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ARTICLES

FEDERALISM RE-CONSTRUCTED: THE ELEVENTH AMENDMENT'S ILLOGICAL IMPACT ON CONGRESS' POWER

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INTRODUCTION

The last decade has seen a transformation in the way the Supreme Court views the balance of power between the federal government and the states. The Eleventh Amendment to the United States Constitution and principles of state sovereign immunity limit the power of the federal judiciary and protect the states from suit by individuals in federal court. The Supreme Court has read this protection more and more broadly. At the same time, the Court has been reading Congress' power to enact certain kinds of protective legislation more and more narrowly. These two areas of jurisprudence have converged to limit the power of Congress to provide remedies for civil rights violations by the states.

This convergence is troubling for a number of reasons both practical[1] and jurisprudential.[2] But few scholars have recognized the danger that the Court's jurisprudence poses to Congress' general ability to protect individual liberty and equality. Not only has the Court limited the power of Congress under the guise of limiting the power of the judicial branch,[3] but it also has restricted the power

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1. Practical concerns include how to enforce the myriad of regulatory laws when states act just like private entities, for example as employers, creditors, or patent infringers. *E.g.*, Mark D. Shaffer, *Reining in the Rehnquist Court's Expansion of State Sovereign Immunity: A Market Participant Exception*, 23 WHITTIER L. REV. 1011 (2002).

2. At the time these laws were enacted Congress and the states believed that Congress was validly abrogating the states' immunity and so complied with the rules for enacting legislation. To invalidate that legislation now seems unprincipled. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 84 (2001). Moreover, the analysis adopted by the Court treats Congress as an inferior tribunal and not as a coequal branch of government with its own powers under the Constitution. *Id*. at 84-86.

3. The Eleventh Amendment addresses the power of the federal judiciary over the states, while the Tenth Amendment is generally construed to address the power of the legislative branch

of Congress to enact lasting civil rights legislation. In a line of cases, the Court has systematically violated longstanding principles of separation of powers and denigrated the norms of national citizenship, equality, and liberty, which are central to our core constitutional values.[4]

Under the law as it stands, Congress can pass laws to protect citizens from a broad range of actions by the states under several different parts of the Constitution, but it can provide a private right of action for damages against states only under the Enforcement Clause of the Fourteenth Amendment. While it is not the only remedy in the grand scheme of things, a private right of action for money damages is one of the most effective deterrents to illegal conduct because it decentralizes enforcement power to individuals and because money, by its nature, is a limited resource.[5]

Enforcement is the real issue here. Section 5 of the Fourteenth Amendment allows Congress to enforce the equal protection and due process guarantees of that amendment. The self-executing portion of the Fourteenth Amendment has been interpreted to prohibit the states from only the most egregious forms of discrimination, and to prohibit the states from depriving individuals of a limited category of fundamental rights. Outside of this limited arena, the Fourteenth Amendment has been interpreted to allow a broad range of conduct that perpetuates subordination of particular classes and a broad range of state regulation of individual rights. While the self-executing part of the amendment offers only limited protection to individuals, the Court has consistently rejected the proposition that Congress' power to enforce the amendment is limited to enacting legislation that mirrors the Fourteenth Amendment. Legislation under the Fourteenth Amendment can be broader than the amendment itself and be valid as long as it works to *remedy* past unconstitutional discrimination or

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to encroach upon the states. *See* U.S. CONST. amend. X; U.S. CONST. amend. XI.

4. *See* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1281 (2001) (arguing that equality is a core constitutional value). While not every scholar agrees on the scope of national citizenship, under the federalist view of the Constitution, national citizenship has always been a core constitutional value, which was merely "perfected" by the Reconstruction Amendments. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439-62 (1987).

5. The combination is particularly effective because even defending a number of suits that are ultimately won by the state takes a significant portion of a state's resources. Other remedies are less effective because there is less chance of enforcement and less harm from enforcement. For example, prospective injunctive relief provides no punishment for violations of the law that have already occurred, so there is no incentive for a state to comply with a statute that provides only that relief until the state is ordered to do so by a court. A suit by the United States which could recover damages or result in a fine would usually be brought only in the most egregious circumstances, or where sufficient political will otherwise exists, because of the limited resources of the federal government. Moreover, private suits for money damages are the only remedy designed to fully compensate victims of illegal action for the harm they have suffered. Thus, providing a private right for damages maximizes a statute's enforcement power.

infringement upon rights or to *deter* future constitutional violations.[6]

While remedy and deterrence would appear to give Congress significant power to enact legislation under the Fourteenth Amendment,[7] and thus to make states amenable to suits for damages, in recent years the Court has focused on remedy to the exclusion of deterrence. In other words, the Court has allowed Congress to prohibit only those actions that the states have widely engaged in and which violate the self-executing portion of the Fourteenth Amendment. Congress may not legislate to prevent states from using what appear to be constitutional means to hide discriminatory acts.[8]

That solely remedial focus poses a problem: if a statute is a valid exercise of the Fourteenth Amendment only when it addresses an *existing* constitutional evil, its validity decreases over time as the constitutional evil ceases to exist and its past existence becomes more distant. Focusing on remedy alone leads to a result in which the validity of legislation under the Fourteenth Amendment may expire once enough time has passed during which states actually follow the law and refrain from violating the Fourteenth Amendment.[9] It is paradoxical to think

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6. City of Boerne v. Flores, 521 U.S. 507, 517-18 (1997). While "deter" is the term the Court has always used, it is possible that it has always meant that Congress does not really have power under the Fourteenth Amendment to deter possible violations, but only violations like those that have already occurred. The Court in the *Civil Rights Cases*, 109 U.S. 3, 18 (1883), indicated that only corrective legislation was valid under the Fourteenth Amendment. The Court used "corrective" broadly to mean aimed at particular state action, which, at least in theory, could mean particular potential state action. However, the term "corrective" implies an actual thing to be corrected. The *Civil Rights Cases* have been criticized as constituting an unnecessarily narrow reading of the Fourteenth Amendment. Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 433-35 (2003).

7. Professor Tribe calls the apparent breadth of these dual goals misleading, noting that recently Section 5 measures have "been saddled with something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 959 (3d ed. 2000).

8. In *Board of Trustees of the University of Alabama v. Garrett*, for example, the Court scrutinized the legislative record of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2002), to determine whether there was an existing constitutional evil (rather than a potential constitutional evil) that Congress could have addressed through the legislation it enacted. 531 U.S. 356, 368 (2001) ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.").

9. Daniel Meltzer recognized the possibility that the Court's jurisprudence could lead to this result, but did not discuss it in depth. Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1350 (2001). Offering a similar insight, Justice Jackson, in a memorandum on *Brown v. Board of Education*, argued that statutes could become unconstitutional based on a change in circumstances wrought by time. Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and* Brown, 72 TEMP. L. REV. 51, 104 (1999) (citing Memorandum from Robert H.

that legislation is only constitutionally valid while people are actively engaging in conduct it prohibits. And while the Court could find that legislation is generally valid if it was valid at the time it was enacted, the Court may be compelled by its jurisprudence to find that the Constitution requires an expiration date to be built in to all Fourteenth Amendment legislation for it to be enforceable.[10]

This Article further illustrates this critique and proposes a structure for analysis that would resolve the danger. Part I of this Article briefly describes the state-immunity jurisprudence of the Court.[11] Part II focuses on the Court's treatment of legislation passed under the Fourteenth Amendment.[12] Part III describes the convergence of the two lines of cases and the problems this convergence poses for Congress as it considers ways to protect national citizenship and promote equality and liberty.[13] Finally, Part IV suggests ways in which the Court should consider deterrence and prevention in its analysis.[14]

Jackson on *Brown v. Board of Education* at 22 (Mar. 15, 1954) (on file with Library of Congress, Jackson files, box 184)).

10. When reviewing the constitutionality of legislation, the Court is not restricted to an evaluation of the validity of the legislation at the time it was enacted. "Interestingly, there is near unanimity among courts and commentators that an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid" due, presumably, to a change in the underlying legislative facts. Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 373 n.63 (1999) (citing William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1915, 1908-17 (1993) (discussing the revival of statutes found unconstitutional when a change in the law made them constitutional)).

Treanor and Sperling suggest that revival is not affected by the grounds on which the law was found to be unconstitutional. Treanor & Sperling, *supra*, at 1921-22 (considering the effect of the Court's decision that Congress has the power to enact civil rights laws that prohibit private parties from discriminating on the basis of race on the *Civil Rights Cases* in which Congress was found to lack that power). However, they argue that automatic revival should not be allowed when a statute is found constitutional because of a change in "material societal facts." *Id*. at 1933-34. This argument is based in part on the Court's decision in *Newberry v. United States*, in which the Court stated that when Congress lacked the power to enact legislation, the subsequent enactment of a constitutional amendment granting that power could not revive the statute that had been void when enacted. *Id*. at 1934 (citing *Newberry*, 256 U.S. 234, 254 (1921)).

