to Subcommittee on Constitution	(Not passed)
2-1996	104 th	§657 Omnibus Consolidated Appropriations Act of 1997 (H.R. 3610) (Gun-Free School Zone Act Amendment)	Dems 204 Reps 230 Other 1	Dems 48 Reps 52	Yeas 278 Nays 126 Not voting 30	Yeas 72 Nays 21 Not voting 1	Clinton Dem	Signed into law	Potency: Identical Breadth: Indistinguishable
3-1998 1999 2001	105 th 106 th 107 th	Indian Gaming Regulatory Improvement Act (S. 1870-1998), Indian Gaming Regulatory Improvement Act (S. 399-1999), Intergovernmental Gaming Agreement (S.985-1999), (S.832-2001)	<u>105th</u> Dems 207 Reps 226 Other 2 <u>106th</u> Dems 211 Reps 223 Other 1 <u>107th</u> Dems 212 Reps 221 Other 2	<u>105th</u> Dems 45 Reps 55 <u>106th</u> Dems 45 Reps 55 <u>107th</u> Dems 50 Reps 50	No vote	No vote	Clinton Dem 1998,1999 Bush Rep 2001	Each proposal referred to Committee on Indian Affairs and hearings heard	(Not passed)

4-1999 2000	106 th	Religious Liberty Protection Act (H.R. 1691-1999) (S. 2081-2000) Religious Land Use and Institutionalized Persons Act (S. 2869-2000/ H.R. 4862-2000)	Dems 211 Reps 223 Other 1	Dems 45 Reps 55	<u>H.R. 1691</u> Yeas 306 Nays 188 S. 2869 Unanimous consent <u>H.R. 4862</u> No vote	<u>H.R. 1691</u> No vote S.2869 Unanimous consent <u>H.R. 4862</u> No vote	Clinton Dem	<u>RLPA (H.R. 1691)</u> Referred to Senate Judiciary Committee <u>RLUIPA (S.2869)</u> Signed into law <u>H.R. 4862 (identical statute)</u> Referred to Subcommittee on the Constitution	Potency: Identical Breadth: Significantly narrowed
5-1998	105 th	Title XIV of Omnibus Consolidated Appropriations Act of 1999 (H.R. 4328)(Child Online Protection Act)	Dems-207 Reps-226 Other-2	Dems-45 Reps 55	Yeas-333 Nays-95 Not voting - 9	Yeas-65 Nays-29 Not voting- 6	Clinton- Dem	Signed into law	Passed but Permanently enjoined
6-2006	109 th	Legislative Line-Items Veto Act (H.R. 4890/ S. 2381)	Dems 202 Reps 231 Other 1	Dems 44 Reps 55 Other 1	<u>H.R. 4890</u> Passed 247-172 Not voting - 14 <u>S.2381</u> No vote	<u>H.R. 4890</u> No vote <u>S. 2381</u> No vote	Bush-Rep	<u>H.R. 4890</u> Placed on the Senate legislative calendar (No. 589) <u>S. 2381</u> Committee on the Budget; hearings held.	(Not passed)
7-1999	106 th	Intellectual Property Protection Act (S.1835-1999)	Dems 211 Reps 223 Other 1	Dems 45 Reps 55	No vote	No vote	Clinton- Dem	Read twice and referred to the Committee on the Judiciary	(Not passed)

8-2003	108 th	Intellectual Property Protection Act (S.1191/H.R. 2344-2003)	Dems 205 Reps 229 Other 1	Dems 48 Reps 51 Other 1	<u>S. 1191</u> No vote <u>H.R. 2344</u> No vote	<u>S. 1191</u> No vote <u>H.R. 2344</u> No vote	Bush-Rep	<u>S. 1191</u> Read twice and referred to the Committee on the Judiciary <u>H.R. 2344</u> House Judiciary Committee; subcommittee hearings heard	(Not passed)
9-2000 2001 2004	106 th 107 th 108 th	Older Workers Right Restoration Act (S.3008-2000, S.928-2001), FAIRNESS Act (S.2088/H.R.3809-2004)	<u>106th</u> Dems 211 Reps 223 Other 1 <u>107th</u> Dems 212 Reps 221 Other 2 <u>108th</u> Dems 205 Reps 229 Other 1	<u>106th</u> Dems 45 Reps 55 <u>107th</u> Dems 50 Reps 50 <u>108th</u> Dems 48 Reps 51 Other 1	<u>S.3008</u> No vote <u>S.928</u> No vote <u>S.2088</u> No vote <u>H.R.3809</u> No vote	<u>S.3008</u> No vote <u>S.928</u> No vote <u>S.2088</u> No vote <u>H.R.3809</u> No vote	Clinton-Dem 2000 Bush- Rep 2001,2004	<u>S.3008</u> Read twice and referred to the Committee on Health, Education, Labor and Pensions <u>S.928</u> Placed on the Senate legislative calendar (No. 345) <u>S.2088</u> Read twice and referred to the Committee on Health, Education, Labor, and Pensions <u>H.R.3809</u> Referred to the Subcommittee on Education Reform	(Not passed)
10-2003	106 th	Violence Against Women Civil Rights Restoration Act (H.R. 394)	Dems 205 Reps 229 Other 1	Dems 48 Reps 51 Other 1	No vote	No Vote	Bush-Rep	Referred to the Subcommittee on Crime, Terrorism, and Homeland Security	(Not passed)

11-2003	108 th	PROTECT Act (S. 151)	Dems 205 Reps 229 Other 1	Dems 48 Reps 51 Other 1	Yeas 200 Nays 25 Pres 2 Not voting 8	Yeas 98 Nays 0 Not voting 2 (Conf. Report)	Bush -Rep	Signed into law	Potency: Indistinguish- able Breadth: Indistinguish- able
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