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THE REAFFIRMATION OF PROPORTIONALITY ANALYSIS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT†

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In recent cases, the United States Supreme Court has made clear that Congress's power under Section 5 of the Fourteenth Amendment extends only to provide remedies proportional to violations of the rights incorporated in the Fourteenth Amendment, and not to enlarge those rights.[1] When this principle was explicitly reinforced in the past few years, some scholars expressed surprise at this proportionality requirement, viewing it as a departure from precedent.[2] However, the cases—*Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*[3] and *City of Boerne v. Flores*[4]—provide a clear

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1 *See* Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 (1999); City of Boerne v. Flores, 521 U.S. 507, 519 (1997); *see also* Alden v. Maine, 119 S. Ct. 2240, 2267 (1999).

2 The first case in the modern era to emphasize the proportionality requirement was *Boerne*, which invalidated the Religious Freedom Restoration Act of 1993 ("RFRA"). Those who expressed surprise included prominent defenders of the RFRA. *See Protecting Religious Freedom After* Boerne v. Flores*: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Professor Douglas Laycock) <http://www.house.gov/judiciary>; *id.* (testimony of Marc D. Stern, American Jewish Congress) <http://www.house.gov/judiciary> (transcript on file with author); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997). Others have expressed surprise as well. *See, e.g.*, Robert F. Drinan S.J., Essay, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101 (1997); Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and a Stealth Court*, 33 TULSA L.J. 77 (1997); Mary Ann Glendon, *Religious Freedom and Common Sense*, N.Y. TIMES, June 30, 1997, at A11.

3 119 S. Ct. 2199 (1999).

expression of time-honored constitutional and remedial principles that long have limited Congress's power under the Fourteenth Amendment. *Boerne*, as the first modern reiteration of this principle, was a surprise only to the extent that proportionality principles had receded from the forefront of the Court's explanations for its holdings. Yet, the Court never rejected the principle in its Section 5 cases. The proportionality principle is an important element of the Court's jurisprudence, as statutes, both old and new, will stand or fall on it.[5] The purpose of this Article is to trace the lineage from which the Court's proportionality analysis in *Boerne* and *College Savings Bank* sprang.

The *Boerne* Court invalidated the Religious Freedom Restoration Act of 1993 ("RFRA").[6] The sponsors of that statute set out to correct what they viewed as the Supreme Court's erroneous interpretation of the First Amendment's Free Exercise Clause in *Employment Division v. Smith*.[7] RFRA established a competing standard of review in all cases where generally applicable, neutral laws substantially burden religious conduct.[8] The new, stricter standard, which was to be applied in every circumstance and against every government actor, provided the most expansive protection for religious conduct in this country's history.[9] Congress claimed to have enacted RFRA under the authority granted to it in Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation, the provisions of [the Amendment]."[10] The *Boerne* Court held that legislation enacted

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4 521 U.S. 507 (1997)

5 *See, e.g.*, The Religious Liberty Protection Act of 1999 ("RLPA"), H.R. 1691, 105th Cong. (1999) (attempting to federalize local land use law applied to religious properties under Section 5 of the Fourteenth Amendment); Alsbrook v. Maumelle, 184 F.3d 999, 1006-08 (8th Cir. 1999) (holding Title II Americans with Disabilities Act invalid under Section 5 of the Fourteenth Amendment).

6 *See Boerne*, 521 U.S. at 536.

7 494 U.S. 872 (1990).

8 *See* 42 U.S.C. § 2000bb to § 2000bb-4 (1994).

9 Some have attempted to argue that RFRA was simply a "restoration" of the law before *Smith*. The Court in *Boerne* explicitly rejected such subterfuge. *See Boerne*, 521 U.S. at 534-35 ("[T]he Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify."). Additionally, RFRA could not have been a simple "restoration" of the law before *Smith*, because the Court acknowledged that RFRA's "stringent test" reflected a "lack of proportionality or congruence between the means adopted and the legitimate end to be achieved" while the "substantial costs RFRA exact[ed] ... far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *See id.*

10 U.S. CONST. amend. XIV, § 5. Only two scholars have addressed the issue of Congress's power to enact such a statute. *See The Religious Freedom Restoration Act: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the*

under Section 5 must be aimed at remedying violations of the Amendment's provisions.[11] RFRA failed this test because the statute was not a proportional response to any threats to free exercise rights identified by Congress. As the Court explained: "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."[12] Seven Justices explicitly endorsed this reasoning, and no Justice disagreed.[13]

In *College Savings Bank*, the Court reaffirmed its allegiance to the proportionality requirement and elaborated on the *Boerne* Court's discussion of it, stating "that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[14] In *College Savings Bank*, the bank procured a patent for its college financing methodology,[15] and claimed that the Educational Expense Board directly and indirectly infringed its patent.[16] The Court held that the bank could not prevail under the Patent and Variety Protection Remedy Clarification Act ("PVPRCA") because the Act exceeded Congress's power under Section 5 of the Fourteenth Amendment.[17] In reaching its conclusion that the PVPRCA was not a valid exercise of Section 5, the Court embraced two predicates under Section 5: (1) there must be proof of pervasive unconstitutional conduct in the states; and (2) the remedy

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House Comm. on the Judiciary, 102d Cong. 372, 372-94 (1992) (testimony of Professor Ira Lupu) (arguing that RFRA may be unconstitutional as applied to the states); *see also id.* at 116, 124 (testimony of Bruce Fein) (suggesting that Congress may not have the constitutional authority to enact RFRA); *The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 78 (1990) (letter from Professor Douglas Laycock) (arguing for the constitutionality of RFRA as applied to the states under the Fourteenth Amendment).

11 *See Boerne*, 521 U.S. at 527.

12 *Id.* at 530. The Court held that RFRA failed this test, stating that "RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

13 The Justices who explicitly endorsed this reasoning were Chief Justice Rehnquist and Justices Kennedy, Scalia, Stevens, Thomas, Ginsburg, and O'Connor. *See id.* at 530; *id.* at 545 (O'Connor, J., dissenting).