There is a difference, however, between the act of amending the Constitution to grant a power and a decision by the Court that it was wrong about the lack of power in the first place. The amendment to the Constitution is a popular acknowledgement that Congress did indeed lack the power, while the Court's decision presupposes that Congress actually had the power all along.

11. *See infra* notes 15-60 and accompanying text.

12. *See infra* notes 61-76 and accompanying text.

13. *See infra* notes 77-145 and accompanying text.

14. *See infra* notes 146-54 and accompanying text.

I. THE SUPREME COURT'S STATE IMMUNITY JURISPRUDENCE

Scholars disagree over whether state immunity from suit in federal court was part of the constitutional design.[15] The Constitution itself does not address whether non-consenting states will be subject to suit in federal courts. Article III does say that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties [and]. . . to Controversies . . . between a State and Citizens of another State . . . ."[16] Based on this language, generally creating diversity jurisdiction, the Court in *Chisholm v. Georgia* determined that a citizen of South Carolina could sue the State of Georgia for money damages despite Georgia's claim that it was immune from suit in federal court.[17]

The reaction to *Chisholm* was immediate and strong, and resulted in the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[18]

On its face, this amendment appears to prohibit federal courts from interpreting the Constitution to allow common law suits brought against a state by foreign citizens. It does not by its terms provide that states shall be immune from suits arising under the Constitution, federal law, or treaties, rather than the common law. Nor does it provide immunity from any type of suits brought by the state's own citizens. Thus, the Eleventh Amendment itself does not appear to shed much light on whether states have general immunity from suit in federal

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15. Some of the framers and their colleagues vocal in the state ratification debates believed that states would be amenable to suit in federal court. *See* Seminole Tribe v. Florida, 517 U.S. 44, 142-50 (1996) (Souter, J., dissenting) (detailing this history); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1207-09 (2001) (analyzing the historical commentary); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) (concluding after exhaustive historical research that the Eleventh Amendment was intended to insulate the states from suit only for obligations arising under the Articles of Confederation and not from prospective enforcement of constitutionally-enacted federal laws).

16. U.S. CONST. art. III, § 2, cl. 1.

17. 2 U.S. (2 Dall.) 419, 450-53 (Blair, J.); *Id*. at 453-58 (Wilson, J.); *id*. at 466-72 (Cushing, J.); *id*. at 472-79 (Jay, J.). Three Justices believed that Article III explicitly authorized the suit, *id*. at 450-53 (Blair, J.), *id*. at 466-69 (Cushing, J.), *id*. at 472-79 (Jay, J.), and one of these plus a fourth also thought that state immunity from suit in federal court would be incompatible with popular sovereignty, *id*. at 472-79 (Jay, J.), *id*. at 453-58 (Wilson, J.). Only one Justice dissented, primarily on statutory grounds, but in part on the ground that when the Constitution was ratified, no state permitted a compulsory suit for recovery of money against it, *id*. at 434-35, 449-50 (Iredell, J.). Of course, the states had not existed as "sovereigns" for very long, and the colonies did not have immunity from suit. Alden v. Maine, 527 U.S. 706, 764 (1999) (Souter, J., dissenting) (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 207, at 149 (5th ed. 1891)).

18. U.S. CONST. amend. XI.

court.[19] Over time, however, the Court has found that states are generally immune from all suits brought by individuals and that this immunity is part of the original constitutional design.[20] While it took a substantial period of time for the Court to adopt this understanding, it took only two cases to cement the adoption: *Hans v. Louisiana*,[21] decided in 1890, and *Seminole Tribe v. Florida*,[22] decided over a century later.

Between *Chisholm* and the Civil War, there were no notable developments in this area. After the Civil War, the Court decided a number of cases involving suits against state officers, which like *Chisholm*, were brought to recover debts states did not want to pay.[23] Unlike *Chisholm*, these cases were brought as federal question cases, alleging that the states were impairing the obligation of contracts in violation of the Contracts Clause of the Constitution.[24] The Court found that the real defendants were the states, not the officers named, and the cases could not be maintained under the Eleventh Amendment. The Court did not consider whether the fact that the actions were brought as federal question cases rather than diversity cases would change the outcome.[25]

Despite the fact that the Court had not considered the impact that the source of its jurisdiction might have, the Court in *Hans* interpreted these cases as standing for the proposition that regardless of the source of jurisdiction, whether federal question or diversity, the Eleventh Amendment barred suits against states in federal court.[26] *Hans* involved a Louisiana citizen who sued the State of

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19. Justice Brennan, for example, believed that the states surrendered any immunity to suit in federal courts by joining the United States, at least to the extent that the Constitution they ratified gave Congress specific powers. *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 457-58 (1976) (Brennan, J., concurring).

Similarly, Professor Amar has argued that the amendment merely removed two categories of diverse party jurisdiction so that the party alignments specified by the Eleventh Amendment would no longer provide independent grounds for jurisdiction. Amar, *supra* note 4, at 1474-75.

20. Justice Stevens, however, believes that the amendment means only what it says and that any notion of general state immunity from suit in federal court is judicially created common law, which can be abrogated by Congress or altered by the Court. *E.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 23-24 (1989) (Stevens, J., concurring).

21. 134 U.S. 1 (1890).

22. 517 U.S. 44 (1996).

23. *See*, *e.g.*, *In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1883).

24. U.S. CONST. art. I, § 10. Part of the delay is undoubtedly due to the fact that the lower federal courts did not have general federal question jurisdiction until 1875. *See* 18 Stat. 470.

25. In fact, although in *Ayers* the Court acknowledged that the plaintiffs were alleging violations of the United States Constitution, the Court's discussion was framed as if the case was solely for breach of contract. *See Ayers*, 123 U.S. at 502-04. The Court implied that the case did not arise under the Constitution of the United States for jurisdictional purposes, because the Contracts Clause did not give individuals rights, and any benefit to the plaintiffs from the Contracts Clause was incidental. *Id*. at 504.

26. 134 U.S. at 10. In reaching this decision, the Court failed to consider its holding in

Louisiana to recover on some war bonds.[27] Hans alleged that when Louisiana legislatively disclaimed its obligation on the bonds, it impaired its obligation of contract in violation of the Contracts Clause of the Constitution.[28] The state argued that the Court lacked jurisdiction over it because it was immune from suit without its consent.[29] The Court agreed.[30] It noted that the language of the Eleventh Amendment concerned only suits brought by outsiders, but that the logic behind the amendment could not have countenanced treating citizens of the state differently than non-citizens.[31] Thus, the Court held that the Eleventh Amendment barred suits by all individuals against states in federal court.[32]

At the same time that the line of cases from *Chisholm* to *Hans*, restricting suits against the states, was developing, another line of cases was developing that allowed at least some suits to be brought against state officers, even if the effect of the resulting order would be the same as a suit against the state itself.[33] In *Osborn v. Bank of the United States*,[34] for example, the Bank of the United States, considered a private party, sued a state tax official for seizing bank funds.[35] The official objected that the suit was really one against the state and therefore barred by the Eleventh Amendment, but the Court disagreed, and found that the real defendant should be considered whatever defendant was named in the record.[36]

The holding in *Osborn* was modified a bit by the Court in *Governor of Georgia v. Madrazo*.[37] In *Madrazo*, the Court held that when the party of record was a state official acting legally in an official capacity and when the action was one to recover money from the state treasury or property in state possession, then the action was really one against the state, barred by the Eleventh Amendment.[38]

Following *Osborn* as modified by *Madrazo*, the Court again considered when

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Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 383 (1821), in which it stated that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be parties to that case." The Court considered whether the Eleventh Amendment posed a bar as a separate question. *Id*. at 407. Of course, *Cohens* could also be seen as upholding the power of the Court to review state court decisions, which is how the Court later interpreted it. McKesson Corp. v. Div. of ABT, 496 U.S. 18, 31 (1990).

27. 134 U.S. at 1-2.

28. *Id*. at 1-3.

29. *Id*. at 3.

30. *Id*. at 20.

31. *Id*. at 10-11.

32. *Id*. at 20.

33. *Ex parte* Young, 209 U.S. 123 (1908); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 847-58 (1824).

34. 22 U.S. (9 Wheat.) at 738.

35. *Id*. at 847.

36. *Id*. at 850-58.

37. 26 U.S. (1 Pet.) 110 (1828).

