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ARTICLES

RETHINKING SECTION FIVE: DEFERENCE, DIRECT REGULATION, AND RESTORING CONGRESSIONAL AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT

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Abstract

After the Supreme Court's decision in City of Boerne v. Flores*, the Court worked systematically to undermine the scope of Congress's regulatory authority under Section 5 of the Fourteenth Amendment. The Court did this as part of the neo-federalist revival, in an effort to restrain congressional power in favor of elevating state power against federal intrusion. The Court took this route in restraining various powers, among them the powers granted to Congress under Article I of the U.S. Constitution. Arguably, though, the effort to restrain Congress was most pronounced in the arena of Section 5. In this Article, I argue that this is deeply problematic for a variety of reasons, including the fact that the Court's narrowing construction is out-of-sync with the intentions of the Framers of the Fourteenth Amendment, and further, represents the judicial usurpation of congressional authority. In order to address this problem, the Court should modify its interpretation of Section 5 by striking a pragmatic compromise—it should maintain its current approach when evaluating congressional efforts to use Section 5 to abrogate state sovereign immunity, but when Congress uses its power simply to regulate the states without attempting to create a private right of action for litigants, it should adopt a more relaxed standard of review. This approach is not only in line with the historical intent of the Framers of the Fourteenth Amendment, but*

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it would also give Congress a breadth of authority that is consistent with the power it exercises when using the most closely analogous power that it possesses—the power to regulate interstate commerce.

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INTRODUCTION

What would happen if Congress decided to exercise its power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause by invalidating the laws—both statutes and state constitutional amendments—that prohibit same-sex marriage? Scholars, activists, and society at large have spent a significant amount of time speculating about the possibility that the Supreme Court might one day invalidate the so-called "mini-DOMAs" (so named after the federal Defense of Marriage Act), but it is rare to hear anyone speculate about the role that Congress might play in such an endeavor.[1] One reason for this oversight is undoubtedly practical; given the current atmosphere of political partisanship and the passion of the anti-marriage forces, today's

1. In fact, when President Barack Obama became the first sitting President to offer his support for same-sex marriage, at least one commentator considered the possibility of Congress exercising its power in a similar way. *See* Lyle Denniston, *Constitution Check: Did President Obama Endorse a Constitutional Right to Same-Sex Marriage?*, HUFFINGTON POST (May 11, 2012, 3:58 PM), http://www.huffingtonpost. com/lyle-denniston/constitution-check-did-pr_b_1509096.html (discussing briefly the likelihood of Congress exercising its power to enforce the Privileges or Immunities Clause of the Fourteenth Amendment by declaring marriage a fundamental right of national citizenship that state laws could not abridge). This reference notwithstanding, it is very difficult to find evidence of other commentators who considered similar possibilities.

Congress would not move to pass such a statute.[2] Nonetheless, the conversation is worth having, if only because opinions can change rapidly, and Congress might be faced with the opportunity sooner than anyone would have anticipated.[3]

At this point in time, though, politics are not the only impediment. Currently, the congruence and proportionality doctrine governs analysis of legislation passed pursuant to Section 5, and the standard is extraordinarily difficult to meet. The Court, in an effort to protect its position as the primary interpreter of the Constitution, as well as to protect the federalism-based claims of autonomy asserted by the states, has crafted a doctrine that undermines most of Congress's efforts to play a meaningful role in the enforcement of civil rights. This has profound consequences for any effort to address the problem created by the mini-DOMAs—as the country moves inexorably in the direction of supporting same-sex marriage rights and correspondingly begins to view the bans as discriminatory, Congress would have no ability to respond to this growing national sentiment, despite the fact that arguably, a proper reading of Section 5 says that it *should* have this power.

A way out of the dilemma exists. Recognizing that the Court has legitimate concerns about protecting its own authority, and further, quite reasonably seeks to restrain any congressional efforts to exercise limitless regulatory power over the states, I would suggest a pragmatic compromise that proceeds along lines very similar to one suggested by Professor Calvin Massey. He has argued that Congress should have the ability to use its Section 5 power to invalidate state practices that the Court has not yet determined are unconstitutional, when sovereign immunity is not at stake, and "when a substantial portion of such practices materially interferes with an inchoate constitutional right."[4] He argues that this is a reasonable position to take because it does not give Congress the

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2. An all-out assault on the marriage prohibitions would undoubtedly face substantial opposition, but recent electoral victories in Maine, Maryland, Washington, Minnesota, Delaware, and Rhode Island suggest that the political winds may have definitively changed in favor of same-sex marriage. *See, e.g.*, Editorial, *Gay Marriage's Long March to Equality*, WASH. POST (Nov. 7, 2012), http://www.washingtonpost.com/ opinions/gay-marriages-long-march-toequality/2012/11/07/a6f7c0ba-2924-11e2-96b6-8e6a7524553f_story.html ("Americans in Maryland, Maine and Washington state voted by almost identical four-point margins to extend marriage rights to gay and lesbian couples; in a fourth state, Minnesota, voters rejected a constitutional ban on same-sex marriage, again by about the same margin. With those ballot victories for marriage equality, the first after a 14-year string of defeats in 32 states, it is now reasonable to imagine a day in the not-very-distant future when marriage for gay and lesbian couples across this country will be unexceptional, unencumbered and mostly unremarked upon."); *see also Same-Sex Marriage: Fast Facts*, CNN (Aug. 6, 2013) http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts (laying out, in a timeline, the dates when same-sex marriage became legal in the jurisdictions that have taken this step)

3. *See* PETER NICOLAS & MIKE STRONG, THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE AND RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS) 2 (3d ed. 2013) (map 1 depicting the various mechanisms through which same-sex marriage is prohibited, including through attorney general interpretation in New Mexico).

4. Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 7 (2007).

chance to adopt the most extreme version of *Katzenbach v. Morgan*[5]—specifically, it does not allow Congress to make independent determinations about the meaning of constitutional rights.[6]

I would take a slightly different approach. Recognizing that the enforcement power laid out in Section 5 is an enumerated power much like those laid out in Article I, Section 8, and further recognizing that legislation passed under Section 5 was intended to be measured along the same generous lines as the Article I powers—namely, pursuant to the *McCulloch v. Maryland*[7] standard, which would uphold laws that used appropriate means to pursue legitimate governmental ends—borrowing from Professor Massey, I would also argue that Congress should have the flexibility to invalidate state practices, including those that the Court has not yet determined are unconstitutional, when sovereign immunity is not at stake, but I would subject the legislation to a rational basis standard of review. Specifically, I would consider whether it was rational for Congress to conclude that the legislation in question would provide a remedy for a past constitutional violation, prevent the recurrence of such a violation, or prevent the likely occurrence of a potential violation.

I offer this suggestion for two reasons. First, the historical record supports a reading of Section 5 that is much broader than the current doctrine permits. Second, taking such an approach would make the treatment of Section 5 consistent with the treatment of its clearest Article I, Section 8 analogue—the Commerce Clause. Consistency would be valuable because the two powers are meaningfully similar in certain respects, and while the Court is reasonably clear about both the breadth and the limits on the scope of the Commerce Clause, thus far, the modern revision of Section 5 is clear only regarding its limits.

This Article will be organized as follows: Part I will lay out the initial understanding of Section 5; Part II will discuss the Rehnquist Court's federalist revival and how it impacted the seminal decision, *City of Boerne v. Flores*,[8] and the cases that followed from that decision; Part III will discuss the grounds for the proposed solution to the problem that *City of Boerne*'s doctrinal innovation has created; and Part IV will suggest that under current doctrine, Congress probably *should* have the authority to invalidate the mini-DOMAs, but would likely be *prohibited* from doing so on federalism grounds, and will show that an application of the proposed revised standard would allow it to exercise its Section 5 authority.

I. THE TRADITIONAL DOCTRINAL LANDSCAPE: UNDERSTANDING THE SCOPE OF CONGRESS'S SECTION 5 AUTHORITY

The Fourteenth Amendment consists of five sections, the first four of which provide substantive guarantees ranging from protection for individuals

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5. 384 U.S. 641 (1966).
6. Massey, *supra* note 4, at 7.
7. 17 U.S. (4 Wheat.) 316 (1819).
8. 521 U.S. 507 (1997).

against state invasions of equality,[9] to assurances regarding "the validity of the public debt."[10] Section 5, however, does not provide any substantive guarantees; rather, it offers Congress a new source of legislative authority: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[11] This language has sparked an ongoing debate between the Supreme Court and commentators, and questions regarding the meaning and scope of the terms "enforce" and "appropriate" have been a regular part of the discourse for quite some time.[12] These debates became especially pointed during and after the modern Civil Rights Movement, when Congress used the enforcement powers it acquired in the Reconstruction Amendments—in particular, Section 2 of the Fifteenth Amendment[13] and Section 5 of the Fourteenth Amendment[14]—to pass legislation that was designed to eradicate manifestations of racial animus that existed in various forms throughout the country. Civil rights issues, of course, also arose outside of the context of race, and the presence of Section 5 begged an important, nagging question: What role could Congress play in the effort to broaden civil rights coverage to new groups of claimants, and what limitations were appropriately placed on that role?

A brief scan of modern U.S. history during the latter half of the twentieth century would show that Congress has, indeed, extended broad protections to various groups of people who raised claims of discrimination. Congress has addressed gender discrimination through multiple statutes: Title VII of the Civil Rights Act of 1964,[15] the Equal Pay Act of 1963,[16] Title IX of the Education

9. U.S. CONST. amend. XIV, § 1.

10. *Id.* § 4.

11. *Id.* § 5.

12. *See infra* note 189.

13. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding various challenged sections of the Voting Rights Act of 1965 as an appropriate use of Congress's enforcement power under Section 2 of the Fifteenth Amendment).

14. *See* Katzenbach v. Morgan, 384 U.S. 641, 643-47 (1966) (upholding section 4(e) of the Voting Rights Act of 1965, which abandoned certain literacy tests, under Section 5 of the Fourteenth Amendment).

15. 42 U.S.C. § 2000e-2(a) (2006).

16. 29 U.S.C. § 206(d) (2006). The Lilly Ledbetter Fair Pay Act of 2009 ("Lilly Ledbetter Act"), which amended Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, also relates to the question of equal pay. Congress passed this statute in response to a Supreme Court decision holding that a female worker's claim of Title VII pay discrimination was time-barred when she failed to file a claim with the EEOC within the statutory charging period, even though it was impossible for her to do so because the discriminatory pay decision was concealed by her employer and therefore, unknown to her. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621, 645 (2007). The Lilly Ledbetter Act stated that a new discriminatory act occurred *each time* an individual was compensated in accordance with a previous discriminatory pay decision. Pub. L. No. 111-2, 123 Stat. 5 (2009). Had this law been in place when Lilly Ledbetter filed suit, each paycheck that flowed from the previous discriminatory decision would have been a new violation of the statute, and therefore, when she filed suit, her claim would not have been time-barred.

Amendments of 1972,[17] and the Violence Against Women Act of 1994,[18] to name a few. Similarly, Congress has also addressed age discrimination through the Age Discrimination in Employment Act of 1967, which was designed to protect older workers against arbitrary treatment in the workplace.[19] Congress has addressed disability discrimination through the Rehabilitation Act of 1973[20] and the Americans with Disabilities Act of 1990.[21] Congress has even strengthened the penalties for hate crimes—originally focused only on those crimes committed on the basis of actual or perceived race, color, religion, national origin, ethnicity, or gender.[22] The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act expanded hate crimes coverage to include "offenses involving actual or perceived . . . sexual orientation, gender identity, or disability."[23] Congress primarily relied, of course, on its authority under the Commerce Clause when passing these statutes, despite the fact that the Fourteenth Amendment is the constitutional provision that most directly addresses the forms of discrimination at stake in these cases. It took this path for a familiar reason, namely, the fact that both states and private actors are subject to direct regulation under the Commerce Clause, while the state-action requirement exempts private actors from any obligation under the Fourteenth Amendment. Section 5 has been most useful when Congress sought to abrogate state sovereign immunity and subject the states to money damages for violations of the statutes in question.[24] As a result, most of the doctrine addressing Congress's Section 5 authority has been developed in this context. This fact notwithstanding, it is not unreasonable to believe that the Court might be

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17. 20 U.S.C. §§ 1681-1688 (2006).

18. Pub. L. No. 103-322, 108 Stat. 1902. The statute was reauthorized in March 2013, and it offered a more expansive set of protections. Pub. L. No. 113-4, 127 Stat. 54. The revised statute covers LGBT victims of domestic violence, subjects non-Native abusers to the jurisdiction of tribal courts when they engage in domestic violence on tribal land, and increases the number of visas available to abused undocumented immigrants who agree to assist the state with serious criminal prosecutions. *See* Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Mar. 1, 2013, at A13; *see also* Rosalind S. Helderman, *Violence Against Women Act Reauthorization Bill Passed by Senate*, WASH. POST (Apr. 26, 2012, 5:00 PM), http://www.washingtonpost.com/blogs/ 2chambers/post/violence-against-women-act-reauthorized-by-senate/2012/04/26/gIQAJ 12mjT_blog.html. The House version of the bill dispenses with these protections. *See* Pete Kasperowicz, *House Passes Violence Against Women Act Reauthorization*, THE HILL'S FLOOR ACTION BLOG (May 16, 2012, 4:30 PM), http://thehill.com/blogs/floor-action/house/227877-house-passes-violence-against-women-act-reauthorization.

19. 29 U.S.C. §§ 621-634 (2006).

20. *Id.* § 701.

21. 42 U.S.C. §§ 12101-12213 (2006).

22. Hate Crime Sentencing Enhancement Act, 28 U.S.C. § 994 (1994).

23. 18 U.S.C. § 249(a)(2) (2006).

24. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (confirming that Congress could abrogate state sovereign immunity under Section 5); Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (confirming that Congress could not use the Commerce Clause in order to accomplish the same end). Congress may persuade the states to waive their sovereign immunity through, for instance, a permissible use of the spending power, as in *New York v. United States*, 505 U.S. 144 (1992), but Section 5 is the only provision that allows Congress to force the issue.

amenable to considering the possibility of drawing a distinction between Congress in its abrogation posture and Congress in its simple regulatory posture. In order to make this assessment, though, we must first consider the doctrine as it currently stands.

During the nineteenth century, in the wake of the Fourteenth Amendment's passage, the Supreme Court established a framework for understanding Section 5 that was generous in its scope. In the earliest Section 5 cases, the Court found that the standard for reviewing the validity of legislation passed pursuant to this power was *McCulloch v. Maryland*'s expansive test for the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."[25] This approach carried over into the twentieth century, and the Civil Rights Movement provided a unique opportunity for Congress to test the boundaries of the power that those Post-Reconstruction Era decisions had conferred upon it. Responding to decades of Jim Crow electoral suppression tactics, Congress passed the Voting Rights Act of 1965, pursuant to its powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment.[26] Among other things, the Voting Rights Act was meant "to close whatever loopholes in the Civil War amendments that [S]outhern voter registrars and other officials had used to perpetuate black disenfranchisement."[27] In order to accomplish this goal, "the [Voting Rights Act] spelled out a number of legally and politically innovative, as well as controversial and contestable, mechanisms to bring federal power to bear on state and local officials."[28] The statute represented an extraordinary federal intrusion into a realm that had traditionally been viewed as primarily subject to the dictates of state power—electoral politics, including local electoral politics and the procedures that would govern them. As such, the statute was immediately challenged after its passage. In *South Carolina v. Katzenbach*, the Court was forced to determine whether Congress's enforcement power extended to the far-reaching limits that had been set under the Voting Rights Act.[29]

Even though *Katzenbach* is technically a case focused on Section 2 of the Fifteenth Amendment, the analysis is instructive because Congress's power here has been described as "coextensive" with Section 5 of the Fourteenth Amendment.[30] In keeping with this principle, the *Katzenbach* Court found that

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25. 17 U.S. (4 Wheat.) 316, 421 (1819).

