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'Appropriate' Means-Ends Constraints on Section 5 Powers

Evan H. Caminker
University of Michigan Law School, caminker@umich.edu

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With the narrowing of Congress' Article I power to regulate interstate commerce and to authorize private suits against states, Section Five of the Fourteenth Amendment provides Congress with an increasingly important alternative source of power to regulate and police state conduct. However, in City of Boerne v. Flores *and subsequent cases, the Supreme Court has tightened the doctrinal test for prophylactic legislation based on Section Five. The Court has clarified Section Five's legitimate ends by holding that Congress may enforce Fourteenth Amendment rights only as they are defined by the federal judiciary, and the Court has constrained Section Five's permissible means by holding that Section Five measures must be "congruent and proportional" to a legitimate end thus defined.*

This article argues that the means-ends test for Section Five legislation should be the same as the conventional "rational relationship" test established by McCulloch v. Maryland, *not the "congruence and proportionality" test that the Court has recently adopted. The textual language and the original meaning of the Fourteenth Amendment support this argument, while neither separation of powers nor federalism principles persuasively justify the Court's contrary position. Finally, this article speculates about the significance of Section Five's tightened means-ends scrutiny for other sources of congressional power.*

* Professor of Law, University of Michigan Law School; B.A., UCLA 1983; J.D., Yale 1986. I wrote this article while on leave as Deputy Assistant Attorney General for the Office of Legal Counsel, United States Department of Justice. The views expressed herein are my own and do not necessarily represent the views of the Office of Legal Counsel or Department of Justice. I wish to thank Akhil Amar, Vicki Jackson, Marty Lederman, Trevor Morrison, and Michael Rosman for instructive comments on an earlier draft, as well as the symposium's many participants for enlightening conversations about federalism and the Constitution.

Over the past decade, Congress' Section 5 power to enforce the provisions of the Fourteenth Amendment has taken center stage in the unfolding drama of Our (New) Federalism.[1] For the first time in seven decades, the Supreme Court has begun to narrow the scope of Congress' power to regulate interstate commerce. While not long ago it was plausible to describe Congress' Commerce Clause power as virtually plenary, the Court has twice now invalidated statutes as exceeding the proper boundaries of this Article I authority. In *United States v. Lopez*[2] the Court invalidated the Gun-Free School Zones Act of 1990,[3] and in *United States v. Morrison*[4] the Court invalidated a provision of the Violence Against Women Act of 1994 that provided a federal civil remedy for victims of gender-motivated violence.[5] In both cases, the Court emphasized that the federal statutes purported to regulate activities not economic in nature[6] without any jurisdictional limitation linking particular instances of such activity to interstate commerce,[7] in a manner that would trench upon a realm of "traditional state concern,"[8] thereby obliterating the "distinction between what is truly national and what is truly local."[9] While it remains unclear just how significant a reduction in the scope of Congress' Commerce Clause power these recent precedents portend, it surely places greater pressure on Section 5 as a potential alternative source of congressional power for at least some regulations threatened by this Commerce Clause retrenchment.

Also within the past decade, the Supreme Court has severely restricted an

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1. The relevant provisions of the Fourteenth Amendment provide as follows:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

2. 514 U.S. 549 (1995).

3. 18 U.S.C. § 922q (1994).

4. 529 U.S. 598 (2000).

5. 42 U.S.C. § 13981 (1994).

6. *Lopez*, 514 U.S. at 551, 560; *Morrison*, 529 U.S. at 613.

7. *Lopez*, 514 U.S. at 562; *Morrison*, 529 U.S. at 611-13.

8. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

9. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 599; *see also* Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675, 683-84 (2001) (justifying narrow construction of Clean Water Act's application to "navigable waters" partly on desire to avoid difficult question concerning scope of Commerce Clause authority); Jones v. United States, 529 U.S. 848, 856-58 (2000) (justifying narrow contruction of arson statute partly on desire to avoid difficult constitutional question of whether congressional regulation of private residential arson lies beyond Commerce Clause power).

important enforcement mechanism through which Congress could police state compliance with federal law. Since *Hans v. Louisiana*,[10] the Court has understood the principles underlying the Eleventh Amendment[11] as immunizing states from suits to which they did not consent seeking damages or other retrospective relief brought by private persons to enforce federal law.[12] Within the past three decades, the Court began to consider the extent to which this principle of state sovereign immunity is subject to abrogation by Congress. In 1976, the Court held in *Fitzpatrick v. Bitzer*[13] that Congress may abrogate state sovereign immunity through measures enacted pursuant to Congress' Section 5 authority to enforce the provisions of the Fourteenth Amendment against states. In 1989, the Court extended the scope of this abrogation power in *Pennsylvania v. Union Gas Co.*,[14] where it held that if Congress may regulate the conduct of states pursuant to its Commerce Clause power,[15] then Congress may also enforce such regulations by authorizing private individuals aggrieved by states to sue them directly in federal court to recover monetary damages, the background immunity principle notwithstanding.[16] But this broadened view of Congress' abrogation authority did not last a decade. In 1996, the Court overruled *Union Gas* in *Seminole Tribe v. Florida*,[17] holding that Congress

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10. 134 U.S. 1 (1890).

11. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

12. *See* Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (citations omitted):

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"

This principle does not protect states from suits by individuals seeking prospective relief, see *Ex parte* Young, 209 U.S. 123 (1908) and its progeny. Nor does it apply to Supreme Court review of individual suits seeking retrospective relief against states that were brought originally in state court. *See* McKesson Corp. v. Florida Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 26-31 (1990).

The Court has also held that states waived, in the original constitutional plan, any erstwhile sovereign immunity from suits brought either by the United States, see, for example, United States v. Texas, 143 U.S. 621 (1892), or by a sister state, see, for example, South Dakota v. North Carolina, 192 U.S. 286 (1904). But the Court rejected a similar waiver argument for suits brought either by an Indian tribe, see Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991), or by a foreign state, see Monaco v. Mississippi, 292 U.S. 313 (1934). For a consideration of the rationales for such distinctions, see Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 101-11 (1999).

13. 427 U.S. 445 (1976).

14. 491 U.S. 1 (1989), *overruled by Seminole Tribe*, 517 U.S. 44, 45 (1996).

15. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985), which overruled National League of Cities v. Usery, 426 U.S. 833 (1976), made clear that Congress may in certain circumstances directly regulate state as well as private conduct.

16. *Union Gas*, 491 U.S. at 19-23.

17. 517 U.S. 44 (1996).

cannot abrogate state sovereign immunity in federal court pursuant to its Commerce Clause authority. Then three years later in *Alden v. Maine*,[18] the Court extended *Seminole Tribe* by holding that Congress cannot use such authority to abrogate state sovereign immunity in state court either. At the same time, however, both *Seminole Tribe* and *Alden* specifically reaffirmed *Bitzer*'s acknowledgment of a Section 5 abrogation power.[19] Thus, at the turn of the new century, Congress may enforce federal law by subjecting unconsenting states to private suits for damages pursuant to its Section 5 powers, but not pursuant to its Article I powers.[20] This doctrinal distinction clearly puts additional pressure on Congress to justify many of its federal statutes as being valid exercises of the Section 5 enforcement power rather than exercises of Article I authority.

Given Section 5's new centrality to federalism policy and law, particularly with respect to abrogating state sovereign immunity, it is unsurprising that more of the Supreme Court's major federalism cases in the last decade involved Section 5 than any other font of federal power.[21] And it is equally unsurprising that the Court has been inhospitable to expansive exercises of congressional authority. In the past four years, the Court both clarified and modified the longstanding doctrinal test governing whether legislation can be defended as predicated on Section 5, beginning with *City of Boerne v. Flores*.[22] *Boerne* establishes two major interpretive principles, the first constraining the legitimate end of Section 5 regulation and the second constraining the legitimate means by which Congress may achieve that end. First, Section 5 provides Congress no authority to redefine the substantive scope of the rights protected against state action by the Fourteenth Amendment; rather, Congress may only "enforce" Fourteenth Amendment rights as they are defined by the federal judiciary. Second, even when Congress aims to protect a judicially defined right, Congress may employ only those means that survive heightened scrutiny with regards to means-ends tailoring. Rather than being assessed under the conventional "rational relationship" test established by *McCulloch v. Maryland*[23] in the context of Article I powers, now Section 5 regulations—at least those that are "prophylactic" in that they prohibit some conduct that the

18. 527 U.S. 706 (1999).

19. *Alden*, 527 U.S. at 756; *Seminole Tribe*, 517 U.S. at 59.

20. While *Union Gas*, *Seminole Tribe*, and *Alden* each involved the exercise of Congress' Commerce Clause power, the Court recently proclaimed more broadly that "Congress may not abrogate state sovereign immunity pursuant to its Article I powers." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 636 (1999).

21. *See* Board of Tr. of Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); *Florida Prepaid*, 527 U.S. 627; College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

22. 521 U.S. 507 (1997).

23. 17 U.S. (4 Wheat.) 316 (1819).

federal judiciary would find constitutionally permissible[24]—must survive the stricter standard of "congruence and proportionality" between means and legitimate ends.[25]

Numerous scholars have assessed the first doctrinal principle concerning the scope of legitimate Section 5 ends, some criticizing the Court for giving Congress too little leeway to redefine the scope of Section 1 rights in at least certain circumstances. More specifically, some maintain, quite plausibly in my view, that Section 5 is best understood as contemplating some participation by Congress in the definition of constitutional norms.[26]

My focus here, however, is on the second principle concerning the means-ends relationship, which, with respect, constitutes a sharper break from prior articulated doctrine.[27] Even assuming the Court correctly viewed Congress as having no special role in interpreting the meaning of Fourteenth Amendment rights, the Court acted precipitously in so severely constraining Congress' choice of means in enforcing judicially defined rights. Perhaps on the surface, "the notion that § 5 enactments designed to remedy or prevent constitutional violations should be proportional and congruent to the constitutional wrongs Congress wishes to stop seems harmless enough."[28] But this is a wolf in

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24. *See* notes 158-160 *infra* and accompanying text.

25. *See Boerne*, 521 U.S. at 519-20.

26. *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 818-26 (1999); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61 (forthcoming); Steven A. Engel, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

27. *See, e.g.*, Stephen Gardbaum, *The Federalism Implications of* Flores, 39 WM. & MARY L. REV 665, 682 (1998) (stating that congruence and proportionality is a "more rigorous . . . test between means and ends"); McConnell, *supra* note 26, at 166 (describing *Boerne* as replacing "something akin to 'rational basis scrutiny' with a narrow tailoring requirement typical of intermediate scrutiny"); Post & Siegel, *supra* note 26, at 477 (proposing that the congruence and proportionality test "seem[s] analogous to the narrow tailoring required by strict scrutiny"). *See also* Frank Goodman, *Preface, Symposium on The Supreme Court's Federalism: Real or Imagined?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 18 (2001) (describing the congruence and proportionality test as "ironic" and "anomalous" because "the Court now seems to be judging statutes designed to *protect* basic civil rights with something like the skepticism traditionally reserved for statutes *destructive* of those same rights").

It is true that in some very early cases construing Section 5, the Supreme Court invalidated statutory provisions as lying beyond Congress' Section 5 authority. *See* notes 63-65 *infra* and accompanying text. These decisions turned on a narrow understanding of state action doctrine, however, rather than a narrow construction of Congress' means-ends discretion. *See id.* In any event, at least since the beginning of the twentieth century until *Boerne*, the Court both articulated and applied *McCulloch*'s liberal means-ends standard to Section 5 legislation.

28. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 956 (3d ed. 2000).

sheep's clothing: in fact, Section 5 measures have "suddenly been saddled with something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality."[29] While the Court upheld a variety of prophylactic Section 5 measures over the past four decades, the Court has now held provisions of six federal statutes to be inappropriate exercises of Section 5 power within the past four years alone.[30]

I argue here that the Supreme Court's decision to subject all prophylactic Section 5 measures to significantly more rigorous means-ends scrutiny than measures that carry into execution Congress' various Article I and other powers cannot persuasively be defended. Some proffered justifications prove unpersuasive in their entirety, and others are too crude because they at best can explain some but not all of the four recent cases. In my view, Section 5 provides Congress with the same capacious discretion to select among various means to achieving legitimate ends as does Article I as construed in *McCulloch v. Maryland*. This understanding suggests that, while *Boerne* itself and *College Savings* might be explicable on narrow grounds, the other statutory provisions invalidated in *Boerne*'s wake should have been upheld as appropriate enforcement measures—even assuming *arguendo* that Section 5 does not provide Congress any interpretive role in construing the meaning of Fourteenth Amendment rights.

Part I of this article explores both the relaxed *McCulloch* means-ends standard for executory Article I legislation and the more rigorous *Boerne* congruence and proportionality requirement for prophylactic Section 5 enforcement measures, and then clarifies the precise ways in which the latter deviates from the former. Part II demonstrates that the *McCulloch* standard reflects, and thus the *Boerne* standard deviates from, the original intent and understanding of the Fourteenth Amendment. Part III then identifies and explores various arguments, grounded in both separation of powers and federalism principles, to evaluate the extent to which they might justify this isolated deviation; none of these arguments proves satisfactory to the task. Part IV speculates whether *Boerne*, coupled with the Court's recent narrowing of Congress' Commerce Clause authority, portends a more general tightening of means-ends requirements that will soon constrict all executory powers granted to Congress by the Constitution.

29. *Id.* at 959.

30. *See* note 21 *supra* and accompanying text.

I. MEANS-ENDS JUDICIAL SCRUTINY OF CONGRESSIONAL POWER

A. McCulloch's *Deferential Means-Ends Scrutiny of Executory Laws*

Prior to *Boerne*, the Supreme Court had consistently articulated and employed a very deferential means-ends test when assessing the validity of federal legislation, whether enacted pursuant to Congress' original constitutional authority or the subsequent Reconstruction and other amendments. In order to assess the extent of *Boerne*'s departure from established doctrine, we must first explore that doctrine in some detail.

1. McCulloch *and Article I.*

With respect to congressional authority under Article I, Chief Justice John Marshall provided the canonical articulation of the requisite means-ends nexus in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[31] This relatively weak constraint reflected the proper method for interpreting the broad powers implied by a Constitution that merely designates "its important objects" from which those "minor ingredients which compose those objects [may] be deduced from the nature of the objects themselves,"[32] a method whose propriety is confirmed by the text of the Necessary and Proper Clause.[33]

To understand the nature and extent of the judicial deference to congressional judgments concerning executory laws under the *McCulloch*

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31. 17 U.S. (4 Wheat.) 316, 421 (1819).

32. *Id.* at 407; *see also id.* at 408 (stating that the Constitution "does not profess to enumerate the means by which the powers it confers may be executed"); *id.* at 409 ("It is not denied, that the powers given to the government imply the ordinary means of execution.").

33. U.S. CONST. art. I, § 8, cl. 18. Contrary to a popular misreading of *McCulloch*, Chief Justice Marshall did not rely on the text of the Necessary and Proper Clause to confer broad legislative authority on Congress; rather, he merely interpreted the Clause as confirming his preceding structural argument concerning the broad scope of implied congressional powers. *See McCulloch*, 17 U.S. (4 Wheat.) at 420-21 (explaining that the clause serves "to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble"); CHARLES L. BLACK JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13-14 (1969) (explaining this point). *But see* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROB. 102, 117 n.53 (1976) (implicitly endorsing Governor Randolph's view that each enumerated power of each branch of government, not just Congress, implied only a grant of incidental power "indispensable" to its execution, and that the Necessary and Proper Clause granted Congress additional and broader authority to exercise incidental powers beyond those that are "indispensable").

standard, one must parse its various aspects. By "executory," I mean statutes that support and implement other statutes that Congress is directly empowered to enact by the Constitution, or that carry into execution non-legislative powers vested elsewhere in the Government. The first step in assessing the validity of executory laws is to identify the legitimate end or power toward which a particular executory law strives. While it is commonplace to refer to these legitimate ends as "enumerated powers,"[34] this terminology is somewhat misleading since, as the Court has occasionally acknowledged, certain congressional powers might be derived from the structure, rather than the explicit text, of the Constitution.[35] In other words, while congressional powers are "few and defined,"[36] "defined" is not synonymous with "enumerated."[37]

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34. *See, e.g.*, Printz v. United States, 521 U.S. 898, 919 (1997) (stating that the Constitution confers upon Congress "not all governmental powers, but only discrete, enumerated ones").

35. *See, e.g.*, Burroughs v. United States, 290 U.S. 534, 544-49 (1934) (upholding Federal Corrupt Practices Act based on implied congressional power to safeguard presidential elections); *Ex parte* Garnett, 141 U.S. 1, 12-15 (1891) (holding that congressional power to enact or modify maritime code, as distinct from the power to regulate interstate or foreign commerce, is fairly implied by historical inference and the grant of admiralty and maritime jurisdiction to Article III courts); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615-22 (1842) (upholding congressional power to enact legislation enforcing the Fugitive Slave Clause, even though the Clause grants no such express power to Congress); *cf.* United States v. Eichman, 496 U.S. 310, 316 n.6 (1990) (conceding that "the Government has a legitimate interest in preserving the [U.S.] flag's function as an 'incident of sovereignty,'" though holding that criminalizing flag burning does not advance this interest). *See generally* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 535 (1870) ("[I]n the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted.").

36. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

37. For ease of exposition, however, I shall follow custom and occasionally use the term "enumerated" powers or ends interchangeably with the more accurate term "primary" powers or ends to describe the universe of legitimate ends of congressional legislation.

One might argue that the Necessary and Proper Clause authorizes Congress to enact executory laws only insofar as they effectuate the *foregoing* congressional primary powers, defined strictly to mean the congressional powers provided earlier in the document (from Article I, § 1 through Article I, § 8) and to exclude the congressional powers provided anywhere later in the document, originally or as amended. This strikes me as a difficult position to maintain. First, it requires one to read the subsequent reference to "Government of the United States" as including only the executive and judicial branches and excluding Congress, since the Clause also empowers Congress to carry into execution "all other powers vested" by the Constitution anywhere in the Government. Such a reading is plausible, but surely not compelled. Second, given *McCulloch*'s supposition that the Necessary and Proper Clause is merely declaratory of the implied executory power Congress would have enjoyed even absent this textual confirmation, see note 33 *supra*, it is difficult to divine a rationale for limiting the Clause's application to some but not all primary powers granted to Congress, based solely on where in the document they are located. It would be strikingly odd, for example, to conclude that Congress could not enact laws necessary and proper for carrying into execution its enumerated power to "propose Amendments to this Constitution" or "call a Convention for proposing Amendments." U.S. Const. art. V. *Cf.* Oregon v. Mitchell, 400

If a congressional statute is fairly characterized as exercising an enumerated or other primary power itself, such as a law prohibiting the interstate shipment of commercial goods would be a direct exercise of Congress' power to regulate "commerce . . . among the several States,"[38] then no further analysis is required. But under *McCulloch*'s approach, even a congressional statute that cannot fairly be characterized as directly exercising an enumerated power nevertheless lies within Congress' authority if it is sufficiently tailored to carry into execution such a primary power. The question here is simply whether the congressional measure facilitates or assists in some meaningful sense the effective implementation of a primary power. And the Court, both in *McCulloch* and thereafter, has interpreted this requirement of tailoring between implied means and enumerated ends in a very relaxed manner, deferring to Congress' choice of legislative means so long as it is "plainly adapted" or "conducive to"[39] a legitimate end. As the Court put it succinctly in *McCulloch*, "all means which are appropriate, which are plainly adapted to that [legitimate] end . . . are constitutional."[40]

McCulloch did teasingly suggest that the Court would independently assess whether the claimed executory status of a particular law was merely a pretext for Congress' effort to exercise a general police power denied it by the Constitution. As Chief Justice Marshall explained, "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[41] But the Court quickly made clear that its assessment of "pretext" would consist merely of ensuring that the law "is really calculated to effect any of the objects entrusted to the government . . . ."[42]

McCulloch also rejected the notion that the courts should independently evaluate whether a particular executory law is truly "necessary" to serve the legitimate end, in the sense of determining whether Congress' chosen means, compared to other means Congress could have employed, is a particularly effective or desirable way of addressing the problem Congress is trying to solve. First, Marshall defined the term "necessary" in the Necessary and Proper Clause quite liberally, concluding that "[t]o employ the means necessary

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U.S. 112, 281, 285-92 (1970) (Stewart, J., concurring in part and dissenting in part) (noting that prior cases "establish that Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its power under the Necessary and Proper Clause").

38. U.S. CONST. art I, § 8, cl. 3.

39. *McCulloch*, 17 U.S. (4 Wheat.) 316, 421.

40. *Id.* Lower federal courts have consistently applied the *McCulloch* standard. *See, e.g.*, United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (noting that the *McCulloch* standard requires only "that the effectuating legislation bear a rational relationship to a permissible constitutional end").

41. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

42. *Id.*

to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."[43] Second, in light of this liberal construction, he concluded that the necessity of a given measure was appropriately left to congressional rather than judicial determination. If an executory law is "an appropriate measure," then

> the degree of its necessity, as has been very justly observed, is to be discussed in another place.... But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.[44]

Thus Congress is left to its best judgment concerning the necessity of "proper" executory laws: the Necessary and Proper Clause "cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government."[45] From the perspective of judicial review, one might say that the "necessary" component of the necessary and proper formulation for valid executory laws has essentially been construed to lack independent bite, and all the constraining work (such as it is) is done by the "proper" component of the test.[46] As the Court has repeated again and

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43. *Id.* at 413-14.

44. *Id.* at 423.

