FIXING FOURTEENTH AMENDMENT ENFORCEMENT POWER: AN ARGUMENT FOR A REBUTTABLE PRESUMPTION IN FAVOR OF CONGRESSIONAL ABROGATION OF STATE SOVEREIGN IMMUNITY

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INTRODUCTION

The Fourteenth Amendment, ratified in the wake of the Civil War, was a federal effort to protect newly freed slaves from states attempting to deprive them of the "due process of law" or the "equal protection of the laws."[1] Congress specifically reserved itself powers to enforce these rights through Section 5 of the Fourteenth Amendment.[2] One can imagine that Congress in the 1860s did not predict that the expansive protections of the Fourteenth

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[1] U.S. CONST. amend. XIV, § 1.

[2] *Id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

Amendment would be applied over the next 150 years to women,[3] same-sex intimate behavior,[4] the developmentally disabled,[5] and even hippies,[6] to name just a few categories. Yet, as the Fourteenth Amendment has evolved over time, more and more groups and activities have benefited from its protections.

In recent decades, however, there has been a judicial push to limit the scope of Congress's enforcement power under the Fourteenth Amendment.[7] One of the most notable examples of this trend is the 1997 case of *City of Boerne v. Flores*, in which the Supreme Court held that Congress acts within the scope of its enforcement power only if Congress's proposed remedy is "congruent and proportional" to the targeted violation of individual rights by state actors.[8] This test has dramatically increased judicial second-guessing of congressional factfinding and has sharply curtailed many important pieces of civil rights legislation. This test has also strongly affected the Court's treatment of state sovereign immunity; later cases such as *Board of Trustees of the University of Alabama v. Garrett*[9] demonstrate that the state sovereign immunity analysis depends heavily on the Fourteenth Amendment congruence and proportionality framework.

Because the Supreme Court extended the congruence and proportionality test to resolve the tension between sovereign immunity and the Fourteenth Amendment,[10] the Court has impeded the ability of the federal government to effect social change when the states are unwilling or unable to do so. This Note proposes a more deferential test to replace the congruence and proportionality framework. A new rebuttable presumption framework in favor of abrogation of state sovereign immunity would put Congress in its proper place as the guardian of individual rights when the states are unable or unwilling to act.

Part I of this Note explores the background behind the Court's sovereign immunity and Fourteenth Amendment jurisprudence. Part II then describes current problems with the congruence and proportionality test, including its troubling implications for separation of powers, its inconsistent application, and its frustration of congressional purpose. Finally, Part III advances a revised approach and describes its advantages over the congruence and proportionality

[3] *E.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996).

[4] *E.g.*, Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[5] *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985).

[6] Dep't of Agric. v. Moreno, 413 U.S. 528, 537-38 (1973).

[7] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (restricting Congress to protecting only those rights that are "congruent and proportional" to the protections of the Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 60-63 (1996) (prohibiting Congress from using its Commerce Clause powers to abrogate state sovereign immunity).

[8] *City of Boerne*, 521 U.S. at 530.

[9] 531 U.S. 356, 370-74 (2001) (refusing to abrogate state sovereign immunity because discrimination based on disability is subject to rational basis review).

[10] *See, e.g.*, *id.* at 374.

test. This Note concludes that the Court should abandon the congruence and proportionality test from *City of Boerne* and its progeny and adopt a rebuttable presumption test, thus returning to a deferential approach that nevertheless retains some space for state sovereignty.

I. THE CONGRUENCE AND PROPORTIONALITY TEST

State sovereign immunity generally bars any actions in federal court by private parties against state actors for monetary damages.[11] An exception occurs when Congress acts pursuant to its Section 5 power to enforce the Fourteenth Amendment's protections.[12] If Congress passes legislation under Section 5, Congress successfully abrogates a state's sovereign immunity against private suits for monetary damages only if Congress's statutory remedy is congruent and proportional to the targeted harm.[13]

Because state sovereign immunity functions as a bar to the effective deployment of Fourteenth Amendment protections, it is important to explain the principles and policies involved in the Court's approach to reconciling these two seemingly conflicting ideas. This Part first considers congruence and proportionality in the context of the Fourteenth Amendment. Next, the discussion turns to the impact of the tiers of scrutiny on congruence and proportionality. Finally, this Part concludes with an analysis of the

[11] To correct a common misconception, the Eleventh Amendment, which states that the "judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state," U.S. CONST. amend. XI, does not supply the source of state sovereign immunity. That is because sovereign immunity transcends the text of the Eleventh Amendment, coming instead from historical common law and the general structure of the Constitution. Hans v. Louisiana, 134 U.S. 1, 15-16 (1890) (concluding that sovereign immunity was a broader concept than what was envisioned in the plain text of the Eleventh Amendment); *see also* Alden v. Maine, 527 U.S. 706, 741 (1999) (analyzing sovereign immunity not based on the plain text of the Eleventh Amendment, but rather on the "history, practice, precedent, and the structure of the Constitution"); *Seminole Tribe*, 517 U.S. at 69 ("[B]lind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." (internal quotation marks and citations omitted)).

[12] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (explaining that Section 5 of the Fourteenth Amendment is an exception to state sovereign immunity because it is an affirmative grant of power authorizing Congress to enforce the Fourteenth Amendment with respect to the states). Of course, many other exceptions to the general sovereign immunity bar exist, such as suits against states in which the federal government is the plaintiff (for example, United States v. Mississippi, 380 U.S. 128 (1965)) or suits against state officials acting in their individual capacities (for example, *Ex parte* Young, 209 U.S. 123 (1908)). This Note only addresses congressional abrogation of state sovereign immunity under the Fourteenth Amendment enforcement power.

[13] *City of Boerne*, 521 U.S. at 520.

implications of state sovereign immunity on the congruence and proportionality test.

A. *The Scope of Congress's Fourteenth Amendment Enforcement Power*

Under the plain text of its Fourteenth Amendment enforcement power, "Congress shall have power to *enforce*, by *appropriate legislation*, the provisions" of the Fourteenth Amendment.[14] Since the adoption of the Fourteenth Amendment, the Supreme Court has struggled with defining the scope of this provision. Starting with the *Civil Rights Cases* in 1883, the Court placed substantial restrictions on Congress's enforcement power, requiring "any legislation by Congress . . . [to] be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws."[15] Moreover, the Court determined that Congress could only redress Fourteenth Amendment violations committed by state actors, not by private parties.[16]

In later cases, the Court evinced a broad interpretation of Congress's enforcement power. For example, in *Katzenbach v. Morgan*, the Court deployed Chief Justice Marshall's famous words from *M'Culloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end . . . are constitutional."[17] Under this *M'Culloch* "necessary and proper" approach, the Court viewed Congress's enforcement power as "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."[18]

In *City of Boerne*, however, the Court restricted the broad *M'Culloch* formulation to the current "congruence and proportionality" test.[19] Justice Kennedy, writing for the majority, rejected the enforcement provisions of the Religious Freedom Restoration Act (RFRA) because they exceeded the scope of Congress's enforcement power.[20] Justice Kennedy justified the congruence and proportionality test in several ways. First, Justice Kennedy argued that Congress's enforcement powers are powers to *enforce* the Fourteenth Amendment, not powers to alter its meaning.[21] According to the Court,

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[14] U.S. CONST. amend. XIV, § 5 (emphasis added).

[15] The Civil Rights Cases, 109 U.S. 3, 18 (1883).

[16] *Id.* at 11-12.

[17] Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)). This Note advocates a modified version of the *M'Culloch* "necessary and proper" test. *See* discussion *infra* Part III.

[18] *Katzenbach*, 384 U.S. at 651 (emphasis added).

[19] City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 117-18 (1999).

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

[21] *Id.* at 519.

Congress enforces the Fourteenth Amendment through narrowly targeted "remedial" or "preventive" legislation, not through a declaration of "what constitutes a constitutional violation."[22] In other words, Congress can only remedy or prevent Fourteenth Amendment violations; Congress cannot substantively change the scope of the Fourteenth Amendment through its enforcement power by passing legislation that defines a new set of constitutional rights.[23]

Second, Justice Kennedy reasoned that the Framers of the Fourteenth Amendment intended to create a balance between state and federal power.[24] During the debates over the passage of the Fourteenth Amendment, Ohio Representative John Bingham proposed the following language: "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State . . . equal protection in the rights of life, liberty, and property."[25] This broad language encountered much criticism from opponents, who complained that "all State legislation . . . may be overridden, may be repealed or abolished, and the law of Congress established instead."[26] Representative Bingham's proposal failed, and Congress ultimately adopted the Fourteenth Amendment that we know today.[27] According to Justice Kennedy, Representative Bingham's rejected proposal demonstrates that Congress considered, but ultimately rejected, a broader Fourteenth Amendment enforcement power.[28] Accordingly, under the Fourteenth Amendment enforcement power, "Congress' power was no longer plenary but remedial."[29]

Third, Justice Kennedy argued that existing case law supported the conclusion that Congress's Fourteenth Amendment enforcement power is limited in scope.[30] As early as the *Civil Rights Cases* in 1883, the Court recognized that Congress's enforcement power only encompassed "corrective legislation."[31] Despite the deferential *M'Culloch* interpretation used by the *Katzenbach* Court,[32] Justice Kennedy concluded that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation," because any legislation enforcing the Fourteenth

[22] *Id.* (internal quotation marks omitted).

[23] Such a formulation reaffirms the Court's disposition in the *Civil Rights Cases*. *See supra* notes 15-16 and accompanying text.

[24] *City of Boerne*, 521 U.S. at 524.

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

[26] *Id.* at 521 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866)).

[27] *Id.* at 522-23 (chronicling the defeat of Representative Bingham's proposed amendment).

[28] *Id.*

[29] *Id.* at 522.

[30] *Id.* at 525.

[31] The Civil Rights Cases, 109 U.S. 3, 13 (1883).

[32] *See supra* notes 17-18 and accompanying text.

