The Heart of Federalism: Pretext Review of Means-End Relationships

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INTRODUCTION

Section Five of the Fourteenth Amendment authorizes Congress to enforce the amendment's requirements through "appropriate legislation."[1] The Supreme Court since 1997 has found six federal statutes to exceed the scope of congressional power under Section Five.[2] While the statutes varied widely in subject matter, the Court's analysis in each case rested on one or both of two propositions: (1) the statute pursued an end that had not been delegated to Congress under a proper understanding of the Fourteenth Amendment, or (2) Congress had employed means that were not "congruent and proportional" to a legitimate Fourteenth Amendment end.[3]

This Fourteenth Amendment case law, beginning with the initial decision in *City of Boerne v. Flores*, has generated substantial scholarly criticism.[4] Professor Evan Caminker has now added a powerful critique,[5] which notes that the Framers of the Fourteenth Amendment intended

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[1] U.S. CONST. amend. XIV, § 5 ("Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The most far-reaching substantive provisions of the Fourteenth Amendment are contained in section 1, which reads:

> 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. 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.

U.S. CONST. amend. XIV, § 1.

[2] Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (rejecting Fourteenth Amendment basis for Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (striking down statute permitting suits against private individuals for crimes of violence motivated by gender); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (rejecting Fourteenth Amendment basis for Age Discrimination in Employment Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (rejecting Fourteenth Amendment basis for statute permitting false advertising suits against states); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (rejecting Fourteenth Amendment basis for statute permitting patent infringement suits against states); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down application to state and local governments of Religious Freedom Restoration Act, which permitted suits for actions burdening exercise of religion).

[3] *See infra* notes 70-80, 93-98, 127-166 and accompanying text.

[4] *See, e.g.*, Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997) [hereinafter McConnell]; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000) [hereinafter Post & Siegel].

[5] Evan H. Caminker, *"Appropriate" Means-End Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001) [hereinafter Caminker].

Section Five's requirement of "appropriate" legislation to entail the level of means-end scrutiny employed in *McCulloch v. Maryland*.[6] Professor Caminker contends that the "proportionality" component of the Court's "congruence and proportionality" test imposes a form of heightened means-end scrutiny inconsistent with *McCulloch*.[7] In his view, the Court, without justification, created a more stringent standard for judicial review of Fourteenth Amendment legislation than the standard applied to congressional action under Article I.[8]

Caminker's analysis reflects his characteristic thoroughness and clarity of thought. Nevertheless, there does appear to be room for disagreement with his overarching theses: that Fourteenth Amendment "proportionality" review diverges from *McCulloch* and conflicts with the standards applied to Article I legislation. This article will attempt a reconciliation between the Court's recent Fourteenth Amendment decisions and its earlier opinion in *McCulloch*. While the article does not endorse the results reached in all of the Section Five cases, it will seek to show that the Court's analytical framework implements *McCulloch*'s promise to strike down pretextual exercises of congressional power.[9]

Such *McCulloch*-style pretext review is not an anomaly confined to the Fourteenth Amendment, but rather comports with the Court's recent

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[6] 17 U.S. (4 Wheat.) 316 (1819).

[7] Caminker, *supra* note 5, at 1131-32 ("Rather than being assessed under the conventional 'rational relationship' test established by *McCulloch v. Maryland* in the context of Article I powers, now Section Five regulations — at least those that are 'prophylactic' in that they prohibit some conduct that the federal judiciary would find constitutionally permissible — must survive the stricter standard of 'congruence and proportionality' between means and legitimate ends."); *id.* at 1133 ("In my view, Section 5 provides Congress with the same capacious discretion to select among various means to achieving legitimate ends as does Article I as construed in *McCulloch v. Maryland*."). Professor Caminker is not alone in concluding that the recent Section Five cases depart from *McCulloch*'s standards for judicial review of legislation. *See* Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999) [hereinafter Engel].

[8] Caminker, *supra* note 5, at 1133 ("I argue here that the Supreme Court's decision to subject all prophylactic Section 5 measures to significantly more rigorous means-end scrutiny than measures that carry into execution Congress' various Article I and other powers cannot persuasively be defended."); *id.* at 1187 ("[T]he Court nowhere explains in *Boerne* and its progeny why policing the proper boundaries of federal power requires a much stricter means-end tailoring requirement in the Section 5 context.").