26. STEVEN ANDREW LIGHT, "THE LAW IS GOOD": THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS 1 (2010) ("As an extension of the Fourteenth and Fifteenth Amendments to the U.S. Constitution, the VRA was intended to realize the ideal of citizenship and equal opportunity for all, regardless of race or ethnicity.").

27. *Id.* at 53.

28. *Id.*

29. 383 U.S. 301, 307-09 (1966).

30. *See* City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting)

the same test applied to both provisions: "The basic test to be applied in a case involving [Section] 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."[31] The Court then went on to find that the relevant "test" was the standard from *McCulloch*—the same standard that earlier Courts had applied to all of the Reconstruction Amendments' enforcement provisions.[32] Applying this test to the provisions that South Carolina had challenged, the Court found that "Congress [could] use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting."[33] In this case, the various mechanisms that Congress employed—coverage formulas limiting application of the statute to those places where the problems were most egregious, the suspension of various eligibility tests, the appointment of examiners to monitor

("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."). The Court continues to maintain this position: "Section 2 of the Fifteenth Amendment is virtually identical to [Section] 5 of the Fourteenth Amendment." Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001). This stated position notwithstanding, it is not clear whether the Court will continue to maintain it in the future. In its most recent term, the Supreme Court issued a decision in *Shelby County v. Holder*, which not only passed on an opportunity to speak about the scope of Section 2 or its relationship to Section 5 of the Fourteenth Amendment, but also offered a vision of state power that was striking in its breadth. Shelby Cnty v. Holder, 133 S. Ct. 2612 (2013). The petitioners in *Shelby County* challenged the constitutionality of the preclearance requirement of the Voting Rights Act of 1965.. *Id*. at 2620-22. This section worked in conjunction with the statute, which set a formula that determined coverage: jurisdictions that fell within the parameters of the coverage formula could not make any electoral changes unless they could successfully defend them in a lawsuit, or unless the changes were "precleared" by the Justice Department or the federal district court in Washington, D.C. *Id*. Shelby County is located in the state of Alabama, and the coverage formula made the entire state subject to the preclearance requirement. *Id*. at 2621. As a result, Shelby County argued that preclearance was an extraordinary intrusion into the internal workings of state governance, that the operation of electoral processes—in particular, for local elections—should be committed to the independent sovereign authority of the states, and that the Voting Rights Act was an admitted violation of federalist principles.. *See generally* Petition for a Writ of Certiorari, Shelby Cnty. v. Holder, 133 S. Ct. 594 (2012) (No. 12-96). The Supreme Court found that Congress's 2006 decision to reauthorize the Voting Rights Act, without updating the coverage formula, violated the principle of the equal sovereignty of the states and was therefore unconstitutional. *Shelby Cnty*., 133 S. Ct. at 2631. The Court's decision to invalidate a congressional statute that was reauthorized with overwhelming support, based on a unique assertion regarding state authority, demonstrates the degree to which federalism concerns might override any remaining institutional instincts toward deference. Nonetheless, there is still room to debate the possibility that the Court might be deferential *on the margins*, assuming that the proper safeguards toward federalism can be established.

31. *Katzenbach*, 383 U.S. at 326. Given the fact that one of the purposes of the Fourteenth Amendment was to restructure the federalist relationship between Congress and the states, there is no question that Section 5 is one of those express powers. *See* Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 440 (2003).

32. *Katzenbach*, 383 U.S. at 326-27 (citing the test from *McCulloch* and noting that this test was identified as articulating the standard of review in *Ex parte* Virginia, 100 U.S. 339 (1879), a case that evaluated the scope of Congress's power under Section 5).

33. *Id.* at 324 (emphasis added).

electoral practices, among other things[34]—were appropriate devices that "valid[ly] . . . carr[ied] out the commands of the Fifteenth Amendment."[35] The Court rejected South Carolina's interpretation of Section 2, which would have precluded Congress from creating specific remedies and limited it to passing general prohibitions on racial discrimination in voting.[36] Instead, the Court recognized that this power made Congress "chiefly responsible for implementing the rights created in [Section] 1,"[37] and therefore, Congress had the necessary attendant authority to carry out this role. In fact, the Court found that the enforcement powers gave Congress plenary remedial authority:

> Congress is not circumscribed by . . . artificial rules under [Section] 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution."[38]

This broad assessment of congressional power gave it substantial flexibility to attack the problems that were occasioned by the discriminatory practices that existed in various places throughout the country, though nowhere as pervasively as in the Jim Crow South.

The Court's affirmation of broad congressional authority was tested shortly thereafter in *Katzenbach v. Morgan*, which considered a provision of the Voting Rights Act that was passed pursuant to Congress's power under Section 5 of the Fourteenth Amendment.[39] Under New York law at the time, English literacy was a prerequisite for voting, but the challenged provision made this law unenforceable when the voter in question had received at least a sixth-grade education in a school accredited by the Commonwealth of Puerto Rico, even if the instruction was in a language other than English.[40] New York argued that Congress did not have the authority under Section 5 to pass this law.[41] Unlike the attorneys in *Katzenbach*, the attorneys for the State of New York did not attempt to wholly undercut Congress's remedial authority; rather, they argued that Congress was limited to remedying actions that had already been identified by the Court as violations of the Fourteenth Amendment.[42] The Court, however, disagreed, and upheld the provision on two grounds.

The first, noncontroversial ground for the decision was the Court's conclusion that eliminating the voting requirement would protect the Puerto Rican community of New York from discriminatory treatment in the provision

34. *Id.* at 317-23.
35. *Id.* at 337.
36. *Id.* at 327.
37. *Id.* at 326.
38. *Id.* at 327 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).
39. 384 U.S. 641, 646 (1966).
40. *Id.* at 643-44.
41. *Id.* at 648.
42. *See id.*

of government services.[43] The second ground, however, was extraordinarily controversial: the Court found that Congress might have concluded that the literacy test *itself* violated the Equal Protection Clause.[44] This was controversial because the Court had recently held that literacy clauses were *not* facially unconstitutional under the Equal Protection Clause.[45]

Even though the Court found that Section 5 conferred upon Congress the same breadth of authority as the Necessary and Proper Clause, and further established that the *McCulloch* standard was the appropriate tool for measuring constitutional validity, the Court here seemed to grant Congress a sweeping interpretive authority that moved beyond the actual confines of Section 5.[46] By allowing *Congress* to prohibit specific actions through the enforcement power that the *Court* refused to proscribe through its interpretation of a substantive guarantee, it appeared that the Court was giving Congress the authority to make independent determinations about the meaning of the Fourteenth Amendment.[47]

The Court did not, however, allow *Morgan* to reach its full interpretive potential. In *Oregon v. Mitchell*, the Court considered, among other things, whether the 1970 amendments to the Voting Rights Act enfranchising eighteen-year-olds in state, local, and national elections reflected an appropriate use of Congress's power under Section 5, and it found that the intrusion on state and local authority was not justified.[48]

Justice Black wrote the lead opinion for the Court, and in doing so, articulated a limit on the scope of Section 5 whose underlying rationale anticipated the preferences of the Rehnquist Court in tone if not in substance.[49] Key to his analysis was the role that the Tenth Amendment played in preserving

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43. *Id.* at 652.

44. *Id.* at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.").

45. *See* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51-53 (1959).

46. *See Morgan*, 384 U.S. at 650 (discussing the comparison between Section 5 and the Necessary and Proper Clause, and identifying the *McCulloch* test as the appropriate standard of review).

47. Even though it is common to read *Morgan* as offering an extraordinarily broad reading of Section 5, not all commentators agree with this conclusion. *See, e.g.*, Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison*, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 121-23 (2000) (arguing in support of the proposition that commentators may have misread *Morgan* and understood it too broadly).

48. 400 U.S. 112, 117-18 (1970).

49. No majority of justices could agree on a particular rationale here; instead, they were simply able to reach a series of holdings. Justice Black's opinion became the lead opinion because he provided the fifth vote on the key issues in the case. *See id.* at 118 (showing the existence of five-justice majorities on the issues of congressional power to enfranchise eighteen-year-olds in federal elections and the corresponding lack of congressional power to do the same in state and local elections, while also showing that the justices who reached these conclusions did so on different grounds).

a well of political autonomy for the states:

> [A]s provided in the Tenth Amendment, ... [n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.[50]

Justice Black offered this view of the Tenth Amendment in conjunction with an interpretation of other constitutional provisions, each of which implied that the states maintained control over local electoral matters. He ultimately concluded that the Constitution textually committed to the states the power to regulate local elections.[51]

As a result of this textual commitment, Justice Black found that Congress had a more narrow scope of authority to regulate: Congress could use its enforcement power to regulate local elections, but only when it was addressing the purpose behind the Reconstruction Amendments, which was the elimination of racial discrimination.[52] Justice Black would have imposed this constraint, despite the fact that a century of interpretation had broadened the meaning and scope of the Fourteenth Amendment.[53] This approach was not unimpeachably historically accurate: there was evidence that some individuals during the nineteenth century perceived the Fourteenth Amendment as embodying the general intent of constitutionalizing "a national guarantee of equality before the law,"[54] and did not simply perceive it as a means for ameliorating the condition of the former slaves.[55] While the phrase "equality before the law" is not self-defining,[56] at a minimum, it *must* prohibit arbitrary treatment, and Congress might have reasonably concluded that preventing eighteen-year-old citizens from voting while granting the right to twenty-one-year-old citizens was based on an arbitrary distinction between the two groups, particularly when the law deemed a person sufficiently mature to fight and die for one's country at the age of eighteen. Justice Black would have shielded state autonomy by placing on Congress a powerful constraint,[57] despite the fact that neither the historical nor

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50. *Id*. at 125 (citing Pope v. Williams, 193 U.S. 621 (1904)).

51. *Id*. at 124-26 (laying out the textual evidence in support of the claim that the Constitution provides for state control over local electoral matters).

52. *Id*. at 129 ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.").

53. *Id*. at 126-27 (acknowledging that the Equal Protection Clause has been applied outside of the context of race).

54. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 257 (1988).

55. *See id.* at 256-57 ("[T]he aims of the Fourteenth Amendment can only be understood within the political and ideological context of 1866: the break with the President, the need to find a measure upon which all Republicans could unite, and the growing consensus within the party around the need for strong federal action to protect the freedmen's rights . . . .").

56. *Id.* at 258 (noting that even Republicans disagreed on the meaning of the phrase).

57. *See Mitchell*, 400 U.S. at 127 ("The Fourteenth Amendment was surely not intended to

the contemporary record perfectly justified imposing it, and despite the fact that the actual *purpose* of the power was to enforce the guarantee of the Fourteenth Amendment by undermining state power, if doing so was a necessary part of enforcing the amendment.[58]

This newly robust authority to regulate the states was an outgrowth of the revised federalist structure that followed in the wake of the Civil War.[59] Justice Black recognized that the change had occurred, but this did not, of course, persuade him to adopt a more generous view of congressional power; rather, he a sought limitation on its scope because a broader conception might risk its transformation into something akin to a general police power, and it would do so in an area that was supposed to remain within the primary ambit of state authority:

> As broad as the congressional enforcement power is, it is not unlimited. . . . [T]he power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.[60]

Elections were the key to politics, and control over politics was the key to autonomy. The Civil War may have shifted the balance of power that characterized federalism in the United States, but it did not eliminate its fundamental premise. Federalism, at its core, allocates shares of political authority between sovereign entities, and the principal form of tension that animates a federalist relationship is rooted in the competition over spheres of authority.[61] In *Mitchell*, Justice Black chose an interpretation of Section 5 that prioritized the claim of state autonomy and increased the sphere of state authority against the contrary assertion of congressional power. In doing so, he found that Congress used its power inappropriately because there was no link between the age requirement and eliminating racial discrimination.[62] Justice Black's opinion predicted a Rehnquist Court majority that would regularly adopt the principle of protecting state autonomy as a default position.

Since Justice Black spoke only for himself in *Mitchell*, the *Morgan* standard for measuring Congress's enforcement authority continued to prevail. Nonetheless, Justice Black's opinion in *Mitchell* offers a fascinating ideological bridge between the Burger Court and the Rehnquist Court, despite two facts:

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make every discrimination between groups of people a denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.").

58. *See, e.g.*, FONER, *supra* note 54, at 259.

59. *See Mitchell*, 400 U.S. at 127.

60. *Id.* at 128.

61. *See, e.g.*, Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1777-78 (2011) ("Federalism, for example, is a rule of power theory that seeks to desirably allocate power between national and local governments, i.e., a power allocation between sovereigns.").

62. *Mitchell*, 400 U.S. 112.

first, the Court issued other Section 5 decisions after *Mitchell*,[63] and second, the Court did not adopt an explicitly pro-state autonomy understanding of Section 5 until the 1997 decision in *City of Boerne v. Flores*.[64] This decision represented a sharp turn away from a view of Congress as holding broad enforcement power, exercises of which would be treated deferentially by the Court. Instead, *City of Boerne* ushered in an era that saw the Court placing significant limits on Congress's ability to exercise its power under Section 5, and placed Congress's power firmly under the close supervision of the Court.

II. THE MODERN FRAMEWORK OF SECTION 5 AUTHORITY

Why did the Court make this shift? One cannot answer this question without evaluating *City of Boerne* and the later Section 5 cases through the lens of the federalism revival that was simultaneously happening on the Rehnquist Court.[65] The possibility of a revival was first suggested as early as the 1970s. In *National League of Cities v. Usery*,[66] the Court found that certain provisions of the Fair Labor Standards Act would not apply to state employers whose workers carried out "traditional governmental functions," on the ground that congressional regulation in this area would critically undermine some of the attributes of state sovereignty.[67] The "traditional governmental functions" standard proved unworkable, however, so this decision was overturned less than a decade later.[68] The Court did not, however, abandon the project of imposing on Congress a new set of restraints; instead, once there was a majority on the Court in favor of doing so, it implemented a view of federalism that sought to increase the comparative power of the states.[69] Among the most notable

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63. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 446 (1976); City of Rome v. United States, 446 U.S. 156, 191 (1980).

64. 521 U.S. 507 (1997).

65. Far too many scholars to list here have, of course, written about this revival. *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*?, 111 HARV. L. REV. 2180, 2205-13 (1998) (comparing federalism cases from the 1990s to federalism cases from the 1970s and arguing that the Court had "dramatic[ally] reinvigorat[ed]" its commitment to the idea of imposing limits on state power that were based in federalism); *see also* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.").

66. 426 U.S. 833 (1976).

67. *See id.* at 842-45, 852.

68. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-48, 551 (1985) (finding that exercises of congressional power should be constrained, not through the creation of judicially-enforced doctrines of state immunity, but rather, through the procedural safeguards created by the federal political process).

