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Oh, What a Truism the Tenth Amendment Is: State Sovereignty, Sovereign Immunity, and Individual Liberties

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ARTICLE

OH, WHAT A TRUISM THE TENTH AMENDMENT IS: STATE SOVEREIGNTY, SOVEREIGN IMMUNITY, AND INDIVIDUAL LIBERTIES*

Sharon E. Rush **

Abstract

The Supreme Court under the late Chief Justice Rehnquist and now Chief Justice Roberts takes the Tenth Amendment and state sovereignty seriously. It also takes the Eleventh Amendment and state sovereign immunity seriously. Moreover, the contemporary Court's interpretations of Congress's Article I powers are based on its concomitant interpretations of the Tenth and Eleventh Amendments, which the Court has infused with the idea that an inherent part of a state's sovereignty is not just its prerogative not to have its treasuries invaded, but also includes its right not to have its dignity assaulted. Protecting the dignity of states and other critical principles that inform the Court's Article I, Tenth Amendment and Eleventh Amendment jurisprudence have made their way into cases about Congress's enforcement powers under Section 5 of the Fourteenth Amendment. Indeed, the Court's strong coupling of state sovereignty and state sovereign immunity suggests that they are an inseparable part of the federalism balance.

This Article explores the development of the contemporary Court's strong emphasis on the importance of states as evidenced by its interpretations at the intersection of Article I, the Tenth, the Eleventh, and Fourteenth Amendments (the "Intersection"). When all is said and done, the path to obtaining damage remedies against a state has been significantly blocked by developments at the Intersection, notwithstanding Congress's enforcement power under Section 5 to abrogate states' immunity. Yet the adequacy of state remedies is largely

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irrelevant under § 1983, the primary statute that provides a cause of action for alleged violations of federal law by state actors. Significantly, though, almost all state constitutions protect the principle that “where there’s a right, there must be a remedy.”

In light of this development, the Court’s message about the importance of states under Article I, and the Tenth and Eleventh Amendments, does not include a concomitantly strong message about their importance under the Fourteenth Amendment. To emphasize, this Article does not attempt to lay out the contours of the role state remedies can and should play at the Intersection; that is the focus of future scholarship. Rather, this Article explores the strength and breadth of the Court’s message about the importance of states under Article I, and the Tenth and Eleventh Amendments, and highlights the curious absence of a concomitantly strong message about the importance of the states in protecting individual rights and providing remedies for violations of those rights. Certainly, if states are important under Article I, and the Tenth and Eleventh Amendments, they also are important under the Fourteenth Amendment. Including a message about the importance of state remedies at the Intersection bolsters the Court’s overall message about the importance of states in the constitutional design.

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INTRODUCTION

“[W]ithout [the independent protective force of state law] . . . the full realization of our liberties cannot be guaranteed.”¹

The Supreme Court under the late Chief Justice Rehnquist and now Chief Justice Roberts takes the Tenth Amendment² and state sovereignty seriously. It also takes the Eleventh Amendment³ and state sovereign immunity seriously. As this Article explores, the Court has infused the Eleventh Amendment with Tenth Amendment principles. The contemporary Court’s strong coupling of state sovereignty and state sovereign immunity suggests they are an inseparable part of the federalism⁴ balance. And while enjoying sovereign immunity is part of a state’s sovereignty, it does not necessarily follow that because a state is sovereign, it is always immune. Yet many of the contemporary Court’s decisions protect state sovereignty—immunize states from the effects of federal laws - in ways that extend beyond the traditional understanding of state sovereign immunity that a state cannot be sued without its consent.⁵ I refer to this as the Shield.

Additionally, the contemporary Court fortifies the Shield by limiting Congress’s power under Article I⁶ and Section 5 of the Fourteenth Amendment.⁷ Recent developments at the Intersection of Article I, the Tenth,

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

2. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

3. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

4. Professor Somin’s definition of federalism describes my use of the term and I respectfully quote her: “I focus on constitutional federalism in the narrower sense of judicial enforcement of structural limits on federal power, usually for the purpose of leaving greater scope for state and local authority.” Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS: J. FEDERALISM, 441, 442 (2016). How the division of power should be balanced, of course, is persistently a subject of disagreement. See, e.g., Heather K. Gerken, *The Supreme Court 2009 Term-Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (arguing for a view of federalism divorced from the constraints of sovereignty; a “national federalism” that recognizes the interdependency of federal and state governments).

5. For an excellent history of sovereign immunity, see Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

6. I focus primarily on the Commerce Clause and the Necessary and Proper Clause: “The Congress shall have Power . . . To regulate Commerce . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .” U.S. CONST. art. 1, § 8.

7.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

the Eleventh, and the Fourteenth Amendments (the “Intersection”) send a strong message about the importance of states in the constitutional design.⁸ Simultaneously, the Shield creates a federal void (the “Void”) by making it virtually impossible for individuals to obtain money damages from their states under federal law for violations of their Fourteenth Amendment rights.⁹ The complexities surrounding efforts to obtain this remedy because of sovereign immunity and state sovereignty principles is this Article’s primary focus.¹⁰ It is as if the Constitution can only protect state sovereignty or individual rights, or as Professor Akhil Amar so eloquently asked years ago, “Is the Constitution therefore divided against itself?”¹¹

This Article suggests that state remedies can provide a bridge over this divide and that a critical scene in the bigger picture is largely missing: a

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

8. The Rehnquist and now Roberts Court is often characterized as the “federalism” Court. *See generally* Somin, *supra* note 4. One of the most interesting conceptions of federalism that is receiving attention is “national federalism,” which posits that federal/state relations are increasingly defined by federal regulatory statutes. *See generally* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 996 (2014) (“Federalism today is something that mostly comes – and goes – at Congress’s pleasure. It is a question, and feature, of federal statutory design.”). *Id.* at 1998. Notwithstanding the source of “our national federalism,” and consistent with this Article’s theme, Professor Gluck also notes that it “depends on, and strengthens, the states’ continuing sovereign status in important ways that have yet to be recognized.” (footnote omitted). *Id.* at 2000.

9. Prominent scholars criticize this development. For an excellent history and critique of the Court’s Section 5 cases, see generally WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW (2015). *See also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010) (“Increasing congressional power at the expense of the states was the whole point of the new constitutional structure that followed the Civil War.”). *Id.* at 1809; Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, but not States*, 39 SEATTLE U. L. REV. 787, 792–93 (2016) (describing the Rehnquist and Roberts’ Court view of Congress’s enforcement power as “crabbed.”).

10. Individuals have other federal remedies available, most notably prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), discussed *infra* Part II, enforcement actions brought by the United States, and suits against individual state actors in their personal capacities and suits against local governments. Obtaining those federal remedies also is becoming increasingly more difficult in light of the Shield and the Void, but that exploration is beyond the scope of this Article. For a creative solution to the growing inability of individuals to obtain money damages against their states, see James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 101 (2016) (suggesting “a two-step process” for remedying unlawful state action: individuals first seek injunctive relief under *Young* and then “pursue their claim [for money damages against the state] through whatever machinery the state has established.”) *Id.* at 139. Their argument, of course, is premised on *Testa v. Katt*, 330 U.S. 386 (1947), in which the Court held that the Supremacy Clause requires states to hear federal claims that are analogous to the state claims they hear.

11. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987).

message from the Court about the importance of state remedies. Occasionally, the Court recognizes the existence of state remedies in Section 5 cases.¹² But the adequacy of state remedies is largely irrelevant under § 1983, the primary statute that provides a cause of action for alleged violations of federal law by state actors.¹³ Simultaneously, almost all state constitutions protect the principle that “where there’s a right, there must be a remedy.”¹⁴

To emphasize, this Article does not attempt to lay out the contours of the role state remedies should play at the Intersection; that is the focus of future scholarship.¹⁵ Rather, this Article explores the strength and breadth of the Court’s message about the importance of states under Article I, and the Tenth and Eleventh Amendments, and highlights the curious absence of a concomitantly strong message about the importance of the states in protecting individual rights and providing remedies for violations of those rights. To invoke a cliché in the context of the importance of states: It is as if the Court neglects the states’ forests (remedies) in its protection of the states’ trees (sovereignty and immunity).

This Article proceeds in four parts. Part I explores the contemporary Court’s interpretation of the Tenth Amendment as a substantively meaningful representation of federalism principles, particularly with respect to Congress’s Article I powers. As analyzed in Part II, the contemporary Court’s efforts to

12. For example, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court held that the Age Discrimination in Employment Act (ADEA) does not abrogate states’ immunity, but Justice O’Connor, writing for the majority, opined that “[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.” *Id.* at 91–92. The Court also considers state remedies in the context of evaluating whether or not a state actor has violated due process. *See, e.g., Fla. Prepaid Postsecondary Expense Educ. Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (patent infringement by a state is not a due process violation if state provides remedy). *See also infra* Part IV.

13. *Infra* Part IV (discussing *Monroe v. Pape*, 365 U.S. 167 (1961)). 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

14. For an excellent history of state remedies, see generally Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003). The “rights/remedy” principle, of course, is famously associated with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Interestingly, just because most states recognize the principle does not mean that an individual will necessarily receive a remedy under state law. *See, e.g., Seth Davis & Christopher A. Whytock, State Remedies for Human Rights*, 98 BOSTON U. L. REV. 397, 429 (2018) (“No state court thinks its law guarantees a personal remedy for every legal wrong. Rather, providing law for the redress of wrongs is a recognized state interest, even where countervailing concerns may counsel withholding a remedy.”) (footnote omitted).

15. This Article is not suggesting that state remedies should be exhausted or even that they are more important than federal remedies. The development about the scope of state remedies in light of the Shield and the Void is the focus of future scholarship.

define the boundaries between federal and state power eventually resulted in merging Tenth Amendment state sovereignty principles with Eleventh Amendment sovereign immunity principles. Moreover, the contemporary Court's interpretations of Congress's Article I powers are based on its concomitant interpretations of the Tenth and Eleventh Amendments, which the Court has infused with the idea that an inherent part of a state's sovereignty is not just its prerogative not to have its treasuries invaded but also includes its right not to have its dignity assaulted.¹⁶ Consistent with protecting that principle, the Court held that Congress does not have power under Article I to abrogate states' sovereign immunity.¹⁷

Part III focuses on the relationships among the states, individuals, and Congress under the Fourteenth Amendment. At the heart of this Part lies the challenge of understanding the "congruence and proportionality" test (the "Test") in *City of Boerne v. Flores*.¹⁸ As a brief overview, the *Boerne* Court held that enforcement legislation must be congruent and proportional "to the injury to be prevented or remedied and the means adopted to that end."¹⁹ Although Congress cannot create Fourteenth Amendment rights, *Boerne* held that Congress's enforcement power does extend to imposing obligations on states to prevent constitutional violations. This is what I call the "*Boerne* inconsistency," because preventive measures function a lot like "rights."²⁰ Unraveling the inconsistency and providing a way to understand other complicated issues raised by the Test is the primary goal of this Part.

Part III demonstrates that the Court's interpretation of Section 5 comports with the Court's Tenth and Eleventh Amendment principles, particularly as they relate to protecting states' dignity. Indeed, protecting the dignity of states²¹ and other critical principles that inform the Court's Article I, Tenth Amendment and Eleventh Amendment jurisprudence have made their way into cases about Congress's enforcement powers under Section 5. This is dramatically

16. For an historical perspective on the role of "dignity" in American jurisprudence, see generally Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381 (2011). Professor Daly suggests that the law surrounding the dignity of states can be helpful in the development of a jurisprudence that protects the dignity of individuals. The notion that states have dignity, particularly at the expense of individuals, also is criticized. See, e.g., Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1255 (2016) (the prohibition on assaulting a state's dignity suggests they are entitle[d] . . . to a kind of unaccountability . . ."); see generally Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

17. *Infra* Part II (discussing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). *But see* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (sovereign immunity does not apply in bankruptcy proceedings).

18. 521 U.S. 507 (1997).

19. *Id.* at 508.

20. See *infra* Part III.

21. For an excellent critique of the idea that states are imbued with dignity and do not have to earn it, see Jeremy M. Sher, *A Question of Dignity: The Renewed Significance of James Wilson's Writings on Popular Sovereignty in the Wake of Alden v. Maine*, 61 N.Y.U. ANN. SURVEY OF AM. L. 591 (2005).

illustrated by the Court's decision in *Shelby County, Alabama v. Holder*,²² which relied on the "equal sovereignty principle" to strike down the preclearance coverage formula in § 4 of the 1965 Voting Rights Act (VRA). The contemporary Court uses the analysis in the voting rights cases as a baseline measurement to evaluate the need for Congress to use its enforcement power in Section 5 cases, none of which raised the equal sovereignty principle. This comparison alone makes it even less likely that enforcement legislation will meet the Test because of the unique circumstances surrounding the voting rights of African Americans in the 1960s. Thus, injecting the equal sovereignty principle into the analysis is likely to narrow Congress's enforcement power and thereby fortify the Shield and the Void.

Simultaneously, when enforcement legislation fails abrogation, it generally remains valid under Article I and the analysis circles back (the "Circling Back Phenomenon") to this complicated Intersection. Because Article I is not a source of abrogation, however, money damages against states remain elusive under federal law. Yet when state remedies exist, they mitigate the Void. Fortunately, as explored in Part IV, state remedies are beginning to have a presence at the Intersection,²³ and a message from the Court about their importance would be a welcome addition to its overall message about the importance of states in the constitutional design.

This Article concludes that when all is said and done, Congress's enforcement power is incredibly shallow, and is shrinking.²⁴ Unless Congress takes a seriously more responsive role in exercising its enforcement power, the people will have to rely increasingly on their states to help fill in the Void. The challenge of acknowledging and addressing the Void, while also protecting state sovereignty, should be an appealing one to scholars, especially to those who accept Dean Heather Gerken's challenge to adopt a more integrative understanding of federal/state relations.²⁵ Certainly, sending a message about the important positive role states can and should play under the Fourteenth Amendment would be consistent with and even fortify the Court's emphasis on the importance of state sovereignty.

22. 570 U.S. 2 (2013).

23. Justice Kennedy focused on the availability of state remedies in his dissenting opinion in *Nevada v. Hibbs*, 538 U.S. 721, 751–52 (2003) (Kennedy, J., dissenting), discussed more fully *infra* Part III. This is not to suggest that state remedies limit or even should limit Congress's Section 5 power or that states must provide remedies because that raises commandeering issues. *See infra* Part IV. State also must abide by federal law under the Supremacy Clause. U.S. CONST. art. VI.

24. This is particularly true after *Shelby County, Alabama v. Holder*, 570 U.S. 2 (2013) and *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012), analyzed *infra* Part III.B.4.

25. *See generally* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1697, 1718 (2017) (calling for a "détente between those in the nationalist and federalism camps," and encouraging a robust evaluation of how "Our Federalism" can be perfected to reflect today's reality that the federal and state governments are uniquely interrelated).

I. STATE SOVEREIGNTY AND STATE SOVEREIGN IMMUNITY

A. *From Chisholm v. Georgia*²⁶ to the Eleventh Amendment

The Supreme Court struggled for over two centuries to answer the question whether states retained their sovereign immunity when they adopted the Constitution. Moreover, the primary path the Court has taken in its search for the answer is the Eleventh Amendment. But what it means is anything but obvious. On its face, it bars federal courts from hearing certain diversity suits brought against a state.²⁷ It was adopted to overrule the Supreme Court's 1793 decision in *Chisholm v. Georgia*,²⁸ in which the Court upheld its jurisdiction²⁹ to hear a suit against Georgia for money damages and rejected Georgia's defense of sovereign immunity.³⁰

Chisholm was a surprise because sovereign immunity was a defense at common law, as all of the *Chisholm* Justices acknowledged. Reacting swiftly to overrule *Chisholm*, states quickly adopted the Eleventh Amendment in 1798—only five years later. Importantly, to say that the Eleventh Amendment overruled *Chisholm* does not clarify whether the Amendment means that Article III jurisdiction does not extend to diversity suits against states or whether it means that states retained their common law immunity when the Constitution was ratified. Scholars interpret *Chisholm* in different ways.³¹ The

26. 2 U.S. (2 Dall.) 419 (1793).

27. See *supra* note 3 (quoting Eleventh Amendment).

28. 2 U.S. (2 Dall.) 419 (1793).

29. Article III gives federal courts jurisdiction over “Controversies . . . between a State and Citizens of another State.” U.S. CONST. art. III, § 2, cl. 1. Congress authorized such suits in the Judiciary Act of 1789. ch. 20, 1 Stat. 73 (1789). Interestingly, this Act granted the Supreme Court original jurisdiction over mandamus actions, which the Court in *Marbury v. Madison* held was an unconstitutional violation of Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Diversity jurisdiction is authorized today under 28 U.S.C. § 1332.

30. Georgia did not make an appearance but denied in a written response that the Court had jurisdiction and argued that Article III's language should be interpreted to mean only that states can sue as plaintiffs but that they cannot be sued without their consent because they enjoy immunity. *Chisholm*, 2 U.S. (2 Dall.) at 419. See Massey, *supra* note 5 for a thorough and fascinating history of *Chisholm*. The suit was filed initially in the circuit court in Georgia and it is unclear whether Justice Iredell, who was riding circuit, dismissed that suit because he supported Georgia's sovereign immunity defense or because the Judiciary Act of 1789 did not confer jurisdiction on the circuit courts. *Id.* at 99 n.196. In any event, *Chisholm* then sued in the Supreme Court.

31. Professor Massey argues that the Eleventh Amendment was a response to a fear of what *Chisholm* portended and not what it actually held because the Court never got to decide the immunity question; it merely held that it had jurisdiction to entertain the suit. When Georgia failed to make an appearance, *Chisholm* moved for a default judgment but the Court gave Georgia almost a year to respond and defend itself. Meanwhile, the Eleventh Amendment was ratified and rendered the case moot so the immunity question was never resolved. Massey, *supra* note 5, at 103. In contrast, Professor Amar takes the position that the opinions of the Justices focused on whether an action of assumpsit would lie against a state in federal court and the majority concluded that it would. In their opinions, not only did Article III extend jurisdiction over states, but Professor Amar also notes that the Justices ignored the Rules Decision

important point for this Article is that the Tenth Amendment supports either interpretation, but none of the *Chisholm* Justices explicitly mention it, although their opinions do dance in its shadows.³² Ironically, Justice Iredell's dissenting opinion comes closest to invoking the Tenth Amendment: "The United states are sovereign as to all the powers of Government actually surrendered; each State in the Union is sovereign as to all the powers reserved."³³

Adding to the curious omission of any explicit reference to the Tenth

Act (part of the Judiciary Act of 1789) and fell into the *Swift v. Tyson* general federal common law hole on the assumption question. Amar, *supra* note 11 at 1472 n.197.