[9] *See McCulloch*, 17 U.S. (4 Wheat.) at 423. The term "pretext" carries an unfortunate connotation that Congress has attempted something dishonest or underhanded. In reality, the term simply means that Congress has invoked a power that does not authorize the legislation in question. A court may conclude that Congress has offered a "pretextual" justification for legislation, even if Congress believed it was acting within the scope of its constitutional power. In some cases, Congress and the courts will simply disagree, in good faith, over which "objects" have been "entrusted to the government." *See id.*

rulings under Article I. In *United States v. Lopez*[10] and *United States v. Morrison*,[11] the Court employed comparable scrutiny of means-end relationships to detect pretextual exercises of the commerce power. Since the Fourteenth Amendment and Commerce Clause decisions represent the most consequential elements of the Court's recent federalism revival, the article concludes that pretext review of means-end relationships constitutes the heart of the Court's federalism jurisprudence.[12]

Section I of the article seeks to correct a common scholarly misconception regarding the sort of pretext review envisioned by *McCulloch*.[13] All students of *McCulloch* understand the decision to call for judicial review of the means-end relationship underlying a federal statute.[14] But *McCulloch* also indicated that the Court would strike down legislation "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government."[15]

Various constitutional scholars construe this pretext passage to contemplate a second inquiry — separate from the Court's scrutiny of means-end relationships — into whether the legislative motive behind a statute satisfies constitutional standards.[16] Drawing upon Chief Justice Marshall's anonymous essays explaining *McCulloch*, this article rejects that reading of the pretext passage. The pretext review Marshall envisioned does not entail a second inquiry into congressional motive or purpose, but merely restates *McCulloch*'s restrictions on the means-end relationship. The Court will deem legislation pretextual (regardless of the actual intent of federal legislators) if it does not reflect an appropriate relationship to a legitimate end within the scope of the Constitution. In other words, Marshall designed *McCulloch*'s means-end constraints to weed out pretextual exercises of congressional power. These means-end limitations include requirements of obviousness and objective good faith. Congress may only enact legislation "*plainly* adapted" and "*really*

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[10] 514 U.S. 549 (1995).

[11] 529 U.S. 598 (2000).

[12] *See infra* notes 212-229 and accompanying text.

[13] *See infra* notes 20-65 and accompanying text.

[14] *See McCulloch*, 17 U.S. (4 Wheat.) at 421, 423. Congress may only employ "appropriate" means, "plainly adapted" and "really calculated" to accomplish some end within the scope of the Constitution. *Id.*

[15] *Id.* at 423.

[16] *See infra* notes 28-33 and accompanying text.

calculated" to accomplish an end within the scope of the Constitution.[17]

Section II argues that the grounds invoked for invalidating legislation in the recent Fourteenth Amendment cases constitute forms of means-end pretext review consistent with this corrected reading of *McCulloch*.[18] In one case, the proponent of Section Five power could identify no legitimate end within the scope of the Fourteenth Amendment. In another, the legislation did not serve as a means to accomplish the end identified. *McCulloch* clearly authorizes a court to invalidate legislation on the ground that Congress has not pursued a legitimate end or has employed means that do not further such an end.

The remaining Fourteenth Amendment cases invoke the proportionality standard challenged by Professor Caminker. This article contends that the Court's proportionality test provides a relatively objective measure of congressional good faith. If Congress regulates conduct far beyond the scope of any potential Fourteenth Amendment violations, a court may justifiably find the statute pretextual in that it aims at some end or object other than enforcement of Fourteenth Amendment rights.

Section III relates the Fourteenth Amendment case law to the Supreme Court's recent commerce power decisions in *Lopez* and *Morrison*.[19] While the Commerce Clause cases focused on a somewhat different defect in the means-end relationship — employment of means remote from legitimate constitutional ends — they resemble the Fourteenth Amendment cases in that they likewise seek to detect pretextual exercises of congressional power. Hence, the Supreme Court's recent Fourteenth Amendment case law can be reconciled, not only with *McCulloch*, but also with the parallel attempt to confine congressional power under Article I. The Court's invigoration of means-end pretext review under two of the most expansive sources of congressional power gives doctrinal substance to the proposition that the federal government possesses only limited and enumerated powers.

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[17] *See McCulloch*, 17 U.S. (4 Wheat.) at 421, 423.

[18] *See infra* notes 66-186 and accompanying text.

[19] *See infra* notes 187-229 and accompanying text.