45. *Id.* at 420. Indeed, Chief Justice Marshall had already advanced this interpretation of the Necessary and Proper Clause fifteen years earlier in *United States v. Fisher*, where he explained that

> [i]n construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

6 U.S. (2 Cranch) 358, 396 (1805).

46. *See, e.g.*, Stephenson v. Binford, 287 U.S. 251, 272 (1932) ("The extent to which, as means, [Congress' provisions] conduce to that [legitimate] end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the Legislature, and not to that of the courts."); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 542 (1870) ("The degree of the necessity for any congressional enactment . . . is for consideration in Congress, not here.").

Professor Vicki Jackson has suggested to me that, in an appropriate case, a court might well require the supposed necessity of a particular measure to pass a "straight-face" test of credulity. Suppose, for example, Congress enacted legislation requiring all buildings to have green painted roofs on the premise that the color green would operate to repel nuclear missiles launched from beyond our borders. A court might well scrutinize, at least to some extent, whether this premise has any credible evidentiary support providing a rational reason to believe that the means of green painting would, in any appreciable way as compared to other alternatives, serve the legitimate end of repelling foreign attack. Of course, it is extremely unlikely that Congress would ever enact such a statute absent sufficient change in

again in a myriad of situations, "[i]f it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone."[47]

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knowledge or conditions making it seem far more reasonable under the then-prevailing circumstances than such a law strikes us today. In any event, for present purposes it seems fair to put aside such a *de minimis* inquiry when describing the conventional *McCulloch* standard.

47. Burroughs v. United States, 290 U.S. 534, 547-48 (1934) (citation omitted). As this and many other cases (including *McCulloch*) make clear, the term "proper" is best interpreted as referring simply to the fit between means and ends. *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view...."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1248, at 122 (Fred B. Rothman & Co. 1991) (1833) ("[T]he other word [proper]... has a sense at once admonitory and directory. It requires, that the means should be, *bona fide*, appropriate to the end.").

A handful of scholars have recently argued, however, that the term "proper" embraces more than merely a relationship between means and ends. Rather, they suggest, "proper" implies a broad jurisdictional constraint on legislative authority; Congress may enact only those laws that are considered proper for Congress to enact in the sense that the laws do not trench on the powers or rights of other actors. According to this jurisdictional reading of the term, Congress' choice of means is proper only if it conforms to a set of background constitutional principles of federalism, separation of powers, and individual rights. *See, e.g.*, Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 812-19 (1996); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993); *cf.* David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENT. 93 (1985) (executory statute violating general principle of state immunity is not "proper"). This revisionist view purports to provide a textual hook for the authors' proposal that executory legislation be judicially scrutinized for consistency with such background constitutional principles. Following this lead, the Supreme Court recently articulated, albeit in passing, such a jurisdictional interpretation of "proper." *See* Printz v. United States, 521 U.S. 898, 923-24 (1997) ("When a 'La[w]... for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a 'La[w]... *proper* for carrying into Execution the Commerce Clause....'") (citations omitted) (emphasis added) (citing Lawson & Granger, *supra*).

This revisionist view of "proper" is textually, analytically and historically incorrect, and the textual hook it claims for aggressive judicial review is chimerical. To mention briefly just a few difficulties the revisionist view confronts: (1) "proper" clearly modifies "for carrying into execution" rather than the "laws" themselves, and thus syntactically serves a teleological function, whereas according to the revisionist view the clause should have provided a congressional power to "make all [*proper*] Laws which shall be necessary for carrying into Execution" Congress' primary powers; (2) the *McCulloch* standard *separately* captures the notion, in addition to the requirement of propriety, that all laws (and not just executory laws, as the revisionist view puzzlingly suggests) must "not [be] prohibited, but consist with the letter and spirit of the constitution," *McCulloch*, 17 U.S. (4 Wheat.) at 421; and (3) while the term "proper" was indeed used on occasion by various Framer-era statespersons in a broader jurisdictional sense, the Court as well as statespersons focusing on the term "proper" as used in the Necessary and Proper Clause have consistently employed

Finally, it is notable that *McCulloch* did not carefully consider whether the evil to be addressed by the statute is real or substantial, thus eschewing any rigorous independent assessment of the need for congressional action in the first place.[48] Both *McCulloch* and future cases accept that, when Congress chooses either to exercise an enumerated constitutional power directly or to enact an executory law subservient thereto, Congress decides whether the problem it is purporting to solve through legislation is worthy of any legislative response in the first place. For example, if Congress chooses to "punish those who steal letters from the post office, or rob the mail,"[49] the courts will not independently inquire whether such postal theft constitutes a widespread or serious problem requiring some solution.[50] Rather, under the traditionally relaxed *McCulloch* standard, "[i]t is enough if it can be seen that in any degree, or under reasonably conceivable circumstances, there is an actual relation between the means and the end."[51]

Because the four variables considered here—proper, pretext, necessary, and need for legislation—capture related though discrete concepts, it might be useful to distinguish them through an example. Suppose Congress offers lifetime public employment to all persons aged 18-24 years who agree to serve two years in the armed forces. Whether this executory legislation is "proper"

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the term in its more natural, teleological sense. To be sure, "proper" might be viewed as a jurisdictional limitation, but only in the sense that Congress' jurisdiction with respect to executory means is limited to those means which are "plainly adapted" to achieve its legitimate primary ends. *See, e.g., id.* at 423 (equating "being an appropriate measure" with being "really calculated to effect any of the objects entrusted to the government"); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 539 (1870) (referring to "appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government"); *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view . . . ."). I will leave further elaboration of the revisionist view's shortcomings for another day.

48. *McCulloch* says no more than that "[t]he original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law." 17 U.S. (4 Wheat.) at 402. This bespeaks a deference to Congress rather than an independent judicial assessment of need.

49. *Id.* at 417.

50. Perhaps a court might well require the purported evil being addressed to pass a "straight-face" test of credulity as well (in addition to such a test for "necessity," *see* note 46 *supra*). If, for example, Congress enacted legislation requiring all buildings to have green painted roofs in order to repel a predicted attack from alien beings thought to be enervated upon seeing the color green, a court might well examine the rationality of responding to this perceived evil. Again, however, for the present purpose of describing the conventional *McCulloch* standard we can put such a *de minimis* inquiry aside.

51. Stephenson v. Binford, 287 U.S. 251, 272 (1932); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §432, at 417 (Fred B. Rothman & Co. 1991) (1833) ("[Congress] must have a wide discretion, as to the choice of means; and the only limitation upon that discretion would seem to be, that the means are appropriate to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable, as to strike the eye of every observer.").

turns on the extent to which it is designed to carry into execution a primary power, here the enumerated power to "raise and support Armies."[52] (The *McCulloch* standard asks simply whether inducing the enlistment of military personnel is "plainly adapted" or "conducive to" raising an army, and the answer is obviously yes.) Whether this executory legislation is properly viewed as an illegitimate "pretext" for the exercise of an impermissible police power would presumably—for the Court never clearly explained the factual or normative basis for such a claim—turn on a gestalt sense of various features, such as the legislation's under- and overinclusiveness for its purported purpose.[53] (*McCulloch*'s progeny suggests this assessment is either nonexistent or highly deferential.) Whether this executory legislation is "necessary" turns on the extent to which sufficient troops could be raised through other available means, such as appeals to patriotism. (*McCulloch* holds that this comparative assessment is left to the sound discretion of Congress.) Whether this executory legislation is "needed" turns on whether the lifetime employment program addresses a true as opposed to a fanciful problem, in other words, whether there is a need to enlarge the size of Armed Forces troops. (*McCulloch* provides only glancing mention of this question of need, leaving such judgment to Congress as well.[54])

While the scope of Congress' implied executory powers has not commanded much judicial and scholarly attention over the past decade, Congress has relied upon this broad scope to enact a wide variety of important statutes governing a broad swath of conduct. Indeed, careful reflection reveals that many congressional regulations of intrastate activities having interstate effects, and most congressional statutes that preempt state policies, are grounded in Congress' implied or "necessary and proper" powers.[55] Moreover, almost the entirety of the federal criminal justice system is built upon a Necessary and Proper Clause foundation. As *McCulloch* itself recognized,

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52. U.S. CONST. art. I, § 8, cl. 12.

53. For example, suppose Congress required all able-bodied adults to own, to train themselves to use, and to carry handguns, ostensibly to enhance the military preparedness of the country in the event of a foreign invasion of troops. At least absent some indication of an immediate such threat, a court might likely cite the apparent radically overinclusive nature of the requirement (as compared to focused military training for service-eligible youths) as evidence that the legislation is an impermissible pretext for an exercise of a general police power designed to deter criminals from preying on others.

54. *McCulloch*, 17 U.S. (4 Wheat.) at 422 ("That it is a convenient, a useful, and essential instrument in the prosecution of [the United States'] fiscal operations, is not now subject of controversy.").

55. *See* David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 109-19 (1998) (explaining that the Necessary and Proper Clause is a proper foundation for many laws described as enacted pursuant to Commerce Clause power); Stephen Gardbaum, *supra* note 47, at 803-19 (explaining that the Necessary and Proper Clause is the primary source of Congress' powers to regulate local activity and preempt state law).

Congress' enumerated powers authorize extremely few criminal proscriptions;[56] almost all federal criminal laws are predicated on implied powers, justified as proper means to achieving enumerated or other primary ends.[57] And the implied power to establish a federal criminal code itself implies the subservient power to punish criminals, which in turn implies the subservient power to build and maintain prisons and to operate supervised release systems, and so on.[58] Thus, while the Necessary and Proper Clause gets little play today in the courts or media, broad and significant segments of the United States Code depend on the Court's relaxed means-ends tailoring requirement for implied Article I legislation.

2. McCulloch *and subsequent enforcement clauses.*

Although the Reconstruction and later Amendments expressly granting new powers to Congress use the slightly different locution of "appropriate" rather than "necessary and proper,"[59] the Supreme Court has continued to articulate the very same deferential means-ends test when scrutinizing exercises of Congress' additional enforcement powers. In its first case construing the Fourteenth Amendment's Enforcement Clause, the Court maintained that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . if not prohibited, is brought within the domain of congressional power."[60] The Court repeated this standard in its first case construing the Eighteenth Amendment's Enforcement Clause, explaining that

> It is likewise well settled that where the means adopted by Congress are not

56. *See McCulloch*, 17 U.S. (4 Wheat.) at 416-17 (Congress' express authority to punish misconduct is limited to counterfeiting, U.S. CONST. art. I, § 8, cl. 6, and piracy on the high seas and offenses against the law of nations, *id.* cl. 10). *But see* U.S. CONST. art. III, § 3, cl. 2 (giving Congress the power to "declare the Punishment of Treason").

57. *See McCulloch*, 17 U.S. (4 Wheat.) at 417 (explaining that the enumerated power to establish post offices implies executory power to punish mail theft).

58. *See, e.g.*, Greenwood v. United States, 350 U.S. 366, 375 (1956) (holding that the power to prosecute for federal offenses implies the authority to detain accused persons deemed incompetent to stand trial pending possible recovery of sufficient competence).

59. *See* U.S. CONST. amend. XIII (power to enforce prohibition of slavery by "appropriate legislation"); *id.* amend. XIV (various rights against states, House apportionment, federal official limitations, and public debt claims); *id.* amend. XV (prohibition of racial discrimination in voting); *id.* amend. XVIII (repealed 1933) (prohibition of liquor); *id.* amend. XIX (prohibition of sex discrimination in voting); *id.* amend. XXIII (representation of seat of government); *id.* amend. XXIV (prohibition of poll tax); *id.* amend. XXVI (prohibition of age discrimination in voting) [hereinafter the Enforcement Clauses].

60. *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879); *see also* The Civil Rights Cases, 109 U.S. 3, 13-14 (1883) (explaining that Section 5 authorizes Congress to adopt "corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing").

> prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground.[61]

And throughout the three decades preceding *Boerne*, the Court continued to reiterate the same deferential test. As the Court explained in *Katzenbach v. Morgan*, "the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under Section 5 of the Fourteenth Amendment."[62]

To be sure, in two early cases construing Section 5 the Supreme Court invalidated certain statutory provisions as lying beyond Congress' authority.[63] One might thus suggest that, in deed if not word, at least at one early point the Supreme Court evaluated Section 5 measures with skepticism rather than deference. Perhaps so. However, these early decisions are best understood as reflecting a rigorous application of the state action doctrine rather than a rigorous application of a means-ends test. The statutes invalidated in each of the cases targeted private rather than state conduct, whereas the Court viewed the Enforcement Clauses as authorizing Congress to regulate only state and not private conduct.[64] Thus the Court appeared to reject categorically the means of private regulation, rather than hold these particular instances of private

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61. James Everard's Breweries v. Day, 265 U.S. 545, 559 (1924); *see also* Lambert v. Yellowley, 272 U.S. 581, 596-97 (1926) (equating "necessary and proper" under Article I, Section 8 with "appropriate" under Section 2 of the Eighteenth Amendment).

62. 384 U.S. 641, 651 (1966); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-44 (1968) (applying the same test to the Thirteenth Amendment's identically worded Enforcement Clause); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (applying the same test to the Fifteenth Amendment's identically worded Enforcement Clause); City of Rome v. United States, 446 U.S. 156, 177 (1980) (reaffirming *South Carolina v. Katzenbach* and stating that the means must be "'appropriate,' as that term is defined in *McCulloch v. Maryland*").

63. *See* United States v. Harris, 106 U.S. 629 (1883) (invalidating a statute proscribing private conspiracy to deprive persons of equal protection of the laws); The Civil Rights Cases, 109 U.S. 3 (1883) (invalidating statutory provisions prohibiting private race discrimination in various public accommodations); *see also* James v. Bowman, 190 U.S. 127 (1903) (invalidating statute prohibiting private interference with voting as lying beyond Congress' Section 2 power to enforce the Fifteenth Amendment).

64. *See Harris*, 106 U.S. at 640 ("As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution."); *The Civil Rights Cases*, 109 U.S. at 18 ("[T]he power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers."); *James*, 190 U.S. at 139 ("[A] statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives . . . ."). For discussion of this premise and its reapplication in *Morrison*, see notes 134-136 *infra* and accompanying text.

regulation to a heightened means-ends standard. In fact, the Court expressly confirmed, by word at least, Congress' authority to prevent or remedy misconduct attributable to *state* action through measures deemed by Congress to be "necessary and proper."[65] It is thus unclear the extent to which these early cases are properly viewed as foreshadowing the Court's recent invigoration of means-ends scrutiny. What is quite clear, however, is that at least since the beginning of the twentieth century through its decision in *Boerne*, the Court routinely both articulated and applied *McCulloch*'s liberal means-ends standard to Section 5 and other Enforcement Clause legislation.

B. *The* Boerne *[R]Evolution*

1. Boerne *and the emergence of the congruence and proportionality test.*

In *City of Boerne v. Flores*,[66] the Supreme Court departed sharply from the longstanding tradition of deferential means-ends scrutiny. *Boerne* concerned the constitutionality of the Religious Freedom Restoration Act (RFRA),[67] which was Congress' attempt to override the Court's prior determination in *Employment Division, Department of Human Resources v. Smith*[68] that the First Amendment's Free Exercise Clause provides no exemption from neutral laws of general applicability. RFRA purported to restore a pre-*Smith* balancing test that was more solicitous of free exercise claims brought against both state and federal laws: Congress sought to preclude even neutrally applicable laws from substantially burdening the exercise of religion unless they were narrowly tailored to furthering a compelling governmental interest.[69] While RFRA's application to federal statutes was predicated on Congress' various Article I powers supporting those specific statutes, RFRA's application to state statutes was predicated on Congress' Section 5 authority to enforce the Fourteenth Amendment.

In *Boerne*, the Supreme Court invalidated RFRA as it applies to the states, holding the statute lay beyond Congress' Section 5 authority.[70] The Court

65. *See, e.g., The Civil Rights Cases*, 109 U.S. at 13-14 (Section 5 authorizes "corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce . . . ."); *cf. id.* at 21 (construing the Thirteenth Amendment's Enforcement Clause as affording Congress "a right to enact all necessary and proper laws for the obliteration and prevention of slavery").

66. 521 U.S. 507 (1997).

67. 42 U.S.C. § 2000bb (1994).

68. 494 U.S. 872 (1990).

69. This was the test imposed by the Supreme Court's pre-*Smith* case law. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (analyzing under strict scrutiny and invalidating neutrally applicable state unemployment compensation rules where their application unjustifiably infringed free exercise of religion).

70. A number of lower federal courts have upheld RFRA's application to federal

acknowledged up front that it had long evaluated Section 5 legislation with significant deference to congressional judgments.[71] But "'[a]s broad as the congressional enforcement power is, it is not unlimited.'"[72] And the Court then embarked on a two-step argument defining and sharpening those limits.

a. *The scope of legitimate Section 5 ends.*

First, the Court considered the scope of the legitimate ends that Section 5 authorizes Congress to pursue. Specifically, the Court asked whether Section 5 grants Congress any power, in the course of "enforc[ing]" the Fourteenth Amendment's rights, substantively to redefine the scope of those rights as compared to the federal judiciary's definition. While acknowledging some language in *Katzenbach v. Morgan*[73] suggesting this possibility,[74] the Court emphatically rejected it here, explaining:

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It is been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of the Fourteenth Amendment."[75]

The Court first explained that the drafting history of the Fourteenth Amendment "confirms the remedial, rather than substantive, nature of the Enforcement Clause."[76] The Court traced the development of the clause from the original proposed draft offered by Representative John Bingham of Ohio to the final version ultimately adopted.[77] The Bingham proposal purported to grant seemingly broad powers to Congress to both determine and enforce various rights against state action:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of

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government programs. *See, e.g.*, Adams v. Commissioner, 170 F.3d 173, 175 & n.1 (3d Cir. 1999). *But see* Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998) (arguing that RFRA is unconstitutional as applied to federal law as well, on separation of powers grounds).

71. *Boerne*, 521 U.S. at 517-18.

72. *Id.* at 518 (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).

73. 384 U.S. 641 (1966).

74. *Boerne*, 521 U.S. at 527-28 (noting that one of *Morgan*'s rationales for upholding a provision of the Voting Rights Act of 1965 could be understood as maintaining that Congress may itself decide what constitutes invidious discrimination, but explaining "[t]his is not a necessary interpretation, however, or even the best one" of that precedent).

75. *Id.* at 519.

76. *Id.* at 520.

77. *Id.* at 520-23.

> citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[78]

According to the Court, this formulation was rejected primarily because it raised "concerns . . . regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property,"[79] and secondarily because "some thought [it] departed from that tradition [of affording the Supreme Court "primary authority" to interpret the Constitution] by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation."[80] Both concerns were resolved, in the Court's view, by redrafting the Amendment so as to make clear that the "power to interpret" Section 1 "in a case or controversy remains in the Judiciary,"[81] and that Congress may merely enforce such judicial interpretations.

After explaining in detail how this understanding of the limited scope of Section 5's "legitimate end" comported with decades of prior judicial precedent upholding Section 5 enforcement measures,[82] the Court returned to the notion that the judiciary, and not Congress, is entitled to provide the interpretation of Section 1 rights which Congress may "enforce." The Court warned that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[83] This concern assumes, of course, that the Fourteenth Amendment's "meaning" is fixed by judicial pronouncement—a premise the Court hastened to reaffirm.[84] Perhaps provoked by Congress' open desire to override the Court's previous interpretation of the Free Exercise Clause in *Smith*,[85] the Court explained that:

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78. *Id.* at 520 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

79. *Id.* at 523.

80. *Id.* at 524.

81. *Id.*

82. *Id.* at 524-28.

83. *Id.* at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

84. For the canonical statement of this claim of interpretive supremacy, see *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), stating that "[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *See also, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992); United States v. Nixon, 418 U.S. 683, 703-05 (1974); Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962). Several scholars have discussed this Court-centric approach to constitutional interpretation. *Compare, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial interpretive supremacy), *with* Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution*, 61 TUL. L. REV. 979 (1987) (challenging judicial interpretive supremacy), *and* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (same).

85. *See Boerne*, 521 U.S. at 515 (noting RFRA's stated purposes "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[86]

b. *The scope of permissible Section 5 means.*

After defining the legitimate *ends* of Section 5 power narrowly, the Court next articulated a novel and similarly narrow interpretation of the scope of congressional *means* permissible to achieve those ends. The two moves were related, in the sense that the constraint on means was expressly linked to the desire to enforce the constraint on ends. The Court explained that "[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."[87] The Court conceded that Congress is not limited strictly to fine-tuning the contours of judicial remedies for judicially determined violations. Rather, Section 5 legislation can be "prophylactic" in the sense that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ."[88] And the Court used some language superficially hinting at a relaxed means-ends standard.[89] But the Court then immediately clarified that the actual test to be applied is significantly more stringent: for such prophylactic legislation there still "must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."[90]

Applying this standard, the Court concluded that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence" between means and legitimate ends.[91] To begin with, the "evil presented" appeared insubstantial. "In contrast to the record which confronted Congress

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in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government") (citations omitted).

86. *Id.* at 536.

87. *Id.* at 519-20.

88. *Id.* at 518.

89. *Id.* at 517 (Section 5 power extends to "whatever tends to enforce submission to the prohibitions [that the Fourteenth Amendment's provisions] contain") (quoting *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879)).

90. *Id.* at 530 (citation omitted). *See* Kazmier v. Widmann, 225 F.3d 519, 530-31 (5th Cir. 2000) (rejecting suggestion that *Boerne* and its progeny maintained fidelity to *McCulloch*'s rational basis tradition, concluding "[i]t could not be clearer that congruence and proportionality is a considerably more stringent standard of review than is rational basis").