32. The Justices presented their implicit references to the Tenth Amendment as follows: Justice Blair,

When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State court, and if sovereignty be an exemption from suit in any other than the sovereign's own courts, it follows that when a state, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.

Chisholm, 2 U.S. at 450 (Blair, J., concurring). In Justice Jay's oblique reference to the Tenth Amendment, he explicitly listed several powers that were surrendered to the federal government: "By this great compact however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, etc. etc." *Id.* at 471 (Jay, J., concurring). Significantly, the "etc. etc." is his choice of language. In other words, his explicit list of surrendered powers, and this assumes the critical diversity jurisdiction phrase in Article III would have made the list, stops short of invoking the Tenth Amendment. Justice Wilson,

The question now opens fairly to our view, could the people of those states, among whom were those of Georgia, bind those states, and Georgia among the others, by the legislative, executive, and judicial power so vested? . . . If those states were the work of those people, those people, and that I may apply the case closely, the people of Georgia, in particular, could alter as they pleased their former work. To any given degree, they could diminish as well as enlarge it. Any or all of the former state powers, they could extinguish or transfer. The inference which necessarily results is that the Constitution ordained and established by those people, and still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those states and over the State of Georgia in particular.

Id. at 454. And, Justice Cushing,

As to individual States and the United States, the Constitution marks the boundary of powers. Whatever power is deposited with the Union by the people for their own necessary security is so far a curtailing of the power and prerogatives of States . . . So that I think no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole.

Id. at 466.

33. *Id.* at 435 (Iredell, J., dissenting). It is unclear whether Justice Iredell dissented because he believed states retained their immunity or because he did not think the Judiciary Act authorized the suit. See Massey, *supra* note 5, at 107–11.

Amendment is the reality that the Bill of Rights was added to the Constitution only a few years prior to *Chisholm*, because the states feared that they were surrendering too much power to the national government and adding the Bill of Rights was the *quid pro quo* for some states' agreements to ratify the Constitution.³⁴ Given that concern, especially when coupled with the *Chisholm* question of whether states surrendered or retained their sovereign immunity, the Tenth Amendment would have supported either conclusion.³⁵ So, whither the Tenth Amendment?

B. *The Importance of States and the Tenth Amendment*

1. Article I: *McCulloch v. Maryland*³⁶

It might seem strange to focus on Chief Justice Marshall's decision in *McCulloch* because that case was about Congress's power to create a national bank and Maryland's power to tax it and had nothing to do with sovereign immunity. As Marshall laid out the boundaries between federal and state power, however, he explicitly relied on the Tenth Amendment. Moreover, *McCulloch* was decided only sixteen years after *Chisholm* and only eleven years after the adoption of the Eleventh Amendment, and Marshall's federalism boundaries continue to influence, and even divide, Justices on the contemporary Court—particularly with respect to Congress's enforcement power under Section 5.

Marshall concluded that Congress had the power to create a national bank and that Maryland did not have the power to tax it, and he emphasized that “we must never forget that it is *a Constitution* we are expounding.”³⁷ Accordingly, Congress must have implied powers to carry out its explicit ones. Moreover, Marshall opined that Congress's power is even broader because of the Necessary and Proper Clause, which is not only not a limitation on Congress's power, but it is actually one of Congress's enumerated powers.³⁸ In Marshall's opinion, the Necessary and Proper Clause is like icing on the congressional power cake. Every first year law student learns Marshall's famous statement: “Let the end be legitimate, let it be within the scope of the Constitution, and all

34. See generally KERMIT L. HALL, WILLIAM M. WIECEK & PAUL FINKELMAN, AMERICAN LEGAL HISTORY: CASES AND MATERIALS 94 (2d ed. 1996) (“To secure ratification in critical states like Virginia, Federalists had to promise that they would propose such guarantees [for personal liberty] as amendments to the Constitution.”).

35. Professor Massey and Professor Amar emphasized this as well. See Massey, *supra* note 5, at 66 (“The notion of state sovereign immunity . . . and its constitutional anchor are more properly found in the Tenth Amendment.”) (footnote omitted); see Amar *supra* note 11, at 1491.

36. 17 U.S. (4 Wheat.) 316 (1819).

37. *Id.* at 407. Among Congress's explicit powers that are related to creating a bank are the “great powers,” including the powers “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.” *Id.*

38. *Id.* at 420–21.

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.”³⁹

Notwithstanding his support for broad congressional power, Marshall invoked the Tenth Amendment to acknowledge that the national government is a government of limited powers and that some powers are reserved to the states. One of the most critical points in his opinion is the distinction he made between the states and the people. The Tenth Amendment also makes this distinction, although very little attention is paid to the words “or the people respectively.” This distinction explains why Maryland lacked the power to tax the bank. Quoting Marshall:

The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.”⁴⁰

Marshall’s distinction between the states and the people, citing the Tenth Amendment, was *the rationale* for upholding the constitutionality of the national bank and Maryland’s lack of power to tax it. More specifically, *McCulloch* held that the people are the true sovereigns and that the states are representatives of the people. The people of the United States delegated power to Congress to create the bank, but they retained their sovereignty as a united people and did not delegate to Maryland, a single state, the power to tax the national bank.⁴¹ This is consistent with Madison’s views that the liberty of the people is best protected when governmental power is diffuse.⁴²

Interestingly, all of the Justices in *Chisholm* noted that the people are sovereign but, again, without explicitly mentioning the Tenth Amendment.⁴³

39. *Id.* at 421.

40. *Id.* at 429.

41. Professor Amar provides an excellent history of the tension (leading up to the Civil War) between the Anti-Federalists and Republications, on one side, and the Federalists on the other side, over the question about who was sovereign under the new Constitution. Was each state an independent sovereign, the position of the Anti-Federalists? Or were the people of the United States the sovereign and the states their representatives, the position of the Federalists? Amar, *supra* note 11, at 1452.

42. THE FEDERALIST No. 51 (James Madison). The diffusion of power between the national government and the states is a distinguishing feature of the Constitution compared to the Articles of Confederation.

43. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) (Jay, C.J.).

This analysis is relevant to state sovereign immunity and the Tenth Amendment because the Justices on the Court today are divided on the question whether Congress's power under Section 5 is plenary as decided in *McCulloch*, or whether it is remedial, a more limited standard. Also, the distinction between the states and the people plays a vital role in understanding how the Test functions and the limitations on Congress's Section 5 powers and this is explored in Part III below.

Finally, *McCulloch* adds significant insights into Marshall's view about the importance of states in the constitutional design—at least with respect to the relationship between Congress and the states under Article I. Interestingly, he also acknowledged that “the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist.”⁴⁴ In other words, he suggested that the Tenth Amendment is a truism and that the “truth” will continue to perpetually evolve. Marshall's opinion in *McCulloch* can be interpreted to mean that states are not that important because the people are the true sovereigns and they gave Congress broad Article I power.

This seemingly rapid descent of the importance of states and state sovereignty within a relatively short time after the adoption of the Eleventh Amendment—which was an emphatic response to the “outrageous assault” on Georgia's sovereignty in *Chisholm*—is curious. Within a span of approximately 15 critical years because the Court was called upon to interpret significant parts of the Constitution for the first time, the concept of state sovereignty became clouded with confusion. How could state sovereignty, including its immunity, be so important that the Eleventh Amendment was thought necessary to protect it, but seemingly not so important with respect to defining the scope of Congress's Article I powers? *Barron v. Mayor of Baltimore*⁴⁵ offers interesting insights.

2. The Bill of Rights: *Barron*

In *Barron*, the plaintiff sued Baltimore alleging that the city⁴⁶ failed to maintain the water system which resulted in damage to his wharfs. He alleged that this was an unconstitutional “takings” under the Fifth Amendment.⁴⁷

44. *McCulloch*, 17 U.S. at 405.

45. 32 U.S. (7 Pet.) 243 (1833).

46. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that cities are “persons” under § 1983 and can be sued for money damages but only when local state actors act pursuant to an invalid policy. *Id.* *Monell* overruled *Monroe v. Pape*, 365 U.S. 167 (1961), which held that Congress did not intend for cities to be sued under § 1983 because they enjoyed sovereign immunity.

47. Note, *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068 (2016) (arguing that the Fourteenth Amendment is self-executing and abrogates states' immunity for “takings” and tax refund cases).

Ironically, Baltimore had consented to being sued so the issue of immunity was moot. Still, *Barron* lost. Rationalizing that the Bill of Rights did not apply to the states, the Court had no choice but to conclude that *Barron* was not stating a cause of action under the Constitution.⁴⁸

Several notable aspects of *Barron* are worth highlighting. First, and perhaps most obviously, *Barron* is an acknowledgement about the importance of states in the constitutional design. In fact, it might be one of the Court's most "emphatic" expressions⁴⁹ of just how important states are because they were entrusted with protecting individual rights. The most important rights were those that were included in the Bill of Rights because the people wanted to be sure those rights were protected from violation by the federal government. But the people (excluding the slaves, of course) did not have to fear that their own state governments would violate such important rights. By not applying the Bill of Rights to limit state power, the Court affirmed that the people could in fact trust their states not to violate their rights.

Viewing *McCulloch* and *Barron* with hindsight is informative. In the bigger picture, *McCulloch* downplayed the importance of states with respect to Congress's Article I power but *Barron* emphasized the importance of states with respect to protecting individual rights. And these messages emanated from Chief Justice Marshall within a relative short historical time period that included *Chisholm*, adoption of the Eleventh Amendment, and *Marbury v. Madison*.⁵⁰ Together, the messages provide a map for understanding where Marshall thought the boundaries between national and state power should be and in significant ways that map is charting the contemporary Court's federalism path.

Poignantly, and supportive of this Article's theme, Marshall's messages in *McCulloch* and *Barron* echo with remarkable similarity those from the contemporary Court but with two significant exceptions. As explored below in Part (C), the messages are the same with respect to acknowledging that Congress's power is plenary under Article I. Unlike Marshall, however, the contemporary Court limits Congress's plenary power by articulating and relying on Tenth Amendment principles. Its primary message is to reestablish and reaffirm the importance of states in the constitutional design, including under Article I. The contemporary Court's revival of the Tenth Amendment is

48. It gets even more complicated in light of contemporary jurisprudence. For example, cities are not protected by the Eleventh Amendment. *Monell*, 436 U.S. at 690. Further, suppose that the Bill of Rights had applied to the states at the time of *Barron* in 1833—before the Fourteenth Amendment and § 1983 and even § 1331's general arising under jurisdiction enacted in 1875. *Barron* still would have needed a cause of action, raising questions about implied right of actions under the Constitution, which are beyond the scope of this Article.

49. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the duty of the judicial department to say what the law is.").

50. 5 U.S. (1 Cranch) 137 (1803).

huge as evidenced by the strength of the Shield.

The second exception stands in sharp contrast. Unlike the *Barron* Court, the contemporary Court is not sending a correspondingly loud message about the importance of states in protecting individual liberties. Admittedly, federal/state relations dramatically changed following the Civil War and adoption of the Reconstruction Amendments, and the Court post-*Barron* has incorporated most of the Bill of Rights to apply to the states.⁵¹ Even the contemporary Court recently incorporated the Second Amendment's right to bear arms.⁵² But the Court's fierce respect for the Shield and seeming disregard for the Void raises the question whether the Court is functioning as if federal/state relations are returning to a *Barron*-like time in the sense that states can be trusted again.⁵³ If so, then more can and should be expected of states under the Fourteenth Amendment. If states do provide remedies and mitigate the federal remedy Void, then failing to recognize their efforts to fulfill the *Marbury* rights/remedy principle,⁵⁴ which recall most states also have in their own constitutions, is a missed opportunity for the contemporary Court to strengthen its message about the importance of states and state sovereignty.

C. The Tenth Amendment

1. It is a Truism

Chief Justice Marshall's suggestion in *McCulloch* that the Tenth Amendment is a "truism" is significant because of the context in which he and subsequent Courts use that description. In *McCulloch*, to highlight, Marshall did not invoke the Tenth Amendment as a reminder that federal power is *limited*; he noted that the Constitution's interpretation "depend[ed] on a fair construction of the whole instrument."⁵⁵ In context, his admonition augurs in favor of reading the Constitution to give Congress broad power. He opined that unless Congress legislates under a pretext,⁵⁶ its power is essentially *unlimited*.

Since *McCulloch*, different Courts interpreted the scope of Congress's power differently, particularly its Commerce Clause power, one of the most

51. See *infra* notes 296–98.

52. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

53. See *infra* Part III.B.4.a.

54. *Marbury*, 5 U.S. (1 Cranch) at 166.

But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Id.

55. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

56. *Id.* at 423.

important clauses defining federalism boundaries. By manipulating the definition of commerce (excluding mining,⁵⁷ manufacturing,⁵⁸ for example), different Courts operated on the premise that Congress's Commerce Clause power and states retained powers under the Tenth Amendment were inversely related.⁵⁹

The phrase, "the Tenth Amendment is a truism," was used in *McCulloch* to justify broad congressional power. Interestingly, it was used in *United States v. Darby*,⁶⁰ decided in 1941, for the same purpose—to justify reestablishing the broad scope of Congress's Commerce Clause power compared to the previous Court.⁶¹ In upholding the constitutionality of the Fair Labor Standards Act,⁶² which prohibited the shipment in interstate commerce of goods that were manufactured by workers in violation of the Act's minimum wage and maximum hours provisions, the *Darby* Court held that Congress's Commerce Clause power is plenary and "[f]rom the beginning and for many years the [tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."⁶³

The *Darby* Court cited *Gibbons v. Ogden*,⁶⁴ the case in which Chief Justice Marshall first described Congress's broad Commerce Clause Power and held that it extends to activities within a state that affect another state.⁶⁵ In light of *Darby*, *Wickard v. Filburn*⁶⁶ perhaps came as no surprise. Everyone familiar with *Wickard* knows that the Court held that Congress had the power to impose a penalty on farmers who grew wheat in excess of their allotments under the Agricultural Adjustment Act of 1938.⁶⁷ This was true even though farmer Filburn used his excess wheat to feed his family and his livestock.⁶⁸ It did not matter. The Court held: "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached

57. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (coal mining not in commerce).

58. See, e.g., *United States v. E.C. Knight*, 156 U.S. 1 (1895) (antitrust laws do not extend to sugar company because commerce does not include the manufacturing of sugar).

59. Interestingly, this same conception of the relationship between Congress and the states existed under the Fourteenth Amendment as well. Specifically, the idea that federal power is "carved out of" power that was reserved to the states comes from *Ex Parte Virginia*, 100 U.S. 339, 346 (1879). *Infra* Part III (exploring this power).

60. 312 U.S. 100 (1941).

61. Specifically, in *Darby*, the Supreme Court explicitly referred to the Tenth Amendment as a truism because it is "declaratory of the relationship between the national and state governments." *Id.* at 462.

62. *Id.* at 454–55.

63. *Id.* at 462.

64. 22 U.S. (9 Wheat.) 1 (1824).

65. *Id.* at 30.

66. 317 U.S. 111 (1942).

67. *Id.* at 114 (his allotment was 11.1 acres, but he farmed 23 acres).

68. *Id.*

by Congress if it exerts a substantial economic effect on interstate commerce.”⁶⁹ To emphasize just how broad Congress’s power extended, the Court added: “That [Filburn’s] own contribution to the demand for wheat maybe trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situation, is far from trivial.”⁷⁰

Critically, for the *McCulloch* and *Darby* Courts to label the Tenth Amendment a “truism,” says nothing about what “truth” it represents. Those Courts invoked the saying to suggest that state power is not very significant, enabling the Courts to “dismiss” the importance of states under Article I in finding the “true” federalism balance.

2. Oh, What a Truism It Is

In contrast, the contemporary Court has developed an understanding of the limited nature of Congress’s Article I powers such that the idea that states have reserved powers is meaningful. To the contemporary Court, the Tenth Amendment commands the respect of the states. To highlight this shift in the search for the “truth” behind the Tenth Amendment, I like this phrase: “The Tenth Amendment is a truism, but, oh, what a truism it is.”

Unlike earlier Courts that limited Congress’s power by narrowing the definition of commerce, the contemporary Court adopted the same definition of commerce used in *Wickard*: Congress has the power to regulate the channels of interstate commerce, persons and things in interstate commerce, and activity that substantially affects interstate commerce. The Court also functions on an extremely broad interpretation of the Necessary and Proper Clause. For example, in *Comstock v. United States*,⁷¹ the Court upheld Congress’s power to civilly commit certain sexual offenders after they had already served their federal sentences.

Notwithstanding the broad scope of Congress’s Article I power, the contemporary Court limited Congress’s power in three ways. First, it invoked the anti-commandeering principle embodied in the Tenth Amendment as a structural limitation on federal power. Second, it provided limiting principles to the broad definition of commerce, particularly with respect to the “substantially affects” prong of that definition. Finally, by building on those two limitations of Congress’s power, the Court definitively answered “yes” to the lingering question whether states retained their sovereign immunity when they adopted the Constitution. As developed below, the Court’s three-way attacks on Congress’s broad power under Article I are closely related, but also

69. *Id.* at 125.

70. *Id.* at 127–28.

71. 560 U.S. 126 (2010).

significantly different. Bottom line, though, they work together to fortify the Shield and lay the groundwork for limiting Congress under Section 5.

*a. The Anti-Commandeering Principle*⁷²

This principle provided the core rationale in three Tenth Amendment cases that required states to follow Congress's directives as provided in federal statutes: *New York v. United States*,⁷³ *Printz v. United States*,⁷⁴ and *National Federation of Independent Business v. Sebelius*.⁷⁵ In *New York*, states had to take title to radioactive waste materials they could not dispose of at dump sites.⁷⁶ In *Printz*, state law enforcement personnel had to conduct background checks on gun purchasers until the underlying federal regulatory program could be staffed with federal officials.⁷⁷ In *Sebelius*, states were required to expand their Medicaid coverage or lose federal funding for existing Medicaid programs.⁷⁸

In all three cases, the Court emphasized the Constitution's structural limitations on Congress's power, as symbolized by the Tenth Amendment. Specifically, the *New York* Court held: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."⁷⁹

The Court cited to *Darby* for the proposition that the Tenth Amendment is a truism, but notice that the Court invoked the phrase in the sense of "Oh, what a truism it is." The "truth" the contemporary Court relies on is that the Tenth Amendment protects states under the "anti-commandeering principle," which prohibits the federal government from compelling states to administer federal regulatory programs.⁸⁰ The *Printz* Court added illustrative Tenth Amendment language:

72. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

73. 505 U.S. 144 (1992).

74. 521 U.S. 898 (1997).

75. 567 U.S. 519 (2012).

76. *New York*, 505 U.S. at 926.

