

A COMMENT ON CONGRESSIONAL ENFORCEMENT

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For all its brevity and simplicity, Section 5 of the Fourteenth Amendment has been one tough nut to crack. It provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article,” i.e., the Fourteenth Amendment.¹ Some have insisted that Section 5 cedes to Congress wide latitude “in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”² Others deny such pretensions for the seemingly modest Section.³

My own views largely track Professor Rotunda’s.⁴ Notwithstanding Section 5, Congress lacks the textual authority to constrain state law and action above and beyond the constraints already imposed by the Fourteenth Amendment and the rest of the Constitution. Because Congress lacks a textual hook, the Constitution’s implicit background rule made explicit in the Tenth Amendment⁵ precludes federal legislation.

Rather than merely reiterating Professor Rotunda’s excellent points, this Comment addresses two Section 5 questions. First, does Section 5 require the judiciary⁶ to yield or to defer⁷ to congressional conclusions of law and fact regarding possible violations of the rest of the Fourteenth Amendment?⁸ Second, more generally, what authority does Section 5 actually cede to Congress?⁹ Because more than half a dozen amendments cede to Congress the authority to

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1. U.S. CONST. amend. XIV, § 5.

2. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). *Cf.* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (concluding that under Section 2 of the Thirteenth Amendment Congress may “rationally . . . determine what are the badges and incidents of slavery, and [has] the authority to translate that determination into effective legislation”).

3. *See, e.g., Morgan*, 384 U.S. at 666 (Harlan, J., dissenting) (admitting that Congress can legislate remedies but denying that Congress may draw conclusive judgments about whether a violation has occurred).

4. *See* Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

5. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

6. “Judiciary” refers to the federal and state judiciaries.

7. Judicial “deference” consists of a practice where the judiciary, to some degree, accepts legislative determinations even though the judiciary might have reached a different conclusion in the first instance.

8. This Comment addresses whether Section 5 *requires* the judiciary to defer to Congress. It does not consider whether the judiciary may choose to defer to congressional legal and factual findings.

9. Answering the second question first would obviate the need to consider the first question separately. Nevertheless, it will prove helpful to analyze the issue of deference on its own.

“enforce” their substantive provisions with “appropriate legislation,”¹⁰ the proper answers to these questions are of undoubted interest. Although these “enforcement” provisions were ratified over the course of more than 100 years, we might suppose that the same meaning ought to be supplied to all such provisions because they employ almost identical language.

The answer to the first question is no. The judiciary need not bestow *any* deference upon legislative conclusions of law or fact embedded in legislation passed pursuant to Section 5.¹¹ At the risk of shedding more heat than light, we might say that nothing in Section 5 (or the other enforcement provisions) intimates, let alone demands, that enforcement statutes enacted pursuant to Section 5 are entitled to something akin to either *Chevron* deference¹² or substantial evidence review.¹³ The Constitution’s background rule in which the judiciary draws independent legal and factual conclusions regarding constitutional questions remains intact. To paraphrase *Marbury*,¹⁴ the judiciary independently must say what the law is and what the facts are.¹⁵

With respect to the second question, I want to suggest that Section 5 cedes to Congress the rather unremarkable authority to enact penalties for violations of the Fourteenth Amendment and the ability to create federal judicial and executive

10. U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2; XVIII, § 2; XIX, § 2; XXIII, § 2; XXIV, § 2 & XXVI, § 2.

11. Statutes enacted pursuant to Section 5 may embody legal and/or factual conclusions. For instance, if Congress provided that state higher education admission policies violate the Equal Protection Clause of Section 1 when such policies generate admission rates that are at variance from the college age population for racial groups located in a particular state, Congress would have made a legal conclusion about the scope of the Fourteenth Amendment. If Congress imposed penalties on particular state colleges based on a congressional finding that such colleges have violated the Fourteenth Amendment (say by tossing aside all minority applications), Congress would have embedded factual and legal findings in its legislation.

12. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (providing that if Congress has not spoken to a precise statutory question, judiciary must defer to an agency’s reasonable construction of law).

13. See 5 U.S.C. § 706(2)(E) (1994); see also *Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938) (stating that agency decisions are supported by substantial evidence if “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” exists in the record).

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

15. This Comment merely asserts that the enforcement provisions do not provide a sound basis for insisting that the judiciary must discard or give short shrift to its own interpretations of the Constitution or its own factual findings. It does not address whether the judiciary’s constitutional interpretations and findings are meant to govern the other branches. Whether the other branches heed or disregard a judicial determination is a separate and difficult issue and one not peculiar to the Fourteenth Amendment and its enforcement section. In fact, the arguments contained herein are consistent with either a judicial supremacy or a Paulsenian coordinacy approach. See generally Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

institutions charged with enforcing the Fourteenth Amendment. Given *Kentucky v. Dennison*,¹⁶ there quite likely were some apprehensions that in the absence of congressional “enforcement” authority, Section 1 might prohibit the states from denying equal protection of the laws, etc., but the federal government would be powerless to ensure that sanctions attached to state violations. In the words of *Dennison*, though state officers might have a “moral duty” arising from Section 1, there would be no federal means of compelling compliance with this duty.¹⁷ Under this view, Section 5 enforcement authority does not encompass the prerogative to enact broad prophylactic measures designed to prevent violations when the Fourteenth Amendment itself would not otherwise bar state legislation or action.¹⁸ Such legislation cannot be said to enforce the Fourteenth Amendment.

These answers are based largely on a textual approach to these questions. The arguments are tentative and incomplete as a thorough originalist treatment would focus more intensely on the original meaning of Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment.¹⁹ Moreover, given the limited scope of the inquiry, I will not comment on the Religious Freedom Restoration Act (“RFRA”)²⁰ generally or on the merits of *City of Boerne v. Flores*.²¹ Nor will I attempt to make sense of Sections 1 through 4 of the Fourteenth Amendment. *City of Boerne* contains so many rich issues—free exercise, incorporation, Section 5, separation of powers, federalism—that it would be foolhardy to try to comment on all of them.