91. *Boerne*, 521 U.S. at 533.

and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry,"[92] the only legitimate congressional target given the Court's interpretation of the Free Exercise Clause in *Smith*. Congressional hearings mentioned no episodes of such persecution in the past forty years, and indeed testimony before Congress indicated that intentional discrimination through the use of generally applicable statutes is now quite rare.[93]

Moreover, by potentially subjecting every neutral state regulation to strict scrutiny, RFRA would impose a "considerable congressional intrusion into the States' traditional prerogatives and general authority . . . ."[94] These "substantial costs [that] RFRA exacts . . . far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[95] Given the broad scope and magnitude of the imposed burden compared to the insubstantial evil to be addressed, the Court concluded that "RFRA 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 [as judicially defined]."[96]

Thus, the Court in *Boerne* articulated a restrained vision of both the scope of Section 5's legitimate ends and the scope of permissible legislative means to achieve those ends.[97] While the first doctrinal test arguably merely clarified an ambiguity in prior case law,[98] the second doctrinal test clearly deviated from the Court's longstanding articulation and application of the more deferential *McCulloch* means-ends standard.

2. Boerne*'s progeny.*

When *Boerne* was decided, one might have wondered whether the "congruence and proportionality" formulation would prove to be merely case-specific rhetoric describing the ill-fitting RFRA, or instead would signal an important shift in means-ends analysis. The Supreme Court resolved any uncertainty immediately and emphatically: within the next four terms, the Court held five more statutory provisions to be inappropriate exercises of Section 5 authority.

Florida Prepaid—In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[99] the Court held that the Patent and Plant

92. *Id.* at 530.
93. *Id.* at 530-31.
94. *Id.* at 534.
95. *Id.*
96. *Id.* at 532.
97. No Justice dissented from either of these aspects of *Boerne*.
98. *See* note 74 *supra*.
99. 527 U.S. 627 (1999).

Variety Protection Remedy Clarification Act,[100] which purported to abrogate state sovereign immunity in patent infringement cases, could not be sustained as Section 5 enforcement legislation. Congress justified the Act as an acceptable enforcement measure on the ground that a patent is a form of property, and thus a state's act of infringing a patent can constitute a deprivation of property without due process.[101]

After summarizing its holding in *Boerne*, the Court explained that "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[102] The Court concluded that Congress fell short on both fronts.

The Court defined the legitimate end plausibly animating the Act as that of addressing "unremedied patent infringement by the States."[103] The Court immediately complained, however, that in reviewing the legislative record, it found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[104] In any event, instances of patent infringement would constitute a due process violation only where the state provided an inadequate postdeprivation remedy,[105] a more nuanced issue that Congress barely considered, and where the deprivation was intentional rather than negligent, which the legislative record revealed to be the exception rather than the rule.[106] Thus, 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."[107]

Given the scant record of constitutional violations, the Court considered the Act's abrogation provision subjecting states to "expansive liability"[108] out of proportion to the supposed evil being addressed. Congress did not limit state liability to instances involving inadequate state remedies, or involving policy-based or even nonnegligent infringements, or occurring in states with a high incidence of patent infringment.[109] Instead, "Congress made all States immediately amenable to suit in federal court for all kinds of possible patent

100. 35 U.S.C. §§ 271(h), 296(a) (1994).

101. *Florida Prepaid*, 527 U.S. at 637.

102. *Id.* at 639.

103. *Id.* at 640.

104. *Id.*

105. *Id.* at 643 (citing Parratt v. Taylor, 451 U.S. 527, 529-31 (1981); Hudson v. Palmer, 468 U.S. 517, 532-33 (1984)). Here, the Court skated over some tricky questions as to whether the *Parratt* line of cases should apply to patent infringement. *See* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1060-61 (2000) (questioning whether patent infringement is better viewed as raising a substantive rather than procedural due process claim).

106. *Florida Prepaid*, 527 U.S. at 643.

107. *Id.* at 645 (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997)).

108. *Id.* at 646.

109. *Id.* at 647.

infringement and for an indefinite duration."[110] This "indiscriminate scope . . . is particularly incongruous," since "it simply cannot be said that 'many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional.'"[111] Thus, the Act's "apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*."[112]

College Savings Bank—*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*[113] considered whether the Trademark Remedy Clarification Act,[114] which purported to authorize private suits for damages against states to enforce the Lanham Act,[115] was a valid Section 5 measure for purposes of abrogating state sovereign immunity. The more precise question was whether the Lanham Act's false-advertising provisions protect a "property" interest within the meaning of the Fourteenth Amendment's Due Process Clause. The Court considered, but rejected, two claimed property interests in this context: "(1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests."[116] The Court concluded that, because a right against false advertising does not involve a "right to exclude," there is no "property right in freedom from a competitor's false advertising about its own products."[117] And, more generally, "the activity of making a profit is not property in the ordinary sense . . . ."[118] The Court thus rejected the proposed Section 5 foundation for the abrogating Act without having to then resort to the congruence and proportionality standard.[119] In other words, where there is no judicially defined violation of Section 1 that Congress can even plausibly claim to be enforcing, there is no legitimate Section 5 end for which the Court need explore the means-ends relationship.[120]

Kimel—In *Kimel v. Florida Board of Regents*,[121] the Court considered

110. *Id.*

111. *Id.* (quoting *Boerne*, 521 U.S. at 533).

112. *Id.* at 647-48.

113. 527 U.S. 666 (1999).

114. Pub. L. No. 102-542, 106 Stat. 3567 (1992).

115. Trademark Act of 1946, 15 U.S.C. § 1125(a) (1994).

116. *College Savings*, 527 U.S. at 672.

117. *Id.* at 673.

118. *Id.* at 675.

119. *Id.* (finding no need to perform this test given the absence of an unconstitutional deprivation of property).

120. The Court also considered but rejected the argument that a state's decision to engage in activities regulated by the Lanham Act operated as a constructive waiver of the state's immunity. *Id.* at 675-87.

121. 528 U.S. 62 (2000).

whether the Age Discrimination in Employment Act (ADEA),[122] which makes it unlawful for an employer (including a state) to discriminate in employment decisions on the basis of age, was enacted pursuant to Section 5 and therefore could validly abrogate state sovereign immunity.[123] Applying the "congruence and proportionality" standard, the Court concluded that the ADEA was not "appropriate legislation" under Section 5.[124]

As in *Boerne* and *Florida Prepaid*, the Court determined that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[125] Under the Court's age discrimination precedents, states may discriminate on the basis of age without violating Section 1 so long as the age classification is rationally related to a legitimate state interest.[126] Because rational reasons for such classifications will frequently if not almost invariably exist, age discrimination is generally not unconstitutional. As a result the ADEA, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[127] This judgment was confirmed by the Court's examination of the ADEA's legislative record, in which "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[128] Thus, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States,"[129] the Act could not be characterized as a valid Section 5 enforcement measure.

Morrison—In *United States v. Morrison*,[130] the Supreme Court considered the constitutionality of a provision of the Violence Against Women Act (VAWA) providing victims of gender-motivated violence with a federal civil action against the perpetrator.[131] The Court invalidated the provision, holding that it could not be justified as an exercise of either Congress' power to regulate

122. 29 U.S.C. § 621 et seq. (1994).

123. The Court acknowledged its previous determination in *EEOC v. Wyoming*, 460 U.S. 226 (1983), that Congress could apply the ADEA to state and local government employment decisions pursuant to its power to regulate interstate commerce, but noted that, post-*Seminole Tribe*, Congress could enforce the ADEA through private damages suits against states only if the Act could be justified on Section 5 grounds as well. *Kimel*, 528 U.S. at 76-80.

124. *Kimel*, 528 U.S. at 91.

125. *Id.* at 83.

126. *Id.* at 83-87.

127. *Id.* at 86.

128. *Id.* at 89.

129. *Id.* at 91.

130. 529 U.S. 598 (2000).

131. 42 U.S.C. § 13981 (1994).

interstate commerce or power to enforce the Fourteenth Amendment.[132]

Unlike in the previous four cases, the Court did not directly dispute Congress' pronouncement and findings that numerous participants in state criminal justice systems engage in behavior satisfying the judicially crafted standards for violations of the Equal Protection Clause.[133] The Court held, however, that the civil remedy provision was not a congruent and proportional response to this pattern of presumably unconstitutional activity because the provision provided a right of action against misconduct by private rather than state actors. As the Court explained, the provision "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[134] Moreover, viewed as a prophylactic measure, the VAWA provision in question was also overly broad according to the Court, since it applied uniformly throughout the nation, rather than merely in states with congressionally documented records of this type of gender discrimination.[135] Thus, even accepting Congress' identification of a constitutional "evil" to be addressed, the Court found the provision insufficiently tailored to qualify as an enforcement of Section 5: "the remedy is simply not 'corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.'"[136]

Garrett—In *Board of Trustees of the University of Alabama v. Garrett*,[137] the Court held that Title I of the Americans with Disabilities Act of 1990 (ADA),[138] which prohibits state and other employers from discriminating in various ways against employees on the basis of disability, was not a valid Section 5 measure. As a result, Congress could not abrogate state sovereign immunity and authorize victims of discrimination to sue states for compensatory damages.

Applying the now-familiar doctrine, the Court first identified the scope of

132. *Morrison*, 529 U.S. at 612, 619-21.

133. The Court observed that, based on a "voluminous" record, "Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence." *Id.* at 620. The Court did not disclaim the suggestion that the behavior documented in the legislative record rose to the level of unconstitutional conduct according to the Court's own intermediate scrutiny standard.

134. *Id.* at 626. For an argument that the provision's targeting of private misconduct still operated, albeit indirectly, to prevent or remedy the identified unconstitutional behavior, see Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1353-58 (2000). This essay also challenges the Court's broad language suggesting that private remedies are *per se* excluded as appropriate Section 5 measures. *Id.* at 1359-72.

135. *Morrison*, 529 U.S. at 626-27.

136. *Id.* at 625 (quoting The Civil Rights Cases, 109 U.S. 3, 18 (1883)).

137. 121 S. Ct. 955 (2001).

138. 42 U.S.C. §§ 12111-12117 (1994).

the constitutional right at issue and interpreted prior case law to hold that disability discrimination is unconstitutional only if it fails to satisfy rational basis review.[139] The Court next asked whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled. The Court held that the record compiled by Congress was inadequate to the task: most of the examples of discrimination did not involve state action, and those that did were anectodal in nature.[140] In the end, the

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139. Here, the Court read some language in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), for less than it could have been worth. *See id.* at 448 (arguably suggesting that state decisionmaking reflecting "negative attitudes" toward or "fear" of persons with disabilities is unconstitutional).

140. *Garrett*, 121 S. Ct. at 964-65. In the course of explaining the legislative record's inadequacy, the Court stated that evidence of unconstitutional conduct by *local* as opposed to state governmental entities did not count:

> Respondents contend that the inquiry as to unconstitutional discrimination should extend not only to States themselves, but to units of local governments, such as cities and counties. All of these, they say, are "state actors" for purposes of the Fourteenth Amendment. This is quite true, but the Eleventh Amendment does not extend its immunity to units of local government. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890). These entities are subject to private claims for damages under the ADA without Congress' ever having to rely on section 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.

Id. at 965.

This evidentiary limitation is quite puzzling on its face. It is true that, in *Garrett*, Congress did not need to rely on Section 5 to regulate the employment practices of local governmental units and to authorize private damages suits to enforce those regulations, because Title I's application to public employers falls within Congress' Commerce Clause authority. Reliance on Section 5 was important only as a basis for authorizing private damages suits against the states themselves. But in other contexts (such as the Voting Rights Act provisions that the Court repeatedly uses as a baseline for assessing congruence and proportionality, see *id.* at 967), Congress sometimes must rely on Section 5 not just for abrogation, but for the power to regulate *at all*—so as to authorize private suits for injunctive relief or United States suits for retrospective relief. In such circumstances, it is difficult to understand why Congress could not enact enforcement measures in response to Section 1 violations by any state actors, including local government units. And I see no reason why there should be a different standard for assessing Section 5 power depending on whether a particular measure's application to local governmental units happens to lie within Congress' Article I power. The Court appears here simply to have forgotten that Section 5 is an independent font of power, not merely an abrogation-authorizing provision.

The aforementioned paragraph might be read as suggesting that Congress may not abrogate state sovereign immunity even under a valid Section 5 regulation unless Congress can additionally demonstrate that there is a need for such abrogation, requiring some evidence of misconduct by the state rather than merely by local entities. *But see* note 156 *infra* (challenging any such suggestion). Alternatively, the paragraph might be read as an extension of the Court's previous suggestion that, if Congress wants to redress unconstitutional behavior that (according to the record evidence) occurs only in some states, Congress must target its remedy toward those states rather than apply the remedy indiscriminately across the nation. *See* text accompanying note 135 *supra*. Perhaps the Court is stating here that a congruent and proportional remedy must target only those government levels *within* a single state for which there is record evidence of unconstitutional conduct.

record evidence simply "fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[141] Moreover, the Court continued, even were there sufficient evidence of a pattern of unconstitutional discrimination by the states, "the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in" *Boerne*.[142] For example, the ADA requires state employers to accommodate persons with disabilities even though employers frequently have rational reasons to refrain from doing so, and the ADA places certain evidentiary burdens on employers to justify their inaction even though the Constitution, claimed the Court, places these evidentiary burdens on employees.[143]

C. *Parsing Section 5's Heightened Means-Ends Scrutiny: What Do "Congruence and Proportionality" Mean?*

Throughout *Boerne* and its progeny, the Supreme Court never clearly defined the distinctive meanings of, or requirements imposed by, the two components of the composite phrase "congruence and proportionality."[144] Of course, in fairness to the Court, it may not have focused much on any precise conceptual distinction between these two components, instead wielding the phrase loosely to capture a set of interrelated and perhaps somewhat amorphous ideas about means-ends relationships. As a result, perhaps one should not push too hard to divine the precise and separable content of "congruence" and "proportionality" as used by the Court. But for ease of exposition, and at the risk of imposing some unintended—perhaps even undesired—clarity on the Court's choice of language, I shall try here to reformulate the substance of the Court's concerns about Section 5's means-ends nexus, and then link that reformulation to a plausible (and I hope analytically constructive) understanding of the two components.

The Court's application of the congruence and proportionality standard in this line of cases appears to engage two different lines of inquiry. The first explores the instrumental relationship between Congress' means and ends. As the Court repeatedly makes clear, a Section 5 measure must target state conduct that the judiciary itself understands to violate the Fourteenth Amendment's

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I doubt that the paragraph was intended to embrace either of these two alternative interpretations (rather than reflecting a lack of care in considering the point of Section 5 justification). But if so, this paragraph portends yet another unexplained and significant deviation from *McCulloch*'s conventional means-ends test.

141. *Garrett*, 121 S. Ct. at 965.

142. *Id.* at 966.

143. *Id.* at 966-67.

144. Indeed careful parsing of the Court's usage of the two components separately suggests that the Court may not have deployed them consistently, even within as well as across, the several decisions.

restrictions on state action. In other words, Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[145] This inquiry is best exemplified by *College Savings*. Once the Court concluded that a state business' allegedly false advertising did not deprive a competitor of any Fourteenth Amendment "property" interest as the Court defined the term, it easily followed that Congress' prohibition of this business practice did not prevent *any* conduct violating a judicially defined right.[146] As such, the regulation obviously could not be characterized as "plainly adapted" to enforcing a Section 1 right, and the Court held the provision beyond Congress' Section 5 authority without further analysis. Put differently, the provision was radically underinclusive as compared to the legitimate Section 5 end because it did not prohibit or remedy any unconstitutional state conduct. This inquiry—whether the measure actually prevents or remedies a sufficient quantity of identifiable constitutional violations or is instead too underinclusive—is best understood as capturing the Court's notion of "congruence."

Boerne and its progeny engage a second distinct inquiry, one focusing on the calibration or balance between the magnitude of the prophylactic remedy and the magnitude of the wrong or problem being addressed. As the Court explained in *Boerne*, "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[147] The question here is whether the remedy is too much of a blunderbuss compared to the targeted harm. This multifaceted inquiry is best understood as capturing the Court's notion of "proportionality."

Parsing this inquiry further, the Court's consideration of the magnitude of a remedial measure reflects both quantitative and qualitative concerns. The quantitative dimension focuses on the extent to which the measure is overinclusive, i.e., how much *constitutional* conduct does the measure prohibit or regulate, beyond the unconstitutional conduct that it purports to target. To be sure, the Court made clear that overinclusiveness does not automatically doom a Section 5 measure.[148] However, in general, the greater the ratio of statutory applications to actual constitutional violations proscribed, the more cause for concern.[149] This theme echoes throughout the cases, each of which

145. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999).

146. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673-75 (1999).

147. City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (citations omitted).

148. *Id.* at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.").

149. *See, e.g., id.* at 532 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.").

bemoaned the fact that the Section 5 measure under review swept far more broadly than necessary to prevent or redress actual unconstitutional activity.[150] Indeed, one might capture this quantitative dimension of proportionality as imposing a presumptive "less restrictive alternative" requirement.[151]

The qualitative dimension focuses not on the scope of the measure's coverage, but rather on the nature and severity of the burden the measure imposes on the state wherever it applies. The more weighty or intrusive the burden on the state, the less "proportional" the enforcement measure.

The Court balances these quantitative and qualitative concerns about the scope and nature of the remedy against the magnitude of the wrong or evil being addressed. This latter variable clearly has a quantitative dimension, since the Court has repeatedly inquired whether a Section 5 measure "respond[s] to a

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150. In *Boerne*, the Court complained that RFRA's "[s]weeping coverage . . . prohibit[s] official actions of almost every description and regardless of subject matter," with "no termination date or termination mechanism," 521 U.S. at 532, with the inevitable result that "[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry." *Id.* at 535. In *Florida Prepaid*, the Court lamented that "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations," 527 U.S. at 646, such that the Court could not conclude that many of the regulated state actions "'have a significant likelihood of being unconstitutional.'" *Id.* at 647 (quoting *Boerne*, 521 U.S. at 532). In *Kimel*, the Court concluded that the ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the [judicially] applicable equal protection, rational basis standard." 528 U.S. 62, 64 (2000). In *Morrison*, while the Court primarily developed an argument that the regulation of private conduct is *ultra vires* in the Section 5 context, the Court did note that VAWA's remedy "applies uniformly throughout the Nation," even though Congress (said the Court) did not find that discrimination against the victims of gender-motivated crimes "exist[s] in all States, or even most States." 529 U.S. 598, 626 (2000). And in *Garrett*, the Court expressed the "same sort of concerns." 121 S. Ct. 955, 966 (2001).

Of course, at least in *Boerne* and *Florida Prepaid*, and perhaps *Kimel* and *Garrett* as well, the apparent reason for the problematic overbreadth was that Congress believed it could legitimately aim at a broader end, i.e., the range of state conduct that in *its* (but not, it turns out, the Court's) judgment violated Section 1. Thus, it was the Court's narrower reading of legitimate Section 5 ends that set up the tailoring problem in the first place.

151. At least two scholars have suggested that this specific concern about quantitative overinclusion is better characterized as part of the "congruence" rather than "proportionality" inquiry. *See* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 641-42 (1998); Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 815 (1998). As I mentioned earlier, it is more important to understand precisely what the Court's test as a whole requires than to worry about the peculiar meaning of each component—even assuming the Court itself ever purported to define each term separately. I still prefer my characterization, however, not only because I think it more accurately reflects the Court's apparent terminology, see *Boerne*, 521 U.S. at 532 (describing RFRA as "out of *proportion* to a supposed remedial or preventive object" because of its "[s]weeping coverage" (emphasis added)), but also because this interpretation makes it easier linguistically to trace the similarities and differences between the *Boerne* and *McCulloch* means-ends standards.

history of 'widespread and persisting deprivation of constitutional rights.'"[152] This seems to suggest that the more widespread the practice, the more appropriate a Section 5 response. It is less clear whether this second variable also has a qualitative component. The Court has not specifically explored this question in the four decided cases. But the Court's statements that "*[d]ifficult and intractable* problems often require powerful remedies,"[153] and "'[s]trong measures appropriate to address one harm may be an unwarranted response to another, *lesser* one,'"[154] imply that the Court would take into account certain qualitative aspects of the harm being addressed. One might surmise, for example, that an overinclusive and intrusive measure may be appropriate to prevent unconstitutional state executions even if an equally overinclusive and intrusive measure would not be appropriate to prevent minor deprivations of property rights.

Having identified the various aspects of the Court's congruence and proportionality test, we can now compare and contrast this multifaceted test with *McCulloch*'s traditional means-ends scrutiny. The Court's first inquiry in the Section 5 context is whether a particular measure is conducive to preventing or remedying a judicially defined Section 1 violation, in the sense that at least some of the conduct it proscribes or redresses is actually unconstitutional. This "congruence" requirement mimics the requirement that executory Article I legislation be "proper," in the sense that such legislation must actually to some degree execute or promote the function of a primary governmental power.

The Court's Section 5 proportionality inquiry, which assesses and balances the magnitude of the remedy and the magnitude of the evil being addressed, subsumes the "necessary" and "need" variables within the *McCulloch* rubric developed above. In reverse order, the scope and nature of the evil being addressed by Section 5 legislation correspond to the "need" for Article I legislation. As explained above, this matter is not subject to meaningful judicial scrutiny in the Article I context.[155]

The overinclusive scope and magnitude of the burden imposed by Section 5 legislation can best be viewed as corresponding to the question of "necessity" for Article I legislation. To be sure, *Boerne* and its progeny do not describe the calibration between the scope/burden of a measure and the scope/seriousness of the evil by asking whether the remedy is "necessary" to address the problem in these precise words.[156] But the nature of the inquiry is the same. By focusing

152. *Florida Prepaid*, 527 U.S. at 645 (quoting *Boerne*, 521 U.S. at 526).