77. *Printz*, 521 U.S. at 902 (In 1993 Congress amended the Gun Control Act of 1968 by passing the Brady Act, which required the Attorney General to create a national background check system for gun purchasers. While the federal program was being put into place, the Act required state and local law enforcement to conduct the background checks. Several states objected to this requirement and challenged Congress's power.).

78. *Sebelius*, 567 U.S. at 548. It also required individuals to purchase health insurance under the Individual Mandate provisions. See *infra* notes 85-88 and accompanying text.

79. *New York*, 505 U.S. at 166.

80. *Id.* at 188. The Court cited to the Federalist No. 39, which states that the Constitution "leaves to several States a residuary and inviolable sovereignty . . ."

Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁸¹

Compared to the previous Court, the contemporary Court was quickly turning the "dismissive" truism into the "respectful" truism.

The Court's second primary message supporting state sovereignty harkens back to one of the critical aspects of understanding the scope of state sovereign immunity; distinguishing between the states and the people. Specifically, the *New York* Court reiterated, drawing on the Framers' intent as evidenced in the Federalist Papers, the established principle that the federal government has power to regulate individuals but not states.

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate *individuals*, not States... We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.⁸²

Notably, the *Printz* Court protected state sovereignty and simultaneously cited to Hamilton, stressing the importance of distinguishing between the states and the people and the shared power the states and the federal governments have over the people: "framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"⁸³

New York and *Printz* are powerful states' rights case because there is no question that the radioactive waste or the guns were in commerce—under a definition as broad as that used in *Wickard*⁸⁴— and still the Court limited Congress's power and gave substantive meaning to the Tenth Amendment. Indeed, the anti-commandeering principle carried the day in *Sebelius*, the more recent case about the constitutionality of the Affordable Health Care Act (AHCA).

Although *Sebelius* is a little bit different from *New York* and *Printz*, it adds

81. *Printz*, 521 U.S. at 919 (footnote omitted).

82. *New York*, 505 U.S. at 166 (emphasis added).

83. *Printz*, 521 U.S. at 919–20 (citing THE FEDERALIST NO. 15, at 109).

84. *Wickard v. Fillburn*, 317 U.S. 111 (1942).

a walloping boost to state sovereignty. *Sebelius* presented two issues: whether Congress has the Commerce Clause power to require individuals to buy health insurance (the “Individual Mandate”) and whether Congress has the power to require states to expand Medicaid or lose existing federal funding (the “Medicaid Expansion”). I explore the Individual Mandate provision below, but note here that the Court held that it violated the Commerce Clause but not the Taxing and Spending Clause.⁸⁵ The important point here is that the Court held that the Medicaid Expansion is unconstitutional because it violates the anti-commandeering principle.⁸⁶ Moreover, the Court cited to both *New York* and *Printz* in support of its holding.⁸⁷ In fact, the language Chief Justice Roberts used in *Sebelius* dramatically makes the point that Congress cannot coerce states to participate in federal regulatory programs by “putting a gun to their heads.”⁸⁸ It is hard to imagine a more vivid and dramatic visualization of an “assault.”

b. The “Substantially Affects” Prong of Commerce

The second method of protecting state sovereignty by limiting Congress’s Article I powers focuses on the “substantially affects interstate commerce” prong of the broad definition of commerce. *United States v. Lopez*⁸⁹ provides a solid starting point to begin the analysis. In *Lopez*, the Court addressed the question whether Congress has the power to make possession of guns near schools a federal crime.⁹⁰ Critically, the *Lopez* Court affirmed that the correct definition of commerce is the same one used in *Darby*. To be within Congress’s Commerce Clause power, then, the law had to regulate an *activity* that has a “substantial effect” on interstate commerce. At this juncture in its opinion, the Court highlighted that possession of a gun is not even *economic activity*.⁹¹ And while the Court noted that it was not necessary for Congress to present evidence that Lopez’s gun *actually had a substantial effect on interstate commerce*, the absence of such evidence was noteworthy to the Court.⁹²

The highlighted words or phrases identify critical issues that divide the Justices even today. Ironically, it was not until *Sebelius* that the idea that Congress could only regulate an “activity” became crystal clear. This, of

85. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012).

86. *Id.* at 523.

87. *Id.* at 559.

88. *Id.* at 522–23.

89. 514 U.S. 549 (1995).

90. *Id.* at 551. (The Gun-Free School Zones Act of 1990 at 18 U.S.C. §922(q) made it a federal crime to knowingly . . . possess a firearm near a school).

91. *Id.* at 562. Moreover, the law was not even limited to a subset of guns that have some connection to interstate commerce.

92. *Id.* at 563.

course, arose in the context of the Individual Mandate and the requirement that a person has to buy health insurance under the AHCA or face a penalty.⁹³ Chief Justice Roberts emphasized that Congress's power to regulate commerce only extends to "activities" and not buying health insurance is inactivity and, therefore, not even in commerce.⁹⁴

Prior to *Sebelius*, the cases the Court reviewed in this area focused on the other two highlighted phrases: "economic activity" and "actually in commerce." For example, in *United States v. Morrison*,⁹⁵ the Court held that Congress does not have power under Article I to provide a civil remedy for women who are the victims of violence because, among other reasons, committing acts of violence is not "economic activity."⁹⁶ Moreover, it is clear following *Sebelius* that to meet the "substantially affects" prong of the definition of commerce, the federal law must regulate economic activity.

c. The "Actual Evidence" Prong of Commerce

As for the "actual evidence" issue, the law remains uncertain and the Justices are split on what standard to apply. Does Congress need actual evidence that the economic activity substantially affects commerce? Alternatively, is it sufficient that Congress has a rational basis for concluding that an economic activity substantially affects commerce? If actual evidence is required, Congress's power is more limited and the Court plays a larger role in limiting Congress's power. Presumably, a federalism Court would prefer this. On the other hand, if the standard is that Congress simply needs a rational basis for concluding that an economic activity substantially affects commerce, then there is little need for the Court to review Commerce Clause legislation to see if it meets the test.⁹⁷

This issue marked the turning point for the different outcomes in *Lopez* and *Gonzales v. Raich*.⁹⁸ In *Raich*, the Court upheld Congress's power to make possession of medical marijuana a crime.⁹⁹ In *Lopez*, the Court was concerned about the absence of congressional findings that possession of guns in school zones actually had a substantial effect on interstate commerce because that conclusion "was not visible to the naked eye."¹⁰⁰ In their concurring opinion,

93. *Sebelius*, 567 U.S. at 519.

94. *Id.* at 558–59.

95. 529 U.S. 598 (2000).

96. *Id.* at 598–99 (striking down the Violence Against Women Act (VAWA)). Congress also lacked power under Section 5 of the Fourteenth Amendment to provide a civil remedy for domestic violence victims who are harmed by private people. *Id.* at 622. *See also infra* Part III and Part IV.B.

97. This issue also arises in the context of Congress's Section 5 power under the Fourteenth Amendment. *See infra* Part III.B.3.

98. 545 U.S. 1 (2005).

99. *Id.* at 57.

100. *United States v. Lopez*, 514 U.S. 549, 562 (1995).

Justices Kennedy and O'Connor emphasize that the Court has a responsibility to ensure that Congress respects two more essential postulates about state sovereignty: (1) that states are supposed to be laboratories for experimenting with their own ideas about what should be regulated and how it should be regulated, and 40 states already criminalized possession of guns near schools,¹⁰¹ and, (2) there are areas of traditional state concern, like education, that are reserved for the states to regulate.¹⁰² Note how the "labs of experimentation" and "areas of traditional state concern" principles fit neatly into Tenth Amendment jurisprudence and are articulable standards for defining the boundary between national and state power.

This issue about whether Congress needs "actual" evidence also is at the heart of the dissenting opinions by Justices Stevens, Souter, Breyer and Ginsburg in *Lopez*. In fact, Justice Breyer's dissent cites to studies that present empirical evidence about the effects of guns in schools on interstate commerce.¹⁰³ But the important point all of the dissenting Justices highlight is the limited role the Court should play in evaluating the constitutionality of the federal law. All that is required for the law to be constitutional, in their opinions, is that it was rational for Congress to conclude that possession of guns near schools has a substantial effect on interstate commerce.¹⁰⁴

The *Raich* majority (the *Lopez* dissent joined by Justices Kennedy and Scalia) concluded that the regulation of drugs is "quintessentially economic activity."¹⁰⁵ But, unlike in *Lopez*, the *Raich* majority found that Congress had a rational basis for concluding that possession of medical marijuana has a substantial effect on interstate commerce and emphasized the Court's limited role: "[W]e stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."¹⁰⁶

Teaching *Lopez* and *Raich* is challenging because it is not easy to understand the different outcomes.¹⁰⁷ First, the Court uses the same broad

101. *Id.* at 581 (Kennedy, J., & O'Connor, J., concurring).

102. *Id.* at 583.

103. *Id.* at 564–68 (Breyer, J. dissenting).

104. *Id.* at 565; *id.* at 584 (Thomas, J., concurring).

105. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005).

106. *Id.* at 33. Interestingly, Justice Scalia concurred to provide the sixth vote to uphold the law. In his concurrence, he also relied on the Necessary and Proper Clause and even opined that Congress's power extends to the regulation of non-economic intrastate activity if not regulating it would undercut a national market. *Id.* at 34 (Scalia, J., concurring). He also has unique views about the scope of Congress's Section 5 powers, discussed *infra* Part III.

107. I distinctly remember asking my Constitutional Law class in 1995 when we studied *Lopez*: Do you think the Court would rule the same way if *Lopez* violated a federal law that made it a crime to possess marijuana? The buzz around the room suggested that I had asked a silly question. After all, possession is possession; it does not matter what is possessed. Of course, I felt the same way, but I also

definition of commerce in both cases.¹⁰⁸ It cites to *Wickard* and *Darby* with approval in both cases.¹⁰⁹ The outcomes are different, however, because of this open issue about what the standard is that controls the “substantially affects” prong. Justices Kennedy and Scalia joined the majority in *Raich* for a relatively rare 6–3 vote in cases in this area. As explored in Part III, the scope of Congress’s Article I power engenders a similar disagreement in the Section 5 cases and also is vital to the effect of federal laws that Circle Back to the Intersection because they fail under the Fourteenth Amendment. If such laws are valid under Article I, then at least states can be held to federal standards.

II. THE ELEVENTH AMENDMENT IMMUNITY AND TENTH AMENDMENT STATE SOVEREIGNTY MERGE

Around the time of *New York*, *Printz*, and *Lopez*, the Court also decided *Seminole Tribe v. Florida*¹¹⁰ and *Alden v. Maine*.¹¹¹ In fact, these cases were all decided within seven years of each other, with *Morrison*, *Comstock*, and *Raich* right on their heels. *Seminole Tribe* and *Alden* join the state sovereignty revival in perhaps one of the most significant ways: they clarify the meaning of the Eleventh Amendment by relying on Tenth Amendment principles.

To appreciate the full import of *Seminole Tribe* and *Alden*, however, it is important to include *Hans v. Louisiana*¹¹² and *Ex parte Young*.¹¹³ Decided almost a century after *Chisholm*, the *Hans* Court held that the Eleventh Amendment also bars federal-question suits against non-consenting states in federal court. At the time of *Chisholm* and the adoption of the Eleventh Amendment, there is logic in the observation that the Eleventh Amendment was intended to bar diversity suits because it was “correcting” *Chisholm*’s error and also because general arising under jurisdiction did not exist until 1875.¹¹⁴ Nevertheless, despite its literal language, the *Hans* Court held that the Eleventh Amendment represents the *principle* of sovereign immunity embedded in the common law prior to adoption of the Constitution.¹¹⁵

Hans added to the confusion left in the wake of *Chisholm* and the wording of the Eleventh Amendment because it did not answer the question whether the Amendment restored common law immunity or whether it established a subject

thought the question was kind of silly because I never imagined the Court would grant cert in such a case.

108. *Lopez*, 514 U.S. at 551; *Raich*, 545 U.S. at 16, 17.

109. *Lopez*, 514 U.S. at 556; *Raich*, 545 U.S. at 9, 17–20.

110. 517 U.S. 44 (1996).

111. 527 U.S. 710 (1999).

112. 134 U.S. 1 (1890).

113. 209 U.S. 123 (1908).

114. *Hans*, 134 U.S. at 4.

115. *Id.* at 18.

matter jurisdiction bar—to just diversity suits or even to federal question suits.¹¹⁶ Depending on the answer, Congress’s power would be affected; a common law rule invited Congress to possibly abrogate a state’s immunity, whereas a subject matter jurisdiction bar meant that Congress could not open the Article III gates through ordinary legislation.¹¹⁷

The *Hans* Court’s reasoning that state sovereign immunity is an essential ingredient of state sovereignty laid the perfect foundation for the contemporary Court’s decisions in *Seminole Tribe* and *Alden*. Focusing on *Seminole Tribe*, the case raised the question whether Congress has the power under Article I’s Indian Commerce Clause to abrogate states’ sovereign immunity, which Congress clearly intended to do in the Indian Gaming Regulatory Act.¹¹⁸ The case arose because the Seminole Tribe sued Florida in federal court when its Governor refused to negotiate with the Tribe as required by the Act.¹¹⁹ Florida successfully raised the defense of sovereign immunity.¹²⁰

The Court held in a 5-4 decision that Congress lacks abrogation power under the Indian Commerce Clause, and in its reasoning, the Court reviewed the plurality opinion in *Pennsylvania v. Union Gas*¹²¹ in which that Court held that Congress does have abrogation power under the Interstate Commerce Clause in Article I.¹²² By considering both Article I Clauses in its opinion, the *Seminole Tribe* Court relied on the sovereign immunity principle embedded in *Hans* to declare that Congress does not power under either Clause to abrogate a state’s sovereign immunity.¹²³ Significantly, the Court affirmed that the Amendment does not mean what it says: “Although the text of the Amendment would appear to restrict only Article III diversity jurisdiction of the federal courts, ‘we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’”¹²⁴

What is that presupposition? It is that states are sovereign and that an “inherent” part of their sovereignty is their immunity from suit without their

116. Professor William Baude recently presented a persuasive argument that sovereign immunity is a special common law rule that is part of the constitutional backdrop such that it cannot be changed. From this view, *Hans* was correctly decided. See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017). See also William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

117. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

118. *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996).

119. *Id.* at 51.

120. *Id.* at 47.

121. 491 U.S. 1 (1989).

122. *Id.* at 3.

123. *Seminole Tribe*, 517 U.S. at 68–70. *But see* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (sovereign immunity does not apply in bankruptcy proceedings).

124. *Seminole Tribe*, 517 U.S. at 54 (citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

consent.¹²⁵

Critically important, the *Seminole Tribe* Court left no doubt that states retained their immunity when they ratified the Constitution. Relying on *Hans*, the Court said, “For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting states ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’”¹²⁶ To phrase more poignantly, at long last, the contemporary Court clarified that the Eleventh Amendment presents a constitutional bar to suits against non-consenting states in federal court and Congress cannot alter that using its Article I powers, citing *Marbury*.¹²⁷ Accordingly, it overruled *Union Gas* and held that Florida enjoyed immunity from suit.¹²⁸

Seminole Tribe is significant for another critical issue and here it is time to introduce *Ex parte Young*,¹²⁹ decided in 1908. In *Young*, Minnesota enacted a law regulating railroad rates that a federal court ruled was unconstitutional under the Fourteenth Amendment and enjoined Young, Minnesota Attorney General, from enforcing the law.¹³⁰ Undeterred, Young sought relief in state court and the federal court held him in contempt.¹³¹

In *Young*, the Supreme Court faced a challenging question: If Young was essentially the state of Minnesota and therefore enjoyed immunity, how was the supremacy of federal law going to be protected? Cleverly, the Court held that Young acted without state authority when he tried to enforce an unconstitutional law and therefore was not the state and did not enjoy Eleventh Amendment immunity.¹³² Simultaneously, the Court held that he was a state actor, albeit acting unlawfully, for purposes of the state action doctrine under the Fourteenth Amendment.¹³³ This opening enabled the Court to allow prospective injunctive relief against Young and against state actors more generally.¹³⁴ The availability of *Young* relief respects the Eleventh Amendment and also the Fourteenth Amendment by enabling courts to protect the supremacy of federal law by enjoining state actors from continuing to violate federal law. *Young* relief also plays a pivotal role in the Circling Back Phenomenon as a way to hold states to federal standards when abrogation fails under the Fourteenth Amendment.

When Florida’s Governor did not negotiate with the Seminole Tribe, it

125. *Id.*

126. *Id.* (citing *Hans*).

127. *Id.* at 65. (citing *Marbury*).

128. *Id.* at 66.

129. 209 U.S. 123 (1908).

130. *Id.* at 148.

131. *Id.* at 126, 172. The Supreme Court reviewed his writ of habeas corpus.

132. *Id.* at 153.

133. *Id.* at 154; *infra* Part III.A (discussing state action doctrine).

134. *Young*, 209 U.S. at 131–32.

sought to enjoin him under *Young*.¹³⁵ The Court, however, held that *Young* relief was unavailable because Congress had provided a comprehensive remedial scheme in the Act and had not listed injunctive relief among the possible remedies.¹³⁶ This is important because the *Young* doctrine was established almost 90 years earlier and it would have been reasonable to presume it was available because Congress did not exclude it. Instead, the Court presumed that Congress intended for it to be unavailable by not including it. Arguably, this protects separation of powers principles, but, more significantly, it strengthens the Shield.¹³⁷

Interestingly, the *Seminole Tribe* Court does not explicitly rely on the Tenth Amendment, but it fits perfectly into the contemporary Court's Tenth Amendment jurisprudence. This becomes crystal clear in *Alden*, decided only three years later, because *Alden* raised the same question the Court decided in *Seminole Tribe*: whether Congress has the power to abrogate a state's sovereign immunity using its Article I powers. Significantly, though, *Alden* was a suit in *state court* against Maine to recover wages allegedly due to state probation officers under the Fair Labor Standards Act (FLSA).¹³⁸ The Eleventh Amendment, on its face, does not apply in state court. Moreover, even the decision in *Seminole Tribe* interpreted the Amendment as a complete subject matter jurisdiction bar to suits for money damages against non-consenting states by private parties in *federal court*.¹³⁹

Given the contemporary Court's coupling of state sovereignty principles embedded in the Tenth Amendment with the principle of state sovereign immunity embedded in the Eleventh Amendment, it is not surprising that the *Alden* Court applied those Tenth Amendment principles to protect Maine from the suit *in its own courts*. Justice Kennedy's majority opinion explicitly rests on the Tenth Amendment:

We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is . . . something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather,

135. *Seminole Tribe*, 517 U.S. at 51–53.

136. *Id.* at 53–54, 74.

137. For a critique of *Seminole Tribe*'s holding on the *Young* relief issue, see Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997). Significantly, the Court held in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), that state officials cannot be enjoined in federal court on state law issues.