38. *Id*. at 123-24.

a suit could be brought against a state official in *Ex parte Young*.[39] In *Young*, the Court held that the Eleventh Amendment did not bar a suit against a state official seeking to enjoin that official from enforcing an unconstitutional state law.[40] The Court reasoned that a state cannot itself violate the Constitution, and that therefore, any act by a state official to enforce a law that did violate the Constitution lost its character as an act of the state and became an act of the state official in his individual capacity.[41] Thus, while the Court was limiting the rights of individuals to sue states in federal court, it left open a safety valve to allow all suits against state officers in their individual capacities and suits against such officers in their official capacities to enjoin them from enforcing unconstitutional state laws. The Court narrowed the reach of *Ex parte Young* in *Edelman v. Jordan*,[42] by providing that *Young* applied only to suits for prospective injunctive relief.

With these parallel lines of cases establishing that states were immune from certain types of suits in federal court, the focus of the Eleventh Amendment inquiry shifted to whether and how Congress might abrogate that immunity. In *Fitzpatrick v. Bitzer*,[43] the Court analyzed whether Title VII of the Civil Rights Act of 1964[44] validly abrogated states' sovereign immunity. The Court concluded without analysis that Title VII was enacted under Section 5 of the Fourteenth Amendment, and in that context, found that Congress could validly abrogate states' sovereign immunity.[45] The Court rested its decision on the fact that the enactment of the Fourteenth Amendment shifted the balance of power to Congress, away from the states, and the that power to abrogate state sovereign immunity was part of that shift.[46]

In a subsequent case, the Court found that Congress had the power to abrogate state immunity from suit under Article I in *Pennsylvania v. Union Gas Co.*[47] A plurality of the Court stated that the states waived any immunity to suit under Article I when they agreed to be subject to the Constitution which contained Article I.[48] Justice Stevens concurred, adding that any general principle of immunity that exceeded the plain language of the Eleventh Amendment was federal common law, which could be altered by Congress acting under any constitutional provision.[49] Justice White also agreed that Congress could abrogate states' immunity under Article I, but disagreed with the plurality's

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39. 209 U.S. 123 (1908).
40. *Id*. at 152, 159.
41. *Id*. at 159-60.
42. 415 U.S. 651 (1974).
43. 427 U.S. 445 (1976).
44. 42 U.S.C. §§ 2000e through 2000e-17 (2002).
45. 427 U.S. at 453.
46. *Id*. at 453-55.
47. 491 U.S. 1, 14-17 (1989) (Brennan, J.); *id*. at 56-57 (White, J., concurring).
48. *Id*. at 14-17 (Brennan, J.).
49. *Id*. at 24 (Stevens, J., concurring).

reasoning; he did not explain his own reasoning.[50]

Only seven years later, the Court overruled *Union Gas* in *Seminole Tribe v. Florida*.[51] Using a historical analysis the Court found that state immunity from suit in federal court was part of the constitutional design.[52] The Court rejected Justice Brennan's view that the states gave up some of their sovereignty when they ratified the Constitution.[53] The majority held that it was unnecessary for the Constitution to mention immunity because immunity was part of the background.[54] Because the framers took immunity for granted, the majority held, the Constitution's silence on the subject meant that immunity would not disappear after ratification, not that it would not exist. Still, because the Fourteenth Amendment marked a shift in power away from the states and to Congress, Congress could abrogate state sovereign immunity under it.[55] However, Congress did not properly have the power to abrogate state sovereign immunity under its Article I powers.[56]

Following *Seminole Tribe*, the Court decided *Alden v. Maine*,[57] in which it applied the same rules to suits against states under federal laws in the states' own courts.[58] The end result was that states could not be sued for money damages in any court unless the states consented or unless Congress validly abrogated the states' immunity under the Fourteenth Amendment.[59]

For the many statutes that provided a private right of action for damages against states, it was natural then that after *Seminole Tribe* and *Alden*, the focus shifted from whether Congress intended to abrogate states' sovereign immunity to whether it had validly done so under the Fourteenth Amendment. This change might have been relatively minor if in the meantime the Court had not also decided *City of Boerne v. Flores*,[60] narrowing the scope of permissible Fourteenth Amendment legislation.

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50. *Id*. at 56-57 (White, J., concurring).

51. 517 U.S. 44, 66 (1996).

52. *Id*. at 67-71. This result was not an inevitable consequence of historical study. The decision was 5 to 4, and the dissent used a historical analysis to demonstrate that immunity was not part of the constitutional design. *Id*. at 78-93, 95-99 (Stevens, J., dissenting); *id*. at 107-23 (Souter, J., dissenting).

53. *Id*. at 64-65.

54. *Id*. at 54.

55. *Id*. at 59.

56. *Id*. at 63-66.

57. 527 U.S. 706 (1999).

58. *Id*. at 712.

59. *Id.* at 755 (Individuals could still sue state officials in their personal capacity and could still sue for prospective injunctive relief. Additionally, the United States can sue a state for damages.).

60. 521 U.S. 507 (1997).

II. CONGRESS' POWER UNDER THE FOURTEENTH AMENDMENT TO PROTECT INDIVIDUALS FROM STATE ACTION

At the same time that the Court was reviving the Eleventh Amendment, the Court was considering a variety of issues involving Congress' power to protect individuals from state action. Congress has the power to regulate state behavior through either the Fourteenth Amendment or Article I.[61] In other words, the states are bound to obey laws enacted under the Fourteenth Amendment or under Article I. However, after *Seminole Tribe*, Congress has the power to create a private right of action for damages only under the Fourteenth Amendment; thus while the states must comply with laws enacted under either power, the most efficient enforcement mechanism, a private right of action for damages, can be provided against a state only by legislation enacted validly under the Fourteenth Amendment.

Congress has greater powers under Article I to reach a broader scope of conduct. Under Article I, the Court determines whether the end to be achieved by the legislation is within the legitimate powers of Congress and whether the means chosen are reasonably related to that end.[62] The Court generally has deferred to Congress as to the necessity of particular legislation—the need for the legitimate end to be served in this way.[63] Moreover, the Court has deferred to Congress on whether the end needs to be addressed by the federal government in the first instance.[64] The Court traditionally used this same analysis for enactments under Section 5 of the Fourteenth Amendment.[65]

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61. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56 (1985). Conversely, Congress can regulate private behavior only through Article I, since the Fourteenth Amendment only prohibits state action. Because both states and private entities are employers, Congress bases most employment-related civil rights legislation upon both Article I and the Fourteenth Amendment.

62. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421-23 (1819).

63.

> [W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

Id. at 423.

64. Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1139-40 (2001) (discussing *McCulloch*, 17 U.S. (4 Wheat.) at 402, 407, 422).

65. *City of Boerne*, 521 U.S. at 507. *E.g.*, City of Rome v. United States, 446 U.S. 156, 177 (1980); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879). In fact, as the Court in *South Carolina v. Katzenbach* notes, this is the test to be applied "in all cases concerning the express powers of Congress with relation to the reserved powers of the States": "'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" 383 U.S. 301, 326-27 (1966) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

The Court changed the Fourteenth Amendment analysis in *City of Boerne v. Flores*.[66] In *City of Boerne*, the Court considered whether the Religious Freedom Restoration Act (RFRA) was validly enacted under the Fourteenth Amendment. RFRA was a reaction to the Court's decision in *Employment Division v. Smith*.[67] In *Smith*, the Court held that state statutes of general applicability that were neutral on religion but that incidentally affected religious practices would be subject only to rational basis scrutiny.[68] This holding changed the law.[69] Public reaction to this change in the law was strong, and RFRA was passed in direct response. RFRA provided that any substantial burden on religion by a neutral law would be suspect, and legislators would have to show that the statute was the least restrictive means to advance a compelling governmental interest.[70] Not only was RFRA an attempt to restore the prior law on the Free Exercise clause of the First Amendment, it was also a slap in the face to the Court. RFRA stated that the prior rule made more sense, disagreeing with the Court's interpretation of the Constitution in *Smith*.[71]

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66. 521 U.S. at 507.

67. 494 U.S. 872 (1990).

68. *Id*. at 878-79.

69. While the Court denied that it was changing the law, *Smith*, 494 U.S. at 878-79, Congress clearly believed that the Court had done so. 42 U.S.C. § 2000bb(a)(4), (5).

Prior to *Smith*, the Court had considered a line of cases in which people had been denied unemployment compensation benefits after they were fired for refusing to do things prohibited by their religious practices. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). In this line of cases, the Court had held that the states could not deny unemployment compensation on this basis unless its reasons for doing so passed strict scrutiny–that withholding benefits was the most narrowly tailored means to promote a compelling governmental interest. In *Smith*, the Court denied that it was changing the law, but stated that it was simply not extending the rule in *Sherbert* to the application of criminal statutes. *Smith*, 494 U.S. at 878-79.

70. *City of Boerne*, 521 U.S. at 515 (citing 42 U.S.C. § 2000bb(a), (b)).

71. In RFRA, Congress stated:

> (1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
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> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a). RFRA's purposes were:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S.