I. MEANS-END PRETEXT REVIEW UNDER *MCCULLOCH V. MARYLAND*

This article maintains that the modes of analysis employed in the Supreme Court's recent Fourteenth Amendment case law represent forms of pretext review consistent with *McCulloch v. Maryland*. To recognize the connection with *McCulloch*, it is necessary to understand what Chief Justice Marshall had in mind when he promised judicial invalidation of pretextual exercises of congressional power. This section seeks to explain Marshall's conception of pretext review and, in the process, to challenge a common misreading of *McCulloch*'s pretext passage.

A. The McCulloch *Test(s?) of Congressional Power*

McCulloch required the Supreme Court to decide whether the Constitution confers on Congress a power to incorporate a national bank.[20] More significant than the Court's decision vindicating the bank legislation has been *McCulloch*'s frequently-quoted test of implied congressional power under the Necessary and Proper Clause: "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."[21]

The Court offered only a cursory means-end analysis in *McCulloch* itself.[22] It pointed to the constitutional 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."[23] It noted that "[t]he exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed," operations that could prove "difficult, hazardous, and expensive" if Congress could not choose the "most appropriate means" for carrying its powers into execution.[24] Apart from these observations, the Court made no effort to describe a cause and effect relationship between incorporation of the bank and the

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[20] *McCulloch*, 17 U.S. (4 Wheat.) at 400-01.

[21] *Id.* at 421.

[22] Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 198 (1996) ("Now of course the Court in *McCulloch* didn't tell us which end it thought the bank a necessary means to; Marshall suggested a number of possible ends, but never resolved really which the Court thought this statute served.").

[23] *McCulloch*, 17 U.S. (4 Wheat.) at 407.

[24] *Id.* at 408 (emphasis omitted).

attainment of ends within the scope of the Constitution.[25] This somewhat perfunctory analysis left many unanswered questions concerning the precise defects in the means-end relationship that might lead to judicial invalidation of federal legislation.

The Court generated additional uncertainty concerning the meaning of *McCulloch* by its reference to pretextual congressional action, a reference appearing in the following passage:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[26]

The Court did not employ the word "pretext" elsewhere in the opinion. Apart from what may be gleaned from the immediate context,[27] it did not elucidate on the nature of the inquiry this passage authorized. As we will see below, this unexplained reference to pretextual legislation has led many scholars to conclude that Marshall anticipated a second test of congressional power, separate from the court's inquiry into legislative means-end relationships.

B. Correcting a Misconception of Pretext Review

A number of scholars understand *McCulloch*'s pretext passage to refer to judicial examination of legislative motives or purposes, as distinguished from the Court's inquiry into legislative means and ends. One scholar, for instance, writes that "Chief Justice Marshall spoke not only of a required nexus between means and ends, but also of a requirement that Congress not abuse its authority by enacting laws beyond its constitutionally entrusted powers 'under the pretext' of exercising powers actually granted to it."[28] A leading constitutional law casebook also appears to read the pretext passage to contemplate a

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[25] The Court may have viewed it as beyond serious dispute that the bank would serve as a means to accomplish valid federal objectives. It noted the concurrence of "[a]ll those who have been concerned in the administration of our finances" in the view that a national bank was an important and necessary institution. *Id.* at 422.

[26] *Id.* at 423 (emphasis added).

[27] *See infra* notes 40-46 and accompanying text.

[28] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3, at 802 (3d ed. 2000) [hereinafter TRIBE].

second inquiry by the court. The authors write that "[i]n articulating limits on congressional exercise of implied powers as 'necessary and proper' to effectuate enumerated ones, Marshall spoke not only of required means-end relationships, but also, second, of inquiry into congressional purposes."[29] Other scholars likewise understand the pretext passage to refer to a judicial inquiry into congressional purposes or motives, separate from review of the means-end relationship underlying a statute.[30]

A leading constitutional law casebook also appears to read the pretext passage to contemplate a second inquiry by the court.[31] In cases construing the Commerce Clause, the Court has insisted that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[32]

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[29] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 105 (14th ed. 2001) [hereinafter SULLIVAN & GUNTHER].

[30] *See* Hon. Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L. Q. 901, 908 (1987) ("Thus, in Marshall's view, each enumerated power granted Congress authority to legislate for certain, defined purposes only."); Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 733-36 (1996) [hereinafter Graglia] (stating that Supreme Court abandoned pretext review in *Champion v. Ames*, when it permitted Congress to regulate interstate commerce for purpose of suppressing gambling); Joseph D. Grano, *Teaching the Commerce Clause*, 78 B.U. L. REV. 1163, 1173-74 (1998) (asking questions concerning pretext passage: "If a local activity, like racial discrimination, has an impact on interstate commerce, why should Congress's real purpose, or motive, be relevant? Should constitutionality turn on motive? How would a party prove real purpose or motive of a collective body like Congress?").

