

6-1-2000

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## Recommended Citation

Evan H. Caminker, *Private Remedies for Public Wrongs under Section 5*, 33 Loy. L.A. L. Rev. 1351 (2000).  
Available at: <https://digitalcommons.lmu.edu/llr/vol33/iss4/5>

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# PRIVATE REMEDIES FOR PUBLIC WRONGS UNDER SECTION 5

*Evan H. Caminker\**

## I. INTRODUCTION

The Supreme Court has ushered in the new millennium with a renewed emphasis on federalism-based limits to Congress's regulatory authority in general, and Congress's Section 5 power to enforce the Fourteenth Amendment in particular. In a recent string of cases, the Court has refined and narrowed Section 5's enforcement power in two significant ways.<sup>1</sup> First, the Court made clear that Congress lacks the authority to interpret the scope of the Fourteenth Amendment's substantive provisions themselves, and may only "enforce" the judiciary's definition of Fourteenth Amendment violations.<sup>2</sup> Second, the Court embraced a relatively stringent requirement concerning the relationship between means and ends, ruling that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>3</sup> Within the past three years, the Court has applied these standards governing Congress's Section 5 enforcement to the Religious Freedom Restoration Act,<sup>4</sup> the Patent and Plant Variety Protection Remedy

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1. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

2. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

3. *Id.* at 519-20.

4. *See id.*

Clarification Act,<sup>5</sup> and the Age Discrimination in Employment Act.<sup>6</sup> And just last month, the Court applied these same standards to invalidate the Violence Against Women Act in *United States v. Morrison*.<sup>7</sup>

The Violence Against Women Act (VAWA) challenge uniquely raised a novel question concerning the type of remediation Congress may deploy pursuant to Section 5. In all previous cases, Congress enacted enforcement measures that directly regulated the conduct of states through their officials, either by preventing or remedying conduct that was itself unconstitutional (as defined by the Court), or by preventing or remedying a somewhat broader category of state conduct as a prophylactic measure to protect against unconstitutional action.<sup>8</sup> In contrast, VAWA proscribes certain kinds of private conduct rather than state action. While the “wrong” being targeted remains state misconduct purportedly violating the Equal Protection Clause, Congress’s remedy is directed at private behavior.

In *Brzonkala v. Virginia Polytechnic Institute & State University*,<sup>9</sup> the Fourth Circuit invalidated the civil rights provision of VAWA as lying beyond Congress’s Section 5 authority.<sup>10</sup> The court declared that, in addition to other limitations, Section 5 authorizes Congress to regulate *only* state conduct (what I shall call “public remediation”). The court viewed congressional regulation of private

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5. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

6. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000).

7. Nos. 99-5 and 99-29, 2000 U.S. Lexis 3422 (May 15, 2000).

8. See *Boerne*, 521 U.S. at 518 (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))); see also *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490 (1989) (recognizing Congress’s power under Section 5 to adopt “prophylactic rules”).

9. 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom.* *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. Lexis 3422 (May 15, 2000).

10. VAWA embraced several different enforcement strategies, including the criminalization of certain behavior, new federal grant programs to assist states’ enforcement efforts against gender-based violence, and a new federal civil remedy. This Essay deals exclusively with the latter—the so-called civil rights provision. Further references to VAWA refer, more specifically, to this civil rights provision. See *id.* at 827.

behavior as invalid, not simply because it is “inappropriate” as applied in this particular context due to pretext or means-ends tailoring concerns (although the court thought this as well), but more broadly because “private remediation” is a per se inappropriate means of Section 5 enforcement.<sup>11</sup> In *Morrison*, the Supreme Court affirmed this broader ruling, holding that Congress may not invoke Section 5 authority to regulate private behavior even as a means to remedying state misconduct.<sup>12</sup>

I want to use VAWA as a lens through which to explore and take issue with this broader proclamation. Neither text, precedent, nor federalism values guiding constitutional interpretation persuasively support limiting Congress’s Section 5 powers in this manner. It may well be that a *particular* private remediation scheme (including VAWA) fails the other aspects of the Court’s means-ends scrutiny as deployed to address a particular Section 1 problem. However, the constitutionality of Section 5 enforcement does not hinge on a public/private distinction concerning the regulatory target.

## II. VAWA AS AN ILLUSTRATION OF PRIVATE REMEDIATION

The premise of VAWA’s Section 5 justification is that, in both direct and subtle ways, “bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws.”<sup>13</sup> Congress found that states routinely treat violent gender-motivated crimes—crimes disproportionately affecting women, such as rape and domestic abuse—less seriously than other violent crimes. Moreover, Congress determined this disparity of treatment to be attributable to improper or archaic stereotypes about such violence and its victims reflected in state laws, evidentiary rules, and the attitudes of state police, prosecutors, and judges.<sup>14</sup> As the Court has held in numerous contexts, state action based on inaccurate gender-based stereotypes

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11. *See id.* at 862-80.

12. *See Morrison*, 2000 U.S. Lexis 3422, at \*35-49. The Supreme Court also held that VAWA’s civil rights provision could not be justified as an assertion of Congress’s authority to regulate interstate commerce. *See id.* at \*16-35. I will not explore any Commerce Clause issues in this Essay.

