Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power

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Few questions of constitutional law are as uncertain as the scope of congressional power to enforce the substantive provisions of the Fourteenth Amendment. The Supreme Court has provided a mixed bag of answers in the context of congressional attempts to use the Section 5 enforcement power to abrogate state sovereign immunity, but it has given almost no guidance concerning the scope of the enforcement power when such abrogation is not at issue. This is an attempt to explore and, perhaps, remedy that latter lacuna.

Although *City of Boerne v. Flores*[1] established that Congress has only a remedial power to enforce the Fourteenth Amendment and may not define for itself the substance of the Amendment's guarantees,[2] it left the boundaries of that power ill-defined. The Court acknowledged that "Congress must have wide latitude" to determine the scope of its remedial power,[3] and it recognized that Congress may remedy the constitutional wrongs of the states both before and after they occur.[4] But the Court insisted that the test for whether remedial measures are authorized by the Fourteenth Amendment is that there must exist "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[5]

Since *Flores*, the Court has addressed the scope of Congress's prophylactic power almost entirely in connection with congressional

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

2 Congress "has been given the power 'to enforce' [the provisions of the Fourteenth Amendment], not the power to determine what constitutes a constitutional violation." *Id.* at 519.

3 *Id.* at 520.

4 "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530 (citation omitted).

5 *Id.* at 520.

attempts to abrogate the states' sovereign immunity from private suits for damages.[6] The distilled product of those cases is the notion that judicial deference to Congress concerning the proper scope of such preventive measures varies in rough proportion to the level of judicial scrutiny the Court invokes to test the validity of state actions that allegedly violate the Fourteenth Amendment. For example, in *Board of Trustees v. Garrett*[7] the Court ruled that Congress lacked prophylactic power to bar the states from discriminating against the disabled because such discrimination, constitutionally speaking, is valid so long as it is rational to do so in the service of some legitimate objective.[8] By contrast, in *Nevada Department of Human Resources v. Hibbs*[9] the Court found that Congress had prophylactic authority to require the states to provide sex-neutral, unpaid family medical leave to its employees because Congress had evidence that the failure to do so contributed to unlawful sex discrimination in the granting of such leave. [10] The difference in outcomes was attributable to the heightened level of judicial scrutiny brought to bear upon alleged sex discrimination.[11]

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6 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), held that Congress may not use its Article I, Section 8 powers to abrogate the states' Eleventh Amendment immunity from private suits for money damages. *Id.* at 62–66. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), modified this holding with respect to Congress's bankruptcy power by holding that the constitutional requirement of uniformity in federal bankruptcy legislation implied that states had surrendered "in the plan of the Convention" their sovereign immunity with respect to matters ancillary to the in rem jurisdiction of bankruptcy. *Id.* at 373.

Other than bankruptcy, though, the only avenue for Congress to abrogate the states' Eleventh Amendment immunity is by using its power to enforce the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 447–48 (1976). After *Katzenbach v. Morgan*, 384 U.S. 641 (1966), it was thought that it might be possible for Congress to enforce the Fourteenth Amendment by altering its substance, so long as those alterations did not "restrict, abrogate, or dilute" the rights guaranteed under the Amendment. *See id.* at 651 n.10. That possibility remained controversial but was extinguished by *Flores*, 521 U.S. at 512, which expressly limited the Section 5 enforcement power to remedial measures. According to *Flores*, only those measures that are congruent with and proportional to an identified constitutional violation are remedial. *Id.* at 519–20. Ever since *Flores*, the scope of the Section 5 power has been charted in the context of congressional attempts to abrogate the states' Eleventh Amendment immunity.

7 Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).

8 *Id.* at 366–68.

9 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

10 *Id.* at 735.

11 "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier [in *Hibbs*] for Congress to show a pattern of state constitutional violations" than in *Garrett*. *Id.* at 736; *accord* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (upholding abrogation of Eleventh Amendment by Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–12165 (2000), as applied to state action infringing the "fundamental right of access to the courts").

The Court has not yet decided whether Congress has greater latitude to exercise its enforcement power when it does not subject the states to private suits for damages for those actions. The Court has, however, left hints suggesting that there are two zones of prophylaxis: an "inner zone" that is tightly bound to levels of judicial scrutiny applicable to Fourteenth Amendment claims and an "outer zone" that permits Congress greater discretion to prevent state wrongdoing when state sovereign immunity is not at issue. Although the Court in *Garrett* held that Congress had no Section 5 enforcement power to abrogate Eleventh Amendment immunity to enable the disabled to sue states to recover money damages for state discrimination against them, it suggested in a footnote that Congress did have Section 5 enforcement authority to forbid that discrimination and subject officers of the states to suit for injunctive relief and the states themselves to suit for money damages brought by the federal government, neither of which implicate state sovereign immunity.[12] So long as Congress does not seek to remedy identified state misbehavior by abrogating state sovereign immunity, its power to prevent Fourteenth Amendment violations may be broader.

Yet the Court also insists that all congressional exercises of its prophylactic enforcement power must be congruent with and proportional to the identified constitutional violation it seeks to prevent. But if the *Garrett* dictum is to be taken seriously, it must be that the criteria for assessing congruence and proportionality are different, and more deferential to Congress, when Congress acts to prevent state constitutional misconduct without seeking to abrogate state sovereign immunity. But what are these criteria? The Court has not had occasion to tell us. I propose to hazard an answer.

Part I recapitulates briefly the judicial calculus used to assess whether Congress may validly subject states to private suits for damages for conduct that Congress prohibits to prevent possible violations of the Fourteenth Amendment. I argue that the Court's tool kit—congruence and proportionality—is one fashioned by *Flores* to advance both separation-of-powers and federalism concerns. The *Flores* test preserves the Court's primacy as the authoritative interpreter of

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12 *See Garrett*, 531 U.S. at 374 n.9 ("Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*. . . .") (internal citation omitted).

the Constitution and prevents Congress from exercising a general police power. When the test is applied in the abrogation context, however, it functions mostly to preserve state sovereignty. Although both federalism and separation-of-powers issues are matters of constitutional interpretation, and thus properly for the Court to decide,[13] the Court's conflation of these issues tends to impede clarity. Do the cases involving use of the Section 5 power to abrogate state sovereign immunity[14] pertain only (or primarily) to the scope of congressional power to abrogate such immunity, which is principally a federalism question concerning the proper scope of state sovereign immunity? Or, do those cases have equal application to the scope of the enforcement power generally, which implicates both separation-of-powers concerns and a different federalism issue: the extent of the enumerated powers of Congress?

Because these cases lie at the intersection of state sovereign immunity and congressional power to enforce the substance of the Fourteenth Amendment, they pertain to both doctrinal areas. But the threshold question is whether their reasoning principally explicates the Court's doctrine concerning the scope of Congress's power to abrogate state sovereign immunity or informs the Court's jurisprudence concerning the general scope of the Section 5 enforcement power. If they are only about abrogation, they are applications of *Seminole Tribe of Florida v. Florida*[15] and *Alden v. Maine*[16] within the specific context of the enforcement power. If they are about the general scope of the enforcement power, they delimit congressional power to enforce the Fourteenth Amendment, regardless of the remedy chosen by Congress. The messy reality, of course, is that these cases speak to both issues, and both issues involve questions of federalism and separated powers. The task is to separate the strands of this tangled skein into usable threads.

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13 I recognize the long-standing debate over whether federalism is more properly enforced by political or judicial processes. I reject the proposition that federalism limits are, or should be, established entirely by the political process, no matter how free from defects that process may be. While the level of judicial scrutiny applicable with respect to various federal initiatives that may transcend the Constitution's federalism limits is fairly debatable, I contend that judicial power to police federalism limits ought not be debatable.

14 *See generally* United States v. Georgia, 546 U.S. 151 (2006); *Lane*, 541 U.S. 509; *Hibbs*, 538 U.S. 721; *Garrett*, 531 U.S. 356; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

15 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64–66 (1995) (holding that Article I of the U.S. Constitution does not give Congress the power to abrogate state sovereign immunity).

16 Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Article I of the U.S. Constitution does not give Congress the power to abrogate state sovereign immunity).

The view that these cases are all about abrogation and nothing more combines logic and cynicism. When Congress uses its enforcement power to abrogate state sovereign immunity, it is identifying conduct that it believes violates the Fourteenth Amendment and selecting a remedy for enforcement of the Fourteenth Amendment. Of course, because of the combined effect of *Fitzpatrick v. Bitzer*[17] and *Seminole Tribe*,[18] the only avenue for the abrogation remedy is the enforcement power. When the Court considers whether Congress has properly invoked its enforcement power to abrogate state sovereign immunity, it is, at bottom, deciding whether awarding money damages to private litigants for what Congress regards as constitutional violations by states is an appropriate remedy. One might ask why Congress's choice of remedy should influence the logically separate question of the scope of congressional power to enforce the Fourteenth Amendment. Although Congress's choice of remedy is relevant to the question of whether states enjoy sovereign immunity, the remedy chosen by Congress is a long step removed from the question of whether the state practices Congress seeks to remedy are within its power to address. The cynical component of this view is that the Section 5 abrogation cases represent nothing more than the continuing efforts of a slender majority of the Court to enhance state sovereignty by preventing Congress from abrogating state sovereign immunity. Cynics contend that after the Court slammed shut the Article I door to abrogation in *Seminole Tribe*, it was necessary to the state sovereignty project to squeeze the scope of the enforcement power whenever that power was invoked to abrogate state sovereign immunity.

Whatever the realpolitik, there is considerable force in the logical objection, but not so much that it requires that the Section 5 abrogation cases be read solely as appurtenances to the Court's tangled web of law that encrusts the Eleventh Amendment. Indeed, the theme of this Article, developed most fully in Part II, is that the Section 5 abrogation cases define a distinctly different scope of the enforcement power when Congress chooses the abrogation remedy than when it does not. This construction disentangles the remedy from the underlying power by recognizing that there are two tiers to the enforcement power. In the lower tier, or the inner zone of prophylaxis, questions

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17 Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress may abrogate state sovereign immunity pursuant to its Fourteenth Amendment enforcement power).

18 *Seminole Tribe*, 517 U.S. at 72–73 (holding that Congress may not abrogate state sovereign immunity under the Indian Commerce Clause and overruling a decision allowing abrogation under the Interstate Commerce Clause).

of remedy predominate and the scope of the enforcement power is confined to accommodate the strictures of state sovereign immunity that are based in notions of federalism. By contrast, in the upper tier, or the outer zone of prophylaxis, the question of remedy is irrelevant and the scope of the enforcement power may be charted more broadly and without regard to considerations of state sovereign immunity. Federalism concerns remain alive in this tier but are shorn of the sovereign immunity issues that drive the abrogation cases. Two concerns shape the scope of the enforcement power in the outer zone: first, preservation of the Court as the authoritative interpreter of the Constitution, and second, preservation of state autonomy from unbounded congressional regulation. The two concerns, of course, are mutually dependent.

City of Boerne v. Flores makes clear that Congress's enforcement power does not permit it to prohibit state practices that the Court has determined to be constitutionally valid.[19] Put another way, Congress may enforce constitutional rights, but the set of constitutional rights is determined by the Court. Congress has no independent power to determine the substance of constitutional rights and, thus, may not enforce its own notion of what constitutes constitutional rights. Congress may, however, prohibit practices that threaten to interfere with judicially recognized constitutional rights.[20] As described in Part I, in the inner zone of the abrogation context the scope of this prophylactic enforcement power has been tightly bound to the levels of judi-

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19 City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).

20 The basic relationship between the Supreme Court and Congress with respect to the enforcement power that was established by *Flores* may be expressed as follows:

> (1) The Fourteenth Amendment creates constitutional rights, the substance of which are determined with finality by the Supreme Court. *See id.* at 536.
>
> (2) When Congress interprets the substance of the Fourteenth Amendment differently from the Supreme Court, its interpretation does not establish any constitutional rights, but simply creates statutory rights, which are valid only to the extent condition (3) is satisfied. *See id.* at 519.
>
> (3) Congress may act validly to enforce constitutional rights but may not enforce statutory rights (unless there is some other valid source of authority for congressional action). *See id.*

Left unstated is the following problem:

Under its enforcement power Congress may prohibit state conduct that actually violates constitutional rights, and Congress may also prohibit state conduct to prevent violation of constitutional rights, but how extensive is this prophylactic power? May Congress prohibit only state conduct that poses an *immediate* threat of constitutional violations, or only that conduct which is *necessary* to prevent such violations? May it prohibit state conduct that does not violate constitutional rights, but which, in Congress's judgment, might produce results that violate constitutional rights, or which Congress thinks will violate constitutional rights, once the judiciary has examined the prohibited conduct?

cial scrutiny applicable to claims of constitutional right and to specific evidence of state constitutional wrongdoing.