153. *Kimel*, 528 U.S. at 64 (emphasis added).

154. *Id.* at 89 (emphasis added) (quoting *Boerne*, 521 U.S. at 530) (citation omitted).

155. *See* notes 48-51 *supra* and accompanying text.

156. With one exception: In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Justice Scalia stated that because there was no deprivation of property at issue, the Court need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve:

> whether the prophylactic measure taken under purported authority of § 5 (viz., prohibition of

on the overinclusive and burdensome nature of a particular Section 5 measure, the Court is essentially asking whether Congress could have adequately addressed the identified evil through a remedy of lesser scope or duration, and/or a less burdensome remedy. While using different words, this is the same comparative inquiry that *McCulloch* describes as the test of necessity, namely, whether the means Congress selected is necessary when compared to other available alternatives that could secure the same end. And, as explained above, in the *McCulloch* scheme the definition of necessity lies within congressional discretion.[157]

It is important to note that language in *Boerne*'s progeny suggests that the proportionality analysis applies, at least in full dress, only to "prophylactic" Section 5 measures that are overinclusive in that they sweep into their prohibitory scope some constitutional state conduct.[158] By contrast, if a Section

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States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was *genuinely necessary* to prevent violation of the Fourteenth Amendment.

527 U.S. at 675 (emphasis added). One might read Justice Scalia's dictum to suggest that, even after the Court has concluded that a statutory obligation (such as the Lanham Act there at issue) may be imposed on a state under Section 5, the Court will uphold the abrogation of state sovereign immunity to enforce that obligation only if the abrogation is genuinely necessary. *See* Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 899 (2000) (suggesting that the dictum can be read this way). If so, I believe the dictum reflects a category error. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that states waived their sovereign immunity from suits seeking to enforce the Fourteenth Amendment, and therefore Congress may abrogate such immunity through any valid Section 5 legislation so long as Congress makes its intent to do so "unmistakably clear," *Seminole Tribe v. Florida*, 517 U.S. at 44, 56 (1996). This is true without any separate requirement that Congress demonstrate the "necessity" of abrogation. Indeed, given the Court's repeated insistence that other remaining avenues of judicial enforcement provide ample means of enforcing Section 1 restrictions on states, *see, e.g.*, *Alden*, 527 U.S. 706, 755-57 (1999), it is unclear how Congress could ever make such a showing. Rather, under the Court's own "congruence and proportionality" standard, the only question should be whether the *underlying obligations* imposed on the states are necessary in the first place, thus rendering the statute a valid exercise of Section 5 authority, and not an additional question regarding the necessity of abrogation to enforce those obligations. To the extent an enigmatic paragraph in *Garrett* suggests otherwise, *see* note 140 *supra*, it augers yet another *McCulloch*-deviating move constraining congressional discretion.

157. *See* notes 43-47 *supra* and accompanying text. One might plausibly argue that quantitative overinclusion could instead be captured by *McCulloch*'s pretext analysis. *See* notes 41-42 *supra* and accompanying text. If a particular congressional measure is significantly broader than appears necessary to execute or service a primary power, one might become suspicious that Congress is invoking the primary power as a pretext for acting beyond its permissible domain. For example, if Congress purported to prohibit all state criminal prosecutions ostensibly to ensure that no defendant is ever compelled to incriminate himself, such radical overinclusion between means and ends might doom the statute under *McCulloch*'s pretext inquiry. But, as numerous cases have made clear over the past 180 years, pretext analysis is extremely deferential (where it occurs at all), and indeed it takes a radical hypothetical like this one merely to frame the issue. Thus, whether *Boerne*'s focus on quantitative overinclusion is better viewed as an analog to *McCulloch*'s necessity or pretext inquiry, it certainly reflects a far more rigorous means-ends evaluation.

158. *See, e.g.*, *Florida Prepaid*, 527 U.S. at 645 ("The legislative record thus suggests

5 measure regulates only conduct judicially defined to violate the Constitution and merely supplements the judicial remedies therefor,[159] then Congress would appear not to have to justify the measure with the same demonstration of need.[160]

This parsing helps to lay bare *Boerne*'s clear departure from *McCulloch*'s relaxed standard. While the latter defers substantially, if not completely, to legislative judgments about need and necessity, the former applies rigorous scrutiny of the same notions under the guise of "proportionality" review—scrutiny rigorous enough to drive the invalidation of six purported Section 5 measures in the span of four years, either preventing Congress from abrogating state sovereign immunity (as in *Florida Prepaid*, *College Savings*, *Kimel*, and *Garrett*), or more broadly preventing Congress from regulating primary conduct at all (as in *Boerne* and *Morrison*). Thus, the central question of this article is squarely posed: What justifies the Court's decision to engage in searching scrutiny of the proportionality of a Section 5 measure, even while it defers entirely to Congress' judgments about the equivalent concepts of need for and necessity of an Article I executory measure?

II. *BOERNE'S* DEVIATION FROM ORIGINAL INTENT AND UNDERSTANDING REGARDING MEANS-ENDS TAILORING

In reaching its conclusion that Section 5 grants Congress remedial but not substantive interpretive authority, the Court relied heavily on an originalist methodology, canvassing the available statements of the relevant Framers and also interpreting the drafting history of what eventually became Sections 1 and 5 of the Fourteenth Amendment.[161] Whether one believes the Court executed

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that the Patent Remedy 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.") (emphasis added) (quoting *Boerne*, 521 U.S. at 526); *Morrison*, 529 U.S. 598, 625 (2000) ("as we have phrased it in more recent cases, *prophylactic* legislation under § 5 must" satisfy congruence and proportionality) (emphasis added); *Garrett*, 121 S. Ct. 955, 963 (2001) ("Accordingly, § 5 legislation *reaching beyond the scope of § 1's actual guarantees* must exhibit" congruence and proportionality) (emphasis added).

159. *See, e.g.*, 42 U.S.C. §§ 1983, 1988 (proscribing and providing remedies for, *inter alia*, state action that violates the federal Constitution).

160. *See* Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331 (2001). I say that proportionality analysis would not apply "in full dress," however, because one must wonder whether the Court would still consider relevant the nature and severity of the legislative burden, notwithstanding right-remedy correspondence. For example, the Court might express some concern under the proportionality test if confronted by a Section 5 statute making it a crime punishable by a mandatory 20-year prison term for a state law enforcement officer to conduct a pat-down search that violates the Fourth Amendment by exceeding a valid *Terry*-stop. *See* Terry v. Ohio, 392 U.S. 1 (1968) (outlining the conditions considered reasonable for an officer to stop and search a suspect).

161. *See* text accompanying notes 76-81 *supra*.

this task well,[162] the Court's methodological approach to the question of ends renders inexplicable its failure to engage in a similar originalist inquiry before articulating the "congruence and proportionality" constraint on Section 5 means. And, an originalist inquiry—whether focused on the Framers' actual subjective intentions, as the Court did with respect to the interpretation of Section 5 ends, or whether focused on the most likely public understanding of the amendment's plain language, as many contemporary originalists would do[163]—firmly supports the conclusion that Section 5 was designed and understood to impose a means-ends tailoring test that mimicked the test applied to Article I executory statutes. Indeed, the replacement of Article I's "necessary and proper" formulation with Section 5's "appropriate" standard is best understood as codifying Chief Justice Marshall's especially deferential gloss on the former language in *McCulloch*.

To begin with, the framing history of the Thirteenth and Fourteenth Amendment's Enforcement Clauses reveals that the same Framers whose intentions the Court canvassed regarding legislative ends appear uniformly to have embraced the *McCulloch* standard when discussing the tailoring requirement for legislative means. The drafters of Section 2 of the Thirteenth Amendment did not clearly explain their decision to employ the term "appropriate" rather than "necessary and proper" when proposing Section 2. Their debates clearly indicate, however, that "appropriate" was selected with the *McCulloch* standard in mind.[164]

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162. Trenchant criticism of the Court's originalist analysis is offered by several authors. *See, e.g.*, Engel, *supra* note 26, at 122-52; McConnell, *supra* note 26, at 174-83. *But see* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 82-100 (interpreting history of Fourteenth Amendment to support the conclusion that *Boerne* later reached).

163. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (distinguishing between the methodologies of "original intent" and "original meaning," the former focusing on the subjective intentions of the relevant Framers and the latter focusing on the objective original meaning that a reasonable listener would place on the words used in the Constitution at the time of a provision's enactment).

164. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson) (equating "appropriate" with "necessary and proper," and noting "[o]f the necessity of the measure Congress is the sole judge") (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819)); *id.* (statement of Rep. Shellabarger) (explaining that the relevant question concerning scope of Section 2 power is whether a particular measure "can be said to come within the rule laid down by the Supreme Court in innumerable cases [meaning *McCulloch* and its progeny], that in order to entitle this Government to assume a power as an implied power of this Government it 'must appear that it is appropriate and plainly adapted to the end'") (quoting STORY, *supra* note 51, at 416); Burt, *supra* note 162, at 93 n.44 ("In 1871, debating the Ku Klux Klan Act, [Representative] Bingham insisted the two formulations ["necessary and proper" and "appropriate"] were identical."). The Supreme Court itself has linked together the Section 2 enforcement power with the *McCulloch* standard. *See, e.g.*, Jones v. Alfred Mayer Co., 392 U.S. 409, 439 (1968) (explaining that Section 2 of the Thirteenth Amendment "clothes Congress with power to pass all laws *necessary and proper* for abolishing all badges and incidents of slavery in the United States") (emphasis added); The Civil Rights Cases, 109 U.S. 3, 20 (1883) (same).

To be sure, the drafters of Section 5 of the Fourteenth Amendment initially did employ the "necessary and proper" formulation.[165] This phrasing was later replaced with the "appropriate" formulation when the Framers changed the entire structure of the amendment to provide a primary judicial role in enforcing Section 1's guarantees. But there is no hint in the legislative record, nor logical implication from the structural change, suggesting that the Framers intended this terminological shift to ratchet up the required means-ends nexus.[166] Indeed, nowhere in the legislative history is any means-ends standard other than *McCulloch* mentioned, let alone endorsed. And just two years after Section 5's adoption, the Supreme Court once again equated "necessary and proper" with "appropriate," proclaiming

> [i]t must be taken then as finally settled, so far as judicial decisions can settle anything, that the words 'all laws necessary and proper for carrying into execution' powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but *appropriate*, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.[167]

Moreover, the plain language chosen by the Framers is best understood as

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165. As the Court observed in *Boerne*, Representative John Bingham's initial draft of the proposed amendment stated that:

> The Congress shall have power 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.

521 U.S. at 520 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

166. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.9 (describing this drafting revision and explaining that the revision "was never thought to have the effect of diminishing the scope of this congressional power"); TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 187-90 (1951) (same); McConnell, *supra* note 26, at 178 (asserting that the shift from "necessary and proper" to "appropriate" was a "mere change[] in nomenclature, with no substantive significance"); *see also* 2 CONG. REC. 414 (1874) (statement of Rep. Lawrence) ("The power to secure equal civil rights by 'appropriate legislation' is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ. This has been settled in *McCulloch vs. Maryland.*"); *id.* at 4085-86 (statement of Sen. Thurman) ("'[B]y appropriate legislation,' means nothing more in respect to the amendments to which it is attached, the thirteenth, fourteenth, and fifteenth, than does the last clause in the eighth section of the first article [i.e., the Necessary and Proper Clause]."); CONG. GLOBE, 42d Cong., 1st Sess., App. 83 (statement of Rep. Bingham, the principal drafter of the language that became the Fourteenth Amendment) ("The power to enforce this provision [the Fourteenth Amendment] by law is as full as any other grant of power to Congress."); CONG. GLOBE, 39th Cong., 1st Sess. 586 (1866) (statement of Rep. Donnelly) (construing Bingham's proposed "necessary and proper" language as providing "in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution").

167. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 615 (1870) (emphasis added); *see also* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (Section 2 of the Thirteenth Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.").

emphasizing the deference to be accorded congressional enforcement choices, by specifically eschewing any independent constitutional assessment of the "necessity" of particular congressional means. Direct comparison of the language of the Necessary and Proper Clause and Section 5 reveals an obvious similarity and an equally obvious difference: Section 5 repeats the requirement of propriety but omits the requirement of necessity.

The terms "proper" in Article I and "appropriate" in Section 5 (and the other similarly worded Enforcement Clauses) are etymologically linked, and as a linguistic matter it is difficult to deny their equivalent meaning in this context. Chief Justice Marshall used the terms interchangeably in *McCulloch*, for example, using the phrase "means which are appropriate" to capture the requirement that executory means be "proper."[168] One would thus be hard-pressed to ground a more stringent means-ends nexus in the term "appropriate" than in "proper."

Indeed, the term "necessary" is notable by its absence in Section 5. A reader of the text would naturally conclude, absent compelling nontextual evidence to the contrary, that Section 5 did not incorporate a necessity test into its means-ends nexus requirement. And this conclusion would be fully consistent with the Framers' understanding since, given *McCulloch*'s canonical status, the term "necessary" had long since ceased to be viewed—if it ever was—as imposing a meaningful independent constraint on Congress' choice of means to implement permissible ends. Recall that, while *McCulloch* made it clear that courts must review congressional choices to ensure they are "appropriate" in the sense of being "plainly adapted to" a legitimate end,[169] *McCulloch* (and *Fisher* even before that[170]) made it just as clear that courts should not second-guess Congress' judgment as to the "necessity" of congressional legislation.[171]

Thus the plain language of Section 5, coupled with the Framers' specific

168. *See* note 47 *supra*; *see also, e.g.*, Legal Tender Cases, 79 U.S. (12 Wall.) 457, 539, 542, 543 (1870) (describing and applying *McCulloch*'s test for "necessary and proper" authority by using the term "appropriate" and "appropriateness" to describe the notion of proper); United States v. Wrightwood Dairy Co., 315 U.S. 111, 121 (1942) (affirming Congress' power to control intrastate transactions "as is necessary and appropriate to make the regulation of the interstate commerce effective") (emphasis added).

169. *See, e.g.*, *McCulloch*, 17 U.S. at 423 (equating "being an appropriate measure" with being "really calculated to effect any of the objects entrusted to the government").

170. *See* note 45 *supra*.

171. *See* notes 43-47 *supra* and accompanying text. *McCulloch*'s deferential treatment of the "necessary" criterion was clearly familiar to the Fourteenth Amendment's Framers. *See also, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1124 (statement of Rep. Cook) (noting that "Congress should be the judge of what is necessary for the purpose of securing to [freed slaves] those rights" when construing the scope of Section 2 of the Thirteenth Amendment); *id.* at 1836 (statement of Rep. Lawrence) ("If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of necessity is a question of legislative discretion, not of judicial cognizance.").

endorsement of the *McCulloch* standard, powerfully dictates the conclusion that "appropriate legislation" means nothing more than legislation that is "plainly adapted" or "conducive to" or "really calculated to" enforcing Fourteenth Amendment provisions. Section 5 does not impose a judicially enforceable requirement that Congress' choice of means to enforce these provisions satisfy any particular standard of "necessity" as compared with alternative means. Nor does "appropriate legislation," any more than "necessary and proper" laws, invite any judicial inquiry into the need for Congress to address the identified evil or strive to promote the identified good in the first place.[172] In other words, using the Court's *Boerne* terminology (at least as I have clarified it), the plain language and original understanding of Section 5 impose on enforcement measures a requirement of "congruence," but eschew any judicially enforceable requirement of "proportionality."

Of course, even if one downplays the emendation of "necessary" from the conventional formulation and views the term "appropriate" as a synonym for *both* components of the phrase "necessary and proper," it is *still* the case that the phrase, as understood by the Fourteenth Amendment Framers operating on a post-*McCulloch* legal landscape, captured only the concept of "congruence" and not "proportionality," since the issues of necessity and need were left to congressional discretion.

This plain language interpretation is buttressed by further evidence of the Fourteenth Amendment Framers' contemporaneous understanding of the breadth and significance of Section 5's grant of power. First, it is quite telling that no participant in the debates over the Reconstruction Amendments' Enforcement Clauses proffered and defended any alternative standard for defining the scope of Congress' enforcement power; incorporation of *McCulloch*'s liberal means-ends standard was either expressly invoked or implicitly assumed.[173] For a Court willing (at times) to view the Framers' silence on a particular issue as strong evidence of a specific intent to endorse prior understandings,[174] here the silence is deafening.

Second, the deeds of the Fourteenth Amendment's Framers, the Thirty-Ninth Congress, reveal the breadth of the prevailing understanding of "appropriate" legislation. The Framers clearly had a capacious view of congressional power to enforce the Thirteenth Amendment because they enacted the Civil Rights Act of 1866,[175] which "swept far beyond merely prohibiting slavery and involuntary servitude."[176] As the Supreme Court has

172. *See* notes 48-51 *supra* and accompanying text.

173. *See* note 166 *supra* and accompanying text.

174. *See* Alden v. Maine, 527 U.S. 706, 741-43 (1999) (stating that Framers' silence as to states' immunity from private suit in state court is best explained by the assumption that no one even considered the possibility that such immunity would be stripped).

175. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

176. Amar, *supra* note 26, at 823; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-40 (1968) (noting that the leaders of Congress who had authored the Thirteenth

put it, "[w]hether or not" Section 1 of the Thirteenth Amendment "did any more than" abolish slavery, "it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more."[177] This understanding of "appropriate legislation" as operationalized in Thirteenth Amendment practice prevailed while the Thirty-Ninth Congress drafted the parallel Enforcement Clause of the Fourteenth Amendment.

Third, both by word and deed the Fourteenth Amendment Framers made clear their desire not to vest the judiciary with exclusive or even primary jurisdiction with respect to safeguarding Section 1 rights. Republican leaders of Congress criticized the Supreme Court's recent decisions indicating a lack of sympathy with the basic normative vision of the Reconstruction Amendments, such as *Dred Scott v. Sandford*[178] and *Ex parte Milligan*.[179] Thus, "Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power."[180] At the same time, members of Congress reflected this fear by proposing (though never enacting, apparently because of doubts as to Congress' power to do so) various supermajority requirements on Supreme Court adjudication to protect federal legislation—and even the Fourteenth Amendment itself—from judicial invalidation.[181] Such contemporaneous evidence of the Section 5 Framers' attitude towards judicial protection of Section 1 rights confirms the

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Amendment "had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act").

177. *Jones*, 392 U.S. at 439.

178. 60 U.S. (19 How.) 393 (1856).

179. 71 U.S. (4 Wall.) 2 (1866). *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868) (statement of Rep. Bingham) (denouncing *Dred Scott*); CONG. GLOBE, 39th Cong., 2d Sess. 1484 (1867) (statement of Rep. Wilson) (denouncing *Ex parte Milligan*).

180. McConnell, *supra* note 26, at 182.

181. *See, e.g.*, H.R. 1015, quoted in CONG. GLOBE, 39th Cong., 2d Sess. 616 (1867) ("[N]o judgment shall be rendered or decision made [by the Supreme Court] against the validity of any statute, or of any authority exercised by the United States, except with the concurrence of all the judges of the said court."); S. 163, quoted in CONG. GLOBE, 40th Cong., 2d Sess. 503-04 (1868) (No Supreme Court case involving "the action or effect of any law of the United States shall be decided adversely to the validity of such law without the concurrence of two thirds of all the members of said court in the decision . . . ."); H.R. 30, reported in CONG. GLOBE, 40th Cong., 2d Sess. 473 (1868) ("requiring the concurrence of two thirds of the judges of the Supreme Court of the United States in order to pronounce a law passed by Congress to be unconstitutional"); H.R. 379, reported in CONG. GLOBE, 40th Cong., 2d Sess. 668 (1868) (same).

Representative Bingham specifically supported a two-thirds supermajority requirement in part to protect the Fourteenth Amendment itself from attack based on the disputed validity of its ratification procedures:

> This great and victorious people, we are told, cannot amend their own Constitution without the concurrence of some, at least, of the disorganized communities who but yesterday rushed into war with arms in their hands and attempted to batter down the holy temple of our liberties. I desire this law to be passed so that the question shall only be touched, if at all, by the consenting voice of two thirds of the judges of that court; and then, if they dare to do it, let an appeal again be taken from their atrocious decision to the people.

CONG. GLOBE, 40th Cong., 2d Sess. 484 (1868).

Framers' intention, reflected in the plain language of the Enforcement Clause, to provide Congress with capacious authority to enforce those rights itself.

One further point bears mention. The Framers' equation of "appropriate" with *McCulloch*'s conventional means-ends standard can be further bolstered by considering an interesting, if ultimately flawed, structural argument focusing on the relationship between the Necessary and Proper Clause and all other congressional powers. Recall that this Clause structurally operates to supplement each of Congress' enumerated and other primary powers, as well as each of the powers vested in the executive and judicial branches of government. Section 5 expands the scope of Congress' enumerated powers, by adding the power (as defined in *Boerne*) to enforce, *inter alia*, court-defined Section 1 rights. Just as the Necessary and Proper Clause supplements each of the specific grants of power enumerated in Article I, such as the power to "raise and support Armies," so too, it would seem as a matter of constitutional structure, the Necessary and Proper Clause supplements the enumerated Section 5 power (as well as all of the other enumerated Enforcement Clauses sprinkled throughout the Constitution's amendments). Just as Congress can both "raise Armies" *and* enact executory laws it deems necessary and proper (assessed under *McCulloch*) to achieve that end, Congress can both "enforce" judicially defined rights against states *and* enact executory laws it deems necessary and proper (again assessed under *McCulloch*) to achieve *that* end. In other words, the argument would run, the same "bubble" of incidental powers surrounding each Article I enumerated power should also surround each enumerated Enforcement Clause power. According to this argument, at the end of the day the *McCulloch* standard still governs Congress' ability to restrict state violations of judicially defined rights, even if only through the confluence of Section 5 *and* the Necessary and Proper Clause, rather than through the former clause by itself.