69. *See, e.g.*, Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 799-800 (2007) ("[T]he Rehnquist Court took significant steps to rebalance power between the state and federal governments. The Court revived normative arguments for self-rule at more local levels of government and found textual and structural bases for vindicating such arguments against assertions of federal power that had gone unchallenged for decades.").

examples of this trend were *United States v. Lopez*[70] and *United States v. Morrison*,[71] cases which placed limits on Congress's power under the Commerce Clause; *New York v. United States*[72] and *Printz v. United States*,[73] cases which asserted the shield of state autonomy against the federal commandeering of state legislative and executive activities; and cases like *Seminole Tribe of Florida v. Florida*[74] and *Alden v. Maine*,[75] which not only highlighted the Rehnquist Court's commitment to shoring up state autonomy against federal efforts to abrogate state sovereign immunity, but in the case of *Alden*, subsumed the Eleventh Amendment so deeply within the federalism principles of the Tenth Amendment that it rendered the Eleventh Amendment a practical nullity.[76]

Each one of these lines of cases spoke in singular fashion to the problem of congressional overreach that the Court perceived. *Lopez* and *Morrison*, for example, reflected a desire to prevent Congress from transforming one of the most powerful enumerated powers, the power to regulate interstate commerce, into a general police power.[77] The power to issue broad-based, general

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70. 514 U.S. 549, 556-59 (1995).

71. 529 U.S. 598, 608-13 (2000).

72. 505 U.S. 144, 188 (1992).

73. 521 U.S. 898, 935 (1997).

74. 517 U.S. 44, 47 (1996).

75. 527 U.S. 706, 760 (1999) (Souter, J., dissenting).

76. *See id.* at 712-13 ("The Eleventh Amendment makes explicit reference to the States' immunity from suits commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is . . . something of a misnomer, for the 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 . . . except as altered by the plan of the Convention or certain constitutional Amendments." (internal quotation marks and citation omitted)).

77. During the almost sixty-year period between the New Deal era and the decision in *Lopez*, the Court treated congressional exercises of the commerce power with a significant amount of deference. Michael Kennan, *Is* United States v. Morrison *Antidemocratic?: Political Safeguards, Deference, and the Countermajoritarian Difficulty*, 48 HOW. L.J. 267, 285 (2005). This period saw Congress pass statutes like the Agricultural Marketing Agreement Act, 7 U.S.C.S. § 608, based on which the Court in *United States v. Wrightwood Dairy Co.* found the connection to interstate commerce "by reason of its competition with the handling of the interstate milk." 315 U.S. 110, 125 (1942). During the same period, Congress also passed the Labor Management Relations Act of 1947, 29 U.S.C. 185, which the Court explored in *Textile Workers Union of America v. Lincoln Mills of Alabama*, finding that the face of section 301(b) of the statute makes it possible for a labor organization, representing employees in industry affecting commerce, to sue and be sued in federal court. 353 U.S. 448, 451 (1957). These statutes served as crucial building blocks in the construction of the regulatory state that also had clear links to interstate commerce. Of course, the period also saw Congress use its authority to pass the Civil Rights Act of 1964, a variety of criminal statutes, and other laws, some of whose links to interstate commerce—though established—were admittedly tenuous. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303 (1964) (finding the regulatory scheme of Title II of the Civil Rights Act of 1964 to be a valid exercise of the power to regulate

regulations that impacted nearly every area of life had been specifically taken away from Congress, and those two cases were an effort to ensure that the Commerce Clause would not be used to undermine that intended limitation.[78] By contrast, the anticommandeering cases were an effort to prevent Congress from obscuring democratic lines of political accountability between themselves and the states—an outcome that might have been produced if the legislative and executive arms of the states could be conscripted in the service of implementing specific federal policies.[79] Finally, the Eleventh Amendment cases were not

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commerce because racial discrimination placed a burden on food purchased in interstate commerce); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (holding that the Civil Rights Act of 1964 was a valid exercise pursuant to Congress's commerce power as applied to a local motel that served interstate travelers because racial discrimination has a disruptive effect on interstate commerce); Perez v. United States, 402 U.S. 146, 156-57 (1971) (affirming that a conviction for "loan sharking" pursuant to the Consumer Credit Protection Act was not a violation of Congress's powers under the Commerce Clause as there was a link between local "loan sharks" and interstate crime, which was sufficient to show that intrastate extortionate credit transactions adversely affected interstate commerce). Though *Gibbons v. Ogden* had committed the Court to a view of the commerce power that was both broad and plenary, and Congress exercised its authority to its fullest extent during that near-sixty year period, the Court nonetheless perceived limits on the power that were crossed by the Gun Free School Zones Act of 1990, 18 U.S.C.S. § 922(q)(1)(A), and the Violence Against Women Act of 1994, 42 U.S.C.S. § 13981. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 20 (1824); Kennan, *supra*, at 285, 286 nn.103-04. The Court held that Congress did not have the power to criminalize mere possession of a handgun with no provable link to interstate commerce; similarly, noneconomic, criminal activity lay outside the scope of Congress's regulatory purview, and it could not subject the perpetrators of such crimes to civil liability under federal law. *See* United States v. Lopez, 514 U.S. 549, 561 (1995). Even though the Court retreated somewhat from the narrowing implications of *Lopez* and *Morrison* in *Gonzales v. Raich* when it recharacterized the "economic activity" limitation of *Lopez* in extraordinarily broad fashion, it nonetheless remains clear that at least five members of the Court are prepared to find and enforce specific limits on the reach of the Commerce Clause. *See* Gonzalez v. Raich, 545 U.S. 1, 25–26 (2005). In *National Federation of Independent Business v. Sebelius*, the Court upheld the Patient Protection and Affordable Care Act, popularly known as Obamacare, under Congress's power to tax. 132 S. Ct. 2566, 2608 (2012). Chief Justice Roberts, however, in a portion of the opinion joined by no other member of the Court, as well as the four dissenters, agreed that the decision to forego health insurance was not economic activity within the meaning of the Commerce Clause. *Id.* at 2586-87, 2644 (Scalia, J., dissenting). Therefore, Congress could not use its power under that provision to regulate that decision. *Id.* at 2586-87; *id.* at 2644 (Scalia, J., dissenting). There are serious questions at the moment within academic circles regarding the operative force of this conclusion, in light of the dissenters' refusal to join this portion of Chief Justice Roberts' opinion. Even though Chief Justice Roberts claimed that his conclusion regarding the power to tax necessarily turned on his analysis of the commerce power (and therefore, the other four members of the majority were presumably obliged to accept his analysis of the commerce power, too), this argument is manifestly unpersuasive. As such, a number of commentators have maintained that this portion of the opinion is merely dicta. *See generally* John K. DiMugno, *Navigating Health Care Reform: The Supreme Court's Ruling and the Choppy Waters Ahead*, 24 NO. 6 CAL. INS. L. & REG. REP. 1 (2012); David Post, *Dicta on the Commerce Clause*, THE VOLOKH CONSPIRACY (July 1, 2012, 6:40 PM), http://www.volokh.com/2012/07/01/dicta-on-the-commerce-clause/.

78. Kennan, *supra* note 77, at 282.

79. *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 614 (2003) ("Justice O'Connor's opinion [in *Printz*] speaks with conviction and advances a clear theory of the case: that federal statutes compelling state

simply an effort to protect the public fisc of the states; they were also an effort to strengthen state-based efforts to erect a shield of autonomy against the federal government.[80] All of these differences notwithstanding, the logic behind the cases held something important in common: a demonstrable willingness by the Court to embrace the idea that federalism, like equality or liberty, is such an important constitutional value that it could not be left to the political process alone for its protection.[81] Instead, judicial actors were obliged to protect federalism by actively policing the boundary between the states and the federal government. These lines of cases reveal the two strategies that the Rehnquist Court employed as it carried out its watchdog function: it either (1) eliminated certain regulatory options for Congress; or (2) created muscular doctrinal constraints that required careful judicial implementation and oversight.[82]

The modern Section 5 cases, starting with *City of Boerne*, manifestly fall into the latter category.[83] This decision considered whether Congress had made appropriate use of its power under Section 5 when it passed the Religious Freedom Restoration Act ("RFRA").[84] RFRA was itself a response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[85] which held that neutral laws of general applicability could be applied to religious practices without violating the Free Exercise Clause of the First Amendment, a standard which replaced the prior compelling interest test.[86] Numerous advocates for religious freedom were

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governments to enforce federal law destroy the accountability of both federal and state governments and, hence, undermine the integrity of the democratic process."); *see also* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1192-93 (2003) ("[I]n *New York* and *Printz*, the Court concluded that 'commandeering' violates the original design because, among other things, it permits federal officials to take credit for creating a popular program while forcing state officials to take the heat for implementing it, in violation of federalism's 'accountability' norm.").

80. *See* Eid, *supra* note 79, at 1204.

81. *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1349-51 (2001) (discussing the Rehnquist Court's embrace of substantive review of federalism concerns). The Rehnquist Court did, of course, come under fire for its robust approach to exercising the power of judicial review in matters that pertained to federalism:

> As a group, the Rehnquist Court's federalism developments share a striking disregard for Congress as a coequal branch of government and reflect the Court's self-serving effort to assure its own dominance as the nation's expositor of constitutionally informed values. These developments should make us wonder anew whether there is a demonstrated need for such aggressive judicial review, given the political safeguards of federalism that arguably allow the states, in a normal case, to take care of their own interests in the national political process.

Thomas O. Sargentich, *The Rehnquist Court and State Sovereignty: Limitations of the New Federalism*, 12 WIDENER L.J. 459, 462 (2003).

82. *See id.* at 522.

83. *See id.* at 518 ("The Court, in *City of Boerne*, lectured Congress on the need to let the Court be the sole interpreter of what the Free Exercise Clause requires.").

84. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

85. 494 U.S. 872 (1990); *see also City of Boerne*, 521 U.S. at 512.

86. *Smith*, 494 U.S. at 888-90.

incensed by the shift and pushed Congress to pass new legislation:

> The RFRA coalition included over fifty interest groups, ranging from church lobbying entities to the American Civil Liberties Union and People for the American Way, two organizations that frequently opposed the initiatives supported by religious interest groups. The coalition pointed to state and local actions that, it argued, unjustifiably interfered with religious liberty. . . .
>
> State and local government officials found it politically difficult to oppose RFRA, which the House of Representatives passed on a voice vote, with no opposition recorded . . . . President Clinton signed the statute into law on November 16, 1993.[87]

From an institutional perspective, the difficulty with the statute was immediately apparent. RFRA explicitly noted that *Smith* largely eliminated the compelling interest test,[88] that the compelling interest test was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests,"[89] and worst of all, that the purpose of the statute was

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87. Mark Tushnet, *The Story of* City of Boerne v. Flores*: Federalism, Rights, and Judicial Supremacy*, *in* CONSTITUTIONAL LAW STORIES 483, 483-84 (Michael C. Dorf ed., 2d ed. 2009). The advocates' position was not unreasonable *per se*. Even though the Supreme Court had altered the relevant standard of review for constitutional purposes, nothing prevented Congress from creating a statutory right that protected free exercise rights and mandated application of the compelling interest test when assessing liability under the statute. The examples of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause are instructive. A plaintiff may not succeed on an equal protection claim unless she has successfully proven that the defendant in her case engaged in intentional discrimination against her. *See* Washington v. Davis, 426 U.S. 229, 239-42 (1976) (discussing the intent standard in equal protection jurisprudence). By contrast, the same discrimination claim, if brought under Title VII, might be successful if the plaintiff had no evidence of intent, but rather, presented sufficient evidence of disparate impact. *See* 42 U.S.C. § 2000e-2(k) (2006) (laying out the burden of proof for disparate impact claims brought under Title VII). This is an example where Congress and the Supreme Court are working toward the same end, but they have chosen distinctive paths for achieving the goal. The fact that the Civil Rights Act was passed pursuant to Congress's power under the Commerce Clause, rather than its authority under Section 5, seems to be a distinction without a difference. Both the statute and the constitutional rule have the purpose of vindicating the principle of equality. *See* Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 88 (2010) (pointing to common origins and purpose of the Equal Protection Clause and Title VII of the Civil Rights Act). Another example highlights a similar difference between constitutional and statutory standards. In *Geduldig v. Aiello*, the Supreme Court held that disparities in treatment based on pregnancy status do not constitute gender-based discrimination in violation of the Equal Protection Clause. 417 U.S. 484, 494 (1974). Congress, however, disagreed with this position and amended the Civil Rights Act of 1964 to create the Pregnancy Discrimination Act, which says that discrimination on the basis of pregnancy status violates Title VII's prohibition against sex discrimination. *See* 42 U.S.C. § 2000e(k) (2006) (amending Title VII). Regarding RFRA, Congress could have drafted a statute that carved out a space that distinguished between the Court's sphere—interpreting the constitutional rules—and its own space, creating legislative rules.

88. 42 U.S.C. § 2000bb(a) (2006). The compelling interest test was still applicable when other constitutional protections were at stake, or when the claim of religious hardship was advanced in a circumstance where the state already had in place a system that allowed for individual exemptions. *See Smith*, 494 U.S. at 885-86.

89. *City of Boerne*, 521 U.S. at 515 (quoting 42 U.S.C. § 2000bb(a)(5) (2006)).

"to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*, . . . and to guarantee its application *in all cases* where free exercise of religion is substantially burdened."[90] In short, Congress passed a statute that not only purported to overturn a constitutional decision rendered by the Supreme Court, it supplied an interpretive rule of decision that had to be applied in future constitutional cases that the Supreme Court had just specifically rejected.

Unsurprisingly, the Court found that this exercise of Congress's Section 5 authority exceeded the scope of Congress's authority, and the Court rested its argument on two grounds: separation of powers and federalism.[91] The Court located the limits of Section 5 in both the text and its view of the Fourteenth Amendment's history, and the conclusion that it drew supported its contention that Congress had invaded the province of the judiciary.[92] Acknowledging these limitations did not, however, mean that the Court was prepared to ignore the extent of Congress's *actual* authority. Section 5 was "a positive grant of legislative power"[93] that was so broad, it could "prohibit[] conduct which [was] not itself unconstitutional and intrude[d] into 'legislative spheres of autonomy previously reserved to the States.'"[94] Nonetheless, the power to enforce the substantive provisions of the Fourteenth Amendment was *remedial* in nature, which meant that Congress did not have the power to declare the actual meaning of those provisions:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[95]

In other words, Congress had no power to offer its own accounting of what governmental conduct might, for instance, rise to the level of unconstitutional discrimination in violation of the Equal Protection Clause.[96] The Court's vision of Congress's power, supported by an abbreviated historical account of the drafting of the amendment, was fairly surprising in light of two contradictory factors: (1) a more accurate accounting of the history, which reveals a greater role for Congress than the one described by the Court,[97] and (2) the *Morgan*

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90. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000bb(b)(1) (2006)).

91. *Id.* at 536.

92. *Id.*

93. *Id.* at 517 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

94. *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

95. *Id.* at 519 (alteration in original).