Predictably, RFRA did not receive a warm welcome when challenged. In *City of Boerne*, the Court held that Congress' powers were limited to enforcing the Fourteenth Amendment, and it was the Court's role to determine the substance of that amendment.[72] The Court acknowledged that the line between measures that prevent unconstitutional conduct and measures that define the right at stake is not easy to draw and that Congress should be given wide discretion to draw that line, although the line must be drawn correctly.[73] Accordingly, the Court held that to the extent a federal law prohibited conduct that was constitutional, the law could only do so in order to remedy some existing constitutional violation, and there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[74]

In evaluating whether RFRA was congruent and proportional to the injury it was designed to prevent or remedy, the Court focused on the legislative history of RFRA and discovered that Congress had made no findings that governmental bodies were using neutral laws to discriminate against religions.[75] Because there was no constitutional evil to remedy, the legislation was out of proportion to any existing harm, and was not a proper way to "enforce" the Fourteenth Amendment.[76] The Court did not consider whether Congress could have been trying to prevent a potential constitutional violation and did not explain what kind of analysis might apply to purely prophylactic legislation, probably because the focus of RFRA was explicit: nullifying the Court's holding in *Smith* rather than remedying infringements on the exercise of religion. But by not considering a preventative goal, the Court implied that purely prophylactic legislation would never be valid under the Fourteenth Amendment unless that legislation mirrored that amendment precisely.

398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. § 2000bb(b). Thus, Congress directly challenged the Court's interpretation of the Constitution.

72. *Id*. at 519-24 (tracing the historical development of the language of the amendment). The Court's historical analysis has been called into question by scholars. *E.g.*, Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783 (2002).

73. *City of Boerne*, 521 U.S. at 519-20.

74. *Id*. at 520. Although the Court did not further define congruence or proportionality, subsequent lower court opinions have shed some light on the subject. "Congruence," generally has meant how closely the prohibitions of the legislation mirror the prohibitions of Section 1 of the Fourteenth Amendment. *See* Endres v. Ind. State Police, 334 F.3d 618, 628 (7th Cir. 2003). "Proportionality" refers to whether the remedies the legislation provides are narrowly tailored to resolve the particular evils the legislation is designed to address. *Id*.

75. *Id*. at 530-32. Presumably, the Court skipped to the proportionality test because RFRA was not congruent to the First Amendment as the Court had interpreted it.

76. *Id*. at 532.

While the result may have been warranted, this new test improperly restricted Congress' powers under the Fourteenth Amendment by essentially removing Congress' power to deter potential constitutional violations. Now, the Court had the policy-making power to decide whether the end Congress sought to serve needed to be served, not merely whether that end was a legitimate government interest in the abstract.[77] This new limitation had drastic effects on litigation involving states when combined with *Seminole Tribe*.

III. THE CONVERGENCE OF THE TWO LINES OF JURISPRUDENCE AND THE TRANSFORMATION OF CONGRESS' POWER TO LEGISLATE

When the Court in *Seminole Tribe* held that Congress could not abrogate a state's sovereign immunity under its Article I power, it cast into doubt the validity of every law that provided for a private right of action against a state. It was only natural that any such laws would have to pass the new *City of Boerne* test, and the less laws mirrored the Fourteenth Amendment, the less likely they would pass the new test. Thus, while traditionally the Court had upheld many prophylactic Section 5 measures, it struck down six such measures in four years.[78] In analyzing these six measures, the *City of Boerne* test was applied with increasing rigor as the treatment of civil rights statutes demonstrates.

The first civil rights statute to be challenged as it applied to the states[79] was the Age Discrimination in Employment Act (ADEA), which the Court held was not valid legislation under the Fourteenth Amendment in *Kimel v. Florida Board*

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77. *See* Caminker, *supra* note 64, at 1131. In doing so, the Court turned expansive language from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which found the Voting Rights Act constitutional, on its head to limit Congress' power. *See* Kimberly E. Dean, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After Garrett?*, 43 B.C. L. REV. 697, 707 (2002). Professor Dean notes that former Chief Justice Warren disagreed with this view of what *Morgan* meant. *Id*. at 707 n.88 (citing Earl Warren, *Fourteenth Amendment Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT 227 (Bernard Schwartz ed., 1970)).

78. *Garrett*, 531 U.S. 356; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. at 507.

The Court has also struck down remedial legislation passed under Article I, thus restricting Congress' powers across the board. *Morrison*, 529 U.S. 598; United States v. Lopez, 514 U.S. 549 (1995).

79. The Court had already considered legislation to enforce due process guarantees when it held that the Patent and Plant Variety Protection Remedy Clarification Act and the Lanham Act were not valid enactments under the Fourteenth Amendment in *Florida Prepaid*, 527 U.S. at 627, and *College Savings Bank*, 527 U.S. at 666, respectively, but because the focus of this Article is on civil rights laws, those cases are not discussed in depth. They are consistent with the cases that are discussed and demonstrate that other areas, such as bankruptcy, will be affected by the Court's jurisprudence in this area as well.

of Regents.[80] The analysis used by the Court was a further refinement of its *City of Boerne* analysis. First, the Court examined congruence by comparing protection for the aged under the Fourteenth Amendment to the protection afforded by the ADEA.[81] The Court noted that under the Fourteenth Amendment, states may discriminate on the basis of age as long as that discrimination is rationally related to a legitimate governmental interest.[82] In other words, under the Fourteenth Amendment, classifications based on age are presumptively valid. The ADEA, on the other hand, treats age classifications as presumptively invalid, providing employers a defense to age classifications only when they are bona fide occupational qualifications reasonably necessary to the job.[83] Thus, the Court found the ADEA prohibits conduct that is constitutional and was not congruent to the Fourteenth Amendment.

The Court proceeded to examine whether despite this incongruence, the legislation might nonetheless be proportional to some persistent and intractable constitutional evil to be remedied.[84] To evaluate proportionality, the Court first examined the legislative record to see Congress' motivations and the end it wished to serve with the legislation.[85] The Court found that the legislative record lacked evidence of a pattern of unconstitutional age discrimination by the states.[86] Because there was no constitutional evil to be remedied, the ADEA lacked proportionality and was not properly enacted under the Fourteenth Amendment.[87]

The next civil rights statute to be addressed was Title I of the Americans with Disabilities Act (ADA), which governs equal employment opportunities for people with disabilities.[88] The Court held that Title I of the ADA was not a valid enactment under the Fourteenth Amendment in *Board of Trustees of University of Alabama v. Garrett*.[89] The analysis in *Garrett* was similar to that in *Kimel*, but was even more exacting. The Court first compared the reach of Title I of the ADA to what the Fourteenth Amendment required.[90] Based on *City of Cleburne, Texas v. Cleburne Living Center*,[91] the Court determined that rational basis was the level of scrutiny applicable to the disabled.[92] And, as it did with the ADEA, the Court found that Title I of the ADA made adverse job actions presumptively

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80. 528 U.S. 62 (2000).

81. *Id*. at 83-84.

82. *Id*.

83. *Id*. at 86-88 (citing 28 U.S.C. 623(f)(1) and Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)).

84. *Id*. at 88.

85. *Id*. at 89.

86. *Id*.

87. *Id*. at 91.

88. 42 U.S.C. §§ 12111-12117 (2002).

89. 531 U.S. 356 (2001).

90. *Id*. at 365-68.

91. 473 U.S. 432 (1985).

92. *Garrett*, 531 U.S. at 365-68.

invalid, which meant that it was not congruent to the Fourteenth Amendment.[93]

Likewise, in its proportionality inquiry, the Court's examination of the legislative record was even more searching than it had been in *Kimel*.[94] The Court held that Congress had to find that *states* had an egregious pattern of discriminating in *employment*; examples of discrimination in employment by private employers, discrimination in employment by local government bodies, and discrimination in public access by states could not support application of the employment title against the states, nor could they support a Congressional finding that the states had discriminated in employment.[95] Not only were the main antidiscrimination provisions of Title I invalid as applied to the states, but so was the disparate impact provision, since a government action is not unconstitutional solely because it disparately impacts a protected group.[96] Because the remedy in Title I was not "congruent and proportional" to any constitutional evil, the Court found that it was not a valid enactment under the Fourteenth Amendment.[97]

As the Court seemed to be increasing the level of scrutiny of legislative records for evidence of constitutional evils, and shrinking the boundaries of congruence and proportionality, it seemed poised to invalidate nearly every private right of action against an unconsenting state.[98] But just as it seemed that any civil rights statute that did not mirror the Fourteenth Amendment or which was not supported by a detailed legislative record demonstrating a long history of egregious constitutional violations by the states would be invalid, the Court found the Family Medical Leave Act of 1993 (FMLA),[99] a valid enactment under Section 5 of the Fourteenth Amendment. The FMLA mandates that employers provide both men and women twelve weeks of unpaid leave per year for their own illnesses or to care for a family member, and allowed employees to sue for violations of its provisions.[100]

In *Nevada Department of Human Resources v. Hibbs*, the Court found that the private right of action for damages to enforce the leave provision of the

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93. *Id*. However, the Court did not consider that the ordinance in *City of Cleburne* was actually struck down on the ground that the classification in that case was based on fear and negative attitudes, the evil that Congress said it was addressing by the ADA. *Id*. at 381 (Breyer, J., dissenting). The Court also failed to closely analyze whether Title I of the ADA really created a presumption that employer actions were invalid. Arguably, by requiring only "reasonable" accommodations to "qualified" individuals, those who could perform the job with such accommodations, the ADA created a presumption that employer actions were valid rather than invalid.