13. H.R. CONF. REP. NO. 103-711, at 385 (1994).

14. *See S. REP. NO. 103-138*, at 42 (1993).

may violate the Equal Protection Clause of the Fourteenth Amendment.<sup>15</sup>

I wish to stipulate in this Symposium essay that Congress's findings of discriminatory state law enforcement are sufficient to satisfy the first doctrinal hurdle facing Section 5 measures. Given the Court's established state action doctrine, it is clear that Congress cannot predicate Section 5 authority on the premise that either private misconduct or state "inaction" violates the Fourteenth Amendment.<sup>16</sup> Congress's premise in enacting VAWA was that states are violating the Constitution through their *affirmative* discriminatory conduct, by generally protecting women from private violence less stringently than they protect men from private violence.<sup>17</sup> Undoubtedly, the Court would find unconstitutional a state statute that authorized state officials to investigate and prosecute violence against men, but prohibited them from investigating and prosecuting violence against women.<sup>18</sup> The discriminatory state practices identified by Congress in VAWA's legislative record are typically more subtle than this exemplary hypothetical. For present purposes, I assume that a state's failure to take gender-motivated violence against women as seriously as private violence against men qualifies as discriminatory state action for the purpose of triggering Congress's Section 5 authority. For ease of exposition, I will sometimes refer to the state's "underprotection" of women from gender-motivated violence as a shorthand for this cognizable form of discriminatory state action.

While this discriminatory state action creates the public wrong triggering Congress's Section 5 enforcement authority, VAWA does not uniquely target official state behavior. Rather, VAWA largely

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15. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982).

16. See, e.g., *Morrison*, 2000 U.S. Lexis 3422, at \*39 ("Foremost among these limitations is the time-honored principle that the Fourteenth Amendment by its very terms prohibits only state action.").

17. See S. REP. NO. 103-138, at 49. The Supreme Court in *Morrison* neither endorsed nor rejected this premise. See *Morrison*, 2000 U.S. Lexis 3422, at \*36-37.

18. Cf. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

targets private conduct by granting victims of gender-motivated violence a federal cause of action against their individual perpetrators. More specifically, 42 U.S.C. § 13981(b) declares that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.”<sup>19</sup> Section 13981(c) provides that

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.<sup>20</sup>

Section 13981(d) defines a “crime of violence motivated by gender” that could create such civil liability,<sup>21</sup> and § 13981(e) establishes various procedures governing civil claims.

It might at first appear counterintuitive for Congress to regulate private misconduct as a means of “remedying or preventing”<sup>22</sup>

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19. 42 U.S.C. § 13981(b) (1994).

20. *Id.* § 13981(c). Given this provision’s definition of person, VAWA does theoretically encompass some “state action” as well as private misconduct. Certainly, a state official following state policy or using his badge of authority to commit a gender-motivated violent crime would be liable in his individual capacity to his victim. In this sense, VAWA does proscribe some “core” violations of the Equal Protection Clause. However, VAWA’s extensive legislative history makes clear that the civil remedy is designed primarily with private violence in mind. State officials may fail to protect women as equally as men from private violence, but the record does not dwell on instances of gender-motivated criminal violence perpetrated by state actors themselves. For shorthand purposes, therefore, I will refer to § 13981 as embracing a “private remediation” scheme in that it primarily targets private acts of violence.

21. Section 13981(d)(1) states that a crime is “motivated by gender” if it is committed “because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” *Id.* § 13981(d)(1). Section 13981(d)(2) further defines a “crime of violence” as “an act or series of acts that would constitute a felony against the person,” or “a felony against property if the conduct presents a serious risk of physical injury” to a person, under federal or state law and that would constitute a “crime of violence” under 18 U.S.C. § 16. *Id.* § 13981(d)(2).

22. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999).

unconstitutional state action. Surely a more direct remedy would be to proscribe or prescribe state action as necessary to ensure the equal protection of women and men from private violence. On reflection, however, there are several ways in which VAWA's civil cause of action can plausibly be understood as preventing or remedying the underlying constitutional violation.

With respect to prevention, VAWA's regulation of private conduct might reduce the prevalence of unconstitutional state underprotection in two indirect manners. First, such federal regulation might serve as a vehicle for spurring a gradual shift in social norms concerning the treatment of women in state criminal and civil justice systems. There is a burgeoning "norms literature" in legal scholarship concerning the ways in which governmental regulations may lead various actors to internalize new social norms of behavior, and through such internalization actually change the way people behave.<sup>23</sup> By highlighting the seriousness of gender-motivated violence and placing a clear stamp of disapproval on such activity, VAWA might instill in state officials both a greater appreciation of the problem and a greater understanding of the ways in which their own sex-stereotyped attitudes perpetuate the problem.<sup>24</sup> To be sure, such social norm-inculcation might be more effective were the state officials themselves subject to behavioral regulation, but this observation does not deny that private remediation might still spur norm adjustment in state officials, even if perhaps somewhat indirectly.

Second, VAWA's very enactment drew public and media attention to the widespread problem of gender-based violence, and individual civil suits under VAWA will further highlight specific acts of

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23. See generally, e.g., Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998); Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); see also Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anticommandeering Rule*, 33 LOY. L.A. L. REV. 1309 (2000) (discussing expressive justifications for legal rules).