96. *See id.*

97. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L REV. 153, 176 (1997) (describing the fact that nineteenth century congressmen believed that their power to enforce the Fourteenth Amendment included the power to interpret it).

decision, which *City of Boerne* actually reaffirmed.[98] First, as Professor Michael McConnell noted: "The historical evidence presented in the *Boerne* opinion proves only that Congress was not intended to have authority to pass general legislation determining what the privileges and immunities of citizens should be. It does not support the more extreme claim that Congress lacks independent interpretive authority."[99] Beyond that, *Morgan* suggested that the Court might adopt a deferential stance toward congressional interpretations of the Equal Protection Clause, holding that the Court's sole obligation was to ensure that it "perceive[d] a basis upon which Congress might predicate a judgment that the . . . [statute under review] . . . constituted an invidious discrimination in violation of the Equal Protection Clause."[100] The Court's response to the *Morgan* holding was to recharacterize it as merely reflecting the possibility that Congress had a factual basis for believing that invidious discrimination did, in fact, exist.[101] A cynic might argue that relying on an incomplete version of the historical account and revising a key precedent in a manner that may or may not have been reliable served an important strategic purpose: a new standard of review, one that was much less generous than the *McCulloch* standard relied on in *Morgan*, could be devised if Congress's institutional role was both limited and subject to significant judicial control. To that end, the Court held that legislation passed under Section 5 had to show "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[102] The Court believed that this test would adequately monitor "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."[103]

In short, Congress had upset the balance of powers, and in so doing, violated both separation of powers and federalism. Congress had not compiled a voluminous legislative record detailing a history of abuses directed at people of faith, so the sweeping nature of the legislation was deeply incongruent with the insignificant nature of the evil that was at stake.[104] Moreover, the law would affect "every level of government," and its requirements—if taken seriously—would be very difficult for the government to avoid.[105] As such, "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise."[106] Therefore, the law also lacked proportionality. Congress, according to the Court, was not enforcing the requirements of the Free Exercise Clause; it was changing the nature of the

98. *See City of Boerne*, 521 U.S. at 527-28.

99. McConnell, *supra* note 97, at 176.

100. Katzenbach v. Morgan, 384 U.S. 641, 656 (1966).

101. *City of Boerne*, 521 U.S. at 528.

102. *Id.* at 520. Notably, the Court never explained why it was abandoning the *McCulloch* standard.

103. *Id.* at 519.

104. *See id.* at 532.

105. *See id.* at 532-34.

106. *Id.* at 534.

clause by expanding the universe of its protection, and this overhaul of the substantive right not only undermined the Supreme Court's authority to determine the location of the right's operative limits, it intruded too greatly on the governing prerogatives of the states.[107] In light of these conclusions, the Court invalidated RFRA as it applied to the states.[108]

The next several cases following *City of Boerne* both solidified the sense that the Court's approach to Section 5 was an aspect of the federalist revival and clarified the contours of the new congruence and proportionality doctrine.[109] In each of these cases—almost all of which challenged the validity of a Congressional abrogation of state sovereign immunity[110]—the Court's

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107. *Id.* at 534-36.

108. *Id.* at 536.

109. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2-5 (2003) (summarizing Section 5 jurisprudence following the *City of Boerne* decision). It is possible to read *City of Boerne*'s adoption of a new and narrow doctrinal test that was sharply out of step with both precedent and the framers' intent as an ends-oriented reflection of the majority's federalist orientation, but even if one challenges the Court's framework for analysis, its ultimate conclusion was correct. A handful of scholars have noted that Congress's actions here seemed to point in the direction of a problem highlighted in the nineteenth-century case, *United States v. Klein*. *See, e.g.*, Michael Paisner, Boerne *Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 556-57 (2005). In *Klein*, the Supreme Court invalidated an effort by Congress to compel a particular outcome in a future judicial decision. United States v. Klein, 80 U.S. (13 Wall.) 519, 525-26 (1872). Similarly, when RFRA stated that its purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*, . . . and to guarantee its application *in all cases* where free exercise of religion is substantially burdened," it was effectively stating that courts would be compelled to apply the compelling interest test to evaluate claims where the right of free exercise had purportedly been substantially burdened, even constitutional claims. 42 U.S.C. § 2000bb(b) (2006) (emphasis added). This was precisely the test that the Supreme Court had just abandoned in *Smith*. Congress was forcing the Court to adopt a specific rule of constitutional doctrine,when the Court is supposed to have a free hand when interpreting the Constitution. *See City of Boerne*, 521 U.S. at 519, 523-24. One might argue that Congress should have been able to use its Section 5 authority to create statutory protection for religious claimants that was distinctive from its constitutional counterpart, but it should not have been allowed to compel a particular form of constitutional analysis by the Court. *See id.*

110. *See* Post & Siegel, *supra* note 109, at 4 (noting that recent Supreme Court decisions have held that Congress may not abrogate state sovereign immunity based on its Article I powers except when it exercises its Section 5 powers). The exception was *United States v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, Congress attempted to use its Section 5 power to subject private individuals who committed acts of gender-motivated violence to civil liability under the Violence Against Women Act. *See id.* at 620. The Court rejected this use of Section 5 because it circumvented the state action requirement:

> [P]rophylactic legislation under [Section] 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

Id. at 625-26 (citations omitted). In other words, Section 5, at a minimum, had to address itself to enforcing violations of the Fourteenth Amendment, and private individuals were incapable of violating the Fourteenth Amendment. *See id.* at 621.

insistence on applying the equivalent of a heightened scrutiny standard made it much more difficult for the statutes to survive.[111] The Court did not have to create a new standard of review, and it certainly did not have to create a new standard that would be difficult for Congress to meet; the decision to do so, however, arguably placed a thumb on the scale in favor of promoting state autonomy and emphasizing the importance of maintaining the federalist balance. These decisions made it very clear that the Court viewed Section 5 as a potent source of authority, and even though the text and history supported a reading that gave Congress wide latitude in the exercise of that power, federalism and separation of powers were the crucial default norms against which Section 5 was ultimately understood.[112] As such, the Court believed that it properly imposed this new standard of review, which limited Congress's ability either to engage with the Court in a dynamic process of interpretation and revision or meaningfully regulate civil rights.[113]

The notion of "congruence and proportionality" was not altogether clear,[114] so the Court used the next few cases to create a framework for analyzing Section 5. Starting with *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[115] the Court made it clear that Congress could not access its power under Section 5 unless it "identif[ied] conduct transgressing the Fourteenth Amendment's substantive provisions, and . . . tailor[ed] its legislative scheme to remedying or preventing such conduct."[116] Congress abrogated the states' sovereign immunity here so that patent owners whose inventions had been infringed by the states could seek a remedy in federal court, but the Court found that the abrogation was invalid. There was no evidence of a pattern of state infringements leading to deprivations of due process; therefore, the expansive liability created by the statute was disproportionate to the nature of the problem.[117] While *Florida Prepaid* made it clear that Congress would have to identify a pattern of constitutional violations prior to exercising its power under Section 5, it was not clear how much flexibility it would have in determining the existence of a violation.[118]

The Court answered this question, for purposes of the Equal Protection

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111. *See* Post & Siegel, *supra* note 109, at 2-3.

112. *See id.* at 4-5 (emphasizing the role of federalism and separation of powers in the Supreme Court's analytical transformation during the 1990s).

113. Professor Robert Post and Professor Reva Siegel have written persuasively about the idea that the Court mistakenly views itself as the sole expositor of Section 5's meaning. *See id.* at 2 (describing this as a "juricentric" point of view). Arguing that the American constitutional and political cultures overlap in multiple ways, the authors chastise the Court for "deliberately suppressing a vibrant constitutional conversation between Congress and the Court that has persisted throughout the second half of the twentieth century." *Id.* at 30.

114. *Id.* at 5, 7.

115. 527 U.S. 627 (1999).

116. *Id.* at 639.

117. *Id.* at 640-43.

118. *Id.* at 645-47.

Clause, in *Kimel v. Florida Board of Regents*.[119] *Kimel* considered whether or not Congress could subject states to damages liability for violations of the Age Discrimination in Employment Act ("ADEA"), and once again, the Court said no.[120] The Court made this determination by first providing a framework for measuring the scope of the equal protection right, and by then deciding whether or not the statute's coverage was proportionate to the size of the problem.[121] In a curious move that has been roundly criticized by scholars,[122] the Court identified the relevant right in question—the right to nondiscriminatory treatment based on age—and found that the proper yardstick against which the right should be measured was its corresponding level of tiered scrutiny review.[123] Under tiered scrutiny, age classifications were subject to rational basis review, which meant that a vast range of governmental conduct would survive a constitutional challenge.[124] Therefore, the universe of wrongs to which Congress might respond was necessarily quite small. The scope of the ADEA, however, was not calibrated to the size of the eligible universe of wrongs; instead, it applied nationwide, making the statute wildly disproportionate.[125]

Kimel was an extraordinary decision, the natural implication of which was fairly straightforward: "If the exercise of congressional Section 5 power [had to] be congruent and proportional to behavior that a court would hold unconstitutional under rational basis review, virtually all antidiscrimination legislation, except that protecting racial minorities and women, [would] be rendered beyond Congress's Section 5 power."[126] The harshness of this approach notwithstanding, the Court reaffirmed it in *Board of Trustees of the University of Alabama v. Garrett*.[127] *Garrett* considered whether plaintiffs could receive money damages from state employers after suing them pursuant to Title I of the Americans with Disabilities Act ("ADA"), and again, the answer was no.[128] The Court found that the limits on the right in question were determined by the scope of the applicable standard of review, but it also tightened the evidentiary standard that Congress had to meet in order to satisfy this requirement. *Garrett* accomplished this through a three-part test. First, the Court said that Congress, when exercising its Section 5 power, had to "identify with

119. 528 U.S. 62 (2000).

120. *Id.* at 91.

121. *Id.* at 80-91.

122. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

123. *Kimel*, 528 U.S. at 83-86.

124. *Id.* at 86 ("The [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.").

125. *See id.*

126. Post & Siegel, supra note 122, at 461.

127. 531 U.S. 356, 374 (2001).

128. *Id.* at 360.

some precision the scope of the constitutional right at issue."[129] Second, Congress had to have identified a pattern and history of unconstitutional behavior because Section 5 is triggered only when the states have actually violated the substantive provisions of the Fourteenth Amendment.[130] Since disability rights were at stake in this case, the Court was looking for a pattern of irrational discrimination by state officials; evidence of "adverse, disparate treatment" would not suffice.[131] Finally, if Congress could overcome the first two thresholds, the congruence and proportionality test would evaluate the means-ends relationship between the statute in question and the remedy it proposed.[132] The refinements that *Garrett* made to the relevant test had at least one crucial consequence: Congress's ability to enforce the Equal Protection Clause was firmly yoked to the Supreme Court's equal protection jurisprudence. Thus, regarding "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," Congress no longer had "wide latitude in determining where it lies"[133]—that latitude had seemingly been caged by the Court.

Nevada Department of Human Resources v. Hibbs[134] and *Tennessee v. Lane*[135] saw a reversal in the steady of string of losses. In these two cases, the test that the Court applied was the same, but the outcomes were different because the classifications in question were subject to higher standards of review under equal protection.[136] In *Hibbs*, the Court approved the abrogation of state sovereign immunity when the provision in question was the unpaid leave portion of the Family and Medical Leave Act of 1993 ("FMLA").[137] *Lane* upheld the abrogation of state sovereign immunity when Title II of the ADA was at stake.[138] Moreover, both cases satisfied the Court's desire to see the inclusion of a precisely defined right, a sufficiently well-developed pattern showing constitutional violations, and a sufficiently fine-tuned calibration between the legislation and the injury it was intended to address.[139] The Court was much more forgiving in these two cases about the quantum of evidence necessary in order to prevail—since the standard of review was higher, there was a smaller universe of government action that would survive review. Therefore, the Court was willing, in effect, to presume the existence of a

129. *Id.* at 365.

130. *Id.* at 368.

131. *Id.* at 368, 370 (citation omitted).

132. *Id.* at 372.

133. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).

134. 538 U.S. 721 (2003).

135. 541 U.S. 509 (2004).

136. *Hibbs*, 538 U.S. at 728-29 (discussing heightened scrutiny in cases of gender-based workplace discrimination); *Lane*, 541 U.S. at 528-29 (justifying heightened scrutiny for discrimination against persons with disabilities).

137. *Hibbs*, 538 U.S. at 725.

138. *Lane*, 541 U.S. at 515.

139. *See Hibbs*, 538 U.S. at 729-32; *Lane*, 541 U.S. at 526-28.

constitutional violation if Congress was able to show at least *some* evidence of one.[140] This stands in marked contrast to *Florida Prepaid*, *Kimel*, and *Garrett*, where it became clear that the Court did not take seriously its own statement that Congress had "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[141] After *Hibbs* and *Lane*, though, it appears that the Court is prepared to offer Congress a bit more room to maneuver when it links its Section 5 authority to the Court's judgment about those claims most worthy of review.[142]

Lane was the last significant Section 5 decision that the Supreme Court issued. Looking back on the cases as a whole highlights any number of concerns, but two issues rise immediately to the fore: the remarkable degree of control that the Supreme Court has appropriated from Congress since issuing *City of Boerne*, and the amount of regulatory control over the states that Congress has *lost* since *City of Boerne*.

Regarding judicial control over Congress, the first problem is reflected in the inexorable tightening of the standard of review. Initially in *City of Boerne*, the Court argued that "there must be a congruence between the means used and the ends to be achieved[;] [t]he appropriateness of remedial measures must be considered in light of the evil presented."[143] The Court seemed to be saying that the remedy presented should be reasonably precisely fixed to the violation it was meant to address, and in that case, Congress had created a remedy that was in search of a problem to resolve.[144] If the remedy targeted an ill that did not provably exist, there was no realistic sense in which the remedy might be congruent. Proportionality, by contrast, was not focused on the closeness of the fit between the remedy and the violation; rather, it was focused on the overall impact of the remedy as compared to the scope of the harm. If the remedy invalidated far more laws than were necessary to attack the harm, the Court

140. *See Hibbs*, 538 U.S. at 732; *Lane*, 541 U.S. at 528.

141. *Lane*, 541 U.S. at 518 (alteration in original) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)).

142. Professor Justin Schwartz, for example, has recently suggested that the damage wrought by the *City of Boerne* line of cases is less profound than many commentators would suggest, using cases like *Hibbs* and *Lane* as examples that support his claim. *See* Justin Schwartz, *Less than Meets the Eye: Antidiscrimination and the Development of Section 5 Enforcement and Eleventh Amendment Abrogation Law Since* City of Boerne v. Flores, 38 HASTINGS CONST. L.Q. 259, 262-63 (2011). Even though he uses those cases to reframe the received account of Congress's current ability to enforce the rights provisions of the Fourteenth Amendment—an account which I still find persuasive—he nonetheless recognizes the salience of the point made above, namely, that the Court offers a more relaxed application of the congruence and proportionality test when Congress regulates in areas that implicate higher standards of review and therefore, a closer degree of scrutiny from the Court. *Id.* at 277-78.

143. City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

144. *See id.*

would find a lack of proportionality.[145] Even though this standard was far less flexible than the *Morgan* standard under which Congress had previously operated, it seemed to leave room for Congress to attack problems, large and small, as long as there was a close fit between means and ends, and as long as the operative scope of the legislation did not vastly outstrip the size of the problem.

By the time the Court rendered its decision in *Garrett*, though, the standard had tightened substantially.[146] First, by tying the identification of the enforceable right to the applicable judicial standard, the Court had eliminated even the smallest possibility of a congressional role in identifying the rights that might be worthy of protection; and second, by focusing on the existence of a pattern of discrimination, the Court confined Congress's authority to large, widespread problems, rather than small, relatively discrete issues, when the classification receiving protection was subject to rational basis review.[147] Limiting Congress's power in this way ensured that under typical circumstances, it could use its power only when the matter at stake had taken on nearly national proportions, a restraint that the Fourteenth Amendment's framers surely did not intend.

Beyond this, the Court's reliance on standards of review in order to determine the scope of the right in question is problematic for an additional reason. As various scholars have already suggested, Congress has the power to enforce the rights that are protected under the Fourteenth Amendment, but the Court has made the assumption that the judicially-derived standards of review mark the outer boundaries for any rights claims that might come before the Court.[148] The difficulty with this position, though, is the fact that those standards of review—in particular, rational basis review—were developed as institutional constraints on *federal courts*, not as constraints on Congress or as demarcations of the metes and bounds of the rights in question.[149] The institutional limits that bind courts simply do not apply when Congress is exercising its power under Section 5; as others have noted, Congress has no obligation to observe judicial standards of deference when exercising its own

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145. And this, of course, was precisely the outcome that the Court reached in *City of Boerne*. *See id.* at 536.

146. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 383-87 (2001).

147. This was mostly true in those cases where the group of people that Congress sought to protect embodied a classification that was subject to rational basis review. As noted in *Hibbs* and *Lane*, if the classification in question received heightened scrutiny under equal protection analysis, the Court was prepared to view Congress's efforts with a more generous eye. *See supra* notes 134-40.

148. *See supra* Part I.

149. *See, e.g.*, Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1103-04 (2001) (arguing that the justification for rational basis review relates to a proper understanding of the democratic roles played by courts and legislators; these concerns, and the standards of review themselves, are meant to restrain judicial actors by ensuring that they do not overstep their institutional boundaries—they are not meant to restrain Congress).

authority.[150]

Insofar as the loss of regulatory control over the states is concerned, there is no question that Congress still retains significant power: it may still rely on its authority under Article I, Section 8; the enforcement provisions of the Thirteenth and Fifteenth Amendments provide additional sources of power; and Section 5 is not completely without teeth.[151] All of this notwithstanding, the doctrinal changes since *Morgan* suggest that congressional uses of the Section 5 power that were upheld in the pre-*City of Boerne* era might not fare as well today.[152] Despite *City of Boerne's* decision to reaffirm *Morgan*, it is questionable whether or not the federal statute in that case would have survived the current interpretation of Section 5. The elevation of state interests in the wake of the federalist revival, combined with the restrictions placed on Congress's power, establishes a powerful restraint on Congress's ability to address potential violations of citizens' civil rights.

Viewed in its most charitable light, *City of Boerne* can be characterized as a judicial overreaction to an isolated instance of congressional overreaching. Unfortunately, the timing of the overreaction was particularly

150. *See, e.g.*, Post & Siegel, *supra* note 122, at 464 ("Nothing in the justification of rational basis review constrains Congress from exercising its own institutional prerogatives to undertake legislative factfinding to determine whether there is invidious discrimination in any given area of national life.").

151. Other specific enumerations of power that give Congress regulatory authority include language in the Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments. U.S. CONST. amend. XIX; U.S. CONST. amend. XXIII, § 2; U.S. CONST. amend. XXIV, § 2; U.S. CONST. amend. XXVI, § 2. None of these grants of power, however, are as significant as Section 5 of the Fourteenth Amendment, which grants enforcement authority in a comparatively greater number of substantive areas, permits the enforcement of rights whose boundaries are regularly subject to litigation and debate, and finally, was specifically intended to reshape the original dynamic of federalism by shifting power to Congress and away from the states. *See infra* notes 214-15 and accompanying text (regarding the federalist revision).

152. One example of a case that might have a different outcome today is *Maher v. Gagne*, 448 U.S. 122 (1980). In *Gagne*, the Supreme Court found that Congress could use its power under Section 5 to authorize an award of attorneys' fees when a court entered a consent decree between the plaintiff and the state defendant and declared the plaintiff the "prevailing party" in the dispute, but did not find that the state had violated her constitutional rights. *Id.* at 124-27. Granting awards in a case like this—where plaintiff prevailed under the statutory claim but neither won nor lost the alleged constitutional claims—was an appropriate mechanism for enforcement because doing so upheld the goal of encouraging citizens to vindicate their constitutional rights. *Id.* at 130-33. It is not clear that the Court would reach the same decision today. Plaintiff's equal protection and due process claims were economics-based arguments challenging the state's calculation of welfare benefits, and both claims would almost certainly have been subject to rational basis review. *Id.* at 125 n.5. Based on this fact, if today's Court reexamined the case and treated it like an "as applied" challenge, the claim for fees would probably flounder on the first prong of the Section 5 analysis for failing to show that a defensible right was at stake. Even if the Court reviewed the fee awards provision of the statute on its face, and even if it somehow survived the first step in the analysis, it might still fail if claims like the plaintiff's were common—the Court would almost surely find a lack of congruence and proportionality if it believed that states were too frequently paying attorneys' fees in cases where plaintiffs merely appended specious constitutional challenges to their statutory claims.

disadvantageous for Congress, since it coincided with the height of the Court's federalist revival.[153] The Court took the opportunity that Congress presented, not just to rap it on the metaphorical nose, but also to cabin the reach of its Section 5 power. The Court, however, now runs the risk of restraining Congress so much that it will create its own separation of powers problem—it will undermine Congress's ability to exercise a power that it was meant to have. Section 5 was *never* supposed to be the narrow, crabbed doctrine that it has become today.

III. A COMPROMISE STANDARD FOR REGULATION UNDER SECTION 5

It is not clear how many future opportunities the Court will have to engage in the hard work of substantive reimagination. Nonetheless, it is crucial that the Court do so. The congruence and proportionality test does not allow Congress to maintain its status as a co-equal partner in governance; rather, in this particular arena, it has been rendered subordinate by the Court.[154] It has limited power to predict and respond to—or, "prevent"—the anticipated civil rights threats of the future, and if the Court has not recognized that a particular class of people deserves the designation of "suspect" or "quasi-suspect", Congress will have a diminished ability to protect them from harm until conditions have worsened to the point that they are the consistent victims of animus or irrational targeting.[155]

The LGBT community provides a case in point. Even though we do not currently exist in a climate that would, for instance, allow Congress to pass legislation attacking the mini-DOMAs, *some* forms of legislation based on Section 5 that would offer greater protection to the LGBT community should be politically permissible. Yet, since the Court has not announced the standard of review that applies to classifications on the basis of sexual orientation (and since gender identity is not even on the table), there is ambiguity regarding the kind of equal protection enforcement legislation that would ultimately pass

153. See *supra* notes 64-86.

154. *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997) ("The Amendment's design has proved significant also in maintaining the traditional separation in powers between Congress and the Judiciary, depriving Congress of any power to interpret and elaborate on its meaning by conferring self-executing substantive rights against the States and thereby leaving the interpretive power with the Judiciary." (internal citations omitted)).

155. After the Court upheld Title II of the ADA in *Tennessee v. Lane*, it became clear that one potential strategy for advancing civil rights causes was to legislate on the basis of protecting fundamental rights, rather than protecting classes of people. 541 U.S. 509 (2004). This strategy does not, however, offer much protection to the transgender community, for instance, or to people who might be subject to discrimination on the basis of their genetic information. *See, e.g.*, William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 476-80 (2010) (discussing the doctrinal difficulties at stake if Congress attempts to use its Section 5 authority to protect transgendered people, or the potential difficulty that will arise once the constitutionality of the Genetic Non-Discrimination Act is challenged).

constitutional muster.[156] There is, however, an even greater frustration at stake here: the Court has not simply *failed* to announce a standard of review; in *Romer v. Evans, Lawrence v. Texas*, and most recently, in *United States v. Windsor*, it had three opportunities to announce a standard of review that would be relevant to due process rights claims or equal protection claims of discrimination in the context of sexual orientation, and it *refused* to do so.[157] Congress, then, is pinched: it is undercut by an interpretation of Section 5 that limits its ability to act, it is chained by a Court that has more than once declined, in the context of sexual orientation, to settle the boundaries of congressional enforcement authority, and these combined constraints undermine its ability to regulate state actors who consistently discriminate against LGBT citizens, sometimes without penalty.[158]

Several key examples will highlight the degree to which state governments have engaged in, or facilitated, discrimination against the LGBT community, and the corresponding need to give Congress more authority to regulate than it currently holds. As an initial matter, there is evidence that shows animus in at least some of the campaigns surrounding the passage of the mini-DOMAs.[159] In addition, survey data suggests that a significant number of LGBT citizens have experienced discrimination while working as public sector employees. By way of example, a 2005 national survey of 1205 LGBT individuals, five percent of whom identified as workers who provided government services, indicated that thirty-nine percent of them had experienced workplace discrimination related to sexual orientation within the past five years.[160] Similarly, a climate survey for LGBT students, faculty, and staff was taken at colleges and universities across the country in 2009, and among the 1902 LGBT respondents who were employees of public institutions, nineteen percent of them had experienced hostile or harassing behavior that had interfered with their ability to work on campus, and over seventy percent of them attributed their treatment to their "sexual identity."[161] Even more evidence of discrimination by public employers

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156. *Id.* at 462-63.

157. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 133 S. Ct. 2675 (2013).

158. *See, e.g.*, BRAD SEARS ET AL., THE WILLIAMS INST.,DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 12-14 (2009), *available at* http://williamsinstitute.law.ucla.edu/ research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/ (discussing instances of discrimination experienced by LGBT state employees in a report that collected evidence back to 1980, and noting that the employees "are often told that [the discrimination] is of their own making, and no action is taken").

159. By way of example, see *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1001-02 (N.D. Cal. 2010) (finding that a substantial amount of evidence existed supporting the claim that animus permeated California's Proposition 8 campaign).

160. SEARS ET AL., *supra* note 170, at 9-6.

161. *Id.* at 8-9. These employment statistics are part of a larger trend of discrimination. According to a 2008 study conducted by the National Opinion Research Center at the University of Chicago, thirty-seven percent of all lesbian and gay workers had experienced employment discrimination within the past five years; as of 2011, the largest survey of transgendered individuals

exists.[162] Another example of government-sponsored misconduct comes in the form of police departments that mistreat LGBT citizens through harassment, abuse, or potentially unjustifiable inaction in the face of a specific need for law enforcement protection.[163]

This is the kind of evidence that supports a need for intervention on the federal level, but current doctrine might hamper congressional efforts to address these and other forms of discrimination. Regarding the marriage restrictions, it is not immediately apparent that courts throughout the entire country would reject as irrational many of the justifications that states have offered in support of traditional marriage laws.[164] By contrast, congressional authority to provide for workplace protection is more certain—with the exception of religious employers—it is unclear how courts might find that sexual orientation or gender identity serve as even a rational basis for refusing to hire or promote an employee, for deciding to fire an employee, or for creating or maintaining a hostile work environment. Nonetheless, as long as the Court either fails to

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showed that ninety percent of respondents had experienced discrimination at work or taken steps to avoid it. And finally, at least one 2011 study found that forty-eight percent of white-collar LGBT workers surveyed were not "out" at work. *See* Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 721-22, 735 (2012).

162. *See generally* SEARS ET AL., *supra* note 170.

163. *See, e.g.*, *Giles v. City of Johnson, et al*., LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/giles-v-city-of-johnson-city (last visited May 19, 2013) (discussing a complaint filed against a police department in Tennessee that released the pictures of men who were arrested in a public sex sting that specifically singled out gay and bisexual men); *see also Police Raid at the Atlanta Eagle*, ATLANTAEAGLERAID.COM (Sept. 10, 2009), http://atlantaeagleraid.com/police-raid-atlanta-eagle-2 (describing antigay bias that led to a police raid on an Atlanta gay bar despite the lack of probable cause or reasonable suspicion, and the anti-gay harassment that occurred during the raid); *accord* JUSTIN ROSADO ET AL., NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE 60 (2010), *available at* http://www.cuav.org/wp-content/uploads/2012/08/7243_2010IPVReport.pdf (reporting that in 21.8% of intimate-partner violence cases in which a report was made and a complaint was taken, the alleged abuser was not arrested).

164. Even though the trend since 2008 has been to find that prohibitions against same-sex marriage violate state guarantees of equal protection, courts have reached these conclusions on the basis of heightened scrutiny analyses rather than rational basis analyses. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). Moreover, the Supreme Court's recent decision to strike down Section 3 of the Defense of Marriage Act in *United States v. Windsor* does not necessarily address the issue. *United States v. Windsor*, 133 S. Ct. 2675, 2691-93 (2013) (invalidating the portion of the statute that defined marriage as the union between a man and a woman for purposes of federal law, in part because it undermined the right of the states to determine the meaning of marriage, but also in significant measure because the attempt to draw distinctions between married same-sex couples and unmarried same-sex couples was an affront to the dignity that married same-sex persons possessed). It is not difficult to contemplate a state court finding that traditional restrictions on marriage should be upheld, despite *Windsor*, because *Windsor* spoke to the dignity of *already married* persons, rather than the dignity of those persons who sought to acquire a married status.

articulate a heightened scrutiny standard of review for such claims of discrimination, or even better for purposes of Section 5, fails to give Congress more breathing room to pass civil rights legislation (regardless of the standard of review that it either does or does not articulate for such claims), lower courts in states that offer no workplace protection might find reasons to uphold discriminatory actions against LGBT employees.[165] Therefore, even though there are very strong doctrinal arguments that support the claim that a congressional statute prohibiting employment discrimination on the basis of sexual orientation or gender identity would survive even the form of analysis required under *Garrett*,[166] a slight possibility exists that it would not. Finally, even if Congress wanted to pass, for example, a civil rights statute that prohibited state governments from discriminating on the basis of sexual orientation, it is possible that this would be problematic under current doctrine. The Court might find an insufficiently widespread pattern of abuse, or in the case of alleged police inaction when specific protection is required, for instance, might accept as rational a defense related to the allocation of limited resources, especially if police departments could show that they were not otherwise derelict in responding to claims raised by members of the LGBT community.

Discrimination of this sort notwithstanding, the conditions of equality have improved tremendously, and over time, an increasing number of state actors will undoubtedly shift their attitudes and follow in the wake of their fellow citizens. To date, sixty-three percent of Americans believe that antigay discrimination is a "serious" problem.[167] In addition, a majority of Americans

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165. At present, twenty-one states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation, sixteen states prohibit such discrimination on the basis of gender identity, and nine governors have issued executive orders prohibiting some discrimination based on LGBT status. *See* CROSBY BURNS ET AL., CTR. FOR AM. PROGRESS, GAY AND TRANSGENDER DISCRIMINATION IN THE PUBLIC SECTOR 22, 24 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/2012/08/LGBTPublicSectorReport1.pdf. By contrast, twenty states leave LGBT public sector employees with no protection at all. *See id.* at 23 fig.1. In the states that do not offer protection, it is difficult to find recent case law, which proves that some judges have upheld discriminatory employment actions based on sexual orientation or gender identity. One case, however, illustrates the reason for concern. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1223-25 (10th Cir. 2007) (upholding under Title VII a state transit authority's decision to terminate a transgender employee after accepting as a nonpretextual justification for the removal an explanation that might suffice for purposes of rational basis review); *accord* Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219, 1232-34 (10th Cir. 2008) (upholding an adverse employment action against two lesbian school administrators on the basis of their sexual orientation because it was not clearly established, prior to *Lawrence v. Texas*, that such action might be unlawful).

166. *See generally* William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1 (2002) (offering a careful analysis that ultimately concludes that ENDA could survive review even under the current Section 5 requirements).