[31] *See* Graglia, *supra* note 30, at 735-36; *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 448 (1995) (stating that *McCulloch* "required that the Court employ a kind of pretext analysis to assure that the use of the Necessary and Proper Clause not be allowed to subvert state interests. But since the New Deal, this part of the *McCulloch* test has been all but forgotten"); *cf.* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 181 (4th ed. 2001) ("Note that the Court [in *Darby*] refuses to use Congress's 'motive and purpose' as a basis for its constitutional analysis. Can that be reconciled with the 'pretext' language of *McCulloch*?"); SULLIVAN & GUNTHER, *supra* note 29, at 145 ("Note that the first holding of Darby, overruling Dagenhart, permitted Congress to regulate the literal 'shipment' of goods across state lines even if its motive was to control aspects of local production. . . . Did the disavowal [of judicial scrutiny] in Darby signify a final rejection of the 'pretext' limitation in McCulloch?"); Caminker, *supra* note 5, at 1140 ("*McCulloch*'s progeny suggests this [pretext] assessment is either nonexistent or highly deferential.").

[32] United States v. Darby, 312 U.S. 100, 115 (1941). Thus, the Court has upheld assertions of the commerce power notwithstanding charges that the legislation was designed to accomplish social or moral objects, such as regulating wages and hours in local manufacturing operations. *Id.* at 113-14. The Court has also permitted use of the Commerce Power to eliminate racial discrimination by local businesses. Heart of Atlanta

One scholar notes that, since *McCulloch*, "the Supreme Court has ordinarily refused to inquire into a statute's 'real' purposes or its drafters' 'true' motives . . . so long as it can rationally be thought to promote legitimate ends that Congress might have been pursuing."[33]

In reality, the Court has not abandoned the pretext review promised by *McCulloch*. The opinion never called for an inquiry into the "real" purpose or "true" motive of legislation, beyond the judicial examination of the fit between legislative means and ends.[34] While the *McCulloch* opinion may be somewhat ambiguous on this score, Marshall subsequently clarified the matter in an anonymous essay, one of several defending *McCulloch* against its detractors.[35] In the essay, Marshall used *McCulloch*'s pretext language as another way to describe the means-end review anticipated in the opinion.

Marshall's essay referenced the pretext passage in the course of denying the constitutionality of a hypothetical federal statute abrogating state taxation of land:

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, or any means whatever, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or "conducive to" the end. *The passage of such an act would be an attempt on the part of Congress, "under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the government."*[36]

Significantly, Marshall employed *McCulloch*'s pretext language to restate his conclusion that the hypothetical legislation did not represent a means "appropriate," "plainly adapted" or "conducive to" the achievement of the legitimate constitutional end of collecting taxes.[37] He did not suggest

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Motel v. United States, 379 U.S. 241, 257 (1964) ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

[33] TRIBE, *supra* note 28, at 802-03. The exception lies in situations where motive is relevant to some constitutional limitation on legislative power, such as the Equal Protection Clause or the Establishment Clause. *Id.* at 802-04.

[34] *See McCulloch*, 17 U.S. (4 Wheat.) at 421, 423.

[35] *See* John Marshall, A FRIEND TO THE UNION NOS. 1-2 (Apr. 24-28, 1819), and A FRIEND OF THE CONSTITUTION NOS. 1-9 (June 30-July 15, 1819), *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).

[36] A FRIEND TO THE UNION NO. 2, *supra* note 35, at 100 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421, 423) (emphasis added).

[37] Obviously, Marshall is correct that suppressing state taxation of land does not serve as a means to collect federal taxes. Aggressive enforcement of the hypothetical federal

any need to review the statements of legislators or other evidence of congressional motivation. He inferred pretextual legislative action *solely* from the defects in the means-end relationship underlying the hypothetical statute.