I. SOME NOTES ON THE JUDICIAL ROLE

The federal judiciary could adopt any one of a number of frameworks when reviewing factual or legal conclusions embodied in legislation passed under

16. 65 U.S. (24 How.) 66, 77-80 (1860) (admitting that Ohio governor had a constitutional responsibility to deliver up a fugitive who had helped a Kentucky slave escape but denying that the federal government could compel a state officer to perform this duty), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

17. *Id.* at 107.

18. In this respect, I view congressional authority more narrowly than the Supreme Court. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997) (claiming that Congress can enact legislation deterring violations, even where conduct would not otherwise be unconstitutional).

19. U.S. CONST. amend. XIII, § 2.

20. This Comment does not examine the propriety of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), itself because that would entail an examination of the scope of the First Amendment’s Free Exercise Clause, U.S. CONST. amend. I, cl. 1.

21. *City of Boerne*, 117 S. Ct. at 2157. One can conclude that Section 5 does not cede to Congress some level of deference without subscribing to the Court’s free exercise jurisprudence. See *id.* at 2176 (O’Connor, J., dissenting) (agreeing that Congress lacks authority “to define or expand the scope of constitutional rights by statute,” while disagreeing with the disposition of the case because of her belief that RFRA merely enforces the free exercise clause rather than expanding it).

Section 5. A brief sketch of three such approaches to the judicial role will be useful before we consider our two questions. Likewise, a quick examination of the “default” approach that the judiciary ordinarily adopts when reviewing the constitutionality of federal legislation will prove instructive. If we understand how the judiciary customarily approaches its task, we can gauge whether Section 5 effects a departure from that default rule.

A. Three Approaches

A casual reader of Section 5 of the Fourteenth Amendment might be forgiven for adopting a rather narrow view of that Section’s delegated authority. The ability to “enforce” the rest of the Fourteenth Amendment using “appropriate” legislation seems rather inconsequential. Such language hardly seems to even hint that the judiciary must defer to Congress regarding either the meaning of the rest of the Fourteenth Amendment or whether States have violated that amendment’s prohibitions. In other words, the casual reader might be excused for concluding that the judiciary need not defer to Congress but must instead adopt a “De Novo” approach to the constitutionality of Section 5 legislation.

At the same time, the casual reader might be a bit puzzled. Enforcement is traditionally considered the province of the magistrates and not the legislature; the executive and the judiciary enforce the laws (including the Constitution). That Section 5 apparently assigns this role to Congress might seem extremely odd. Were Representatives or Senators to come to the defense of the freed slaves who were being discriminated against at the hands of the states? Were congressional committees to make arrests and conduct trials?

These perplexing questions might lead the casual reader to explore further, recognizing that like any provision of the Constitution, the Fourteenth Amendment should not be interpreted in a historical vacuum. The Amendment was enacted against the backdrop of a civil war fought, in part, on the notion that justice demanded that blacks be treated as the equals of whites in the eyes of the law. For far too long, the South had thumbed its nose at the concepts “that all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights.”²² To remedy the situation, the Thirteenth, Fourteenth, and Fifteenth Amendments established a constitutional baseline of rights that states must respect and granted Congress seemingly unusual enforcement authority.

Given this historical context, perhaps Section 5 reflects an attitude that only Congress had the ability or the willingness to ride roughshod over recalcitrant states and that accordingly, Congress ought to have the exceptional authority to “enforce” the Amendment against the southern states.²³ After all, *Congress* is the branch empowered to enforce the Fourteenth Amendment, not the judiciary. Maybe there are some *expressio unius* implications of Section 5 that benefit

22. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

23. On this view, Section 2 of the Thirteenth Amendment would be the first instance where Congress was ceded exceptional enforcement authority.

Congress at the expense of the judiciary.²⁴ Indeed, the judiciary's decisions prior to the Civil War, such as *Dred Scott v. Stanford*,²⁵ perhaps led to a lack of confidence in mere judicial enforcement of the rights guaranteed by these amendments.

There are at least two ways of making sense of this supposed attitude. One framework insists that the judiciary must respect congressional conclusions regarding what the Fourteenth Amendment provides and whether the States have violated it. In the absence of a legislative determination, perhaps the judiciary can reach its own conclusions. But when Congress speaks via statute, the judiciary must heed Congress. Accordingly, on this view, Section 5 embodies a judgment by its ratifiers to leave enforcement in the hands of Congress and to preclude second-guessing by the judiciary. Very few subscribe to this theory of "Legislative Supremacy," where genuine judicial review of Section 5 legislation would be non-existent.

Many are more comfortable with the less breathtaking assertion that Congress must be entitled to some leeway or "play in the joints" when, pursuant to Section 5, it purports to enforce the rest of the Fourteenth Amendment. Under this "Judicial Deference" approach, the judiciary ought to accord some level of factual and/or legal deference to congressional statutes that arguably enforce the Fourteenth Amendment.²⁶ For instance, if Congress by statute finds that a particular state has denied blacks the equal protection of the law, a court, when presented with a case involving such a state, ought to approach the congressional statute with some level of deference for any congressional legal and factual findings contained in the statute. Such deference might be particularly appropriate in circumstances where there are a range of plausible legal and/or factual conclusions. Thus, if the First Amendment's Free Exercise Clause²⁷ is susceptible of two reasonable interpretations, one reflected in *Employment Division v. Smith*,²⁸ and one revealed in RFRA,²⁹ the judiciary arguably ought to acquiesce to the reasonable congressional interpretation, even if the Court believes its interpretation is superior. Likewise, if the judiciary could reach any one of a number of reasonable factual conclusions, the courts should defer to any reasonable finding embodied in congressional legislation. Congress does not

24. See RAOUL BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221-29 (1977) (arguing that Section 5 raises questions as to whether the judiciary can even enforce the Fourteenth Amendment).