167. Jeffrey M. Jones, *Most in U.S. Say Gay/Lesbian Bias is a Serious Problem,* GALLUP POLITICS (Dec. 6, 2012), http://www.gallup.com/poll/159113/most-say-gay-lesbian-bias-serious-problem.aspx.

have abandoned their prior objections and now believe that same-sex marriage should be legal.[168] The United States Supreme Court has declared that a key provision of the federal Defense of Marriage Act is unconstitutional.[169] The current President of the United States—an obviously key political actor—has made a point of advancing the cause of LGBT rights, not just to a greater degree than any other President before him (a threshold that is not hard to cross), but to an affirmatively excellent degree. The same is true of his administration. Specifically, he has ended the discriminatory "Don't Ask, Don't Tell" policy;[170] he previously instructed the Justice Department to refuse to defend the federal Defense of Marriage Act ("DOMA") in court;[171] his former Secretary of State announced that LGBT rights ought to be perceived as human rights across the world;[172] and finally, he insists on the unassailable moral worth of lesbian and gay relationships, and respects the LGBT struggle for equality as one of the great civil rights movements of American history.[173] The outlook for the LGBT

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168. *See, e.g.*, Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP POLITICS (May 20, 2011), http://www.gallup.com/poll/147662/ first-time-majority-americans-favor-legal-gay-marriage.aspx (finding that fifty-three percent of Americans believed that same-sex couples should be allowed to marry); *cf. Two Thirds of Democrats Now Support Gay Marriage*, THE PEW FORUM ON RELIGION & PUB. LIFE (July 31, 2012), http://www.pewforum.org/Politics-and-Elections/Two-Thirds-of-Democrats-Now-Support-Gay-Marriage.aspx (finding that forty-eight percent of the total American public favored same-sex marriage).

208. *Windsor*, 133 S. Ct. at 2695-96.

170. President Barack Obama signed legislation on December 22, 2010, that ultimately led to the demise of Don't Ask, Don't Tell. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. Under the terms of the legislation, the repeal was to take effect sixty days after the President, the Secretary of Defense, and the Chairman of the Joints Chiefs of Staff certified to Congress that lifting the ban would not harm the standards of military readiness, unit cohesion, military effectiveness, recruiting, and retention. *See About "Don't Ask, Don't Tell"*, OUTSERVE-SLDN, http://www.sldn.org/pages/about-dadt1 (last visited May 19, 2013). The certification was issued on July 22, 2011, and the ban on open homosexuality was lifted on September 20, 2011. *See Repeal of "Don't Ask, Don't Tell" (DADT): Quick Reference Guide*, USD(P&R) (Oct. 28, 2011), http://www.defense.gov/home/features/ 2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_APPROVED.pdf.

171. *See* Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (announcing the President's change in policy regarding the Defense of Marriage Act, and specifically arguing that classifications based on sexual orientation should be subject to heightened scrutiny, and in light of this belief, concluding that DOMA is unconstitutional); *see also* Brief for the United States on the Merits Question at 12, United States v. Windsor, 133 S. Ct. 786 (2012) (No. 12-307), *available at* http://images.politico.com/global/2013/02/22/windsorusdojbrf.html.

172. See Hillary Rodham Clinton, *Remarks in Recognition of International Human Rights Day*, U.S. DEP'T OF ST. (Dec. 6, 2011), http://www.state.gov/secretary/rm/2011/ 12/178368.htm ("Some have suggested that gay rights and human rights are separate and distinct; but, in fact, they are one and the same. . . . Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.").

173. In his second inaugural address, President Obama stated:

> We, the people, declare today that the most evident of truths – that all of us are created

community has advanced faster than it has for any other minority group in American history.[174] In light of the social consensus that has been building around the cause of LGBT rights in general, are we truly so far away from a point in time when Congress might reasonably start to consider the idea of tackling the problem of the mini-DOMAs?

The time for that conversation might be closer than anyone currently believes, but it may be irrelevant because the Court is unlikely to repudiate its Section 5 jurisprudence. It might, however, be open to a pragmatic compromise. It would maintain its current jurisprudence when Congress abrogated state sovereign immunity, but allow Congress to engage in straightforward regulation when it is not creating a private right of action against the states, subject to a specific standard of review: Was it rational for Congress to conclude that the legislation in question would provide a remedy for a constitutional violation, prevent the recurrence of such a violation, or prevent the likely occurrence of a potential violation?

As a compromise position this might be reasonably appealing for two reasons: (1) it is in line with the historical understanding of Section 5; and (2) it attempts to establish a consistent approach between Section 5 and the approach that the Court has taken when evaluating Congress's other major enumerated power, the Commerce Clause. In that arena, judicially imposed limitations have established both a broad swathe of federal power and a sphere of state autonomy that contemplates the balance between federal authority and the role of the states as cosovereigns. In light of the fact that Section 5 was meant to reorder the federalist balance between the national government and the states, it is self-evidently a major congressional power, very much like the powers established in Article I, Section 8, and treating this power in a manner that is consistent with the way in which the Court treats its clearest analogue would reflect a proper understanding of the role that Congress should play in the regulation of national affairs.

A. History as a Basis for Adopting Rational Basis Review in the Nonabrogation Context

As an initial matter, adopting the proposed standard would bring Section 5 reasonably in line with the original understanding of the power. Various

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> equal – is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall . . . .
>
> It is now our generation's task to carry on what those pioneers began. For our journey is not complete . . . until our gay brothers and sisters are treated like anyone else under the law – (applause) – for if we are truly created equal, then surely the love we commit to one another must be equal as well.

Barack Obama, President of the United States, Inaugural Address (Jan. 21, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

174. *See, e.g.*, Mark Z. Barabak, *A Faster Track for Gay Rights*, L.A. TIMES, May 20, 2012, at A1 http://articles.latimes.com/2012/may/20/nation/la-na-gay-rights-movement-20120521("[B]y moving public opinion so dramatically and changing the political dynamic with such rapidity, the gay rights movement has achieved remarkable success with unprecedented speed . . . .").

scholars have suggested that Congress originally intended that the powers conveyed through the Reconstruction Amendments—and especially, the Fourteenth Amendment—be quite broad, especially in light of its desire to reconfigure the structural relationship between the federal government and the states, with a significant measure of power being transferred from the states to the federal government.[175] Congress did not spend a great deal of time discussing the issue—it was more focused on the other substantive provisions of the Fourteenth Amendment at the time[176]—but the people who spoke about Section 5 seemed to have a distinct point of view about its function. Senator Jacob Howard of Michigan, for instance, discussed each section of the amendment, and in effect noted that the substantive provisions were not self-executing; rather, he noted that "[t]he power which Congress has . . . is derived . . . from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment."[177] Similarly, Representative Ignatius L. Donnelly argued that the South's various political decisions over the course of time, culminating in its decision to take the nation to war, resulted in a corresponding loss of trust for the region, and as such, Congress should have broad enforcement authority to guarantee the promises of the Fourteenth Amendment.[178] These kinds of statements were not isolated points of view, and this evidence, in combination with other assessments, have convinced various scholars that the use of the word "appropriate" was a deliberate choice, reflecting the Court's generous understanding of the term when interpreting the Necessary and Proper Clause in *McCulloch v. Maryland*.[179]

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175. *See, e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808-10 (2010) (arguing that the purpose of the enforcement clauses in the Thirteenth, Fourteenth, and Fifteenth Amendments was to alter the federalist balance in the name of guaranteeing individuals equal citizenship before the law); *see also* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 367 (2006) ("If Congress was to have such power with respect to the Fourteenth Amendment, and in particular the restrictions of Section 1, it had to be granted explicitly. [Senator] Howard thus presented Section 5 as extending Congress' substantive authority, adding to the list in Article I, Section 8."); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 183 (1998) ("[W]hile the rule-of-recognition notion justifies Article VI's Supremacy Clause—because a court needs to know how to resolve conflicts between state and federal law—it cannot account for the numerous limitations on state legislative authority contained in Article I, Section 10, or in Section 1 of the Fourteenth Amendment."); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 762 (1992) ("[T]he Reconstruction amendments (most notably, the Fourteenth) effectuated significant *substantive* changes in the Constitution . . . .").

176. *See* Harrison, *supra* note 187, at 366 (noting that the debate over the Fourteenth Amendment was more focused on matters such as reapportionment in the House of Representatives and the Electoral College, and the imposition of political liabilities on the members of the former Confederacy).

177. CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866).

178. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 586 (1866).

179. *See, e.g.*, Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1159 (2001) ("And, an originalist inquiry . . . firmly supports the

In fact, soon after the ratification of the Fourteenth Amendment, the Supreme Court confirmed this view:

> [The Reconstruction Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. . . .
>
> . . . .
>
> . . . It is the power of Congress which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.
>
> . . . Such enforcement is no invasion of State sovereignty.[180]

Even the contemporaneous decision, *The Civil Rights Cases*—which placed a sharp limit on the operative scope of the Fourteenth Amendment by establishing the state action requirement—proceeded under the assumption that Congress had broad enforcement authority under Section 5.[181] In this case, the Court considered whether Congress could use its power to enforce the requirements of Section 1 against private actors, and it found that only state actors were restrained under the terms of the amendment.[182] The Court reached this decision after applying the following standard:

> [T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be *necessary and proper* for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.[183]

Professor Jack Balkin has argued that the Court's description here of Congress's

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conclusion that Section 5 was designed and understood to impose a means-ends tailoring test that mimicked the test applied to Article I executory statutes."); J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 423 (2003) (asserting that the Framers of the Fourteenth Amendment incorporated the standard from *McCulloch* into Section 5); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 117-18 (1999) (same).

180. *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879).

181. 109 U.S. 3, 11, 54 (1883).

182. *Id.* at 10-11.

183. *Id.* at 13-14 (emphasis added).

enforcement authority implicitly incorporated the test for Article I's Necessary and Proper Clause:[184] "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."[185] The notion that the Court measured Section 5 along the same lines as the Necessary and Proper Clause is borne out, most obviously, by its actual use of the above-referenced "necessary and proper" language. The combination of statements from the framers, contemporaneous analyses by the Supreme Court, and the assessment of legal scholars supports the position that the Framers of the Fourteenth Amendment wanted Congress's enforcement authority to be coextensive with the breadth it enjoyed under Article I.[186] As such, the Roberts Court—in particular, its members who purport to be originalists—should reconsider its approach to Section 5 by re-establishing the idea that Congress possesses greater authority than current doctrine would permit, and the proposed standard would allow it to do so.

B. Structural and Functional Similarities Between Commerce Clause and Section 5 Justify Similarity of Treatment

Fidelity to the historical understanding of Section 5 is simply one justification for adopting the proposed standard. The second justification is based on the idea that there is value in treating Section 5 consistently with the other great power that Congress uses when passing legislation—the Commerce Clause—because these powers share important similarities along structural and functional lines. They share structural similarities because of the significant role that both doctrines either played or were intended to play in the process of consolidating national power—the Commerce Clause during the Founding Era and Section 5 during the period following the Civil War. In addition, they share functional similarities because they both offer solutions to particular kinds of collective action problems: the Commerce Clause was intended to solve the

184. Balkin, *supra* note 187, at 1811.

185. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

186. *See, e.g.*, Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747, 824-26 (1999) (arguing that the members of the Reconstruction Congress were aware of the definitional linkage between the enforcement provision's use of the language "appropriate legislation" and the Necessary and Proper Clause's reference to "proper laws," and further arguing that the Supreme Court's definition of the word "appropriate" linked the standard from *McCulloch* to the language of the enforcement provisions in the both the Thirteenth and the Fourteenth Amendments); *see also* A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 596-97 (2010) (arguing that "substantial evidence" links the use of the word "appropriate" in the Reconstruction Amendments to the Court's opinion in *McCulloch*); Caminker, *supra* note 191, at 1159 ("And, an originalist inquiry . . . firmly supports the conclusion that Section 5 was designed and understood to impose a means-ends tailoring test that mimicked the test applied to Article I executory statutes."); Beck, *supra* note 191, at 423 (asserting that the Framers of the Fourteenth Amendment incorporated the standard from *McCulloch* into Section 5); Engel, *supra* note 191, at 117-18 (same).

kinds of problems that the states alone either could not solve, would not solve, or whose solutions might have undermined the best interests of the nation, while Section 5 was intended to solve the kinds of civil rights problems that the states would have refused to solve. In light of these similarities, there are logical and institutional reasons for affording them similar doctrinal treatment.

1. The Commerce Clause: Facilitating the Process of National Consolidation and Solving Collective Action Problems

The Commerce Clause was one of the most significant reforms that emerged from the failed experiment in governance embodied by the Articles of Confederation. When the Articles of Confederation were designed, they were constructed with an eye toward establishing a form of union that prioritized the sovereignty of the states and minimized the power of the central government.[187] A number of structural mechanisms ensured that the central government would remain weak. The Confederation Congress was a unicameral legislature that exercised primary governmental authority—there was no officer that held executive authority.[188] Moreover, the powers of that central government were quite limited: while it could ratify treaties, declare war, borrow money, coin money, and raise taxes, the *states* had the power to determine how to collect those taxes; Congress could not enforce its own laws against the people and had to rely on the states to do this for it, and Congress could not regulate interstate or foreign commerce.[189]

The inability to control the commercial fortunes of the nation was a serious failing of the confederation government, and as a result, the Commerce Clause began to take shape during the Constitutional Convention of 1787, six years after it became clear that the confederation framework for governance had failed.[190] It was the collective inability to regulate interstate or foreign commerce that served as the spark that ultimately led to the Constitutional Convention, which had a much greater focus on constructing a stronger central

187. *See* DAVID J. BODENHAMER, THE REVOLUTIONARY CONSTITUTION 40 (2012) (arguing that the Articles of Confederation were based on the premise that "centralized power was the greatest threat to liberty").

188. MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, FROM THE FOUNDING TO 1900, at 71-73 (3d ed. 2011) (noting that the Articles established a form of government in which there was no unitary executive that held ultimate responsibility for governance, even though Congress held the power to create executive departments).

189. *See* ARTICLES OF CONFEDERATION of 1781, art. IV, para. 4; art. VI, paras. 2, 5; art. VIII, para. 1; art. IX, paras. 4-5; *see also* BODENHAMER, *supra* note 199, at 40-41.

190. *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 229 (Max Farrand ed., 1911), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1057&Itemid=27 (proposing as part of the Virginia Plan that the legislature has the power to "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation"); *see also* ARTICLES OF CONFEDERATION of 1781.

government.[191] Various state officers from Virginia convened a meeting in Annapolis, Maryland, in 1786 in order to discuss some of the general commercial problems that were plaguing the young republic at the time, as well as the inability of the Confederation Congress to handle these problems in its current form.[192] Since only five states were willing to attend the meeting, they were unable to accomplish anything on a grand scale.[193] All, however, was not lost:

> Apparent failure . . . turned into success when Alexander Hamilton of New York proposed that they issue a report calling for a national convention to secure a more powerful central government that was capable of meeting the [economic] crisis before them. Madison urged Hamilton to tone down his draft, since as it stood it would certainly fail to win approval of the Virginia assembly. In a brilliant revision, Hamilton subtly linked a call for a general commercial convention into one pointing to a total constitutional overhaul, and in words adopted by the gathering, on September 14, 1786, he announced that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.[194]

Commercial problems and the national government's failure to respond to them in an effective manner were the core justification for calling the convention, and once the delegates arrived in Philadelphia in 1787 in order to draft the Constitution, granting Congress the power to regulate interstate commerce was one of the primary ways of ensuring that the newly formed central government would operate effectively in the future.[195]

Even though Congress would not end up using its power under the Commerce Clause in a robust fashion for more than a century, the Founders granted Congress the power for the specific purpose of facilitating the process of creating a unified, national economy.[196] Congress's power here was exclusive, and it was plenary—complete unto itself.[197] As such, Congress gained the ability to solve some of the collective action problems that had been produced during the period of the Articles of Confederation, especially as they pertained to trade wars between the states.[198] In addition, it also acquired the

191. *See* UROFSKY & FINKELMAN, *supra* note 200, at 102-03.

192. *Id*.

193. *Id.* at 102.

194. *Id.* at 103.