24. See, e.g., S. REP. NO. 103-138, at 38 (1993) (explaining that Congress intended to make clear to all, including state officials, that "attacks motivated by gender [are] to be considered as serious as crimes motivated by religious, racial, or political bias"); S. REP. NO. 101-545, at 41 (1990) (stating that VAWA reflects "a national commitment to condemn crimes motivated by gender in just the same way that we have made a national commitment to condemn crimes motivated by race or religion").

violence. Such publicity might well encourage citizens to pressure their state officials to attack the problem more aggressively. Of course, these officials might be tempted to use VAWA's enactment as an excuse for ignoring this public pressure. However, the Court's own insistence that state officials are accountable to their citizenry in the realm of criminal law policy suggests that these state officials would likely respond to such constituent pressure, in order to avoid being viewed as part of the problem rather than its solution.

More directly, while VAWA does not prevent the unconstitutional state action in any immediate sense, to the extent VAWA deters private violence against women, it does prevent the tangible *consequences* that flow from such unconstitutional state action. Women are subject to gender-motivated violence by private actors in part because the state fails to deter such violence by evenhandedly investigating and prosecuting it. Thus, while the state's discriminatory underprotection itself inflicts an intangible harm on women by devaluing their interests in an unconstitutional manner,<sup>25</sup> the state's underprotection also enables or facilitates the infliction of tangible harm on women in the form of private violence.<sup>26</sup> One might say that a woman's tangible victimization has two "but for" causes, the private violence and the state enforcement regime that facilitates such violence through nondeterrence. By directly deterring the private violence—and thereby fulfilling the state's proper role—VAWA prevents the state's unconstitutional behavior from contributing to a woman's tangible injury.<sup>27</sup>

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25. *Cf.* *Allen v. Wright*, 468 U.S. 737, 754-56 (1984) (referring to "stigmatic injury" caused by government's unequal treatment of specific individuals).

26. *Cf.* *Texas v. Lesage*, 120 S. Ct. 467 (1999) (holding that only tangible harms resulting from unequal treatment, not the intangible harms caused by the mere fact of such treatment, give rise to an action for damages as opposed to prospective relief).

27. To be sure, private deterrence does nothing to remedy the *intangible* or dignitary injuries caused by the mere fact of unequal treatment by the state. But no one suggests that prophylactic Section 5 legislation is valid only if it prevents or remedies every single instance or facet of constitutional injury. Partial underinclusiveness may be a factor in assessing whether the legislation satisfies the requisite means-ends test, but it does not doom the legislation from the outset.

With respect to remedying the unconstitutional state action, VAWA provides victims of private violence with monetary compensation for their tangible injuries. To the extent money can ever truly compensate for physical and psychic injuries, such monetary recoveries constitute remediation in the most traditional sense. To be sure, the compensation comes from the pockets of private rather than state wrongdoers. But the source of the recovery makes no difference to the recovery's proper characterization as a remedy for the injury caused by the combination of private violence and state underprotection. Surely if Congress provided monetary compensation from the federal treasury to victims of unconstitutional state police brutality, this compensation would be viewed as a legitimate Section 5 "remedy"—in addition to a legitimate exercise of Congress's spending power—even though the compensation came from federal rather than state coffers.<sup>28</sup>

In several respects, therefore, VAWA can plausibly be viewed as both preventing future and remedying prior injuries caused by the conjunction of state and private conduct. One might, and the Fourth Circuit did, quibble with whether VAWA's scheme is sufficiently tailored to serve these preventative and remedial interests so as to satisfy the somewhat stringent "congruence and proportionality" means-ends test devised in *Boerne*. But I want to put aside this inquiry here and focus on the Supreme Court's and Fourth Circuit's broader determination that private remediation is a per se inappropriate means of Section 5 enforcement, no matter how severe the record of state violations and how well-tailored the scheme to prevent and remedy state wrongdoing.

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28. Of course, monetary damages awards drawn from state coffers would both directly remedy the injuries caused in part by state action, and indirectly prevent such injuries by deterring future state underprotection. In comparison, damages awards drawn from private, or federal, coffers would directly remedy injuries but not simultaneously indirectly deter future state underprotection. Nevertheless, if the Court's repeated references to "preventing and remedying" state violations are presumed not to be internally redundant, then remediation alone through compensation ought to qualify as a legitimate Section 5 measure.

### III. THE LEGITIMACY OF PRIVATE REMEDIATION

Private remediation for unconstitutional state action is consistent with the constitutional text, Supreme Court precedent, and principles of federalism that appropriately guide Section 5's interpretation.

#### A. Text

Several commentators have suggested that the language and structure of the Fourteenth Amendment's provisions limit Congress to enforcement measures that directly regulate state conduct. The claim is that, because Section 5 merely authorizes Congress to "enforce" Section 1, and Section 1 merely proscribes certain state conduct, Congress's Section 5 power is limited to directly proscribing state conduct. As the Fourth Circuit stated in *Brzonkala*: "[T]he plain-language and common-sense understanding [is] that Section 1 provides rights only against the States and that, correspondingly, Section 5 only grants Congress power to enforce the rights provided in Section 1 through legislation directed against state action, not a power to regulate purely private conduct."<sup>29</sup>

If one respects the conceptual distinction between means and ends, however, the conclusion does not "correspondingly" follow from the premise. To begin with, Section 5's language does not limit Congress's potential regulatory targets. Section 5 adds to the panoply of congressional powers by providing a new legitimate "end" or goal of regulation, specifically, to "enforce" the provisions of the Fourteenth Amendment, including Section 1's restrictions on state action. But Section 5 then authorizes Congress to use any "appropriate" means to further this end.<sup>30</sup> It does not, by way of contrast, declare that Congress may only "regulate states to enforce the provisions of this article."