14 *College Sav. Bank*, 119 S. Ct. at 2207.

15 *See id.* at 2203.

16 *See id.*

17 *See id.* at 2209.

redressing such unconstitutional actions must be proportional to the constitutional harm posed.[18]

The Court's proportionality analysis is rooted in bedrock constitutional principles and leaves Congress ample power to enforce, but not to amend, constitutional rights. This Article delineates three explanations for the limits identified in *Boerne* and *College Savings Bank*. First, such a proportionality requirement was an essential component of constitutional tradition long before *Boerne*. In *Katzenbach v. Morgan*,[19] the Court included dictum giving Congress more power, but the *Boerne* Court chose to reject this newly introduced element and to follow the weight of the case law. Second, the scope of Congress's power under Section 5 to enforce the rights incorporated in the Fourteenth Amendment draws its content from the law of remedies, which requires that the remedy respond proportionally to the wrong done or threatened. Third, the proportionality requirement is consistent with the Court's close attention to the Constitution's structural protections of liberty and democracy inherent in the separation of powers and federalism.[20] *College Savings Bank* and *Boerne* are further evidence of the Court's increasing willingness to protect the Constitution's structure.

I. PROPORTIONALITY REVIEW AND SECTION 5 JURISPRUDENCE

According to the Supreme Court and the plain language of the Constitution, Section 5 grants Congress the authority only to "enforce" the constitutional provisions incorporated in the Fourteenth Amendment.[21] Because Section 5 grants the power to enforce law, it presupposes the existence of a law to be enforced (in this case constitutional law). It also presupposes a violation, or likely violation, of that law that necessitates its enforcement.[22] Such enforcement may extend to preventing nascent constitutional violations, but Congress is nonetheless limited to enforcing

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18 *See id.* at 2206-07.

19 384 U.S. 641 (1966).

20 *See* Alden v. Maine, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); Clinton v. City of New York, 524 U.S. 417 (1998); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

21 Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5; *see also Boerne*, 521 U.S. at 519.

22 *See Alden*, 119 S. Ct. at 2267 (discussing *Boerne*); *College Sav. Bank*, 119 S. Ct. at 2224 (same); *Florida Prepaid*, 119 S. Ct. at 2206-07 (same).

constitutional rights. It may not redefine them.[23] It also may not enforce those rights without evidence of constitutional wrongdoing.[24]

Proportionality review requires that the means fit the end, the means being legislation and the end being enforcement of the Fourteenth Amendment's constitutional proscriptions. As early as *McCulloch v. Maryland*,[25] the Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[26]

The requirement of a means-end fit had a secure place in Section 5 jurisprudence even before *Boerne*. The Court has applied proportionality reasoning in a variety of Section 5 cases.[27] The Court's earliest treatment of Section 5 of the Fourteenth Amendment turns on the proportionality requirement. In the *Civil Rights Cases*, the Court stated that remedial legislation under Section 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against"[28] and held that, because the legislation under scrutiny was not adapted to remedy a state constitutional violation, no authority for its passage could be derived from the Thirteenth or Fourteenth Amendments.[29] The *Boerne* decision relied on the *Civil Rights Cases*, and on succeeding enforcement cases, to explain the proportionality test applied to invalidate RFRA.[30] In fact, the proportionality requirement has been a staple of the Section 5 cases. However, the Court has applied it with varying degrees of vigor.

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23 *See Boerne*, 521 U.S. at 527.

24 *See id.* at 524, 532 (citing The Civil Rights Cases, 109 U.S. 3, 13-14, 15 (1883)).

25 17 U.S. 316 (1819).

26 *Id.* at 421; *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (citing *McCulloch*, 17 U.S. at 316); Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (same); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (same); Heart of Atlanta Hotel, Inc. v. United States, 379 U.S. 241, 276 (1964) (Black, J., concurring) (same).

27 The *Boerne* decision itself cites to a variety of previous decisions in which the Court had used either explicit or implicit proportionality reasoning. *See Boerne*, 521 U.S. at 530 (referring to South Carolina v. Katzenbach, 383 U.S. 301, 308, 334 (1966)); *id.* at 532 (referring to City of Rome v. United States, 446 U.S. 156, 177 (1980)); *id.* (referring to *The Civil Rights Cases*, 109 U.S. at 13).

28 *The Civil Rights Cases*, 109 U.S. at 13.

29 *See id.* at 14, 25.

30 *See Boerne*, 521 U.S. at 530-33.

A. Katzenbach v. Morgan *and Other Section 5 Cases*

The leading case on which RFRA's supporters rested their hopes was *Katzenbach v. Morgan*.[31] In *Boerne*, the city argued that *Morgan* could be interpreted as containing two threads: one permitting Congress to enforce constitutional rights; the other permitting Congress to create new constitutional rights.[32] The *Boerne* Court snipped the latter thread, explaining that such an interpretation is not necessary, preferable, or consistent with the vast majority of prior case law.[33] Thus, the *Boerne* Court embraced one theory of *Morgan* but explicitly rejected the other to announce that Congress must have evidence of unconstitutional activity and that its remedy must be proportional.

Justice Harlan, in his *Morgan* dissent, took the Court to task for upholding a federal law prohibiting state literacy requirements as applied to voters educated in Puerto Rico, on the ground that the record in Congress was bare: "There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns."[34] Harlan's point was that evidence of unconstitutional action by the states is a necessary prerequisite for proportionality review. In the absence of evidence of state wrongdoing, Harlan would have struck down the federal law. Harlan's reading was consistent with the earlier and later Section 5 cases, and made the holding in *Morgan* questionable. While the Court in *Boerne* went out on a limb to make clear that it was not overruling any previous Section 5 holding, its reassertion of the proportionality principle weakened the precedential value of the reasoning in *Morgan*. The Court plainly rejected a broad reading of *Morgan*.[35]

While the *Morgan* decision gave short shrift to the proportionality requirement, however, it did not openly reject it. The rhetoric in *Morgan* strongly implied that the law would have passed the proportionality requirement even under intermediate or strict scrutiny.[36] The Court found that the means chosen were based on a "plain" empirical foundation clearly relevant to the end sought.[37] The foundation was, in fact, so plain that "[a]ny contrary

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31 384 U.S. 641 (1966).