The proper response, I think, is that this structural argument is too clever by half. Section 5 is of course an enumerated power, but unlike those enumerated in Article I (other than the Necessary and Proper Clause) this power is itself an executory power of sorts. Section 5 does not simply declare that Congress has the power to enforce Section 1, but says more specifically that Congress may do so "by appropriate legislation." Thus unlike, say, the Commerce Clause, Section 5 contains its own built-in standard for defining permissible executory legislative actions. As a result, the specific standard of "appropriate" legislation in Section 5 is better viewed as *supplanting* the conventional *McCulloch* authority for implied executory legislation, rather than being *supplemented* by it. Put differently, the "by appropriate legislation" language overrides or impliedly repeals the erstwhile applicability of the Necessary and Proper Clause as a supplement to Section 5's enumerated authority; to view it otherwise is to double-count the scope of permissible means-ends reasoning.

But this insight, while responsive to the structural argument outlined

above, provides additional reason to reject the Court's position that the standard for Section 5 "appropriate" legislation is more restrictive than the standard for Article I "necessary and proper" legislation. It is one thing to understand Section 5's reference to "appropriate" as supplanting, essentially through an implied repeal, the erstwhile applicability of the Necessary and Proper Clause. But given the presumption against implied repeals, it is quite another thing to assume—without any basis in text or legislative history—that the new test of "appropriate" was intended to replace the *McCulloch* standard with a *stricter* means-ends test. Of course, it is logically possible for a later-adopted narrow rule to repeal impliedly an earlier-adopted broad rule. But it seems especially unlikely in this context; had the Framers intended to replace a longstanding rule of broad congressional authority with a narrower new standard, one would expect that there would be at least a hint of such an intent in the legislative debates surrounding the Fourteenth Amendment. But there is none; the only discussions of the scope of Congress' enforcement authority explicitly invoked or intentionally mimicked the conventional *McCulloch* standard.[182] Thus, the recognition that Section 5 impliedly repealed the erstwhile applicability of the Necessary and Proper Clause as a structural matter makes it all the more difficult to argue that Section 5 was originally intended or understood to retreat from, rather than embrace, the "hitherto universally accepted" standard for means-ends review.[183]

It therefore appears clear that the Court's announced congruence and proportionality standard decisively breaks from the best textual and originalist understanding of the Enforcement Clause. Given the Court's professed reliance on text and the Framers' original intent regarding the scope of legitimate ends, the Court's refusal to engage in serious textual interpretation or to explore the Framers' original intent regarding the scope of legitimate means renders its conclusion all the more suspect. Moreover, given the textual and historical support for *McCulloch*-style means-ends scrutiny of Section 5 measures, the separation of powers and federalism arguments that purportedly support the heightened congruence and proportionality test bear a heavy burden of persuasion. Let us now consider whether they can meet this burden.

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182. *See* notes 165-167 *supra* and accompanying text.

183. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 539 (1870) (explaining that the "rules of construction" for assessing the scope of Congress' "discretion with respect to the means by which the powers [the Constitution] confers are to be carried into execution" were "settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted"); *see also* Edward Hartnett, *A "Uniform and Entire" Constitution; or, What if Madison had Won?*, 15 CONST. COMMENT. 251, 269-70, 275-76 (1998) (stating that had the Thirteenth and Fourteenth Amendments been interwoven into the original constitutional text rather than appended to it as stand-alone provisions, the Enforcement Clauses would have been included merely by adding to the end of the existing Necessary and Proper Clause the phrase "and to enforce the limitations and obligations imposed by this Constitution").

III. *BOERNE*'S REVISIONISM: CAN HEIGHTENED MEANS-ENDS SCRUTINY FOR SECTION 5 ENFORCEMENT MEASURES BE JUSTIFIED?

While in *Boerne* the Court offered some reasons for concluding that Congress can enforce only judicially defined as opposed to congressionally defined rights, the Court offered little justification for imposing the "congruence and proportionality" restriction on Congress' choice of means. The Court said no more than that this restriction serves to distinguish between enforcement measures that are truly remedial (and hence serve the legitimate ends of protecting court-defined Section 1 rights) and those that are impermissibly substantive (because necessarily predicated upon protecting a congressionally defined right).[184] I consider here several possible rationales for this heightened means-ends scrutiny: concerns about pretextual legislation, various separation of powers concerns, and various federalism concerns. In the end, none of these rationales fully supports the Court's sharp break from its longstanding employment of the more deferential *McCulloch* standard.

A. *A Concern for Pretextual Exercises of Congressional Authority*

Various scholars have suggested that this heightened means-ends nexus requirement might be described as ferreting out the "pretextual" use of Section 5. In other words, the test is designed to prevent Congress from justifying legislation as a remedial measure when Congress is "really" trying to impose its own definition of privileges or immunities, due process, or equal protection rights on the states.[185]

One might initially ask whether such a "pretext" analysis is properly applied to Section 5, since the Court does not similarly scrutinize the motives underlying any particular exercise of most other enumerated powers.[186] But if

184. *See* text accompanying note 87 *supra*.

185. *See, e.g.*, Dorf & Friedman, *supra* note 26 (arguing that congruence and proportionality test is "[t]he mechanism the *Boerne* Court chose for discerning bona fide remedial measures from impermissible efforts to ratchet up substantive constitutional protection"); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 131-32 (1997) (treating *Boerne*'s Section 5 analysis as resting on a "purpose" test); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 628 (2000) ("A disproportional law may be a law not really designed for one asserted purpose but to sweep more broadly or in other directions. In this sense, *Flores*'s proportionality test may be a reinvigoration of the 'legitimate end' test of *McCulloch v. Maryland*, through a mechanism perhaps less difficult to administer, in light of the challenges of identifying a collective legislative intent and the reluctance of courts to attribute improper motives to a coordinate branch of government.") (footnotes omitted).

186. *See, e.g.*, United States v. Darby, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

Section 5 is viewed as a power that, like the Necessary and Proper Clause, is intrinsically "telic" in nature in that the power is authorized only insofar as it is directed toward an identified constitutional end, then a pretext inquiry seems appropriate.[187] Indeed, *McCulloch* itself suggested that courts should scrutinize Congress' executory laws to ensure they are truly designed to serve legitimate ends, rather than being pretextual exercises of a forbidden police power.[188] Thus, as Professor Vicki Jackson has observed, the congruence and proportionality test might be viewed as "a *sub silentio* reinvigoration of the 'pretext' line of *McCulloch* stemming from a perception that Congress behaves in 'pretextual' ways too much of the time."[189]

However, as Professor Jackson's carefully chosen word "reinvigoration" implies, since *McCulloch* the courts have eschewed any meaningful role in policing this boundary by asking whether particular exercises of the Necessary and Proper Clause are really pretexts to assert a forbidden general police power.[190] Rather, courts defer substantially to congressional judgment in the Article I context.

The Court's apparent reinvigoration of pretextual analysis in *Boerne* and its progeny raises two related questions. First, what constitutional values are at stake, such that the fear that Congress might stretch beyond the limits of its constitutional authority by using granted powers beyond their limited purposes justifies heightened judicial scrutiny to ferret out such statutes? Is it because the motives underlying pretextual statutes are constitutionally troublesome *per se*, or because the effects of such extended congressional authority contravene federalism values? Second, why should there be more rigorous scrutiny for pretextual exercises of Section 5 than for pretextual exercises of the Necessary and Proper Clause?

Absent a normative answer to these questions, the claim that the congruence and proportionality test is designed to ferret out pretextual exercises of Section 5 power remains purely descriptive. In other words, even if a desire to screen out pretextual uses of Congress' Section 5 power *explains*

187. Professor Laurence Tribe suggests that congressional motive may be relevant for assessing the limits of congressional power under any grant of authority "that contains its own statement of the purposes for which it may be invoked," and he lists as examples the Necessary and Proper Clause, the Reconstruction era Enforcement Clauses, and the clause empowering Congress to provide for patents and copyrights "[t]o promote the Progress of Science and useful Arts," U.S. CONST. art. 1, § 8, cl. 8. 1 TRIBE, *supra* note 28, at 803 n.12. I am unsure whether text alone is sufficient to distinguish between these so-called purpose-specific clauses and those treated as "plenary" and hence not subject to motive scrutiny (such as the power "to regulate Commerce" in various contexts, which could plausibly be read to contain a notion of commercial purpose). But the context as well as text of the Necessary and Proper Clause and Enforcement Clauses reveals their telic nature.

188. *See* text accompanying notes 41-42 *supra*.

189. Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L. J. 691, 720 (2000).

190. *See* text accompanying note 42 *supra*.

the Court's insistence on a carefully tailored means-ends nexus, the question remains what *justifies* this insistence uniquely in the Section 5 context.[191] We must therefore consider and evaluate plausible justificatory arguments for this unique concern.

B. *Separation of Powers Justifications for Heightened Means-Ends Scrutiny*

The Court's only express justification for requiring "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" was that "[l]acking such a connection, legislation may become substantive in operation and effect."[192] And "substantive" legislation is unacceptable because the Court, and not Congress, has the power to decree the substance of the Fourteenth Amendment's restrictions on the States: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[193] The stated rationale for heightened means-ends scrutiny, therefore, apparently is to preserve judicial authority over constitutional interpretation.

Unfortunately, assessing whether the Court's separation of powers concern justifies a heightened means-ends tailoring requirement for Section 5 measures—and only Section 5 measures—is rendered difficult by the fact that the Court never explains what, *precisely*, is wrong with so-called substantive congressional enforcement measures. Even an exercise of what the Court would call substantive Section 5 authority would not change the Constitution in a conceptual sense, nor would it directly change what the Constitution means *to the Court.* So what drives the Court's apparent concern for preserving its authority to dictate "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning"?[194] What does the Court think is truly at stake?[195]

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191. A second question lurks here: Even if the Court can justify a special focus on pretext in the Section 5 context, is the heightened tailoring requirement an appropriate mechanism for detecting pretextual legislation? Professors Robert Post and Reva Siegel suggest that "the criteria of congruence and proportionality seem an odd and awkward way" to discern legislative intent. "[A] court that wishes to discover congressional purpose is perfectly capable of asking the question directly and simply." Post & Siegel, *supra* note 26, at 510-11. In my view, however, even if the question of congressional motive can sometimes be answered with a more direct exploration of, *inter alia*, a statute's legislative history, there is nothing odd about supplementing such an inquiry with a means-ends test.

192. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

193. *Boerne*, 521 U.S. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

194. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000).

195. The Court does not suggest and cannot mean that Congress can never exercise *any* of its legislative powers based on an interpretation of the Constitution that diverges from the Court's. So long as Congress does not take or authorize governmental action that is itself prohibited by the Constitution, Congress can and frequently does legislate—or choose not to

1. *Judicial control over the implementation of constitutional norms.*

One possibility is that the Court really cares about ensuring its ultimate control over the actual implementation of constitutional norms.[196] The Court did declare in *Kimel* that the congruence and proportionality test is designed to ensure that the "ultimate interpretation *and determination* of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[197] Perhaps the Court's premise is that, as a matter of institutional responsibility, it is the Court and not Congress which is responsible for determining the extent to which legal norms—both those granting government powers and those restricting the same—are articulated *and operationalized* in the name of the Constitution. In the Section 5 context, in other words, the Court wants to ensure that Fourteenth Amendment rights do not, in practice, become something other than what the Court says they should be.

If this type of concern is the driving force behind the Court's desire to rein in Congress, it is subject to challenge on both intrinsic and extrinsic grounds. First, the Court's position can be criticized as insufficiently sensitive to the distinctive institutional factors that shape and sometimes constrain the Court's and Congress' ability to draft enforceable doctrines protecting constitutional rights. Second, even if the Court's position is intrinsically sound, it is difficult to explain why the argument should apply uniquely to constrain Congress' Section 5 authority, and not also Congress' authority to enact necessary and proper Article I legislation. I consider these criticisms in turn.

a. *The institutionalist critique.*

Various scholars have persuasively argued that sometimes there is a divergence between the "Constitution-as-applied-by-courts and the Constitution-in-the-abstract,"[198] or at least between the former and the

legislate—based on its own interpretation of constitutional norms. *See Boerne*, 521 U.S. at 535 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."). The Court's argument in *Boerne* is a narrower one: For purposes of determining the outer reach of Section 5 authority, the Court and not Congress is the final arbiter of the meaning of Section 1's provisions.

196. *See, e.g.*, Lupu, *supra* note 151, at 812 ("Moreover, a broad reading of Section 5—the type of reading suggested by *McCulloch*, representing maximum elasticity of implied power—is in stark tension with the Court's *Marbury* function. When Congress legislates broadly to prevent what it perceives as violations of Section 1 of the Fourteenth Amendment, it strikes at the Court's dominance in law declaration . . . .").

197. *Kimel*, 528 U.S. at 81 (emphasis added).

198. McConnell, *supra* note 26, at 189; *see, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978). For criticism of this way of characterizing the relationship between rights and judicial doctrine, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

Constitution as construed by someone "not subject to the same institutional constraints as courts."[199] Such a gap calls into question the Court's unwillingness to view Congress as a partner rather than competitor in the project of constitutional interpretation. Suppose a particular Section 5 measure is designed to secure a right defined somewhat more broadly than the Court defines it, and yet the Court's own doctrinal definition of the right reflects not the right in its "true abstract" form but rather is somewhat truncated because of institutional factors constraining its interpretive function. Then, so the argument goes, the congressional measure might be seen as fully consistent with judicial supremacy in constitutional interpretation because the measure actually fleshes out the right's actual protection in a manner that better matches the Court's own unconstrained vision of what the right should mean. The scholars developing this critique have generally argued that the Court should employ a more capacious definition of legitimate Section 5 ends (so as to include enforcing the "true" as opposed to truncated judicial protection for a Section 1 right). But the same line of reasoning could be deployed to argue that the Court should not employ a means-ends tailoring requirement that is so rigorous that it precludes Congress from compensating for judicial underprotection of abstract rights.

Scholars have focused upon two different sorts of institutional constraints that sometimes lead courts to develop judicial doctrines that, viewed from a less institutionally constrained perspective, underenforce particular constitutional rights. The first sort of constraint arises from the need of courts to implement rights through workable doctrines: based on institutional and sometimes empirical considerations, courts must translate abstract norms or rights into specific and elaborate legal doctrines useful for resolving concrete cases. Courts generally bring constitutional norms to life by employing one of various types of doctrinal tests, for example, per se rules, balancing tests, and purpose rules,[200] and those tests may "identify as unconstitutional only a subset of legislative actions which contravene the norm motivating the doctrine."[201]

The second sort of constraint arises from judicial fealty to structural separation of powers principles, including the presumption of constitutionality properly accorded to the actions of coordinate branches and the presumptive caution properly exercised by life-tenured judges in evaluating the actions of more democratically accountable actors. To the extent judges take these structural norms into account in determining the scope of judicially defined rights, "it follows that there will be cases in which judicial interpretations of the Constitution will differ from the way those judges would interpret the

199. Post & Siegel, *supra* note 26, at 467.

200. *See* Fallon, *supra* note 185, at 75-106 (describing eight such doctrinal tests).

201. Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1192 (1986); *see* Fallon, *supra* note 185, at 66 (same).

Constitution independently of institutional restraints."[202]

Thus, both because of the demands of doctrine-formation and because of separation of powers principles urging judicial caution in invalidating governmental action, there is some inevitable underenforcement of constitutional rights as viewed from even the courts' own "purist" or unconstrained perspective. According to the institutionalist critique, it would be fully consistent with the Court's proclaimed desire to maintain its interpretive supremacy for it to uphold Section 5 measures that are predicated on legislative interpretations of Section 1 rights that more closely approximate the Court's purist views than do its articulated doctrinal contours.[203] The Court's unwillingness to consider this possibility thus proves counterproductive to its own presumed objective.

While scholars have generally focused on the presence of this gap between abstract and judicially protected rights, Professors Robert Post and Reva Siegel have recently evaluated this gap from a more dynamic, diachronic perspective. They argue that, at least in the specific context of equal protection norms, the Court's stingy approach to Congress' enforcement discretion might undermine the Court's ability to implement its own vision of constitutional rights over the span of time. After carefully detailing and evaluating the history of civil rights adjudication and legislation beginning with *Brown v. Board of Education*[204] and extending throughout the latter half of the twentieth century, Post and Siegel

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202. McConnell, *supra* note 26, at 189; *see id.* ("The restrained judge will give elected officials the benefit of the doubt with respect to governmental purpose, will assume facts favorable to the government in assessing effect, will seek to avoid gratuitous conflict with legislative authority, and will accept reasonable interpretations of the Constitution that support legislative action.").

203. *See, e.g.*, McConnell, *supra* note 26, at 156 (explaining that unlike courts, "Congress need not be concerned that its interpretations of the Bill of Rights will trench upon democratic prerogatives, because its actions *are* the expression of the democratic will of the people") (emphasis added); Sager, *supra* note 198, at 1239 ("If the federal judiciary is constrained by institutional concerns from exhausting the concept of [a constitutional right], congressional attempts pursuant to Section 5 to enlarge upon the judiciary's limited construct do no violence to the general notion that the federal judiciary's readings of the Constitution are dispositive within our system.").

In *Garrett*, Justice Breyer's dissent advanced such an argument in response to the Court's objection that Congress' attempt in the ADA to require state employers to justify refusals to accommodate persons with disabilities deviated from the *Constitution's* requirement that the employee "negate reasonable bases for the employer's decision," 121 S. Ct. 955, 967 (2001) (Breyer, J., dissenting). Justice Breyer argued that: "The problem with the Court's approach is that neither the 'burden of proof' that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power. 'Limitations stemming from the nature of the judicial process . . . have no application to Congress.'" *Id.* at 972 (quoting Oregon v. Mitchell, 400 U.S. 112, 248 (1970) (Brennan, J., concurring in part and dissenting in part)). *See also id.* at 973 (Breyer, J., dissenting) ("There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations."). The Court did not respond to the dissent's argument.

204. 347 U.S. 483 (1954).

conclude that the Court relied on Congress as a necessary partner in actualizing into institutional life the Court's own initial or evolved interpretation of the Equal Protection Clause.

This is so for two reasons. The first is that congressional action supporting judicial norms over a sustained period of time is sometimes necessary to undermine the force of the institutional constraints that can create a static right-doctrine gap. This is exemplified by the evolution of judicially enforced equality norms as applied to race discrimination:

> Nothing better illustrates this than *Brown* itself. *Brown* forced the nation to confront a new and compelling vision of equal citizenship under the Fourteenth Amendment. But the Court, acting by itself, was unable to bring the nation to embrace the commitments it had expressed in *Brown*. As Judge Wisdom famously observed, "[t]he courts acting alone have failed." It was only with the intervention of Congress and the Executive Branch in 1964 that the vision announced in *Brown* began to become a living constitutional reality.[205]

As Post and Siegel demonstrate, for example, Congress' enactment of the Civil Rights Act of 1964[206] provided needed institutional and popular support for the Court's vision of equality so as to impress, over time, the Court's vision firmly into law. Thus, "the Court will sometimes require the assistance of Congress to succeed in the very task of constitutional interpretation that *Boerne* seeks to safeguard."[207]

The second reason is that sometimes the Court's own ultimate crafting of equal protection doctrine has been heavily influenced by congressional statutes that, when first enacted, might well have extended beyond the Court's own concurrent vision of equality. In certain contexts, "Congress, as a popular legislative body, is well situated to perceive and express evolving cultural norms," and therefore "Congress' understanding of equality is a vital resource for the Court to consider as it interprets the Equal Protection Clause."[208] While to some degree the evolution of racial equality norms reflects this phenomenon as well, this second point is perhaps more clearly exemplified by the evolution of judicially enforced equality norms as applied to sex discrimination. As Post and Siegel explain, the Court did not hold facial sex-based classifications to trigger heightened judicial scrutiny until the 1970s, after the growth of the feminist movement and congressional enactment of legislation prohibiting sex discrimination in the workplace.[209] And the plurality opinion in the pivotal case

205. Post & Siegel, *supra* note 26, at 515 (quoting United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967)).

206. 42 U.S.C. § 2000e (1994).

207. Post & Siegel, *supra* note 26, at 519.

208. *Id.* at 520.

209. *Id.* at 520-21.

Frontiero v. Richardson[210] frankly acknowledged how congressional action had influenced the Justices' evolving approach to sex discrimination.[211] Recent history thus reveals that sometimes congressional enforcement of equality norms prompts a learning experience for the Court, such that unduly fettering Congress through heightened Section 5 scrutiny might preclude the Court from learning from and perhaps later incorporating norms that can only be perceived, appreciated and developed by a popularly accountable institution.

For both of these reasons, Post and Siegel warn, *Boerne*'s heightened means-ends scrutiny could prove counterproductive for the Court's own purposes. If the institutional disparities of perspective and approach between the Court and Congress

> are spurned and discarded in the name of maintaining ultimate judicial control over the meaning of the Constitution, the Court risks failing to make its own constitutional vision 'more firmly law.' In such circumstances, to read the *Boerne* test to require a strict form of narrow tailoring would be actually to endanger the Court's own interpretive authority.[212]

Thus, the authors conclude, in the equal protection and other similar contexts the Court should display a greater willingness to uphold Section 5 measures predicated on somewhat broader definitions of Section 1 rights than the Court has previously or would contemporaneously articulate.