So the argument for limits really rests on a structural claim about the relationship between Sections 5 and 1. Perhaps when one thinks of enforcing a restriction, one most naturally thinks of ensuring that the restriction is not violated by the actor whom the

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29. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 865 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. Lexis 3422 (May 15, 2000).

30. See U.S. CONST. amend. XIV, § 5.

restriction purports to bind. Under this reading, Congress may “enforce” Section 1 only by preventing or deterring Section 1 violations, which means preventing or deterring state action.

Of course, to the extent that VAWA indirectly—through norm-inculcation or the instigation of political pressure—deters Section 1 violations or prevents such violations from causing constitutionally cognizable injuries,<sup>31</sup> then it qualifies as a means of “enforcement” even in this most limited sense. In any event, the Court has rejected such a cramped construction of “enforce” by affirming repeatedly that Congress may prevent *or remedy* unconstitutional state behavior.<sup>32</sup> If the Court’s repetitive reference to “remedy” separate from “prevent” is not entirely redundant—a conclusion not to be drawn lightly—then some measures that redress but do not prevent unconstitutional state conduct must “enforce” Section 1 provisions, undermining the claim that prevention is the *sine qua non* of “enforce[ment].”

A hypothetical might help to illustrate this point. Suppose a state enacts a law defining physical assault against white persons but not against black persons to constitute a crime, in obvious violation of the Equal Protection Clause.<sup>33</sup> Congress could unquestionably enact a statute pursuant to Section 5 mandating that the state apply its assault laws in a race-neutral manner; Congress might even be able to mandate that the state extend its assault laws to include black victims.<sup>34</sup> Suppose instead Congress directly criminalizes assault against black persons in that state, regulating private conduct. Even leaving aside any argument that such direct regulation would indirectly spur state legislative reform,<sup>35</sup> it would clearly protect blacks from suffering tangible constitutional injury caused by the state’s

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31. See *supra* notes 22-24 and accompanying text.

32. See *City of Boerne v. Flores*, 521 U.S. 507, 524-27 (1997); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2206-07 (1999).

33. This hypothetical was offered by Professor Larry Alexander at a Federalist Society conference during which I presented the views contained herein, and it was later offered by Justice Kennedy at oral argument.

34. See *infra* note 61 (noting that it is an open question whether Congress may commandeer state officials to implement federal policy pursuant to Section 5).

35. See *supra* notes 22-24 and accompanying text.

unequal provision of protection (although it would not mitigate the intangible injury caused by the unequal treatment itself). I would call this a form of prevention;<sup>36</sup> but it certainly qualifies as “enforce[ment]” under the Court’s more capacious “prevent or remedy” construction of that term. Neither the language nor structure of the Fourteenth Amendment’s textual provisions, therefore, preclude private remediation measures per se.

### B. Precedent

In *Morrison*, the Supreme Court relied strictly on its application of prior precedent in concluding that Congress may not enforce the Fourteenth Amendment through private remediation schemes. The Court recounted prior decisions establishing that, because the Fourteenth Amendment targets only state action, Section 5 does not authorize Congress to regulate purely private activity.<sup>37</sup>

The petitioners in *Morrison* argued that these precedents are distinguishable on the ground that the cases held only that Section 5 does not expand the legitimate ends of congressional authority to encompass the regulation of purely private activity, but that the cases did not reject the use of private regulation as a means of combating unconstitutional state conduct. As the Court put it, the petitioners “argue[d] that, unlike the situation in the *Civil Rights Cases*, here there has been gender-based disparate treatment by state authorities,

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36. See *supra* notes 25-27 and accompanying text.

37. See *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. Lexis 3422, \*38-45 (discussing *United States v. Harris*, 106 U.S. 629 (1883), and *The Civil Rights Cases*, 109 U.S. 3 (1883)).

The Court has previously held that Congress may regulate the conduct of private actors who engage in “active connivance” with state officials. See, e.g., *United States v. Guest*, 383 U.S. 745, 756-57 (1966). *Guest* might be read somewhat more broadly, as six Justices suggested that private action might violate the Fourteenth Amendment in a larger category of circumstances. See *id.* at 762 (Clark, J., concurring, joined by Black & Fortas, JJ.) (“[Section] 5 empowers the Congress to enact law punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.”); *id.* at 782-83 (Brennan, J., dissenting, joined by Warren, C.J., & Douglas, J.) (same). But the *Morrison* Court eschewed such a broad reading of *Guest*, proclaiming that it “ha[s] no hesitation in saying that it would take more than the naked dicta contained in Justice Clark’s opinion, when added to Justice Brennan’s opinion, to cast any doubt upon the enduring vitality of *The Civil Rights Cases* and *Harris*.” *Morrison*, 2000 U.S. Lexis 3422, at \*44.

whereas in those cases there was no indication of such state action."<sup>38</sup>

After briefly questioning the accuracy of this description,<sup>39</sup> the Court responded as follows:

[E]ven if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." Or, as we have phrased it in more recent cases, prophylactic legislation under § 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Section 13981 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.<sup>40</sup>

But this rejoinder again conflates the questions of *ends* and *means*. It is one thing to say that Congress cannot invoke Section 5 as authority for regulating private behavior as an end in itself, based on the premise that Congress has regulatory authority over such behavior. It is quite another thing, however, to say that Congress cannot invoke Section 5 as authority for regulating private behavior as a means of preventing or redressing unconstitutional state action. The Court offered no explanation as to why private remediation as a means is

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38. *Morrison*, 2000 U.S. Lexis 3422, at \*45.