94. *Id*. at 369-72.

95. *Id*. at 371-72.

96. *Id*. at 372-73.

97. *Id*. at 374.

98. As discussed *supra* note 79, the Court's decisions were not limited to the civil rights context.

99. 29 U.S.C. §§ 2601-2619 (2002).

100. *Id.* § 2612.

FMLA was "congruent and proportional" to eliminating gender-based discrimination in the workplace.[101] While the Court still seemed to require that the act be remedial (rather than deterrent) in order to be valid,[102] the Court was willing to consider sources of evidence other than the legislative record and to allow Congress to draw less obvious conclusions to show the existence of a constitutional evil to be addressed. The Court attributed its willingness to the fact that classifications on the basis of gender are subject to heightened scrutiny.[103]

To determine whether the states had a pattern of unconstitutional sex discrimination, the Court did not begin its analysis with the legislative record as it had in *Kimel* and *Garrett*. Rather, the Court began its analysis by looking to its own prior decisions, which had upheld state laws that limited women's employment opportunities.[104] When it did examine the legislative record, the Court did not limit itself to sources that detailed unconstitutional leave policies by the states. Rather, it considered reports that suggested gender-role stereotypes lead to discriminatory leave practices, it reviewed evidence from the private sector, the federal government, and local governments in addition to evidence about state governments, and it also considered evidence that had been before Congress in prior attempts to pass family leave legislation.[105] The Court also

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101. 123 S. Ct. 1972, 1982 (2003) (quoting *Garrett*, 531 U.S. at 374). The Court only considered whether the private right of action to enforce the provisions allowing leave for employees to care for another validly abrogated state sovereign immunity. The FMLA also allows employees to take leave for their own serious illnesses. Nine circuits have found that the states are immune from suit to enforce that provision because it is not related in the same way to the elimination of gender discrimination. Brockman v. Wyo. Dep't of Family Servs., 342 F. 3d 1159 (10th Cir. 2003); Laro v. New Hampshire, 259 F.3d 1, 16-17 (1st Cir. 2001); Lizzi v. Alexander, 255 F.3d 128, 134-35 (4th Cir. 2001); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 228-29 (3d Cir. 2000); Townsel v. Missouri, 233 F.3d 1094 (8th Cir. 2000); Kazmier v. Widman, 225 F.3d 519, 527 (5th Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559, 563-64 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000); Garrett v. Univ. of Ala., 193 F.3d 1214, 1219 (11th Cir. 1999).

102. *See Hibbs*, 123 S. Ct. at 1982-84.

103. *Id*. at 1981-82. Using similar reasoning, five of the thirteen federal circuits had found that Congress had validly abrogated state sovereign immunity in the Equal Pay Act under Section 5 of the Fourteenth Amendment. Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000); Kovacevich v. Kent St. Univ., 224 F.3d 806 (6th Cir. 2000); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998). Two other circuits had found the Equal Pay Act to be valid Fourteenth Amendment legislation prior to the development of the *City of Boerne* test. Usery v. Charleston County Sch. Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976).

104. *Hibbs*, 123 S. Ct. at 1978.

105. The Court cites the following sources to support Congress' decision to enact the FMLA: a 1990 Bureau of Labor Statistics survey of private-sector employees, S. Rep. No. 103-3, at 14-15 (1993); a fifty-state survey discussed in The Parental and Medical Leave Act of 1986: Joint

considered the leave policies that states had implemented, most of which applied differently to women and men either explicitly or in their applications.[106] This information the Court presumed to be before Congress was "weighty enough" to justify prophylactic Section 5 legislation.[107]

The conclusions the Court allowed Congress to draw in the context of the FMLA were broad. First, the Court found that even after Title VII of the Civil Rights Act of 1964 was passed, women continued to suffer unconstitutional discrimination.[108] In particular, the administration of leave policies was often discriminatory either because the leave policies on their faces or in their applications treated men and women differently.[109] The Court seems to have recognized that Title VII did not eradicate discrimination, but only made its practices more subtle.[110] More importantly, the Court looked to the *effect* of leave policies to find that they were a mechanism that reinforced gender stereotypes. Such gender stereotypes were a product of societal discrimination, which restricted access to equal employment opportunities for women. This lack of access, in turn, reinforced societal discrimination.[111]

It is evident that the Court treated the Family Medical Leave Act significantly differently than it had the Age Discrimination in Employment Act or the Americans with Disabilities Act. The Court attributed its different treatment to the level of scrutiny due the underlying classes protected by the different acts.[112] Classifications based on age or disability are subject only to rational basis review, while gender classifications receive heightened scrutiny.[113]

However, the level of scrutiny applied to each fails to account for the focus of the Court's analysis. By focusing on the effects of employment practices rather than on the intent of employers, and by allowing Congress to regulate an employment action as a means to prevent and remedy societal discrimination, the

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Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong. 2d Sess., 33 (1986) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); *id.* at 147 (Washington Council of Lawyers); M. LORD & M. KING, THE STATE REFERENCE GUIDE TO WORK-FAMILY PROGRAMS FOR STATE EMPLOYEES 30 (1991); The Parental and Medical Leave Act of 1987: Hearings Before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 1, p. 385 (1987); *id*. at pt. 2, p. 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago); Family and Medical Leave Act of 1987: Joint Hearing Before the House Committee on Post Office and Civil Service, 100th Cong., 1st Sess., 2-5 (1987) (Rep. Gary Ackerman); H.R. Rep. No. 103-8, pt. 2, pp. 10-11 (1993). *Hibbs*, 123 S. Ct. at 1979-80.

106. *Hibbs*, 123 S. Ct. at 1980-81.

107. *Id*. at 1981.

108. *Id*. at 1978-79.

109. *Id*. at 1980.

110. *Id*. at 1982.

111. *Id*. at 1982-83.

112. *Id*. at 1981-82.

113. *Id*.

Court's analysis seems more like an analysis under Article I of the Constitution than an analysis under the Fourteenth Amendment.[114] The proper inquiry under Article I focuses on the effect on society[115] of the action Congress seeks to regulate. Conversely, the proper inquiry under the Fourteenth Amendment has been first and foremost the intent of the actor or the effect of an action on the individual.[116]

In the Court's jurisprudence at least through *Garrett*, it engaged in complex maneuvering. Throughout the cases discussed, the Court has weighed the power of the states against the power of the federal government—determining what the federal government can force the states to do. The Court also, however, balanced its own power against the power of Congress—which body has the power to decide whether any mechanism is available to reach a particular goal, and if so, what mechanism.

The Court's failure to give Congress, a coequal branch of government, any role in interpreting the Constitution is fundamentally disrespectful.[117] Moreover, the Court's insistence in *City of Boerne* that Congress had no role to play in defining the scope of constitutional protection was a sharp break with its prior cases. For example, in *Richmond v. J.A. Croson Co.*, the Court stated that "Congress . . . has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[118] While

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114. In fact, the Court's reasoning might appear to conflict with its reasoning in *United States v. Morrison*, 529 U.S. 598 (2000). The Violence Against Women Act (VAWA) at issue in *Morrison* was similar to the FMLA in that it created a mechanism to redress longstanding societal discrimination against women which was facilitated by state and local officials' discriminatory refusal to treat crimes against women seriously. The discrimination and the state complicity was equally notorious as the discrimination against women in the workplace that the Court in *Hibbs* took notice of on its own. However, in *Morrison*, the Court ignored the history; and further it held that the statute was not valid under the Fourteenth Amendment even though, like the FMLA, it focused on the role that the state played in creating and perpetuating societal discrimination. The difference between the two is that the VAWA created a right of action against the criminals rather than the officials, whereas the FMLA created a cause of action against the state as employer itself. Thus, in that sense, the FMLA was directed more clearly at state action than was the VAWA.

115. I use this term somewhat loosely to refer to interstate commerce, which is fairly synonymous with our society's economy.

116. For example, only intentional discrimination in the form of explicit classification or disparate application violate the Fourteenth Amendment; disparate impact alone does not. Washington v. Davis, 426 U.S. 229, 242 (1976).

117. *E.g.*, Colker & Brudney, *supra* note 2.