I argue that, within the outer zone, Congress should be free to prohibit state practices that have not been determined by the Supreme Court to be constitutionally valid when a substantial portion of such practices materially interferes with an inchoate constitutional right. I use the term "inchoate constitutional right" to refer to either of two forms of claimed right. The first is a claimed right that has yet to be recognized by the Supreme Court as deserving of any form of heightened judicial scrutiny, but which has been widely and repeatedly treated as a plausible constitutional right by multiple sources within our constitutional culture, including decisions of state and lower federal courts, repeated *dicta* in opinions of the Supreme Court, legislative debate, learned commentary, and popular opinion. The second is a legislative application of an existing judicially recognized right that has not yet been determined by the Court to be within or without the existing right, but which Congress has found, by adequate evidence, to be within the existing judicially recognized right.

As explained in Part II, this standard is more flexible than that which applies in the abrogation context but more rigid than the *Katzenbach v. Morgan*[21] standard, which permitted Congress to define and enforce its own notions of constitutional rights.[22] The standard proposed here is intended to preserve the Court as the expositor of constitutional rights while permitting Congress to prevent violations of nascent constitutional rights. The result would be a dialogue between the Court and Congress about the shape of constitutional rights, informed by other sources of our constitutional culture, but one which remains relatively confined. The alternatives are not pleasant. On one hand, Congress could be denied any prophylactic power, an outcome that strips the enforcement power of almost all meaning. On the other hand, Congress could be allowed to define and enforce its own version of constitutional rights, an outcome that destabilizes constitutional interpretation and threatens to swamp federalism limits by granting an unfettered police power to Congress.

Part II develops this argument in three phases. First, I consider the possibility that the *Garrett* dictum says nothing about the enforcement power, but is merely a cryptic comment about the scope of the interstate commerce power. Next, assuming that the *Garrett* dictum is

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21 Katzenbach v. Morgan, 384 U.S. 641 (1966).

22 *Id.* at 648–51.

directed to the enforcement power, I discuss whether the criteria developed to answer the abrogation question are appropriate to ascertain the scope of congressional power to enact nonabrogation remedies to prevent state action that might violate the Fourteenth Amendment. To the extent that the abrogation criteria are either inappropriate or should be applied differently in this latter context, I develop the approach, outlined above, that the courts should employ when Congress acts to prevent state wrongdoing without using abrogation as an enforcement mechanism.

I. The Inner Zone: Prevention and Abrogation

In constitutional law, if not in mathematics, congruence and proportionality are highly elastic concepts. No one disputes that Congress has power to abrogate state sovereign immunity with respect to state conduct that, even in the absence of congressional action, would violate the Fourteenth Amendment.[23] When Congress seeks to *prevent* possible constitutional wrongs by enabling injured private parties to bring suit for damages, however, the meaning of congruence and proportionality becomes contested. The battleground has several sectors, the most important of which are the nature of the evidence upon which Congress relies to prohibit a "broader swath of conduct [that] is not itself forbidden by the [Fourteenth Amendment],"[24] the fit between the evidence of state constitutional misconduct and the remedial prohibition chosen by Congress, and the degree to which the conduct sought to be proscribed is thought to violate the Fourteenth Amendment. These sectors are not hermetically sealed from one another; rather, they are related and interdependent. The most significant such relationship is that the nature and fit of the evidence upon which Congress relies to abrogate state sovereign immunity under Section 5 diminishes in importance as the presumptive unconstitutionality of the conduct proscribed increases.

A. The Nature of the Evidence

In the years since *City of Boerne v. Flores*, the Court has insisted that Congress act only upon evidence that the states, as distinguished

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23 United States v. Georgia, 546 U.S. 151, 157–58 (2006) (assuming the truth of a state prison inmate's allegations that the conditions of confinement violated both Title II of the ADA and the Eighth Amendment's prohibition of cruel and unusual punishment incorporated into the Due Process Clause of the Fourteenth Amendment, Congress had undoubted power to subject the state to a private suit for damages).

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

from private actors, have engaged in constitutionally prohibited behavior. The Court's focus upon this evidentiary element stems from its observation in *Flores* that the validity of preventive remedial legislation "must be judged with reference to the historical experience . . . it reflects."[25] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[26] the Court characterized *Flores* as imposing a requirement that Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[27] Because Congress failed to identify any "pattern of patent infringement by the States, let alone a pattern of constitutional violations," when it authorized private suits against states for damages resulting from patent infringement, Congress exceeded the scope of its prophylactic authority.[28] Congress simply "acted to head off this speculative harm," and that was not a sufficient basis for invoking its enforcement power to abrogate state immunity.[29] The Court repeated and amplified this evidentiary requirement in *Kimel v. Florida Board of Regents*,[30] when it held that Congress had exceeded its enforcement authority by prohibiting the states from engaging in virtually all age discrimination in employment.[31] The evidence supporting the validity of Congress's action consisted of "isolated sentences clipped from floor debates and legislative reports"[32] that were either naked conclusions or recitations of anecdotes. Evidence before Congress of possible unlawful age discrimination by the federal government was deemed to be irrelevant to the question of whether Congress had adequate evidence of state wrongdoing.[33]

The ultimate refinement of this requirement that Congress rely upon evidence of a pattern of state wrongdoing was reached in *Board of Trustees v. Garrett*. The Court held that Congress lacked the power to abrogate state immunity to enforce Title I of the Americans with

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25 *Flores*, 521 U.S. at 525 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1996)).

26 Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

27 *Id.* at 639.

28 *Id.* at 640, 645–46.

29 *Id.* at 641, 645–46.

30 Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

31 *Id.* at 89 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

32 *Id.*

33 *See id.*

Disabilities Act ("ADA"),[34] which requires employers (including the states) to provide reasonable accommodations to the disabled except when to do so would work an undue hardship upon the employer.[35] Part of the Court's rationale was that although Congress relied upon evidence that private employers and local governments engaged in discrimination against the disabled, there was not much evidence that states had engaged in a pattern of unconstitutional behavior toward the disabled.[36] Although local governments are part of the state for purposes of the Fourteenth Amendment, they do not enjoy Eleventh Amendment immunity.[37] Because the precise issue was whether Congress could validly abrogate Eleventh Amendment immunity, the Court regarded evidence of wrongful behavior by *local* governments as irrelevant to the question of whether Congress had an adequate evidentiary basis to abrogate the *states'* sovereign immunity.[38] Although this distinction is surely a hint that the nature of judicial scrutiny of the scope of the enforcement power may vary with the means chosen by Congress to implement its enforcement power, it also indicates the high degree of evidentiary specificity that the Court requires Congress to have before it to abrogate state immunity via its enforcement power.

The requirement that Congress rely on specific evidence of state wrongdoing is not as implacable as the foregoing would suggest. All

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34 Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2000)). Title I is codified at 42 U.S.C. §§ 12111–12117.

35 Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001).

36 *Id.* at 370–72.

37 *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

38 *Garrett*, 531 U.S. at 368–69. The focus upon state conduct, as distinguished from that of private actors and local governments, appears to depend upon the nature of the constitutional right that Congress is purportedly enforcing. In *South Carolina v. Katzenbach*, 383 U.S. 301, 312–15 (1966), the Court relied upon evidence of constitutional misconduct by local officials to support the validity of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973bb-1 (2000), as an exercise of congressional power to enforce the Fifteenth Amendment. Similarly, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 730–35 (2003), the Court invoked evidence of private misconduct to support the validity of the family medical leave provisions of the Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654 (2000), as within the enforcement power. Finally, in *Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004), the Court characterized as "mistaken" the "premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." However, the Court in *Lane* relied heavily upon evidence of state misconduct with respect to the constitutionally fundamental right of access to courts. *Id.* at 527. As discussed below, the rights at issue in each of *South Carolina v. Katzenbach*, *Hibbs*, and *Lane* are rights that command particular protection, a fact that *Lane* recognized by noting that, "[w]hile § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." *Id.* at 523.

of the cases in which this requirement was developed—*Florida Prepaid, Kimel,* and *Garrett*—involved conduct that, from a constitutional perspective, is presumptively valid. Patent infringement, though unlawful, is not a constitutional wrong.[39] Discrimination against the aged and the disabled is constitutionally valid unless it can be proven that there is neither a legitimate reason for such discrimination or that such discrimination is not rationally connected to the accomplishment of some legitimate government objective.[40] When Congress proscribes state activities that carry a presumption of constitutional invalidity, however, Congress may abrogate state immunity under its enforcement power with much less evidentiary specificity.

The clearest example of this phenomenon is *Hibbs*,[41] in which the Court upheld Congress's abrogation of state immunity to enforce the family leave provision of the Family and Medical Leave Act of 1993.[42] Congress relied on evidence that "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits,"[43] and testimony that state leave policies were either facially discriminatory or applied in a sexually discriminatory fashion.[44] However, much of "the evidence considered by Congress concerned discriminatory practices of the private sector, not those of state employers"[45] and was connected to the states only by inferential conjecture.[46] Moreover, Congress relied "on evidence suggesting States provided men and women with the parenting leave of different length,"[47] which the Court deemed relevant "because state discrimination in the provision of both [parental and family leave] is based on the same gender stereotype: that women's family duties trump those of the workplace."[48]

The evidence upon which Congress acted was no more conclusive of a pattern of state discrimination than that rejected as insufficient in *Kimel* and *Garrett*, but this time the Court regarded it as "weighty

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39 *See* Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 672–74 (1999).

40 *Garrett*, 531 U.S. at 366–67.

41 *Hibbs*, 538 U.S. at 735.

42 Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654 (2000).

43 *Hibbs*, 538 U.S. at 730.

44 *Id.* at 732.

45 *Id.* at 746 (Kennedy, J., dissenting).

46 *Id.* at 747–48.

47 *Id.* at 748.

48 *Id.* at 731 n.5 (majority opinion).

enough to justify the enactment of prophylactic § 5 legislation."[49] The difference was because Congress, in enacting the family leave provision, "directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[50] To buttress this rationale, the Court cited *South Carolina v. Katzenbach*, in which the presumptive unconstitutionality of racial discrimination played a large part in the Court's conclusion that the Voting Rights Act[51] was valid prophylactic legislation.[52]

The Court's approach in this area seems to resolve into several propositions. When Congress seeks to abrogate state sovereign immunity to prevent state behavior that, constitutionally speaking, is presumptively valid, Congress must marshal strong evidence of state misconduct that establishes a pattern of unconstitutional behavior. When Congress seeks to abrogate state sovereign immunity to prevent state behavior that, constitutionally speaking, is presumptively invalid, Congress may rely on much less persuasive evidence of state wrongdoing. Left unresolved is the question of whether the degree of the evidence that Congress must have to invoke its prophylactic enforcement power to abrogate state immunity dwindles to little more than a showing of inferences and conjecture demonstrating state wrongdoing when the state action that Congress bans carries the strongest presumption of invalidity.[53]

The Court's approach, however, fails to answer more questions than simply the nature of the evidence necessary to support prophylactic abrogation when Congress acts to prohibit state conduct that

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49 *Id.* at 735.

50 *Id.* at 736 (internal citations omitted).

51 Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973bb-1 (2000).

52 *Hibbs*, 538 U.S. at 736 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308–13 (1966)).

53 Justice Scalia rejects the entire notion that Congress's enforcement power under Section 5 of the Fourteenth Amendment includes a prophylactic power: "Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called 'prophylactic legislation' is reinforcement rather than enforcement." Tennessee v. Lane, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting). Nevertheless, Justice Scalia would make an exception, "principally for reasons of *stare decisis*," for "congressional measures designed to remedy racial discrimination by the States." *Id.* at 564 (Scalia, J., dissenting). The fact that an opponent of prophylaxis would relent when it comes to race may suggest that those who embrace prophylaxis would relax the evidentiary burden on Congress in cases of race even more than the Court did with respect to sex in *Hibbs*.

would be subject to strict scrutiny. What if Congress relies on evidence that a presumptively valid practice was motivated by a constitutionally suspicious animus? In racially disparate impact cases, a presumptively valid practice becomes subject to strict scrutiny when it is proven that a motivating factor for its adoption was a constitutionally suspicious intent.[54] Suppose that the evidence before Congress consists of pervasive private animosity toward a particular group, but the connection between that widespread animosity of the citizenry and the presumptively valid actions of its elected representatives is thin. Is this evidence sufficient to support congressional prohibition of the state conduct in question and abrogation of state sovereign immunity as a remedy? Or must Congress produce strong evidence of the *state's* wrongful motive, as distinct from that of the citizens who are the ultimate sovereigns of the state? *United States v. Morrison*,[55] in which the Court reaffirmed the doctrine that the enforcement power may only be deployed against state action, suggests that there must be proof of animus on the part of state actors,[56] and *South Carolina v. Katzenbach*, which upheld the Voting Rights Act, was premised upon voluminous evidence of racial animus on the part of state actors.[57]

Moreover, by tying the nature of the evidence to the level of judicial scrutiny that would be applicable if the state practice were the subject of constitutional challenge, the Court conflates the question of whether levels of scrutiny are substantive rules of constitutional law or tools of judicial deference to be used in ascertaining the substance of constitutional law. This problem is endemic to the entire project of charting the scope of the enforcement power with respect to prophylactic abrogation,[58] but it is especially problematic in connection with the nature of the evidence necessary to support prophylactic abrogation. If the point of confining such evidence to explicit proof of state action is to ensure that Congress acts only to address state misconduct, why should evidence of private behavior become relevant as soon as Congress acts to prohibit state action that, although not constitutionally suspicious, is thought necessary to prohibit in order to

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54 *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 242–48 (1976). Of course, a state found to have acted with the requisite animus might still prevail if it can prove that it would have adopted the practice regardless of the identified animus. *See* Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 286–87 (1977).