25. 60 U.S. (19 How.) 393 (1856).

26. For purposes of this Comment, it is unnecessary to characterize the level of deference the judiciary ought to afford to Congress under the theory of Judicial Deference.

27. U.S. CONST. amend. I ("Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof.").

28. 494 U.S. 872, 885-86 (1990) (holding that generally applicable, neutral laws that incidentally infringe upon free exercise rights do not violate the First Amendment).

29. The RFRA view of free exercise suggests that substantial burdens on free exercise are only justified if there is a compelling governmental interest for the burden and the burden is the least restrictive means of achieving the governmental interest. 42 U.S.C. § 2000bb-1(a)(b) (1994).

have the final authority to say what the law is or what the facts are, but it can make legal and factual findings and expect that the courts will defer to those findings in appropriate circumstances.

Thus there are at least three approaches to understanding the judicial role in reviewing congressional legislation passed pursuant to Section 5: De Novo, Judicial Deference, and Legislative Supremacy.³⁰

B. The Default Judicial Approach to Constitutional Questions

As noted earlier, we should try to understand how the judiciary approached its interpretational task prior to the enactment of the “enforcement” provisions. Had there been a tradition of Legislative Supremacy or, at the very least, Judicial Deference to congressional understandings of the Constitution, there would be sound reason to read Section 5 against this background rule of judicial supineness. Alternatively, had there been a custom of De Novo judicial determination of the constitutionality of congressional enactments, then we must analyze whether Section 5 and the other enforcement provisions changed the default rule of De Novo judicial review.

Prior to the adoption of the Civil War Amendments,³¹ courts generally approached constitutional disputes pertaining to congressional statutes with a De Novo approach.³² That is, the courts independently determined whether a federal statute violated the Constitution. To be sure, the judiciary occasionally applied a presumption of constitutional regularity to federal legislation.³³ Because the judiciary was reviewing the actions of a coordinate branch of the federal

30. Professor Amar points out a fourth approach. Section 5 legislation may force the judiciary to reconsider prior judicial interpretations of Sections 1 through 4. In other words, Congress may tell the courts to ignore precedents. Akhil Amar, *Intertextualism*, 112 HARV. L. REV. (forthcoming Jan. 1999). See also Stephen Carter, *The Morgan Power and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986). Because I question the judiciary’s practice of adhering to their precedent when called upon to construe the *Constitution*, I do not discuss Professor Amar’s interesting suggestion.

31. U.S. CONST. amends. XIII-XV.

32. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (independently determining whether Congress improperly granted the Supreme Court the ability to issue writs of mandamus). See also THE FEDERALIST NO. 78 at 395 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (“The interpretation of the laws is the proper and peculiar province of the courts . . . It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.”). But see *id.* at 394 (discussing the judicial duty to strike down laws against “manifest tenor” of the Constitution). Interestingly, *Marbury* also adopted a De Novo approach in considering James Madison’s refusal to deliver William Marbury’s commission. *Marbury*, 5 U.S. (1 Cranch) at 155-62.

33. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“An exposition of the Constitution, deliberately established by legislative acts . . . ought not be lightly disregarded.”). *McCulloch*, however, also makes clear that the Court will strike down unconstitutional laws. *Id.* at 423 (discussing “painful duty”).

government, the Court perhaps was willing to cede congressional legislation “the benefit of the doubt” by presuming constitutionality and placing a burden on the plaintiff to show otherwise.³⁴

Were the other branches supposed to accede to judicial constructions of the Constitution? Professor Paulsen has argued that, as original matter, each branch was to arrive at its own view of the constitutionality of measures and actions without the need for deference to its coordinate branches (he calls this the “Postulate of Coordinacy”).³⁵ Citing numerous passages in the *Federalist Papers*, the writings of Thomas Jefferson, Andrew Jackson, other luminaries, and *Marbury v. Madison*,³⁶ Paulsen persuasively challenges the modern acquiescence to judicial supremacy.³⁷

Of course, some thought that the judiciary would be supreme in construing the Constitution and that other branches were bound to follow the federal judiciary’s view of the Constitution. The Anti-Federalist Brutus charged that the Constitution would make the federal judiciary truly supreme: “The opinions of the supreme court . . . will have the force of law; because there is no power provided in the constitution, that can correct their errors or controul their adjudications.”³⁸ Perhaps in response to Brutus, Hamilton admitted that “interpretation of the laws [including the Constitution] is the proper and *peculiar* province of the courts.”³⁹ Like Brutus, Justice Joseph Story in his famous *Commentaries on the Constitution* asserted that the “Final Judge or Interpreter in Constitutional Controversies” was the federal judiciary: The Supreme Court’s interpretation “becomes obligatory and conclusive upon all the departments of the Federal government.”⁴⁰ Finally, there is *Marbury v. Madison*,⁴¹ which many people, rightly or wrongly, equate with judicial supremacy.⁴²

34. Thomas Jefferson invoked a similar proposition in concluding that President George Washington should sign the Bank of United States bill unless he was “tolerably clear” that it was unconstitutional. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 14 (Little, Brown 3d ed., 1992) (quoting Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 PAPERS OF THOMAS JEFFERSON 275, 279-80 (Library of Congress 1974)).

35. Paulsen, *supra* note 15, at 228.

36. 5 U.S. (1 Cranch) 137 (1803).

37. Paulsen, *supra* note 15, at 228-63.

38. *Essays of Brutus*, No. XI, in 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST § 2.9.138 (University of Chicago Press 1981). For a general discussion of the fears of the Anti-Federalists, see Paulsen, *supra* note 15, at 245-46 & ns.94-100.

39. THE FEDERALIST NO. 78 at 395 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (emphasis added).

40. JOSEPH STORY, *Commentaries on the Constitution*, in 1 STORY ON THE CONSTITUTION § 383 (Melville M. Bigelow, ed., 5th ed., 1891).