32 *See* Brief for Petitioners at 27, 31-33, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074).

33 *See Boerne*, 521 U.S. at 527-29.

34 *Morgan*, 384 U.S. at 669.

35 *See Boerne*, 521 U.S. at 529-34.

36 *See generally Morgan*, 384 U.S. at 648-58.

37 *See id.* at 653.

conclusion would require [the Court] to be blind to the realities familiar to the legislators."[38] Having determined that the means were based on a plain foundation and the end was surely legitimate, the Court upheld the law. The *Boerne* Court stated that the same conclusion could be reached concerning the laws at issue[39] in *City of Rome v. United States*,[40] *Oregon v. Mitchell*,[41] and *South Carolina v. Katzenbach*,[42] where the "Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights."[43] Thus, the claim that the Court has employed mere rationality review of proportionality in its Section 5 jurisprudence is not borne out by the analysis or rhetoric of its Section 5 cases.[44]

B. Fullilove v. Klutznick[45]

The Supreme Court's decision in *Fullilove* has been cited for the proposition that Congress has expansive power under Section 5 to do whatever it pleases to remedy violations of the Fourteenth Amendment, and therefore Congress does not labor under a proportionality requirement.[46] This is an overreading of the amalgam of opinions in *Fullilove*, most of which directly addressed and embraced a proportionality requirement.

The *Fullilove* plurality opinion, written by Chief Justice Burger, and joined by Justices White and Powell, characterized the Minority Business Enterprise program ("MBE"), which set aside ten percent of federal funds for public works projects for businesses owned by minorities, as "a limited and properly tailored remedy to cure the effects of prior discrimination."[47] Justice Powell concurred, stating that the appropriate test in the Section 5 arena is whether the "means selected are equitable and reasonably

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38 *Id.*

39 *See Boerne*, 521 U.S. at 533

40 446 U.S. 156 (1980).

41 400 U.S. 112 (1970).

42 383 U.S. 301 (1966).

43 *Boerne*, 521 U.S. at 526.

44 *See, e.g.*, McConnell, *supra* note 2, at 165-66.

45 448 U.S. 448 (1980) (plurality opinion).

46 *See* Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 935-38 (1992); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1071-72 (1993); *see also* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 164 & n.94 (1995).

47 *Fullilove*, 448 U.S. at 450 (plurality opinion).

necessary to the redress of identifiable discrimination."[48] Justice Marshall, joined by Justices Brennan and Blackmun, who also voted to uphold the program, declared that the scheme was "substantially related to achievement of [its] objectives."[49] The issue of proportionality, or means-end fit, was dispositive for Justice Stevens in *Fullilove*, whose solitary dissent rested on the ground that the MBE set-aside was not "a 'narrowly tailored' racial classification because it simply raise[d] too many serious questions that Congress failed to answer or even to address in a responsible way."[50] Only Justices Stewart and Rehnquist did not explicitly visit the proportionality issue, because they viewed the racial classification as violative of an absolute constitutional prohibition against race-based lawmaking.[51] Suffice it to say, not only is the proportionality requirement not novel, but it is embedded in even those decisions understood to be the most solicitous of Congress's Section 5 power and championed even by the most liberal Justices.

C. *The Other Arena Involving Proportional Remedies for Constitutional Violations: Affirmative Action*

Subsequent Supreme Court decisions implicating governmental attempts to remedy racial discrimination have wrestled with the appropriate level of scrutiny to apply to the proportionality between means and ends, but the essential necessity of a means-end fit analysis has never been questioned in these cases, let alone jettisoned. In *City of Richmond v. J.A. Croson Co.*,[52] the Court held that whenever a state or local government engages in race-based distinctions, the government is required to prove that the means chosen are "narrowly tailored" to the end in view.[53] In response to the claim that it had violated the Fourteenth Amendment's Equal Protection guarantees, the City of Richmond was required to prove a "nexus between [the] scope [of its set-aside plan] and [the] factual basis" on which it rested and to demonstrate that its actions were "necessary" for the end to be achieved.[54] The Court held that the City woefully failed this exacting standard.[55]

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48 *Id.* at 510 (Powell, J., concurring).
49 *Id.* at 519 (Marshall, J., concurring).
50 *Id.* at 552 (Stevens, J., dissenting).
51 *See id.*
52 488 U.S. 469 (1989).
53 *See id.* at 509.
54 *Id.* at 495.
55 *See id.* at 508.

A year later, the Court took its cue from *Fullilove*, rather than *Croson*, and held in *Metro Broadcasting v. FCC*[56] that intermediate scrutiny applies when the federal government engages in set-aside programs to remedy past racial discrimination. In upholding the minority preference policies of the Federal Communications Commission, the Court applied a rule that required the government to prove that its scheme was "substantially related to achievement of [its] objective[s]."[57] A vigorous dissent by Justice O'Connor criticized the majority for the laxity of its standard, proposing instead that the federal government should be required to prove that its laws are "narrowly tailored to achieve a compelling interest."[58]

Justice O'Connor's dissent in *Metro Broadcasting*, advocating a tough proportionality standard, became law when the Court decided *Adarand Constructors, Inc. v. Pena*.[59] In that case, the Court continued to hew to a proportionality requirement, but rejected intermediate means-end analysis in favor of strict proportionality review when governments engage in race-based distinctions.[60] The Court explicitly rejected the standards announced in *Fullilove* and *Metro Broadcasting*, to the extent that they failed to employ strict scrutiny.[61] In a disarmingly frank explanation, Justice O'Connor explained that strict proportionality review is a tool the Court employs in order to "smoke out" unconstitutionality.[62] In the words of the Court, "requiring strict scrutiny is the best way to ensure the courts will consistently give racial classifications [a] detailed examination, both as to ends and as to means."[63]

Against this background, the measured and dispassionate proportionality discussion in the majority opinion in *Boerne* should have come as no surprise. The Court once again embraced proportionality, or means-end, review.[64] This time, however, the Act under review was so disproportionate that the Court had occasion to reach a new conclusion based on the use of its entrenched proportionality test. The defenders of RFRA claimed

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56 497 U.S. 547 (1990).