55 United States v. Morrison, 529 U.S. 598 (1999).

56 *Id.* at 626–27.

57 South Carolina v. Katzenbach, 383 U.S. 301, 308–10 (1966).

58 *See* discussion *infra* Part I.C.

prevent constitutionally wrongful state conduct? However plausible it may be to think that only evidence of state misconduct is relevant to the scope of an enforcement power that is limited to prohibition of state action, it is far less plausible to think that evidence of *private* misconduct suddenly becomes relevant when Congress acts to ban presumptively valid state conduct to prevent constitutional wrongdoing by the state.

Yet in the prophylactic abrogation context, the Court seems to be doing just that, so long as the constitutional wrong it seeks to prevent is one that would be subject to heightened scrutiny. The family medical leave provision at issue in *Hibbs*, for example, required employers to grant twelve weeks of unpaid leave to any employee for family medical care.[59] Although the sex-neutral aspect of the provision addresses sex bias in the granting of such leaves and thus deals with conduct subject to heightened scrutiny, the twelve-week requirement is wholly unconnected with sex discrimination. Nonetheless, evidence of behavior of actors other than states was treated as relevant to support congressional power to prohibit granting of less than twelve weeks of unpaid leave.[60] Whatever the merits of tying substantive rules of constitutional law to levels of judicial scrutiny, it seems peculiar to tie the relevance of evidence of state or private conduct to such levels.

B. The Fit Between the Evidence and the Remedy

This element of the Court's analysis of the propriety of congressional use of the enforcement power to prevent unconstitutional harm by abrogating state sovereign immunity is first cousin to the Court's focus on the nature of the evidence upon which Congress relied. Unlike the "nature" requirement, which focuses upon evidence that states, as distinguished from private actors or the federal government, have engaged in a pattern of wrongful conduct, the "fit" requirement appears to employ two alternative criteria: either the congressional remedy must be limited to those jurisdictions where unlawful state conduct has been identified, or, if applicable nationwide, must be based upon evidence that enough states are engaging in unlawful conduct that the issue can be confidently recognized as a national problem.

When Congress applies its enforcement power uniformly across the nation, the Court demands evidence that the problem Congress

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59 Nev. Dep't Human Res. v. Hibbs, 538 U.S. 721, 725 (2003).

60 *Id.* at 735–37.

seeks to prevent is national. One reason the Court in *Florida Prepaid* held the Patent and Plant Variety Protection Remedy Clarification Act[61] invalid as to its attempted abrogation of state immunity was that Congress had "no evidence that unremedied patent infringement by States had become a problem of national import. At most, Congress heard testimony that patent infringement by States might increase in the future . . . ."[62] The requirement that the evidence be broadly applicable across the nation must be distinguished from the requirement that evidence clearly implicate state wrongdoing, rather than private misbehavior or wrongful action by the federal government. In this dimension, the "fit" requirement is one of generality, whereas the "nature" requirement is one of specificity.

An indication of this generality can be gleaned from *Kimel*, where the Court rejected as irrelevant a California study which arguably indicated that California had engaged in unlawful age discrimination.[63] This was inadequate to support the Age Discrimination in Employment Act's[64] nationwide abrogation of state immunity because the California "report simply does not constitute 'evidence that [unconstitutional age discrimination] had become a problem of national import.' "[65] In *United States v. Morrison*, decided during the same term as *Kimel*, the Court confirmed this as a required element of congruence, even though the issue arose in a context where abrogation was not at issue.[66] When Congress created a federal civil remedy for victims of violence motivated by the sex of the victim, it relied upon evidence of "pervasive bias in various state justice systems against victims of gender-motivated violence."[67] That voluminous evidence indicated that twenty-one states had commissioned task forces that had documented unconstitutional sex discrimination in their state justice systems,[68] and Congress had made additional findings that "many participants in state justice systems are perpetuating an array of erroneous stereotypes[, which] often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the be-

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61 Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. 102-560, 106 Stat. 4230 (1992).

62 Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 641 (1999).

63 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000).

64 Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2000)).

65 *Kimel*, 528 U.S. at 90 (quoting *Fla. Prepaid*, 527 U.S. at 641).

66 United States v. Morrison, 529 U.S. 598, 626–27 (2000).

67 *Id.* at 619.

68 *Id.* at 666 (Breyer, J., dissenting).

havior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[69] To the Court, however, this evidence "indicate[d] that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."[70] The Court reasoned that, when Congress enacts a nationwide remedy, congruence is established only if there is evidence of a national problem, and evidence from twenty-one states is insufficient.[71] The Court was silent about whether the requisite national problem can be proven by evidence of a problem in a simple majority of the states or by some unspecified supermajority of the states.

Yet in *Morrison* the Court also drew an inference from *Katzenbach v. Morgan*, in which the Court upheld a remedy (that effectively applied only to New York)[72] that congruence is established if the legislative remedy applies only to the jurisdictions that have been identified as engaging in the targeted wrongful conduct.[73] Similarly, the Court cited *South Carolina v. Katzenbach*, in which the Court upheld the preclearance requirements of the Voting Rights Act, and which only applied to jurisdictions identified by a formula that sought to focus on those places that had practiced unlawful racial discrimination in voting,[74] as support for an implied proposition that, absent evidence of a national problem, congruence can be met only by application of the legislative remedy to those states that have been solidly identified as constitutional miscreants.[75]

Only Justice Scalia has taken this argument to its fullest extension:

> The constitutional violation that is a prerequisite to "prophylactic" congressional action to "enforce" the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken*. There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.[76]

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69 *Id.* at 620 (majority opinion).

70 *Id.* at 626.

71 *See id.*

72 *See* Katzenbach v. Morgan, 384 U.S. 641, 656 (1966).

73 *Morrison*, 529 U.S. at 627.

74 South Carolina v. Katzenbach, 383 U.S. 301, 329, 337 (1965).

75 *Morrison*, 529 U.S. at 626–27.

76 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 741–42 (2003) (Scalia, J., dissenting).

Perhaps what is most surprising is that Justice Scalia's position has not been endorsed by other justices. The logic of the Court's persistent emphasis that Congress must tailor the scope of abrogation to the states identified as engaged in a pattern of wrongdoing leads inexorably to Justice Scalia's conclusion.

To paraphrase Justice Holmes, a page of experience is worth a volume of logic,[77] and the experience relevant to this point is that some government actions bear the mark of presumptive invalidity. When Congress acts to prevent states from indulging in behavior that bears the constitutional mark of Cain, it may impute such possible wrongdoing to states that have not been explicitly demonstrated to be violators. After all, Congress is seeking to *prevent* behavior that already is branded as constitutionally suspicious. No doubt this is why the Court disagreed in *Hibbs* about the requisite nature of the evidence before Congress and the closeness of the fit of that evidence to the prophylactic remedy prescribed. Just as was true with the nature of the evidence, the required fit is relaxed when Congress abrogates state immunity to address behavior that smells of constitutional invalidity. According to the result in *Hibbs*, state behavior that implicates heightened scrutiny need not have the full stench of constitutional decay; it need only exude the faint odor of possible constitutional rot. A constitutional problem in one state may be adequate justification for Congress to prevent the problem from spreading to other states.

In its relaxation of the fit requirement, *Hibbs* may represent a departure from prior practice. In *Oregon v. Mitchell*,[78] for example, a unanimous Court upheld the use of the enforcement power to impose a national ban on literacy tests as a prerequisite for voter eligibility.[79] In doing so, however, the Court emphasized the national nature of racial discrimination in voting, rooted in part in racially unequal educational opportunities that facilitate literacy tests as a facially neutral proxy for racial discrimination in voting.[80] Even though governmental

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77 "Upon this point a page of history is worth a volume of logic." N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

78 Oregon v. Mitchell, 400 U.S. 112 (1970).

79 *Id.* at 118.

80 The majority declared:

> In enacting the literacy test ban . . . Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. . . . [As] to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.
>
> Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. . . . [The] history of this legislation

racial discrimination is presumptively void and subject to strict scrutiny, the Court was careful to identify the national nature of the problem as highly relevant to the question of whether Congress's enforcement power permitted nationwide prohibition of literacy tests. By contrast, the Court in *Hibbs* was much less inclined to insist on proof that sex bias in the granting of family medical leave was a pervasive national problem. Perhaps this change is due to the Court's recognition that there is "a deep-seated popular understanding . . . that a central task of the federal government is the elimination of race- and sex-based discrimination."[81] If so, it may account for the Court's apparent willingness to relax the stringency of the evidentiary requirements related to nature and fitness when Congress abrogates sovereign immunity to prevent states from such discrimination, and its unwillingness to do so when Congress acts similarly to address state conduct that is presumptively valid under the Constitution.

C. The Proximity of the Proscribed Conduct to Fourteenth Amendment Violations

Tiered scrutiny originated as a device for courts to assess the constitutional validity of government actions. Most such actions are presumptively valid; only when government action bears a hallmark of invalidity is that presumption reversed. This may be a useful tool for judicial review of acts that infringe upon claimed individual rights,[82] but whatever its merits in that context, the Court has also imported it as a standard for assessing the scope of the enforcement power. Thus,

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> suggests that concern with educational inequality was perhaps uppermost in the minds of the congressmen who sponsored the Act. The hearings are filled with references to educational inequality. Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments.
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> . . . In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious *national* dilemma that touches every corner of our land. . . . Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation.

Id. at 132–34.

81 Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 23 (2003).

82 I have speculated about the possible demise of tiered scrutiny elsewhere. *See* Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH. & LEE L. REV. 165, 192–205 (2007); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 980–96 (2004).

in *Kimel* and *Garrett*, where the discriminatory conduct banned by Congress was constitutionally valid so long as it was rationally related to a legitimate state interest, the breadth of the legislative prohibition fatally impeached both its congruence with the constitutional right it purported to enforce and the proportionality of the legislative remedy to the identified constitutional injury.[83] By contrast, in *Hibbs*, where Congress sought to prohibit perceived sex discrimination in workplace practices, the family leave provision of the Family and Medical Leave Act was seen as closely tied to the equal protection right to be free of sex discrimination that is not substantially related to an important state interest, and the remedy prescribed by Congress—twelve weeks of sex-neutral unpaid leave to care for family members—was regarded as a measured and proportional response to the constitutional injury.[84]

A wrinkle on this theme was introduced by *Tennessee v. Lane*. There the Court upheld the abrogation of state immunity worked by Title II of the ADA, which forbids discrimination against the disabled in public services, programs, and activities, as applied "to the class of cases implicating the accessibility of judicial services."[85] Although Title II prohibits a great deal of state behavior that is presumed to be constitutionally valid,[86] the Court declined to examine the congruence and proportionality of Title II as an undifferentiated whole to the constitutional problem it sought to remedy. Rather, the Court confined its congruence and proportionality analysis to the specific application before it: access to courts.[87] The Court did not declare that it will undertake piecemeal examination of a comprehensive statute enacted pursuant to the enforcement power only with respect to applications that implicate constitutional rights that receive heightened scrutiny, but the approach taken in *Lane* on this point differs markedly from that taken in *Kimel* and *Garrett*, where at least an entire title of a comprehensive statute was considered as a whole.[88]

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83 Bd. of Trs. v. Garrett, 531 U.S. 356, 372 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (1999).

84 Nev. Dep't of Human Res. V. Hibbs, 538 U.S. 721, 737 (2003).

85 Tennessee v. Lane, 541 U.S. 509, 531 (1978). Title II is codified at 42 U.S.C. §§ 12131–12165 (2000).

86 Title II "reaches a wide array of official conduct," including such constitutionally trivial matters as "seating at state-owned hockey rinks" and such constitutionally fundamental matters as "voting-booth access." *Lane*, 541 U.S. at 530.