118. 488 U.S. 469, 490 (1989) (plurality opinion) (citing and quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment")). *J.A. Croson* is also significant because it demonstrates that the Court is not really interested in protecting the states. In that case,

the Court was distinguishing Congress' legislative power from the legislative power of the States, rather than from the Court's judicial power, the fact remains that the Court has, at least at times, recognized that Congress has a role in determining how best to serve the principles of equality and, presumably, liberty. When the Court held in *City of Boerne* that Congress' role in serving equality was to merely effectuate what the Court deemed the national policy on equality to be, it exceeded its institutional competence. Declaring national policy is primarily a legislative function.[119] Essentially, the Court has secured to itself a way to pass on the wisdom of legislation, rather than limiting its inquiry to whether Congress has the power to enact such legislation.

Congress' power to protect individuals from state action is thus limited by whether the Court thinks that those individuals deserve protection. It is counter-intuitive that where Congress has the greatest power to make classifications of individuals under its own equal protection and due process limitations, it has the least power to require states to comply with its classifications. Conversely, where Congress has the least power to make classifications, it has the greatest power to regulate the states. Under this reasoning, the Eleventh Amendment must be stronger the greater power Congress has to regulate individuals, and weaker the less power Congress has to regulate individuals. One would expect the Eleventh Amendment either to remain constant or to give way when Congress' power was stronger.

One of the effects of the Court's maneuvering is that statutes that once enforced the Fourteenth Amendment might be found not to do so any longer when the Court decides that the people protected by that statute no longer need protection. In other words, it appears that the Court can change the national policy and decide that legislation that once enforced the Fourteenth Amendment ceases to do so once the legislation is successful enough that there is no widespread evidence that states continue systematically to violate the Constitution. And, once the Court finds that legislation has ceased to be remedial, it would be bound by its jurisprudence to find that legislation no longer valid under the Fourteenth Amendment, and thus no longer a valid abrogation of state sovereign immunity. The Court could also decide that since the validity of this type of legislation might expire, it might require all prophylactic legislation

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the Court held that the states had less ability than Congress to legislate in the area of race because the Fourteenth Amendment expressly gave Congress primary authority in the area. *Id*. at 489-90.

The decision in *J.A. Croson* also highlights an inconsistency in the Court's equal protection analysis. In that case, the Court held that even "benign" classifications, those that benefitted the discrete and insular minority, should be subject to strict scrutiny because it was nearly impossible to determine whether the effects of the classification at issue would truly be benign or if they would merely create new mechanisms for oppression. *Id*. at 493. By requiring that legislation be proportional to the particular harm that Congress has documented, the Court leaves open the possibility that neutral laws which protect the majority in the same way that they protect the minority might not comply because they are too broad and not proportional to the harm.

119. *See, e.g.*, Local 1976, United Broth. of Carpenters and Joiners of Am. v. NLRB, 357 U.S. 93, 100 (1958); Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 42 (1933).

under the Fourteenth Amendment to be limited in time.

It is not just the underlying logic of the Court's decisions that leads eventually to this result; the Court explicitly suggests the same thing. In its proportionality analyses, the Court has indicated several times that time limits factored into its decision. In *South Carolina v. Katzenbach*, the Court found the Voting Rights Act valid in part because the most sweeping parts of the act were limited in time and in geographical scope.[120] In *City of Boerne*, as well, the Court remarked that RFRA was not proportional to the First Amendment in part because it had no termination date or termination mechanism.[121]

Of course, the Court stated in each case that the limits were not necessary to its decision. For example, in *City of Boerne*, the Court stated that a termination date or mechanism merely tended to ensure that means are proportionate to ends.[122] And, in *Katzenbach*, after the Court repeatedly stressed that the Voting Rights Act provisions were limited in time, limited in geography, and limited to the most egregious practices, the Court hastened to add, "[t]his is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates."[123] I am inclined, however, to agree with Professor Brant, who wrote that "when Justice Kennedy says that the voting rights cases survive constitutional scrutiny because the V.R.A. was aimed at a discrete class of state laws, was less than national in scope, and was of limited duration, then the lower courts will faithfully apply those factors in their analysis."[124] To echo her, when Justice Kennedy says that limited duration matters, the courts will consider duration in their analyses.

The best indication of this power of language is the Court's subsequent out-of-context use of the language in *Katzenbach* in *City of Boerne* to limit the power of Congress to enact Fourteenth Amendment legislation. In *Katzenbach*, in the context of discussing the broad powers Congress had under the reconstruction amendments, the Court said "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[125] The remedial powers the Court was referring to were those that allowed Congress to prohibit conduct that was constitutional in order to ensure that states were not discriminating in establishing voting qualifications. The Court in *City of Boerne* took that language and stated that "[t]he Court has

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120. 383 U.S. 301, 328-29 (1966). The geographical limitation also raises an interesting point that Scalia takes up in his dissent in *Hibbs*. He suggested that a particular state's sovereign immunity could be validly abrogated under the Fourteenth Amendment only if Congress had found that state had a history of systematic constitutional violations. *Hibbs*, 123 S. Ct. at 1985 (Scalia, J., dissenting). Scalia's view seems aligned with the theory that sovereign immunity is a doctrine of personal rather than subject matter jurisdiction. For more on that theory, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002).

121. 521 U.S. at 533.

122. *Id*.

123. 383 U.S. at 328-29.

124. Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 792 (1998).

125. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

described [Congress'] power as 'remedial,'" as if Congress' power were solely remedial.[126] If the Court can take such language out of context to change the rules, in other words if the words rather than their intent count, lower courts will feel equally bound to give effect to the Court's rules regardless of what it meant by them.[127]

While the line of cases through *Garrett* leads to this result, *Hibbs* fails to resolve the matter and confuses the issue further. After *Hibbs*, the principles of Equal Protection and Due Process have become a ceiling on Congress' power, rather than the floor, for the protection of individuals. While the Fifth Amendment allows Congress to enact laws to protect non-suspect classes as long as those laws are rational, the Eleventh and Fourteenth Amendments limit the application of those laws to the states unless the laws mirror the protections the Fourteenth Amendment gives to individuals.[128] Granted, this scheme might

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126. 521 U.S. at 519.

127. An example of how the lower courts are prone to taking the Court's words out of context is the split that arose in the federal courts after the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The Court took *St. Mary's Honor Center* to resolve a split in the circuits about how lower courts should evaluate employment discrimination cases when the employer lies about the real reason for its actions. *Id*. at 512-13. Some courts had held that once the trial court found that the employer lied, it was required to find in favor of the plaintiff (the pretext-only rule). *E.g.*, Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991); MacDissi v. Valmont Indus., Inc. 856 F.2d 1054, 1059 (8th Cir. 1988); Dister v. Cont'l Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1563-64 (11th Cir. 1987); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987) (en banc); Tye v. Bd. of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 318 (6th Cir. 1987); Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986); Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985), *modified*, 784 F.2d 1407 (1986). Other courts found that the trial court was prohibited from entering judgment in favor of the plaintiff without further specific proof of discriminatory animus (the pretext-plus rule). *E.g.*, Bienkowski v. Am. Airlines, Inc. 851 F.2d 1503, 1508 (5th Cir. 1988); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988); White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir. 1984). In *St. Mary's Honor Center*, the Court struck a middle ground, finding that the trier of fact was not compelled to enter judgment in favor of the plaintiff, but could without more evidence if it drew the inference that the real reason for the employer's actions were discrimination. 509 U.S. at 511.

However, after *St. Mary's Honor Center*, a new split developed between the circuits, in which some of them interpreted the Court to require the pretext-plus rule, while others followed what the Court actually held. Marcia L. McCormick, *Truth or Consequences: Why the Rejection of the Pretext Plus Approach to Employment Discrimination Cases in* Reeves v. Sanderson Plumbing *Is the Better Legal Rule*, 21 N. ILL. L. REV. 355, 363 (2001). The Court had to take *Reeves v. Sanderson Plumbing Products* to resolve the persistent split, and in an uncharacteristically unanimous opinion, wrote that it meant what it had said, once again rejecting the pretext-plus approach. 530 U.S. 133, 148 (2000).

128. Of course, the states would still have to comply with the law as long as it was validly enacted under Article I, but the most effective remedy, a private suit for damages, would not be available.

appear to contain a kind of logic, since the states also have more power to regulate individuals when not dealing with suspect classes, but it completely ignores the principle implicit in the Fourteenth Amendment that individuals have the constitutional protection of national citizenship.

That *Hibbs* failed to resolve the problem is best supported by a recent decision from the Seventh Circuit on Title VII's religious accommodation provision. In *Endres v. Indiana State Police*, the Seventh Circuit found that the religious accommodation provision of Title VII did not validly abrogate state sovereign immunity.[129] In its analysis, the Seventh Circuit ignored two key points: (1) the abrogation in Title VII was found to be valid in *Fitzpatrick*, and the Court did not indicate that its analysis was limited to the gender discrimination provisions of Title VII; and (2) the religious accommodation provision in particular was valid under the Constitution at the time Congress passed Title VII and provided that it applied to the states.