39. *Id.* at \*45-46 (suggesting that concerns about discriminatory state underprotection of victims of private racial discrimination played a role in the enactment of the earlier civil rights statutes). *But see, e.g., The Civil Rights Cases*, 109 U.S. at 14 (describing the civil rights statute proscribing private discrimination in public accommodations as beyond Section 5 authority because it did "not profess to be corrective of any constitutional wrong committed by the States"; instead, the statute regulated private conduct "without referring in any manner to any supposed action of the State or its authorities"). *See generally* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1377-81 (1964) (discussing *Harris* and *The Civil Rights Cases*).

40. *Id.* at \*46-47 (citations omitted).

categorically off-limits, so long as it survives the Court's "congruence and proportionality" test in other respects.<sup>41</sup>

Moreover, the Court reaffirmed its previous rulings that Section 5 "includes authority to 'prohibit conduct which is not itself unconstitutional . . .'"<sup>42</sup> But if Congress may, as a prophylactic matter, prohibit conduct that is "not itself unconstitutional" because *some of the activity* being proscribed is within constitutional boundaries, why cannot Congress prohibit conduct that is "not itself unconstitutional" because *some of the actors whose activity is being proscribed* are not state actors? In other words, there are two different ways in which a Section 5 remedy might encompass some conduct that does not itself contravene the Fourteenth Amendment: either the conduct (even if performed by a state actor) is not wrongful in substance, or the conduct (even if wrongful in substance) is not fairly imputed to the state. The Court in *Morrison* provided no rationale for permitting prophylactic remedies proscribing conduct that is "not unconstitutional" because it falls into the former category, but rejecting prophylactic remedies proscribing conduct that is "not unconstitutional" because it

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41. As to this inquiry, the Court simply noted that "Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the nation," *id.* at \*48, despite the fact that Congress's findings did not identify discrimination against the victims of gender-motivated crimes "in all States, or even most States." *Id.* But see *id.* at \*112 (Breyer, J., dissenting) (noting that Congress's findings identified constitutional violations in at least 21 states). Taken at face value, this argument implies that Congress cannot enact generally applicable legislation under Section 5 absent a finding that at least "most States" have engaged in unconstitutional conduct. *Id.* at \*48. This certainly appears to be a significantly more stringent means-ends test than the one routinely applied under the Necessary and Proper Clause, thus underscoring the concerns I raise *infra* concerning the propriety of the stricter "congruence and proportionality" test for Section 5 legislation in the first place. See discussion *infra* Part IV.

42. *Morrison*, 2000 U.S. Lexis 3422, at \*35 (citation omitted). Indeed, the Court has repeatedly upheld Section 5 schemes that prophylactically regulate or proscribe state actions that concededly do not violate Section 1, on the ground that such regulations are nevertheless appropriate means conducive to the end of preventing or remedying other state actions that do violate Section 1. See *supra* note 8; *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000) ("[C]ongress's power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

falls into the latter category. At bottom, then, the Supreme Court's rejection of VAWA's civil cause of action rests on an unexplained categorical exclusion of private remediation, no matter how appropriately tailored to the legitimate end of preventing or remedying unlawful state discrimination.<sup>43</sup>

### C. Structural Principles of Federalism

Since neither text nor precedent foreclose resort to private remediation as an "[in]appropriate" means, the issue ultimately turns on the set of federalism values driving the constitutional boundaries on congressional authority. While the Supreme Court in *Morrison* did not address this consideration, the Fourth Circuit in *Brzonkala* concluded that private remediation actually poses a *greater* threat to federalism values than does public remediation, and this distinction justifies a per se exclusion of the former.<sup>44</sup> In my view, this conclusion represents a perversion, not application, of federalism principles as reflected in recent Supreme Court jurisprudence.

To clarify the analysis, it is helpful to distinguish between two categories of federalism values. One category ("jurisdictional values") concerns the allocation of lawmaking authority among the federal and state governments; these values protect the states' proper sphere of exclusive regulatory jurisdiction. The second category ("sovereignty values") concerns the federal-state intergovernmental relations; these values protect the states' status and dignity as a

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43. The Fourth Circuit in *Brzonkala v. Virginia Polytechnic Institute & State University*, 169 F.3d 820, 874 (4th Cir. 1999), thought it significant that prophylactically regulated state conduct *might* in certain circumstances actually violate Section 1, but prophylactically regulated private conduct could *never* actually violate Section 1. But the court offered no persuasive reason why this distinction should matter. Once Congress is permitted to go beyond the prevention of "actual" violations, nothing in the language or logic of the Supreme Court's precedents addressing prophylactic regulation offers a basis for a bright-line rule limiting such prophylaxis to public remedies. It may well be that, precisely because purely private regulations *never* directly prevent behavior that is technically unconstitutional while public regulations might *sometimes* prevent behavior that is technically unconstitutional, the former might less frequently satisfy the contextual means-ends "congruence and proportionality" test. But this conclusion depends on the success of the private remediation scheme in *indirectly* deterring or remedying Section 1 violations, and does not justify a per se exclusion of such schemes.