87 *Id.* at 531.

88 Justice Stevens, writing for the majority in *Lane*, pointed out that in *Garrett* the Court severed Title I of the ADA from Title II, and considered only Congress's power to abrogate state immunity to enforce the constitutional rights implicated by Title I. *Id.* at 531 n.18.

One explanation for the difference is that state action restricting citizen access to courts receives strict scrutiny, while state discrimination against the disabled or the aged does not receive heightened judicial scrutiny.[89] This explanation is reinforced by *Hibbs*, where the Court considered in isolation the family-leave provision of the Family and Medical Leave Act. One might tentatively conclude that, in determining the scope of the prophylactic power to abrogate state sovereign immunity, judicial willingness to examine laws bit by bit increases with the level of scrutiny attached to the constitutional right the statutory provision is claimed to protect.

United States v. Georgia[90] represents the logical conclusion of the phenomenon of tying the scope of the enforcement power to the level of judicial scrutiny attached to the constitutional right Congress seeks to protect. The Court reversed an Eleventh Circuit ruling upholding dismissal of a prison inmate's claim for damages premised upon alleged violations of Title II of the ADA.[91] Some of the plaintiff's allegations were uncontested violations of the Eighth Amendment incorporated into the Fourteenth Amendment's Due Process Clause, and the parties agreed that those violations also constituted violations of Title II.[92] Because there was agreement that, as to these allegations, Title II was a perfect fit with acknowledged constitutional wrongdoing, Congress's power to address this wrongdoing was undisputed.[93] The question of whether Congress had power to abrogate state immunity to prevent state actions that were not actual constitutional violations was left unresolved, pending further development of the issues on remand. When constitutional violations are acknowledged, of course Congress has power to provide for citizen redress. In that sense, *United States v. Georgia* states the acme of the relationship between the scope of the enforcement power and the probability that the enforcement power is exercised to prevent real, rather than imagined, constitutional injuries.

The normative nub of the matter is whether the Court should be imposing on Congress, as a prerequisite to exercise of its prophylactic enforcement power, the burden of overcoming the usual presumption

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89 *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 366–67 (2000) (disabled); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (aged).

90 United States v. Georgia, 546 U.S. 151 (2006).

91 *Id.* at 882.

92 *Id.* at 880–81.

93 "[N]o one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." *Id.* at 881.

of validity that attaches to government actions. Justice Breyer, dissenting in *Garrett*, noted:

> [N]either the "burden of proof" that favors States [under minimal scrutiny] nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power. . . .
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> . . . .
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> 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. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy.[94]

Breyer's argument, which fastens upon the differing institutional functions and capacities of Congress and the courts as the basis for vesting in Congress an enlarged power to enforce the Fourteenth Amendment, has been made by many commentators.[95] The essence of the argument is that courts are obliged to act with restraint when confronting the momentous question of the constitutional validity of legislative action, that tiered review is a judicial tool for allocating the burden of proof with respect to this question of constitutional validity and not a substantive metric of constitutional validity, and that the tool of tiered review is irrelevant to the quite different function of a legislature. Congress, so the argument goes, is better able to determine societal facts that bear upon the question of whether any given state practice is constitutionally valid.

One illustration of this heightened fact-finding capacity is said to be the gap between intentional race or sex discrimination and the unintentional infliction of disparate outcomes by race or sex produced by race- or sex-neutral rules or practices. As a constitutional matter, the equal protection guarantee is presumed to be violated by state

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94 Bd. of Trs. v. Garrett, 531 U.S. 356, 383–84 (2001) (Breyer, J., dissenting).

95 *See*, *e.g.*, David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 61–63; Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 121 (1966); Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 91; Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 189–92 (1997); Post, *supra* note 81, at 44; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 513 (2000) [hereinafter Post & Siegel, *Antidiscrimination*]; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Policentric Interpretation*].

action that intentionally discriminates on race or sex lines, but no such presumption attaches to state action that is race- or sex-neutral, but which delivers a disparate impact by race or sex.[96]

Some argue that the requirement of discriminatory purpose is not a substantive rule of constitutional law, but a rule of judicial deference to legislatures.[97] In support of this position, it is often noted that the Court has approved of legislation that prohibits disparate impact by race or sex, thus implying either that Congress's enforcement power permits it to prohibit conduct that is not itself unconstitutional, or that Congress has power to specify the substance of constitutional rights.[98] It is surely true that, as the Court acknowledged in *Flores* and *Kimel*, Congress may use its enforcement power to prevent constitutional injury by prohibiting state conduct that is not itself unconstitutional, but which is congruent with a recognized constitutional right and proportional to the constitutional injury it seeks to prevent.[99] What Congress may not do is to define for itself the substance of constitutional rights.[100] Congress may prevent judicially recognized constitutional wrongdoing by prohibiting some actions that, though not unconstitutional in isolation, are well tailored by Congress to arrest conduct that poses a high risk of producing constitutional injury.[101] Disparate impact legislation illustrates a reasonable prophylactic application of congruence and proportionality. The Court presumes that, absent a showing of intentional discrimination, race- and sex-neutral practices are valid even if they inflict disparate impact, but Congress is free to reverse that presumption.[102] Congruence is established by the fact that the congressional reversal is limited to disparate impact on lines

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96 *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 273–74 (1979) (sex); Washington v. Davis, 426 U.S. 229, 242 (1976) (race).

97 *See*, *e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 898–99 (1999); Post & Siegel, *Antidiscrimination*, *supra* note 95, at 469 ("[T]he doctrine of discriminatory purpose is not justified by the requirements of the Equal Protection Clause, but by . . . the particular institutional limitations of the Court as a nonrepresentative body within a democracy.").

98 *See*, *e.g.*, City of Rome v. United States, 446 U.S. 156, 173 (1980) (holding that Congress, through the Voting Rights Act of 1965, may outlaw voting practices that are discriminatory in effect).

99 The enforcement "power is not confined to the enactment of legislation that merely parrots the . . . Fourteenth Amendment. Rather [it] includes the authority both to remedy and to deter violation of [constitutional] rights . . . by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

100 *Flores*, 521 U.S. at 519.

101 *City of Rome*, 446 U.S. at 158.

102 *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

that, if made explicit, would be presumptively void. Proportionality is established by the fact that all such legislation provides an opportunity for the state actor to rebut the legislative presumption of invalidity.

With respect to the use of the enforcement power to abrogate state sovereign immunity, a justification for using tiered scrutiny to limit the enforcement power emerges. Although it is true that tiered scrutiny is a tool of judicial analysis, and not a substantive rule of constitutional law, it is a useful aid to application of the congruence and proportionality test. In the abrogation context, congruence and proportionality serve to cabin congressional power to preserve both federalism and separation-of-powers interests. The separation-of-powers interest is to preserve the Court's historical role as the final voice in constitutional interpretation. To do so, it is necessary to prohibit Congress from engaging in its own independent, interpretive quest and to determine whether "Congress, under the pretext of executing its powers [has enacted] laws for the accomplishment of objects not entrusted to the government."[103] The federalism interest is to preserve state autonomy via preservation of the fisc from private raids authorized by Congress to vindicate injuries that do not derive from constitutional wrongdoing. If Congress were to be granted a freewheeling prophylactic abrogation power, it could do under the enforcement power what it may not do using its Article I powers and could freely invade state sovereignty. The essential judgment of the Court in the abrogation context is that abrogation should be limited to vindication of private injuries that result from unquestionably unconstitutional conduct.

No doubt it is true that the critics of this doctrine also criticize *Seminole Tribe* and are very likely to criticize the entire edifice of state sovereign immunity, but this is not the forum in which to engage in that protracted debate. Whatever the ultimate merits of sovereign immunity, it is easy to see why tiered scrutiny has been imported into the prophylactic abrogation context as a tool to determine the limits of the enforcement power. Put most simply, tiered scrutiny acts as a template to ensure that prophylactic abrogation hews closely to the contours of constitutional rights as the Court has established them. This may be a "juricentric" approach to the enforcement power, but the twin demands of federalism and separated powers suggest its efficacy in the prophylactic abrogation context.

Perhaps this is why Justice Breyer did not persuade a majority of his fellow justices in *Garrett* that tiered scrutiny was an inappropriate

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103 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

tool by which to test congruence and proportionality. However, the fact that in *Hibbs* the Court sustained the enforcement power on evidence not significantly different than that before Congress in enacting Title I of the ADA indicates that, even when the Court adheres to the tiered scrutiny template to assess the scope of the prophylactic enforcement power, the effect of this template is to increase deference to Congress whenever it invokes its enforcement power to prevent government actions that would be judicially assessed under any level of heightened scrutiny. Once more, an unanswered question is whether the level of deference to prophylactic abrogation will become even greater when Congress acts to prevent racial discrimination by prohibiting actions that are not presumptively invalid. The larger, unanswered question is whether the scope of congressional prophylaxis is significantly different when abrogation is not an issue, and it is to that issue that I now turn.

II. The Outer Zone: Prevention Without Abrogation

Apart from *Morrison*, the Court has not had recent occasion to consider the scope of the prophylactic enforcement power in a nonabrogation context. Yet in *Garrett* the Court dropped a tantalizing hint that the scope of that power might be considerably broader in a nonabrogation context. In a footnote, the Court said:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity . . . does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908).[104]

There are two ways to read this note. Because the Court acknowledged the continuing validity of Title I of the ADA as applied to the states, it may be a recognition that in a nonabrogation context the scope of the enforcement power is broader than when abrogation is at issue. On the other hand, it may be that Title I of the ADA continues to be binding on the states after *Garrett* because Congress had authority under its interstate commerce power to enact the law. Because the commerce power is not a source of authority to abrogate state sovereign immunity, it is irrelevant to cases where that is at issue, but the

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104 Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

commerce power remains a potent source of authority to regulate the states.[105] These possibilities raise three questions, which are the focus of this Part: 1) which possibility is the more accurate description of the Court's limited examination of the issue?; 2) which possibility should the Court adopt?; and 3) assuming that there is broader scope for exercise of the prophylactic enforcement power when abrogation is not at issue, what should define the outer boundaries of that power?

A. Reading the Tea Leaves of Morrison *and* Garrett

When Congress enacted the Violence Against Women Act ("VAWA"),[106] it compiled a "voluminous record" supporting its conclusion that there was "pervasive bias in various state justice systems against victims of gender-motivated violence."[107] Congress acted on

> evidence that many participants in state justice systems [perpetuated] an array of erroneous stereotypes and assumptions [that resulted] 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.[108]

One remedy for the equal protection violation that Congress believed was produced by this sex bias of state actors in state justice systems was the creation of a federal civil remedy for victims of such violence.[109]

In *Morrison*, Congress's power to enact this civil remedy was successfully challenged; neither its interstate commerce nor enforcement power was sufficiently broad to authorize Congress to act.[110] Power to act under the Commerce Clause was lacking because Congress sought to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce,"[111] a form of regulation that amounted to assumption of a general police power in-

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105 Of course, Congress may not regulate the states in ways that commandeer a state's legislature by forcing the state to legislate in a federally prescribed manner, New York v. United States, 505 U.S. 144, 161–66 (1992), nor may Congress conscript state executive officers to administer federal laws, Printz v. United States, 521 U.S. 898, 933 (1997).

106 Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.).

107 United States v. Morrison, 529 U.S. 598, 619–20 (2000).

108 *Id.* at 620.

109 *Id.*

110 *Id.* at 627.

111 *Id.* at 617.

consistent with the structural principle of a national government of limited and enumerated powers.[112] Congress lacked authority under its enforcement power to enact the civil remedy provision because "it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias. [The law] visits no consequence whatever on any Virginia public official involved in investigating or prosecuting" the rape that produced the civil claim at issue in *Morrison*.[113] One might criticize this conclusion by noting that, although the federal civil remedy was directed toward private actors, the perceived necessity for that remedy was entirely due to state misconduct in the administration of justice. However, even accepting the Court's conclusion as sound, *Morrison* appears to stand simply for the proposition that the enforcement power, whether or not abrogation is at issue, is limited to remedies against state actors. The Court in *Morrison* also noted that the VAWA civil remedy applied nationally, but that the evidence of state misconduct upon which Congress acted was adduced from only twenty-one states.[114] Given the Court's conclusion that Congress may not use its enforcement power to create remedies against private actors, this latter observation is entirely obiter dictum, and appears to be contradicted by such later cases as *Hibbs* and *Lane*.