Both the static and dynamic accounts of a gap between abstract rights and judicial doctrine concretizing those rights are compelling, and I agree that this gap ought self-consciously to inform various aspects of judicial decisionmaking.[213] And while I am quite sympathetic to the challenge to *Boerne* based on this gap, I think it appropriate to sound a note of caution. Before acting on this trenchant criticism, one must at least consider the possibility that ceding to Congress a meaningful role in the development of constitutional norms through Section 5 might in certain contexts constrain rather than expand the operational reach of rights.

Viewed in a static sense, judicial doctrine sometimes *overenforces* rather than underenforces the "pure" scope of a right, because the requirement that courts devise workable doctrines to decide concrete cases sometimes leads the Court to deploy doctrines such as bright-line rules that proscribe more conduct than that which actually contravenes the norm in question.[214] Perhaps the most prominent of many examples of such overenforcement is *Miranda v.*

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210. 411 U.S. 677 (1973).

211. *Id.* at 687-88.

212. Post & Siegel, *supra* note 26, at 519; *see also id.* at 522 ("In fact, history suggests that there are circumstances in which imposing such [means-ends] restrictions might well diminish, rather than enhance, the Court's authority in interpreting the Constitution.").

213. *See, e.g.*, Caminker, *supra* note 201, at 1202-09 (courts ought to take this gap into account when fashioning remedies for unconstitutional statutes).

214. *See* Fallon, *supra* note 185, at 65 ("[C]onstitutional tests frequently *either overenforce* or underenforce constitutional norms . . . .") (emphasis added).

Arizona.[215] The Court has long interpreted the Fifth Amendment's Self-Incrimination Clause (and the Fourteenth Amendment's incorporation thereof) to preclude the use in a criminal case of a defendant's inculpatory statements that were not truly voluntary because they were obtained through compulsion.[216] *Miranda* held that the Fifth Amendment additionally requires that statements produced through custodial interrogation be suppressed from the prosecution's case-in-chief absent the provision of specifically identified safeguards now called the *Miranda* warnings (or equally effective measures sufficient to dispel the otherwise inherently coercive environment such interrogation creates).[217] Frequently (albeit unhelpfully) described as a "prophylactic rule," this additional requirement reflects an awareness that courts cannot devise and feasibly apply a doctrinal test that will screen out all, but only, those statements that are "compelled" in the constitutional sense (thus perfectly protecting the "pure" scope of the right against self-incrimination). In particular, applying a totality of the circumstances test for voluntariness on a case-by-case basis would likely underenforce the scope of the right. Put differently, this judicial doctrine would not satisfy the dictates of the Fifth Amendment.[218] On the other hand, the *Miranda* doctrine extends judicial

215. 384 U.S. 436 (1966).

216. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (affirming this interpretation of the Self-Incrimination Clause).

217. *See Miranda*, 384 U.S. at 467-79; *see also* Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming the requirement of *Miranda* warnings).

218. *Miranda* is perhaps best understood as reflecting a judgment that the voluntariness test, based on numerous state and federal trial judges' evaluations of the totality of circumstances of a given interrogation, insufficiently protected the Fifth Amendment right because of an unacceptably high error-rate. Despite courts' best efforts, the voluntariness test likely will generate a number of false-negatives, meaning confessions that are truly involuntary under the constitutional standard but that nevertheless survive a court's case-by-case scrutiny, either because the factors are so subjective to balance, or because it is difficult to reconstruct the facts of the interrogation (especially when the fact-finding process often pits the claims of a suspect against those of police officers). *See Dickerson*, 530 U.S. at 442 ("In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.") (citation omitted). The Court might have also been concerned by the cost in terms of judicial resources in applying the voluntariness test on a case-by-case basis, and the cost in terms of disuniformity of treatment (since lower courts seemed to be making inconsistent decisions applying this subjective test). *See id.* at 444 ("[T]he totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."). Finally, the requirement that officers themselves verbally articulate the specified warnings arguably influences their own behavior in a way that reduces the frequency of actual coercion during custodial interrogations. For at least the false-negative and maybe all of these reasons, the Court decided that the totality-of-the-circumstances test was insufficient to protect the constitutional right at stake, and thus decided instead to enforce the bright-line *Miranda* rules so as to sufficiently minimize false-negatives and make the enforcement process judicially more manageable and uniform.

protection for the right against self-incrimination beyond that actually required by the Court's own interpretation of the right's conceptual scope, in the sense that the doctrinal test will occasionally lead to the suppression of statements that were not actually compelled. The same general description fairly applies to a large number of judicial doctrines, applied in the area of constitutional criminal procedure and elsewhere.[219]

My cautionary note about the institutionalist critique of *Boerne*'s supremacy-based rigidity in assessing Section 5 measures is this: If the critique justifiably supports judicial deference to congressional measures enforcing the "true" scope of a constitutional right where the Court concedes that that scope is broader than its own, underprotective judicial doctrine, one might plausibly argue that the critique also supports judicial deference to congressional measures providing *lesser* protection for a constitutional right, where the Court concedes that the right's "true" scope is narrower than its own, overprotective

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As an aside, despite many complaints to the contrary, this explanation of *Miranda* can square it with many of the later-recognized "exceptions" to the *Miranda* rule, such as *Harris v. New York*, 401 U.S. 222 (1971), which held that statements obtained through non-*Miranda*-compliant custodial interrogations can be used to impeach the defendant's testimony at trial. The benefits and costs of applying *Miranda*'s irrebuttable presumption that non-*Miranda*-compliant interrogations are "compelled" differ when incriminating statements are used for impeachment purposes rather than in the case-in-chief. The issue of impeachability will arise only in a smaller subset of all cases, because many defendants will not take the stand, and many of those who do will not perjure themselves in a manner impeachable by their earlier confession, so the benefits of expanding the doctrinal test beyond voluntariness are not as great in this context. Since fewer confessions will be at issue, the absolute number of improperly admitted coerced confessions will be lower than if the Court used the voluntariness test even for admissibility of statements in the case-in-chief. Since fewer confessions will be at issue, the voluntariness test will consume fewer scarce judicial resources and will lead to less divergent lower court decisions. And the requirement that officers provide warnings to enable introduction of elicited statements in the prosecutor's case-in-chief remains sufficient to influence police behavior so as to deter actual coercion. On the other hand, the costs of an overinclusive doctrinal test would be higher in the impeachment context—the use of non-*Miranda*-compliant confessions for impeachment purposes is important to ensure that defendants do not have an opportunity to take the stand and perjure themselves with impunity. I personally wonder whether the Court reached the correct conclusion in *Harris* even given the somewhat different cost-benefit analysis. But my point for present purposes is merely that it is not conceptually incoherent for the Court to conclude in *Miranda* that the institutional inability of state and federal courts to avoid false-negatives with the voluntariness test justifies a broader doctrine with respect to the prosecution's case-in-chief, and yet to conclude in *Harris* that the same institutional constraints do not justify a similarly broad doctrinal rule with respect to impeachment. One can articulate a similar defense (with somewhat different cost-benefit criteria) of other exceptions to *Miranda*, such as *New York v. Quarles*, 467 U.S. 649 (1984) ("public safety" exception), and *Michigan v. Tucker*, 417 U.S. 433 (1974) ("fruit of the poisonous tree" exception).

219. For a list and discussion of judicial doctrines that overprotect the conceptual right at issue, see Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. (forthcoming 2001) and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

judicial doctrine. In other words, while in some cases Congress might offer greater protection for a right than does the Court, in other cases such as *Miranda*, Congress might respond to the judiciary's overenforcement of a right by offering it somewhat lesser protection.

To be sure, one might counter that Section 5 should be interpreted as containing a one-way ratchet, such that Congress can act to "correct" judicial underprotection but not overprotection of Section 1 rights. Such a restriction would conform to the notion that the separation of powers among our three branches of government generally and intentionally generates a rights-protective, libertarian bias.[220] But Section 5's term "enforce" does not clearly imply authority only for pro-rights congressional action, as opposed to any congressional action that implements a valid congressional definition of the Section 1 right however it compares to the Court's own view. Indeed, a couple of scholars have maintained, at least in specific contexts, that such a strict one-way ratchet cannot easily be squared with the institutional critique's premise.[221] To my mind, the question of whether and in what contexts Congress may supplant judicial doctrines with weaker protections for constitutional rights turns on some complex jurisprudential considerations.[222]

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220. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1504 (1987) ("[B]uilt into the general structure of the Constitution is a libertarian bias based on checks against constitutionally suspect laws and in favor of the broadest of the various constructions of the constitutional right given by the three branches."); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1535 (2000) (proposing, with respect to the allocation of interpretive authority among the three branches, "a libertarian presumption that favors whichever institution is most protective of the liberty in question").

221. *See, e.g.*, Dorf & Friedman, *supra* note 26 (suggesting Congress can retrench to some extent from *Miranda*'s safeguards, so long as the replacement set of safeguards is "constitutionally adequate").

222. The Court has long explained that Section 5 "grants no power to restrict, abrogate, or dilute these [Fourteenth Amendment] guarantees," *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), suggesting that Congress may not retrench to the point of *under*protecting a right. At most, Congress may retrench from judicial *over*protection to a lower level of protection that still minimally suffices to cover the right at its core. But the notion of the right's "core," or the baseline against which the congressional measure properly should be assessed, requires further exploration than I can provide here.

To identify the issue briefly, consider again the *Miranda* exemplar. Suppose Congress were able to devise some means of regulating custodial interrogations, say a videotaping requirement, that allowed courts applying that measure to screen out every single actually coerced confession (i.e., producing no false-negatives) without simultaneously screening out nearly so many voluntary confessions as do the *Miranda* warnings (i.e., minimizing the false-positives). Such a congressional measure would retrench from the *Miranda* Court's doctrinal protection for the right at stake in one sense, as it would reduce the number of excluded confessions overall. But the measure would clearly remain constitutionally adequate, as it would secure the same level of protection against the introduction of unconstitutionally-elicited confessions.

But suppose Congress' proposed videotaping requirement would produce a small number of false-negatives because it, like the pre-*Miranda* voluntariness test, would not screen out each and every coerced statement. For ease of exposition, suppose a court

While the *Miranda* exemplar identifies a plausible rights-regressive effect of recognizing a static gap between abstract rights and judicial doctrine, the dynamic perspective of this right-doctrine gap developed by Professors Post and Siegel raises a concern about rights-regression as well. Over the long haul, a Congress with views divergent from the Court's might well persuade or pressure the Court to relax rather than extend constitutional protections for various individual rights. While the Court has typically felt far greater pressure in this direction from states,[223] Congress certainly has at times expressed displeasure with what it views as overly expansive judicial protection of rights, for example, considering efforts to strip the Court's jurisdiction over constitutional issues such as abortion, busing, and school prayer. Such congressional pressure might well subtly influence the Court's own views and

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applying the pre-*Miranda* voluntariness test could assure itself of excluding only 75% of all actually coerced confessions, with the other 25% slipping through the test as false-negatives. By contrast, suppose a court applying the *Miranda* warnings would be confident of excluding 99% of coerced confessions (at the cost of a high false-positive rate), and a court applying Congress' videotaping requirement would be confident of excluding 95% of all coerced confessions (with a much lower false-positive rate). Under these conditions, the videotape requirement would clearly retrench from the Court's doctrinal protection for the right at stake in a different sense than before; not only would it reduce the number of excluded voluntary confessions, but it would also fail to exclude a greater percentage of coerced confessions.

Even so, one might still view the videotape requirement as constitutionally adequate, *if* one concludes that a 95% confidence level for exclusion satisfies the dictates of the Fifth Amendment. Perhaps, in circumstances of inherently imperfect knowledge, constitutional violations are plausibly understood in probabilistic terms, and correlatively, doctrines implementing constitutional rights are plausibly understood as securing probabilistic states of affairs. For example, procedural due process norms might be understood as dictating that government cannot deprive someone of a property interest absent procedures guaranteeing a sufficient probability that the deprivation is substantively lawful. Here, the argument would run, the Fifth Amendment dictates that a prosecutor cannot introduce a defendant's statement into her case in chief absent procedural safeguards guaranteeing a sufficient probability that the statement was not compelled. Following this reasoning, and particularly given the government's competing interest in minimizing the exclusion of voluntary confessions, arguably a 95% confidence level is good enough to satisfy the Fifth Amendment norm. If so, then the congressional videotape requirement would remain constitutionally sufficient notwithstanding the fact that, as compared to the *Miranda* warnings, it would somewhat reduce the protection against the introduction of compelled testimony in the prosecution's case-in-chief.

Whether and in what contexts this probabilistic approach to defining constitutional norms is legitimate and persuasive are questions worthy of further investigation. And *Dickerson*'s recent reaffirmation of *Miranda* provides little guidance on this point. On the one hand, *Dickerson* baldly states that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." 530 U.S. at 437. On the other hand, *Dickerson* repeats *Miranda*'s invitation to Congress to devise legislative alternatives that are "at least as effective"—without clearly qualifying whether that would mean effective at the 99% or 95% confidence level in the preceding hypothetical. *See* Evan H. Caminker, Miranda *and Some Puzzles of Prophylactic Rules*, 70 U. CIN. L. REV. (forthcoming 2001) (tentatively exploring this probabilistic approach).

223. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (describing and denouncing a pattern of state officials' obstruction of judicial efforts to desegregate schools).

encourage or support its own proclivity towards judicial retrenchment in these areas. One might wonder whether a self-conscious understanding by the Court that it ought, at times, to follow Congress' lead in interpreting and implementing constitutional norms might lead to judicial movement in *both* directions, on different issues and at different historical moments.

At the very least, before embracing the implications of the institutionalist critique for *Boerne*'s constraints on Section 5, one must consider the potential tradeoff here, and assess whether the potentially rights-enhancing effects of a self-conscious judicial-legislative partnership in the concretization of constitutional norms outweigh the potentially rights-regressive effects. My tentative view is that, even if rights-regression is a legitimate concern here, the likelihood that judicial doctrine more typically underprotects than overprotects constitutional rights as abstractly defined makes the tradeoff a favorable one. It may well be, however, that the Court's reluctance to embrace the critique's premise in *Boerne* and its progeny, particularly in *Kimel* where the argument was advanced by the United States but pointedly ignored by the Court,[224] reflects some uncertainty as to whether in the long run the argument would expand or contract the operationalized definition of constitutional rights. Perhaps given this lack of certitude, the Court felt more comfortable retaining strict control of the process of rights-declaration and implementation.

In any event, the Court's conclusion that retention of such strict control justifies application of a rigorous congruence and proportionality assessment of the means-ends relationship is properly criticized for an entirely different reason: the Court cannot persuasively explain why this argument applies uniquely to Section 5 measures and not to all necessary and proper Article I measures as well.

b. *The non-uniqueness critique.*

Section 5 grants Congress power to "enforce" rather than to expand Section 1's provisions through substantive redefinition. But the Necessary and Proper Clause similarly grants Congress power to "carry[] into execution"[225] rather than to expand Article I's primary powers through substantive redefinition. Thus any judicial concern for retaining control over the actual implementation of constitutional norms is equally applicable to Congress' Article I powers, where means-ends scrutiny serves to police precisely the same conceptual boundary between Congress' adherence to the Court's constitutional views and its "alteration of the Constitution's meaning." Article I authorizes Congress to exercise power in specific categories of legislative activity, and the

224. *See* Brief for the United States at 22-31, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (Nos. 98-796 & 98-791) (arguing that the Court's application of rational basis review to age discrimination reflects institutional constraints that can properly be ignored by Congress in applying a more rigorous test for state employment decisions).

225. U.S. CONST. art. I, § 8, cl. 18.

Court has long claimed responsibility for providing the authoritative construction of this aspect of the Constitution's meaning. If Congress acts beyond those powers conferred by Article I as defined by the Court, then by *Boerne*'s reasoning Congress has altered the meaning of the Constitution by acting on a different definition than the Court's.

Suppose, for example, that Congress charters a National Bank. Following the Court's approach in *Boerne*, one would have to conclude that, "[l]acking such a connection"—meaning congruence and proportionality—this "legislation may become substantive in operation and effect"[226] in the sense that it represents a congressional redefinition of the Constitution by extending Article I powers beyond the limits defined by the Court. This was, of course, precisely the argument originally lodged against Chief Justice Marshall's reasoning in *McCulloch*.[227] Thus, if the point of means-ends scrutiny is to screen out legislative acts that, from the Court's perspective, "alter" rather than conform to the Constitution's meaning, then one would expect the Court to employ the same level of scrutiny to "necessary and proper" Article I legislative measures as to "appropriate" Section 5 legislative measures. But, of course, the Court has never suggested that a relaxed Article I means-ends test would impermissibly enable Congress to change the meaning of the Constitution.

Might *Boerne* be explained by a rights/powers distinction, presuming that greater judicial vigilance is appropriate to preclude congressional redefinition of rights than of powers? It is difficult to see why. The point of constraining an "alteration" of Fourteenth Amendment rights in this context is simply to cabin Congress' Section 5 powers, so at bottom the judicial concern focuses on the scope of powers in any event. And in support of its court-centric view of substantive constitutional meaning, *Boerne* invoked Chief Justice Marshall's famous *Marbury* dictum that it is "the province of the Judicial Branch . . . to say what the law is,"[228] which of course was employed in *Marbury* to constrain congressional power (there, to preclude Congress from unlawfully expanding the Supreme Court's original jurisdiction) rather than to protect individual rights. Thus it is unclear why the Court's professed concern for policing the substantive boundaries of the Constitution explains the heightened means-ends scrutiny of "appropriate" measures uniquely in the Section 5 context.

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226. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

227. *See, e.g.*, GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (1969) (collecting essays critical of Marshall's analysis); R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland, *and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875 (2000) (examining state opposition to *McCulloch*); Van Alstyne, *supra* note 33, at 116 n.52 ("Characteristic of antifederalist objections to the sweeping clause were fears that (in connection with the taxing power and/or the preamble to the proposed Constitution) it would readily support acts of Congress completely displacing the authority of state legislatures.").

228. *Boerne*, 521 U.S. at 536 (quoting Marbury v,. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

2. *Concern for the appearance of legislative disregard for judicial supremacy.*

The preceding discussion assumed that *Boerne*'s heightened means-ends scrutiny reflects the Court's desire to maintain ultimate control over the actual implementation of norms in the name of the Constitution. Perhaps instead the Court is more concerned with *appearances* than with *consequences.* In repeatedly admonishing that the Court's interpretation of the Constitution should be regarded by Congress and all others as constitutionally supreme, the Court might be advancing an expressivist rather than consequentialist claim: the Court insists that Congress acknowledge, rather than challenge, the Court's supremacy in this regard. In other words, perhaps what troubled the Court in *Boerne* about Congress' purported "alteration" of the Constitution's substantive meaning was not the effect this would have on the Constitution's actual implementation, but rather the fact that it evidenced Congress' disrespect for the Court's self-proclaimed role as ultimate arbiter of constitutional meaning.

The core idea here is that "[s]tate action not only brings about material consequences, it too expresses values and attitudes. Actions of the state have social meanings as well as material consequences."[229] As Professor Richard Pildes has explained, "[a]n expressive harm is one that results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about."[230]

The claim that expressive harms play an underappreciated role in constitutional interpretation has most fully been developed with respect to the Supreme Court's equal protection and establishment clause jurisprudence. Numerous scholars have observed that in these doctrinal realms, the Court has invalidated governmental actions in large or whole part because those actions entail social meanings that contravene constitutional values by visiting expressive harms on individuals. In particular, these doctrines reflect a sensitivity to the ways in which laws can send a message of exclusion and denigration—laws that segregate people along racial lines or distinctly burden racial minorities send a message that minorities are unworthy of equal concern and respect; and laws that endorse particular religious viewpoints similarly send a message that adherents to other religions or non-religion are "outsiders."[231] More recently, several scholars have proposed that such

229. Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 726 (1998).

230. *Id.* at 755.

231. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533-51 (2000) (voting rights and establishment clause jurisprudence); William P. Marshall, *"We Know It When We See It": The Supreme Court Establishment*, 59 S. CAL. L. REV. 495 (1986) (establishment clause jurisprudence); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v.

expressivist reasoning plays an important role in various strands of the Court's recent federalism jurisprudence.[232] My suggestion here is that perhaps an expressive concern underlies the Court's resistance to Section 5 measures that appear to be non-remedial; such measures reveal a congressional attitude at odds with the Court's interpretive superiority.

Some of *Boerne*'s language arguably evinces a concern along these lines. The Court cautioned that

> [o]ur national experience teaches that the Constitution is preserved best when each part of the Government *respects* both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.[233]

Moreover, the Court suggested some concern with the way Congress' measures might likely be viewed: "RFRA 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."[234] If the Court is worried about whether Section 5 measures might be viewed as challenging and even overriding its interpretive statements, the Court's insistence that Congress must "identify conduct transgressing the Fourteenth Amendment's substantive provisions"—as defined by the Court—"and must tailor its legislative scheme to remedying or preventing such conduct"[235] becomes quite explicable.[236]

But if this is the Court's concern, it would not appear to justify fully the

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Reno, 92 MICH. L. REV. 483 (1993) (voting rights jurisprudence). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1428-47 (2000) (evaluating critically expressivist claims in equal protection and establishment clause jurisprudence).