41. *Marbury*, 5 U.S. (1 Cranch) at 137.

42. In *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the Court asserted that *Marbury*, 5 U.S. (1 Cranch) at 137, “declared the basic principle that the federal judiciary is supreme in the exposition of the law in the Constitution.” While this reading of *Marbury* is wrong, we should not be

But the point not to be lost is that whatever the view of judicial power and constitutional interpretation (whether the judiciary was supreme or no different than the other branches), the courts generally engaged in a De Novo review of the constitutionality of federal action.⁴³ In fact, early discussions of judicial review of congressional actions assumed that the courts would stand athwart the “impetuous vortex”⁴⁴ and declare null and void congressional usurpations of authority.⁴⁵ A contrary rule of judicial supineness would have been unthinkable. Indeed, to have introduced an element of deference to judicial review of congressional statutes only would have emboldened the legislative “vortex” at the expense of the least dangerous branch and made the judiciary’s task of enforcing limits on congressional authority all the more difficult.⁴⁶ That is why Hamilton hailed the judiciary as the “bulwarks of a limited Constitution”⁴⁷ and scoffed at the notion that the judiciary must defer to congressional constructions of the Constitution.⁴⁸

II. TEXT, STRUCTURE, AND A LITTLE BIT OF HISTORY

In this section, we examine whether Section 5 alters the default rule of De Novo judicial review by somehow requiring judicial deference to congressional factual and legal conclusions regarding possible violations of the Fourteenth Amendment. We also consider the scope of enforcement authority more generally. Of course, our inquiry into the question of deference must be de novo. We ought not apply an approach (deference) that assumes an answer to the very question that we wish to resolve, i.e., whether congressional constructions of Section 5 and the rest of the Fourteenth Amendment are entitled to deference.

A. Section 5 Does Not Entitle Congress to Any Deference

1. *Congress and Legislation.*—Many people understandably believe that if any branch is entitled to deference, it must be Congress. After all, *Congress* may enact appropriate enforcement legislation. Because Section 5 did not revolutionize our federal sausage-making process, however, Section 5 legislation must satisfy bicameralism and presentment.⁴⁹ Accordingly, when Section 5 speaks of Congress, we must recognize that it actually refers to both Congress

surprised that others might have viewed *Marbury* in a similar light.

43. For that matter, I am not aware of anyone suggesting that the Executive’s construction of the Constitution is entitled to deference or supremacy from the other branches.

44. THE FEDERALIST NO. 48, at 251 (James Madison) (Garry Wills ed., Bantam 1982).

45. See generally John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

46. See THE FEDERALIST NO. 44, at 230 (James Madison) (Garry Wills ed., Bantam 1982) (discussing the judiciary’s responsibility to oppose legislative usurpations).

47. THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

48. See *id.* at 395 (discussing spurious claim that Congress is the “constitutional judge[]” of its own power).

49. See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

and the President. If Congress must receive deference for its constructions and findings under the Fourteenth Amendment, then surely the President must be entitled to his two cents of deference as well. But if there is a divergence of opinion as to the findings of law or fact, what then? Should the President disagree with congressional findings made in committee reports or hearings, there seems to be no natural way of definitively resolving the conflict between Congress and the President.

Perhaps the answer lies in the judiciary deferring only to the text of legislation rather than paying heed to committee reports and committee hearings.⁵⁰ After all, Congress has the power to enforce by passing legislation, not by making findings *simpliciter*. Presumably when Congress makes factual findings and legal conclusions in the text of the bill and the President signs the bill into law, all relevant parties are “on board.” Likewise, if the President does not sign a bill into law, but it becomes law nonetheless by reason of a veto override, that is all that matters for purposes of Section 5. To refine the pro-deference claim: Congress is not entitled to deference. Only federal legislation enacted pursuant to Section 5 should benefit from any deference.⁵¹

2. *Enforce.*—Congress may pass legislation that only *enforces* the rest of the Fourteenth Amendment. “Enforce” hardly seems to connote the ability to instruct other branches regarding what the law is or what the facts are. But even if we thought it might confer some deference, the broad swath cut by the claim of deference militates against it. Reading “enforce” as though it cedes deference in Section 5 has rather problematic implications for the rest of the Constitution.

First, one must recognize that if “enforce” connotes some level of deference with respect to Section 1, it must perform a similar role with the entire Fourteenth Amendment. For example, if Congress must enjoy judicial deference regarding the meaning or scope of the Privileges and Immunities Clause⁵² in Section 1, Congress must enjoy some leeway for its interpretation of Section 4 of the Fourteenth Amendment.⁵³ With such authority, Congress might have made it more difficult to prove that a particular debt was federal or authorized by law.⁵⁴ Similarly, Congress could have enacted legislation embodying factual findings regarding whether the federal government or a state could satisfy a claim stemming from an alleged Confederate debt.⁵⁵ Congress even might have

50. This argument merely parallels the arguments for treating only the text of federal statutes as law to be applied by the other branches.

51. Notwithstanding this refinement, this Comment will continue to refer to “Congress” seeking deference to its legal or factual conclusions.

52. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

53. U.S. CONST. amend. XIV, § 4.

54. U.S. CONST. amend. XIV, § 4 (“The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”).

55. See U.S. CONST. amend. XIV, § 4 (“But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United

weakened the exclusion of former rebels from government service by simple majority votes.⁵⁶ Deference to congressional views of Sections 3 and 4 might seem quite troubling.⁵⁷

“Enforce” also must convey deference with respect to the other amendments where it is found.⁵⁸ The word is first mentioned in Section 2 of the Thirteenth Amendment.⁵⁹ Virtually identical language is found in numerous amendments to the Constitution, namely Sections 2 of the Fifteenth, Eighteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments.⁶⁰ In all these provisions, Congress may “enforce” the relevant amendment with “appropriate legislation.”⁶¹

While the Civil War Amendments⁶² might seem appropriate candidates for

States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.”).