Garrett presents a different cryptic interpretational problem. The Court hastened to assure its readers that, despite Congress's inability to use its enforcement power to abrogate state sovereign immunity, the substantive provisions of Title I of the ADA remained enforceable against the states by private suits for injunctive relief or by suits brought by the federal government.[115] What it did not reveal was whether this condition is true because Congress had authority to enact Title I (except for abrogation) under its commerce power, its Section 5 enforcement power, or both. Unlike the civil remedy provision of the VAWA, Title I deals with employment, a quintessentially economic activity that is almost certain, in the aggregate, to affect interstate

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112 *Id.* at 618.

113 *Id.* at 626.

114 *Id.* at 628–31.

115 Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9. In a concurrence, Justice Kennedy, joined by Justice O'Connor, noted that

> what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act [but] whether the States can be subjected to liability in suits brought . . . by private persons seeking to collect moneys from the state treasury without the consent of the State.

Id. at 376 (Kennedy, J., concurring). But Justice Kennedy, like the majority, did not specify the constitutional power or powers Congress could use to compel the states to act.

commerce substantially. Indeed, after *Gonzales v. Raich*,[116] which emphatically reaffirmed the aggregation principle of *Wickard v. Filburn*,[117] there would seem to be no doubt on this point.[118] But the fact that Congress had authority under its commerce power to enact Title I of the ADA does not dispose of the question of its power to do so under the Section 5 enforcement power.

The *Garrett* footnote makes explicit reference to *Ex parte Young*[119] as the apparent source of authority for private actions against states seeking injunctive relief for state violations of Title I of the ADA.[120] *Ex parte Young*, of course, is the judicially created exception to state sovereign immunity that permits citizen suits against state officers to enjoin them from violations of federal law.[121] The Court's invocation of *Ex Parte Young* does not dispose of the question, though, because a suit under *Ex parte Young* may be brought to ensure compliance with any federal law, no matter what the source of federal authority for its enactment. To test the question of whether the *Garrett* footnote assumes that Congress has greater Section 5 power to prevent state wrongdoing when it does not abrogate state sovereign immunity, one must posit a federal law regulating the states and exceeding the scope of the interstate commerce power or any other source of federal authority except the Section 5 enforcement power. The only such recent case is *Morrison*, but the rationale of *Morrison*'s conclusion that Congress exceeded its enforcement power is sufficiently narrow that *Morrison* alone cannot be a reliable Virgil for our stroll through the inferno of judicial review of the enforcement power. On the other hand, the dicta in *Morrison* that either a nationwide remedy must be rooted in evidence of a nationwide problem, or the remedy must be limited to the states identified as probable constitutional offenders, suggests that the Court will not readily defer to congressional judgment about the scope of the prophylactic enforcement power, even when abrogation is not at issue.[122] The net result is that we are forced to engage in, at best, informed surmise. The Court has left us hanging and, in doing so, has surely preserved for itself room to declare that its footnote observation in *Garrett*[123] was meant

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116 Gonzales v. Raich, 545 U.S. 1 (2005).

117 Wickard v. Filburn, 317 U.S. 111 (1942).

118 *See Raich*, 545 U.S. at 18–19; *Filburn*, 317 U.S. at 125–29.

119 *Ex parte* Young, 209 U.S. 123 (1908).

120 *Garrett*, 531 U.S. at 374 n.9.

121 *Ex parte Young*, 209 U.S. at 148.

122 *See* United States v. Morrison, 529 U.S. 598, 628–31 (2000).

123 *Garrett*, 531 U.S. at 374 n.9.

only to recognize the independent existence of Congress's interstate commerce power, should it wish to throttle the enforcement power in nonabrogation settings. Thus, as a purely descriptive matter, the tea leaves of *Morrison* and *Garrett* are too murky to read with confidence.

B. A Fresh Pot of Tea Leaves: Normative Observations on the Scope of the Enforcement Power in a Nonabrogation Setting

Because the descriptive task reveals results "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh,"[124] a foray into prescription is both appropriate and needed. Because the overwhelming bulk of the recent cases dealing with the scope of the enforcement power have involved the question of abrogation of state sovereign immunity, it is necessary to ask whether there is something distinctive about the states' sovereign immunity that would suggest a different, and more restrictive, scope of enforcement power when abrogation is at issue.

A principal underlying rationale for state sovereign immunity is preservation of state autonomy. This was most clearly expressed in *Alden v. Maine*,[125] in which the Court held that Congress could not compel Maine to entertain in its own courts private suits against the state seeking damages for violations of federal law.[126] Because the Eleventh Amendment was literally not applicable, the Court relied for its decision upon a structural principle of state sovereignty embedded in the constitutional design:

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.[127]

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124 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

125 Alden v. Maine, 527 U.S. 706 (1999).

126 *Id.* at 749–54.

127 *Id.* at 713.

Because no enumerated power of the federal government permitted Congress to abrogate this immunity, Congress lacked authority to compel the states to entertain in their own courts private suits against themselves for damages stemming from violation of federal law. The explanation for why this was so deserves to be set forth at some length:

> A power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. . . .
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> . . . .
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> . . . Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. . . .
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> . . . .
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> A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. . . . [T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process. Although the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. . . .
>
> . . . When the Federal Government asserts [such] authority . . . it strikes at the heart of the political accountability so essential to our liberty and republican form of government.
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> The asserted authority would blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments. . . . A State is entitled to order the processes of its own governance, assigning to the political

> branches, rather than the courts, the responsibility for directing the payment of debts.[128]

State sovereign immunity is thus revealed to be the sibling of the procedural immunity that states enjoy under the interstate commerce power. Just as Congress may not commandeer a state's legislative process or executive officers to enact or enforce federal commands,[129] so it may not tell the states how they must allocate their scarce financial resources, at least with respect to private judgment creditors seeking to vindicate federal commands. This immunity, however, is hardly boundless. Congress may impose all manner of regulations upon states via its commerce power, so long as it regulates the states in common with private citizens.[130] Congress may pressure the states to use their treasuries in ways desired by the federal government through adept use of its considerable spending power.[131] The judicial doctrine that limits Congress's power of abrogation is simply an aspect of the procedural immunities that are more commonly seen in *New York v. United States* and *Printz*. Those immunities are distinctly procedural because they amount to advice to Congress on how to behave properly in the elegant salon of federalism.[132] When the judicial limits on abrogation are recognized as a part of this etiquette manual (though perhaps couched as stronger advice, inasmuch as there are fewer ways to avoid the bar against abrogation), it becomes apparent that when abrogation is not at issue there is no good reason to adhere slavishly to the analysis that charts the scope of the enforcement power when abrogation is the issue.

This is not to say that questions of state autonomy and preservation of political accountability are irrelevant to the scope of the enforcement power in a nonabrogation context; it is to say that those questions need to be examined and answered without the same degree of concern for preservation of the states' autonomous management of their treasuries. Of course, because the *Flores* factors of congruence and proportionality apply whether or not abrogation is the issue, it is necessary to define their meaning in a nonabrogation context. Let us consider the possibilities.

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128 *Id.* at 749–52 (internal citations omitted).

129 *See* Printz v. United States, 521 U.S. 898, 935 (1997) (conscription of state executive officers to enforce federal law); New York v. United States, 505 U.S. 144, 161 (1992) (commandeering of the legislative process).

130 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985).

131 *See* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

132 *See* Calvin Massey, *Etiquette Tips: Some Implications of "Process Federalism,"* 18 HARV. J. L. & PUB. POL'Y 175, 176 (1994).

Morrison held only that congruence and proportionality limit Congress's enforcement power to remedies that act directly upon state actors.[133] Whether or not this reaffirmation of the central holding of the *Civil Rights Cases*[134] is sound, it does no more than specify a single dimension of the remedial power to which enforcement of the Fourteenth Amendment is limited. *Morrison* says nothing about the scope of congressional power to prevent state officials from actions that might violate the Fourteenth Amendment. By way of illustration, suppose that, acting upon much the same evidence as Congress had before it when it enacted the VAWA, Congress amended the statute to provide a federal civil remedy of treble damages and attorneys' fees to victims of sex-based violence against any state actor who had unreasonably or negligently failed to investigate or prosecute any act of sex-motivated violence. Such a provision would strip police and prosecutors of the qualified immunity they normally enjoy in the performance of their duties, and would apply regardless of whether or not their failure was actually the product of sexual bias. Thus, liability is created for actions that may not be constitutionally wrongful, but would certainly operate to prevent equal protection violations from occurring in the administration of justice concerning sex-motivated violence. The hypothetical provision may or may not be wise, but surely the Court should be as indifferent to that point as, for the moment, am I. The provision is directed squarely to state actors. Is it congruent with and proportional to identified constitutional injury? If one takes the position of Justice Scalia that the enforcement power has no prophylactic scope whatever,[135] the answer is surely "no." But Justice Scalia writes alone on this point. If Congress may use its enforcement power to mandate twelve weeks of sex-neutral unpaid family leave on the theory that it is acting to prevent archaic sex stereotypes from causing possible violations of the equal protection guarantee, it ought to have the power to subject state actors to personal civil liability for negligent performance of their duties, where the negligence inheres in conduct that at least implicates that same equal-protection right, one that has elevated status in the hierarchy of tiered scrutiny.

Moreover, this hypothetical law is one that is beyond the scope of the interstate commerce power, thus presenting the precise case that is necessary to test the implications of the *Garrett* footnote. The law regulates an entirely noneconomic matter that is, by definition, an in-

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133 United States v. Morrison, 529 U.S. 598, 620–21 (2000).

134 Civil Rights Cases, 109 U.S. 3 (1883).

135 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 741–42 (2003) (Scalia, J., dissenting).

trastate activity. Because the rationale of *Lopez* and *Morrison* with respect to the proper scope of the commerce power remains undisturbed after *Raich*, at least as applied to a single-issue regulatory measure, the commerce power should not authorize its enactment. If Congress lacks authority to enact this law, it must be because it is beyond the scope of the enforcement power. But if that is so, it is not easy to see a principled distinction between *Hibbs* and this hypothetical case. Zealous advocates of state autonomy might argue that the procedural immunities of *Printz* and *New York v. United States* should apply, even though the hypothesized federal law does not draw upon the commerce power. In this example, Congress would be regulating only the states, and doing so to require state executive officials (primarily police and prosecutors) and judicial officers (primarily judges, bailiffs, and court clerks) to execute their duties in accordance with a federally prescribed code of conduct.[136] The interference with state officialdom posited here might be less burdensome than the burdens imposed by the Brady Act,[137] which was struck down in *Printz*, but the Court in *Printz* thought that the extent of the interference was not constitutionally significant.[138] The Court has given no indication that it is inclined to extend these autonomy principles beyond the commerce context, but even if it did so, the hypothetical law should not be seen to offend the *Printz* rule because it forbids state actors from conduct that threatens to violate constitutional rights, rather than requiring them to act affirmatively to implement a federal regulatory program. The point of *Printz* was to disable Congress from conscripting state officers to execute federal regulatory measures, not to deny to Congress any power to prohibit or prevent unconstitutional state conduct.

Suppose that the Court were to uphold the validity of the hypothesized VAWA amendment, citing *Hibbs* as precedential authority.

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136 One might argue that imposing civil liability upon state officials for conduct not actionable under state law does not constitute an attempt to require state officials to administer or enforce a federal regulatory program. Rather, Congress has simply used its enforcement power to prevent state actors from violating constitutional rights. The rejoinder would be that the federally imposed liability standard forces state officials to act in a certain way and that is not functionally different from the federal compulsion voided by *Printz*.

137 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–925A (2000)).

138 Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may . . . [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

Such a result might merely confirm the state of affairs that exists when Congress uses its enforcement power to abrogate state sovereign immunity. As we have seen, the prophylactic abrogation power expands as it addresses state conduct that is more likely to be presumed to be constitutionally invalid. The supposed validity of the imaginary VAWA amendment may serve only to suggest that the scope of the enforcement power is the same, regardless of whether abrogation is at issue. To probe more deeply into the possibility that the scope of the enforcement differs between the abrogation and nonabrogation contexts, we must imagine federal laws that are not authorized by any federal power other than the enforcement power, and do not involve vindication of rights that, when interfered with by governments, would be entitled to heightened judicial scrutiny. The latter condition is necessary because the Court imposes the most stringent limits upon prophylactic abrogation when Congress seeks to vindicate rights that are presumed to be subject to valid limitation by governments.

Thus, consider some examples: the Religious Freedom Restoration Act ("RFRA"),[139] Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[140] and two hypothetical laws that draw upon the current debate concerning same-sex marriage.