232. *See, e.g.*, Anderson & Pildes, *supra* note 231 (developing expressivist explanations for various federalism doctrines); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001) (exploring but finding unpersuasive an expressivist justification for state sovereign immunity doctrine); Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000) (developing expressivist explanation for the anti-commandeering rule). *But see* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 140-42 (summarily rejecting suggestion that expressivism justifies anti-commandeering doctrine).

233. *Boerne*, 521 U.S. at 535-36 (emphasis added); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("It is thus a 'permanent and indispensable feature of our constitutional system' that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'").

234. *Boerne*, 521 U.S. at 532 (emphasis added).

235. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639 (1999).

236. More broadly, this worry might explain the Court's apparent reluctance to acknowledge that there is a divergence between the Constitution-as-applied-by-courts and the Constitution-in-the-abstract. *See* notes 198-202 *supra* and accompanying text. Such an express acknowledgment might be perceived as undermining the Court's unique status as constitutional arbiter as well.

Court's imposition of such a strict means-ends tailoring requirement on Section 5 legislation. In light of this expressive concern, the Court's doctrinal question ought merely to be whether Congress can defend a Section 5 measure as an appropriate means of enforcing the Fourteenth Amendment's substantive provisions without invoking, as a necessary step in the reasoning process, an interpretation of those provisions that questions or disagrees with the Court's previous interpretation (or, if the issue is novel, the Court's likely future interpretation).

The Court correctly determined in *Boerne* that Congress could not, and indeed did not really purport to, justify RFRA without directly challenging the Court's previous interpretation of the Free Exercise Clause in *Smith*. The Government tried to defend RFRA as designed to protect individuals from state laws that violate the Court's own understanding of the Clause because, while neutral on their face, they nevertheless were "enacted with the unconstitutional object of targeting religious beliefs and practices."[237] Unfortunately, the evidence suggesting that state laws posed any such problem was meager at best.[238] Moreover, in a supposed effort to weed out the few (if any) such laws that might truly threaten Court-defined free exercise norms, RFRA's reach and scope would have invalidated a far greater number of state laws and executive actions than could possibly be viewed as unconstitutional under the Court's own standard: "In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."[239] In sum, given the Court's free exercise norm requiring an intent to harm religious exercise rather than merely a detrimental impact on it, "Congress made no findings that might have rendered RFRA reasonable in light of that norm, and findings of that sort would have been virtually incredible."[240]

But in any event, Congress itself did not even try to hide its antipathy toward *Smith* and justify RFRA as consistent with Court-defined free exercise norms. Instead, Congress candidly proclaimed its fundamental disagreement

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237. *Boerne*, 521 U.S. at 529; *see id.* ("'A law targeting religious beliefs as such is never permissible.'") (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

238. *Id.* at 530 ("The history of persecution in this country detailed in the [congressional] hearings mentions no episodes occurring in the past 40 years."); *see also* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81-82 ("[T]he legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only 'anecdotal evidence' that, standing alone, did not reveal a 'widespread pattern of religious discrimination in this country.'" (quoting *Boerne*, 521 U.S. at 531)).

239. *Boerne*, 521 U.S. at 535; *see id.* at 532-35.

240. Lupu, *supra* note 151, at 814; *see id.* at 817:

> RFRA quite evidently manifested discontent with those decisions, rather than any desire to remedy or prevent substantive violations of the Constitution as the Court understood it. Congress thus designed RFRA to accomplish an object, which, in the Court's view, the Constitution did not entrust to the federal government in its regulation of the states. The claim that RFRA rested on Section 5 was a transparent pretext . . . .

with, and desire to displace, the Court's constitutional interpretation of the Free Exercise Clause. As the Court noted, RFRA's findings and purposes expressly took issue with *Smith* and purported to restore the prior judicial "compelling state interest" test that *Smith* itself had overruled,[241] and RFRA's passage followed floor debates in which numerous members of Congress directly criticized *Smith*'s reasoning and result.[242] In this respect, RFRA can be viewed as a direct affront to the Court's claimed supremacy in constitutional interpretation.[243] If the Court's separation of powers concern is triggered by a perceived congressional disrespect for Supreme Court rulings, then *Boerne* is a proper application of expressivist reasoning.

This concern, however, cannot readily justify the heightened means-ends scrutiny applied in *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett*. In *Florida Prepaid*, Congress clearly had a legitimate end in mind: to protect property interests in the form of copyrights from being taken by states without due process. At most, Congress tried to protect such interests in an unduly broad fashion; there was no suggestion that Congress acted in a manner that did or would likely be perceived to disrespect governing Supreme Court precedent. One can say the same about *Kimel* and *Garrett*; the ADEA and ADA did not directly challenge the Court's prior interpretation of the Equal Protection Clause, but were merely unextraordinary antidiscrimination statutes designed to protect older and disabled employees from unfair treatment. In *Morrison*, the Court assumed that Congress was striving to achieve the legitimate end of securing the equal protection of state laws to victims of gender-motivated violence rather than challenging the Court's interpretation of equal protection, although the Court held that Congress' means were insufficiently tailored to survive the congruence and proportionality test.[244]

Indeed, if cases such as these (as distinct from *Boerne*) trigger heightened means-ends scrutiny based on a desire to forestall any appearance of legislative repudiation of judicial interpretive supremacy, then the same scrutiny would seem appropriate for Congress' exercises of Article I and Section 2 of the Thirteenth Amendment powers as well. In both cases, if Congress asserts its power to the outer margin of that allowed by the capacious *McCulloch* test, Congress might similarly be accused of evincing disrespect for the Court's narrower construction of those powers, and thus indirectly challenging the Court's interpretive supremacy. Once again, a superficially plausible justification for heightened means-ends scrutiny proves not to explain the uniquely rigorous scrutiny afforded Section 5 legislation.

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241. *See Boerne*, 521 U.S. at 515.

242. *Id.* at 515-16.

243. *See* Post & Siegel, *supra* note 26, at 454 ("In *Boerne*, the Court was plainly provoked by Congress' openly expressed purpose to nullify the Court's own interpretation of the First Amendment in *Smith*.").

244. *Morrison*, 529 U.S. 598, 625-26 (2000).

3. *Constitutional turf: the "province" of the judiciary.*

The preceding subsections explored whether the Court's separation of powers rhetoric might reflect a specific concern for either the consequential or expressive significance of Congress' divergence from judicially defined norms. But perhaps the Court's approach reflects an even simpler, more primordial attitude about turf battles over constitutional authority. The Court might be thinking something like the following:

> Section 1 of the Fourteenth Amendment safeguards certain constitutional rights, and the definition of rights is peculiarly the "province of the Judicial Branch."[245] When Congress enforces this Amendment, Congress is essentially facilitating or assisting the exercise of a core judicial power. Therefore, congressional measures are "appropriate" only if they fully support and assist, rather than purport to modify, our exercise of that judicial power.

This understanding would be correct in part: when Congress enacts measures to carry into execution the constitutional powers vested in departments other than itself, those measures must assist, rather than alter or hinder, the other department's exercise of its own powers.[246] One might therefore object to specific congressional measures that seem adversarial toward rather than respectful and supportive of the other department's vested functions.

But it is wrong to equate the establishment of new individual rights with a vesting of power in the judicial branch per se. Contrary to the Court's assumed premise here, Section 1 of the Fourteenth Amendment does not vest power in any department of the federal government, let alone the federal judiciary in particular. Rather, Section 1 grants certain persons citizenship status and places various boundaries on the powers of state government. And while the Court's Article III power to decide cases and controversies encompasses the subsidiary power to enforce Section 1's citizenship-conferral and state boundaries in a proper case, Section 5 expressly grants Congress the power to enforce them as well. It is a category error, therefore, to assume that the protection of Section 1 rights is vested in or otherwise "belongs" to the judiciary in a manner that suggests Congress is somehow legislating on foreign turf when it enacts Section 5 measures.

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245. *Boerne*, 521 U.S. at 536. For perhaps an even more emphatic statement, see Board of Tr. of Univ. of Ala. v. Garrett, 121 S. Ct. 955, 963 (2001) (referring to the "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees").

246. *See, e.g.*, David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 103:

> In other words, in connection with the powers of the other branches, the Necessary and Proper Clause operates like a one-way ratchet: it lets Congress make laws facilitating the powers (hence discretion) of the other branches, but it gives Congress no power, no discretion, over whether, how far, or how those other branches should perform the roles contemplated for them by the Constitution. The words "for carrying into Execution" are wholly unsuited to authorize laws which diminish, curtail, or interfere.

The Framing history of the Fourteenth Amendment starkly highlights this category error. As explained earlier,[247] Congress' considered choice of terminology, voluminous legislative debates, and broad construction of the identically worded Thirteenth Amendment Enforcement Clause in the 1866 Civil Rights Act all reveal a clear intention that Congress should enjoy a broad range of power to enforce Section 1 rights based on *McCulloch*'s liberal means-ends standard. And in particular, Congress' evident concern that the Supreme Court was predisposed against a broad construction of Section 1 rights[248] belies any suggestion that Congress intended to vest the judiciary with exclusive or even primary jurisdiction with respect to safeguarding those rights.

Perhaps the Court's separation of powers rhetoric in *Boerne* and its progeny reveals a primordial predisposition that enforcement of Section 1 rights lies peculiarly within the judicial province, and therefore Congress must be relegated to a junior helpmate. But if so, the Court's unreflective attitude begs the central question here. The plain language and historical evidence supporting the incorporation of *McCulloch*-style means-ends reasoning into Congress' Section 5 power is simply too strong to be first ignored, so as to allow the Court to construct a judicial-centric vision of Section 1—and then assumed away during the construction of Section 5, because it is inconsistent with that vision of Section 1. The Fourteenth Amendment does not lie exclusively on judicial rather than congressional turf.

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In the end, the Supreme Court is frustratingly unclear about the precise nature of its claim that a *McCulloch*-style means-ends test applied to Section 5 measures uniquely raises separation of powers concerns. If the Court's objective is to maintain ultimate control over the actual implementation of constitutional norms, then the Court's doctrinal approach is questionable on a variety of fronts. And if instead the Court's objective is to maintain the appearance of judicial interpretive supremacy by rebuffing congressional efforts to repudiate judicial decisionmaking, this objective can at best explain only *Boerne,* not its progeny.

There is one other plausible reading of the *Boerne* Court's separation of powers focus. The Court observed that, if Congress could "define its own powers by altering the Fourteenth Amendment's meaning . . . it is difficult to conceive of a principle that would limit congressional power."[249] Might the Court's concern about congressional redefinition really merge into a federalism concern about the scope of congressional power at the expense of the states? I now turn to this question.

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247. *See* notes 164-181 *supra* and accompanying text.

248. *See* note 181 *supra* and accompanying text.

249. *Boerne*, 521 U.S. at 529.

C. *Federalism Justifications for Heightened Means-Ends Scrutiny*

The Supreme Court has suggested that two different constitutional values underlie its stricter means-ends tailoring requirement: maintaining the Court's authority to provide the definitive interpretation of the Constitution, and preserving the proper balance of power between the federal and state governments. The federalism concern can itself be understood in two different ways: the first focuses on the potential breadth of Congress' regulatory authority in general, and the second focuses on Congress' authority to impose regulatory burdens on state governments in particular. This division corresponds to a distinction between two categories of federalism values. "Jurisdictional values" concern the allocation of law-making authority between the federal and state governments, and protect the states' proper sphere of exclusive regulatory jurisdiction. "Sovereignty values" concern intergovernmental relations, and protect the states from federal regulatory burdens, thereby preserving the states' status and dignity as co-equal sovereigns.

It is conceivable that the identical concepts of "necessary and proper" and "appropriate" should be given different application in different legislative contexts, to the extent that they generate different implications for either or both of these categories of federalism values. I explore such an argument by considering these categories in turn.

1. *Jurisdictional values and the federal-state allocation of law-making authority.*

Over the past decade, this Court has increasingly expressed concern about the general expansion of Congress' regulatory authority and the concomitant shrinking of the exclusive regulatory jurisdiction of the states. The Court and commentators have identified several structural values purportedly served by dividing law-making jurisdiction between the federal and state governments, a division secured by respecting the Constitution's delegation of limited powers to the former.

Circumscription of congressional power is frequently defended as serving one or more of the following values: (1) enhancing the responsiveness of government to the specific needs and desires of members of a heterogenous society, through (a) decentralizing decisionmaking so as to allow greater tailoring to local interests, (b) creating smaller government units so as to bring government officials closer to the people, and (c) generating competition for a mobile citizenry; (2) enhancing national social welfare by permitting and encouraging states to act as laboratories experimenting with diverse solutions to economic and social problems, generating useful information for the nation as a whole; (3) stimulating the development of democratic skills and attitudes by providing more accessible fora for citizen participation in self-governance; and

(4) sustaining a set of competing institutions with the incentive, as well as the political and economic capital, to identify and oppose the assertion and especially overreaching of Congress' regulatory authority and thus reduce the risk of federal tyranny.[250] I call these "jurisdictional values" because they support a narrow view of the scope of federal legislative jurisdiction.

Boerne and its progeny strongly suggest that the congruence and proportionality standard for prophylactic Section 5 legislation is motivated, at least in part, by a desire to preserve these jurisdictional values by construing Section 5 power narrowly. *Boerne* observes that if Congress can cross the line between "remedial" and "substantive" legislation in the Section 5 context, then "it is difficult to conceive of a principle that would limit congressional power."[251] A substantive reading of Section 5 authority might enable Congress "to prescribe uniform national laws with respect to life, liberty, and property."[252]

The Supreme Court highlighted this federalism concern even more directly in *Morrison*, claiming that limits on Congress' Section 5 power "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."[253] This language tracks *Morrison*'s similar concern about an expansive reading of Congress' Commerce Clause authority, which could also "obliterate the Constitution's distinction between national and local authority."[254]

While the Court thus recognizes that both expansive Section 5 and Article I powers might threaten to upset the proper federal-state balance, the Court nowhere explains in *Boerne* and its progeny why policing the proper boundaries of federal power requires a much stricter means-ends tailoring requirement in the Section 5 context. Recall that in the Article I context, the Court has repeatedly maintained that if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone."[255] Is there good reason to believe the same relaxed means-ends test would pose a uniquely greater threat of obliterating the Constitution's distinction between national and local authority?

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250. *See* Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1365 (2000); *see also, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (providing narrower but similar list of federalism values); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 524-33 (1995) (evaluating similar list of values); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (same).

251. *Boerne*, 521 U.S. at 529.

252. *Id.* at 523.

253. United States v. Morrison, 529 U.S. 598, 620 (2000).

254. *Id.* at 615; *see also* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (making a similar assertion).

255. Burroughs v. United States, 290 U.S. 534, 548 (1934).

The strongest argument supporting heightened scrutiny in the Section 5 context is that Section 1's proscriptions on state action are potentially so broad that a *McCulloch*-style means-ends test would uniquely allow Congress to intrude significantly into heretofore exclusively state territory. "Ever since the resurrection of substantive due process and the Supreme Court's expansion of the constitutional ideal of equality," Professor Ira (Chip) Lupu has maintained, "there has lurked the possibility" that, with a relaxed means-ends test,

> Congress could become what the Court has refused to be—a "perpetual censor upon all legislation of the States." The [Fourteenth] [A]mendment is sufficiently broad in its language and historical meaning that it puts virtually no subject off legislative limits for Congress .... [A] power so broad would end the concept of a Congress limited in its coercive authority to textually designated subjects of national significance—commerce, intellectual property, bankruptcy, national defense, etc.[256]

Of course, Professor Lupu's concluding sentence is false by definition; no matter how broad the resulting enforcement power might be, it would still reflect a "textually designated subject[] of national significance." More significantly, the sentiment behind it, that the resulting power would be both uniquely and unacceptably broad in a system of limited federal authority, rests on questionable footing.

First, as foreshadowed earlier, it is difficult to view this concern as unique. Precisely the same criticism was originally levied at *McCulloch*'s relaxed means-ends tailoring requirement,[257] and yet the Court has continued for almost two centuries to adhere to this canonical statement of the breadth of Congress' implied Article I powers. To be sure, the Fourteenth Amendment's definitions of citizenship, liberty, property and equality—and thus judicially defined restrictions on state power—expanded considerably over the second half of the nineteenth century. But this is equally true of the power to regulate interstate commerce, perhaps the most significant of Congress' Article I powers.[258] Many other Article I powers have expanded as well; for example, the advent of modern technology has transformed the Armed Forces provisions into a far greater and more awesome power than was true two centuries ago. And the Court has applied *McCulloch*'s deferential standard to Congress' Section 2

256. Lupu, *supra* note 151, at 812 (footnote omitted); *see also* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 49 (asserting that congressional authority "to avert merely hypothetical constitutional violations ... would render Section 5 a far-reaching grant of power indeed").

257. *See* note 227 *supra*.

258. *See Morrison*, 529 U.S. at 608 ("[I]n the years since [1937], Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.") (citation omitted); New York v. United States, 505 U.S. 144, 157 (1992) ("The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities.").

power to enforce the provisions of the Thirteenth Amendment, even though (especially given the absence of a state action constraint) one might plausibly argue that this power gives Congress "nearly plenary authority . . . to protect all but the most trivial individual rights from both governmental and private invasion."[259] While various political forces might successfully pressure Congress not to exercise the full potential of its Article I and Section 2 authority,[260] the same or similar forces have the opportunity and incentives to pressure Congress to stay its Section 5 hand as well.[261] Thus, there appears to be no sharp contrast between Congress' Section 5 and its Article I or Section 2 powers with respect to their potential to "obliterate the Constitution's distinction between national and local authority."[262] If the heightened means-ends test is designed to compensate for a broadening over time of the scope of Congress' legitimate ends, then it is unclear why it should apply uniquely to Section 5 authority.[263]

Second, any concern that a liberal construction of a particular federal power would allow Congress to intrude too deeply into traditional realms of state authority should be evaluated by qualitative as well as quantitative criteria. The Court frequently seems to be focused exclusively on an acontextual worry about opening the door to a broad quantity of congressional regulations. But whether a particular scope of federal authority is considered undue necessarily turns on a nuanced, clause-specific inquiry. For example, the Court has given broad range to Congress' war and related military powers because of their essentially national character, notwithstanding the potential for intrusion into areas of traditional state police powers.[264] A compelling

259. 1 TRIBE, *supra* note 28, at 927.

260. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

261. As a formal matter, one might argue that states will act alone in lobbying against Section 5 measures because only states are directly regulated, whereas states will generally have some private interests aligned with them to lobby against Article I legislation, given that such legislation typically applies generally to states and private entities alike. But the significance of this formal distinction is often overstated. First, federal regulations of state conduct (such as RFRA) typically will negatively affect some private interests as well, such that in theory states do not stand alone in opposition. Moreover, VAWA primarily regulated private rather than state conduct, and the Patent Act and ADEA imposed burdens on state and private actors alike. In any event, states themselves seem to hold their own when engaged in focused lobbying on Capitol Hill.

262. *Morrison*, 529 U.S. at 615.

263. Moreover, even if it might occasionally be legitimate for a court employing a functionalist interpretive methodology to construe one power narrowly in order to compensate for a broadening of power elsewhere, such compensatory balancing seems unavailable for a Court purporting to employ an originalist or other formalist interpretive methodology. *See* Evan H. Caminker, *Context and Complementarity Within Federalism Doctrine*, 22 HARV. J.L. & PUB. POL'Y 161, 167-68 (1998).

264. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no

argument can be made that congressional efforts to enforce antidiscrimination norms in particular, and other Fourteenth Amendment rights more generally, similarly represent an appropriately "national" response to a matter of national concern over which the Framers of the Fourteenth Amendment specifically and intentionally divested states of exclusively local control.[265] As the Court has acknowledged, "[a]s a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established."[266] Indeed, given the centrality of equality and due process norms to this country both after the Civil War and during the past half-century, a broad Section 5 authority might be qualitatively more appropriate than a broad Article I authority of the same quantitative dimensions.

Third, even accepting the premise that a *McCulloch*-style Section 5 power would be unprecedented in its breadth, it would still overlap significantly with Congress' Article I powers. As a result, many exercises of Section 5 power could be justified as exercises of Article I powers as well; this is true for the statutes at issue in *Florida Prepaid*, *College Savings*, *Kimel*, and *Garrett*, although not *Boerne* or *Morrison*. Where the powers overlap, a broadly defined Section 5 power poses no unique concerns with respect to Congress' ability to regulate in general or regulate state conduct in particular. Whereas in *Kimel* Congress can employ Article I to govern state activity and enforce its regulations through a variety of judicial avenues,[267] the only added significance to an additional Section 5 foundation is Congress' ability to abrogate state sovereign immunity from private damages actions. This may raise unique issues concerning "sovereignty values" which I will consider in the next section, but does not implicate the more general concern about Congress' ability to intrude into local rather than national matters and the various values of decentralized decisionmaking. At best, then, a concern for "jurisdictional" federalism values supports heightened means-ends scrutiny only where Congress seeks to exercise Section 5 power beyond the reach of its other constitutional powers.

Finally, this rationale for heightened means-ends scrutiny of Section 5 measures cannot easily explain the Court's apparent application of the same rigorous scrutiny to Section 2 measures designed to enforce the Fifteenth Amendment. The ends authorized by this Section 2 are far more constrained than those authorized by Section 5; whereas the latter touch upon a wide variety of liberty and property interests in a wide variety of contexts, the former focus exclusively on voting rights. For this reason, Section 2 could not

other area has the Court accorded Congress greater deference.").

265. *See* Post & Siegel, *supra* note 26, at 507-510 (developing such an argument to question heightened scrutiny of antidiscrimination measures).