57 *Id.* at 564 (quoting Fullilove v. Klutznick, 488 U.S. 448, 519 (1980) (Marshall, J., concurring)).

58 *Id.* at 602 (O'Connor, J., dissenting).

59 515 U.S. 200 (1995).

60 *See id.* at 236.

61 *See id* at 237.

62 *Id.* at 226.

63 *Id.* at 236.

64 *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

that it was remedial—an attempt to enforce threatened constitutional violations.[65] The Court employed the proportionality requirement to determine that the Act was not remedial, but rather a unilateral attempt to amend the Constitution.[66] The Court reasoned that the means chosen and the ends identified were so out of whack that the Act could not be remedial: "The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[67] According to the Court, this disproportionality was the Act's "most serious shortcoming."[68]

Ironically, RFRA's severe disproportionality permitted the *Boerne* Court to avoid the debate, carved out in *Fullilove* and its progeny, over the level of scrutiny to be applied in the means-end analysis; the Act was so evidently disproportionate that it would fail under any level of scrutiny. Thus, the level of scrutiny to be used for the means-end fit requirement in Section 5 cases not involving race-based distinction remains open. Without question, however, some level of scrutiny is required. That fact was reinforced by the Supreme Court's recent decision in *College Savings Bank*, where the Court reasserted its allegiance to proportionality analysis, including the requirement that the remedy under Section 5 can only be justified by a finding of state wrongdoing.[69]

The Court required proportionality in *Boerne* and *College Savings Bank* to achieve the same effect as in *Croson*—to "smoke out" unconstitutional legislative actions. In *Boerne*, it was not racial discrimination that was to be discovered by proportionality review. Rather, the Court examined whether Congress had exceeded its enumerated powers, thus violating federalism principles, or whether it had trenched upon the domain of the courts, thus violating separation of powers principles.[70] In *College Savings Bank*, Section 5 proportionality review smoked out violations of the Eleventh Amendment. The lesson to be learned is that when Congress acts under Section 5 without a particularized

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65 *See supra* note 2 and accompanying text.

66 *See Boerne*, 521 U.S. at 532 (stating that under RFRA's approach, "[s]hifting legislative authorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V").

67 *Id.* at 533.

68 *Id.* at 509, 531-32.

69 *See* Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2207 (1999).

70 *See Boerne*, 521 U.S. at 520-24, 529.

focus on the constitutional violations that it seeks to remedy, it is likely to trespass upon prerogatives of other branches of the federal government, the states, or the people.[71]

Having identified the proportionality thread in the Court's cases treating remedial legislation, we now turn to the law of remedies to explain the legal and theoretical basis for the proportionality requirement.

II. THE LAW OF REMEDIES AND PROPORTIONALITY

The law of remedies rests upon two foundational principles explicitly invoked in *Boerne*. First, remedies are supposed to enforce the law violated, not create a new law. In *Boerne*, the Court surveyed its "treatment of Congress' § 5 power as corrective or preventive, not definitional. . . . Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."[72] Second, remedies must be in proportion to threatened or existing violations.[73] These central remedial principles apply across the board—to compensatory damages,[74] disgorgement of ill-gotten gains,[75] and injunctions.[76]

A. *Remedies, Including Section 5 Remedies, Must Enforce the Law Violated, Not Create New Law*

In accordance with the first remedial principle, injunctions must seek to enforce the law that the defendant has violated, or threatens to violate, not to change it. Professor Douglas Laycock, RFRA's chief author and advocate in the courts, has emphasized

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71 *See* Marci A. Hamilton, Boerne v. Flores*: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998) [hereinafter Hamilton, *Landmark for Structural Analysis*].

72 *Boerne*, 521 U.S. at 525-27.

73 *See id.* at 530.

74 As the first case in Professor Laycock's casebook demonstrates, compensatory damages are supposed to award the plaintiff precisely the amount of funds needed to buy what was lost through the violation. *See* DOUGLAS F. LAYCOCK, MODERN AMERICAN REMEDIES, CASES AND MATERIALS 16 (2d ed. 1994); United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958). The aim is "the plaintiff's rightful position"—the position that the plaintiff would have occupied if the defendant had obeyed the law being enforced. *See* LAYCOCK, *supra*, at 16. Thus, in accordance with the first of the two remedial principles, compensatory damages are designed to enforce the law of liability, not change it. Moreover, in strict accordance with the second principle, the remedy is measured by the wrong.

75 Relief designed to force a defendant to disgorge ill-gotten gains is measured by the defendant's rightful position. *See* LAYCOCK, *supra* note 74, at 16. Again, this remedy honors both remedial principles.

76 *See* discussion *infra* notes 83-116 and accompanying text.

in his writings on remedies that an injunction must seek to achieve "the plaintiff's rightful position."[77] To illustrate, in *Mount Healthy City School District Board of Education v. Doyle*,[78] although a school board violated the First Amendment by basing its refusal to renew a teacher's contract partly upon the content of his speech, the Supreme Court reversed the lower court's order restoring the teacher to his job. The Court explained that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[79] The case was then remanded to the district court for a determination on whether the teacher would have been fired absent unconstitutional motives.