The first hypothetical example that follows is a hybrid case that does not involve commerce, but does involve another collateral source of federal authority, and which implicates both garden-variety rights that are not constitutionally fundamental and, indirectly, a fundamental right. The second hypothetical example does not involve commerce or constitutionally fundamental rights (at least under the current state of constitutional doctrine).

First, suppose that Congress provides that same-sex marriages that are valid in the state where contracted must be recognized as valid in every state and imposes personal civil liability upon state actors who refuse to do so. Congress has power under the Full Faith and Credit Clause[141] to enact the first clause of this law,[142] but would it

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139 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb to 2000bb-4 (2000).

140 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc to 2000cc-5 (Supp. IV 2004).

141 U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

142 Although the issue is not entirely free of doubt, it is generally agreed that Congress has power to *increase* the degree to which states are required, by the clause alone, to recognize the acts, records, and proceedings of their sister states, but may not have the authority to *reduce* that

have authority under its enforcement power to enact the second clause? The provision is directed to state actors and thus does no offense to the limitation on the enforcement power imposed by *Morrison* and the *Civil Rights Cases*. It seeks to secure to same-sex couples the benefits that accrue from exercise of the constitutionally protected right to migrate from one state to another. While same-sex marriage itself is not a fundamental constitutional right and discrimination on the basis of sexual orientation triggers no heightened judicial scrutiny,[143] Congress could reasonably conclude that the states are presently engaged in an orgy of legal activity designed to deny to out-of-state, lawfully wed same-sex couples the status benefits of marriage upon their arrival in a new jurisdiction. This may or may not be a penalty imposed on exercise of the right to travel, but Congress has simply declined to wait and see what the judicial answer may be, and has sought to prevent the injury by imposing personal liability upon state actors who refuse to adhere to the congressional directive. Conceivably, the Court could avoid the entire issue by simply deciding that the second clause of the hypothetical law is a means permitted by the necessary and proper clause to the accomplishment of the enumerated federal power of effecting full faith and credit. If the Court were to take that tack, though, it would merely defer the ultimate question for the next hypothetical law.

Suppose, instead, that Congress explicitly preempts state law to provide that any two people, regardless of their sex, may marry one another. In doing so, Congress relies on voluminous evidence of the existence of stable, long-term, same-sex relationships, and the injuries suffered by such same-sex partners due to nonrecognition of their quasi-marital status. Congress recites that it is acting to prevent unconstitutional state interference with the constitutionally fundamental

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degree of recognition. *See*, *e.g.*, Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 n.18 (1980) (plurality opinion) ("[W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court."); Williams v. North Carolina, 317 U.S. 287, 303 (1942) ("Whether Congress has the power to create exceptions [from the constitutional requirements of full faith and credit] is a question on which we express no view. It is sufficient here to note that Congress, in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another has not done so."); *see also* Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1229–30 (1946) (federal laws enlarging full faith and credit may be permissible, but such laws "withdrawing from the compulsory area what the Court has held is encompassed by the constitutional mandate may stand on a different footing.").

143 *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996) (applying rational basis standard to law discriminating against homosexual persons).

right to marry.[144] When the Court in *Loving v. Virginia*[145] struck down a ban on interracial marriages, it did so because it identified marriage as a constitutionally fundamental right.[146] To be sure, *Loving* involved, as a practical matter, the intersection of strict scrutiny under both equal protection and modern substantive due process—a racial barrier to marriage. State bans of same-sex marriage do not bear quite the same imprimatur of invalidity, for *Romer* established that rational sexual-orientation discrimination in the service of a legitimate objective is lawful, and there can be little doubt that the notion of marriage that the Court in *Loving* had in mind was exclusively heterosexual. Nevertheless, the Court in *Loving* pronounced marriage to be a fundamental right and has subsequently indicated that significant interference with entry to the marital state must be subjected to "critical examination" by "rigorous scrutiny."[147]

Marriage has evolved. At one time a woman ceased to have a separate legal identity upon entry into marriage and lost control over most of her property, and, while her husband acquired the right to control her property, he also assumed responsibility for her torts. Of course, the abandonment of those features of marriage were unrelated to the question of who could enter into marriage, but *Loving* represents judicial and constitutional acceptance of the idea that barriers to marriage cannot exclude people on the basis of their skin color. While we have not yet judicially resolved the question of whether barriers to marriage on the basis of the sex of the partners are equally infirm, the question is whether the prophylactic dimension of the enforcement power should permit Congress to act without waiting for the Court.

Now consider what Congress has actually done with respect to protection of religious practices that are not constitutionally protected. In RFRA, Congress required all governments to justify substantial burdens upon religious conduct by demonstrating that the interference was necessary to the accomplishment of some compelling governmental objective.[148] Congress invoked its Section 5 enforcement power as the source of authority for the law, which, of course, imposed requirements that went well beyond what was constitution-

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144 I assume that there is no reasonable prospect that this hypothetical law is within the commerce power. The subject is not commercial, concerns a relationship that has historically always been considered a state concern, and, for the most part (at least in terms of its contraction), is a wholly intrastate matter.

145 Loving v. Virgina, 388 U.S. 1 (1967).

146 *Id.* at 12.

147 *See* Zablocki v. Redhail, 434 U.S. 374, 383, 386 (1978).

148 42 U.S.C. § 2000bb-1 (2000).

ally required of governments under the Free Exercise Clause.[149] With respect to state and local governments, the Court invalidated RFRA in *City of Boerne v. Flores*, and did so in an opinion that made no distinction between the use of the enforcement power to abrogate state sovereign immunity or to regulate state action without using abrogation as a remedy.[150] Critical to the Court's reasoning was the paucity of evidence "of modern instances of generally applicable laws passed because of religious bigotry."[151] That fact, coupled with the omnibus scope and stringent burdens placed upon states by RFRA, caused the Court to conclude that RFRA was neither congruent with nor proportional to the free exercise guarantee that it purported to vindicate.[152] However, because *Flores* was decided before the Court began to deal with the interface between abrogation and the enforcement power, it may be imprudent to conclude that *Flores* is the definitive pronouncement upon the scope of the enforcement power in a nonabrogation context.

In *Cutter v. Wilkinson*[153] the Court upheld the validity of section 3 of RLUIPA against a facial challenge that it violated the Establishment Clause.[154] Section 3 forbids the imposition of any substantial burden upon religious conduct with respect to any person in a federally supported institution, unless that burden can be justified under the strict scrutiny standard.[155] RLUIPA was a reaction to the partial demise of RFRA in *Flores*, and was crafted to invoke Congress's spending and commerce powers.[156] Although the state governmental defendants in *Cutter* argued that Congress lacked authority to enact RLUIPA under either its spending or commerce powers, the Court of Appeals did not address these arguments, ruling instead that the section offended the establishment clause.[157] Because the Court of Appeals failed to decide the spending or commerce issues, the Supreme

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149 *Id.* § 2000bb(a)(4); Employment Div. v. Smith, 494 U.S. 872, 878–79, 882 (1990) (holding that any regulation that is generally applicable to all citizens, and not directed simply to religious conduct, is presumptively valid, regardless of the fact that the regulation may prescribe or proscribe conduct that is forbidden or required by religious faith).

150 City of Boerne v. Flores, 521 U.S. 507, 533–36 (1997).

151 *Id*. at 530.

152 *Id*. at 533.

153 Cutter v. Wilkinson, 544 U.S. 709 (2005).

154 *Id.* at 714.

155 Religious Land Use and Institutionalized Persons Act of 2000 § 3, 42 U.S.C. § 2000cc-1 (Supp. IV 2004).

156 Cutter v. Wilkinson, 349 F.3d 257, 260 (6th Cir. 2003), *rev'd*, 544 U.S. 709 (2005).

157 *Id.* at 268–69.

Court did not consider them in *Cutter*.[158] Accordingly, we do not know whether RLUIPA is grounded solely on the enforcement power. It is at least possible that prohibition of all but compellingly justified substantial burdens upon religious conduct with respect to institutionalized persons in state facilities supported in part by federal funds is sufficiently "unrelated 'to the federal interest'"[159] in supporting state institutional facilities that section 3 of RLUIPA is beyond the spending power.[160] Nor do we know whether section 2 of RLUIPA, which bars state and local governments from imposing land use regulations that substantially burden religious conduct unless the government can prove a compelling justification, is within congressional power to regulate interstate commerce. It is at least possible (though not very probable after *Raich*) that such intrastate regulations, even in the aggregate, fail to exert a substantial effect upon interstate commerce. Only if RLUIPA is beyond the spending and commerce powers does it present a test case for examining the scope of the enforcement power in a nonabrogation context, where Congress seeks to prevent harm that is not presumptively unconstitutional.

It is true that each of these examples interferes with autonomous state governance, but so does the Fair Labor Standards Act,[161] the Clean Air Act,[162] and any other federal law enacted pursuant to the commerce power that lawfully regulates states. The financial autonomy of states is left undisturbed by these imaginary marriage laws,[163] and that is the fulcrum of concern when it comes to abrogation. Interference with state autonomy is no magic talisman; objection to these hypothetical examples must be rooted elsewhere. Yet the enforcement power, however prophylactic it may be, is limited to remedial

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158 *Cutter*, 544 U.S. at 718 n.7.

159 South Dakota v. Dole, 483 U.S. 203, 207 (1987).

160 Of course, this limit on the spending power has never been successfully invoked, but *Dole* fails to address how close the relationship must be between the federally imposed condition and the national project that it seeks to further. If the federal interest in supporting state penal institutions, for example, is to aid vigilant and effective law enforcement, perhaps a spending condition that seeks to facilitate prisoners' religious conduct is too unrelated to survive. But if the federal interest in supporting state prisons is to assist states to furnish humane conditions of confinement the same spending condition is closely related to that interest.

161 Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2000)).

162 Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended in scattered sections of 42 U.S.C. (2000)).

163 Of course, states would be required indirectly to expend resources in the form of expenditures and tax benefits to a larger base of married couples, to the extent they extend such benefits at all to married couples. That situation is no different than the financial effect that may be felt by states in complying with the Fair Labor Standards Act or the Clean Air Act.

action; that is what the twins of congruence and proportionality are intended to police. If there is to be a difference in the meaning of those terms when abrogation is not at issue, it must be with respect to state behavior that is presumptively in conformity with the Fourteenth Amendment. It is in this area that the Court has most zealously guarded state treasuries by denying Congress the power to abrogate state immunity.

The category of state conduct that is presumptively valid is not static. Sex classifications, once thought to be presumptively valid, eventually came to be regarded as presumptively void, and subjected to an intermediate level of scrutiny.[164] A similar process attended classifications of people by the marital status (or lack thereof) of their parents.[165] In both cases, it was a fundamental alteration in society's understanding of these distinctions that caused the judiciary's treatment of them to change. There is no reason to think that this process of evolution has come to an end. Indeed, our culture's view of homosexuality has been radically altered over the past two or three decades, even if that has not led to a formal change in the level of judicial scrutiny applied to government classifications by sexual orientation. One reaction to this phenomenon is to condemn the Court's approach to the enforcement power as fundamentally misguided, an exercise in judicial control that conceives of constitutional interpretation as an autonomous activity of courts, undertaken independently of, and to the exclusion of, other political actors.[166] On this view, the enforcement power belongs as much to Congress as to the Court, and the judiciary should defer to Congress "when it enacts Section 5 legislation premised on an understanding of the Constitution that differs from the Court's."[167] The only limit upon the enforcement power would be "that the Court remains free to invalidate Section 5 legislation that in the Court's view violates a constitutional principle requiring judicial protection."[168] This conception of the enforcement power is, of course, identical to that expressed by Justice Brennan in *Katzenbach v. Morgan*: legislation is valid under the enforcement power so long as it "is 'plainly adapted to that end' and . . . consistent with 'the letter and spirit of the constitution,'"[169] but not if it "restrict[s], abro-

164 *See* Craig v. Boren, 429 U.S. 190, 197–98 (1976).

165 *See* Matthews v. Lucas, 427 U.S. 495, 505 (1976).

166 *See generally* Post & Siegel, *Policentric Interpretation*, *supra* note 95.

167 *Id.* at 1947.

168 *Id.*

169 Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

gate[s], or dilute[s]" constitutional rights as the judiciary understands them.[170]

At the opposite end of the spectrum is Justice Scalia's contention that "[n]othing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called 'prophylactic legislation' is reinforcement rather than enforcement."[171] According to Justice Scalia, except for "measures designed to remedy racial discrimination by the States," prophylaxis is "ultra vires."[172] Justice Scalia defends this position by contending that some test is necessary to "avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of § 5"[173] and by noting the indeterminacy of the congruence and proportionality test as proof of its ineffectiveness.