44. *See id.* at 876.

co-equal and original sovereign. The first set of values proves indifferent between public and private remediation and the second set actually prefers the former to the latter.

1. Section 5 enforcement, jurisdictional values, and the allocation of lawmaking authority

The Court and commentators have identified a coterie of structural values served by dividing lawmaking 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 heterogeneous 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 and 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 political and economic capital, to identify and oppose the assertion and especially overreaching of Congress's regulatory authority and thus reduce the risk of federal tyranny.<sup>45</sup>

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45. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[A federalist regime] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”); see also *id.* (“[T]he principal benefit of the federalist system is a check on abuses of governmental power.”). See generally Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 524-33 (1995) (evaluating traditionally-stated values of federalism); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a*

I call these “jurisdictional values” because they all support a narrow view of the scope of congressional authority.

The Fourth Circuit asserted in *Brzonkala* that these values relating to the scope of congressional lawmaking authority are threatened more by private than by public remediation. The court explained as follows:

In fact, if anything, it may well be federal regulation of *private* conduct pursuant to the Fourteenth Amendment [rather than regulation of state conduct] that poses the greater danger to the sovereignty of the several States. The Fourteenth Amendment recognizes the sovereignty of the States to protect their citizens’ rights of life, liberty, property, and equality. A federal power under Section 5 to legislate against private interference for the protection of these rights would permit Congress to regulate all of “the rights which one citizen has . . . against another,” and thereby eliminate any role for the States whatsoever.<sup>46</sup>

This last quoted sentence is clearly hyperbole. At the very most, Congress can regulate private conduct only where that is an appropriate means of preventing or remedying unconstitutional state behavior, which is a far cry from plenary congressional authority.

The more central point, however, is that the potential preemptive scope of private remediation is no greater than the potential preemptive scope of conventional public remediation. It is true that congressional regulation of private conduct can, and often does, trump state law and thereby displace the state’s erstwhile regulatory role. But congressional regulation of *state* conduct does much the same thing.

Let me illustrate by supposing that, instead of enacting VAWA, Congress directly enjoined states from either enforcing any law that provides differential protection to victims based on their sex, or enforcing any facially neutral law in a discriminatory manner. Suppose further that Congress enforced these prohibitions by authorizing both

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*National Neurosis*, 41 UCLA L. REV. 903 (1994) (discussing such values, and arguing that all but category (4) are better understood as values of decentralization rather than federalism per se).

46. *Brzonkala*, 169 F.3d at 876 (emphasis and ellipses in original) (citations omitted).

the executive branch and all aggrieved persons to bring damages actions against the states and their officials, or maybe even by criminalizing certain actions of state officials. These clearly permissible regulations would trump all contrary state policies, including those by which the states heretofore purported to protect "their citizens' rights of life, liberty, property, and equality."<sup>47</sup> The state would either have to impose or enforce stricter regulations on private perpetrators of gender-based violence (which would have exactly the same preemptive effect as VAWA), or lift or stop enforcing its regulations on other private perpetrators (which would preempt different state policies, but to an equally great extent), or employ some combination of both until its laws and enforcement policies provided for equal protection of men and women.

These permissible Section 5 regulations would have the same impact on the jurisdictional values described above as does congressional regulation of private conduct. For example, the diversity and experimentation among various state policies would be equally circumscribed through either means. Thus, the ultimate scope of congressional interference with the states' police powers does not turn on whether the states' citizens are governed directly by private remediation schemes or governed indirectly by state compliance with public remediation schemes.

## 2. Section 5 enforcement, sovereignty values, and intergovernmental relations

Much of the Supreme Court's recent federalism case law concerns intergovernmental relations rather than the relative scope of each government's lawmaking authority. In a series of cases, the Court has emphasized that "the Constitution established a system of 'dual sovereignty,'"<sup>48</sup> and that the states thus retain "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."<sup>49</sup> This status entails that "Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of

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47. See *supra* note 46 and accompanying text.

48. See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997).

49. *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999); see also *id.* (providing that states "retain the dignity, though not the full authority, of sovereignty").

sovereignty in both the central Government and the separate States.”<sup>50</sup>

The Court has drawn upon these principles to impose significant and sometimes absolute barriers to direct congressional regulation of states. The modern Court evinced concern for regulating “States as States” as early as *National League of Cities v. Usery*<sup>51</sup> and, while that case was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>52</sup> the *Garcia* dissenters made clear their intention to continue protecting states where possible.<sup>53</sup> In *Gregory v. Ashcroft*,<sup>54</sup> the Court imposed a clear statement rule of statutory interpretation as an indirect means of protecting states from direct federal regulation. In *New York v. United States*<sup>55</sup> and *Printz v. United States*,<sup>56</sup> the Court held that Congress may not commandeer state officials to enact or administer federal regulatory programs.<sup>57</sup> Finally, even when Congress may regulate state activities pursuant to its Article I powers, the states’ sovereign status precludes Congress from abrogating their immunity from unconsented private suits in federal or state court.<sup>58</sup> Thus, at least when interpreting the scope of Congress’s Article I authority, the Court has invoked the states’ sovereign status to discourage or preclude direct congressional regulation of state conduct.