266. Mitchum v. Foster, 407 U.S. 225, 238-39 (1972).

267. *See* note 12 *supra*.

possibly give rise to a legitimate fear that, if construed to require only *McCulloch*-style means-ends tailoring, it would functionally award Congress a virtually plenary police power.[268] And yet, *Boerne* strongly suggests that Section 2 measures designed to enforce the Fifteenth Amendment are subject to stringent congruence and proportionality analysis as well.[269] If so, there must be some other argument doing the work.

2. *Sovereignty values and congressional regulation of states in their sovereign capacities.*

Finally we come to an argument that the Supreme Court pointedly chose *not* to advance anywhere in *Boerne* or its progeny: shrinking Congress' Section 5 power through the rigorous congruence and proportionality test protects states from being regulated in their sovereign capacities. While Section 5 clearly authorizes Congress to regulate states qua states, the argument would run, such regulation should be disfavored because it contravenes the notion that states are independent and co-equal sovereign entities. Heightened means-ends scrutiny is a creative (if atextual) way of implementing this disfavored status, by interposing a meaningful barrier for each Section 5 measure to hurdle. Seen in this light, *Boerne* can be viewed as "a first cousin of the state sovereignty principle of *New York v. United States*" and related cases.[270]

It is not surprising, however, that the Court failed to articulate this justification for rigorous means-ends scrutiny, because the premise is at odds with the oft-proclaimed axiom that the Fourteenth Amendment in general, and

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268. *See* Dorf & Friedman, *supra* note 26.

269. *Boerne* does not expressly equate the two standards, and I suppose one might argue that the Court contrasted RFRA with various provisions of the Voting Rights Act previously upheld as valid Fifteenth Amendment Section 2 enforcement measures merely to highlight the distinctions between a well-tailored and poorly tailored enforcement measure, without meaning to hold that such well-tailoring is now a prerequisite for the constitutionality of Section 2 measures (i.e., without "rewriting" the *Katzenbach* and *City of Rome* decisions). But I think the fairer reading of *Boerne* is that the Court did impliedly modify the means-ends standard applicable to Section 2 measures as well as Section 5 measures. *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (citing cases regarding Congress' enforcement powers under the Fourteenth, Fifteenth, and Eighteenth Amendments without making any distinction among those powers for purposes of its analysis); *see also* Lopez v. Monterey County, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) ("Although *City of Boerne* involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive."); Mixon v. State of Ohio, 193 F.3d 389, 398-99 (6th Cir. 1999) (concluding that the standards for Section 5 and Section 2 enforcement measures are the same); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 725 n.5 (1998) ("[B]ecause the two amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the analysis [in *Boerne*] surely carries over.").

270. Lupu, *supra* note 151, at 816 n.110 (citations omitted).

Section 5 in particular, were designed specifically to override state sovereignty claims in this regulatory realm. This tension is most clearly visible with respect to Section 5 measures that Congress can enact pursuant to some other grant of power as well (such as the Commerce Clause), but the tension remains even with respect to measures for which Section 5 provides the only arguable source of congressional power.

First, consider a statute such as *Kimel*'s ADEA, which incontrovertibly falls within Congress' Article I powers even with respect to its regulation of state conduct.[271] There is no question here that Congress can fetter state discretion by declaring certain state conduct illegal. Moreover, Congress can enforce such proscriptions in a variety of ways, including suits brought by the United States for prospective or retrospective relief and suits brought by aggrieved private parties for prospective relief.[272] Suppose further that the ADEA would lie within Congress' Section 5 authority as well, if the Court employed the conventional *McCulloch* means-ends standard for determining "appropriate" enforcement measures. Such a determination would be relevant for only one reason: it would enable Congress to enforce the ADEA's proscriptions on state conduct through the additional means of abrogating the state's sovereign immunity and authorizing private damages actions, a means unavailable to Congress exercising only Article I powers. But as the Court proclaimed in *Fitzpatrick v. Bitzer*[273] and repeated numerous times since,[274] abrogation pursuant to Section 5 is permissible because the states agreed to this congressional power through ratification of the Fourteenth Amendment, which worked a "corresponding diminution of the governmental powers of the States."[275] Thus, the only reason to reject a *McCulloch*-style Section 5 would be to protect an aspect of state sovereignty that the state has specifically waived.[276] It is one thing to impose a hurdle such as a clear statement rule to

271. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 78 (2000).

272. *See* note 12 *supra*.

273. 427 U.S. 445 (1976).

274. *See, e.g.*, Board of Tr. of Univ. of Ala. v. Garrett, 121 S. Ct. 955, 962 (2001).

275. *Bitzer*, 427 U.S. at 455.

276. *Bitzer* speaks in terms of the scope of congressional power, rather than expressly of state "waiver" of its erstwhile immunity. But the Court elsewhere uses the language of waiver or consent explicitly to describe the states' agreement in this and other contexts to being sued notwithstanding background immunity principles. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 755 (1999) ("The States have consented, moreover, to some suits pursuant to the plan of the Convention or to subsequent constitutional amendments."); *id.* at 756 ("[I]n adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power."); Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934) (explaining that the vulnerability of a state to suit by the United States or a sister state is based on "[t]he waiver or consent, on the part of a state, which inheres in the acceptance of the constitutional plan").

ensure that Congress really intends to override state sovereign immunity,[277] but it is quite another thing—indeed, it is incoherent—to narrow the scope of Section 5 authority specifically to preclude Congress from doing the very thing that the states themselves consented to allow Congress to do.[278]

Second, consider a statute such as *Boerne*'s RFRA, which falls outside of Congress' Article I powers as applied to state conduct. Here, more is at stake than merely whether a *McCulloch*-style Section 5 would allow Congress to enforce regulations of state activity through private damages actions; the question is whether Congress may enforce regulations of state activity at all. A Court protective of the states' broad sovereignty interest in being free from direct congressional regulation might well conclude that the best way to protect that interest is to eschew *McCulloch* and narrow the scope of Congress' regulatory authority.

But the profound federalism principle motivating *Bitzer* and a long line of related cases undermines the sovereignty-protection rationale for rigorous means-ends scrutiny. The Court in *Bitzer* and its progeny did not (and could not persuasively) argue that Section 5's terms "enforce" or "appropriate," when compared to "necessary and proper for carrying into Execution," uniquely authorize private damages suits against states. These cases necessarily rest on a broader, atextual principle.

The Court has distinguished *Bitzer* from *Seminole Tribe*'s holding that Congress cannot abrogate state sovereign immunity pursuant to Article I on historical grounds, focusing on the following chronology: the Eleventh Amendment's purported restatement of immunity principles was ratified subsequent to (and therefore qualifies) Article I authority, but the Fourteenth Amendment was ratified subsequent to (and therefore can be read as qualifying) the Eleventh Amendment's immunity principles.[279] But the mere

277. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 55-57 (1996).

278. This is not to say that every statute applicable to states under Article I is necessarily a valid Section 5 enforcement measure as well, but merely that principles of state sovereignty provide no reason to *withhold* Section 5 status from a valid Article I statute if that statute would otherwise come within Section 5's proper *McCulloch*-mimicking scope.

One might argue that Section 5 authority to enact a statute that already lies within Congress' Article I power is significant not only because it enables Congress to authorize private damages suits against the state, but also because it enables Congress to "commandeer" state officials to implement federal law. *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 233-43 (suggesting federalism objections to Section 5 commandeering are inapposite but querying whether *Printz*'s apparent Article II objections to commandeering might still apply). If this is so, it is because through ratification of the Fourteenth Amendment, states waived their erstwhile immunity from commandeering as well as from private suits for damages. The same analysis therefore applies: It makes no sense to narrow the scope of Section 5 authority just to preclude the very commandeering of state officials to which the states themselves gave their constructive consent.

279. *See Seminole Tribe*, 517 U.S. at 65-66; Pennsylvania v. Union Gas Co., 491 U.S, 41-42 (Scalia, J., dissenting), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

fact that the Fourteenth Amendment followed the Eleventh does not necessarily mean the former repealed the latter in whole or in part; nor does it provide any basis, without more, for determining the extent of the implied repeal.[280] And one cannot plausibly claim that the Framers of the Fourteenth Amendment had in mind any specific intent to override the states' immunity from private damages claims arising under federal law, because the states' immunity was not clearly held to reach this far (as opposed to protecting states from unconsented suits based on *state* law) until after the Fourteenth Amendment was ratified.[281]

Moreover, *Bitzer* and its progeny cannot easily rest on a judgment that private damages suits against states are intrinsically more necessary to enable Congress to "enforce" Fourteenth Amendment restrictions than to enforce Article I statutory schemes. Indeed, the Court has never hinted that the congressional options still available under Article I, including suits by the United States or sister states for damages and suits by private individuals for prospective relief,[282] somehow become constitutionally inadequate and hence in need of supplementation in the Fourteenth Amendment context.

The question thus remains why *Bitzer* correctly construed the Fourteenth Amendment to work an implied partial repeal of the states' Eleventh Amendment immunity. The reason is this: The Reconstruction Amendments in general, and the Fourteenth Amendment in particular, worked a significant shift in the federal-state balance of power, as part of which the states waived various features of their erstwhile sovereign status. Put differently, the Fourteenth Amendment reconstituted the constitutional conception of state sovereignty, embracing one that eschewed various immunities from congressional regulation that the states had previously enjoyed.[283] Long before

280. For example, if one can read the Fourteenth Amendment as impliedly repealing erstwhile Eleventh Amendment restrictions on exercises of Section 5 power, why not similarly read the Fourteenth Amendment as impliedly repealing erstwhile Eighth Amendment constraints on Section 5 power, such that Congress could authorize cruel and unusual punishment as a means of deterring state violations of the Due Process and Equal Protection Clauses? No one takes seriously the latter implication. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, 573-74 (1990) (noting the absurdity of such a conclusion draws into question any reliance on chronology alone to explain *Bitzer*).

281. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the Eleventh Amendment bars federal claim brought against state by citizen of same state); Louisiana v. Jumel, 107 U.S. 711 (1883) (holding that the Eleventh Amendment bars federal claim brought against state by citizen of a different state); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 21 (making this point).

282. *See* note 12 *supra*. Specifically, Congress can authorize the United States to sue states on behalf of aggrieved individuals for violations of the Fourteenth Amendment in its capacity as parens patriae. *See* Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111 (1997) (arguing that the United States should seek federal judicial relief from violations of the Fourteenth Amendment when the states or state officials act in a way that implicates systemic public interests).

283. Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and our Bifurcated*

Bitzer, the Court had in a line of cases

> sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carv[ing] out" in *Ex parte Virginia* . . . .[284]

This diminution of state sovereignty reflected a broadening of congressional power with respect to both of what I have called jurisdictional and sovereignty values: Congress has broader authority to regulate matters of which states had previously exercised exclusive legislative jurisdiction,[285] and Congress has broader authority directly to regulate states qua states. Thus, even with respect to enforcement measures for which Section 5 provides the exclusive foundation for congressional authority, the only reason to reject a *McCulloch*-based construction of relaxed means-ends scrutiny would be to protect an aspect of sovereignty that the state has waived. Such protection simply flies in the face of the Fourteenth Amendment's framing vision.[286]

To be sure, given the current Court's view of the central role played by state sovereignty in our constitutional scheme, it is quite understandable that the Court might want to "'indulge every reasonable presumption against waiver'"[287] of that immunity in specific contexts. This presumption can explain

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Constitution, 53 STAN. L. REV. 1259 (2001).

284. *Bitzer*, 427 U.S. at 455-56; *see also Ex parte* Virginia, 100 U.S. 339, 346 (1880) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.").

285. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."); South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.").

286. *See* Board of Tr. of Univ. of Ala. v. Garrett, 121 S. Ct. 955, 975 (2001) (Breyer, J., dissenting) ("Rules for interpreting § 5 that would provide States with special protection, however, run counter to the very object of the Fourteenth Amendment."); Gardbaum, *supra* note 27, at 683-84:

> If anything, one would expect the federalism constraints on the Necessary and Proper Clause to be greater than those on Section 5, since the former is part of the original Constitution and the latter is part of the Fourteenth Amendment that was aimed specifically at the states and designed to limit their jurisdiction. Interpreting Section 5 as imposing more rigorous federalism constraints on Congress than does the Necessary and Proper Clause would appear historically and conceptually anomalous . . . .

See also Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 106 (2000) (asking rhetorically why the modern Court treats Reconstuctors such as John Bingham and Charles Sumner with less reverence and respect than original Founders such as James Madison and Thomas Jefferson).

287. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S.

the Court's clear statement rule insisting that congressional attempts to regulate states in general, and to abrogate their immunity from private suit in particular, be expressed in unmistakably clear language.[288] But it is one thing to give teeth to the political safeguards of federalism by making sure Congress intends to assert its authority within the realm of the states' waiver of their sovereignty, and quite another thing to truncate that authority by ruling out enforcement measures that fall comfortably within the conventional *McCulloch*-style means-ends nexus, Congress' clarity of intent notwithstanding. The latter move cannot be said to police the waiver acknowledged in *Bitzer* and elsewhere; rather, it *repeals* that waiver in significant part—of course without admitting such.[289]

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In the end, it is difficult to develop a satisfactory justification for the Court's unique application of heightened means-ends scrutiny in the Section 5 context that can explain *Boerne* and all of its progeny.[290] Given the strong originalist arguments favoring, and the century-plus of judicial decisions embracing, the *McCulloch* standard in the Section 5 context, the congruence and proportionality test seems an inexplicable anomaly in means-focused jurisprudence.

D. *Implications of Returning to a* McCulloch*-Style Section 5*

Were the Court to return to its pre-*Boerne* jurisprudence and employ *McCulloch*'s more relaxed means-ends requirement, Congress would still not

666, 682 (1999).

288. *Id.* at 678.

289. Moreover, even a desire to roll back *Bitzer*'s waiver of state sovereignty cannot readily explain the Court's decision in *Morrison*. The VAWA provision invalidated there imposed duties primarily on private rather than state actors, and therefore was consonant with, rather than dissonant with, the principle of state sovereignty.

290. Consider one final argument: Professors Marci Hamilton and David Schoenbrod argue that proportionality analysis for Section 5 measures is dictated by the law of remedies, which generally holds that remedies (such as injunctions and damages assessments) should always be proportional to the constitutional right being violated. *See* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analyis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). Leaving aside the fact that Section 5 authorizes Congress to "enforce" the Fourteenth Amendment's provisions rather than to remedy violations thereof, the requirement of right-remedy proportionality embedded within the law of remedies reflects a traditional constraint on the exercise of equitable authority by the *judiciary*, not the exercise of remedial authority by a legislature. Moreover, the authors' claim that recent affirmative action decisions apply such a proportionality analysis to Section 5 legislation, *id.* at 475-79, is unpersuasive; the heightened means-ends scrutiny in these cases reflects a concern for race-based decisionmaking, not a more general concern for the scope of Section 5 authority.

be given carte blanche authority to regulate the states whenever and however it desired. Obviously, the Court could still rightly insist that a congressional measure be reasonably adapted to prevent or remedy state action threatening judicially defined rights, and Congress would still need some rational explanation as to why it believes that judicially crafted remedies for those violations of rights are somehow inadequate by themselves. Despite the seeming expansiveness of *McCulloch*'s formulation, such an explanation would not always be available.

Suppose, for example, the Court held that a person sentenced to death for committing a state crime has a procedural due process right to a judicial hearing regarding the legality of his sentence whenever she can make a "truly persuasive demonstration of 'actual innocence.'"[291] Suppose further that Congress wanted to lower the required threshold showing to a "plausible demonstration" of actual innocence. Leaving aside any argument (which I tentatively find unpersuasive) that the Court's threshold underprotects the "abstract" due process right due to state comity or other institutional concerns, I am unsure how Congress could claim that its lowering of the threshold "enforces" the judicially defined due process right. Rather, the judicial test is perfectly congruent with the judicially defined right, and therefore any congressional deviation therefrom would seem to redefine rather than enforce the scope of that right.

To be sure, if the Court held that the Constitution secures a *substantive* right not to be executed if actually innocent of the crime,[292] then Congress might be able to enact a broader prophylactic rule such as an outright prohibition of the death penalty, on the ground that even careful judicial review after the proper threshold demonstration had been made would not be perfectly successful in screening out all cases in which an innocent person has been sentenced to death. Different judicial interpretations of rights will necessarily enable different congressional enforcement measures. My point here is simply that even the *McCulloch* test embraces some limits and should not be confused with a plenary congressional power. But the *McCulloch* test would, I believe, be sufficiently capacious to embrace the statutes invalidated in *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett*.

IV. SPECULATION ABOUT *BOERNE*'S GENERATIVE SIGNIFICANCE FOR CONGRESS' OTHER EXECUTORY POWERS

In *Boerne* and its progeny, the Supreme Court applied its new means-ends tailoring requirement expressly to prophylactic legislation enacted pursuant to Section 5 of the Fourteenth Amendment, and implicitly to Section 2 of the

291. Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming this for sake of argument).

292. *Id.* at 431-32 (Blackmun, J., dissenting).

Fifteenth Amendment.[293] But because the rationale for this heightened scrutiny remains obscure, it is unclear what, if any, generative significance *Boerne*'s approach might have for other sources of congressional power, in particular Article I and the other Enforcement Clauses such as Section 2 of the Thirteenth Amendment. Certain of the rationales explored here, such as a desire to protect state sovereignty values by narrowing Congress' authority to regulate states qua states, seemingly have little direct implication for Congress' exercise of Article I or other Enforcement Clause authority to regulate private behavior. But other rationales, such as a desire to protect the jurisdictional values of federalism by narrowing congressional power generally, or to protect the judiciary's actual or apparent interpretive supremacy concerning the scope of constitutional rights, apply equally to support heightened constraints on congressional power across the board. The Court has yet to face in recent years any case concerning the scope of Congress' executory powers under either Article I or the other Enforcement Clauses. But the Court has whittled away at the scope of Congress' Commerce Clause authority, probably Congress' most oft-used and significant primary power, reflecting that a generous doctrinal construction would make it difficult to identify "any activity by an individual that Congress is without power to regulate."[294] One can imagine the current Court voicing a similar concern about the scope of executory laws under the conventional *McCulloch* standard. Given the *Boerne* Court's evident willingness to cast aside thirteen decades of case law applying *McCulloch* to Section 5 legislation, one wonders whether the Court might be inclined, perhaps silently rather than expressly, to let its new-found concern for means-ends rigor bleed over into any future constructions of the scope of executory Article I and other powers as well. While I think this doctrinal shift unlikely, current signs remain somewhat ominous.

Perhaps the real issue driving this trend, and thus partly determining its ultimate breadth and longevity, is the Court's evident concern that Congress increasingly has failed to take seriously its own institutional responsibilities in defining and respecting the boundaries of its constitutional authority. Reading *Boerne*, one can readily imagine the majority thinking as follows:

> Back in the 1960s, Congress generally took seriously the notion that it needed to do some careful thinking and preparatory homework before imposing broad burdens on state authority. In the Voting Rights Act, for example, Congress carefully developed a record of widespread state misconduct and explained why a broad set of prophylactic rules was a necessary response to this state threat to fundamental liberties. In stark contrast, in the RFRA, Congress did little more than hold hearings excoriating our interpretation of the Free Exercise Clause in *Smith*, with barely a perfunctory effort to develop a supportive record of alleged state misconduct. Under such circumstances, we cannot in good conscience afford our usual deference to congressional

293. *See* note 269 *supra*.

294. United States v. Lopez, 514 U.S. 549, 564 (1995).

> judgments; such deference is premised on the assumption (not satisfied here) that Congress acts as an equal partner in respecting the limits on its own constitutional authority.[295]

If this captures the Court's attitude (whether or not it accurately reflects recent history[296]), then the generative effect of *Boerne*'s heightened means-ends tailoring requirement on Article I or other Enforcement Clause powers might turn, not so much on whether the particular rationale(s) underlying *Boerne* logically entail a broader application, but more on whether the Court's apparent assumption of congressional neglect of its own constitutional duties remains constant over time. Not surprisingly, then, one central lesson for Congress emerging from this line of cases, as well as from *Lopez* and its progeny in the Commerce Clause context, is that Congress should be more careful and thorough when laying the groundwork for expansive applications of legislative authority. The more the Court comes to respect Congress' own self-policing and diligence in creating a proper record, the more the Court is likely to relax its recent insistence on rigorous means-ends review.[297]

But whatever the ultimate impact of *Boerne* on other legislative powers, its impact on Section 5 authority is immediate, stark, and unfortunate. While purporting to protect "vital principles necessary to maintain separation of powers and the federal balance,"[298] the Court has failed to explain why those principles dictate retrenchment from the venerable axiom that Congress is the proper arbiter of the reasonableness of legislation plainly adapted to achieve legitimate constitutional ends. Rather, *Boerne* ultimately disserves core federalism principles by precluding Congress from exercising *its* intended role in securing the promises of the Fourteenth Amendment by supplementing judicial constraints on state misconduct.

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295. *See* City of Boerne v. Flores, 521 U.S. 507, 531 (1997) ("Judicial deference, in most cases, is based... 'on due regard for the decision of the body constitutionally appointed to decide.'") (citation omitted).

296. *See, e.g.*, Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?* 85 CORNELL L. REV. 883, 887-906 (2000) (detailing how Congress' passage of 18 U.S.C. § 3501 purporting to overrule *Miranda* reflected antagonism toward the Court's perceived soft-on-crime status without careful and deliberative consideration of either Fifth Amendment values or the limits of congressional authority to withdraw judicial protection thereof).

297. *See* Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 150-53 (2001) (assessing the implications of the Court's recent federalism decisions for Congress' "care and craft" in enacting legislation).

298. *Boerne*, 521 U.S. at 536.