Amendment must be "remedial."[33] Justice Kennedy justified *Katzenbach*'s result based not on the deferential *M'Culloch* test,[34] but rather on the nature of the Civil Rights Act of 1965 as a measure that remedied the ineffectiveness of existing voter rights legislation.[35]

To protect this remedial quality of Congress's enforcement power, Justice Kennedy advanced the "congruence and proportionality" test.[36] The test functions by distinguishing permissible "remedial" pieces of legislation from impermissible "substantive" pieces of legislation that alter the Fourteenth Amendment's meaning.[37] For legislation to be "congruent," there must be "a congruence between the means used and the ends to be achieved."[38] According to the Court, a statute is not congruent if, for example, it "applies uniformly throughout the Nation," while the targeted harm "does not exist in . . . even most States."[39] For legislation to be "proportional," a seemingly overlapping inquiry, there must be "appropriateness of remedial measures . . . in light of the evil presented."[40] For the proportionality aspect, "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[41] The resulting congruence and proportionality test has far-reaching impacts on Fourteenth Amendment claims, as it affects whether a statute passed under Congress's enforcement power may authorize a private suit for damages as an enforcement mechanism.

B. *The Tiers of Scrutiny and Their Effect on Congruence and Proportionality*

Underlying the congruence and proportionality test is a consideration of the tiers of scrutiny (that is, rational basis, intermediate scrutiny, and strict scrutiny) that the Supreme Court has applied to its analysis of constitutional violations. The Supreme Court will more likely find that a statute passed by Congress is a valid exercise of Congress's enforcement power if the targeted

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[33] *City of Boerne*, 521 U.S. at 518-19 (quoting U.S. CONST. amend. XIV, § 5).

[34] *Id.* at 517-19 (reasoning that, while the enforcement power is a "'positive grant of legislative power' to Congress," such power "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment" (alteration in original) (citations omitted)); *cf. id.* at 527-28 ("There is language in our opinion in *Katzenbach v. Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.").

[35] *Id.* at 528 (citing Katzenbach v. Morgan, 384 U.S. 641, 653 (1966)).

[36] *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

[37] *Id.* ("Lacking such [congruence and proportionality], legislation may become substantive in operation and effect.").

[38] *Id.* at 530.

[39] United States v. Morrison, 529 U.S. 598, 626 (2000).

[40] *City of Boerne*, 521 U.S. at 530.

[41] *Id.*

discrimination goes to the heart of the rights protected by the Fourteenth Amendment.[42] Where the Court has found a strong nexus between the rights guaranteed by the Fourteenth Amendment and the discrimination targeted by Congress, it applies heightened scrutiny to assess the validity of such discrimination in its congruence and proportionality analysis.[43]

This analysis of the levels of scrutiny emerged explicitly in the cases of *Nevada Department of Human Resources v. Hibbs*[44] and *Tennessee v. Lane*.[45] Both *Hibbs* and *Lane* involved situations in which the Court, faced with discrimination that required heightened scrutiny, upheld Congress's exercise of its Fourteenth Amendment enforcement power. In *Hibbs*, state employee William Hibbs sought unpaid leave under the Family and Medical Leave Act (FMLA).[46] The FMLA created a private right of action against state employers for monetary damages[47] should the employer "interfere with, restrain, or deny the exercise of" FMLA leave.[48] When the Department cancelled his FMLA leave and ordered him to return to work in November, Hibbs refused and was subsequently fired.[49] Hibbs sued his employer for monetary damages under the FMLA, and the employer raised state sovereign immunity as a defense.[50]

Explicit in *Hibbs* was the Court's analysis of the tiers of scrutiny. The FMLA "aims to protect the right to be free from gender-based discrimination in the workplace."[51] Such gender discrimination is subject to intermediate scrutiny; consequently, the Court would disallow private suits for monetary damages if the FMLA was not at least "substantially related" to the achievement of "important governmental objectives."[52] When creating the FMLA, Congress could not rely on "overbroad generalizations about the

[42] *See infra* notes 51-57, 65-69, and accompanying text. Some academics have argued, however, that the recent case of *United States v. Windsor*, 133 S. Ct. 2675 (2013), in which the Court struck down the Defense of Marriage Act but failed to place discrimination based on sexual orientation into a particular level of scrutiny, has distanced the congruence and proportionality analysis from the tiers of scrutiny. *See* William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 395 (2014).

[43] *See infra* notes 52, 67, and accompanying text.

[44] 538 U.S. 721, 736-37 (2003).

[45] 541 U.S. 509, 528-29 (2004).

[46] *Hibbs*, 538 U.S. at 725.

[47] 29 U.S.C. § 2617(a)(2) (2012) ("An action to recover [damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any . . . employees . . . .").

[48] *Id.* § 2615(a)(1).

[49] *Hibbs*, 538 U.S. at 725.

[50] *Id.*

[51] *Id.* at 728.

[52] *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)) (internal quotation marks omitted).

different talents, capacities, or preferences of males and females."[53] The Court, however, found ample evidence that Congress acted proportionately and impartially when passing the FMLA. For example, through the FMLA, Congress attempted to address the "stereotype-based beliefs about the allocation of family duties" that employers continued to rely on in "establishing [widespread] discriminatory leave policies."[54] Moreover, the Court determined that the gender-neutral nature of the FMLA "attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."[55] Therefore, this "across-the-board" remedy was Congress's way of ensuring that "family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees."[56] Accordingly, the FMLA was "congruent and proportional to its remedial object."[57]

In *Lane*, a paraplegic named George Lane faced criminal charges in Tennessee.[58] The Tennessee courthouse lacked an elevator. The first time he arrived at the courthouse, Lane crawled up two flights of stairs.[59] When Lane later returned to the courthouse for a hearing, Lane refused to crawl or be carried up the stairs.[60] After Lane was arrested for failure to appear, Lane counterclaimed against Tennessee for violations of Title II of the Americans with Disabilities Act (ADA).[61] Tennessee responded with a defense of sovereign immunity.[62] Justice Stevens, writing for the Court, held that Title II of the ADA, as applied to the right of access to the courts, was a congruent and proportional remedy to the pervasive discrimination against disabled people.[63] Consequently, as applied to the right of private access to courthouses, Title II of the ADA successfully abrogated Tennessee's state sovereign immunity against private suits for monetary damages.[64]

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[53] *Id.* at 729 (quoting *Virginia*, 518 U.S. at 533) (internal quotation marks omitted).

[54] *Id.* at 730.

[55] *Id.* at 737.

[56] *Id.*

[57] *Id.* at 740.

[58] Tennessee v. Lane, 541 U.S. 509, 513 (2004).

[59] *Id.* at 514.

[60] *Id.*

[61] *Id.* at 513. The relevant text of Title II reads, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2012).

[62] *Lane*, 541 U.S. at 514.

[63] *Id.* at 531.

[64] *See id.* at 533-34 ("[W]e conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.").

Also explicit in *Lane* was the Court's analysis of the tiers of scrutiny. Though rights based on disability receive rational basis review,[65] the rights in *Lane* implicated enumerated constitutional rights – namely, the fundamental Sixth Amendment right to be present at one's own criminal trial. Congress passed Title II of the ADA specifically to combat the "evidence of discrimination by the States against persons with disabilities" relating to "the provision of public services and public accommodations."[66] Thus, Congress designed Title II as a special provision to prevent exactly the kind of harm present in *Lane*: a violation of the Sixth Amendment right to access one's own court proceeding because of a state's failure to accommodate a disability reasonably. The Court, recognizing the fundamental constitutional right to be present at one's own criminal trial, determined that *Lane* triggered strict scrutiny.[67] Such strict scrutiny meant that the state bore a great burden to justify discriminatory treatment against disabled persons.[68] Accordingly, the Court concluded that Title II was congruent and proportional to the harm.[69]

The lesson that emerges from *Lane* and *Hibbs*,[70] then, is that the congruence and proportionality analysis is actually twofold. First, the Court identifies the

[65] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001); *id.* at 383 (Breyer, J., dissenting). In extraordinary circumstances, however, governmental classifications regarding mental handicap fail rational basis review when they are directed with animus toward the politically unpopular group. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985) ("[S]ome objectives – such as a 'bare . . . desire to harm a politically unpopular group' – are not legitimate state interests." (citations omitted) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))). The Court did not analyze *Lane* using standard rational basis or rational basis with bite, because *Lane* directly involved heightened scrutiny. *See infra* note 67 and accompanying text.

[66] *Lane*, 541 U.S. at 521.

[67] *See id.* at 510 ("[Title II] seeks to enforce a variety of other basic constitutional guarantees, including some, like the right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny.").

[68] *Id.* at 529.

[69] *Id.* at 533-34.

[70] Besides *Lane* and *Hibbs*, which explicitly upheld legislation as constitutional exercises of Congress's enforcement power under the Fourteenth Amendment, only one other recent case has suggested that one of Congress's actions was a constitutional use of its enforcement power. In *United States v. Georgia*, 546 U.S. 151, 155 (2006), the state denied a wheelchair-friendly prison cell to a paraplegic inmate. The inmate sued the state and its prison system under Title II of the ADA. *Id.* at 154-55. After the district court dismissed the case on sovereign immunity grounds, the federal government intervened to defend the constitutionality of Title II's abrogation of state sovereign immunity. *Id.* at 155. Justice Scalia, writing for the Court, determined that these violations of the Eighth Amendment were "actual" violations of the Fourteenth Amendment, since the Fourteenth Amendment's Due Process Clause incorporates the Eighth Amendment against the states. *Id.* at 158-59. Because of these actual violations of the fundamental right to be free from cruel and unusual punishment, the Court determined that Title II, as applied to suboptimal prison conditions, likely was congruent and proportional. *Id.* at 159 ("[I]nsofar as Title II creates a private

right protected by the statute and determines whether that right implicates rational basis, intermediate scrutiny, or strict scrutiny review.[71] Second, with this standard of review in mind,[72] the Court applies the *City of Boerne* test and decides whether Congress's action is congruent and proportional to the violation of the right.[73] Consequently, the more "heightened" the review, the more constitutionally fundamental the right is likely to be, and thus the more likely that the statute will be congruent and proportional to the targeted harm. If the statute is congruent and proportional to the harm, then the statute is a valid exercise of Congress's Fourteenth Amendment enforcement power, and private plaintiffs consequently can recover monetary damages from state actors under federal statutes that generate a right of action for Fourteenth Amendment violations.