Without question, any public remediation scheme designed to serve the same ends as VAWA’s civil rights provision would similarly constitute highly intrusive regulation in “areas of traditional

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50. *Id.* at 2268.

51. 426 U.S. 833, 845 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

52. 469 U.S. 528 (1985).

53. *See id.* at 579 (Powell, J., dissenting); *id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O’Connor, J., dissenting).

54. 501 U.S. 452 (1991).

55. 505 U.S. 144 (1992).

56. 521 U.S. 898 (1997).

57. *See id.* at 935; *New York*, 505 U.S. at 188.

58. *See, e.g., Idaho v. Couer d’Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing “the dignity and respect afforded a State, which the immunity [from private suit] is designed to protect”); *Alden*, 119 S. Ct. at 2263 (“The principle of sovereign immunity preserved by constitutional design ‘thus accords the States the respect owed them as members of the federation.’”) (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

state concern.”<sup>59</sup> As suggested earlier, Congress could enjoin state officials from either enforcing any law that provides differential protection to victims of violence based on their sex or enforcing any facially neutral law in a discriminatory manner. Congress could enforce these mandates by imposing both civil and criminal liability on the state and/or its officials. This would require state officials to alter their definition and/or policing of criminal law, as well as override the venerable principle of state prosecutorial discretion. In addition, the imposition of monetary liability “may threaten the financial integrity of the states,”<sup>60</sup> which at a minimum will divert state funds that might otherwise be used to bolster law enforcement resources and redress the underprotection problem. Congress could also authorize private persons to sue state officials for noncompliance, thus inviting federal courts to issue structural injunctions and engage in ongoing supervision of state law enforcement policy and practice. Indeed, Congress might even have the authority to commandeer state officials to enforce specific federally-defined law enforcement policies, thus removing *any* vestige of state discretion in this area.<sup>61</sup> Public remediation thus entails some intrusive regulation of states qua states.<sup>62</sup>

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59. *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring); see also *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. Lexis 3422, at \*33 (May 15, 2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”).

60. *Alden*, 119 S. Ct. at 2264.

61. The same “waiver of sovereignty” theory underlying the Court’s decisions that Congress may abrogate state sovereign immunity from private suit in federal court pursuant to Section 5 but not Article I, see *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (reaffirming Section 5 abrogation while rejecting Article I abrogation), can be used to support commandeering of state officials pursuant to Section 5 even though not pursuant to Article I. See Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 238-42.

62. John Harrison suggested to me that Congress could at least circumvent whatever underprotective biases might be traced to state judicial processes by authorizing original or removal jurisdiction in federal courts over cases brought to enforce existing state laws against gender-based violence. This scheme would be far less intrusive on state interests. However, the scheme would not even purport to address nonjudicial sources of state underprotection. Moreover, Article III’s subject matter limitations would allow the scheme to remove from state judicial purview only those relatively few cases enforcing

The Fourth Circuit in *Brzonkala* brusquely dismissed this concern:

The government maintains, second, that in enacting section 13981, Congress might have chosen to regulate private action, rather than the States directly, so as not to offend the sovereignty of the States. This argument, however, confuses the Fourteenth Amendment with the Commerce Clause and other similar grants of federal power. The Supreme Court has often held that it violates principles of state sovereignty for the federal government to impose certain obligations directly upon the States when acting pursuant to the federal power to regulate interstate commerce, and various other federal powers. However, the Court has made clear that, by its very nature, the Fourteenth Amendment is a limitation on the governments of the States.<sup>63</sup>

But, the Fourth Circuit's extension of this case law to a different issue is misguided. While this reasoning does justify Congress's broader authority to regulate states qua states under Section 5 rather than Article I, it does not support a preference for public Section 5 remediation over private Section 5 remediation.

To begin with, read for its greatest impact, this line of reasoning—that states waived some of their erstwhile sovereignty interests in coordinate status (as well as regulatory scope)—suggests that Section 5 public remediation poses absolutely no threat whatsoever to the status/dignitary values underlying recent federalism decisions. But, of course, private remediation by definition also poses absolutely no threat to these values. The most one can say is that these values are entirely indifferent to Congress's choice between public

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state criminal or civil laws that have a sufficient "federal ingredient" to qualify as "arising under" federal law.

63. *Brzonkala*, 169 F.3d at 876 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (reasoning that the Fourteenth Amendment "quite clearly contemplates limitations on [the States'] authority" and "[t]he substantive provisions are by express terms directed at the States"); *Ex parte Virginia*, 100 U.S. 339, 346 (1879) ("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.") (additional citations omitted)), *aff'd sub nom. United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. Lexis 3422 (May 15, 2000).

and private remediation schemes, in which case they provide absolutely no support for concluding that the latter are per se inappropriate.