56. See U.S. CONST. amend. XIV, § 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Id.

57. Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) (asserting that deference might enable Congress “to dilute equal protection and due process”).

58. Not much is made of the fact that Section 1 of the Fourteenth Amendment also uses “enforce”—“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1. Clearly, the word carries no special connotation of deference in this context because this provision does not empower the states in any way. Rather it limits their authority by denying the power to enforce certain laws.

59. U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

60. See U.S. CONST. amends. XV, § 2; XVIII, § 2; XIX, § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. There are minor variations. Most provisions state that “Congress shall have the power to enforce this article by appropriate legislation.” See, e.g., U.S. CONST. amend. XIII, § 2. The Fourteenth Amendment reads slightly differently, “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article,” U.S. CONST. amend. XIV, as does the Eighteenth Amendment: “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” U.S. CONST. amend. XVIII. Despite these minor variations, we arguably ought to treat these provisions as ceding the same type of authority to Congress.

61. Although these “enforcement” provisions were ratified over the course of more than 100 years, presumably the same meaning must be given to all such provisions since almost identical language is used throughout the Constitution.

62. U.S. CONST. amends. XIII-XV.

judicial deference to congressional legislation that “enforces” such amendments (notwithstanding the discussion above), the other amendments seem ill-suited for deference. For instance, it is hard to imagine that there was a perceived need for Legislative Supremacy or Judicial Deference with respect to the enforcement of the voting age requirement (the Twenty-sixth Amendment)⁶³ or the District of Columbia’s selection of presidential electors (the Twenty-third Amendment).⁶⁴

Moreover, one must make sense of Section 2 of the Eighteenth Amendment, which gave Congress *and* the states the concurrent power to enforce the prohibition against liquor.⁶⁵ If Congress was entitled to deference because it could have enforced the Eighteenth Amendment, the states would have benefitted from judicial deference as well. If states were entitled to deference, however, each state could have established its own interpretation of the Eighteenth Amendment and the courts would have been bound to defer to these multiple constructions.⁶⁶ In effect, we could have had a substantively different Eighteenth Amendment in the several states. It is hard to believe that the Amendment accorded deference to *both* Congress and the states.⁶⁷

Finally, if we treat “enforce” as roughly analogous to “execute,”⁶⁸ we can draw some more troubling analogies. The President has the “Executive Power”⁶⁹ to enforce federal laws and has the correlative duty to ensure that such laws are

63. U.S. CONST. amend. XXVI.

64. U.S. CONST. amend. XXIII.

65. “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” U.S. CONST. amend. XVIII, § 2, *repealed by* U.S. CONST. amend. XXI, § 1.

66. The analogous situation in administrative law is hard to envision. Congress would have to delegate *Chevron* authority with respect to the meaning of a statute to several administrative agencies. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

67. If a conflict were to arise, Congress’ interpretation (as reflected by statute) presumably would supersede the state enactments because federal laws, when made pursuant to the Constitution, benefit from the Supremacy Clause. U.S. CONST. art. VI, § 2. So long as Congress had not spoken, however, we could have had the specter of the Eighteenth Amendment applied differently in the several states.

68. *The Federalist Papers* treat the words rather similarly. THE FEDERALIST NOS. 12 (discussing the new methods “to enforce” tax laws that had been in vain), 15 (commenting on difficulty of seeing laws “enforced” against the States), 21 (complaining that Congress lacked the ability to “enforce” its laws), and 27 (discussing using state institutions to help in “enforcement” of federal laws) (Alexander Hamilton).

The words are not precisely synonymous because “execute” seems to have a broader meaning. Magistrates enforce the law usually *against* someone, whereas execution can refer to carrying out laws that only apply to the executive. For instance, it seems awkward to say that the executive branch “enforces” the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552-559 (1994 & Supp. II 1996), on itself. Rather it sounds more appropriate to say that the executive branch “executes” FOIA when it complies with it.

69. U.S. CONST. art. II, § 1, cl. 1.

“faithfully executed.”⁷⁰ No one supposes that the Constitution provides that the President is entitled to either factual or legal deference with respect to the execution of federal laws. Executive findings of fact and law often do receive deferential judicial review, but such deference is a result of federal statutes rather than by reason of the Constitution itself.⁷¹ Moreover, notwithstanding the fact that the Constitution is law that binds the President and that the President must enforce all federal law, no one believes that the President’s views of the Constitution are entitled to deferential judicial review.⁷² And for good reason—though the power to enforce necessarily includes the power to interpret (for one cannot enforce the law without interpreting it), enforcement power does not include the authority to demand deference to enforcement constructions.⁷³ Likewise, Section 5 enforcement power should not be read as implicitly ceding some level of deference to Congress.

3. *Appropriate.*—Whatever the import of enforce, congressional legislation must be “appropriate.” An appropriateness inquiry can hardly confer deference to congressional determinations. In fact, the requirement of “appropriate” legislation is clearly a *limitation* on legislative authority, not language meant to empower Congress. Thus, even if we believe that “enforce” connotes some level of deference, the appropriateness requirement might suggest the opposite conclusion. Perhaps someone else outside of Congress (the courts) must determine independently whether federal legislation is appropriate.

4. *Comparisons to Other Provisions.*—If Section 5 means to grant some deference to Congress, it does so in a rather oblique manner. Other constitutional provisions meant to cede an issue to another branch are fairly explicit about such aims. For example, Article I, Section 9 permitted the States to determine how many slaves they wanted to import (as they “shall think proper to admit”).⁷⁴ Similarly, the President decides whether to propose laws for congressional consideration (“as he shall judge necessary and expedient”)⁷⁵ and how long to

70. U.S. CONST. art. II, § 3.

71. See generally Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (explaining that *Chevron* deference to agency constructions of law is justified by reference to legislative intent not Constitution); 5 U.S.C. § 706(2)(E) (1994) (providing substantial evidence review of fact-finding when facts are found through formal procedures of 5 U.S.C. §§ 556, 557 (1994)).