Title VII prohibits employers from taking an adverse employment action against an employee because of that employee's religious observance, practice or belief, "unless an employer demonstrates that [it] is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[130] The Court has interpreted this provision very narrowly to require an accommodation only if it causes a minimal hardship or no hardship at all to the employer or other employees.[131]

At the time that Title VII was enacted and applied to the states, neutral practices that substantially burdened an individual's religious practices or beliefs had to be narrowly tailored to support a compelling state interest.[132] Thus, when enacted, the religious accommodation provision was easily both congruent and proportional to the Fourteenth Amendment. However, when the Court decided *Smith*, the case that prompted RFRA, the landscape changed. After *Smith*, neutral practices that impact religion need only be rationally related to a legitimate government interest.[133] Accordingly, after *Smith*, the Seventh Circuit reasoned, the religious accommodation provision is no longer congruent to the Fourteenth Amendment because *Smith* requires an attitude of neutrality toward religion, and accommodation is not neutrality.[134] The Seventh Circuit also held that the religious accommodation provision was not proportional to any

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129. 334 F.3d 618, 628-30 (7th Cir. 2003). The Seventh Circuit reheard this appeal en banc, but at the time this Article went to press, it had not issued a new decision.

130. 42 U.S.C. § 2000e(j) (2002).

131. Trans. World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

132. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963).

133. 494 U.S. at 882-84.

134. *Endres*, 334 F.3d at 628. Although the Seventh Circuit recognized that undue hardship meant only minimal hardship for the states, it found implicitly that the religious accommodation provision made state actions that impacted religion presumptively invalid by relying on the Court's meager analysis on the subject in *Garrett*. *See id.*

constitutional evil, since the legislative record of Title VII was entirely silent on the subject of whether states discriminated on the basis of religion.[135]

In this way, a statutory provision which once was a valid abrogation of state sovereign immunity became invalid.[136] Additionally, while the passage of time was not the only factor that invalidated this portion of Title VII, it certainly affected the perspective with which the court viewed the states' treatment of religious differences.

It is not too far of a stretch to think that one day, the Court may decide that racism or sexism has been resolved to the extent that classifications on those bases no longer deserve heightened scrutiny. As Justice O'Connor said in *Grutter v. Bollinger*, "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[137] Affirmative action rests on the principle that members of certain protected classes should be preferred for some things, all qualifications being equal, to increase their participation in all aspects of life and to help make up for a history of exclusion. If affirmative action can be dispensed with, the justification for heightened scrutiny will be next. Heightened scrutiny is justified on the theory that some classes are "discrete and insular minorities" which need special judicial protection from oppression based on their status.[138] On the day that heightened scrutiny seems less vital, Title VII, one of the most valuable pieces of legislation in the antidiscrimination arsenal, will no longer validly abrogate state sovereign immunity, as a matter of judicial fiat.

The Court's Fourteenth and Eleventh Amendment jurisprudence revises the Constitution to create a confederacy. It posits an adversarial model of federalism, in which the states and the federal government vie for power, but in which the states have little practical power against the force of the federal government.[139] This jurisprudence focuses on states as if the states had rights

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135. The Seventh Circuit did acknowledge that it was not limited to the legislative record to support a history of discrimination, but found that there was no such history. *Id*. at 629-30.

136. Supporters of the Court's federalism jurisprudence could argue that the religious accommodation provision was never a valid enactment because the constitutional analysis before *Smith* was incorrect, and *Smith* merely stated what the law had been (or should have been) all along. That does not change the fact that for nearly thirty years, the religious accommodation provision of Title VII was actually a valid enactment under the Fourteenth Amendment and thus a valid abrogation of state sovereign immunity.

137. 123 S. Ct. 2325, 2348 (2003). The hope that this statement evinces is laudable. It would be wonderful to eradicate discrimination and to affirmatively re-right the balance so that everyone's basic needs were satisfied and they had equal access to opportunities regardless of race or skin color. The danger that the statement belies, however, is that the Court seems to believe that the government's job to reach this goal ends when formal equality is achieved on the surface, regardless of whether discrimination is still active.

138. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 n.10 (1986); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

139. This adversarial model has been criticized as inaccurately capturing the dynamic often

that needed special protection under the Constitution.[140]

However, the Fourteenth Amendment was not enacted and ratified to protect the states from encroachment by the federal government, nor to protect the federal government from encroachment upon its powers by the states.[141] Rather, the Fourteenth Amendment was enacted and ratified because *individuals* needed protection from the states.[142] If there must be an adversarial model applied to our structure of government, the Fourteenth Amendment posits the people on one side, with the states on the other, and the federal government acting as the intermediary necessary to keep the states from encroaching on the people.[143] The Fourteenth Amendment was enacted because the promises of the Federal Constitution, equal treatment for all and protection of life, liberty, and property, were being frustrated by state governments.[144] After all, "[i]n the compound

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present in which states actively lobby for federal legislative assistance to protect individual rights. Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002) (proposing a cooperative rights model of federalism).

140. "At the core of the Rehnquist Court's Section 5 cases is the anti-federalist conviction that close judicial oversight is necessary to protect local interests from federal domination since the U.S. Constitution, [sic] is structurally ineffectual in affording the states meaningful representation." Banks, *supra* note 6, at 451.

141. There may be some support for the proposition that the Second Amendment protects the rights of states or local governments to have national guard and police forces, rather than the individual's right to possess weapons. *See generally* Carl T. Bogus, *The History and Scholarship of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53 (2002); John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659 (2002). And, it is true that the Tenth Amendment acknowledges that states have some powers. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). However, the majority of other amendments clearly protect individuals from an overreaching government, and even the Tenth Amendment notes that the people are ultimately sovereign. Of course, the Ninth Amendment states that unequivocally. U.S. CONST. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Regardless of whether the Ninth Amendment constitutes a source of individual rights, at the very least, its expressive value suggests that ultimately the Constitution exists to protect individuals from an overreaching government. *See* Amar, *supra* note 4.

142. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 66-74 (1993); Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473 (2003).

143. Other parts of the Constitution, notably Article I and the first ten amendments, may envision the federal government as the adversary of the people, but the Fourteenth Amendment is, by its terms, a positive grant of power to the federal government to limit the powers of state governments. U.S. CONST. amend. XIV.

144. John Bingham, the author of the Fourteenth Amendment, explained his view of the meaning of equality as embodied in that amendment:

republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."[145] By losing sight of whom the Fourteenth Amendment is designed to protect, the Court is frustrating the core constitutional values of national citizenship, liberty, and equality.[146]

IV. FOCUSING ON DETERRENCE RESTORES THE COURT AND CONGRESS TO THEIR PROPER ROLES AND PROPERLY SERVES TO PROTECT INDIVIDUALS

The Constitution is designed to limit the powers of the government in order to promote the rights of individuals. Therefore, it must set a minimum standard for equality and liberty, upon which no government can encroach. It makes no sense in most cases to think that the Constitution describes the mechanism by which equality and liberty can be maximized on a national scale.[147] The values of national citizenship, liberty, and equality are best served by recognizing that the Constitution establishes the minimum protection necessary for individuals and then by allowing Congress to legislate in a wide variety of areas and to provide private rights of action for money damages against states through that legislation. Congress should be allowed to experiment with ways to promote equality, liberty, and the benefits of national citizenship to the full extent of its enumerated powers as constrained by the amendments other than the Fourteenth, which is not a constraint on the federal power. As a part of its power, Congress must be able to enact the most effective remedy to accomplish its goals.

Legislation rather than judicial action promotes these goals best for a number of reasons. First, legislation is more flexible. One of the reasons the Court hesitates to acknowledge that some classes should get protection or that some

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> The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil . . . the charm of that Constitution lies in the great democratic ideals which it embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or state may rightfully take away.

Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 719 (2003) (quoting Cong. Globe, 35th Cong., 2d Sess. 985 (1859)).

145. THE FEDERALIST No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

146. Banks, *supra* note 6, at 465 (citing WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLES TO JUDICIAL DOCTRINE 80 (1988)). During and immediately after Reconstruction, the Court read this protection so narrowly that it nearly eviscerated the purpose of the amendments. *Id.* at 438-39.