138. *Alden v. Maine*, 527 U.S. 710, 711–12 (1999). The suit was originally filed in federal court, but when *Seminole Tribe* was handed down, the federal court dismissed it because Maine enjoyed sovereign immunity and Congress lacked the power to abrogate it. Hopeful, the *Alden* plaintiffs filed their suit in Maine state court. *Id.* at 712. Recall that the *Darby* Court upheld Congress's Commerce Clause power to enact the FLSA. *See supra* Part I.C.1.

139. *Seminole Tribe v. Florida*, 517 U.S. 44, 45, 68 (1996).

as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States)¹⁴⁰

except as altered by the plan of the Convention or certain constitutional Amendments . . ."¹⁴¹

Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment . . ."¹⁴²

Alden follows logically from the contemporary Court's Tenth and Eleventh Amendment jurisprudence and the opinion is infused with reliance on and citations to principles at the heart of those decisions, particularly *Seminole Tribe*.¹⁴³ States' immunity from money damages not only protects their coffers (the traditional understanding of immunity), but it also protects their independent policy decision-making (dignity).¹⁴⁴ The *Alden* Court even intimates that allowing suits under federal law (enacted under Article I, at least) for money damages against states—in either federal or state courts—without their consent, would violate the anti-commandeering principle,¹⁴⁵ and explicitly suggests it would confuse political accountability lines,¹⁴⁶ much like the take-title provision of the federal law in *New York*,¹⁴⁷ and the background check provision in *Printz*—two Tenth Amendment bulwark cases.¹⁴⁸

But the *Alden* Court was not just concerned about protecting states' coffers. Its opinion emphasizes that states enjoy a constitutional immunity from having their *dignity* assaulted. The Court opined, "[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."¹⁴⁹ The rhetoric the Court associates with protecting a state's dignity is akin to the

140. Notice that this is the original understanding of the principle of equal sovereignty among the states, which is different from the way in which *Shelby County* used it. See *infra* Part III.B.4.a.

141. *Alden*, 527 U.S. at 713.

142. *Id.*

143. *Id.* at 739–40 (citing *Seminole Tribe*, 517 U.S. at 71 n.15).

144. *Id.* at 750.

145. *Id.* at 749.

146. *Id.* at 750.

147. *Id.* at 714. The Founders adopted “a system in which the State and Federal Governments would exercise concurrent authority over the people . . .” (quoting the Federalist No. 15; referring to *New York v. United States*, 505 U.S.144 (1992)).

148. *Id.* at 751–52; see also *supra* Part I.C.2.

149. *Id.* at 748.

choice of words one might use when an individual's dignity is impugned. For example, the Court held that subjecting a non-consenting state to suit for money damages is "[not] becoming,"¹⁵⁰ is "offensive,"¹⁵¹ is "denigrating,"¹⁵² and, of course, is "disrespectful" of a state's inherent sovereignty.¹⁵³

Finally, a significant portion of the majority's opinion is devoted to refuting Justice Souter's dissent because he continued to rely on the diversity jurisdiction interpretation of the Eleventh Amendment.¹⁵⁴ It is as if the majority is signaling that they are tired of talking about what the Eleventh Amendment means and are ready to "put to bed" any lingering questions about the scope of state sovereignty,¹⁵⁵ especially with respect to state sovereign immunity and the full scope of how the constitution's history and structure protect states, not just from monetary judgments against their will, but, quite significantly, also from assaults to their *dignity* in the constitutional design.

To briefly summarize, the contemporary Court protects states and their sovereignty from the effects of federal law in ways that extend beyond the traditional understanding of sovereign immunity. This is apparent from the Court's focus on protecting states' dignity in a broad sense that extends beyond protecting their treasuries. With the merger of the Tenth and Eleventh Amendments, the Shield is securely in place and ready to protect states from a coercive or disrespectful Congress. Notably, the Court relies on *Alden* in almost all of the Section 5 cases discussed below even though those cases were filed in federal court. Such reliance is evidence that the Court intends to infuse the Section 5 cases with the basic sovereignty and immunity principles that led up to and supported its decision in *Alden*.

II. THE FOURTEENTH AMENDMENT: CONGRESS, STATES, AND INDIVIDUALS

The Fourteenth Amendment protects individual rights and explicitly limits

150. *Id.*

151. *Id.* at 749.

152. *Id.*

153. *Id.* at 748–49 (“The principle of sovereign immunity preserved by constitutional design ‘thus accords the States the respect owed them as members of the federation.’”) (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993)). For a comprehensive critical analysis of the value of dignity-based claims of individuals, see Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLORIDA L. REV. 1 (2017).

154. *Alden*, 527 U.S. at 793–94 n.29 (Souter, J., dissenting) (joined by Justices Stevens, Ginsburg, and Breyer).

155. The Court also seems to be tired of this battle in the context of sovereign immunity and Congress's abrogation power under the Fourteenth Amendment. For example, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2002), Justice O'Connor, writing for the majority, opined: “Indeed, the present dissenters' refusal to accept the validity and natural import of decisions like *Hans*, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution.” *Id.* at 79–80. See also *infra* Part IV.B.

state power. Section 1 provides that

[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁵⁶

Congress has power under Section 5 to enforce the Amendment through “appropriate legislation.”¹⁵⁷ Before analyzing some of the confusing issues raised by Section 5, two significant issues are clear. First, in 1976 in *Fitzpatrick v. Bitzer*,¹⁵⁸ a unanimous Court¹⁵⁹ held that Section 5 is a source of abrogation.¹⁶⁰ Second, the *Fitzpatrick* Court also held that Congress’s enforcement power diminished what had previously been reserved to the states and that “[s]uch enforcement is no invasion of State sovereignty.”¹⁶¹ The *Fitzpatrick* Court relied on a line of cases beginning in 1880 with *Ex parte Virginia*,¹⁶² which even the contemporary Court continues to cite with approval.¹⁶³ Notwithstanding this simple “truth,” however, Congress’s enforcement power is incredibly shallow and arguably is shrinking, as explored below. However, this development is consistent with the “oh, what a truism it

156. U.S. CONST. amend. XIV.

157. *Supra* note 7 (Fourteenth Amendment).

158. 427 U.S. 445 (1976) (Title VII of the Civil Rights Act of 1964 successfully abrogated a state’s sovereign immunity when a male plaintiff sued Connecticut for money damages alleging that his employer discriminated against him on the basis of sex).

159. Justice Rehnquist wrote the opinion but he was not elevated to Chief Justice until 1986 and *Fitzpatrick* was decided in 1976.

160. *Fitzpatrick*, 427 U.S. at 457.

161. *Id.* at 454–55 (citing *Ex parte Virginia*, 100 U.S. 339, 345 (1880)). Professor Azaira raises the question whether the anti-commandeering principle would limit Congress’s enforcement power and suggests it would not, pointing out the significant intrusion into state sovereignty under the VRA. AZAIRA, *supra* note 9, at 4. I think requiring states to provide remedies would violate the anti-commandeering principle, which became prominent at the Intersection after *New York, Printz*, and *Sebelius* and also *Shelby County*. Subjecting states to potential money damages under federal law is different from “forcing” states to provide remedial schemes. Justices Kennedy and O’Connor note this distinction in their concurring opinion in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 376 (2001). *See infra* Part III.B.3.c (giving a fuller discussion of *Garrett*).

162. *Fitzpatrick*, 427 U.S. at 455 (explaining a line of cases dating from *Ex parte Virginia*, 100 U.S. at 339 to *Mitchum v. Foster*, 407 U.S. 225 (1972)). *Id.* opining:

There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress’ powers—with the corresponding diminution of state sovereignty

163. *See, e.g.*, *Georgia v. United States*, 546 U.S. 151, 158–59 (2006); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004).

is” understanding of the Tenth Amendment.

The critical key to successful abrogation and also not violating the Tenth Amendment is that the legislation must be valid and therein lies the seeds for confusion. Generally, Fourteenth Amendment legislation is invalid if it fails to meet the state action requirement or if it fails the Test. Moreover, there are aspects of these two reasons that overlap and contribute to the confusion, but the following analysis demonstrates that they are integral parts of the development of the law surrounding the Shield, the Void, and the Circling Back Phenomenon.

A. *The State Action Requirement as a Fourteenth Amendment Limitation*

In the *Civil Rights Cases (CRC)*,¹⁶⁴ the Court interpreted Sections 1 and 5 to mean that Congress lacked power under Section 5 to enact the Civil Rights Act of 1875 to prohibit race discrimination in “private inns and hotels, and certain public conveyances and places of amusement.”¹⁶⁵ Emphasizing the Tenth Amendment, the Court held that without state action,¹⁶⁶ there can be no Fourteenth Amendment violation.¹⁶⁷ The Court rejected Justice Harlan’s opinion that the state’s failure to protect people from private discrimination was, in essence, state action.¹⁶⁸ Critically, the *CRC* Court explicitly left open the question whether the Commerce Clause would be a valid source of power to sustain the 1875 Civil Rights Act.¹⁶⁹

Eighty-one years later, critical issues raised by the 1883 *Civil Rights Cases* reappeared at the in Intersection in two iconic cases—*Heart of Atlanta Motel*

164. 109 U.S. 3 (1883).

165. *Id.* at 11.

166. The “citizenship clause” of the Amendment does not have a state action requirement; it overruled *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856) and makes the newly freed slaves citizens. For a persuasive argument that protecting equal citizenship of individuals does not require state action, see Balkin, *supra* note 9 at 1833 (“To prevent some Americans from being relegated to a second-class form of citizenship, Congress may—and indeed must—reach private as well as public activity.”).

167. *Civil Rights Cases*, 109 U.S. at 11.

168. Justice Harlan dissented in the *Civil Rights Cases*, reasoning that state action includes a state’s failure to prevent private discrimination on the basis of race. *Id.* at 46-47 (Harlan, J., dissenting). This issue surfaced in more recent cases that were not about race, but the Court held that state inaction is not state action. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2002) (no property interest in having restraining order enforced and police failure to respond to mother’s plea for help from abusive father is not state action); *DeShaney v. Winnebago Co. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (no state action when father beat his son Joshua even though state social workers were aware he was being abused).

169. *Civil Rights Cases*, 109 U.S. at 19. Interestingly, the *CRC* Court also noted that individuals who are harmed by private people typically have state remedies, implying there is no need to impose another remedial scheme based on federal law. This Article goes further and suggests States should provide money damages when individuals are harmed by state action.

*v. United States*¹⁷⁰ and *Katzenbach v. McClung* (Ollie’s Barbeque).¹⁷¹ At issue was the constitutionality of the Civil Rights Act of 1964, which—like the 1875 Act—prevented private businesses from discriminating on the basis of race in public accommodations.¹⁷² The 1964 Act was enacted pursuant to Congress’s power under both the Commerce Clause and the Fourteenth Amendment.¹⁷³ While the *CRC* Court left the Commerce Clause question open,¹⁷⁴ the *Heart of Atlanta* Court upheld the 1964 Act under the Commerce Clause and explicitly left open whether it was constitutional under the Fourteenth Amendment.¹⁷⁵

In 1964, then, the Court intimated that Congress’s Section 5 enforcement power might authorize legislation like the 1964 Act—even though the 1964 Act prohibited the same conduct as the 1875 Act which was struck down in the *Civil Rights Cases* because there was no state action. This intimation comports with Justice Harlan’s dissent in the *Civil Rights Cases* that state inaction is state action.¹⁷⁶ Not surprisingly, the contemporary Court has reaffirmed that state inaction is not state action.¹⁷⁷ However, and as analyzed below in Part III.B.3, valid enforcement legislation that imposes obligations on states as deterrent measures to prevent actual constitutional violations, in essence, make states “act” and their failure to act makes them vulnerable to money damages if the legislation clearly intends to abrogate their immunity.¹⁷⁸

Although the *Heart of Atlanta Court* left open the Section 5 issue, the

170. 379 U.S. 241 (1964).

171. 379 U.S. 294 (1964).

172. *Heart of Atlanta*, 379 U.S. at 243–44.

173. *Id.* at 249.

174. *Civil Rights Cases*, 109 U.S. at 19.

175. *Heart of Atlanta*, 379 U.S. at 250 (“This is not to say that the remaining authority upon which it [Congress] acted [the Fourteenth Amendment] was not adequate, a question upon which we do not pass, but merely that, since the commerce power is sufficient for our decision here, we have considered it alone.”).

176. In the 1966 case, *United States v. Guest*, 383 U.S. 745 (1966), the Court upheld a federal law that prohibited private discrimination in commerce, but the Justices were divided over the question whether Congress could prohibit such conduct under its Section 5 power. The Court in *United States v. Morrison*, 529 U.S. 528 (2000) held it could not. The Court’s intimation in the *Civil Rights Cases* could also mean it saw merit in Justice Douglas’s concurrence in *Heart of Atlanta Court* that state action exists because state judges enforce state (trespass) laws—relying on the controversial *Shelley v. Kraemer* decision. For an excellent article that argues *Shelley* should have been decided under the Thirteenth Amendment case law, see Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451 (2007). *But see* Carol M. Rose, *Shelley v. Kraemer Through the Lens of Property*, in *PROPERTY STORIES* (Gerald Korngold & Andrew P. Morriss, eds., 2004) (*Shelley* was correctly decided under property law). Some studies show that the decision had a measurable impact on racial segregation patterns in the 1950s. *See, e.g.*, Yana Kucheva & Richard Sanders, *The Misunderstood Consequences of Shelley v. Kramer*, 49 SOC. SCI. RES. 212 (2014) (“limiting the enforceability of restrictive covenants enabled a new kind of black intra-city migration.”). However, the Section 5 cases have not implicated *Shelley*-type issues.

177. *Morrison*, 529 U.S. at 599 (Fourteenth Amendment prohibits only state action, not private conduct).

178. *See infra* Part III.B.3.

holding highlights that Congress has the Commerce Clause power to prohibit discrimination by private persons engaged in commerce and this enables the Circling Back Phenomenon. Moreover, rights created by Congress using its Article I powers are statutory rights. The difference between a statutory right and a constitutional right might not seem significant to someone who experiences race discrimination. For example, Ollie's Barbeque had to serve African Americans because of the CRA, not because of the Fourteenth Amendment and the difference did not matter in everyday life. But statutory rights are vulnerable to changing or disappearing altogether depending on the political majority. Constitutional rights can also change and disappear, but they are more insulated by the arduous amendment process,¹⁷⁹ Article III's life tenure and salary protections for federal judges¹⁸⁰ and the judiciary's respect for *stare decisis*.¹⁸¹

Importantly, the availability of remedies for violations are not the same for statutory and constitutional rights. Circling Back, *Seminole Tribe* held that Congress cannot abrogate a state's sovereign immunity under Article I, but it can hold states to standards using its Article I powers. Congress also has Article I power to create private rights of action for damages against private people.¹⁸² Contrastingly, § 1983, although valid under the Fourteenth Amendment, does not abrogate a state's sovereign immunity because Congress did not make its intent to do so clear.¹⁸³ In addition to a clear intent to abrogate, legislation under Section 5 also must meet the *Boerne* Test, another significant limitation on Congress's enforcement power.

179. U.S. CONST. art. V. I thank Michael Brennan for this insight.

180. U.S. CONST. art. III, § 1.

181. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Id.

182. Alleged violations of federal statutory rights also can be brought under § 1983. *Maine v. Thiboutot*, 448 U.S. 1 (1980). However, the contemporary Court, consistent with the Shield, is also establishing higher hurdles for those types of cases. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002) (“[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”).

183. *Quern v. Jordan*, 440 U.S. 332 (1979).

B. The “Congruence and Proportionality” Test as a Fourteenth Amendment Limitation

To understand the scope of Congress’s enforcement power under the Test, it is helpful to briefly review the basic Fourteenth Amendment analytical framework because it defines the relationship between the state and the individual. When Congress, through its enforcement power, interjects itself into that relationship, things change. Moreover, the direction changes take is determined by the Court in its *Marbury* role to “emphatically say what the law is.”¹⁸⁴

1. Background: The Basic Fourteenth Amendment Analytical Framework

In Footnote 4 of *United States v. Carolene Products*,¹⁸⁵ the Court introduced the concept of heightened judicial review for laws that burden fundamental rights and also for laws that discriminate against “discrete and insular minorities,” like racial minorities.¹⁸⁶ Prior to heightened review, the Court subjected laws to rational basis review, regardless of what was at stake for an individual. This flat standard of review nullified the reality that fundamental rights are more important than other rights, and that some types of discrimination are more unacceptable than other types. Given this reality, holding the government to higher standards to justify laws that regulate fundamental rights or that discriminate against particular groups not only is logical, but it is an analytical framework that is *necessary* to give meaning to the constitutional design with respect to individual liberties.¹⁸⁷

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

185. 304 U.S. 144, 152–53 n.4 (1938).

186. *Id.* The Court said:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition . . . and which may call for a correspondingly more searching judicial inquiry.

Id.

187. I explore the importance of maintaining the basic Fourteenth Amendment analytical framework in my article, Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL OF RIGHTS J. 685 (2008). Renown scholars criticize the analytical framework, among other reasons, for the Court’s imposition in *Washington v. Davis*, 426 U.S. 229 (1976) of the disparate impact rule and the need to prove an illegal motive in order for heightened review to apply to facially neutral laws. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Consistent with addressing this criticism, Professor Vicki C. Jackson persuasively argues for “proportionality” review in her article, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J.

Since Footnote 4, of course, the Court has embellished its equal protection and due process hierarchies. Fundamental rights are subject to strict scrutiny,¹⁸⁸ except that a woman's right to choose, although part of an individual's Fourteenth Amendment right to "liberty," is subject to the "undue burden standard."¹⁸⁹ On the equal protection side, the most unacceptable forms of discrimination—like race discrimination—also are subject to strict scrutiny,¹⁹⁰ except discrimination on the basis of sex is subject to intermediate scrutiny.¹⁹¹ If a law under due process or equal protection is not subject to heightened review, it merely has to be rational.¹⁹²

This basic analytical framework defines critical Fourteenth Amendment relationships. Whenever an individual challenges the constitutionality of a state law,¹⁹³ the individual is challenging his or her fellow-citizens majority vote to impose whatever the state law's requirement is. When the analytical framework requires only that the majority act rationally, it is logical for it to be harder for the individual to win a challenge. Couched in terms of the distinction in the Tenth Amendment between the state and the people, in the realm of rational basis review, the people have delegated to the state the power to act as their collective "rational" selves. In fact, laws are presumed to be rational and the individual challenging a law under this level of review has the burden to show

3094 (2015) ("A standard focused not only on the nature of the classification but also on the relative nature of the harm complained of and its relationship to the particular government interests at stake would allow courts the flexibility to hold legislatures accountable without invalidating most legislation."). *Id.* at 3178.