Although enacted in the name of protecting the right to religious freedom, RFRA was, from the beginning, an effort to change the "rightful position"—the Supreme Court's interpretation of the Free Exercise Clause—rather than an attempt to enforce it. As such, it violated this first remedial principle: that remedies are supposed to enforce the law, not expand it.[80] As RFRA's legislative history shows, and the Court explicitly recognized, Congress attempted to enact a constitutional amendment by statute rather than enact a statute to enforce existing constitutional guarantees: "[RFRA] appears . . . to attempt a substantive change in constitutional protections."[81]

B. *Remedies Must Be Proportional to Violations Discovered*

Prophylactic rules play a role in injunctive remedies, but one strictly limited, unsurprisingly, by the concept of proportionality. In the Court's words in *Boerne*: "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[82] This principle is nicely reflected in Professor Laycock's analysis of remedies law:

> Specific relief should be generally available for proven harms, but specific relief should not be an occasion for a court to remedy harms that it would not compensate with the equivalent damage remedy. If a harm is not sufficiently connected to the wrong to justify submitting a damage issue to the jury, it is hard

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77 LAYCOCK, *supra* note 74, at 285-86.

78 429 U.S. 274 (1977).

79 *Id.* at 285-86.

80 Professor Schoenbrod takes no position on whether the Supreme Court has interpreted the Free Exercise Clause correctly.

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

82 *Id.* at 530.

> to see how it justifies an injunction. But if there is a functional reason to reach further with injunctions than with damages, the proponents of such relief should state that reason explicitly.[83]

The Solicitor General tried to rescue RFRA by invoking this principle and arguing that the Act was not a constitutional amendment, but rather an attempt to enforce the First Amendment, incorporated through the Fourteenth Amendment, as interpreted by the Court.[84] On this theory, the statute sought to prevent covert violations of the First Amendment by laying down prophylactic rules.[85]

Under the second remedial principle, a remedy must be proportional to the violation threatened. A court may grant an injunction that gives the plaintiff more than its rightful position, but only if necessary to achieve the plaintiff's rightful position. For example, in *Mount Healthy*, the relief that the Supreme Court granted went beyond the plaintiff's rightful position, but not nearly as far as the injunction that it reversed.[86] The teacher's rightful position was to have the school board decide whether to renew his contract without taking his protected speech into account.[87] Moreover, the teacher had no right to have the board show cause for refusing to renew his contract.[88] But an injunction strictly tailored to plaintiff's rightful position would run the risk that the board would covertly continue to base his firing on the content of his speech. As a prophylactic against such covert subversion of the First Amendment, the Supreme Court directed the school board to explain to the district court why it would have fired him absent unconstitutional motives.[89] Thus, the teacher got more than his rightful position; the school board would have to show cause for refusing to renew the teacher's contract and the final decision would be made by the district court rather than his enemies on the school board.

The case law can be synthesized in the following terms:

> The injunction should require the defendant to achieve the plaintiff's rightful position unless (a) different relief is

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83 Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 77 (1993).

84 *See* Brief for the United States at 26-35, Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074).

85 *See id.* The Court found this reading of RFRA untenable. *See Boerne*, 521 U.S. at 519.

86 *See* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

87 *See id.* at 285-86.

88 *See id.* at 285.

89 *See id.* at 286.

> consistent with the goals of the violated rule and (b) the case involves a factor justifying departure from the [violated] rule that was not reflected in its formulation [such as an undue risk that the defendant would covertly violate a narrowly drafted injunction or undue hardship], but the injunction may never aim to achieve more than the plaintiff's rightful position.[90]

If there were any way to square RFRA with understandings derived from the law of remedies, it would have to be that the Act was intended to put religious organizations in better than their rightful positions in order to ensure that they are not covertly cheated out of their protected rights. This argument was made by Professor Laycock and the federal government before the Supreme Court; they argued that RFRA was necessary in order to protect minority religions from constitutional violations.[91] Their argument backfired because RFRA was far broader than was needed to achieve this purpose. The Act protected every religion from every government action. The Act's enormous breadth made clear that the minority religion defense was a pretext for overreaching.

The prophylactic remedial power is available only after a finding that the defendant is *likely* to violate plaintiff's rights. This bedrock remedies principle is explicitly articulated in *Boerne*: "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[92]

A court may not simply issue an injunction to prevent future violations, even one that goes no further than plaintiff's rightful position, without finding that defendant is likely to violate plaintiff's rights. Even if some future violations are likely, an injunction may not be. For example, in *Hecht Company v. Bowles*,[93] the Hecht Company had inadvertently violated war time price controls.[94] The company, however, was sensitive to being the target of an injunction against price-gouging in wartime

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90 David Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 MINN. L. REV. 627, 664 (1988). Professor Dan Dobbs identifies this formulation as the "Schoenbrod principle." *See* DAN B. DOBBS, LAW OF REMEDIES 181-82 (2d ed. 1993). Professor Laycock has signaled his agreement with its substance. *See* LAYCOCK, *supra* note 74, at 17.

91 *See* Brief for the United States at 29-32, Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074); Brief for Respondent at 6-43, Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074).

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

93 321 U.S. 321 (1944).

94 *See id.* at 325-26.

Washington. It pled that the original violations were unintentional and convinced the district court that it would try assiduously to avoid future violations.[95] Although the Supreme Court found that future violations were all but inevitable, given the complexity of the price regulations and the size of Hecht's inventory, it directed that an injunction should not be issued automatically.[96] Instead, it held that the courts below should exercise equitable discretion. It is clear from the Court's discussion that the lower courts were supposed to consider whether an injunction would really decrease future violations.[97]

The plaintiff must show even more to get an injunction that goes beyond its rightful position. In *Hutto v. Finney*,[98] the district court had found that punitive isolation in a prison for longer than thirty days was not, in itself, cruel and unusual punishment, but did rise to such level when compounded by the harsh conditions in Arkansas's punitive isolation cells.[99] The district court nonetheless enjoined punitive isolation for longer than thirty days without regard to the conditions in the cells, and the Supreme Court affirmed:

> In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit [on the period in isolation cells] might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.[100]

Thus, in order to issue an injunction that goes beyond plaintiff's rightful position, the court must find not only a threat of future violations, but also that an order tailored to plaintiff's rightful position will not adequately insure compliance.[101]

As Professor William Fletcher has pointed out, in institutional reform cases against governments, courts ordinarily begin with an injunction narrowly tailored to plaintiff's rightful position,