C. *The Relationship Between State Sovereign Immunity and Congruence and Proportionality*

The presence of state sovereign immunity adds another wrinkle to the fabric, forcing the Court to add several steps to the analysis when legislation promulgated under the Fourteenth Amendment's enforcement power purports to abrogate state sovereign immunity. Because a private statutory right of action against state actors for monetary damages is one way of enforcing the guarantees of the Fourteenth Amendment, current law regarding state

cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."). Accordingly, the Court remanded the case to district court to determine the actual scope of the constitutional violations. *Id.* Notably, *Lane*, *Hibbs*, and *Georgia* are the only three modern cases in which the Court has approved (or has suggested its approval) of Congress's exercise of its Fourteenth Amendment enforcement power.

[71] *Lane*, 541 U.S. at 522 ("The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce . . . .").

[72] Other considerations include "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States." Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001). Notably, this "history and pattern of unconstitutional . . . discrimination" still implicitly involves the tiers of scrutiny. *Id.* For instance, in *Garrett*, the Court supported its holding by identifying discrimination based on disability as subject only to rational basis review. *Id.* at 366 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985)). Under rational basis review, a state's decision to discriminate based on "distinguishing characteristics" does not create a constitutional problem. *Id.* at 366-67 (citing *City of Cleburne*, 473 U.S. at 441). Thus, rational basis review, plus the lack of a "history and pattern of unconstitutional . . . discrimination," led the Court to conclude that "adverse, disparate treatment often does not amount to a constitutional violation where rational-basis scrutiny applies." *Id.* at 368, 370 (internal quotation marks omitted).

[73] *See Lane*, 541 U.S. at 530 ("The only question that remains is whether [the statute] is an appropriate response to this history and pattern of unequal treatment.").

sovereign immunity implicates the *City of Boerne* congruence and proportionality analysis for such private suits.[74]

Before a statute is subject to the congruence and proportionality analysis, the plaintiff challenging the statute must satisfy several gateway immunity requirements. First, Congress must make its intent to abrogate state sovereign immunity clear in the statute.[75] Second, Congress must use its Fourteenth Amendment enforcement power when attempting to abrogate state sovereign immunity.[76] Third, the private plaintiff must bring a suit against a state actor for monetary damages because injured parties may already sue state officials for prospective forms of relief to address violations of federal law.[77] If the plaintiff meets these gateway requirements, then the Court proceeds to the congruence and proportionality analysis in the context of state sovereign immunity.

In a telling show of the Court's recent stringent treatment toward Congress's enforcement power, *Lane*, *Hibbs*, and *United States v. Georgia* are the only three recent cases in which the Court has allowed Congress's abrogation of state sovereign immunity. In all other instances implicating sovereign immunity, the Court has prohibited Congress's enforcement scheme of allowing private plaintiffs to sue their states for monetary damages.[78] In many of these cases, the Court emphasized how important the levels of scrutiny were in its congruence and proportionality analysis.

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[74] *E.g.*, *Garrett*, 531 U.S. at 372 ("[T]he rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne* . . . ." (citation omitted)).

[75] *E.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (citing *Garrett*, 531 U.S. at 363) ("Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment."); *see also infra* note 165.

[76] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996) (prohibiting Congress from using its Commerce Clause powers to abrogate state sovereign immunity).

[77] *Cf. Ex parte* Young, 209 U.S. 123, 159-60 (1908) (holding that state sovereign immunity does not prevent private lawsuits for prospective relief against state officials acting in their individual capacity).

[78] *See, e.g.*, *Garrett*, 531 U.S. at 374 (disallowing damages recovery by a private plaintiff for disability discrimination because the lack of a "pattern of discrimination by the States" suggested that the statute was not congruent and proportional); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-85 (2000) (disallowing damages recovery by private plaintiff for age discrimination because mere rational basis review for age discrimination suggested that the statute was not congruent and proportional); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645-48 (1999) (disallowing damages recovery by private plaintiff for patent infringements because the lack of "'widespread and persisting deprivation of constitutional rights'" in patent law suggested that the statute was not congruent and proportional (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997))).

For example, in *Board of Trustees of the University of Alabama v. Garrett*, the plaintiff (Garrett) worked as a nurse for a state hospital.[79] Garrett became sick and took substantial time off from work;[80] the hospital thereafter removed Garrett from her position and reassigned her to a lower-paying position.[81] Garrett, unhappy with her new assignment, sued the University of Alabama under Title I of the ADA, which requires states to make reasonable accommodations for disabilities under certain circumstances.[82] The University of Alabama challenged Garrett's lawsuit based on sovereign immunity.[83] The Court held that Title I of the ADA does not successfully abrogate state sovereign immunity.[84] Discrimination based on disability only implicates rational basis review, since it is "entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities."[85] Moreover, even though Congress included specific, detailed, and thorough findings about employment discrimination through society in general, such evidence did "not deal with the activities of States."[86] Because the Court found that Title I's reach extended too broadly, given the discrimination it intended to remedy, the Court held that Title I[87] was not congruent and proportional to the targeted employment discrimination.[88] Consequently, Title I did not successfully abrogate state sovereign immunity.

The results of these post–*City of Boerne* precedents have been a noticeable curtailment of Congress's Fourteenth Amendment enforcement power. Pre–*City of Boerne* decisions, such as *Katzenbach v. Morgan*[89] and *Fitzpatrick v. Bitzer*,[90] held that Congress could allow private suits for monetary damages

[79] *Garrett*, 531 U.S. at 362.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 374.

[85] *Id.* at 370, 372.

[86] *Id.* at 369.

[87] Contrast the treatment of Title I of the ADA (analyzed facially in *Garrett*) with Title II of the ADA (analyzed as applied in *Lane*). Recall that the issue in *Lane* was not just disability discrimination in general, but rather the relationship of that discrimination to a much more important right: the fundamental right to be present at one's own criminal trial. Tennessee v. Lane, 541 U.S. 509, 533-34 (2004). The Court was much more willing to find congruence and proportionality for a fundamental right. *Id.* Clearly, however, the Court's treatment of disability discrimination in the absence of a special factor remains standard rational basis review. *Garrett*, 531 U.S. at 372-74.

[88] *Garrett*, 531 U.S. at 374.

[89] 384 U.S. 641, 650-51 (1966); *see also supra* notes 17-18 and accompanying text.

[90] 427 U.S. 445, 456 (1976) ("We think that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are

against states as a statutory enforcement mechanism. *City of Boerne* and its progeny clarified that Congress's authority to pass legislation under its enforcement power is not limitless, but rather restricted based on the importance of the right that Congress intended to protect.[91] The next Part considers whether this judicial imposition on Congress's enforcement power is workable or desirable.

II. THE PITFALLS OF THE CONGRUENCE AND PROPORTIONALITY FRAMEWORK

The congruence and proportionality framework unduly impedes the ability of Congress to protect individual rights when the states are unable or unwilling to do so. There are several significant problems with the congruence and proportionality test as it currently stands. First, the congruence and proportionality test creates separation of powers problems, as courts second-guess the well-supported findings of Congress. Second, the dueling as-applied and facial approaches to the congruence and proportionality analysis have created judicial and congressional uncertainty in the test's application. Finally, the potential stringency of the congruence and proportionality test contravenes the Fourteenth Amendment's purpose.

A. *Separation of Powers and Institutional Expertise*

Despite comprehensive, well-supported findings by Congress establishing the presence of pervasive discrimination against a specific group, the Court maintains the ability under the congruence and proportionality framework to disallow Congress from using private suits for monetary damages as an enforcement mechanism to guard against such discrimination. This power of judicial review, of course, is granted to the Court by *Marbury v. Madison*.[92] Congress's function, however, is to create laws,[93] and its expertise falls in this area. Section 5 of the Fourteenth Amendment, authorizing Congress to "enforce, by appropriate legislation," the due process and equal protection of law,[94] should allow Congress to remedy well-documented, pervasive discrimination. Indeed, when courts evaluate the normative wisdom of congressional action under the congruence and proportionality test, they would seem to be conducting "the sort of substantive policy judgment that they generally ought to avoid."[95]

constitutionally impermissible in other contexts." (internal quotation marks omitted)).

[91] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).

[92] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[93] U.S. CONST. art. I, § 1.

[94] *Id.* amend. XIV, § 5.

[95] Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 150 (2004); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) ("[G]overnmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts."); Araiza, *supra* note 42, at

Consider the Court's decision in *Garrett*, in which the Court acknowledged Congress's findings that the ADA was necessary to cure "serious and pervasive" discrimination against individuals with disabilities.[96] Such findings included information presented at thirteen congressional hearings, Congress's own experience garnered from similar civil rights legislation since the Civil Rights Act of 1964, and conclusions drawn by a special congressional task force that held hearings in every state and interviewed thousands of disabled individuals.[97] Additionally, Congress found that two-thirds of all working-age, disabled individuals were unemployed, even though a majority of those persons "wanted to, and were able to, work productively."[98] Congress concluded from these facts, quite reasonably, that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[99] Congress also found roughly 300 incidents where state governments *themselves* discriminated against disabled individuals.[100]

Despite these seemingly comprehensive congressional findings showing commonplace discrimination against disabled persons by state employers, the Court still held that Title I of the ADA did not successfully overcome state sovereign immunity.[101] The Court acknowledged the depth of Congress's findings, but reasoned that Congress had investigated discrimination by employers generally, not discrimination by state employers specifically.[102] Even though the Court identified many instances in the congressional record in which state employers were unwilling to provide reasonable accommodations as required by the ADA, it reasoned that such incidents, in the aggregate, "fall short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[103] The Court concluded that in the absence of such a pattern of *state* discrimination, the ADA constituted a

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[96] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369 (2001) ("Congress made a general finding in the ADA that 'historically, society has tended to isolate and segregate individuals with disabilities . . . .' The record assembled by Congress includes many instances to support such a finding." (citation omitted)).

[97] *Id.* at 377 (Breyer, J., dissenting) (highlighting the "vast legislative record documenting massive, society-wide discrimination against persons with disabilities" (internal quotation marks omitted)).

[98] *Id.* at 378.

[99] *Id.* (internal quotation marks and citation omitted).

[100] *Id.* at 379.

[101] *Id.* at 374 (majority opinion).

[102] *Id.* at 369-71 ("The record assembled by Congress includes many instances to support such a finding [of general societal discrimination]. But the great majority of these incidents do not deal with the activities of States.").