188. Strict scrutiny review requires the state to justify the underlying law by demonstrating that it is necessary to achieve a compelling state interest. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306 (2003) (Univ. of Michigan has a compelling state interest in admitting a diverse law school class and race can be one factor in a holistic review of each applicant).

189. *See* Casey v. Planned Parenthood, 505 U.S. 833 (1992) (a woman has a right to an abortion prior to viability but the state can regulate her choice so long as it does not impose an undue burden on her or place substantial obstacles in her path).

190. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944). In evaluating the constitutionality of the removal of all persons of Japanese ancestry during WWII to relocation camps, the Court held: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Id.* at 216.

191. Under intermediate scrutiny, the law will be upheld if it is substantially related to an important government interest. *See generally* Craig v. Boren, 429 U.S. 190 (1976). In *United States v. Virginia*, 518 U.S. 515 (1966), the Court held that the Virginia Military Institute's policy of admitting only male students was unconstitutional because VMI could not demonstrate an "exceedingly persuasive justification" for the policy. *Id.* at 517, 534. This language did not substantively change the standard of review and the Court in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 728–29 (2003), recently cited to both *VMI* and *Craig* as the standard of review in sex discrimination cases. *Infra* Part III (analyzing *Hibbs*).

192. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (in upholding a state law that required a licensed optometrist or ophthalmologist to fit lenses, the Court opined: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

193. A different analysis applies when an individual alleges that an individual state actor or a local government has violated his or her rights and that is beyond the scope of this Article.

it serves no legitimate state end.¹⁹⁴

Flip the analysis and view it from the individual's perspective. Again, couched in terms of the distinction between the state and the people, when an individual is separating from the majority's effort to have the state law represent the people, there must be a different analytical framework to support the importance of Fourteenth Amendment due process and equal protection guarantees that are subject to heightened review. The "majority wins" aspect of a democracy yields in the heightened review spaces to the democratic principle that individual rights need to be protected from majoritarian oppression. In such cases, the people of the state cannot delegate to their state the power to deny the individual the framework of analysis—heightened review—that comports with the important distinction between ordinary and fundamental rights, on the one hand, and acceptable versus unacceptable discrimination, on the other hand, *as decided by the Court*. In fact, the people of the United States delegated this heightened protection of due process and equal protection under the Fourteenth Amendment to the federal government—both to the Supreme Court, through its interpretative powers, and to Congress, through its enforcement power.¹⁹⁵

2. City of Boerne v. Flores¹⁹⁶

At issue in *Boerne* was the question whether Congress exceeded its Section 5 power when it enacted the Religious Freedom Restoration Act (RFRA), requiring states to meet the strict scrutiny standard of review for laws that burden the free exercise of religion but otherwise are neutral and generally applicable.¹⁹⁷ Significantly, the Court held in a previous case, *Employment Div., Dept. of Human Resources of Oregon v. Smith*,¹⁹⁸ that such laws merely

194. This is an incredibly high burden to meet because the Court has held that any conceivable rational purpose will sustain the law. *See, e.g.*, U.S. RR. Ret. Bd. v. Fritz, 449 U.S. 166 (1980) (proffered justification for the law does not need to be the actual reason for it; it only has to be rationally related to a legitimate government interest). Occasionally, a law will fail rational basis review. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (Amendment 2 to Colorado's Constitution that repealed local laws that prohibited sexual orientation discrimination served no legitimate purpose and was motivated by animus); *see also* City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (requiring use permit for home for mentally disabled served no legitimate purpose and was motivated by irrational prejudice).

195. The contemporary Court in *Boerne* does not view Congress as a co-equal partner under Section 5 because it essentially gives Congress no power to share in the interpretation of the Fourteenth Amendment. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000). More recently, Professor Pamela S. Karlan describes the Court's view of Congress as disdainful. *See* Pamela S. Karlan, *The Supreme Court, 2011 Term-Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12–13 (2012).

196. 521 U.S. 507 (1997).

197. *Id.* at 515.

198. 494 U.S. 872 (1990).

have to meet rational basis review. The *Boerne* Court held that imposing the higher standard of review on states exceeded Congress's power because RFRA created a new right and therefore was not an enforcement of an existing right. More emphatically, RFRA essentially overruled *Smith*, which was its intent as stated in the law,¹⁹⁹ and obviously Congress does not have the power to overrule the Court through ordinary legislation.²⁰⁰ From this perspective, *Boerne* is deceptively easy.

Boerne also teaches that the standard of review that attaches to the constitutional right under the basic analytical framework is part of the right. In the context of state laws that burden religious free exercise but which are neutral on their face and generally applicable, this right in *Smith* was subject to rational basis review, but this right in RFRA was subject to strict scrutiny. By raising the standard of review, RFRA created a new right—changed the meaning of the Fourteenth Amendment separate from any concerns about overruling the Court—and that exceeded its enforcement power.

In reaching this conclusion, the *Boerne* Court held that Congress's power is remedial,²⁰¹ which is the same standard applied in the *Civil Rights Cases*,²⁰² but which is narrower than the plenary standard applied in *Fitzpatrick*.²⁰³

199. *Boerne*, 521 U.S. at 515.

200. *Id.* at 529. Professor Balkin questions why Congress's interpretation of RFRA, particularly because RFRA as applied to the federal government is constitutional as decided in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), is not supported by the Necessary and Proper Clause and *McCulloch*. Balkin, *supra* note 9, at 1814. This is an interesting question when viewed from the perspective of Congress's role, if any, in constitutional interpretation. From a federalism perspective, though, the decision in *Gonzales* is consistent with the principle that the political majority (U.S. citizens) can enact laws that give individuals more constitutional protection than is required. That is what federal RFRA accomplished; it subjected federal RFRA to the compelling interest standard and the federal government failed to meet its burden to stop the importation of an illegal drug that was used for religious purposes. As applied to the states, however, the *Boerne* Court held that Congress (U.S. citizens) cannot impose a higher constitutional burden on states than is constitutionally required. If the citizens of a state want to enact a RFRA that gives greater protection to its citizens, that generally would be constitutional, but, of course, it also would be subject to other constitutional limitations. See generally Berta E. Hernandez-Truyol, *Religion: Rites vs. Rights Resolving Tensions Between LGT Equality and Religious Liberty*, in *SEXUAL ORIENTATION AND GENDER IDENTITY IN INTERNATIONAL LAW* (A. Ziegler, ed.) (forthcoming 2018) (on file with author).

201. *Boerne*, 521 U.S. at 522.

202. *Id.* at 524. Post & Siegel, *supra* note 195, at 475–76 (exploring how reliance on the *Civil Rights Cases* is misguided because it is “largely irrelevant” to the scope of Congress's Section 5 power.).

203. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). It is not clear why the *Fitzpatrick* Court changed the standard, but two significant voting rights cases, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), were decided just ten years earlier. Those cases (the VRA cases) evaluated the constitutionality of various provisions, including the preclearance requirement, of the 1965 Voting Rights Act (VRA), which was enacted pursuant to Congress's power under Section 2 to enforce the Fifteenth Amendment “by appropriate legislation.” U.S. Const. amend XV, § 2. Although the VRA was enacted pursuant to the Fifteenth Amendment, notably, Section 10(a) authorizes the Attorney General to enforce the Act “[i]n the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment.” *South Carolina*, 383 U.S. at 348. *Boerne*'s return to the remedial standard, given the *Fitzpatrick* Court's reasoning for holding

Naturally, given the contemporary Court's protection of state sovereignty, the return to the remedial standard is not surprising.²⁰⁴ Nor is it surprising that the dissenting Justices argue for the plenary standard.²⁰⁵ But this presupposes that only one of those standards applies, much like the Court pre-Footnote 4 functioned on the same rational basis review standard regardless of what was at issue.

I suggest that the Test would comport more accurately with the purpose of the Fourteenth Amendment, would not violate separation of powers principles, and would also function with more clarity, if the scope of Congress's power varied so that it comports with the Court's basic analytical framework in which the standard of review varies depending on the importance of the underlying right. Toward this goal, it is time to unravel the Test. Recall that Congress's enforcement power extends to enacting legislation that is congruent and proportional "to the injury to be prevented or remedied and the means adopted to that end."²⁰⁶

3. Unraveling Congruence and Proportionality

a. The Boerne Inconsistency

The *Boerne* Court held that Congress's enforcement power is remedial, but its description of what "remedial" means is confusing as the following passage shows: "Legislation which deters or remedies constitutional violations can fall with the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"²⁰⁷

The idea that Congress can use its enforcement power, not just to "remedy" violations, but also to "deter" them, seems inconsistent with the basic holding of *Boerne*: that Congress does not have power to create rights under the Fourteenth Amendment. Specifically, a law that provides a remedy helps make

that it is plenary, is quite significant in light of *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013), discussed *infra* at Part III.B.4.

204. To support its conclusion, the *Boerne* Court stressed that the drafters of the Fourteenth Amendment originally used the "necessary and proper" language, but changed it to the "appropriate" language after extensive debate. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (the original language partially read, "The Congress shall have power to make all laws which shall be necessary and proper to secure . . ."). The *Morgan* Court also explicitly refers to the language change in the Amendment and held that "[t]he substitution of the 'appropriate legislation' formula was never thought to have the effect of diminishing the scope of this congressional power." *Id.* at 650 n.9 (referring to the Cong. Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and earlier proposals). Professor Balkin argues that the *McCulloch* standard is the correct one to apply in evaluating Section 5 legislation. Balkin, *supra* note 9, at 1810–15.

205. See *infra* Part III.

206. *Boerne*, 521 U.S. at 520.

207. *Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. at 455).

an injured person whole. Clearly, Congress's enforcement power is remedial in the sense that it extends to remedying actual constitutional violations.²⁰⁸ A law that provides a deterrent, however, helps prevent an actual constitutional violation from happening. Deterrent measures impose obligations on states to act to prevent constitutional violations. Individuals benefit from such measures, almost as if they enjoy the right to be protected from suffering a potential actual constitutional violation. This is what I call the *Boerne* inconsistency and it spawns tremendous confusion about how the Test is supposed to function. The late Justice Scalia opined that Congress's power is no broader than remedying actual constitutional violations,²⁰⁹ which obviates the confusion, but the Court has not adopted that position. Much of the confusion, in my opinion, stems from the Court's application of the flat "remedial" standard to define the scope of Congress's enforcement power, regardless of whether the constitutional value that needs to be protected is federalism or individual rights.

b. An Imaginary Federal Target with Three Zones

As a visual guide to the following analysis, represented by the diagram in the Appendix, imagine a federal target with three rings that represent the federal statute. The bull's-eye (Zone 1) represents the space of Fourteenth Amendment rights and unlawful state action in Zone 1 is an actual constitutional violation. For clarity, Zone 1 is divided into Zones 1A and 1B, representing the reality that some rights are subject to rational basis review (Zone 1A) and some are subject to heightened review (Zone 1B). The next ring (Zone 2) represents the statutory deterrent measures, or, as I call them, "shadow rights,"²¹⁰ given in the enforcement statute and unlawful state action in this space results in "shadow violations."²¹¹ By shadow rights and violations, I mean actual violations of the

208. *United States v. Georgia*, 546 U.S. 151, 159 (2006).

209. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 44 (2012) (Scalia, J., concurring judgment) (referring to his dissenting opinion in *Lane*, 541 U.S. 509, 557–58 (2004) ("Nothing in Section 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment.") (italics in original)). *Infra* Part III.B.4.b (analyzing *Coleman*). This also was the position of Justice Harlan in *Morgan*, 384 U.S. at 666 (Harlan, J., dissenting).

210. I use "rights" in the lay sense for clarity's sake, because in legal context, the Court distinguishes between "rights" and statutory "interests" or "benefits" in the implied right of action context, which is beyond the scope of this Article. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, only 'rights,' not 'benefits' or 'interests,' may be enforced under that section."). For Congress to create a statutory right, "its text must be 'phrased in terms of the persons benefited.'" *Id.* at 291 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692, n.13 (1979)). Moreover, the statute must also create a private remedy. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

211. I refer to the enforcement provisions in Zone 2 as "shadow rights" and "shadow violations" because Congress cannot create rights using its enforcement power and, equally important, they are not rights in a technical legal sense, but in everyday life, they function like rights, especially to non-lawyers and potential victims. For example, suppose that Congress provides by statute that employers, including

enforcement statute that are closely related to actual constitutional violations because the deterrent measures are targeted at preventing actual constitutional violations in Zone 1. The Court's emphasis on the remedial nature of Congress's enforcement power under the Test confirms that Zone 1 does not—and constitutionally cannot—cast a long shadow. In other words, the Zone 2 band on the target is not wide and, as will become evident, is even shrinking. Finally, the outer ring (Zone 3) represents other “rights”²¹² given by the federal statute. Zone 3 “rights” and violations are subject to the law governing Congress's Article I powers and limitations.

c. How does the Test Work?

Zone 1: Actual Constitutional Violations

The late Justice Scalia, writing for a unanimous Court in *United States v. Georgia* in 2006, opined that “no one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions.”²¹³ Enforcement legislation that remedies actual constitutional violations in Zone 1 is valid as long as the law includes a clear statement that Congress intends to abrogate a state's immunity. Moreover, it does not matter whether the violated right is in Zone 1A or 1B because the standard of review is part of the underlying right. Admittedly, an actual violation in Zone 1A will be less likely to happen because that space only requires rational basis review and it is rarer for an individual to suffer irrational discrimination than it is for an individual to suffer discrimination that is subject to heightened review in Zone 1B. But the likelihood of suffering an injury in Zone 1 is irrelevant in evaluating whether the enforcement statute meets the Test, because the law is premised on the individual having already suffered the injury. Significantly, it is apt to define Congress's enforcement power “remedial” in this space, because that is exactly what the statute does; it remedies actual constitutional violations.

Thus, *application* of the Test does not present confusing issues with respect to Zone 1. However, two puzzling issues lurk in this Zone. First, Congress

state employers, have to reasonably accommodate persons with disabilities. Clearly, disability discrimination is a right that is protected by the Fourteenth Amendment and a violation of the right would fall into Zone 1. One might call the “reasonable accommodations” provision a statutory “right,” and, in everyday conversation, it makes sense to talk about the “right to be reasonably accommodated.” Again, Congress cannot create rights under the Fourteenth Amendment. Instead, the “reasonable accommodations” provision is a *deterrent measure or remedy* that must meet the Test—that is prevent and remedy violations of the constitutional *right*—to be valid enforcement legislation.

212. Again, the underlying federal statute might create rights, but it might create “interests” or “benefits.” *See supra* note 210.

213. 546 U.S. at 158 (italics in original).

could amend § 1983 to provide that it clearly intends to abrogate a state's sovereign immunity. This would maximize its enforcement power in all of Zone 1. It also is the best way to avoid the Void and provide money damages against states for individuals who are actually harmed when their Fourteenth Amendment rights are violated. Moreover, the line of cases explored below under the Test all include a clear expression of Congress's intent to abrogate states' immunity, evidencing Congress's support for making this avenue of redress available.²¹⁴ Indeed, it is ironic that statutes like the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Family Medical Leave Act (FMLA), for example, include clear statements but whether they successfully abrogate turns on meeting the Test, but § 1983—the historic valid Fourteenth Amendment statute—fails to abrogate because it lacks the clear intent statement.²¹⁵ Finally, even if § 1983 were amended to include such a statement, the Circling Back Phenomenon would still be in play and Congress would have Article I power, the *Young* doctrine, and enforcement by the United States to regulate states and hold them to standards.

The second puzzlement in Zone 1 relates to the question whether a particular enforcement statute that fails the Test as explored below in Zone 2, nevertheless remains valid with respect to abrogating a state's immunity for actual violations in Zone 1. The reason for the confusion seems to be that the plaintiffs in the cases that failed abrogation, unlike the plaintiff in *Georgia*, did not suffer actual constitutional violations so Zone 1 is never implicated in those cases.²¹⁶ An amendment to § 1983 to include the clear statement rule, naturally, would obviate this confusion because it would provide a right of action for any individual who suffers an actual constitutional violation while leaving the Test intact to be applied to Zone 2 violations.

Zone 2: The Enforcement Statute's Remedial and Deterrent Measures

This Zone harbors most of the confusion because this is where the heart of

214. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (ADA); *Fla. Bd. of Regents v. Kimel*, 528 U.S. 62, 73–74 (2002) (ADEA) (Justices Kennedy and Thomas dissented on this point, at 99–100); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (FMLA).

215. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (“The language of § 1983 falls far short of satisfying the ordinary rule of statutory construction that, if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” (quoting *Atascadero State Hosp. v. Scanlon*, 474 U.S. 234 (1985)).

216. *Georgia*, 546 U.S. at 157 (paraplegic inmate in state prison suffered actual violations of his Eighth Amendment rights (incorporated through the Fourteenth Amendment) and also alleged violations of Title II of the ADA but case was remanded for clarification of his pro se complaint in evaluating his ADA claims). *But see infra* Part IV.B (discussing *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999)).

the Test applies, although Zone 1 also plays a significant role because the validity of the enforcement statute is closely connected to the underlying constitutional right.

Understanding the Relationships at Stake: Boerne's progeny show that the shadow rights created by the enforcement statute in this Zone are more likely to meet the Test the more closely they are targeted at deterring actual constitutional violations in Zone 1. Again, Zone 1 does not cast a long shadow. However, it does cast two shadows and the shadow cast by Zone 1A is, and should be, shorter than the one cast by Zone 1B. Specifically, in Zone 1A—the rational basis space—the Tenth Amendment predominantly defines the critical relationships among the state, the individual, and Congress: states have more leeway in the rational basis review space in regulating individual rights,²¹⁷ and therefore Congress should have less leeway in that space regulating states. In fact, the Court has held that states are not violating the Constitution unless they are acting irrationally—or as I describe it, have “gone wild.” As explored below, legislation that connects Zones 1A and 2 have all failed abrogation, which illustrates how unlikely it is that states will have gone wild.²¹⁸ Therefore, there should be less need for Congress to use its enforcement power, and the Court should be less deferential, consistent with striking the appropriate federalism balance. Conversely, in Zone 1B—the heightened review space—the Fourteenth Amendment predominantly defines the relevant relationships: states have less leeway in the heightened review space in regulating individual rights, and Congress should have more leeway in that space regulating states.

A brief overview of a few important Section 5 cases illustrates that this description accurately reflects how the Court applies the Test.