In my view, however, the Fourth Circuit in *Brzonkala* overread the aforementioned case law concerning the interplay between state sovereignty and Section 5 authority. Saying, as the Supreme Court has, that Section 5 gives Congress unique authority to regulate states qua states in certain ways is not tantamount to saying that such regulation raises no federalism concerns at all; it is just that a different balance is struck between those concerns and competing concerns for federal supremacy in the Reconstruction Amendments than in the original Constitution.<sup>64</sup> The Court's solicitude for state sovereignty concerns even regarding Section 5 enforcement remains visible in its insistence that Congress can abrogate state sovereign immunity only by enacting a statute which makes its intent to do so "unmistakably clear"—an especially difficult legislative barrier to hurdle.<sup>65</sup> And those who would resist congressional commandeering of state legislative and executive officials pursuant to Section 5 surely view state sovereignty as continuing to have significant force. Finally, the Court's demand that Section 5 regulations satisfy a means-ends test of "congruence and proportionality," a test more strict than Article I's "necessary and proper" standard in both locution and operation, might reflect the recognition that the former but not the latter test generally governs regulations imposed on state qua states rather than private entities and/or states as market participants.<sup>66</sup>

Thus, it is one thing for the Court to acknowledge that the rights and status inhering in state sovereignty uniquely give way to certain federal interests under the Reconstruction Amendments. However, it is a far different thing to assert, as the Fourth Circuit did in *Brzonkala*, that the concept of state sovereignty loses all significance in this context. More specifically, it seems quite jarring for a court

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64. See, e.g., *Alden*, 119 S. Ct. at 2268 ("The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States.").

65. See, e.g., *Kimel v. Florida Bd. Of Regents*, 120 S. Ct. 631, 634 (2000).

66. See *infra* Part IV (suggesting the Court has yet to provide a satisfactory explanation for the heightened means-ends scrutiny applied to Section 5 measures).

ostensibly concerned about following the Supreme Court's recent lead in protecting the interests of federalism to proclaim that state sovereignty counts for absolutely zero when comparing the propriety of public and private Section 5 remediation.<sup>67</sup>

But even if this proposition is correct, at most it suggests that public remediation is not uniquely disfavored along this dimension. It offers no reason to view private remediation as comparatively disfavored, let alone reason to view private remediation as per se inappropriate. Thus, neither the federalism values underlying recent case law regarding the scope of federal authority nor those regarding the sovereign status of states can persuasively justify the exclusion of private remedies from Congress's Section 5 arsenal.

#### IV. PRIVATE REMEDIATION AND MEANS-ENDS TAILORING

If one fully embraces the Supreme Court's recent sovereignty-protecting doctrine and rhetoric, then forcing Congress to choose public rather than private remediation under Section 5 by ruling the latter simply off limits seems quite perverse. Even if one resists the import of this doctrine and rhetoric, federalism values certainly provide no reason to *prefer* congressional regulation of states qua states over congressional regulation of private conduct. And the constitutional text seems capacious enough to permit any means, public or private, designed to enforce Section 1 restrictions on state behavior. So long as a particular private remedy is a "congruent and proportional" response to unconstitutional state conduct, it appropriately lies within Congress's Section 5 arsenal.

Of course, by its very nature private remediation "prevents or remedies" unconstitutional state conduct in a somewhat less direct manner than would the regulation of state behavior, and thus might have a more difficult time passing the "congruence and

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67. I, among many others, have criticized the Supreme Court's recent paean to "state sovereignty" and protection of special "status" and "dignity" interests—as distinct from its more defensible efforts to circumscribe the scope of congressional regulatory authority—as excessively formalistic. *See, e.g.,* Caminker, *supra* note 61. But it is particularly discordant for a court that seems to applaud this recent case law, let alone is bound to adhere to it faithfully, to dismiss so blithely any regard for state sovereign status in the face of Section 5 regulation of states qua states.

proportionality” test. And the tighter the means-ends nexus the Court demands under this test, the fewer private remedial schemes will survive.

This Essay’s focus on private remedies thus naturally raises the question why the Court employs a stricter means-ends test for assessing Section 5 measures than the looser “necessary and proper” test governing Congress’s exercise of its Article I powers. I think the Court’s stricter “congruence and proportionality” test lacks solid constitutional grounding. Certainly Section 5’s requirement of “appropriate” legislation does not dictate uniquely heightened scrutiny; both the text of Section 5 and its drafting and legislative history strongly suggest that the Framers intended to incorporate the same means-ends test that Chief Justice Marshall articulated when construing the Necessary and Proper Clause and implied Article I powers in *McCulloch v. Maryland*.<sup>68</sup> *Boerne* and its progeny explain that the test of “congruence and proportionality” is designed to ensure that Congress does not end up “substantively” redefining (compared to the Court’s definition) the meaning of Section 1’s restrictions on state action: “Lacking such a connection [of congruence and proportionality], legislation may become substantive in operation and effect.”<sup>69</sup> But this same concern can be voiced for Article I regulation. If Congress purports to stretch its regulatory authority under the Necessary and Proper Clause “too far” through an attenuated means-ends nexus, it similarly threatens to redefine “substantively”

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68. 17 U.S. (4 Wheat.) 316, 421 (1819) (“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.”). See, e.g., Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 131-33, 141-45 (1999); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 178 & n.178 (1997).

While the Court has—in the Article I context—held that certain means of regulating states are off limits, e.g., commandeering state officials and authorizing private suits for damages, it has never retreated from *McCulloch*’s deferential standard for evaluating the relationship between *permissible* means and legitimate ends.

69. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2206 (1999) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

the scope of its legitimate Article I ends (compared to the Court's definition). Further inquiry into the propriety of the more stringent "congruence and proportionality" test that might constrain many private remediation schemes is thus clearly warranted, though it must await another day.