72. The Constitution is law. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (asserting that the Constitution is a “superior, paramount law”). The President is charged with enforcing the law. See U.S. CONST. art. II, § 1, cl. 1, and § 3. It follows that the President must enforce the Constitution. Cf. Bruce Ledewitz, *The Power of the President to Enforce the Fourteenth Amendment*, 52 TENN. L. REV. 605 (1985) (discussing why the President should be able to enforce the Fourteenth Amendment absent an express legislative statement to the contrary).

73. Because the judiciary enforces or executes the Constitution and laws of the United States as well, we would once again run into the problem of multiple authoritative interpreters. See *supra* notes 65-66 and accompanying text.

74. U.S. CONST. art. I, § 9, cl. 1.

75. U.S. CONST. art. II, § 3.

adjourn Congress (as “he shall think proper”).⁷⁶

In some instances, Congress actually has the final word. Congress determines (as “they think proper”) whether the appointment of inferior officers will be left with the President, the Courts, or the Department Heads⁷⁷ and whether to propose constitutional amendments (as they “shall deem it necessary”).⁷⁸ Likewise, the House has the “sole power of Impeachment,”⁷⁹ while the Senate has the “sole power to try all Impeachments.”⁸⁰ Accordingly, the courts cannot interfere with or second-guess these processes.⁸¹ In each of these circumstances, the relevant constitutional actors make decisions and no other branch may interfere.

Professor Van Alstyne aptly has observed that similar sections⁸² “stand in contrast, not in parity with” Section 5.⁸³ Section 5 does not cede to Congress the “sole” authority to deem what is appropriate legislation for the enforcement of the Fourteenth Amendment. Nor does Section 5 permit Congress to pass legislation as “they shall think proper.” Section 5 certainly does not provide that “congressional legal and factual conclusions relating to the Fourteenth Amendment are entitled to deference.” In short, nothing in Section 5 or the other enforcement provisions resembles these textual commitments of authority.⁸⁴

5. *Necessary and Proper Clause.*— Notwithstanding the discussion above, there is a provision in the Constitution that is sometimes perceived as ceding to Congress some measure of deference with respect to the means employed: The Necessary and Proper Clause.⁸⁵ Pursuant to the Clause, Congress may enact laws “necessary and proper for carrying into execution” the powers of the federal government.⁸⁶

The similarity between the Necessary and Proper Clause and Section 5 cannot go unnoticed. Both provisions delegate to Congress the power to pass

76. U.S. CONST. art. II, § 3.

77. U.S. CONST. art. II, § 2, cl. 2.

78. U.S. CONST. art. V.

79. U.S. CONST. art. I, § 2, cl. 5.

80. U.S. CONST. art. I, § 3, cl. 6.

81. See generally *United States v. Nixon*, 506 U.S. 224 (1993).

82. Professor Van Alstyne points to yet another section, Article I, Section 5, Clause 2 which states that, “each House may determine the Rules of its Proceedings.” William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the 14th Amendment*, 46 DUKE L.J. 291, 318 & n.79 (1996).

83. *Id.* at 318.

84. While the difference between Section 5 and these other provisions may cause the Legislative Supremacist to unfurl the white flag, the proponent of Judicial Deference may not be persuaded. After all, those who subscribe to Judicial Deference believe in some judicial role, not absolutely none.

85. U.S. CONST. art. I, § 8, cl. 18.

86. U.S. CONST. art. I, § 8, cl. 18.

appropriate legislation in order to ensure that certain ends are achieved.⁸⁷ Both seem to be measures designed to ensure that the federal government has the wherewithal to see to it that other constitutional provisions are not empty letters.

Of course, there are some differences. In one provision, the laws need only be appropriate enforcement legislation. In the other, the laws must be necessary, proper, and carry into execution a federal power. The omission of “necessary” should not lead us to conclude that Section 5 of the Fourteenth Amendment confers a broader scope of authority than the Necessary and Proper Clause. Indeed, history indicates that Section 5 and Section 1 of the Fourteenth Amendment were originally combined into one clause which merely granted Congress the authority to “make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”⁸⁸ At least one House member objected that the Amendment was not self-executing⁸⁹ because it required federal legislation before the States were constrained in any way. Others, however, objected to the scope of authority ceded to Congress, charging that Congress would possess the authority to enact legislation to protect life, liberty, and property generally.⁹⁰ The Amendment was eventually redrafted, congressional authority was separated and the restrictions on state authority were made stand-alone provisions. This history suggests that Section 5 may have been meant to be a Necessary and Proper Clause for the Fourteenth Amendment, notwithstanding the elimination of the “necessary” restriction.⁹¹

Even if this conclusion is wrong, however, and Congress enjoys more freedom in regard to Section 5 of the Fourteenth Amendment than it does with respect to the Necessary and Proper Clause, nothing suggests that Congress is entitled to deference. Even without “necessary,” Section 5 merely empowers Congress to pass appropriate enforcement legislation. Indeed, neither Section 5 of the Fourteenth Amendment nor the Necessary and Proper Clause dictates or even suggests that Congress’ views on the constitutionality of legislation relying

87. Compare U.S. CONST. art. I, § 8, cl. 18 (authority to “carry into execution” powers of federal government), with U.S. CONST. amend. XIV, § 5 (power to “enforce” provisions of Fourteenth Amendment).

88. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866). John Bingham proposed the original language. *Id.*

89. See *id.* at 1095.

90. See generally EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND THE CONGRESS, 1863-1869, 56-59 (1990).

91. Maltz and Van Alstyne make a convincing case that many opposed Bingham’s original Amendment out of fear that it empowered Congress too much. See *id.*; Van Alstyne, *supra* note 82, at 299. In their view, such opposition led to the reworking of the Amendment and suggests that whatever authority Congress has under Section 5 of the Fourteenth Amendment, it is not as broad as it would have been absent the changes that were made. They may be right, but even if Congress has necessary and proper authority with respect to the Fourteenth Amendment, such authority still does not privilege congressional interpretations or applications of the Fourteenth Amendment.

upon such clauses should receive deference from the other branches. Like most authority delegated to Congress,⁹² Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause make a simple delegation of legislative power to Congress. No reason exists for deferring to congressional constructions of the clause granting Congress authority to ban the counterfeiting of money⁹³ and similarly, no reason exists to defer to Congress with respect to the Fourteenth Amendment's meaning or application. To be sure, in the course of exercising its legislative powers, Congress must interpret the Constitution to obtain a sense of the scope of its authority. Nonetheless, other branches need not defer to congressional determinations of congressional power.

Indeed, in contrast to other provisions, such as the power to establish post offices⁹⁴ or the authority to issue patents,⁹⁵ both the Necessary and Proper Clause and Section 5 arguably are *more restrictive* with respect to congressional authority. Congress cannot pass any enforcement legislation it pleases. It must be *appropriate* legislation. When Congress enacts patent or postal legislation, however, Congress is not so encumbered. Presumably, no one can claim, as a constitutional matter, that patent terms set by statute are "inappropriately" too short or too long. In this sense, Section 5 and the Necessary and Proper Clause actually seem to confer constrained authority to Congress as compared to other sections that do not contain such limitations. Accordingly, Congress' authority to issue patents along with the rest of Article I, Section 8 (save Clause 18) are much better candidates for deferential judicial or executive review than is legislation passed pursuant to Section 5 or the Necessary and Proper Clause.

While Section 5 seems unusual at first blush because it grants "enforcement" authority to Congress, it really is just a variant of the Necessary and Proper Clause. In the end, Section 5 merely confers the legislative power to pass particular types of laws (appropriate enforcement legislation), not authority to issue authoritative constitutional interpretations and not an exceptional ability to find facts.

B. The Scope of the Power to Enforce by Appropriate Legislation

Thus far, we have highlighted some reasons why Section 5 of the Fourteenth Amendment should not be read as entitling Congress to legislative supremacy or deference. The more significant question remains: What does Section 5 permit Congress to do?⁹⁶ As mentioned earlier, the answers are tentative. A definitive

92. I say "most" because the provisions discussed earlier seem to preclude judicial review. See *supra* notes 77-83 and accompanying text.

93. U.S. CONST. art. I, § 8, cl. 6.

94. U.S. CONST. art. I, § 8, cl. 7.

95. U.S. CONST. art. I, § 8, cl. 8.

96. The discussion that follows is meant to lay out some tentative views about the proper scope of congressional power under Section 5 of the Fourteenth Amendment. Even if all three branches agreed with the assertions contained herein, there would still be disagreements about the constitutionality of legislation passed pursuant to Section 5. Given varying interpretations of the

treatment must await more extensive historical inquiry.

1. *Circumscribed Enforcement Authority.*—Section 5 of the Fourteenth Amendment certainly empowers Congress to establish executive and judicial institutions that are designed to enforce the terms of the Amendment. For example, Congress could institute special courts to hear only Fourteenth Amendment claims. By the same token, Congress could establish a separate bureau or department charged with assisting the President in the enforcement of the Fourteenth Amendment. Undoubtedly, Congress also may attach penalties to the violation of the Amendment. Thus, Congress could criminally sanction any state officials who violate an individual's equal protection rights and create executive and judicial magistrates to ensure punishment.

Perhaps Congress also could conclude that a state or several states violated a particular provision of the Fourteenth Amendment. For example, Congress might provide that a state has violated the Privileges and Immunities Clause because it restricts entry into certain professions or trades. Additionally, Section 5 might sanction a congressional ability to rewrite state legislation that runs afoul of the principles embodied in the Fourteenth Amendment.⁹⁷ Thus, if a state statute on its face denied equal protection, presumably Congress could enforce the Equal Protection Clause by rewriting or amending the statutory language.⁹⁸ Of course the judiciary would review all such legislation *de novo* and determine whether the facts and the law support any federal statute.

What of the supposed congressional authority to define the content of the rest of the Fourteenth Amendment? As maintained earlier, Congress lacks such authority. With respect to the assertion of definitional authority, this claim is just another way of insisting that Congress has the authority to demand deference to Congress' conclusions about the import of the Fourteenth Amendment. To borrow from what Professor Redish has said in a related context, Section 5 does not permit Congress to define "persons" to include armadillos or bananas.⁹⁹

Prophylactic legislation is problematic as well. As noted, Congress can attach penalties and disabilities for actual violations and such measures will tend to deter violations. But the Court is wrong when it concludes that Congress has general authority to enact legislation designed to "prevent" or to "deter" Fourteenth Amendment violations.¹⁰⁰ Contrary to the Court's view, Congress

rest of the Fourteenth Amendment, disputes about whether something truly enforces the Fourteenth Amendment will continue. That is why Justice O'Connor is able to agree with the Court's relatively narrow construction of Section 5 yet still dissent on the grounds that Congress actually was enforcing the Free Exercise Clause. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting).

97. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2768-69 (1866).

98. In some sense, this is what courts do when faced with a state statute that, on its face, denies equal protection.

99. Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 25-26 (1987). The assertion was made about judicial power, but the same point should be made with respect to congressional power.

100. *See City of Boerne*, 117 S. Ct. at 2163, 2164.

lacks the authority to prohibit “conduct which is not itself unconstitutional.”¹⁰¹ In the guise of enforcing the Fourteenth Amendment, Congress cannot “prevent” violations by insisting that states render more process than the Due Process Clause requires. Nor can Congress compel greater protection than the Equal Protection Clause affords. Section 5 simply does not cede to Congress an ability to create a protective “bubble zone” around the rest of the Fourteenth Amendment.