The Zone 1B and Zone 2 Relationships: The Court upheld enforcement legislation in two cases that involved Zone 1B rights.²¹⁹ To highlight, using the

217. This is not to say, of course, that an individual's rights cannot be violated even in the rational basis realm, because the Court has held some laws unconstitutional under rational basis review. *See, e.g.,* *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (requiring permit for group home for mentally disabled served no legitimate purpose and was motivated by “irrational prejudice.”); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (ordinance defining family in way that prohibited a grandmother from living with grandsons who were cousins and not siblings unconstitutional). For an excellent analysis of *Moore*, see Nancy E. Dowd, *John Moore Jr.: Moore v. City of East Cleveland and Children's Constitutional Arguments*, 85 *FORDHAM L. REV.* 2603 (2017). Nor is this to say that Congress lacks the enforcement power for actual constitutional violations. *Georgia*, 546 U.S. at 158. However, enforcement legislation targeted at actual violations that harm individuals is different from more generalized enforcement legislation when a state does not have a history and pattern of irrational discrimination.

218. An exception might be in the area of LGBTQ rights. *See* ARAIZA, *supra* note 9.

219. *Hibbs*, 538 U.S. at 721 (involving sex discrimination) and *Tennessee v. Lane*, 541 U.S. 509 (2004) (involving disability discrimination in the administration of judicial services). In *Georgia*, 546 U.S. at 151, the Court reviewed a state prisoner's pro se lawsuit against the state alleging violations of his rights under Title II of the ADA, which prohibits disability discrimination in public services. Americans with Disabilities Act of 1990, 104 Stat. 337, *as amended* 42 U.S.C. § 12131 (2000 ed. and Supp. II). He

Court's comparative terminology highlighted in italics, it seems that the general rule for meeting the Test is this: if the constitutional right is subject to heightened review, then the Court will be *more deferential* and it will be *easier* for Congress to meet the Test. This is consistent with the Court's holdings in *Nevada Dept. of Human Resources v. Hibbs*²²⁰ and *Tennessee v. Lane*.²²¹

In *Hibbs*, the Court upheld Congress's power in the Family Medical Leave Act (FMLA) to require employers (including state employers) to give employees unpaid time off to provide for family and medical care.²²² The constitutional right at stake was Mr. Hibb's right to be free from sex discrimination, which is subject to intermediate scrutiny, placing it in Zone 1B.²²³ There is no constitutional right to take unpaid leave for family and medical care. That shadow right (preventive measure) came from the FMLA, placing it in Zone 2. The question presented was whether Congress's use of its enforcement power to connect Zone 1B with Zone 2 was constitutional under both the Tenth and Fourteenth Amendments, making abrogation valid.²²⁴

Congress presented evidence of a history and pattern of sex discrimination in the workplace by state employers and opined that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."²²⁵ Chief Justice Rehnquist, writing for the Court, held that the FMLA family and medical care provisions met the Test and successfully abrogated states' sovereign immunity.²²⁶ On the federal target, the Zone 2 shadow rights were congruent and proportional to preventing and remedying sex discrimination - Zone 1B violations.²²⁷

The late Chief Justice Rehnquist's opinion was joined by Justice O'Connor and Justices Souter, Ginsburg, Stevens, and Breyer. Fair observation: Chief Justice Rehnquist and Justice O'Connor joined with the other four Justices to uphold abrogation of the family care provision of the FMLA because of the widespread and historically persistent sex inequality in the United States. The

also alleged violations of his constitutional rights. The Court remanded his case with instructions on how to clarify his complaint so that it was clearer what his allegations were under different laws so that the Court could better evaluate whether the Test was satisfied. In its opinion, Justice Scalia opined that Congress has the power to abrogate for actual constitutional violations. *Id.* at 157–58. In contrast, the Court held in *Morrison* that the VAWA, involving sex discrimination, was invalid because there was no state action and violence is not an economic activity. *See supra* Part II.

220. *Hibbs*, 538 U.S. at 721.

221. *Lane*, 541 U.S. at 509.

222. The Court held that the self-care provision of the FMLA did not validly abrogate in *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 35 (2012). *Infra* Part III.B.4.b (analyzing *Coleman*).

223. *Craig v. Boren*, 429 U.S. 190 (1976).

224. Regardless, the FMLA is constitutional under Article I, placing it in Zone 3, and the Circling Back Phenomenon would apply.

225. *Hibbs*, 538 U.S. at 736.

226. *Id.* at 725.

227. *Id.* at 737.

Chief Justice even referred to the widespread discrimination against women based on stereotypes about their unsuitability for work outside the home.²²⁸ Critically important, their votes in support of valid abrogation acknowledged that failure to provide the statutory leave would not necessarily result in a constitutional violation in Zone 1B. In other words, the majority vote rested on an acknowledgement that Zone 2 legislation can be valid even if the Zone 2 preventive measure can be violated without also having a concomitant Zone 1B violation. This is an affirmation of the *Boerne* inconsistency.²²⁹

In this way, finding a history and pattern serves as evidence of the “likelihood” of an actual constitutional violation occurring and the “likelihood” that the preventive measure will deter it from happening. Imposing on state employers a measure such as the family care provision in the FMLA undeniably is likely to prevent some sex discrimination. This observation is further supported by the increasing knowledge and understanding about how implicit bias functions.²³⁰ In other words, while the history of sex discrimination started because of explicit bias against women, we now know that discrimination can be the result of unintentional or implicit bias. Nevertheless, questions remains: how is “likely” to be measured? And, more importantly, who should decide whether “likely” is met? In answering these questions, the difference between a Zone 1A and Zone 2 connection versus a Zone 1B and Zone 2 connection is highly relevant. Given Congress’s explicit role in enforcing the Fourteenth Amendment, once the Court has determined the meaning of the Amendment (consistent with its role in a *Marbury* sense), then Congress’s judgment in evaluating “likelihoods” in Zone 1B and Zone 2 relationships should control (consistent with *McCulloch*). This would be a harmonious separation of powers balance.

Similarly, but with a twist, the *Lane* Court upheld Congress’s power under Title II of the Americans with Disabilities Act (ADA) to abrogate states’ sovereign immunity in order to prevent disability discrimination in “cases implicating the accessibility of judicial services.”²³¹ Mr. Lane faced criminal charges that required him to appear for hearings in a courthouse that lacked elevator access.²³² Significantly, his complaint also included a claim that the

228. *Id.* at 728–32.

229. *See supra* Part III.B.3.a.

230. For an excellent analysis of how implicit bias negatively affects working environments, see Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055 (2017). *See also* Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017) (school safety context).

231. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004). Although disability discrimination is subject to rational basis review, it is still a Zone 1A violation if the unlawful state action is irrational.

232. Mr. Lane crawled up the stairs to make his first appearance, but he refused to do that in his second appearance and he also refused to be carried up the stairs to the hearing room. *Lane*, 541 U.S. at 514. The other plaintiff, Beverly Jones, was a court reporter who also is a paraplegic and alleged she lost

state violated his Due Process rights under the Sixth Amendment Confrontation Clause, incorporated through the Fourteenth Amendment (Zone 1B).²³³

Although disability discrimination falls into Zone 1A because it is subject to rational basis review,²³⁴ the ADA also “seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.”²³⁵ For example, the ADA requires states “to take reasonable measures to remove architectural and other barriers to accessibility.”²³⁶ This requirement creates a Zone 2 “shadow right” (preventive measure). Because the Court was evaluating a Zone 1B and Zone 2 relationship, it was *easier* for Congress to meet the Test and the Court was *more deferential* to Congress’s judgment. The Court noted, that “the record of constitutional violations . . . including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services—far exceeds the record in *Hibbs*.”²³⁷ The *Lane* Court upheld the provision of the ADA.²³⁸

Notably, in *Lane*, Chief Justice Rehnquist departed ways with the *Hibb*’s majority (including Justice O’Connor) on the point about how close the relationship between Zone 1 and Zone 2 needs to be in order for enforcement legislation to be valid. Specifically, the Chief Justice dissented in *Lane* because he was persuaded that Congress provided no evidence of a history and pattern of actual constitutional violations or even arguable constitutional violations by the states based on disability. Without that, he opined that there can be no Zone 2 validity. Stated alternatively, the preventive measures in Zone 2 cannot be considered “*without regard for whether the failure to accommodate [under the ADA] results in a constitutional wrong.*”²³⁹ In his opinion, moreover, Mr. Lane

work because she could not “gain access to a number of county courthouses.” *Id.*

233. *Id.* at 523.

234. *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443, 446 (1985) (“Our refusal to recognize the [mentally disabled] as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally [disabled] and others must be rationally related to a legitimate governmental purpose.”).

235. *Lane*, 541 U.S. at 522–23.

236. *Id.* at 531 (citing to the Act 42 U.S.C. § 12131 (2)). But states are not “required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§35.150(a)(2), (a)(3).” *Id.* at 532. These limitations relate to the scope of Congress’s enforcement power, but they also are relevant to the Act’s validity under Article I if and when the Circling Back Phenomenon takes place. Specifically, the anti-commandeering principle presumably would invalidate a congressional mandate that made states engage in certain activities or incur certain expenses. Justices Kennedy and O’Connor also note this distinction in their concurring opinion in *Garrett*. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001).

237. *Lane*, 541 U.S. at 529.

238. *Id.* at 533–34.

239. *Id.* at 553 (Rehnquist, C.J., dissenting) (italics in original). Given that he treated *Lane* as a Zone 1A (not Zone 1B) and Zone 2 relationship, his opinion fits into the basic analysis for those relationships.

did not even suffer an actual constitutional violation.²⁴⁰

Critically, and as the dissenting Justices highlight, there is a strong parallel between the histories of sex and disability discrimination. Just as women and men throughout history have been held back because of sex stereotyping, so too have people with disabilities. Just as the Court itself sanctioned sex discrimination,²⁴¹ so has it done the same with respect to disability discrimination.²⁴² Arguably, the misstep in the comparison of these two types of discrimination comes from the Court's decision to apply rational basis review and not heightened review to disability discrimination under the basic analytical framework,²⁴³ which is directly related to Congress's power under Section 5. One can only speculate whether the Chief Justice would have voted to sustain the validity of the ADA in *Lane*, just as he did in *Hibbs*, if disability discrimination were subject to heightened review. Regardless, it is difficult to reconcile the outcomes in the cases in light of the widespread stereotyping and histories of discrimination faced by people in both equal protection classes. Again, this evidences how delicate the voting balance is in the Section 5 cases.

Zone 1A and Zone 2 Relationships: In contrast to the *Hibbs* and *Lane* decisions, cases that involve Zone 1A and Zone 2 relationships fail to meet the Test. One might say relationships here are theoretical place holders. This is not surprising because Congress would have to produce evidence that there is a history and pattern of irrational discrimination by the states—that they have gone wild—in order for Congress to successfully abrogate in the rational review basis space.²⁴⁴ Congress has not been able to show that and therefore violations of Zone 2 preventive measures in underlying enforcement statutes have not successfully abrogated states' sovereign immunity.²⁴⁵

For example, in *Board of Trustees of the University of Alabama v. Garrett*,²⁴⁶ the Court faced the question whether Title 1 of the ADA is a valid exercise of Congress's abrogation power. Title I protects employees from disability discrimination in the workplace and requires employers to make

240. *Id.* at 543.

241. *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1873) (women do not enjoy the "privilege" of practicing law).

242. *Buck v. Bell*, 274 U.S. 200 (1927) (upholding state compulsory sterilization law for mentally disabled).

243. *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

244. A strong case can be made that discrimination against members of the LGBTQ community is irrational and widespread and therefore should fall within Congress's enforcement power—even as a Zone 1A case. This would be clearer if such discrimination is subject to heightened review and falls into Zone 1B, but the Supreme Court cases on sexual orientation have failed rational basis review, obviating the need to decide with certainty where sexual orientation falls on the equal protection paradigm. *See generally* Rush, *supra* note 187; AZAIRA, *supra* note 9.

245. What this means for the individual who suffers an actual constitutional violation is unclear. *See supra* Part III.B.3.c.

246. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

reasonable accommodations for disabled workers.²⁴⁷ Ms. Garrett, an employee of the University of Alabama, had to take time off from work to seek medical care and recover from breast cancer.²⁴⁸ When she returned to work, however, her job was no longer available and she had to take a lower paying one.²⁴⁹ She sued Alabama for money damages under the ADA (Zone 2).²⁵⁰ To meet the Test, Congress would have needed evidence that states have gone wild with respect to workplace disability discrimination and, understandably, Congress could not do that. Moreover, Ms. Garrett did not even suffer an actual violation in Zone 1A, meaning Alabama's employment decisions were rational and therefore not unconstitutional.²⁵¹ Therefore, Congress lacked enforcement power to abrogate Alabama's sovereign immunity under Title I of the ADA.²⁵²

Similarly, the Court held that Congress could not show a pattern of irrational age discrimination with respect to Congress's enforcement power under the ADEA in *Kimel v. Florida Board of Regent*.²⁵³ Like Ms. Garrett, the *Kimel* plaintiff also did not suffer an actual constitutional violation. Zone 1A cases—the “rational basis” cases—protect state sovereignty because that space is where the people's collective rationality is presumptively constitutional and Congress did not produce evidence that the states had gone wild. Again, requiring states to meet Zone 2 requirements or face potential money damages is to impose a burden on states that is not constitutionally required and this violates federalism because the burden effects a substantive change in what is required of states under the Fourteenth Amendment.²⁵⁴ However, and to emphasize, irrational discrimination against an individual by a state actor is a Zone 1A violation and enforcement legislation that abrogates a state's immunity would be valid.²⁵⁵ These are very different outcomes and reflect a balancing of the critical Fourteenth Amendment relationships with Tenth Amendment principles.

247. *Id.* at 361.

248. *Id.* at 362. Milton Ash also was a plaintiff who suffered from asthma and alleged his employer would not accommodate his needs. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 367.

252. *Id.* at 360. Under the basic Fourteenth Amendment analytical framework, the plaintiff has the burden of proof to show the employer's decision was not rational, but the ADA unconstitutionally shifted the burden to the state. *Id.* at 372.

253. 528 U.S. 62 (2000).

254. Naturally, states can provide individuals with more protection than is constitutionally required and that also is consistent with federalism and the principle that states are “labs of experimentation.” However, the analysis is far more complicated when individual rights compete as they do, for example, in the area of sexual orientation discrimination and religious freedom. *See Hernandez-Truyol, supra* note 200. *See also* *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. ___, 138 S. Ct. 1719 (2018) (state civil rights commission violated cakeshop owner's right to be free from decisions that are hostile to his religious beliefs when he refused to design a cake for a same-sex couple).

255. *See supra* text accompanying notes 216–17.

In reality, the scope of Congress's power varies: The *Boerne* Court held that Congress's power is remedial, meaning the scope of Congress's power is the same regardless of whether Zone 1A or 1B is the target of the legislation. But it is not the same; Congress's power is broader when Zones 1B and 2 are connected. It is broader because the *Boerne* Court held that it includes the power to enact preventive or deterrent measures to decrease the likelihood that a Zone 1 violation will occur. Saying Congress's power is broader (substantively different) in Zone 1B, is qualitatively different from saying it is easier to meet the Test or saying that the Court will give greater deference to Congress in Zone 1B and Zone 2 relationships. To describe Congress's power as "plenary" in the Zone 1B and 2 relationships, not only is more accurate, but it also provides a more concrete guideline than "easier than" or "harder than," because the standard "plenary" is well-established.

Admittedly, if Zone 2 successfully abrogates, then Zone 2 violations are remedial. More accurately, then, Zone 2 can be both remedial and preventive, but "remedial" in Zone 2 pertains to statutory "shadow rights and violations," and not constitutional rights and violations. Moreover, the Court acknowledges that it will give greater deference to Congress legislating the Zone 1B and 2 relationships, consistent with an understanding that Congress's power is broader.

To acknowledge that Congress's "remedial" power is broader or narrower depending on the underlying relationships in the enforcement statute can be consistent with the contemporary Court's jurisprudence at the Intersection. In other words, such an acknowledgement does mean a return to the Tenth Amendment in the dismissive sense for at least three reasons. First, the Tenth Amendment is not violated when Congress abrogates for actual violations in Zone 1. Second, it is the predominant constitutional provision defining the Zone 1A and Zone 2 relationships. Finally, and perhaps the best evidence, is the Court's record on protecting state sovereignty. Recall that the contemporary Court acknowledges Congress's plenary power under the Commerce Clause and Necessary and Proper Clause and, simultaneously, infused the Tenth Amendment with articulable and limiting principles that protect state sovereignty as analyzed in Parts I and II. "Plenary" is not a limitless standard.

Zone 3: Article I Legislation and the Circling Back Phenomenon

What about Zone 3 and Article I legislation? Sometimes the underlying federal statute in which Congress tries to abrogate a state's sovereign immunity is enacted under both Article I and the Fourteenth Amendment, which is why I describe the imaginary target with three zones because Zone 3 represents

legislation enacted under Article I.²⁵⁶ This is true, for example, of the FMLA, the ADEA, and the ADA. With such legislation, the Test is still relevant only to Zones 1 and 2, which pertain to the Fourteenth Amendment. Moreover, Zone 3 is not a source of abrogation. Nevertheless, Zone 3 is an extremely important space, particularly if abrogation fails under the Fourteenth Amendment, because that invites the Circling Back Phenomenon. Naturally, though, Zone 3 legislation also has to be a valid exercise of Congress's Article I powers, and, as explored in detail in Parts I and II, the contemporary Court is protective of state sovereignty in Zone 3 as well. For example, recall that one reason the VAWA failed in *Morrison* is because violence is not an economic activity.²⁵⁷

4. Zone 2 is Shrinking: Three Cautionary Tales

This Part explores three brewing open questions that bear on the above analysis, and, with time and a few more cases, it probably will be clearer what they mean. For now, though, they serve as bellwethers of what might lie ahead in the development of the law at the Intersection.

a. *Shelby County, Alabama v. Holder*:²⁵⁸ *The Equal Sovereignty Principle*

The Court's decision in *Shelby County* significantly reins in Congress's enforcement power under Section 2 of the Fifteenth Amendment, which portends that perhaps a concomitant trend is brewing under Section 5 of the Fourteenth Amendment. Recall that the *Shelby County* Court struck down the preclearance formula in the 1965 VRA, which, at the time, applied to nine states that Congress found had a history and pattern of violating the voting rights of African Americans.²⁵⁹ In the 1960s, because of the unique circumstances and widespread racial inequality in voting, the Court held that there was no doubt that Congress was justified in using its enforcement power to protect the voting rights of African Americans.²⁶⁰ The Court held that Congress's use of the old

256. With respect to Congress's Article I powers, in fact, the federal target only consists of Zone 3 and, if Congress creates an individually enforceable right in that space, it is only a statutory right. Statutory rights are enforceable under § 1983 but that is beyond the scope of this Article. There is no abrogation in any event under *Seminole Tribe*.

257. *United States v. Morrison*, 529 U.S. 528, 598 (2000).

258. 570 U.S. 529 (2013).