195. Alexander Hamilton argued as much when he said, regarding commerce, that there was "no object . . . that more strongly demands a federal superintendence." THE FEDERALIST NO. 22 (Alexander Hamilton). He went on to suggest that short-sighted forms of economic competition between and among the states would undermine the union if there was no national restraint to prevent such activity from occurring. *Id*.

196. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 12-14 (1824).

197. *Id.* at 14.

198. *See* UROFSKY & FINKELMAN, *supra* note 200, at 248-50.

power to establish an efficient national market that would protect individuals' commercial interests and foster their ability to prosper.[199] Having the ability to carry out these functions eventually became a crucial component in the process of building a more cohesive nation.

2. Section 5 of the Fourteenth Amendment: Reframing the Federalist Relationship and Solving Collective Action Problems

Much like the failures of the Articles of Confederation produced a need for an entirely new framework of government in which the Commerce Clause would eventually play a critical role, the crisis produced by the Civil War resulted in a new series of assumptions about the proper relationship between the states and the federal government, and those, in turn, led to the passage of the Reconstruction Amendments.[200] Each of the Reconstruction Amendments contained an enforcement clause, and each one gave Congress substantially more authority than it previously had to regulate either individuals or the states themselves in their sovereign capacities.[201] This was particularly true of Section 5: "The Fourteenth Amendment can only be understood as a whole, for while respecting federalism, it intervened directly in Southern politics, seeking to conjure into being a new political leadership that would respect the principle of equality before the law."[202] The reconfigured relationship between the states and the federal government represented a transfer of authority in which the states lost some measure of authority, while Congress acquired a measure of power.[203] The acquisition of this power helped to resolidify the fabric of the Nation after four years of war and the loss of many thousands of lives. The structural, unifying purpose was much more explicit for Section 5 than it was for the Commerce Clause, but the two nonetheless share similar roles.

This fact has borne itself out from the perspective of addressing collective action problems. As many have noted, one of the primary original purposes of the Fourteenth Amendment was to ensure that the freedmen received equal treatment before the law, a mandate whose breadth has clearly been extended.[204] The very fact that Congress was given the task of carrying out this goal, though, suggests the existence of a collective action problem. In the wake of the Civil War, defeated white Southerners were disinclined to abide by new dictates of

199. *See id.* at 250 (describing *Gibbons v. Ogden* and its broader effects on the nation).

200. Balkin, *supra* note 187, at 1808-09 ("Between 1865 and 1870, Congress passed three new amendments, each with an enforcement clause: Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment . . . . These new powers significantly affected the federal-state balance. They gave Congress the power to supervise state actors as well as to regulate some private conduct. Increasing congressional power at the expense of the states was the whole point of the new constitutional structure that followed the Civil War.").

201. *Id.*

202. FONER, *supra* note 54, at 259.

203. *See Ex Parte* Virginia, 100 U.S. 339, 347-49 (1879).

204. *See, e.g.*, FONER, *supra* note 54, at 257-58.

equality when dealing with the formerly oppressed blacks, and by the 1870s, were moving quickly to construct the edifice of Jim Crow that would enshrine a system of apartheid against black citizens for most of the next one hundred years.[205] Even though it took a century for Congress to exercise its enforcement powers on behalf of black Southerners, Jim Crow laws offered a perfect example of states establishing formal segregation regimes that were inconsistent with the underlying principles of the amendment, and that Southerners were deeply disinclined to change. The collective action problem at stake in such a case was not due to inability to act effectively, or the failure to know that one was supposed to act, or any other reasonably innocent explanation; the problem here was due to a desire not to act, and the enforcement provisions, Section 5 in particular, gave Congress the authority to intervene forcefully and address that problem.

In drawing the comparison between the Commerce Clause and Section 5, the point is a modest one: they are both enumerated powers that were meant to confer a great deal of authority on Congress; they both facilitated the goal of centralizing authority within the federal government; and they both served the function of solving particular kinds of collective action problems, even though they were not the same kinds of problems. There are, of course, differences between them, too. As an initial matter, Congress has substantive regulatory authority under the Commerce Clause, which gives it the power to pass a wider scope of legislation; by contrast, it has only enforcement authority under Section 5, which limits its power to implementing remedial or preventative policies.[206] Similarly, Congress's power under the Commerce Clause is plenary, while its power under Section 5 is constrained.[207] Despite the existence of points of departure that meaningfully account for differences between the two provisions, the structural and functional similarities, as well as the historical record, offer sufficient points of similarity to warrant giving these provisions comparable treatment.

IV. APPLICATION OF THE NEW STANDARD TO THE MINI-DOMAS

The evidence provided by the historical record and the value of implementing reasonably similar enumerated powers in a reasonably consistent fashion are not the only justifications for applying the proposed standard. The standard is also worth applying if one values the role that Congress has played

205. *Id.* at 149-50, 590-91.

206. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984) (noting that the Commerce Clause gives Congress the power to enact substantive regulations); *see also* City of Boerne v. Flores, 521 U.S. 507, 517-19 (1997) ("All must acknowledge that § 5 is a positive grant of legislative power to Congress. . . . It is also true, however, that as broad as the congressional enforcement power is, it is not unlimited. . . . Congress' power under § 5 . . . extends only to enforcing the provisions of the Fourteenth Amendment. The Court has described this power as remedial. . . ." (internal quotation marks and citations omitted)).

207. *Compare* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824) (describing Congress's power under the Commerce Clause as "plenary"), *with City of Boerne*, 521 U.S. at 517-19 (limiting Congress's enforcement authority under Section 5).

in passing antidiscrimination laws over the course of the past half-century. Section 5 and the Commerce Clause do not simply have structural purposes and functional roles in common; they have also occupied complementary positions in the construction of modern civil rights statutes. Congress began relying on the Commerce Clause in earnest when passing civil rights legislation during the 1960s, after asserting that the Commerce Clause power was the basis for the Civil Rights Act of 1964 and after the Supreme Court upheld that choice in *Heart of Atlanta Motel, Inc. v. United States*.[208] Even though Section 5 would have seemed like the more natural choice to address many of the failures of equality that beset the nation at the time, the Supreme Court had deprived Congress of that option a century earlier in the *Civil Rights Cases* when it constrained Congress's legislative authority by limiting it to actions taken by state officials only.[209] By contrast, the commerce power allowed Congress to reach private actors. Given the development of both lines of doctrine, Congress was able to use these powers in tandem. It could rely on the commerce power to pass civil rights legislation that directly regulated both individuals and states in their sovereign capacities. Beyond that, Congress could use its power under Section 5 to pass enforcement legislation in the areas to which the commerce power did not extend, and further, it could use this power to abrogate sovereign immunity in order to create private rights of action for individual litigants.[210]

Rehnquist Court decisions like *Lopez* and *Morrison* threatened to undermine much of Congress's ability to use the commerce power,[211] and when those cases are viewed in conjunction with the line of Section 5 cases from *City of Boerne* to *Garrett*, it becomes clear that the Court spent a decade eviscerating one of Congress's most effective toolkits for passing civil rights legislation.[212] The harm was not ameliorated until the Court issued its decision in *Gonzales v. Raich*, when Justice Scalia inexplicably switched sides and gave the previously dissenting Justices a chance to redefine Commerce Clause doctrine in a way that maintained the cloak of neo-federalist analysis, but seemed to substantively revive the Court's deferential stance from the post-New Deal era.[213] The Court's deferential stance in *Raich* notwithstanding, recent cases have suggested that there is a majority on the Court that is willing to return to the practice of aggressively policing federalism and, treating as a normative principle, the prioritization of state autonomy over exercises of federal

208. 379 U.S. 241, 250 (1964) (holding that Congress possessed sufficient power under the Commerce Clause to enact the Civil Rights Act of 1964).

209. 109 U.S. 3, 11-12 (1883).

210. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress's powers under the Indian Commerce Clause could not abrogate Florida's Eleventh Amendment immunity); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that a lawsuit brought against Connecticut for violating state workers' civil rights was not avertable under the Eleventh Amendment).

211. United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

212. *City of Boerne*, 521 U.S. at 507; Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

213. 545 U.S. 1 (2005).

authority.[214]

In light of this reality, a new way of understanding Section 5 is even more imperative. The future will always hold new challenges—new groups of people with new experiences of discrimination will emerge, and hampering Congress's ability to craft an effective response will pointlessly increase the misery of the very citizens that the Court purports to protect. The model that I have proposed is quite modest, but it would serve the dual purpose of respecting the Court's desire to protect a large amount of state autonomy, as well as preserve a great deal of its own interpretive authority. In order to demonstrate how the model would work in practice, I would like to return to the hypothetical example of a congressional statute that prohibited marital discrimination on the basis of sexual orientation. I will start by evaluating such a statute under the current congruence and proportionality test, and then I will finish by reviewing it under my proposed standard.

Step 1: Precise Identification of the Right in Question

As the Court stated in *Garrett*, the first step in the congruence and proportionality analysis "is to identify with some precision the scope of the constitutional right in question."[215] Under the terms of the proposed statute, one might reasonably proceed in one of two directions: (1) one might evaluate it as a statute that intended to enforce the Fourteenth Amendment's equality guarantee, and in doing so, consider the extent to which the amendment allows states to create classifications on the basis of sexual orientation; or (2) one might evaluate it as a statute that intended to enforce the fundamental right to marriage under the Due Process Clause of the Fourteenth Amendment.

One might first consider treating the statute as an attempt to enforce the right to equal protection, in which case one would need to understand the operation of the right as it relates to classifications on the basis of sexual orientation. The Supreme Court has not yet articulated a standard of review for classifications on the basis of sexual orientation: "Courts that have confronted classifications based on sexual orientation have managed to avoid establishing a definitive standard of review."[216] Therefore, if the right in question is

214. *See generally* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (asserting the principle of equal sovereignty among the states and defending the so-called "dignity" of the states against purported federal intrusion). *See also* NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

215. *Garrett*, 531 U.S. at 365.

216. *See, e.g.*, Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2695 (2004). This fact notwithstanding, if one considers the three major cases dealing with sexual orientation that the Court has resolved on the merits in the past two decades–*Romer*, *Lawrence*, and *Windsor*–one can note a pattern in which the Court invalidated, on constitutional grounds, laws that reflected the democratic preferences of the people (at least at the time of passage) after the Court engaged in a very close analysis of the ends of the legislation in question. This is the hallmark of a heightened scrutiny analysis under standard equal protection or substantive due process doctrine, but the Court has studiously refused to find that classifications on the basis of sexual orientation (or laws like the antisodomy statutes that were too frequently applied in ways that undermined the dignity of gay and lesbian relationships) merited

proceeding under an equal protection analysis and the Supreme Court has not yet identified a specific standard of review, courts will, as a default matter, apply rational basis review (unless the facts suggest that animus exists, in which case, it will apply the rational basis "with bite" standard). Under rational basis review, the state has a great deal of room to regulate. The room is not, however, without any limiting principles at all. As the Court said in *Garrett*:

> Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.[217]

Therefore, if a state actor cannot establish a rational link between a person's sexual orientation and the decision to treat that person in a discriminatory manner (or, again, if the facts show that animus was present), those actions will be deemed a violation of equal protection. It is highly unusual for courts to find a violation of equal protection on rational basis grounds, but it is not impossible.

By contrast, one might take the alternative approach of viewing the statute as an effort to enforce the right to marry, as protected by the Due Process Clause. When describing the nature of this right, the Court has said that it "is of fundamental importance."[218] It has been described as "one of the vital personal rights essential to the orderly pursuit of happiness by free men,"[219] as well as "a central part of the liberty protected by the Due Process Clause."[220] Moreover, substantial intrusions on the right to marry are subject to strict scrutiny: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[221] The Court explained the practical import of enforcing a right or a classification that was subject to a higher standard of review than rational basis in *Hibbs.* It noted that the higher the level of scrutiny in question, the easier it

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such treatment. In spite of the Court's silence, a record of its behavior now exists. Therefore, the combination of the Court's silence, as well as its willingness to invalidate the laws that came before them, suggest that one of two things might be happening on the Court: (1) it has *sub silentio* recognized that heightened scrutiny applies in cases that undermine the liberty or equality of gay and lesbian citizens; or (2) tiered scrutiny might be increasingly less significant to the Court. This Article, however, will continue to proceed along the traditional lines of analysis with respect to classifications on the basis of sexual orientation, simply because the Court's silence still makes this a viable approach. Nonetheless, I will explore the possibilities described above in a future paper.

217. *Garrett*, 531 U.S. at 366-67 (internal quotation marks and citations omitted).

218. Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

219. Loving v. Virginia, 388 U.S. 1, 12 (1967).

220. *Zablocki*, 434 U.S. at 384 (citation omitted).

221. *Id.* at 388. Even though the language, as used by the Court, sounds a bit like intermediate scrutiny in form, it is unquestioned that material interferences with the right to marry are subject to strict scrutiny review.

would be for Congress to show the existence of a pattern of state law violations.[222] In other words, far fewer actions are presumptively constitutional when the standard of review is higher than rational basis review, and therefore, it is much easier to establish the likelihood that state actions are, in fact, constitutional violations. The task is particularly easy when the standard is strict scrutiny, since almost no significant interferences with the right in question are likely to survive review.

Given the vastly different consequences that flow from the application of the standards of review, it would seem to make the most sense to treat the statute like an effort to enforce the due process right to marry. As a matter of strategy, however, that might be too risky of an approach. Among the state and federal courts of appeal that have considered challenges to their prohibitions on same-sex marriage, the claim that lesbian and gay couples have a fundamental right to marry, as protected by the Due Process Clause of either the U.S. Constitution or their state constitutions, has been largely rejected.[223] Instead, several courts have recognized an equal protection right to marry.[224] Therefore, it might be wiser to follow the equal protection approach, even though it will be more difficult.

Step 2: Identification of a History and Pattern of Unconstitutional Discrimination Against LGBT Persons

The second step is potentially tricky. In *Garrett*, the Court was looking specifically at the applicability of the Americans with Disabilities Act to state employers, so it sought evidence of state employers discriminating against disabled workers. On the other hand, in both *Hibbs* and *Lane*, the Court's inquiries were not so particular. *Hibbs* looked generally at widespread patterns of gender-based discrimination when evaluating the family leave policies under the Family and Medical Leave Act;[225] *Lane* also looked broadly at government agency discrimination when providing public services in a case that focused on the right of access to courts.[226] It is not completely clear why the Court relaxed the strictness of the evidentiary requirement in *Hibbs* and *Lane*; it may be a function of the fact that both of them are subject to higher standards of review. Since our hypothetical case is probably most like *Garrett* on the facts, it would be better to find evidence that the states specifically had a history and pattern of discriminating against the LGBT community with respect to marriage.

The answer to the question is not as easy as one might think. At its core, the question about the history and pattern of discrimination really asks, "What

222. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

223. *See, e.g.*, Dean v. Dist. of Columbia, 653 A.2d 307, 333 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971); *In re* Estate of Cooper, 564 N.Y.S.2d 684, 688 (N.Y. Sur. Ct. 1990), *aff'd sub nom. In re* Cooper, 592 N.Y.S.2d 797 (N.Y. App. Div 1993); Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006).

224. *See Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 383-85.

225. *Hibbs*, 538 U.S. at 728-35.

226. Tennessee v. Lane, 541 U.S. 509, 522-27 (2004).

kind of behavior constitutes an irrational prohibition, is it present here, and how widespread is the problem?" This question lies at the root of the difficulty in the same-sex marriage debate, and explains why—all of the national polls, and excitement about change, and the high-profile victories notwithstanding—thirty-six states have quietly maintained the prohibitions on same-sex marriage,[227] and over thirty of those prohibitions have remained in their state constitutions. How does one embark on the project of proving that the voters or legislators in all of these states were irrational, or motivated by animus or hatred, when they passed these laws? *Can* one persuasively make that claim?