To see why this is so, consider a traffic officer and a speed limit. Suppose the state legislature establishes a speed limit of sixty-five-miles-per-hour. When the traffic officer tickets those who have exceeded the speed limit, we all agree that the traffic officer enforces the law. Should the traffic officer ticket those who zoom along at sixty-three-miles-per-hour, however, there is no sense in which the traffic officer is enforcing the speed limit. Even if the traffic officer pleads that stopping people short of the speed limit is a measure reasonably designed to enforce the speed limit, his arguments will fall on deaf ears.

Similarly, prior to the adoption of the Twenty-first Amendment, Congress might have concluded, rather sensibly, that drug use often led to liquor consumption, but that conclusion could not possibly have ceded to Congress the authority to prohibit drug use as a measure designed to “enforce” the Eighteenth Amendment. Had Congress banned drugs pursuant to the Eighteenth Amendment under the guise of enforcing that Amendment, it would have deserved a slap on the legislative wrist.

Likewise, when Congress requires that states recognize certain rights not already protected by the Fourteenth Amendment, Congress does not enforce the Fourteenth Amendment. Rather, Congress must be viewed as enforcing an amendment of its own making, which is to say that Congress is enforcing nothing but its own will. Congress lacks the authority to “enforce this Amendment and to enact legislation reasonably designed to prevent violations.”¹⁰²

2. *Redundant Enforcement Authority.*—Even in the absence of Section 5 of the Fourteenth Amendment, one might suppose that Congress, by virtue of the Necessary and Proper Clause, already possessed the rather circumscribed authority discussed above. After all, surely the federal government enjoyed the general authority to enforce the Constitution (including the Fourteenth Amendment) against states. As noted earlier, the President and the courts have the power to enforce the Constitution. If those branches have the power to enforce it, then Congress, by virtue of the Necessary and Proper Clause, can enact laws to carry into execution the other branches’ enforcement authority.

Yet perhaps people doubted that Congress, under the aegis of the Necessary and Proper Clause, could enforce the Fourteenth Amendment by creating executive and judicial enforcement apparatus and by imposing penalties. As

101. *Id.* at 2164 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

102. *Compare* U.S. CONST. amend. XIV, § 5 (stating, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”), *with* 15 U.S.C. § 78n(e) (1994 & Supp. II 1996) (granting to Congress the power to “define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative”).

noted earlier, *Kentucky v. Dennison*¹⁰³ contained some rather astonishing language relating to federal enforcement of the Fugitive Clauses.¹⁰⁴ In Kentucky, Mr. Willis Lago had been charged with enticing Charlotte, a slave, to escape her owner. Mr. Lago subsequently fled to Ohio.¹⁰⁵ Invoking Article IV, Section 2, Clause 2, and a federal act designed to enforce the Clause,¹⁰⁶ Kentucky requested that the Governor of Ohio deliver a fugitive to the Governor of Kentucky. The Governor of Ohio refused to deliver Mr. Lago even after receiving a copy of the bill of indictment.¹⁰⁷ Kentucky brought a suit in the Supreme Court asking that the Court mandamus the Ohio governor. The Court, while acknowledging that the Ohio governor had a “moral duty” to hand over Mr. Lago,¹⁰⁸ nevertheless concluded that the federal government could not compel adherence to such duty. The federal government

has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.¹⁰⁹

In other words, though there was a constitutional duty, there was no sanctioned means of compelling adherence to that duty.

Today, we recognize that *Dennison* was wrongly decided.¹¹⁰ Of course the federal government may compel compliance with a state’s obligations under the Constitution. The Constitution’s restrictions on state authority are not merely moral duties, but legal obligations and limitations that must be observed *and* that can be enforced. Given *Dennison*, however, perhaps the framers of the Fourteenth Amendment did not wish to establish yet another merely moral duty on state officers. Federal safeguarding of equal protection, due process, and privileges and immunities might be empty promises if the federal government could not enforce such provisions and attach penalties for non-compliance. On this view, Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment merely reflect the *Dennison* view that the federal government needs specific authority to coerce compliance from the States. In other words, a redundant provision was enacted, because it was not viewed as redundant at the time by the courts and perhaps by the political branches. To

103. 65 U.S. (24 How.) 66 (1860), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

104. U.S. CONST. art. IV, § 2, cls. 2, 3.

105. *See Dennison*, 65 U.S. (24 How.) at 67.

106. *See Fugitives Act of 1793*, 1 Stat. 302, § 1.

107. *See Dennison*, 64 U.S. (24 How.) at 70.

108. *Id.* at 107.

109. *Id.* at 107-08.

110. *See Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987), *overruling Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

remove all doubts, Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment make clear that those amendments generally are not merely moral commands but federally enforceable against the States and individuals. The enforcement provisions, then, overturn *Dennison*'s cramped reading of federal authority.

CONCLUSION

While the Fourteenth Amendment generally is acknowledged to be particularly opaque, Section 5 itself does not seem to suffer from such nebulousness. One should be able to derive an understandable meaning of Section 5 and the other enforcement provisions. I have tried to sketch the outlines of a textual case for a rather limited view of the enforcement power. On this view, Congress should not be accorded something akin to *Chevron* deference for its constructions of the Fourteenth Amendment or to substantial evidence review for factual findings that underlie Section 5 legislation. But the case is hardly proven. Before reaching more definitive conclusions, we would need to undertake an extensive analysis to see what these words meant at enactment. Nevertheless, the power to enforce with appropriate legislation seems like a rather poor font for deference to legislative constructions and findings. If Congress is to be even a somewhat authoritative judge of its own power, surely there must be a clearer indication that the Constitution means to undermine our system of independent judicial review of federal legislation.