[103] *Id.* at 370.

disproportionate solution to the problem and thus did not successfully abrogate state sovereign immunity.[104]

Such reasoning is unconvincing at best. As Justice Breyer recognized in his dissent, the congressional record contained approximately 300 examples of discrimination by states against disabled persons in the employment context.[105] Additionally, Congress identified discrimination by state actors against disabled persons generally, including state-created barriers to voting, to accessing a public building, and to accessing important government services such as emergency responders, to name just a few.[106] Amidst congressional findings of pervasive societal discrimination, the record strongly suggested that these specific examples of discrimination by states as employers are representative of discrimination by states generally.[107] Furthermore, when such findings interact with the simple assumption that pervasive societal discrimination likely spills over into state employment,[108] one is hard-pressed to see how Congress's findings were inadequate to support the application of the ADA against state employers.[109] Finally, it is troubling that the Court required "extensive investigation of each piece of evidence," in effect requiring Congress to do its homework and "break down the record evidence, category

[104] *Id.* at 374.

[105] *Id.* at 379 (Breyer, J., dissenting).

[106] *Id.*

[107] *Id.* at 378 ("The powerful evidence of discriminatory treatment throughout society in general . . . implicates state governments as well, for state agencies form part of that same larger society.").

[108] *See id.* at 382 ("Congress could have reasonably believed that these examples represented signs of a widespread problem of unconstitutional discrimination.").

[109] As an additional example, consider *United States v. Morrison*, 529 U.S. 598 (2000), in which the Court acknowledged the "voluminous congressional record" of "pervasive bias in various state justice systems against victims of gender-motivated violence." *Id.* at 619-20. In that background, Congress passed the Violence Against Women Act (VAWA). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1796, 1941. Yet, despite these comprehensive congressional findings, the Court held that the VAWA was not congruent and proportional to the targeted bias because the VAWA substantively expanded the scope of the Fourteenth Amendment rather than remedying past discrimination. *Morrison*, 529 U.S. at 625-26 ("[T]he remedy is simply not 'corrective in its character, [adopted] to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.'" (citations omitted)). This is because the VAWA created criminal penalties for "individuals who have committed criminal acts motivated by gender bias," not for "any State or state actor." *Id.* at 626. As the dissent pointed out, however, such a private/public actor distinction breaks down when Congress's findings so clearly indicate that the VAWA was a "federal remedy to substitute for constitutionally inadequate *state remedies*." *Id.* at 665 (Breyer, J., dissenting) (emphasis added); *see also id.* ("[VAWA] intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy 'disproportionate'?").

by category."[110] Such a weighty requirement on Congress might also hinder legislators' incentives to propose and fight for some antidiscrimination statutes in the first place.[111] Despite Congress's sensible conclusions in light of overwhelming, comprehensive evidence, the Court now demands much more, despite Congress's expertise as a policymaker.[112]

Instead of protecting the interests of individuals, the Court seems to be injecting itself into legislative policy to protect the interests of the states. While the Court has the power to decide what the Constitution means,[113] the Court's restrictions in the Fourteenth Amendment context "has transformed Congress's role from a coequal branch warranting judicial deference to an entity charged with extensive factfinding responsibilities."[114] Such intervention raises separation of powers problems, especially when considering the courts' lack of expertise in the policy arena.[115] Even armed with substantial evidence of widespread discrimination, Congress may still not be able to legislate effectively because of the Court's "new heightened review" of Congress's factfinding process.[116]

Judicial micromanagement of Congress's factfinding is undesirable for several reasons. First, Congress has an advantage in both information and expertise. Congress collects information through multiple informal channels, especially when speaking with constituents or consulting with executive

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[110] *Garrett*, 531 U.S. at 380 (Breyer, J., dissenting).

[111] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985) ("[M]erely requiring the legislature to justify its efforts in these [heightened] terms may lead it to refrain from acting at all.").

[112] *Cf.* Tennessee v. Lane, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting).

[113] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[114] Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 115-16 (2001); *see also Lane*, 541 U.S. at 558 (Scalia, J., dissenting) ("[The congruence and proportionality test] casts this Court in the role of Congress's taskmaker. Under it, the courts . . . must regularly check Congress's homework . . . . As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government.").

[115] *See, e.g.*, *Garrett*, 531 U.S. at 388-89 (Breyer, J., dissenting) ("The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress."); Young, *supra* note 95, at 150 ("[T]he courts would seem to be making the sort of substantive policy judgment that they generally ought to avoid.").

[116] *E.g.*, Colker & Brudney, *supra* note 114, at 115-16; *see also* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 477 (2000) ("Yet *Morrison* uses the congruence and proportionality test to fasten tight restrictions on the exercise of otherwise legitimate Section 5 legislation, restrictions that seem analogous to the narrow tailoring required by strict scrutiny. We know of no other positive constitutional grant of power to Congress that is treated with such suspicion and hostility by the Court.").

branch members.[117] Congress also collects information through structured formal channels, such as conducting hearings or assembling special task forces.[118] Together, "the capacity to gather and evaluate information in both structured and informal settings, contributes to a distinctive Section 5 [advantage] for Congress."[119] The result of decisions such as *Garrett* "highlights the Court's unwillingness to recognize or respect how Congress educates itself about matters of public concern."[120] The Court went beyond simply interpreting the meaning of the Fourteenth Amendment; instead, the Court's refusal to accept Congress's comprehensive factfinding injected the Court into the policymaking arena by micromanaging Congress's recordkeeping and normative policy judgments.[121]

Second, congressional action in response to well-supported findings of discrimination promotes political accountability and the democratic process. Congress, when passing legislation dealing with civil rights issues, responds to public discourse and constituent needs.[122] The interaction between constituents, interest groups, and members of Congress "contributes importantly to the legitimacy of the lawmaking process, and helps explain the presumption of judicial deference to the final product."[123] In the context of civil rights legislation, especially, Congress should take the lead role in identifying and remedying pervasive discrimination.[124] The Court, in contrast,

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[117] Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, *in* KNOWLEDGE, POWER AND THE CONGRESS 99 (William H. Robinson & Clay H. Wellborn eds., 1991) (identifying constituent complaints, local news, executive agency information, and private lobbyist meetings as informal information-gathering channels for the legislature).

[118] Colker & Brudney, *supra* note 114, at 118.

[119] *Id.* at 117.

[120] *Id.* at 118.

[121] *See id.* ("The Court . . . was unwilling to accord meaningful recognition to Congress's special legislative competence in identifying this threat to equality and then acting to limit its consequences."). Some academics have suggested that the Court has redefined the relationship between Congress and the Court. *See, e.g.*, Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2363 (2003) (analogizing the congruence and proportionality test to "a new and substantial hurdle" to congressional action, "much in the way that use of a racial classification triggers strict scrutiny").

[122] Colker & Brudney, *supra* note 114, at 119 ("Congress seeks to inform the public (and key interested subgroups), thereby helping to shape public discourse. It also tries to respond to agendas promoted by these same interest groups, thereby reacting constructively and responsibly to the problems that groups identify.").

[123] *Id.*; *accord id.* ("The Court's insistence on a type of pristine substantial evidence approach slights another of Congress's distinctive institutional virtues – the politically accountable nature of its record building enterprise." (internal quotation marks omitted)).

[124] *See id.* at 120 (recognizing "the politically accountable nature of its record building enterprise" as one of Congress's distinct institutional advantages); John E. Nowak, *The*

is an insulated branch that does not respond to constituent pressure and is thus less accountable to the people.[125] The concern, then, is that an unelected branch of government "will erect rigid principles of federalism ill-suited to a changing society."[126]

B. *Administrability for Congress and the Lower Courts*

The *City of Boerne* opinion typifies a Court that has been protective of states' rights in recent years.[127] The resulting congruence and proportionality test has a distinctive heightened flavor, imposing demanding factfinding burdens on Congress when passing Fourteenth Amendment legislation.[128] Ultimately, through *City of Boerne*, the Court "narrowed the nation's power," allowing states to violate Fourteenth Amendment protections,[129] only to raise their sovereign immunity shields when injured plaintiffs arrived on courthouse steps. Later cases have toyed with the *City of Boerne* formulation to arrive at divergent and arbitrary interpretations of Congress's enforcement power. Whereas some cases use a restrictive "facial" approach, analyzing congruence and proportionality in the context of the entirety of a statute, other cases use a lax "as-applied" approach, analyzing congruence and proportionality in the context of subparts or specific applications of a statute.[130] Both these approaches are problematic for injured plaintiffs and difficult for lower courts to apply.

Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 COLUM. L. REV. 1413, 1441 (1975) ("Congress is the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels.").

[125] *See* Colker & Brudney, *supra* note 114, at 120 ("[The Court's] own role under Section 1 of the Fourteenth Amendment is fundamentally antidemocratic and should be invoked with caution."); Nowak, *supra* note 124, at 1441 ("The federal judiciary . . . is insulated from the influence of the states. Neither the federal nor state government has any practical recourse from an adverse ruling by the Court limiting or expanding congressional power and affecting the delicate balance between federal and state powers.").

[126] Nowak, *supra* note 124, at 1441; *see also* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) ("American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.").

[127] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (limiting Congress's Fourteenth Amendment enforcement power); United States v. Lopez, 514 U.S. 549, 564 (1995) (limiting Congress's commerce clause power); New York v. United States, 505 U.S. 144, 175-77 (1992) (limiting Congress's ability to influence state actors through federal policies).

[128] *See* discussion *supra* Part II.A.

[129] JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER 156 (2002) ("The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation's power.").

[130] *See infra* notes 131-41 and accompanying text.