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95 *See id.* at 326.
96 *See id.* at 331.
97 *See id.* at 324-26.
98 437 U.S. 678 (1978).
99 *See id.* at 685.
100 *Id.* at 687.
101 *See* Schoenbrod, *supra* note 90, at 678-80.

broadening the injunctions only if the defendants merit harsher treatment—and even then, only in stages.[102] He argues that this careful approach is necessary so that courts do not affront principles of federalism and separation of powers.[103] The lack of proportionality between means and ends in RFRA led the Court to conclude that Congress had violated both principles of federalism and separation of powers.[104]

The school desegregation cases provide further support for the principle that injunction should be in proportion to the threat to plaintiff's rights. As the Court stated in *Milliken v. Bradley II*:

> [T]he nature of the desegregation remedy is to be determined by the nature and scope of the violation. *Swann.* The remedy must therefore be related to the 'the condition alleged to offend the Constitution . . . .' *Milliken I.* Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' *Milliken I.* Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.[105]

Although the Supreme Court has held that the Equal Protection Clause prohibits de jure, but not de facto, segregation, the Court suggests school desegregation orders should be designed "to achieve the greatest possible degree of actual desegregation" and incorporate specific strategies to that end.[106] These color-conscious remedies for violations of a provision of the Constitution that creates a strong presumption against color-conscious government action have been justified by the need to repair past violations and to prevent future, covert violations. As Dean Peter Shane argues: "Where minority students are systematically vulnerable to hostile or insensitive treatment, the racial separation of schools effectively subjugates minority students in the competition for educational resources and deprives them of any basis for reasonable confidence in the evenhanded administration of their schools."[107] Indeed, the Supreme Court did not call for

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102 *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 638 (1982).

103 *See id.* at 637.

104 *See* City of Boerne v. Flores, 521 U.S. 507, 533-36 (1997).

105 Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (citations omitted).

106 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

107 Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1043 (1984).

broad race-conscious remedies until the defendant school boards had demonstrated their unwillingness to comply with more narrowly tailored relief.[108] Similarly, the Supreme Court is willing to terminate school desegregation orders, or cut them back, as the threat of future violations is dissipated by prolonged compliance with the injunction.[109]

It is, of course, true that some school desegregation injunctions have produced sharp splits in the Supreme Court. The fights, however, have been over how to *enforce* the Equal Protection Clause, not over whether injunctions can be used for some purpose beyond the enforcement and prevention of constitutional violations.[110]

Not everyone agrees with the Supreme Court's understanding of the remedial power. Professor Abram Chayes argued in a famous article that, once a violation has been found in a public law case, the judge should be free to fashion relief to take account of the broad public interests.[111] Chayes writes: "At this point, right and remedy are pretty thoroughly disconnected."[112] However, the Supreme Court has rejected Professor Chayes's vision of the judge as, in essence, a legislator in robes, even as he, himself, later acknowledged.[113]

While it is possible to argue that Professor Chayes is right and the Court is wrong,[114] it is impossible to argue that the Court's concept in *Boerne*—of what it means to remedy or enforce—came out of left field, or right field, for that matter.

C. *The Relevance of Remedial Principles to Section 5*

The remedial powers of federal courts are hedged in by separation of powers and federalism concerns. The holding and opinion in *Boerne* make clear that Section 5 remedies are also restricted by these fundamental, structural constitutional

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108 *See Swann*, 402 U.S. at 1; *see also* Green v. County Sch. Bd., 391 U.S. 430 (1968).

109 *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

110 *See, e.g.*, Missouri v. Jenkins, 515 U.S. 115 (1995); *Freeman*, 503 U.S. at 467; *Dowell*, 498 U.S. at 237.

111 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

112 *Id.* at 1293.

113 *See* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

114 We know of no evidence that Professor Laycock sided with Professor Chayes prior to *Boerne*. Professor Laycock's disciplined approach to courts' injunctive power is, if anything, quite contrary to that of Professor Chayes. *See, e.g.*, Laycock, *supra* note 83, at 77.

features.[115] One of us (Schoenbrod) has articulated how courts decide whether, when a legislature enacts a rule of conduct, they must enforce the rule to the letter, or whether they retain traditional equitable power to do more or less.[116] That articulation provides a background understanding against which statutes should be interpreted unless the legislature clearly states another intention.[117] Similarly, the law of remedies helps to provide a background understanding of what it means to "enforce" a right within the meaning of Section 5.

The Supreme Court should not give Congress more latitude in determining whether it has exceeded its remedial power under Section 5 than the Court grants lower courts in determining whether they have exceeded their remedial power. Of course, the Court is deferential to Congress in findings of fact, as it is deferential to the lower courts' factual determination. Such deference should not be taken as a license for Congress or the lower courts to exceed their powers. Rather, this deference takes account of the reality that legislators and trial court judges have, each in their own ways, access to information and insights not readily available to the Supreme Court.

Indeed, there are reasons to suppose that Congress, in formulating legislative remedies under Section 5, should be held to a higher standard of justification than are trial court judges in formulating judicial remedies. First, Congress is better able to gather the facts showing the need for prophylactic remedies. The trial judge is limited to the record built by the parties. In contrast, Congress can draw upon its own investigatory resources and, in most instances, those of the executive branch. With Congress's fact finding resources and latitude, it is not unreasonable to enforce the proportionality requirement, especially when that requirement hedges against congressional usurpation of Article V amendment procedures. Second, Congress is far less circumscribed than are the courts in reaching conclusions of fact needed to justify a prophylactic remedy; Congress is not bound by evidentiary rules and the requirement to base its findings on the record. Third, Congress has more latitude in crafting remedies, and is, therefore, better able to craft remedies narrowly tailored to the threat presented.[118] The fourth and final reason is that

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115 *See* City of Boerne v. Flores, 521 U.S. 507, 533-36 (1997).

116 *See supra* text accompanying note 90.

117 *See* Schoenbrod, *supra* note 90, at 681-82.