Here, in bright contrast, are the "policentric" and "juricentric" views of the enforcement power. The policentric view is touted as "an indispensable resource for maintaining the legitimacy of our constitutional order."[174] This is said to be so because

> [q]uestions of constitutional law involve profound issues of national identity that cannot be resolved merely by judicial decree.
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> . . . [C]onstitutional law is in continual dialogue with the constitutional culture of the nation. . . . Because of Congress's democratic responsiveness, it . . . [can] express[ ] shifts in the way the nation understands the Constitution through legislation premised on constitutional interpretations that differ from the Court's.[175]

By contrast, the juricentric view, whether the soft version of congruence and proportionality or the hard version that would eliminate prophylaxis altogether, is united in its commitment to the principle that constitutional interpretation is a judicial task. It is, after all, "emphatically the province and duty of the judicial department to say what the law is."[176] Thus, the debate is framed almost exclusively in terms of separation of powers. Policentric advocates contend that adjudicative power is fully preserved by Justice Brennan's observation

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170 *Id.* at 651 n.10.

171 Tennessee v. Lane, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting).

172 *Id.* at 564–65.

173 *Id.* at 556.

174 Post & Siegel, *Policentric Interpretation*, *supra* note 95, at 1950.

175 *Id.*

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

that Congress has no power to dilute, restrict, or abrogate constitutional rights.[177] A congressional determination that all age discrimination is a violation of equal protection does not mean that the Court must treat all age discrimination as a violation of equal protection, but would mean that the Court must enforce the ban on all age discrimination as a statutory right. Should Congress determine that racially segregated public schools would improve educational accomplishment for all races and thus facilitate the goals of equal protection, the Court would remain free to void this measure as a violation of equal protection. Moreover, policentric advocates contend that the history of legislative constitutionalism under the Thirteenth and the Fourteenth Amendments in the years between *Katzenbach v. Morgan* and *Flores* has had "no adverse effect on the judicial power of the United States."[178]

This debate, however, is entirely too narrow, for it ignores the federalism concerns that are also relevant. To be sure, some commentators clearly perceive the existence of federalism issues in the debate over the scope of the enforcement power,[179] though by and large they discount federalism values as either unimportant or inadequately articulated by the Court as it has applied the congruence and proportionality test. Two aspects of federalism are implicated by the enforcement power. The first is preservation of state autonomy through recognition of the states as sovereign entities that must be respected as such by the federal government. This is the principle that undergirds state sovereign immunity and, in practice, is the driving force for the Court's enforcement power decisions where abrogation of that immunity is at issue. The second facet of federalism at work in this area is the principle that the federal government is a government of enumerated and limited powers, and that the scope of the enumerated powers of the federal government must be bounded so that it cannot exercise a general police power. This aspect of federalism is at work in the prophylactic abrogation cases, but performs a lesser role in that context.

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177 *See, e.g.*, Post & Siegel, *Policentric Interpretation*, *supra* note 95, at 2032–33.

178 *Id.* at 2038.

179 *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 454–59 (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 371–72 (2002); Post & Siegel, *Policentric Interpretation*, *supra* note 95, at 2048–58.

Disconnecting prophylactic abrogation from nonabrogation prophylaxis allows us to focus separately on these federalism strands and combine them with the separation of powers issues that the policentric enthusiasts discount. Within the abrogation context, the importance of preserving state autonomy by protecting the fisc from liability imposed by private actors at the behest of the federal government argues for a juricentric approach. We cannot reasonably expect Congress to be attentive to fiscal problems of states, for federal legislators have no responsibility with respect to those funds and no accountability for their collection or expenditure. A policentric approach to the enforcement power in the prophylactic abrogation context enables Congress to eviscerate this autonomy. Of course, Congress should have the power to gut state conduct that tramples upon constitutional rights. But if Congress is permitted *Katzenbach v. Morgan* latitude to determine the content of those rights, then it has unbounded authority to ignore state sovereignty and make the states liable to private parties for any conduct Congress chooses to prohibit. The Fourteenth Amendment does not eliminate state sovereignty entirely; rather, it eliminates it with respect to the constitutional wrongdoing of states. Yet to permit Congress to determine what constitutes constitutional wrongdoing is to allow Congress to eliminate state sovereignty at its pleasure. It may be that our doctrine regarding state sovereign immunity is too expansive,[180] but given the contours of the present doctrine, it is not unreasonable to deny to Congress any power to define for itself the content of constitutional rights when abrogation is at issue. To be sure, the *Flores* congruence and proportionality test is a subjec-

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180 The two principal views in opposition to the present doctrine both draw upon the text and history of the Eleventh Amendment to reach different conclusions about the scope of state sovereign immunity. The "diversity repealer" view argues that the Eleventh Amendment repeals two distinct bases of diversity jurisdiction but does not bar suits against states based on federal law. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 109–10 (1996) (Souter, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247–48 (1985) (Brennan, J., dissenting); William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1034 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890–93 (1983).

The "diversity ouster" view argues that the Eleventh Amendment ousts the federal courts of jurisdiction over all suits with the specified party alignment, whether founded on state or federal law. Because the Eleventh Amendment does not mention suits against a state by a citizen of the defendant state, such suits could be entertained. *See* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1375 (1989); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1362, 1370–71 (1989); Calvin Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65–66 (1989).

tive and potentially arbitrary test that can be, and has been, criticized as such from the political right[181] and the political left.[182] The Court's attempt to stiffen this test by tying it to the levels of judicial scrutiny that are used by the Court in determining the content of constitutional rights may not be ideal, but it does serve as a rough mechanism to preserve the underlying goal of state sovereignty.

When abrogation is not at issue, however, strict adherence to tiered scrutiny as a device to apply congruence and proportionality is neither necessary nor particularly helpful to preservation of federalism principles. In this context, preservation of state autonomy by protecting the public fisc is of much less relevance. What is relevant is preservation of the autonomous governance of states by protecting them from federal regulation that is beyond the enumerated powers of the federal government. Advocates of the policentric approach to the enforcement power diminish the significance of this federalism principle by suggesting that there is no adequate account of the outer boundary of federal power, and that without such an account, there is no compelling reason to think that Congress lacks authority to determine for itself what measures are "appropriate" for enforcement of the rights secured by the Fourteenth Amendment.[183] There are two reasons to think otherwise.

First, because Section 1 of the Fourteenth Amendment established new individual rights by imposing new limits on state authority, and our constitutional tradition has been to treat the Supreme Court as the final arbiter of the content of such rights, it is reasonable to conclude that the content of the rights that Congress may enforce is established by the Court. Think of this boundary as a floor; Congress has no power to lower the floor but may act to stiffen the floor. To illustrate, the right to be free of state-imposed undue burdens in terminating an unwanted pregnancy prior to fetal viability is a judicially protected constitutional right. Congress could not prohibit such abortions in the name of protecting fetal life, but could enact legislation that created a private cause of action to enjoin a state from imposing any such undue burden.[184] Could Congress use its enforcement power

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181 *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) ("The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.").

182 *See generally* Post & Siegel, *Policentric Interpretation*, *supra* note 95.

183 *See, e.g.*, *id.* at 2053–57.

184 Of course, such a statute already exists. *See* 42 U.S.C. § 1983 (2000).

to require the states to make state-owned medical facilities available for previability abortions?

According to *Webster v. Reproductive Health Services*,[185] there is no constitutional right to access a state-owned hospital or clinic to obtain an abortion.[186] The policentric approach would answer "yes," and the "no prophylaxis" juricentric approach of Justice Scalia would deliver an emphatic "no." The question is what result would the juricentric congruence and proportionality test deliver. Because the *Flores* test was fashioned to repudiate the alternative holding of *Katzenbach v. Morgan*, which conceded to Congress power to redefine constitutional rights,[187] it is hardly likely that the *Flores* test would be applied to permit Congress to enforce a constitutional right that the Court has said does not exist.

Thus, a portion of the boundary to federal power comes into clearer focus: Congress may not use its enforcement power to secure a claimed constitutional right that the Court has already determined does not exist.[188] Congress, however, may stiffen this floor by securing rights that have not been determined by the Court either to exist or not exist. For example, the Court has never said whether a state requirement that a pregnant woman consult with an adoption agency prior to obtaining a previability abortion is an undue burden. Were Congress to prohibit states from imposing such a requirement, the test I propose would come into play. Does a substantial portion of the prohibited conduct materially interfere with an "inchoate constitu-

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185 Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

186 *Id.* at 507–11 (upholding Missouri statute prohibiting the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life).

187 *See* Katzenbach v. Morgan, 384 U.S. 641, 652–53 (1966).

188 Hasty inspection of this point may cause one to think that it disposes of RFRA and RLUIPA. The Court has declared that the free exercise guarantee does not extend to freedom from generally applicable laws that pinch religious conduct. But this conclusion ignores the "play in the joints" between the accommodations of religion required by the Free Exercise Clause and those prohibited by the Establishment Clause. *Cf.* Locke v. Davey, 540 U.S. 712 (2004) (upholding a state constitutional ban of funding of theological instruction against an Establishment Clause challenge). That "play in the joints" refers to an area in which legislatures are neither required to nor prohibited from accommodating religion; they are free to choose whether to accommodate religious practice. *See, e.g.,* Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1 (2005). When Congress uses its enforcement power to compel such accommodation, as it did in RFRA, the question is purely one of congressional power to act, not whether the religion clauses have been violated. *Flores*, of course, answered that question, at least with respect to state and local governments, but *Cutter* did not answer the question with respect to RLUIPA. *Cutter* did not determine that the liberty interest RLUIPA sought to protect was not protected by the Constitution. Thus, assuming that RLUIPA is founded solely upon the enforcement power, this limitation upon the enforcement power is not germane.

tional right"? The only thing uncertain about this right is whether it constitutes, in purpose or effect, a substantial obstacle to obtaining an abortion.[189] Here is an instance in which Congress could act to prevent constitutional violations by enforcing an inchoate constitutional right that is an application of an existing judicially recognized right. Of course, Congress must adduce facts that establish that the banned requirement would have the effect of being a substantial obstacle, or spring only from a purpose to create such an obstacle.

The second reason to think that federalism boundaries are adequate to the task of limiting the enforcement power is that vesting Congress with a judicially unbounded power would make Congress the judge of its own power. This would convert the enforcement power to a general police power, and such a power is wholly inconsistent with the fundamental structure of our Constitution. Policentric advocates claim that this federalism limit could be enforced by the Court, so long as it is explicit in doing so,[190] but contend that it would be an "exceedingly difficult" task.[191] I do not think so.

Professors Post and Siegel offer *Morrison* as a case study, arguing that to apply this principle to defend the Court's conclusion that the enforcement power extends only to state actors would require the Court to defend the position that the lack of a general police power means that Congress may not use its enforcement power to regulate private parties.[192] This is an untenable proposition, argue Post and Siegel, because Congress routinely regulates private behavior under its commerce power and the problem of invidious private discrimination is a national concern, such that regulation of private discrimination is unlikely to morph into a general police power.[193] But the fact that Congress may regulate private behavior under its commerce power says nothing about whether it may enforce prohibitions upon state conduct against private actors. Indeed, the textual argument that the enforcement power is limited to state action is fairly strong.

Moreover, there is no reason to suppose that, under the policentric approach, Congress would limit its enforcement initiatives to race or sex discrimination. If Congress is free to regulate private behavior in the name of eliminating whatever injustice Congress might imagine

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189 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("[U]ndue burden is a shorthand for the conclusion that the state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

190 *See* Post & Siegel, *Policentric Interpretation*, *supra* note 95, at 2056–57.

191 *Id.* at 2057.

192 *Id.*

193 *Id.*

to exist, there is no limit to that which Congress might prohibit, and that is about as general a police power as one can imagine. Thus, it is necessary to a proper understanding of federalism that the enforcement power be judicially bounded. That conclusion, of course, does not answer the question of what those judicial boundaries should be.

Each of the three approaches to the enforcement power that have been applied by the Court or advocated by its members suffers from some disqualifying defect. The policentric approach undervalues legitimate federalism concerns and naively relies upon congressional forbearance to prevent the exercise of an illegitimate general federal police power. The "no prophylaxis" juricentric approach reduces the enforcement power to the insignificant roles of facilitating enforcement of judicially recognized rights and compelling states to compile evidence that might be used against them to identify constitutional violations.[194] The tiered scrutiny gloss on congruence and proportionality that characterizes the enforcement power in the abrogation context is adequate to preserve state sovereignty but fails to allow Congress the opportunity to address and prevent arguable constitutional wrongs before they occur. Ben Franklin is supposed to have said that an ounce of prevention is worth a pound of cure, and if one really believes in securing constitutional rights it might be preferable to allow Congress some leeway in applying its ounce of prevention. Of course, the federalism concerns outlined here suggest that congressional discretion must be judicially bounded, and that is what my proposal is intended to do.