259. Those nine states included Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and parts of North Carolina and Arizona. *Shelby County*, 570 U.S. at 310. For a persuasive argument that the *Shelby County* Court changed the prior understanding of the equal sovereignty principle that dealt with admission of new states to the Union to now limit Congress's power to target legislation only at states that engage in bad behavior, see Litman *supra* note 16. For a perspective on why allowing targeted legislation promotes federalism and does not violate the equal sovereignty principle if adequately justified, see Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016).

260. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (“[E]xceptional conditions can justify legislative measures not otherwise appropriate.”); see *supra* Part III.

formula violated the “equal sovereignty principle.”²⁶¹ This principle protects the equal dignity of states and requires Congress to justify its disparate treatment of states.²⁶² The *VRA* cases also refer to this principle, but note that it applies in the context of admitting states to the Union on an equal basis. The *Shelby County* Court uses it in a different context²⁶³ and held that the use of the “old” formula did not adequately take into account all of the positive changes that have occurred since the 1960s.

In contrast, Section 5 legislation, consistent with meeting the Test, is not meant to sweep up all states in its enforcement arms; it is supposed to target only those states that have a history and pattern of constitutional violations. In fact, because of RFRA’s “sweeping coverage” in *Boerne*,²⁶⁴ the Court created the Test, but the scope of its coverage continues to be an issue. For example, the *Morrison* Court was concerned that the VAWA applied to all states.²⁶⁵ Simultaneously, the *Hibbs* Court held that the FLMA’s requirement that all states provide a minimum of 12 weeks of unpaid leave for family care met the Test, but the dissent strongly objected to applying this requirement to all states and not just offending ones.²⁶⁶ Interestingly, though, the Section 5 cases were decided before *Shelby County* and none of them rests on Congress violating or not violating the equal sovereignty principle. Indeed, the principle is never mentioned in the cases—not even in those cases that raise questions about whether the underlying legislation should apply to all or only offending states.

Simultaneously, the Section 5 cases either cite to the *VRA* cases or make an explicit analogy to those cases and the constitutionality of the 1965 *VRA* as the Court evaluates the constitutionality of the underlying enforcement legislation before it.²⁶⁷ The *VRA* Court held that Congress’s enforcement power is measured by *McCulloch* (plenary)²⁶⁸ and that the “appropriateness” of

261. *Shelby County*, 570 U.S. at 551.

262. *Id.* at 544. “[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)). The *Shelby County* Court noted that the *Coyle* Court “explained that our Nation ‘was and is a union of States, equal in power, dignity and authority.’” (quoting *Coyle*, 221 U.S. at 567).

263. Litman, *supra* note 16.

264. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (RFRA applied to all states and local governments).

265. *United States v. Morrison*, 529 U.S. 598 (2000).

266. *Hibbs v. Nevada*, 538 U.S. 721, 742–43 (2003) (“The constitutional violation that is a prerequisite to ‘prophylactic’ congressional action to ‘enforce’ the Fourteenth Amendment is a violation by the State against which the enforcement action is taken.”) (italics in original) (Scalia, J., dissenting); (Nevada had a leave policy and “The scheme enacted by the Act does not respect the States’ autonomous power to design their own social benefits regime.”) (Kennedy, J., dissenting, joined by Justices Scalia & Thomas).

267. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001); *Hibbs*, 538 U.S. at 737–38; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2002).

268. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

Congress's enforcement power under both Section 2 and Section 5 is measured by the same standard.²⁶⁹ Quite significantly, the Court also held that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."²⁷⁰ The Court then quoted the famous *McCulloch* "let the end be legitimate" standard, and held that Congress's enforcement power is as broad as its power under the Necessary and Proper Clause.²⁷¹

In this way, *Shelby County* indicates that it almost does not matter whether Congress's enforcement power under Section 5 is remedial or plenary because sovereignty principles, including the equal sovereignty principle, will immunize states from enforcement legislation under both Section 2 and Section 5 except, perhaps, in the most unique circumstances. How unique? The suggestion is the circumstances needed to justify enforcement legislation would have to be as exceptionally dire as those that existed when the VRA was enacted in 1965.²⁷²

Again, this observation brings to mind the suggestion that perhaps the Court is functioning as if current relationships between the states and individuals are more like they were at the time of *Barron*, meaning states can be trusted again.²⁷³ Certainly, as Congress's enforcement powers continue to be reined in, it only makes for a stronger case that state remedies should play a bigger role at the Intersection.

269. *South Carolina*, 383 U.S. at 325–26 ("It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.") (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)). The *South Carolina* Court went on to note that the same standard even applies to Congress's enforcement power under the Eighteenth Amendment (prohibition). *Id.* at 327. The *Shelby County* Court also noted that the enforcement provisions were guided by the same standards. *Shelby County, Ala. v. Holder*, 570 U.S. 529 n.1 (2013).

270. *South Carolina*, 383 U.S. at 326.

271. "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." *South Carolina*, 383 U.S. at 326 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). See also *Katzenbach v. Morgan*, 384 U.S. 641, 646 (1966).

272. The late Justice Scalia opined in his dissenting opinion in *Lane*, in fact, that the Test should be applicable only in race discrimination cases, and added that the "necessary and proper" standard would be the correct measurement in such cases. *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting). In many ways, Justice Scalia's suggestion would bring clarity to the Test because Zone 2 would only exist for race discrimination. However, caution would be called for to avoid the collapsible error. See *Rush*, *supra* note 187.

273. Many people, especially people of color, would argue that states still cannot be trusted with certain equality issues, particularly racial equality issues. Ironically, although society has made significant progress in race relations, there is still much to be done. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). The "return to a *Barron*-like time" observation, sadly, has more than just a ring of truth to it: it also has a deeply unjust element of truth to it that is all too easily masked behind the positive guidelines many people think the contemporary Court has contributed to federalism in light of its jurisprudence at the Intersection.

b. *Coleman v. Court of Appeals of Maryland*:²⁷⁴ *Does Zone 1B Matter?*

In 2012 in *Coleman*, the Court held that the self-care provision under FMLA did not meet the Test (unlike the family and medical care provision in *Hibbs*²⁷⁵). Mr. Coleman, an employee of the Court of Appeals of Maryland, argued that he was discriminated against because of his sex when he was not given sick leave, but the Court found “scant evidence in the legislative history of a purported stereotype harbored by employers that women take self-care leave more than men.”²⁷⁶ It is not clear whether the self-care provision of the FMLA in *Coleman* failed abrogation because it was not congruent and proportional to remedying sex discrimination (Zone 1B) or because it was not congruent and proportional to remedying disability discrimination (due to illness) (Zone 1A). The Court was persuaded that Congress enacted the self-care provision based on “a concern for the economic burdens on the employee and the employee’s family resulting from illness-related job loss and a concern for discrimination on the basis of illness, not sex,”²⁷⁷ suggesting it was in Zone 1A. Throughout the opinion, though, the Court does not say what level of the review the purported constitutional right is entitled to, although the opinion does center on refuting the claim that Mr. Coleman was discriminated against based on sex.

If *Coleman* is interpreted as a disability discrimination case in Zone 1A, Congress could not produce evidence that states are irrationally discriminating against people with disabilities in providing sick leave and that is why abrogation failed. If, on the other hand, it was decided as a sex discrimination case in Zone 1B, which is the stronger argument, in my opinion, then *Coleman* is a more significant decision because abrogation failed to meet the Test in a case involving a heightened review standard. The dissenting Justices in *Coleman*—Justices Ginsburg, Breyer, Sotomayor and Kagan—were strongly persuaded of the evidence that showed the self-care provision was *likely to* [check wording] prevent sex discrimination. In fact, Justice Ginsburg’s dissent picks up on this very point and opined that “Congress honed in on gender discrimination, which triggers heightened review,” and cites to *Hibbs*, “[I]t was [therefore] easier for Congress to show a pattern of state constitutional violations.”²⁷⁸ Justice Ginsburg, joined by the other dissenting Justices, thinks the Court should have given greater deference to Congress.²⁷⁹

274. 566 U.S. 30 (2012).

275. See *supra* Part III.B.3.c.

276. *Coleman*, 566 U.S. at 38.

277. *Id.*

278. *Id.* at 64 (citing *Hibbs v. Nevada*, 538 U.S. 721, 736 (2003)).

279. In *Boerne*, the Court opined that the legislative record is not determinative in evaluating the constitutionality of enforcement legislation. “Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but ‘on due regard for the decision of the body constitutionally

It is significant, though, that *Hibbs* was decided by a 6–3 vote, with Justices Kennedy, Scalia and Thomas in the dissent. By the time *Coleman* was decided nine years later, Justices Rehnquist, O’Connor, Souter and Stevens were no longer on the Court and they, along with Justices Ginsburg and Breyer were the majority in *Hibbs*. In contrast, Justice Kennedy wrote the majority 5–4 opinion in *Coleman*, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The changes in the Court’s composition between *Hibbs* and *Coleman* might explain the different outcomes given the Justices’ overall jurisprudence in this area. It also indicates that the Roberts Court might be taking a tougher stance on whether abrogation is valid and this would be consistent with the fortifying the Shield and protecting state sovereignty. Remember that many of the federalism cases are 5–4 decisions.²⁸⁰

c. Zone 3 and The Circling Back Phenomenon: The Scope of Congress’s Power

From a broader perspective, recall that one of the open issues about the scope of Congress’s Commerce Clause power—even though the definition is the same today as it was at the time of *McCulloch*—is whether Congress needs to produce actual evidence that an economic activity substantially affects interstate commerce or whether Congress’s judgment merely has to be rational.²⁸¹ This mirrors the similar issue dividing the Justices about Congress’s Section 5 power and the degree of deference the Court will give to Congress in enacting enforcement legislation. Should the deferential standard be the same? Although it is logical for it to be harder for Congress to meet the Test in the rational basis review space, applying the same “actual” evidence standard that is being applied in the Commerce Clause context seems too harsh, although it does fortify the Shield.

Moreover, if *Coleman* is interpreted to mean that the Court is reining in Congress even in Zone 1B, then applying the “actual” evidence standard in that space indeed proves too much. It essentially takes the “remedial” standard to mean only “remedial” and not also “preventive.” This interpretation effectively eliminates Zone 2 on the imaginary federal target. Notably, mathematical models facilitate measuring the quantitative impacts of economic regulations

appointed to decided.” *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (quoting Justice Harlan in *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970)).

280. Justice Kennedy’s retirement is unlikely to affect the voting balance because he was not a consequential “swing vote” in most federalism cases.

281. *See supra* Part II. Justice Breyer raises this in *Garrett* in which he said, “In my view, Congress reasonably could have concluded that the remedy before us constitutes an ‘appropriate’ way to enforce this basic equal protection requirement. And that is all the Constitution requires.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 377 (2001) (Breyers, J., dissenting) (joined by Justices Stevens, Souter & Ginsburg).

under the Commerce Clause, but quantitative measurements of the harmful effects of stereotyping and other ways in which discrimination can impact an individual's life are only beginning to be developed in the social sciences. But because it is harder to measure discrimination does not mean that it is not real or that individuals do not suffer real consequences as victims.

For example, social science data is bringing to bear the importance of acknowledging the phenomenon such as “unconscious bias.”²⁸² Indeed, many businesses engaged in commerce are beginning to require their employees to undertake “implicit bias” training as part of their “best business practices.”²⁸³ It would be ironic—an almost unbelievable—if Article I legislation that is designed to prevent discrimination in private commercial relationships (remember Ollie's Barbeque) is given just as much, if not more, deference than Section 5 legislation that is designed to prevent the state from violating individuals' Fourteenth Amendment liberties. This understanding is part of the federalism balance under the Commerce Clause, but it ignores the history and purpose of the Fourteenth Amendment—to protect individuals. The *Boerne* Court, in adopting the Test, held that, “Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but ‘on due regard for the decision of the body constitutionally appointed to decide.’”²⁸⁴ This augurs in favor of giving at least as much deference to Congress under Section 5, particularly in Zone 1B and Zone 2 cases, as the Court does under the Commerce Clause, especially with respect to the explicit and unique role Congress has to enforce the Fourteenth Amendment to protect individuals.

To briefly summarize, the Shield and the Void are persuasive evidence that one of the Court's most important concerns is protecting state sovereignty. This is not to say that the contemporary Court is not concerned about individual rights. In support of individual rights, it held that the Second Amendment right to bear arms is an individual right²⁸⁵ and incorporated the Amendment to apply to the states.²⁸⁶ It also held that same-sex couples have a fundamental right to marry.²⁸⁷ Nevertheless, it is a fair observation that the Court thinks that times

282. See Bornstein, *supra* note 230; Nance, *supra* note 230.

283. A recent example is presented by Starbuck's response to the racial incident when a white employee called the police and had two black men arrested because they were waiting in the store for a friend and were not ordering anything. Starbuck's closed all of its businesses on May 29, 2018 and required its 175,000 employees to engage in “racial bias training.” See “Here's What to Expect from Today's Starbucks Racial Bias Training,” WASH. POST (Business Section), May 29, 2018, at <https://www.washingtonpost.com/news/business/wp/2018/05/23/> (last visited July 27, 2018).

284. *Boerne*, 521 U.S. at 531 (quoting Justice Harlan in *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970)). Justice Scalia's view was to give deference using the Necessary and Proper Clause standard for legislation that applies to only offending states and state actors. See *Tennessee v. Lane*, 541 U.S. 509, 564 (2004).

285. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

286. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

287. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).

have changed and that Congress's enforcement power does not need to be as broad as it was either at the time the Fourteenth Amendment was adopted or at the time of the Second Reconstruction. Moreover, reasonable people agree that the law needs to evolve, presupposing that it will inevitably change over time.²⁸⁸ Recall that "changing times" was the rationale for the *Shelby County* Court's decision to strike down Congress's continued use of the "old" coverage formula in the VRA.²⁸⁹

Nevertheless, individuals who are harmed by unlawful state action deserve remedies. Strengthening the Shield to protect states and leaving individuals vulnerable to falling into the Void is inconsistent with both the purpose of the Fourteenth Amendment to protect individuals and the importance of states. It would be enormously significant and consistent with the modern Court's message about the importance of states if the Court could also provide guidance on the role of states in protecting the rights of individuals.

IV. THE IMPORTANCE OF STATE REMEDIES IN THE FEDERALISM BALANCE

A. *Section 1983 and Monroe v. Pape*:²⁹⁰ *Modifying the Message*

Realistically, given the contemporary Court's jurisprudence at the Intersection, perhaps it is time to focus on the importance of state remedies under the Fourteenth Amendment and there is evidence that the Court is beginning to do that. Admittedly, such a message would necessitate a retreat from the Court's long-standing message—since 1961—in *Monroe* that the availability of state remedies is irrelevant in § 1983 cases. In *Monroe*, thirteen Chicago police officers²⁹¹ unlawfully entered the Monroes' home without a

288. For an excellent analysis of why there can be no definitive "equilibrium" point in the federalism balance, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1749 (2005).

The Constitution's extended existence over time, moreover, requires adjustment and adaptation to new circumstances. Indeed, the most likely explanation for constitutional ambiguity on federalism, to my mind, is that it represents a deliberate strategy on the part of the Framers to allow the mechanics of federalism to be worked out and adapted through practice over time

Id. (footnote omitted).

289. *Shelby County, Ala. v. Holder*, 570 U.S. 529, 580 (2013).

290. 365 U.S. 167 (1961).

291. The city of Chicago, not the state of Illinois, was named as a defendant, along with the police officers. The *Monroe* Court held that cities and local governments were not "persons" under § 1983, but the Court reversed this decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), but also held in *Monell* that to sue a local government for money damages, the plaintiff must show the local state actors acted pursuant to an invalid policy. *Id.* at 690.

warrant in violation of their federal and state rights, and, “routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers.”²⁹² They also unlawfully detained Mr. Monroe and interrogated him for 10 hours and never charged him with a crime.²⁹³ The Monroes sued under § 1983 for damages even though they could have sued in Illinois state court for violation of their state rights and received adequate remedies.²⁹⁴ In holding that state remedies are irrelevant, the Court said that “[i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”²⁹⁵

The *Monroe* Court’s message is not surprising given that it was decided during the 1960s Civil Rights movement. By the time *Monroe* was decided, *Barron*’s holding that the Bill of Rights did not apply to the states was long gone,²⁹⁶ and today most of the rights have been incorporated.²⁹⁷ Interestingly but not surprisingly, the most active period of incorporation was in the 1960s—the second Reconstruction period—when the Court incorporated ten rights in the Bill of Rights.²⁹⁸ Both the incorporation doctrine and the *Monroe* Court’s holding that state remedies are irrelevant under § 1983 are evidence that the states, particularly at that time, were violating the very fundamental rights embedded in the Bill of Rights that the *Barron* Court protected from federal interference. Thus, state remedies were irrelevant at that time, not necessarily

292. *Monroe*, 365 U.S. at 167.

293. *Id.*

294. *Id.* at 195. The idea that a state can provide “adequate” remedies suggests that a wrong committed under state law is just as heinous as a wrong committed under federal law, including the Constitution. This is debatable, of course. Nevertheless, being able to get damages under state law might adequately redress the tangible injuries—medical cost, lost wages, and so forth. Certainly, being able to recover damages under state law is far better than not being able to recover them at all because of the Shield and the Void.

295. *Id.* at 183.

296. For example, the Court incorporated the right to compensation for property taken by the government in 1897 in *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897) and the right to free speech in 1925 in *Gitlow v. New York*, 268 U.S. 652 (1925).

297. The most notable exception is the Seventh Amendment right to civil jury trial. See generally Erwin Chemerinsky, *The Jury Trial and Remedy Clauses*, 96 OR. L. REV. 677 (2017).

298. See, e.g., *Irvin v. Dowd*, 366 U.S. 717 (1961) (Sixth Amendment right to trial by impartial jury); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment right to be free from unreasonable searches and seizures); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment right to be free from cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right to be free from self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment confrontation clause); *Klopfer v. North Carolina*, 382 U.S. 213 (1976) (Sixth Amendment right to speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to trial by jury); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right to be free from double jeopardy).

because the existence of state remedies was unimportant, but because the federal government could not trust states to not violate the Fourteenth Amendment. And because they could not do that, Congress needed to exercise broad enforcement power under both the Fourteenth and Fifteenth Amendments.²⁹⁹

Modifying the *Monroe* message would be consistent with the contemporary Court's jurisprudence at the Intersection. To highlight, since the 1960s Civil Rights movement, the contemporary Court has revived the Tenth Amendment, infused the Eleventh Amendment with Tenth Amendment principles, significantly curtailed Congress's Section 5 (and Section 2) enforcement power, and narrowed its interpretation of §1983.³⁰⁰ All of these developments reflect the dawning of a new day for the contemporary Court. In fact, the contemporary Court rationalizes reining in Congress's power *because of* changing times. This is the rationale for its decision in *Shelby County*, releasing it from the preclearance provision of the VRA. With the dawning of this new day, perhaps it is time to expect more from states under the Fourteenth Amendment.