The potential stringency of the *City of Boerne* test emerged in *United States v. Morrison*, a facial challenge that resulted in the Supreme Court holding that the Violence Against Women Act (VAWA) was an unconstitutional exercise of Congress's Fourteenth Amendment enforcement power.[131] The Court reached this conclusion despite the mountain of congressional findings indicating that there was a pattern of pervasive discrimination against women who had suffered from gender-motivated violence.[132]

The Court concluded that the VAWA was not congruent or proportional to the targeted harm of gender discrimination.[133] The Court did not adequately explain why the VAWA failed as a remedial measure under *City of Boerne*; after all, a new right of action created by Congress and addressing past harm is inherently "remedial" regardless of whom the plaintiff sues.[134] More importantly, the VAWA created a right of action against both individuals and state actors who committed violent acts motivated by gender bias, rather than only state actors.[135] Since the VAWA's right of action applied against both state and private defendants, the federalism concerns that circulated through the *City of Boerne* decision did not apply as strongly to the VAWA.[136] Even though private parties would bear the brunt of the statutory costs of compliance as defendants in VAWA actions, the Court still held that the VAWA failed the *City of Boerne* test. *Morrison* calcified the *City of Boerne* analysis by redeploying the congruence and proportionality test in a facial and restrictive

[131] United States v. Morrison, 529 U.S. 598, 627 (2000). The Court also concluded that the VAWA could not be sustained under Congress's commerce power. *Id.*

[132] *See id.* at 619-20 ("[P]ervasive bias in various state justice systems against victims of gender-motivated violence . . . is supported by a voluminous congressional record.").

[133] *Id.* at 626.

[134] *Id.* at 665-66 (Breyer, J., dissenting); Post & Siegel, *supra* note 116, at 508-09 ("The *Boerne* test [postulates] that the proper role of the federal government is to 'remedy' infringements of Section 1 . . . . *Morrison* is decided on the assumption that [the VAWA] is properly remedial within the meaning of *Boerne* . . . ."); *id.* at 477 ("*Morrison* thus employs the congruence and proportionality test to impose limitations on Section 5 legislation that both *Boerne* and *Kimel* would deem properly remedial.").

[135] *Morrison*, 529 U.S. at 625-26 (majority opinion).

[136] *See id.* at 665 (Breyer, J., dissenting) ("[The VAWA] intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example."). The majority attempted to fold federalism back into the *Morrison* discussion by treating Congress's Fourteenth Amendment enforcement power as implicating federalism concerns directly. *See id.* at 620 (majority opinion) ("These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."); Post & Siegel, *supra* note 116, at 483 ("*Morrison*'s discussion of Section 5 is impatient and filled with suspicion. Although every exercise of every federal power can be said in some sense to subtract from the reserved domain of State legislation, the Court clearly perceives Section 5 power as especially troublesome in this regard . . . ." (internal quotation marks omitted)). But, when states bear little of the direct costs of statutory compliance, federalism cannot be a central justification.

way "to express some other view about the appropriate role of Congress in using Section 5 power."[137] Consequently, *Morrison* can be read as one of the most restrictive cases regarding Congress's ability to exercise its Fourteenth Amendment enforcement power.

More recent cases decided by the Court have watered down *Morrison*'s strict requirements, resulting in much confusion over the strength and application of the current congruence and proportionality test. This watering down takes the form of an as-applied, rather than facial, analysis: instead of considering the *totality* of the statutory scheme, the Court's recent cases have only analyzed certain *subsets* of the statutory scheme to determine whether these subsets are congruent and proportional to the targeted harm.[138] This approach weakens what was once a very stringent standard for Congress to meet – the as-applied approach does not consider the full scope of the congressional remedial scheme targeted against the discrimination and thus artificially deflates the scope of the congressional action.[139] Congress could conceivably circumvent the stringent *City of Boerne* standard by enacting broad, prophylactic legislation and then relying on the courts "to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States."[140] Such a fungible formulation could allow the Court to turn any state action into a Fourteenth Amendment violation.[141]

For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[142] the Court refused to abrogate state sovereign immunity for unremedied patent infringements by states under the *City of Boerne* "facial" framework. Chief Justice Rehnquist argued in his *Lane* dissent that if the *Florida Prepaid* Court had used an as-applied framework focused only on "intentional, uncompensated patent infringements," the Court could have plausibly upheld the statute as congruent and proportional to the targeted

[137] Post & Siegel, *supra* note 116, at 509.

[138] *E.g.*, Tennessee v. Lane, 541 U.S. 509, 533-34 (2008) ("We conclude that Title II, *as it applies* to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." (emphasis added)).

[139] *Id.* at 551-52 (Rehnquist, C.J., dissenting) ("Our § 5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce.").

[140] *Id.* at 552; *see also* Michael J. Neary, Note, *Reversing a Trend: An As-Applied Approach Weakens the* Boerne *Congruence and Proportionality Test*, 64 MD. L. REV. 910, 942 (2005) (arguing that the as-applied approach in *Lane* "has the potential to nullify the limitations placed on Congress" by the stringent *City of Boerne* formulation).

[141] *Lane*, 541 U.S. at 551 (Rehnquist, C.J., dissenting) (expressing reservations about an as-applied approach, because its effect "is to rig the congruence-and-proportionality test by artificially constricting the scope of the [congressional action] to closely mirror a recognized constitutional right").

[142] 527 U.S. 627, 639-41 (1999).

harm of "intentional, uncompensated patent infringements."[143] Thus, the as-applied flavor of congruence and proportionality introduces "further uncertainty into an already muddy test."[144]

Though the as-applied approach grants Congress more constitutional flexibility in passing Fourteenth Amendment legislation by weakening the congruence and proportionality test, such flexibility is too broad, too arbitrarily applied, and too capable of being abused by parties or judges.[145] In addition, the as-applied approach still carries over past problems: for a test that claims to balance state versus federal interests optimally, the congruence and proportionality test, with its facial and as-applied flavors, seems to ignore federalism altogether.[146] The facial formulation boldly ignores important congressional findings of fact that are essential prerequisites for any bona fide federalism analysis.[147] And the as-applied approach also ignores federalism's balancing act because it creates a fungible analysis that allows courts to arbitrarily "sort out which hypothetical applications of [a broad] undifferentiated statute . . . may be enforced against the States."[148] More importantly, the as-applied approach leaves it in the discretion of district courts to identify the relevant statutory provisions for its congruence and proportionality analysis. District courts are consequently left in a conundrum; they can apply the strict flavor of the congruence and proportionality test, or they can choose a statutory provision and analyze it, as applied, to arrive at a

[143] *Lane*, 541 U.S. at 552 (Rehnquist, C.J., dissenting).

[144] *The Supreme Court, 2003 Term – Leading Cases*, 118 HARV. L. REV. 248, 267-68 (2004).

[145] *See supra* note 143 and accompanying text (describing Chief Justice Rehnquist's reservations about *Lane*'s as-applied approach, because such an approach has the potential of turning any congressional action into congruent and proportional Fourteenth Amendment action). Chief Justice Rehnquist's concerns are particularly valid, especially since *Lane*'s calculation of the proper "scope" of the congressional action was rather arbitrary.

[146] *Cf. Lane*, 541 U.S. at 552 (Rehnquist, C.J., dissenting) ("If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, [the *City of Boerne* line of] cases might have come out differently. . . . I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations.").

[147] *See* Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1035 (2003) ("In general the Court has ignored the facts of the particular cases, assessed the challenged legislation without regard to its appropriateness as applied to the state action in question, and announced holdings that exceeded the scope of the plaintiffs' original claims."). In particular, the Court's disregard for the factual findings of Congress cast doubt over what balancing (apart from the indirect balancing in the congruence and proportionality test) the Court actually performs in an area as critical as Fourteenth Amendment legislation. *See* discussion *supra* Part II.A.

[148] *Lane*, 541 U.S. at 552 (Rehnquist, C.J., dissenting); *see also id.* at 557-58 (Scalia, J., dissenting) ("The 'congruence and proportionality' standard . . . is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.").

result that Congress did not intend, or a result that Congress explicitly disavowed. In this sense, the consequences of the facial and as-applied approaches are too restrictive and too broad, respectively.

C. *The Purpose of the Fourteenth Amendment*

The Framers intended the Fourteenth Amendment enforcement power to be broad in scope. Consider, for example, the comprehensive legislative discussions regarding Congress's ability to supersede state laws through its Fourteenth Amendment enforcement power.[149] After Ohio Representative John Bingham proposed a version of the Fourteenth Amendment aimed at protecting the "natural rights of citizens" by guaranteeing federal supremacy in the area of civil rights legislation, the opposition quickly criticized the proposal as granting the federal government too much power over states.[150] Professor Nowak points out that the vast majority of Republicans in Congress at the time believed that strong federal power in the field of civil rights would operate "for the good of the republic," and that the Fourteenth Amendment enforced "natural law" that "no state could deny and [that] Congress was required to protect."[151] Thus, Justice Kennedy's view in *City of Boerne* that Representative Bingham's failed proposal suggests that Congress intended to limit its own Fourteenth Amendment power is relatively unpersuasive. The more plausible rationale for the rejection of Representative Bingham's proposal is that the proposal was simply unnecessary, especially when "the vast majority of the 39th Congress went on record as believing that Congress had the right to enlarge the scope of federal court jurisdiction in order to protect civil rights."[152]

Furthermore, Congress at the time passed two pieces of legislation that expanded federal court jurisdiction and survived the vetoes of President Johnson.[153] This record demonstrates that "Congress had no intention of denying itself full power to use federal courts to enforce the fourteenth amendment."[154] This strong congressional statement in favor of expanded

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[149] Nowak, *supra* note 124, at 1460-62 ("[M]ost of the debate concerning the substantive provisions related to the great power that they would give Congress to supersede state laws and the resulting modification of the principles of federalism as they had been understood in pre-war times."). For the opposing argument regarding the legislative history and intent of the Fourteenth Amendment, see *supra* notes 25-29 and accompanying text.

[150] *See, e.g.*, Nowak, *supra* note 124, at 1460-62 ("Secretary Browning focused his opposition to section one of the amendment on the fact that it would make the federal legislature, as well as the federal judiciary, supreme over the states.").

[151] *Id.*

[152] *Id.* at 1463-64 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1064, 1090, 2461-62, 2465, 2502, 2538 (1866)).

[153] *Id.* at 1463 (citing Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866); and Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27 (1866)).

[154] *Id.* at 1464.

federal jurisdiction to adjudicate Fourteenth Amendment cases provides additional support for the conclusion that Fourteenth Amendment enforcement power was intended to be broad in scope. Moreover, recall that the Fourteenth Amendment's purpose was to fundamentally alter the balance of power between the federal government and the states.[155] Because Congress's ability to effectuate the protections of the Fourteenth Amendment comes from its enforcement power, an extremely narrow reading of this power, such as the one evinced in *Morrison*,[156] circumvents Congress's ability to effectuate the protections of the Fourteenth Amendment in practice and belies the amendment's very purpose.