147. This line of thought does get a bit complicated by the rights-based model we use for thinking about liberty and equality. In a rights based model, individual rights often conflict with one another. Race offers a good example of these kinds of conflicts. One of the reasons that racial classifications get strict scrutiny is that benefitting one race can be seen as harming all others. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

rights warrant protection is that once it does so, it cannot easily go back on its decision.[148] Congress, on the other hand, is free to repeal legislation so long as the rights it grants are not required by the Constitution. Second, the very reasons why Congress is the appropriate body to make policy and the Court is not, support that Congress should be given its full authority. The process of legislative factfinding and investigation allows a wider variety of information and views to be considered. Courts, on the other hand, are limited to the facts presented by particular cases before them and are allowed access to only certain types of information. Moreover, the wide access Congress has to more types of information make it easier for Congress to discern a pattern of troubling activity and work through the possible causes or potential ramifications of that activity. Courts can only hear cases, which must be presented in an adversarial setting, which must be brought under an already recognized cause of action, and which are brought only when the parties have resources sufficient to warrant the time, money, and energy it costs to litigate and appeal. Thus, courts simply cannot see trends the way Congress can.[149] Finally, Congress can engineer more social change because the remedies it can provide are general in nature not limited to a particular party from a particular case.

Not only is legislation the appropriate vehicle for experimenting with ways to maximize equality and liberty, but the federal legislature is in the best position to do so. First, as argued above, the Constitution values national citizenship, which suggests that maximum equality should be shared by all national citizens, which individual states cannot guarantee. Additionally, the Fourteenth Amendment tells us that the states cannot be trusted to maximize equality and liberty even for their own citizens. Moreover, because Congress is focused on the entire country, it has a much clearer view than the states can have of patterns of troubling activity. Finally, the interest of the states are adequately protected by the composition of Congress. While there might be some concern that since senators are popularly elected, rather than elected by the state legislature, they do not represent the states as states, the fact that each state has equal power within the Senate decreases the possibility that a tyrannical minority could

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148. In fact, when it comes to establishing fundamental rights, or the controversial concept of substantive due process, the Court may never be able to take away rights it has acknowledged. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (describing the hesitation the Court has to recognize previously unrecognized fundamental rights). Protected classes, on the other hand, may be more flexible, although it is difficult to say when a traditionally disempowered group might become empowered enough to no longer be a "discrete and insular" minority that requires protection from the majority. *See* Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

149. What is even more important for this context is that under the Court's current jurisprudence, Congress cannot enact remedial legislation unless the constitutional violations by the states are systematic and widespread. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 371-72 (2001). Because it is monumentally more difficult to detect a pattern of violations through adjudications, the Court will rarely if ever have institutional knowledge of a widespread pattern of constitutional patterns that under its test would warrant a more sweeping remedy than the Fourteenth Amendment already provides.

completely eviscerate the power of the states.[150]

This is not an argument that the states have no role in enhancing liberty or equality of the people, and it is not an argument that Congress' power to legislate should be unbridled. The argument is, instead, that analysis of civil rights legislation should focus on whether the legislation maximizes individual equality and liberty. Both the state legislatures and the federal legislature should be given the power to experiment with ways to maximize that equality and liberty. Moreover, the Supreme Court retains a role by declaring the minimum protection the Constitution requires. The federal legislature can enact protections above that minimum, whereby its enactments become the minimum protection of individuals. Above that, the states would be allowed to protect individuals to an extent further than Congress and the Federal Constitution both.

This conception of power to enact civil rights laws comports with institutional competencies of each branch and type of government and ensures a wide variety of experimentation. Additionally, it allows the widest latitude to experiment in protecting groups like gays and lesbians, or rights, like the right to die, that may not qualify for strict scrutiny under the constitutional analysis, but nonetheless warrant protection.[151]

In order to justify empowering Congress to promote a broader kind of liberty and equality than that minimum level required by the Constitution, scholars have generally looked to little-used sections of the Constitution that could be used to promote the values of national citizenship and equality, such as the Privileges and Immunities clause and the Ninth Amendment.[152] While these are valid and interesting arguments, there is no need to look beyond the Court's own language to find a way to resolve the issue. The Court has always said that the power to enforce the Constitution includes the power to deter constitutional violations. If

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150. This argument is certainly susceptible to the fact that federal lawmakers are subject to so much "special interest" lobbying that there is no way to ensure that they can know the will of the people. It is also vulnerable to the argument that once a person moves "within the beltway" in Washington, D.C., that person loses touch with the state and enters a kind of large-scale, group-think culture. However, state lawmakers are not immune from these exact attacks either. There is at least as much state-level lobbying as that present at the federal level, and state lawmaking occurs in state capitals, often far removed geographically and culturally from the people the state lawmakers represent.

151. In fact, the more such groups and rights can be protected by legislation, the less likely it is that the Court will have to step in at some point to recognize a new suspect class or new fundamental right.

152. *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 BYU L. REV. 351; William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235 (2001); Zietlow, *supra* note 144 (arguing that the Privileges and Immunities clause provides a source of individual rights); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000).

the Court simply gave force to its own language and considered that deterrence is a form of enforcement even when purely prophylactic, it could restore the proper balance of powers dictated by the Constitution.[153]

Deterrence is enforcement; that is nearly a tautology. Any action that would deter unconstitutional conduct enforces the Constitution. However, deterrence happens at a different point in time than does remedy. There must first be an ill in order to apply a remedy. Setting up the inquiry in this way requires the Court to determine whether there is really an ill in the first place. Requiring the Court to evaluate whether there is an ill has allowed it to determine whether the end deserves to be addressed by Congress. The Court, for the first time, can ask whether legislation is necessary at all, not just whether the particular mechanism created by the legislation is an appropriate means to serve the end Congress has chosen, and not just whether the legislation and the end Congress has chosen is within its power.

Deterrence, on the other hand, does not allow the Court to evaluate whether the end must be served. Rather, the Court is limited to looking at the particular mechanism the legislation creates and asking whether that mechanism could deter conduct that is within Congress' power to prohibit. Focusing on deterrence restores the means and ends test to its prior formulation by broadening the proportionality review to a rationality review, and it removes the Court's ability to examine the value of the end to be served.

Consider the example of disparate impact legislation. It is well established that actions which have a disparate impact even on a protected group do not themselves violate the Constitution.[154] However, prohibiting actions that had a disparate impact would tend to deter states from intentional discrimination. When a practice has a disparate impact, there is always the chance that the reason for it is some kind of unconscious or sublimated discriminatory belief. Making states liable for disparate treatment in employment would force them to determine whether the cause was actually unconscious or well-disguised animus toward a group, which would tend to root out more unconstitutional behavior. Similarly, legislatively protecting classes that are not suspect would tend to make the states focus more carefully on whether their classifications were based on real differences among classes or stereotypes.

Because these deterrents are clearly a way of guaranteeing the substantive rights to equality or liberty guaranteed by the Fourteenth Amendment, deterrence fits within the literal terms of Section 5. Because allowing Congress to deter potential constitutional violations rather than merely remedy existing widespread violations also better maximizes equality, liberty, and the benefits of national

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153. The Court stated prior to *City of Boerne* that Congress has the positive power to enact purely prophylactic legislation. Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989). It also held in *Morgan* that if the Court could perceive that Congress had a basis for its actions, the legislation in question should be upheld. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). In *City of Boerne*, the Court did not purport to overrule these cases. Rather, it suggested that *Morgan* limited Congressional action to that which was reasonably necessary to remedy a constitutional evil.

154. Washington v. Davis, 426 U.S. 229 (1976).

citizenship, it is the power the Court should look to in evaluating whether Congress is validly abrogating state sovereign immunity.

CONCLUSION

Despite the "sky-is-falling" tone of this Article, the reader may be left with a lingering feeling of, "so what?" The class of legislation affected by the Court's jurisprudence in this area is only a small proportion of the entire universe of litigation. For one thing, in the employment context, only about 3.4% of the workforce is employed by the states.[155] For another, individual state officers can still be sued for money damages, and under *Ex Parte Young*, state officers are subject to suits for prospective injunctive relief. Finally, the United States can always sue the states for money damages. But, the fact remains that the most effective deterrent is the private cause of action for money damages. Without that mechanism for enforcement, legislation will be mostly ineffective.

There is also a danger that Fourteenth Amendment restrictions will bleed into general antidiscrimination theory. If conduct is not bad enough to be the subject of Fourteenth Amendment legislation, maybe it is not something that needs to be regulated at all. Granted, Congress' power under Article I, which is the basis for all civil rights legislation that applies to private parties, is plenary rather than remedial. However, there is a certain expressive value to the Fourteenth Amendment. If that is gone, it will change how we and members of Congress think about equality.

In order to maximize equality and liberty and to protect the value of national citizenship, the Court should recognize that deterrence is a method of enforcing the Fourteenth Amendment. Doing so will restore Congress and the Court to their proper roles, and fulfill the promise of the Constitution for the individuals it is designed to protect.

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155. According to the Bureau of Labor Statistics of the Department of Labor, in 2000, 4,370,160 of the nations 129,877,063 workers were employed by state governments. http//:data.bls.gov.