The examples presented earlier with respect to same-sex marriage involve state conduct that, under current precedents, is presumptively valid. Yet reasonable people could disagree about whether the state conduct implicated by these examples should continue to enjoy the presumption of validity. State laws forbidding same-sex marriage are presumed to be valid under the federal Constitution. Those states that have struck down such laws have acted under their state constitutions.[195] Classifications on the basis of sexual orientation are presumed to be valid, but attempts to deny gays and lesbians the ability to claim commonly available rights because of their sexual orientation have been invalidated under minimal scrutiny,[196] and criminal prohibi-

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194 *See* Tennessee v. Lane, 541 U.S. 509, 559–60, 560 n.2 (2004) (Scalia, J., dissenting).

195 *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 48–50 (Haw. 1993); Opinions of the Justices to the Senate, 802 N.E.2d 565, 567 (Mass. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003); Baker v. State, 744 A.2d 864, 869–70 (Vt. 1999).

196 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–32 (1996).

tion of private consensual homosexual intimacies have been struck down for want of a legitimate governmental objective.[197] Several states have voluntarily acted to extend to gays and lesbians the status benefits of marriage under such rubrics as domestic partnerships or civil unions.[198] In such instances, where multiple sources of constitutional culture have acted to protect the embryonic right and where the Supreme Court has not declared that the inchoate right is *not* a constitutional right, perhaps Congress should be permitted to act affirmatively to prevent a nascent constitutional wrong.

Unlike the policentric approach, this approach actually has judicially enforceable boundaries. First, enforcement legislation is not congruent with and proportional to the constitutional problem it identifies unless a significant portion of the conduct it regulates is arguably within the ambit of constitutional protection. This is a standard not unlike the "substantial overbreadth" rule,[199] which appears to be capable of reasoned administration by courts. Second, Congress must act on evidence of a wide and repeated expression within our constitutional culture that the right it purports to protect is a plausible constitutional right. A cavalier suggestion by a single commentator, or even a serious argument by a score of distinguished professors should be insufficient. There must be recognition of the claimed right in multiple judicial decisions, state legislative action, learned commentary, judicial dicta, and even popular opinion, before Congress should be seen by the Court to have had an adequate basis to invoke its enforcement power.[200] This ensures that Congress is not inventing rights from pure imagination, but is seeking in good faith to prevent constitutional wrongs before the courts have had an opportunity to address them. If the Court is convinced that the signals that directed Congress to act are too dim, or sufficiently conflicting, it may say so. This approach preserves judicial control of the scope of the enforcement power and significantly dampens the prospect of a general federal police power, but allows space for Congress to participate in a constitutional dia-

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197 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).

198 *See, e.g.*, CAL. FAM. CODE § 297 (West 2004); N.J. STAT. ANN. § 26:8A-1 to -12 (West 2007).

199 *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973).

200 This prong of my proposed test for the scope of the prophylactic enforcement power in a nonabrogation context must be distinguished from the prong that would permit Congress to act, in the absence of a definitive judicial decision to the contrary, to apply an existing judicially recognized right to a specific factual context by forbidding state conduct that Congress has concluded, on the basis of adequate evidence, would constitute an unconstitutional interference with the existing judicially recognized right.

logue in which it may give voice to the nonjudicial aspects of our constitutional culture.

To be sure, Justice Scalia is likely to criticize this as just another "flabby test[ ], a standing invitation to judicial arbitrariness and policy-driven decision making."[201] But the alternative to some such test is to deny to Congress any meaningful prophylactic power whatever. If the enforcement power is so limited then it is virtually nonexistent, for all Congress could do is create statutory remedies limited to vindication of precisely what the Supreme Court has already said is constitutionally forbidden.[202]

As with contemporary politics, the pressures inherent in this problem are likely to push judges and analysts in polar opposite directions. Adoption of the loose standard I propose could lead toward a de facto version of Justice Brennan's famous ratchet test: the enforcement power, he said, "grants Congress no power to restrict, abrogate, or dilute" the rights guaranteed by the Fourteenth Amendment, but other than that Congress could do what it pleased.[203] However, it was precisely this standard that the Court repudiated in *Flores*.[204] That rejection, coupled with the intimation in *Morrison* that the geographic scope of any remedy must hew closely to the locales where the problem is identified,[205] suggests that the Court is unlikely to embrace a very deferential standard of the sort promoted by policentric enthusiasts. The test I propose is much less deferential, but still loose enough to allow Congress some flexibility in preventing constitutional injury. On the other hand, adoption of Justice Scalia's approach substantially eviscerates the enforcement power, and extension of the Court's tiered scrutiny gloss on congruence and proportionality to the nonabrogation use of the enforcement power ties that power so closely to the constitutional rights to which the Court affords height-

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201 Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

202 The principal examples of this limited, but still important, power are 42 U.S.C. § 1983 (2000) and its criminal analogue, 42 U.S.C. § 242, which create civil and criminal remedies against state actors (but not the state) for actual constitutional violations. These remedies are not "prophylactic," in the sense that they are applicable only to actual constitutional violations. Yet they add to enforcement of the Fourteenth Amendment in that the Fourteenth Amendment, by itself, does not create remedies. Thus, these statutes stand as examples of nonprophylactic enforcement mechanisms that Congress has in fact properly enacted pursuant to its Section 5 powers. Of course, § 1983 abrogates state sovereign immunity; thus, an enforcement power limited to § 1983 means that there is but one zone of prophylaxis that applies equally in and out of the abrogation context.

203 *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

204 City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

205 *See* United States v. Morrison, 529 U.S. 598, 628–31 (2000).

ened protection that Congress has no freedom to recognize and protect emerging rights.

We are left with a choice of flabby tests; how obese do we wish to be in our thinking about the enforcement power? So long as we admit that the enforcement power has a prophylactic element, we must permit Congress wide latitude in selecting its prophylactic means. The test I propose grants Congress that latitude, even with respect to some state conduct that is presumed to be valid under the Constitution. It does not, however, grant to Congress the virtually limitless discretion that Justice Brennan delivered in his ratchet footnote and that the policentric approach now advocates.

For all its flabbiness, this test could be firmed in its application by recognizing some basic principles. First, as a matter of practicality, Congress would be given an incentive to cast its regulatory net rather narrowly. Omnibus legislation that seeks to cover vast areas of state activity would be less likely to survive judicial scrutiny under the "significant portion" aspect of this test. What counts as a significant portion of the regulated activity inevitably would remain a bit vague (more than a little, less than a majority?), but Congress could increase the odds of success by identifying particular practices that are most prone to lead to constitutional violations. For example, Title I of the ADA would be upheld under this standard if Congress had identified the irrational practices it sought to eliminate by its sweeping prohibition of employment discrimination against the disabled and, perhaps, limited Title I mostly to those practices.[206] The RLUIPA is another possible example. Even though the Court had declared in *Smith* that the Free Exercise Clause does not insulate religious conduct from generally applicable laws,[207] the Court in *Flores* placed great weight upon the breadth of RFRA in concluding that it was neither congruent with nor proportional to the constitutional injury Congress sought to prevent.[208] RLUIPA, by contrast, is aimed at only two particular categories of religious conduct. The land-use provision requires state and local governments to make a compelling justification for regulations that inhibit religious communities from physical accommodation of their worship services.[209] The institutionalized persons provision

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206 According to *Garrett*'s cryptic footnote, it might be valid even without that demonstration, but it is just as likely that the Court penned the footnote with the commerce power in mind. *See supra* text accompanying notes 119–23.

207 *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

208 *Flores*, 521 U.S. at 532–34.

209 42 U.S.C. § 2000cc (Supp. IV 2004).

places the same burden upon state and local governments with respect to the religious practices of people who are held in institutions—usually prisoners or deeply disabled persons.[210] These incursions upon religious liberty are profound, and there is some reason to suspect that religious discrimination is apt to hide behind generally applicable laws. Just as Congress may statutorily prohibit practices that produce racially disparate results, even though such practices are not constitutionally wrongful, Congress may be able to use its enforcement power to prevent practices that have a disparate religious impact.

Second, Congress would be given an incentive to confine its regulation of state behavior to those areas where there is legitimate disagreement over the scope of the underlying constitutional right Congress seeks to protect. This should not inhibit legislative policy, for it is precisely these issues that become the hotly contested social issues of every time. Today it may be the rights of gays and lesbians, tomorrow it could be the rights of animals or cloned humans. So long as the issues are the subject of legitimate debate manifested widely and repeatedly in multiple sources of our constitutional culture, and Congress acts within the arena of that debate, the courts should defer to legislative prophylaxis. Of course, there will be disagreement over what constitutes legitimate debate. Two decades ago, it would be a rare judge who could have declared with confidence that the right of same-sex couples to marry constitutes a legitimate constitutional debate. Today, only the most obdurate and partisan advocates on either side of the question would take that position. As conditions change, so does the scope of congressional prophylactic power.

This proposal is, as Jonathan Swift said, "a modest proposal," though neither as mordant nor satirical as Swift's essay.[211] It is offered to call attention to the apparent second zone of prophylaxis in the enforcement power, to justify its existence, and to sketch out some preliminary thoughts about its proper scope. As with all proposals, if there is utility to it, criticism will whet it into a sharply pointed tool.

Conclusion

The Supreme Court has limited congressional power to enforce the Fourteenth Amendment to remedial actions, but has acknowl-

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210 *Id*. § 2000cc-1.

211 *See* JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE IN IRELAND FROM BEING A BURDEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLIC (1729). Swift, of course, proposed that the Irish poor eat their young.

edged that prevention of constitutional injuries is remedial. To control the boundaries of this remedial power, the Court limits Congress to regulations that are congruent with the identified constitutional wrong it seeks to prevent and proportional to the extent of that injury. The meaning of congruence and proportionality has been fleshed out almost entirely in the context of congressional attempts to abrogate state sovereign immunity. In that context, those terms require evidence that states have been engaged in a pattern of unconstitutional behavior and that the prohibited state behavior is closely connected to the constitutional wrong. In practice, the Court requires less evidence and permits a looser fit between the remedy and the wrong when the prohibited state behavior is presumed to be unconstitutional.

The Court has intimated that Congress may have even greater freedom to prevent constitutional injury when abrogation of state sovereign immunity is not at issue. If this is so, the meaning of congruence and proportionality must differ from the abrogation context. The central concern of abrogation of state sovereign immunity is protection of the sovereignty of the states and autonomous state governance by preservation of the public fisc. Those concerns become of lesser importance when abrogation is not at issue, and federalism issues become of much greater significance.

The principal federalism issue is interpreting the enforcement power in such a way that Congress is unable to use it as a general police power. Courts should defer to congressional judgments about the scope of the enforcement power when, in a nonabrogation context, a significant portion of the state conduct it regulates materially interferes with an inchoate constitutional right. For this purpose, an inchoate constitutional right is either (1) a claimed right that has yet to be recognized by the Supreme Court as deserving of any form of heightened judicial scrutiny, but which has been widely and repeatedly treated as a plausible constitutional right by multiple sources within our constitutional culture, including decisions of state and lower federal courts, repeated dicta in opinions of the Supreme Court, legislative debate, learned commentary, and popular opinion; or (2) a legislative application of an existing judicially recognized right that has not yet been determined by the Court to be within or without the existing right, but which Congress has found, by adequate evidence, to be within the existing judicially recognized right.

Such a standard, while inherently loose, would allow Congress wide latitude to prevent constitutional injuries, even when the conduct Congress regulates is presumptively in compliance with the Four-

teenth Amendment, but would not permit Congress to assume a general police power. This standard is consistent with the underlying rationale of *City of Boerne v. Flores*, which recognized the prophylactic aspect of the enforcement power, even as it repudiated the extremely deferential *McCulloch*-derived test of *Katzenbach v. Morgan*, which permitted Congress independently to define the content of the constitutional rights it chooses to enforce. Congressional ability to identify and enforce constitutional rights before their recognition as such by the judiciary would be bounded by judicial, legislative, academic, and popular voices in the constitutional culture, and would be subject to judicial control to ensure that nascent constitutional rights recognized by Congress actually have a strong impetus for recognition within our constitutional culture.

The substantive law of the Fourteenth Amendment reveals that some presumptively valid acts are, nevertheless, unconstitutional and it is not always easy to identify them. The proposed standard allows multiple sources of constitutional interpretation a voice in that process of identification, limited by our venerable constitutional tradition of vesting the Supreme Court with final authority with respect to constitutional meaning. As nonabrogation cases occur, the Court should take those opportunities to clarify that Congress has broader discretion to prevent constitutional injuries than when abrogation of state sovereign immunity is at issue.