There is no compelling reason, grounded in constitutional structure, common law, or otherwise, for the current expansive reading of state sovereign immunity in light of the Fourteenth Amendment enforcement power's broad scope and purpose to remedy pervasive discrimination in society. When combined with the problems associated with the Court's current narrow reading of the Fourteenth Amendment enforcement power, citizens harmed by illegal state actions are left with little avenue for redress. Consequently, current jurisprudence threatens not only the force of antidiscrimination legislation, but also "the integrity and possibly the stability of our legal system"[157] as private citizens lose faith in the ability of our courts to enforce the most basic of our constitutional rights. Even worse, when Congress is faced with such uphill battles in the courts, where even well-supported factual findings may not be sufficient, "requiring the legislature to justify its efforts in these terms may lead it to refrain from acting [to pass antidiscrimination legislation] at all."[158] With these considerations in mind, this Note now turns to proposing a new approach that safeguards important Fourteenth Amendment protections while preserving state sovereignty in appropriate contexts.

III. FIXING FOURTEENTH AMENDMENT ENFORCEMENT POWER

Instead of the Court's current approach of second-guessing Congress, this Note advocates a deferential approach to judicial review of legislation enforceable through Congress's Section 5 power. The Supreme Court should abandon the congruence and proportionality test, in both its restrictive *City of Boerne* flavor and its fungible and arbitrary "as-applied" flavor as evinced in *Lane* and later cases. Instead, the Court should readopt a revised *M'Culloch*-

[155] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 255 (1995) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident.").

[156] *See* discussion *supra* Part II.B.

[157] William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1131 (1983).

[158] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985).

style test that facilitates judicial deference toward congressional findings of fact.

A. *A Rebuttable Presumption in Favor of Abrogation*

In practice, this approach would work as a rebuttable presumption framework. One can imagine a plaintiff coming into court, demanding monetary compensation from a state defendant for violations of federal law under a statutory right of action passed through Congress's enforcement power. The state defendant would then respond with a defense of sovereign immunity. In this situation, the threshold consideration should be whether the plaintiff can demonstrate that Congress has clearly (1) identified what Congress believes to be a Fourteenth Amendment violation committed by state actors, and (2) intended to correct such harm using its enforcement power. Once the private plaintiff satisfies this threshold requirement of a clear statement, the plaintiff would have the burden of demonstrating that Congress, through its factfinding – using information assembled through congressional hearings, studies, task forces, and the like – *could have rationally believed* that its statutory scheme was "appropriate" and "plainly adapted" to remedy the specific Fourteenth Amendment violation alleged by the plaintiff. The private plaintiff's burden would be a low standard, since the enforcement power "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."[159] For example, Congress should never need to prove discrimination by every state, or even a majority of states, under this framework; the relevant consideration for this low standard should not be who is discriminating,[160] but rather whether Congress could have rationally determined that its statutory scheme was necessary and proper to remedy Fourteenth Amendment violations committed by state actors.[161]

If the private plaintiff succeeds in demonstrating these low threshold requirements, then Congress's findings regarding Fourteenth Amendment violations should be presumed accurate, and Congress's statutory scheme abrogating state sovereign immunity against private suits for monetary damages should prevail.[162] This presumption can be rebutted only in the

[159] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

[160] *See* United States v. Morrison, 529 U.S. 598, 666 (Breyer, J., dissenting) ("This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution.").

[161] *See Katzenbach*, 384 U.S. at 650 ("'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 . . . are constitutional.'" (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819))).

[162] This presumption intends to resolve cases efficiently and expediently at the summary judgment stage, since factfinding regarding the plaintiff's injury, the defendant's purportedly illegal actions, and congressional findings should already be complete;

exceptionally rare circumstances that (1) Congress, based on its factfinding, could not have possibly arrived rationally at the conclusion that its statutory scheme was "appropriate" and "plainly adapted" (in other words, "necessary and proper") to remedy Fourteenth Amendment violations; or (2) the burden on states in being subject to private suits for monetary damages or in complying with federal law would be imminent, concrete, and overbearing.[163] The state defendant bears the burden of proving the requirements of these grounds for rebuttal.

It should be noted that these two grounds for rebuttal must be applied exceedingly sparingly. For the first ground, a court would be inherently interjecting itself into the policymaking expertise of Congress should the court find that Congress could not possibly have rationally arrived at its conclusion. This ground, consequently, should almost *never* be invoked.[164] There are certain situations, however, in which the second ground should provide a stronger check against congressional overreaching. To be sure, courts should still be wary of using this second exception – a court would also inherently

consequently, the district court would be faced only with a matter of law. *See, e.g.*, FED. R. CIV. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

[163] This standard returns the courts to an approach that is stricter than the *M'Culloch* framework, where courts defer to Congress's discretion in recognizing and remedying Fourteenth Amendment violations as long as Congress's means are "appropriate" and "plainly adapted" to the targeted ends, but still broader than the *City of Boerne* framework. *Cf. Katzenbach*, 384 U.S. at 650 (quoting *M'Culloch*, 17 U.S. (4 Wheat.) at 421); *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1197 (2001). This Note gives meaning to and places concrete limits on *M'Culloch*'s "necessary and proper test," as this Note details a mechanism whereby courts can adjudicate such disputes using more defined standards. The rebuttable presumption also benefits from a better balance between states' rights and judicial deference. *M'Culloch*'s "necessary and proper" nexus may still be deployed in an overly narrow way; under the *M'Culloch* approach, a judge might find the ends legitimate, but still wiggle out of deferring to Congress's judgment because he thinks the method of achieving the ends is disproportionate. *M'Culloch*'s means-ends nexus may also be deployed in an overly broad way, harming states' rights. Under the *M'Culloch* approach, a judge might find the ends legitimate, but approve too broad of a means to arrive at the ends, because the *M'Culloch* approach contains no meaningful limitations or guidance for lower courts in its application besides a vague balancing act.

[164] Another reason for the restrictiveness of this ground is that Congress's mistakes will become apparent when the plaintiff produces evidence (or lack thereof) to satisfy her burden of proof. If Congress has not collected a sufficient factual record, then the plaintiff fails to gain a presumption in favor of abrogation, and the suit should be dismissed before it even reaches the rebuttal stage. *See* discussion *infra* Part III.B.

interject itself into Congress's policymaking expertise using this approach because Congress must abrogate state sovereign immunity via a clear statutory statement.[165] Consequently, the statutory language *itself* reflects Congress's policy judgment that the federal interest in preventing the targeted state discrimination outweighs the costs on states of compliance or damages suits.

Under this second ground for rebuttal, courts might find guidance from other areas of constitutional law, such as the state commandeering context. For example, in *National Federation of Independent Business v. Sebelius* (*NFIB*), the Court found that Congress conditioning "over 10 percent of a State's overall budget" on state compliance with federal law constituted "economic dragooning" in the Spending Clause context.[166] Ignoring the coercion analysis and transplanting this *NFIB* cost into the Fourteenth Amendment context, imagine a scenario in which the expected costs of compliance with federal laws or liability from private suits approach this *NFIB* cost. This cost would be sufficiently imminent and concrete, since states would have otherwise been subjected to these expected costs without a court invoking this exception.[167] This cost would also be overbearing, as ten percent of a state's budget is clearly domineering. This is an obvious case where this ground for rebuttal should be invoked. In closer cases, however, the strong presumption should be in favor of judicial deference to Congress's statutory scheme. Under this ground for rebuttal, courts should allow defendants to rebut a presumption in favor of abrogation only in the exceptionally rare circumstance that Congress has created a truly prejudicial statute, and not when courts disagree with the normative rationale for congressional policy.

This approach departs from the congruence and proportionality test's current focus, which is whether the discrimination fits snugly within the confines of Fourteenth Amendment protections, a rather stricter approach than a rebuttable presumption.[168] Through this rebuttable presumption mechanism, courts will

[165] *See* Sossamon v. Texas, 131 S. Ct. 1651, 1661 (2011) ("The requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter. Without such a clear statement from Congress . . . , federal courts may not step in and abrogate state sovereign immunity." (citing Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005))); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996) ("Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'" (citation omitted)).

[166] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604-05 (2012).

[167] The requirements of "imminent" and "concrete" cost can be analogized to a substantially relaxed injury-in-fact requirement for standing, and are not designed to be difficult for state defendants to prove. The difficulty for state defendants, however, should lie in proving that the imminent and concrete cost is *overbearing*. This will be the primary issue for determination in most cases implicating this second ground for rebuttal.

[168] *See* Katz, *supra* note 121, at 2363 (characterizing the congruence and proportionality test's current formulation as an extremely difficult burden for plaintiffs to meet); Post & Siegel, *supra* note 116, at 477; Matthew D. Taggart, *Title II of the Americans with*

avoid the *Morrison* and *Garrett* quagmire of brazenly ignoring well-supported congressional findings of fact.[169] The mechanism also promotes compliance with federal laws and reduces enforcement costs imposed on the federal government. Though sovereign immunity is an essential element in our federal-state balance of power, private actions against state governments are critical to enforce federal laws effectively and efficiently. Otherwise, the federal government would be erroneously trusting the "good faith of state governments" to enforce the protections guaranteed by the Fourteenth Amendment,[170] or expending exorbitant amounts of time, resources, and energy into policing state compliance. For example, many state governments, if left on their own, might simply ignore a federal law that prohibited discrimination against sexual orientation out of animus; the Court's congruence and proportionality jurisprudence provides these states with a potent defense against suits for monetary damages brought by injured individuals. Victims of state-based discrimination have already felt the harm that comes from state failures to enforce federal law.[171] To make matters worse, a broad reading of sovereign immunity effectively forecloses plaintiffs from their day in court because plaintiffs would have no redress under federal (or state) laws.[172]

Disabilities Act After Garrett*: Defective Abrogation of Sovereign Immunity and Its Remedial Impact*, 91 CALIF. L. REV. 827, 844 (2003).

[169] *See, e.g.*, Post & Siegel, *supra* note 116, at 479-81.

[170] Chemerinsky, *supra* note 126, at 1212 ("Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law? . . . To rely on the trust in the good faith of state governments is no assurance of the supremacy of federal law at all.").