118 *Cf.* Peter H. Schuck, *The New Judicial Ideology of Tort Law, in* NEW DIRECTIONS IN LIABILITY LAW 4, 15-16 (Walter Olson ed., 1988).

remedies under Section 5 are far more powerful than those issued by a trial judge. A trial judge's injunction binds only the parties to that case and their privies. In contrast, legislative remedies under Section 5 can bind the whole country. For example, RFRA established a new free exercise standard for all governments at every level throughout the United States.[119]

III. THE STRUCTURE OF THE CONSTITUTION AND PROPORTIONALITY REVIEW

Proportionality review is part and parcel of the Court's increasingly close attention to structural principles.[120] If Congress were permitted to enact rules that it calls "prophylactic" without any proportionality review, it could increase its power under Section 5 geometrically. For example, in the name of equal protection, Congress could require courts to apply heightened scrutiny to protect any group with sufficient political power to get the attention of legislators, and thereby mandate state and local government to confer benefits on that group. In the name of protecting free speech, Congress could prevent state and local government from zoning or licensing pornography shops out of residential neighborhoods.[121] It could unilaterally force Tennessee and California to accept the same definition of obscenity.[122] In the

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[119] *See* 42 U.S.C. § 2000bb-2(1) (1994) (defining "government" as "[a] branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State . . . .").

[120] The proportionality and congruence requirement has been applied in the following cases since *Boerne*: Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (discussing lack of proportionality and congruence); Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 178 F.3d 212 (4th Cir. 1999) (finding congruence and proportionality) (petition for rehearing and rehearing en banc pending); Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998) (stating that the ADA met the proportionality requirements); Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (stating that the ADA satisfies the congruence/proportionality requirement); Pease v. University of Cincinnati. Med. Ctr., 6 F. Supp. 2d. 706 (S.D. Ohio 1998) (stating that the ADEA satisfies the proportionality and congruence requirements); Kish v. Verniero, 212 B.R. 808 (1997) (finding lack of proportionality and congruence in bankruptcy law); *see also* Hamilton, *Landmark for Structural Analysis*, *supra* note 71.

[121] Of course, Section 5 only provides the power to regulate state and local governments. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under the Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 374 (1994) [hereinafter Hamilton, *Henhouse*]. Regulation of the federal government arises only under Article I. *See id.* at 364; *see also* FW/PBS v. City of Dallas, 493 U.S. 215, 229 (1990) (striking a zoning and licensing ordinance as a prior restraint to the First Amendment); City of Renton v. Playtime Theatres, 475 U.S. 41, 54-55 (1986) (upholding ability to zone entertainment away from residential neighborhoods).

[122] In *Miller v. California*, 413 U.S. 15, 30 (1973), the Court upheld "contemporary community standards" as the national criteria to determine whether a trier of fact would find that the work appealed to the prurient interest.

name of protecting property, Congress could prevent state and local government from responding to environmental threats left unaddressed by federal environmental law, or could tell communities that they may not protect their shared history through historical preservation.[123]

That Congress does not always avail itself of the opportunity to enact bad laws is no answer to this parade of horribles. How it and other governmental institutions act depends very much on the ground rules of politics under which they operate. For that reason, the Framers of the Constitution sought to structure a system of government that would discourage arbitrary laws and infringements on liberty by dividing power between the discrete power centers within the society, and by making political actors accountable for the consequences of their choices.

Professor Michael McConnell has argued that Congress, when acting under Section 5, "is not bound by the institutional constraints that in many cases lead the courts to adopt a less intrusive interpretation from among the textually and historically plausible meanings of the clause in question."[124] His reasoning rests on the strange notion that "Congress need not be concerned that its interpretations of the Bill of Rights will trench upon democratic prerogatives, because its actions *are* the expression of the people."[125] On his skewed understanding of the Constitution, "the *Boerne* Court overturned the 'will of the people.'"[126]

This view rests on two common errors. First, representatives are *not* the people, but rather hold independent decision making authority distinct from the people.[127] Their decisions are constitutionally legitimate, no matter how far they stray from the people's wishes, so long as they do not cross constitutional boundaries. Thus, they hold tremendous power, both to do good and to trample on the people's liberties. The circumstances surrounding RFRA reveal the flaw in assuming that legislation is the will of the people; the people knew little if anything about it.[128]

Second, the Constitution does not sanction any lawmaking

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123 *See, e.g.*, Brooks M. Beard, *The New Environmental Federalism: Can The EPA's Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1, 27 (1997) (discussing state privilege legislation curbing a state's ability to enforce environmental laws).

124 McConnell, *supra* note 2, at 156.

125 *Id.*

126 *Id.* at 168.

127 *See generally* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 480 (1994); Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U CHI. SCH. ROUNDTABLE 1 (1997) [hereinafter Hamilton, *The People*].

128 *See* Marci A. Hamilton, *Religion's Reach*, 1997 THE CHRISTIAN CENTURY 644.

that is "the expression of the people."[129] All laws are supposed to be made through legislative filtering,[130] or, if constitutional amendments, through supermajorities of Congress and the states.[131] The Framers made it quite clear that the people's views *require* filtering.[132] In short, Professor McConnell's foundational presumptions are simply incorrect. Congress is just as dangerous when it is tinkering with constitutional protections under Section 5 as when it is engaged in Article I lawmaking.

Without proportionality review in Section 5 jurisprudence, Congress could change the ground rules of government built into the Constitution in five fundamental ways. First, Congress would become, in effect, a legislature with unlimited, rather than enumerated, powers. Second, Congress would have increased power to impose unfunded mandates directly on state and local government, even in their core policy making functions.[133] Third, Congress would, in effect, have the power to revise the Court's interpretation of rights to make them more "protective"—at the expense, of course, of other groups. Since there is no vacuum of power in our society, every time the lines of power are redrawn, some benefit and others do not.[134] Fourth, Congress could take credit for conferring new rights without taking responsibility for the concomitant costs, by forcing the executive branch or the states to carry out its edicts.[135] Finally, Congress could impose on unelected judges the hard policy choices necessitated by the inevitable need to strike a balance between costs and benefits.