At least one lower court believed that the answer to the question was yes. In *Perry v. Schwarzenegger,*[228] plaintiffs challenged California's Proposition 8 ("Prop 8"), the ballot initiative that accomplished two major goals: (1) it reversed a state supreme court decision that found that prohibitions on same-sex marriage violated the state's guarantee of equal protection; and (2) it amended the state constitution to say that marriage was a union between a man and a woman.[229] After conducting a trial on Prop 8's merits, the trial judge made extensive findings of fact and concluded that the purported justifications in support of the amendment constituted such a poor fit that it was irrational to find that they were anything more than ill-conceived efforts to mask a belief that homosexual couples were inferior citizens.[230] The judge also noted actual evidence from the Prop 8 campaign that supported a conclusion that Prop 8 was the product of animus:

> The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples. The campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians.
>
> . . . The evidence shows, however, that Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual.[231]

As an initial matter, one must acknowledge that the trial judge's analysis was inconsistent with a standard rational basis analysis. Even if he was not insisting that the evidence fit the ends that they were allegedly meant to achieve with precision (e.g., establishing socially acceptable sexual relationships that

227. The thirty-seventh state, New Mexico, has neither a prohibition on same-sex marriage, nor a case or statute legalizing same-sex marriage. Alexandra Ma, POLICYMIC, *New Mexico Gay Marriage: The Next State to Legalize Same-Sex Marriage?*, http://www.policymic.com/articles/47137/new-mexico-gay-marriage-the-next-state-to-legalize-same-sex-marriage (last visited Aug. 7, 2013) (describing New Mexico's unique status among the states regarding this issue).

228. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 617 F.3d 1052 (9th Cir. 2012).

229. *Id*. at 927-28.

230. *Id*. at 1002.

231. *Id*. at 1002-03 (internal citations omitted).

were designed to produce biologically-related children; recognizing same-sex marriage will contribute to the deinstitutionalization of marriage; etc.), he was unwilling to concede that rational basis review was a standard that permits overbroad generalizations that are occasionally, if not frequently, incorrect.[232] The arguments that the trial judge rejected were arguably appropriate under a straightforward application of the rational basis review standard.

Obviously, then, the trial judge was not applying a standard rational basis analysis; due to the presence of animus, he applied the *Romer-Cleburne-Moreno* standard known as rational basis "with bite."[233] This trilogy of cases stands for the proposition that state actors may not discriminate against individuals on the basis of mere dislike, or simple disapproval.[234] As stated by Professors Farber and Sherry, they remind us that government may not use the power of the state to create a pariah class: "If the equal protection clause means anything, it means that the government cannot pass caste legislation: it cannot create or sanction outcast groups. . . . The principle is that the government cannot brand any group as unworthy to participate in civil society."[235]

Perry, therefore, is somewhat illustrative of how one might build the argument in favor of using Section 5 to invalidate the mini-DOMAs. Challenges, however, exist. Marshaling evidence that shows the presence of animus in each state that has a prohibition would not only be a massive task, it might also be futile because it would raise too many questions that would be difficult, and maybe even impossible, to answer. For instance, whose intent matters? Does one look for malice from the ballot sponsors of amendments? If so, how much evidence of intent does one need before a judge can confidently say that he or she has seen enough? On the other hand, does one need to see evidence that the voters were motivated by malice? If so, how many voters must have been so motivated, and how does one confidently ascertain the existence of their malice? Finally, no matter how much evidence one gathered, much of it would likely be anecdotal, and in *Garrett*, the Court rejected the use of too much anecdotal evidence when establishing a pattern and history of discrimination. Based on these considerations, it seems that one might say that the trial judge's approach is a double-edged sword. On the one hand, the factual evidence on which he relied was ultimately anecdotal, but on the other hand, he was able to discern objectively that the proponents' arguments were so discontinuous with the amendment, that the best explanation for them was animus.[236]

If, however, a hypothetical Congress that was determined to undermine the

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232. *Id*. at 947-49, 1001-02.

233. *See* Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59-64, 78 (1996).

234. *See* Romer v. Evans, 517 U.S 620, 644 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

235. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT 257, 266-69 (1996).

236. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372-74 (2001).

mini-DOMAs did, in fact, amass a sufficiently large factual record—even one comprised of many thousands of bits of anecdotal evidence demonstrating animus in the campaigns to prohibit same-sex marriage—they might be able to move forward with the effort with an eye toward success. Generally speaking, there are two broad categories of amendments that Congress would have to attack: Single-Subject Amendments ("SSAs"), which cover nothing more than marriage, and Multi-Subject Amendments ("MSAs"), which can cover a variety of topics—marriage, civil unions, relationship recognition, and more.[237] The MSAs are easier to attack because the manner in which they target gays and lesbians sits right on the face of each law. Consider, for instance, Kentucky's marriage amendment: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."[238] The amendment does not simply prevent lesbian and gay residents from getting married—it also prohibits the creation of any legal regime that would offer them any kind of meaningful status or protection. Even worse, the amendment strips away the status and protection that a couple held if they moved to Kentucky from a jurisdiction in which they *were* allowed to marry or enter into a domestic partnership or civil union. No heterosexual couple would ever be subjected to such an indignity in Kentucky, but gay and lesbian couples are. Denying one's own residents the opportunity to formalize their relationships is bad enough, but stripping a newcomer of a privilege that he or she acquired in a different state, which will usually be based on nothing more than his or her *status* as lesbian or gay, is arguably a textbook case of animus.[239] At the moment, at least twenty states have amendments that are comparable to the Kentucky amendment.[240] Gathering specific evidence of animus would still be necessary for any sustained attack, but the actual language

237. Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, 17 VA. J. SOC. POL'Y & L. 83, 87 (2009).

238. KY. CONST. § 233a.

239. There are some states that have established these alternative marriage regimes and allow non-LGBT couples (e.g., elderly couples who wish to pool their benefits) to participate in them. *See, e.g.*, William Butte, *California's Decisions Could Affect Florida*, SUN-SENTENIAL, Feb. 15, 2008, at 25A (discussing how cohabitating senior citizens worried over how their status could lead to loss of their rights as domestic partners played into the ultimate rejection of Arizona's marriage amendment). If those couples moved to a state like Kentucky, their unions would be dishonored, as well. KY. LEGIS. RESEARCH COMM'N, PROPOSED MARRIAGE AMENDMENT 2 (2004) ("Legal status identical to or similar to marriage also would be denied for unmarried individuals, regardless of where they were performed."). The technical truth of this statement notwithstanding, the intent behind the passage of the statute was to ensure that Kentuckians would not be forced to offer recognition or legal status to *gay and lesbian relationships*, specifically. *Id.* at 1-2; *Kentucky Voters Approve Same-Sex Marriage Ban Amendment*, USA TODAY (Nov. 3, 2004, 2:26 AM), http://usatoday30.usatoday.com/news/politicselections/vote2004/2004-11-02-ky-initiative-gay-marriage_x.htm.

240. Graham, *supra* note 247, at 139-42 apps.1-2 (listing each state); *see also* N.C. CONST. art. XIV, § 6 (defining marriage).

of these laws and their broad-based consequences effectively speak for themselves.

The SSAs present a more difficult case because they do one thing—define marriage as the union between a man and a woman.[241] Because they are not overbroad like the MSAs, it is harder to make a case for animus against them. As such, developing a record of evidence showing discriminatory intent during the campaigns to pass these amendments would be even more crucial. If Congress could provide a sufficient record that showed a pattern of irrational discrimination in each state that had a prohibition in place, it should be able to clear the hurdle in this step of the analysis. If not, it might be wiser to restrict its efforts to attacking the more vulnerable set of prohibitions.

Step 3: Is the Proposed Legislation Invalidating the Mini-DOMAs Proportional to the Problem at Hand?

Whether or not both categories of amendments survived the second step, they would almost certainly fail on the third step. In *City of Boerne*, the focus on proportionality was directed to the fact that the Religious Freedom Restoration Act was wildly disproportionate in its coverage when compared to the size of the problem that it was meant to address.[242] Proportionality, however, is not simply a matter of calibrating the size of the remedy to the size of the problem. It is also a way for the Court to evaluate the *propriety* of the solution that Congress has selected. Thus, if the first prong of the congruence and proportionality test serves the limiting purpose of identifying the right in question, and if the second prong serves the purpose of forcing Congress to prove the existence of an actual problem that it needs to address, then this third and final prong serves as a built-in brake that ensures that Congress will not use its power in a manner that creates general police authority for itself. The proportionality prong can serve various functions, but one of them is to operate as the Court's federalism watchdog. This prong ensures that Section 5, which could be used to implement a breathtaking sweep of changes if Congress chose to pass such laws and the Court did not interfere, maintains a certain amount of legislative modesty: "This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall abridge the privileges or immunities of citizens of the United States."[243]

In this case, if the proposed legislation was able to survive the second prong, the Court would likely invalidate it on the third prong because it would be a direct regulation of marriage, an area that has traditionally been left to the states for regulation. There are, of course, scholars who would challenge on

241. *See* Graham, *supra* note 247, at 143 app.3 (listing each state's constitutional language that utilizes an SSA).

242. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

243. *Id.* at 523 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 294 n.1 (2d ed. 1871)) (internal quotation marks omitted).

empirical grounds the notion that the federal government simply does not regulate marriage.[244] Even though Congress has regulated marriage in the past, it appears to have done so in the areas, like immigration law or the treatment of territories (legislation regarding Mormon polygamy), over which it has control.[245] The proposed legislation, by contrast, not only directly engages the body of state law in this country; it would contradict and overturn state laws that were passed by voters, many of whom were deeply committed to the passage of the amendments. Arguably, this is the kind of statute that places Congress in the realm of exercising general police authority, so it is precisely the kind of statute that the Court wants to reject.

If, however, the new proposed standard was adopted, it might produce a different outcome for the hypothetical law. Recall that the proposal would ask the following question when Congress passed legislation that simply regulated the states without abrogating their sovereign immunity: Was it rational for Congress to conclude that the legislation in question would provide a remedy for a constitutional violation, prevent the recurrence of such a violation, or prevent the likely occurrence of a potential violation? The statute would be satisfied fairly easily. First, as explained above, Congress should be able to establish, at a minimum, that the MSAs facially violate the Equal Protection Clause, and further, should be able to gather a sufficient amount of evidence in the states with SSAs to establish a good-faith basis for concluding that animus existed during the campaigns that led to their passage, even if there difficult questions remained regarding the meaning and probative value of such evidence. Ideally, Congress could provide at least a rational answer to the kinds of questions regarding this type of evidence that were posed above. Beyond that, Congress would simply need to establish that it was rational for them to conclude that their chosen remedy would address the problem. In this case, the answer to that question is undoubtedly yes. The problem is exemplified by the existence of the mini-DOMAs; legislation that eliminates them not only solves the problem, it does so in a way that targets them precisely and attacks nothing else. This approach protects state interests by operating only when sovereign immunity is not at stake; it respects the intentions of the Founders of the Fourteenth Amendment by restoring the standard of review that they would have applied, and it partially restores the balance of responsibility that existed between Congress and the Court to address the many and varied social ills that exist in the nation, with a multitude of available tools.

This approach also has the benefit of respecting the boundaries of state autonomy. First, the proposal narrows substantially the universe of examples

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244. *See* Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1367-69 (2011) (discussing the federal regulations that prevented the military from marrying certain foreign nationals); Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. COLO. L. REV. 963, 978-82 (2012) (discussing the regulation of polygamy).

245. *See* Villazor, *supra* note 254, at 1367-68; Choudhury, *supra* note 254, at 978-79.

where the standard would apply. One might look at this fact and say, if the applicable scope is so small, why worry? As an initial matter, it is worth remembering that three members of the Rehnquist Court's pro-state autonomy coalition—Justices Kennedy, Scalia, and Thomas—remain on the Court, and Chief Justice Roberts, along with Justice Alito, have signaled a willingness to embrace that position. *Raich* may have reclaimed an expansive mandate for the use of the commerce power,[246] but there are still five members of the Court who are prepared to impose federalism-based restraints on Congress.[247] In light of this fact, a limited compromise of the sort that I propose would have the benefit of giving Congress slightly more room to regulate, if only under narrow circumstances.

Second, by relaxing the standard only when sovereign immunity is not at stake, the Court would be giving Congress room to respond when the Court has been silent, while maintaining the stance that federalism is both a value and a norm that it must protect. This view was on display in *Alden v. Maine*, which treated immunity as a linchpin of the federalist structure, describing it as an aspect of state "dignity," as well as the source of a state's "residuary and inviolable sovereignty."[248] *Alden* tells us that unconsented to invasions of the public fisc critically undermine that dignity, and subtly implies that such invasions by Congress appropriately invite a close scrutiny of means and ends.[249] The congruence and proportionality test meets this need for close review, but stringent application outside of the context of abrogation might substantially over regulate a coequal branch of government. Congruence and proportionality, when it applies, forces an *ex ante* accounting of separation of powers and federalism concerns. The proposed solution attempts to sidestep federalism problems: as noted above, the universe within which the rule would apply is small, and even if Congress overstepped, the Court could still invalidate the statute.[250] Moreover, if the public fisc is the key to dignity, the

246. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

247. In *NFIB v. Sebelius*, Justice Alito joined the dissenters who were prepared to rule that Congress had no authority at all to impose an individual mandate to acquire healthcare. 132 S. Ct. 2566, 2642 (2012). Chief Justice Roberts wrote a section of the lead opinion (a section that no one else joined) that relied on easily-manipulated categories in order to impose a new, substantive restraint on Congress's regulatory authority under the Commerce Clause. *Id.* at 2589. Even though the statute was upheld, there were five votes on the Court to impose such a restraint on Congress. Similarly, the Court's decision in *Shelby County* to invalidate a key portion of the Voting Rights Act of 1965 on the ground that the states held equal dignity that was violated by the challenged iteration of the statute, showed in technicolor that a strong profederalist majority continues to exist on the Roberts Court.

248. Alden v. Maine, 527 U.S. 706, 712-15 (1999).

249. *Id.* at 751 (arguing that decisions regarding the use of state funds go to the heart of political accountability and democratic self-governance, and that a general federal power to authorize damages suits against states in state courts would unreasonably intervene in this process).

250. One cannot overlook the fact that a congressional statute that invalidated the marriage laws of thirty-six states might be viewed as the kind of federalism problem that the proposed solution not only fails to side step, but specifically encourages. This is especially true with the SSAs, which are less sweeping and, therefore, less suggestive of animus than their broader counterparts, the MSAs.

proposed standard avoids that issue altogether. The compromise here is a small one, but it is worth reaching: not only does it strike the balance with an eye toward respecting the Court's current priorities, but it gives the Court a chance to reestablish more balance in its relationship with Congress.

V. CONCLUSION

Ultimately, for the Court to agree to adopt a pragmatic solution, it must concede the existence of a problem. Whether or not it is willing to do so is a question to be answered in another forum. To the degree that the Court is willing to admit that relations with one of its coequal branches of government are currently skewed, the proposed solution offers a way to bring matters closer to an even keel.

Congress, however, might be able to justify the extraordinary intrusion into a traditional state preserve by creating the very extensive record described above that would ideally demonstrate such a degree of animus in the passage of these laws that the federalist predisposition of the Court might, in this specific instance, be overcome.