[171] The congruence and proportionality cases arising under the ADA or ADEA provide some examples of harm coming to plaintiffs harmed directly by illegal state action. *See* discussion *supra* Part I.

[172] Not only would plaintiffs fail to attain redress for constitutional violations in federal courts due to the *City of Boerne* line of cases, which prevent plaintiffs from receiving monetary damages against states in federal suits, but plaintiffs would also fail in state courts because "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation," absent any state waiver. Alden v. Maine, 527 U.S. 706, 754 (1999). The other alternatives for such plaintiffs might be an *Ex parte Young* or 42 U.S.C. § 1983 action, but the use of these alternatives is heavily restricted. *See, e.g.*, City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005) (preventing the plaintiff from using § 1983 if plaintiff possessed an alternative private right of action granted by statute); Gonzaga Univ. v. Doe, 536 U.S. 273, 285-86 (2002) (citing Alexander v. Sandoval, 532 U.S. 275, 289 (2001)) (preventing the plaintiff from using § 1983 if Congress did not expressly confer a personal right in the statute); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (preventing the plaintiff from using *Ex parte Young* for state officials' violations of *state* law); Edelman v. Jordan, 415 U.S. 651, 677 (1974) (preventing the plaintiff from using *Ex parte Young* to recover retrospective relief (that is, monetary damages) against state officials).

Additionally, allowing plaintiffs to win monetary damages in suits against noncompliant states is "often essential to ensuring accountability" because the actual existence or mere threat of these suits creates incentives for state governments to follow federal law.[173] Moreover, the possibility of winning monetary damages encourages plaintiffs who might otherwise be indigent to sue to address state violations. Damages also create efficiencies in the enforcement of federal law because the federal government does not need to seek violations of federal law actively. Instead, the federal government may defer investigative work to private citizens,[174] intervening when a private citizen, through a court action or administrative complaint, alerts the government to a possible compliance problem.[175]

As an example of this rebuttable presumption in action, consider the VAWA in *Morrison*, in which the Court refused to allow plaintiffs to sue states for damages because the VAWA exceeded Congress's Fourteenth Amendment enforcement power. The Court explicitly rejected Congress's well-supported and impressively comprehensive findings that state judicial systems discriminated pervasively against the victims of gender-motivated violence.[176] The rebuttable presumption framework would reach a different outcome, since Congress clearly identified and documented pervasive gender-motivated discrimination against the victims of domestic violence, especially because the states, "through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence."[177] Congress then abrogated state sovereign immunity through a clear statutory statement.[178] Given Congress's impressive and seemingly accurate array of facts regarding pervasive discrimination, courts should come to the conclusion that Congress rationally concluded that, based on the pattern of gender discrimination, legislative action was necessary to prevent state actors from violating the protections of the Fourteenth

[173] Chemerinsky, *supra* note 126, at 1214.

[174] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing the difference between "fire alarm" oversight, in which the enforcer establishes an efficient system to respond to problems reported by others, and "police patrol" oversight, in which the enforcer exerts substantial resources to actively and directly enforce the law); William B. Rubenstein, *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129 (2004) (discussing the efficiency and deterrence benefits conferred when private citizens "enforce" federal law).

[175] *See, e.g.*, United States v. Georgia, 546 U.S. 151, 155 (2006) (observing the intervention of the federal government to defend Title II of the ADA in a private suit against a state).

[176] United States v. Morrison, 529 U.S. 598, 619-20 (2000); *see also* discussion *supra* Part II.B.

[177] *Morrison*, 529 U.S. at 664.

[178] *See infra* note 180 (reproducing the VAWA's private right of action provision, which contains an explicit monetary damages clause).

Amendment.[179] This finding would trigger the presumption in favor of abrogating state sovereign immunity. Because the VAWA's compliance costs[180] would not be unduly burdensome, defendants would not successfully rebut the presumption in favor of abrogation.

As another example, consider the ADA in *Garrett*, in which the Court refused to allow plaintiffs to recover monetary damages against state defendants under Title I of the statute.[181] The Court came to this conclusion despite a voluminous congressional record, documenting societal and state discrimination against disabled persons.[182] Under a rebuttable presumption approach, congressional factfinding in *Garrett* would be sufficient to sustain the ADA's constitutionality for two reasons. First, Congress identified "roughly 300 examples of discrimination by state governments themselves in the legislative record."[183] Second, Congress also identified "massive, society-wide discrimination" against the employment of disabled persons.[184] Such widespread societal discrimination "implicates state governments as well, for state agencies form part of that same larger society."[185] Though widespread societal discrimination should not be independently sufficient to find pervasive discrimination by state actors, when combined with hundreds of examples of state actor discrimination and comprehensive congressional hearings, expertise, and studies,[186] such facts in the aggregate clearly establish that Congress rationally believed the ADA to be necessary to safeguard the protections of the Fourteenth Amendment. This finding would trigger the presumption in favor of the abrogation of state sovereign immunity. Because the ADA's compliance costs[187] would not be unduly burdensome, defendants would not rebut the presumption in favor of abrogation.

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[179] *Morrison*, 529 U.S. at 628-37 (Souter, J., dissenting) (discussing Congress's "mountain of data" in support of the VAWA).

[180] Such compliance costs would be costs to states of private suits if a state actor were to discriminate against the victims of gender-motivated crime. *See* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, tit. IV, § 40302(c), 108 Stat. 1796, 1941 (1994) ("A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages . . . ." (internal quotation marks omitted)).

[181] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369-70 (2001).

[182] *Id.*

[183] *Id.* at 379 (Breyer, J., dissenting).

[184] *Id.* at 377 (internal quotation marks and citations omitted).

[185] *Id.* at 378.

[186] *See id.* at 377-78 (identifying thirteen congressional hearings, forty years of congressional studies and expertise, and a special congressional task force that traveled from state to state and gathered information from thousands of disabled victims as policy justifications behind the ADA).

[187] Such compliance costs would be the financial burdens imposed on states as a result of requiring them to stop their discrimination against disabled persons during hiring and during

Finally, consider a hypothetical case in which Congress passes a law under its Fourteenth Amendment enforcement power called the Employment Non-Discrimination Act (ENDA) that prohibits state-practiced employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) individuals.[188] To support the ENDA, assume that Congress advances significant factual findings demonstrating pervasive employment discrimination by states against LGBT individuals.[189] Under the congruence and proportionality test, the Court would most likely hold that private plaintiffs cannot sue states for monetary damages as a remedy for ENDA violations. First, discrimination based on sexual orientation currently implicates only rational basis review.[190] This standard of review alone, based on current

the course of employment. *See* Americans with Disabilities Act, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331-32 (1990) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). The costs in the ADA context are likely to be higher than the costs in the VAWA context. For discrimination based on disability, states would have to incur the opportunity costs of hiring disabled individuals, and then the actual costs of these hires during the course of employment. For discrimination based on gender-motivated violence, however, states would bear a minimal amount of the cost – they would just have to order their courts not to discriminate in their judgments against victims of gender-motivated crimes. Even though the costs of compliance would be higher in the ADA context, such costs still do not rise to a sufficient level to rebut a presumption in favor of abrogation.

[188] The ENDA, S. 815, 113th Cong. (2013), is a bill that has passed the Senate, but has little chance of succeeding in the House of Representatives. *See* Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 8, 2013, at A24 ("Success in the Senate guarantees nothing in the House, where the measure faces serious Republican resistance."). The ENDA would prohibit discriminatory hiring practices by employers. *See* Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 4 (as introduced in House, Apr. 6, 2011). It would apply to both public and private employers. *Id.* § 2(1). Congress specifically invoked its Fourteenth Amendment enforcement power when it enacted the ENDA. *Id.* § 2(3) ("[We] invoke congressional powers, including the powers to enforce the 14th Amendment to the Constitution . . . to prohibit employment discrimination on the basis of sexual orientation . . . .").

[189] *See generally* JODY FEDER & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) (2013), *archived at* http://perma.cc/Q8S7-QVN6.

[190] *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose." (quoting Romer v. Evans, 517 U.S. 620, 634 (1996))). Notably, the Second Circuit applied intermediate scrutiny toward discrimination based on sexual orientation in *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). When *Windsor* reached the Supreme Court, however, the Court seemed to ignore the question of intermediate scrutiny and arguably applied rational basis to the issue. *See Windsor*, 133 S. Ct. at 2696 ("The federal statute is

jurisprudence, seems to indicate that Congress's remedy of monetary damages is not congruent and proportional to the targeted discrimination.[191] Second, even if the Court were to apply heightened scrutiny, persuasive reasons exist to suggest that the enforcement of the ENDA through monetary damages still would not survive congruence and proportionality review. For example, in *Garrett*, the Court accepted Congress's well-documented findings of discrimination against disabled persons as true, but nevertheless concluded that Congress's findings dealt primarily with general societal discrimination, with only a handful of instances reflecting discrimination by state employers.[192] In *Morrison*, the Court ignored Congress's well-supported findings of state-practiced discrimination against victims of gender violence *and* ignored the applicability of intermediate scrutiny, instead holding that the VAWA was not congruent and proportional.[193] Ultimately, the relevant jurisprudence indicates that private plaintiffs would most likely be unable to enforce the ENDA through monetary damages suits against the states.[194]

This Note's suggested presumption in favor of abrogation would arrive at a different result. Congress identified widespread discrimination by state employers against LGBT employees.[195] Moreover, though general societal employment discrimination against LGBT individuals would probably be insufficient to establish pervasive discrimination by state actors specifically, such widespread societal discrimination only buttresses the plausibility that state employers practice such discrimination.[196] Congress, based on its

invalid, for no *legitimate purpose* overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." (emphasis added)). At least one academic has argued that in *Windsor*, the Court bypassed the tiers-of-scrutiny analysis altogether. Araiza, *supra* note 42, at 395.

[191] *See, e.g.*, *Garrett*, 531 U.S. at 372.

[192] *Id.* at 357 ("Although the record includes instances to support such a finding, the great majority of these incidents do not deal with state activities in employment.").

[193] United States v. Morrison, 529 U.S. 598, 619-27 (2000).