The Court did succumb to political pressure in the days of the Court-packing plan because the country was desperate during the

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129 *See* Hamilton, *The People*, *supra* note 127.

130 *See* U.S. CONST. art. I (mandating that lawmaking powers of the federal government lodge in the legislative branch); *id.* art. IV, § 4 (Guaranty Clause).

131 *See id.* art. V.

132 *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 83-88 (Adrienne Koch ed. 1966); *see also* THE FEDERALIST NO. 15, at 72 (Alexander Hamilton) (Garry Wills ed., 1982) ("(T)he passions of men will not conform to the dictates of reason without constraint.").

133 *See* Alden v. Maine, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Post-Secondary Educ. Expense Bd., 119 S. Ct. 2199 (1999). *See generally* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113 (1997) (discussing the importance of allowing the political system to keep federalism in check).

134 This was the intent of the Framers. "It is obviously impracticable in the federal government of these States to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society must give up a share of liberty to preserve the rest." MADISON, *supra* note 132, at 627 (letter to Congress accompanying a draft of the Constitution).

135 *See* Hamilton, *Henhouse*, *supra* note 121, at 378-86 .

Great Depression, and the Court had in fact used constitutional review to try to impose its policy preferences on the political branches.[136] Proportionality review rightly applied, however, does not second-guess congressional policy. Rather, it requires that Congress make policy *within its enumerated powers*. Far from subverting democratic accountability, proportionality review protects it by ensuring that politicians cannot change the ground rules of government to avoid responsibility and to serve powerful interests. RFRA, whatever the good intentions behind it, exemplifies congressional avoidance of responsibility.[137]

The Supreme Court must enforce the formalistic boundaries established by the Constitution if it is to protect the Constitution's structure without second guessing policy.[138] Good fences make good neighbors, and they are essential for democratic accountability and liberty. If the Supreme Court is to be faulted, it is for not going far enough to enforce such boundaries. For example, the Court has wavered over the years in its enforcement of the nondelegation doctrine,[139] which is, nevertheless, an

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136 *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (rejecting direct/indirect effect on interstate commerce distinction to uphold National Labor Relations Act); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage statute); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (holding state minimum wage law unconstitutional as violating due process); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935 for infringing on power of the states); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding unconstitutional National Industrial Recovery Act).

137 The record of constitutional violations undergirding the Religious Liberty Protection Act of 1999, which invokes Section 5 of the Fourteenth Amendment, to federalize local land use laws is little improvement over the record developed regarding RFRA. *See, e.g.*, *Religious Liberty Protection Act of 1999: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong.*, May 12, 1999, *available in* 1999 WL 304868 (testimony of Steven T. McFarland, Christian Legal Society); *id.* at 304682 (testimony of Douglas Laycock); *id.* at 304853 (testimony of Rabbi David Saperstein, Religious Action Center of Reform Judaism); *id.* at 304846 (testimony of Von G. Keetch, Church of Jesus Christ of Latter-Day Saints); *id.* at 304842 (testimony of J. Brent Walker, on behalf of the Baptist Joint Committee on Public Affairs); *see also Religious Liberty Protection Act of 1999: Hearings on S. 2148 Before the Subcomm. on the Judiciary*, 105th Cong., June 23, 1999, *available in* 1999 WL 416833 (testimony of Nathan B. Diament, Institute for Public Affairs, Union of Orthodox Jewish Congregations of America); *id.* (testimony of Elliot M. Mincberg, People for the American Way); *id.* at 416832 (testimony of Steven T. McFarland, Christian Legal Society). It is anecdotal and runs counter to objective studies done on the issue. *See, e.g.*, Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, University of Arizona (visited Nov. 8, 1999) <http:\\www.marcihamilton.com/rlpa/landuse.html>.

138 *See generally* Marci A. Hamilton, *Buried Voices, Dominant Themes: Justice Hans Linde and the Move to Structural Constitutional Interpretation*, 35 WILLAMETTE L. REV. 167 (1999).

139 *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 155-95 (1993); *see also* Amicus Curiae

important element of the Court's emerging structural orientation. In the Court's words: "Another strand of our separation of powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties.... The fundamental precept of the delegation doctrine is that the lawmaking function belongs to the Congress."[140] The proportionality requirement also encourages Congress to engage in its lawmaking function with integrity and care.

CONCLUSION

The Constitution is structured so that policy makers can exercise their power only through pre-ordained mechanisms designed to make them accountable in specific ways. The current Supreme Court continues to underscore this point.

The Court's renewed vigor in enforcing proportionality in *College Savings Bank* and *Boerne* is simply further evidence that the Court is turning towards structural principles in its review of legislative action.[141] At one time, the Court's use of the means-end fit requirement was subject to the criticism that it was a subterfuge to assess the policy justifications for the statute.[142] The proportionality test is a tool for divining when Congress is acting according to its constitutional role.

Proportionality review, and its presupposition that remedies must redress existing wrongs, forces Congress to justify its flights of policy that invade the states' and the courts' domains. The Court has implemented this time-honored tool from the law of

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Brief in Support of Appellees at 8-19, Raines v. Byrd, 521 U.S. 811 (1997) (No. 96-1671) (describing history of the Court's nondelegation doctrine).

[140] United States v. Loving, 517 U.S. 748, 758 (1996).

[141] The best examples of this contemporary turn are Alden v. Maine, 119 S. Ct. 2240, 2267 (1999); College Savings Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd., 119 S. Ct. 2219, 2224 (1999); Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); Morrison v. Olson, 487 U.S. 654 (1988); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

[142] *See* Hans Linde, *Due Process of Lawmaking*, *in* INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995).

remedies to uncover the often wily means by which the most dangerous branch, the legislature,[143] can creep beyond its constitutional bounds.

[143] The Framers feared the legislature most. "The legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose." MADISON, *supra* note 132, at 322 (statement of Gouverneur Morris).