B. *The Contemporary Court's Observations About State Remedies*

As the Court began to iron out its jurisprudence about Congress's Section 5 power by taking a number of cases in somewhat rapid succession after *Boerne* in 1997, it also started to include observations about the existence of state remedies. The force or weight of the Court's observations fall along a continuum. At one end (#1), are those Section 5 cases in which the Court says nothing about state remedies and at the other end (#5) are those cases where abrogation is successful so that state remedies are less important because individuals avoid the Void. In between the continuum's end points are observations about the importance of state remedies that vary in weight: (#2) states could or do provide remedies, (#3) states could waive their immunity under federal law, and (#4) if states provide a remedy, then there is no constitutional violation. Notably, the same case can exemplify more than one observation. The important point to take away from this analysis is this: Regardless of where a particular case falls on the continuum, the Court's observations do not send a message that providing state remedies is an important contribution to protecting individuals under the Fourteenth Amendment.

Example of #1 (nothing about state remedies): Interestingly, the *Boerne*

299. The late Justice Scalia emphasized this same point in his dissent in *Lane*. See *supra* note 272.

300. For example, the Court has read into § 1983 very stringent immunity defenses to protect state actors, but that is beyond the scope of this Article. See generally Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62 (2016).

Court, which established the Test, said nothing about the existence of state remedies. Justice O'Connor's dissent, however, focused on the depth of the states' commitment to protecting the free exercise of religion and noted that the "remedy" for laws that unduly burden this right was to accommodate the individual by excusing them from the legal obligation.³⁰¹ Because of that, she argued that the Court should reconsider its decision in *Smith*, in which the Court held that neutral laws of general applicability are constitutional if they meet the rational basis test.³⁰² For a state to provide a remedy when an individual right is violated, however, would demonstrate an even deeper commitment to protecting that right. But, again, state remedies played no part in the very case that significantly reined in Congress's enforcement power.

Example of #2 (could provide or do provide remedies): The Court's observations in this group merely reflect the reality that states could provide remedies and that some states in fact do provide them. For example, in striking down the VAWA in *Morrison* in 2000, Chief Justice Rehnquist ended his majority opinion with this observation:

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort...to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy . . . But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.³⁰³

This message about the importance of state remedies is significant, because only the state could mitigate the Void in light of the Shield.

Shortly after *Morrison*, in *Kimel v. Florida Board of Regents*,³⁰⁴ the Court held that the Age Discrimination in Employment Act (ADEA) does not abrogate states' immunity, and in *Garrett*, the Court held that neither did the ADA. Unlike *Morrison*, the *Kimel* Court observed that states provide remedies for age discrimination. Specifically, Justice O'Connor opined that "[s]tate employees are protected by state age discrimination statutes and may recover money damages from their state employers, in almost every State of the Union."³⁰⁵ The *Garrett* Court noted that all states protected individuals from

301. *City of Boerne v. Flores*, 521 U.S. 507, 552–53 (1997) (O'Connor, J., dissenting) ("By 1789, every state but Connecticut had incorporated some version of a free exercise clause into its constitution.").

302. *Id.* at 544–45.

303. *United States v. Morrison*, 529 U.S. 528, 627 (2000).

304. 528 U.S. 62 (2000).

305. *Id.* at 91–92. Justice Stevens noted in his opinion that before Congress extended the ADEA in 1974 to apply to public employers, "all 50 States had some form of age discrimination law, but 24 of them did not extend their own laws to public employers." *Id.* at 94 n.2 (Stevens, J., dissenting in part and concurring in part).

disability discrimination by the time the ADA was enacted in 1990, but also noted that “[a] number of these provisions...did not go as far as the ADA did in requiring accommodation.”³⁰⁶ However, like the *Kimel* Court, the *Garrett* Court did not address states’ remedial measures, and, in particular, whether money damages were available for violations due to disability discrimination.

When the federal Void appears as it did in *Boerne*, *Morrison*, *Garrett*, and *Kimel*, it is significant for the Court to acknowledge that states can or even do provide remedies. But notice that there is no “punch” behind the *Morrison* Court’s observations. If Virginia provides a remedy, great; it shows Virginia is “civilized” in the Court’s eyes. But it does not have to provide a remedy and presumably the federal government could not make Virginia provide a remedy because the anti-commandeering principle protects Virginia’s sovereignty and sovereign immunity. And saying nothing about the availability or unavailability of state remedies is not a message about the importance of states.

In contrast, Justice O’Connor’s opinion in *Kimel* is more forceful and suggests that it is important for individuals to have the ability to seek money damages against their states for age discrimination. Otherwise, why include that message? Still, her opinion does not connect the absence of federal remedies with the presence of state remedies in any analytical sense. For example, she does not say that federal remedies are unnecessary because states provide them. Nor does she suggest, for example, that Congress’s enforcement power might be greater or be due greater judicial deference when states do not provide remedies. Rather, her observation about state remedies is just that; it describes the reality. Nevertheless, it is a more significant observation about the importance of state remedies than that in *Boerne*, *Morrison* or *Garrett*.

Example of #3 (could waive their immunity): Justice Kennedy’s observation, writing for the majority in *Coleman* in 2012, exemplifies this message. Recall that the *Coleman* Court struck down the self-care provision of the FMLA because it failed congruence and proportionality. This meant that the plaintiffs fell into the Void and could not sue Maryland for money damages. Their hope to secure that remedy had to come from Maryland. But Justice Kennedy did not simply acknowledge that, as Chief Justice Rehnquist did in *Morrison*, or as Justice O’Connor did in *Kimel*. Rather, Justice Kennedy “elbowed” Maryland in its immunity side to suggest that the money Void is also its responsibility to address:

Of course, a State need not assert its Eleventh Amendment immunity from suits for damages . . . Discrimination against women is contrary to the public policy of the State of Maryland . . . and the State has conceded that the Act is good social policy . . . If the State agrees with petitioner that damages liability for violations of the self-care provision is necessary to combat discrimination against women, the State may waive

306. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001).

its immunity or create a parallel state law cause of action.

This message is definitely more forceful than any of the ones mentioned. But, again, in none of these cases, with the possible exception of *Coleman* explored more fully in #4 below, does the Court engage in any critical analysis about the role states could play in remedying Fourteenth Amendment violations and how that possibility would affect Congress's enforcement power. For example, if states willingly waive their sovereign immunity, there would be less cause for concern about the federal remedy Void. And if states do not provide a remedy, then there also should be less concern about protecting state sovereignty and concomitantly, less concern about giving greater deference to Congress when it enacts enforcement legislation. To be sure, the Court's observations that an individual's only recourse to secure a remedy for wrongful state action might be under the individual's state laws is somewhat of a recognition that the individual should have a remedy. And if it is not forthcoming because of the Shield and Void, then why not expect it to come from the states? At least engaging the complexities of the consequences of the Shield and the Void to the individual, while simultaneously promoting the importance of states, would add legitimacy to the recent developments at the Intersection.

Example of #4 (if they do provide, then no constitutional violation): This observation is important because it explicitly links state remedies and constitutional violations. Specifically, in *Florida Prepaid Postsecondary Expense Education Board v. College Savings Bank*,³⁰⁷ College Savings Bank sued the state of Florida under the Patent Remedy Act (PRA)³⁰⁸ for patent infringement. The PRA was enacted under both Article I and Section 5 and it included a clear statement of intent to abrogate states' immunity.³⁰⁹ Chief Justice Rehnquist, writing for the majority, held that the PRA failed the Test because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."³¹⁰ Not only was there virtually no evidence of patent infringement by the states, there was even evidence that "states are willing and able to respect patent rights . . ."³¹¹ Importantly, the Court held that if states provide a remedy, as Florida did,³¹² then there is no constitutional violation at all.³¹³ Without a constitutional violation, of course,

307. 527 U.S. 627 (1999).

308. 35 U.S.C. § 271.

309. *Florida Prepaid*, 527 U.S. at 635.

310. *Id.* at 640.

311. *Id.* at 640–41 (quoting William S. Thompson's testimony before the House Subcommittee in the Patent Remedy Clarification Act: Hearing on H.R. 3886).

312. *Id.* at 644 n.9.

313. *Id.* at 643 ("[O]nly where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process

an individual does not even have a federal case and the Void is irrelevant.

The Court's message in *Florida Prepaid* about state remedies is dramatically different from a more general message about the availability of state remedies when the Fourteenth Amendment has been violated. *Florida Prepaid* fits into a line of cases that makes the availability of adequate state remedies a decisive factor in deciding whether certain due process rights have been violated.³¹⁴ Certainly, in thinking about the contours of what it might mean for state remedies to be available at the Intersection, the focus of future scholarship, this is one possible view.³¹⁵ Moreover, it is a view that is consistent with protecting federalism, because *Florida Prepaid* did not hold that states have to provide remedies.³¹⁶ And the anti-commandeering principle presumably prevents the federal government from requiring states to provide one.³¹⁷ All *Florida Prepaid* held is that if states do provide one, then there is no constitutional violation. And the options for remedies are as diverse as the states, eliminating any suggestion that states are compelled to provide certain remedies or else. If Congress can successfully manage federal regulatory schemes with the states' cooperative participation under Article I's respect for "labs of experimentation" principle, it also can respect varying state remedies—something it already does. For example, some states waive their immunity in certain cases and other states do not. This is in-keeping with Dean Gerken's and other scholars' observations that federal/state relations are much more interwoven in today's modern world. Thus, a state's sovereignty is not impugned when Congress enacts legislation to keep individuals from falling into the Void by providing federal remedies, including money damages, when states have chosen not to provide their own remedies.

Flip the *Florida Prepaid* coin, however, and *Coleman* comes up again. One line in Justice Kennedy's majority opinion in *Coleman* deserves mention. Specifically, with respect to the validity of the self-care provision of the FMLA under Section 5, Justice Kennedy quotes *Florida Prepaid* and stresses that

result.”).

314. This line of cases begins with *Parratt v. Taylor*, 451 U.S. 527 (1981), a case involving a prisoner's lost hobby kit. Briefly, while Mr. Taylor was in segregation, prison officials negligently misplaced a hobby kit he had ordered. Taylor sued under § 1983 alleging that his property had been taken without due process. Chief Justice Rehnquist, writing for the Court, held that because the state provided a post-deprivation remedy, Taylor did not suffer a constitutional violation. Similarly, *Florida Prepaid* did not take College Savings Bank's property when it infringed its patent because Florida provided an adequate remedy. Understandably, in cases like *Parratt* where the state actor's conduct is random and unauthorized, only a post-deprivation remedy is possible.

315. This analysis is beyond the scope of this Article. See generally *Zinermon v. Burch*, 494 U.S. 113 (1990).

316. For a persuasive argument that the “right to a remedy” should be a fundamental right under the U.S. Constitution (as it is in most states), see Tracy A. Tomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975 (2015).

317. But see AZAIA, *supra* note 9 (questioning whether the anti-commandeering principle applies).

“Congress . . . said nothing about the existence or adequacy of state remedies.”³¹⁸ Linking *Coleman*, which arguably is more like *Hibbs* (FMLA and sex discrimination) but results in a decision that is more like *Garrett* (ADA and disability discrimination), with *Florida Prepaid* is curious because *Florida Prepaid* is radically different from all of the Section 5 cases. But this observation should be taken quite seriously because it was followed with this observation: “It follows that abrogating the States’ immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if existing state leave policies would have sufficed.”³¹⁹

Is the Court suggesting that the existence of state remedies means that congruence and proportionality can never be met? Stated alternatively, does it mean that Congress has no enforcement power if states provide a remedy? Not even for actual violations? In *Florida Prepaid*, of course, the existence of state remedies meant there was not even a Fourteenth Amendment violation. The *Coleman* opinion does not go that far and the full import of this observation needs to be explored.

Example of # 5 (successful abrogation): Congress’s successfully abrogated states’ immunity in *Hibbs* and *Lane*, but neither majority opinion addressed state remedies. It is possible for states to provide remedies and for Congress to also successfully abrogate. This was the situation in *Monroe*, in fact. And even if the *Monroe* message were to be modified to express the importance of state remedies, such a shift would not necessarily mean that state remedies supplant federal remedies. Still, the curious *Coleman* message that needs greater exploration raises this possibility.

From the bigger picture perspective, as important as state sovereignty and state sovereign immunity are, it simply violates the spirit of the Fourteenth Amendment to shield states from injuries they cause by allowing victims of state action wrongdoing to fall into the Void. When states do protect individuals, they deserve recognition for that. Additionally, a message from the Court about the importance of state remedies would support its jurisprudence at the Intersection and even strengthen it by encouraging and perhaps even expecting states to play a significant role in protecting the important principles embedded in the Fourteenth Amendment.

CONCLUSION

This Article explores how the contemporary Court interprets Article I, and the Tenth, Eleventh, and Fourteenth Amendments to protect sovereignty and

318. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 39 (2012) (quoting *Florida Prepaid*, 527 U.S. at 644).

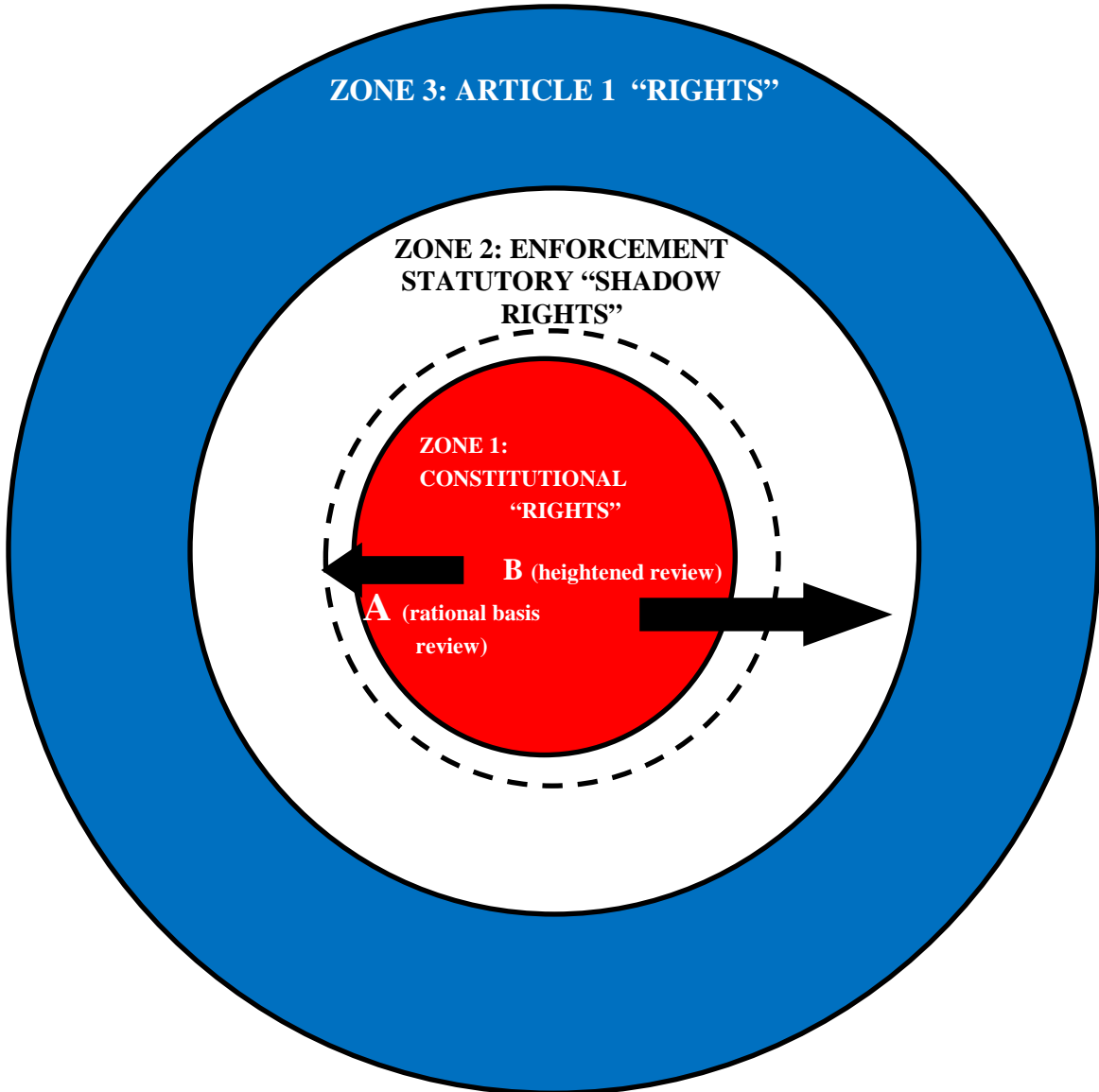
319. *Id.* at 38.

federalism principles. The contemporary Court is providing meaningful and substantive guidance with respect to drawing the boundary between Congress and the states, particularly with respect to Congress's Article I powers. Perhaps the most curious part of this area of jurisprudence is that the Eleventh Amendment, despite the havoc it has wreaked, nevertheless serves its purpose, which is reflected in the broader Tenth Amendment principles. The Tenth Amendment is a truism, but the current substantive meaning behind it reveals what a truism it is!

With respect to drawing the boundary among Congress, the states, and the individual under the Fourteenth Amendment, however, the Shield and the Void loom large. Accordingly, the contemporary Court's resurgence of and emphasis on state sovereignty is an invitation to explore the positive role states can and should play in protecting individual rights. A message from the Court in support of this invitation would be consistent with, and even fortify, its overall message about the importance of states in the constitutional design. The late Justice Brennan, a self-avowed supporter of federalism, also believed that states play an ever-increasingly important role in protecting human liberty, particularly as it becomes more difficult to secure federal remedies. In his words: "[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to the . . . [states] . . . to step into the breach."³²⁰ For those who strongly support state sovereignty, and for those who strongly support individual liberties, this Article suggests that both goals can be met if a jurisprudence about the positive role of states under the Fourteenth Amendment is developed.

320. Brennan, *supra* note 1, at 503. Justice Brennan was talking specifically about the role of state courts in interpreting state constitutions to protect human liberty. This Article calls on states to exercise their various powers—legislative, judicial, executive—to mitigate the federal Void.

APPENDIX: DIAGRAM OF THE FEDERAL TARGET



Relationship	Primary	Secondary
Zone 1A-Zone 2	10th Amendment (States-Individual)	14th Amendment (States/Individuals-Court/Congress)
Zone 1B-Zone 2	14th Amendment (Individual-Court/ Congress)	10th Amendment (States-Congress)
Zone 3	Article 1 (Congress-States)	Article 1 (Congress/States-Individual)