[194] *See* FEDER & BROUGHER, *supra* note 189, at 11 ("Taken together, [*City of Boerne*, *Morrison*, and *Garrett*] restrict the ability of private individuals to take the states to court for federal civil rights violations."). For another analysis regarding how the congruence and proportionality test would apply to a hypothetical ENDA statute, see Araiza, *supra* note 42, at 409-12.

[195] Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 2 (as introduced in House, Apr. 6, 2011) (characterizing one goal of the ENDA as the creation of a "comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation," based on the failure by states to "address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by . . . local, State, and Federal Government employers").

[196] *See, e.g.*, *Garrett*, 531 U.S. at 378 (Breyer, J., dissenting) ("The powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that same larger society. There is no particular reason to believe that they are

findings, could have rationally believed that legislative action was necessary to address Fourteenth Amendment violations committed by state actors against LGBT individuals. Consequently, the presumption would be in favor of abrogation. Neither ground for rebuttal to this presumption seems to apply: Congress cannot be said to have arrived at its conclusion irrationally based on the facts before it, and the burden on states in complying with the ENDA would be minimal, since the "aversion that homosexuals experience [in employment] has nothing to do with aptitude or performance,"[197] and since "the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a . . . legitimate state interest."[198]

B. *A Preservation of State Sovereignty*

While it may first appear that this newfound deference replicates an essentially arbitrary as-applied analysis under the congruence and proportionality framework, it actually affords significant built-in protections to states.[199] First, the rebuttable presumption approach would allow a private plaintiff to sue a state for monetary damages under an enforcement power statute only if the plaintiff can show that Congress acted rationally, based on facts regarding what it believed to be Fourteenth Amendment violations. Thus, a rebuttable presumption approach ensures that Congress must be truly enforcing the Fourteenth Amendment when passing legislation under its enforcement power. Second, a defendant's ability to rebut the presumption in favor of abrogation by demonstrating a clear congressional error or undue burden on states further limits Congress's ability to pass any legislation it wants under the guise of its enforcement power.

Finally, structural and procedural roadblocks in the legislative process[200] would generally prevent statutes from becoming law; this would be especially

immune from the 'stereotypic assumptions' . . . that Congress found prevalent. . . . Local governments often work closely with, and under the supervision of, state officials, and in general, state and local government employers are similarly situated.").

[197] Windsor v. United States, 699 F.3d 169, 182-83 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

[198] *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003).

[199] *See supra* note 163; *cf.* Caminker, *supra* note 163, at 1196-97 (arguing that a return to the *M'Culloch* test would still impose some limitations, albeit undefined, on congressional action). This Note attempts to provide some support for Professor Caminker's proposed return to a *M'Culloch*-style test by creating a rebuttable presumption mechanism that still creates important pockets of protections for state sovereignty.

[200] *See, e.g.*, Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 880-82 (2011). These "veto points" in the legislative process include speed bumps such as bicameralism, presentment, longer (and offset) terms in the Senate, the Senate filibuster, the two-party system, factional splits within parties, lobbyists, and committee procedures, among others. *See id.* All these speed bumps, working together, "make enactment of any sort of federal legislation difficult." *Id.* at 882. For additional analyses of the impact of veto points on the legislative process, see, for example, Nolan

true where a statute could be disguised as an enforcement power statute, but in reality have little to do with the guarantees of the Fourteenth Amendment. The often adversarial atmosphere in Congress ensures vigorous debate and advocacy, meaning Congress will likely pass only salient Fourteenth Amendment legislation. If proposed legislation imposes adverse impacts on states, legislators will presumably take those impacts into account, either in accepting or rejecting the statute.[201] Therefore, despite its deferential character, the rebuttable presumption approach prevents Congress from egregiously expanding the scope of the Fourteenth Amendment by passing unrelated statutes and using its enforcement power as a smoke screen.

Consider two cases where plaintiffs would fail to meet their burden of proof under the rebuttable presumption framework. In *Alaska v. EEOC*,[202] one of the issues before the Ninth Circuit was whether the Government Employee Rights Act (GERA) of 1991 successfully abrogated state sovereign immunity. Though the Ninth Circuit ultimately concluded that the congruence and proportionality test did not apply to the case,[203] Judge O'Scannlain, in dissent, observed that the plaintiffs (former executive branch officials of then-Alaska Governor Walter Hickel) admitted that Congress, when passing the GERA, "made *no findings* regarding discrimination against state employees at the policy-making level."[204] Plaintiffs argued in response that the GERA was designed to piggyback off Congress's extensive findings of state-based discrimination when it passed the Equal Employment Opportunity Act (EEOA) of 1972.[205] Despite this argument, however, under this Note's rebuttable presumption mechanism, plaintiffs would still fail their burden of proving that Congress enacted its statutory scheme as a rational response to Fourteenth Amendment

McCarty, *Proposal Rights, Veto Rights, and Political Bargaining*, 44 AM. J. POL. SCI. 506 (2000); AM. POL. SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS (Jane Mansbridge & Cathie Jo Martin eds., 2013).

[201] If the proposed statute were particularly harsh on states, many legislators presumably would raise concerns with the statute. If the proposed statute were to pass through Congress despite these concerns, then the statute would reflect Congress's policy judgment that federal interests in enforcing Fourteenth Amendment protections in this specific context trump the potential costs to states. Such a policy judgment should then be given substantial deference. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) ("[T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."). The safeguards identified in *Garcia* include representation of states in Congress, state election of the President through the Electoral College, the federal grants system, and exceptions for states in many federal statutes. *See id.* at 550-54.

[202] 564 F.3d 1062, 1066-67 (9th Cir. 2009).

[203] *See id.* at 1067-68 (analyzing the case as a direct remedy for an Equal Protection Clause violation, rather than under a "prophylactic" flavor of the Fourteenth Amendment that would implicate *City of Boerne*).

[204] *Id.* at 1077 (O'Scannlain, J., dissenting) (emphasis added).

[205] *Id.*

violations that it found via its factfinding capabilities. First, despite any widespread discrimination practiced by state employers and identified by Congress in 1972, the GERA was passed almost twenty years later. Congress failed to demonstrate that the discrimination that it identified in 1972 persisted when it passed the GERA.[206] Second, when passing the EEOA, Congress explicitly excluded "personal and policymaking staff" such as state executive branch officials from the statute's reach.[207] Such a disavowal in the GERA's predecessor statute, combined with the GERA's distinct lack of a congressional record on current employment discrimination, should cause plaintiffs to fail their burden of proof under the rebuttable presumption mechanism.

Next, consider Title II of the ADA in the context of state bar applications. One court has held that a plaintiff's suit for monetary damages for discriminatory treatment by a state board of bar examiners – specifically, allegedly unconstitutional character-and-fitness questioning – did not successfully abrogate state sovereign immunity.[208] Recall that in *Tennessee v. Lane*, the Supreme Court allowed Title II of the ADA to abrogate state sovereign immunity in the context of courthouse access, since "discrimination discussed in the legislative history [detailed] the inadequate provision of public transportation and access to public facilities."[209] Congress included no findings, however, regarding a state's determination over attorney admissions to the bar or any other state regulation of a professional license, besides factfinding over handicap accessibility of testing sites.[210] With such a dearth of a congressional record, a plaintiff simply could not demonstrate that Congress acted rationally when it passed its statutory scheme, since Congress did not even consider the plaintiff's problem, let alone collect any facts on the issue. This conclusion would prevent a plaintiff from gaining a presumption that Title II of the ADA abrogated state sovereign immunity in the context of attorney admissions to the bar.

CONCLUSION

Congress and the states never intended the Fourteenth Amendment enforcement power to be a limited grant of lawmaking authority to Congress.[211] Yet the Supreme Court's jurisprudence in its line of cases starting with *City of Boerne* strangles Congress's ability to correct Fourteenth

[206] *See id.*

[207] *Id.* at 1077-78.

[208] Roe v. Johnson, 334 F. Supp. 2d 415, 422 (S.D.N.Y. 2004).

[209] *Id.* at 422-23 (citing Tennessee v. Lane, 541 U.S. 509, 525-27 (2004)).

[210] *Id.* at 422.

[211] *See, e.g.*, Fletcher, *supra* note 157, at 1115; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1463 (1968); *supra* Part II.C (discussing why the drafters of the Fourteenth Amendment likely envisioned a broad reading of the enforcement power).

Amendment violations when states are unwilling or unable to do so. *City of Boerne*'s congruence and proportionality test, muddled by the Court in later cases, has spawned an era of judicial second-guessing of Congress's expertise in policymaking when Congress acts under its Fourteenth Amendment enforcement power. Congress's ability to specify private suits for monetary damages as an enforcement system for statutes that safeguard Fourteenth Amendment protections implements critical federal policies efficiently and effectively.

Strangely, in a world in which the Court has been extremely willing to grant administrative agencies a substantial degree of deference,[212] the Court cannot be said to do the same for Congress in the Fourteenth Amendment context. Instead of doubting Congress's normative policy judgments at every turn, courts should defer to congressional factfinding more frequently. The Court[213] should replace the congruence and proportionality framework with a rebuttable presumption in favor of the abrogation of state sovereign immunity. Under this new approach, a private plaintiff suing a state for monetary damages under a statutory right of action passed via Congress's Fourteenth Amendment enforcement power must satisfy several requirements before she can attain such a presumption. She bears the burden of proving that Congress has (1) found sufficient facts to demonstrate what it believes to be a Fourteenth Amendment violation by state actors; (2) responded rationally via a statute that is necessary and proper to remedy the Fourteenth Amendment violations; and (3) abrogated state sovereign immunity via a clear statutory statement. Upon satisfaction of these requirements, the plaintiff will gain a presumption in favor of abrogation, unless the state defendant can meet the high burden of demonstrating an egregious error by Congress or a burden on states that is imminent, concrete, and overbearing. This framework better protects minority groups, safeguards Congress's primacy in legislating, and promotes state compliance with important federal laws.

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[212] *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); *cf.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 544 (1978) ("[W]hile a court may have occasion to remand an agency decision because of the inadequacy of the record, the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as [it] develops.'" (quoting Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333 (1976))).

[213] Because "Congress may not legislatively supersede [Supreme Court] decisions interpreting and applying the Constitution," and because the ratification of a constitutional amendment to overrule *City of Boerne* is highly unlikely to move forward, this issue is now the Court's to address. Dickerson v. United States, 530 U.S. 428, 437 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997)).