The *McCulloch* pretext limitation, then, does not anticipate a judicial search for the "true" motivations of legislators, such as one might find in an equal protection case.[38] The conclusion that Congress has invoked its constitutional powers as a "pretext" follows from a judicial determination that Congress has not adopted a "necessary and proper" means to accomplish a legitimate constitutional end. This does not mean legislative purpose is irrelevant. The term "pretext," after all, implies a concern with motives. But Marshall expected courts to determine legislative motivation in this context from an objective review of the means-end relationship underlying an act of Congress.[39]

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statute would not, by itself, yield any tax revenues for the federal coffers. At the same time, it does seem plausible that preventing state tax collection would assist federal tax collectors by leaving more money in the taxpayers' pockets.

In some instances, the Court has read the Constitution to permit congressional action that facilitates exercise of an enumerated power, rather than directly carrying the power into execution. For instance, creation of a bank did not itself "borrow money" or "collect taxes," but it facilitated those operations. In his anonymous essays following *McCulloch*, Marshall suggested that whether a particular enumerated power tacitly permits pursuit of an incidental end presents a question of fair constitutional construction. A FRIEND OF THE CONSTITUTION NO. 3, *supra* note 35, at 168. Marshall's insistence that this hypothetical federal statute is unconstitutional rests upon an unstated premise that the constitutional tax collection power, fairly construed, does not encompass the incidental end of facilitating federal tax collection by interfering with state taxation of land. *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 614 [hereinafter Beck].

[38] *See* Washington v. Davis, 426 U.S. 229, 241 (1976) (stating that discriminatory purpose necessary to show equal protection violation need not be "express or appear on the face of the statute").

[39] Marshall expressed skepticism about judicial inquiry into subjective legislative motivations in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) ("[i]t may well be doubted how far the validity of a law depends upon the motives of its framers"). He noted several difficulties that would arise were a court to inquire into a claim that particular legislation resulted from corrupt influences:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Id. Similar difficulties would attend a judicial inquiry into the "real" purpose or "true"

Upon further consideration, the *McCulloch* opinion suggests that the pretext language refers to the decision's test of means-end relationships.[40] This becomes clearer when we examine the Court's pretext language in context with the sentences that precede and follow:

> [W]ere [the bank's] necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.[41]

The Court had previously indicated that a statute must be both "appropriate" and "not prohibited" to survive constitutional scrutiny.[42]

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motive of legislation. *See supra* text accompanying note 33. In light of *Fletcher*, it would be very odd to find Marshall calling for such an inquiry in *McCulloch* every time someone challenged federal legislation as exceeding the scope of congressional power.

[40] In selecting the word "pretext," Chief Justice Marshall was likely drawing upon an argument of the Attorney General, who assured the Court that it could guard against pretextual exercises of congressional power through judicial review of means-end relationships:

> Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that this is nothing more than arguing from the abuse of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government; that *the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government*; and that, whatever may be the magnitude of the danger from this quarter, it is not equal to that of annihilating the powers of the government, to which the opposite doctrine would inevitably tend.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 358-59 (1819) (argument of Attorney General) (emphasis added).

[41] *Id.* at 423.

[42] *Id.* at 421 ("all means which are *appropriate*, which are plainly adapted to that end,

In this passage, the Court allocates responsibility between Congress and the judiciary for resolving the issues of necessity, appropriateness (i.e., propriety), and prohibition. The first sentence indicates that the degree of necessity is a matter for Congress, so long as a measure is "appropriate." The second sentence states that the Court will invalidate legislation that is either prohibited or pretextual. The third sentence reiterates that degree of necessity is a matter for Congress where the measure is not prohibited and not pretextual. The structure of the passage suggests that one should equate legislation that is not pretextual with legislation that is "appropriate," the term used earlier in the opinion to describe the requisite means-end relationship.[43]

Moreover, Marshall states that Congress acts pretextually when it "pass[es] laws for the accomplishment of objects not entrusted to the government,"[44] that is, when the legislation does not serve as a means to a legitimate constitutional end, but instead serves an end beyond the scope of congressional power. Conversely, Congress does not act pretextually if a law "is really calculated to effect any of the objects entrusted to the government."[45] Thus, in *McCulloch*, the proposition that a law serves as an appropriate means to a legitimate end operates as the antithesis of the proposition that the law is a pretext for pursuing objects not entrusted to Congress.[46]

This corrected understanding of the *McCulloch* pretext passage shows that the Court has not abandoned pretext review in its commerce power decisions. When the Court describes the purpose or motive of a law regulating interstate commerce as matters for legislative judgment,[47] it really makes a statement concerning the legitimate ends encompassed within the scope of the commerce power. As construed by the Court, the Commerce Clause permits Congress to regulate interstate commerce for both economic and non-economic reasons. A statute that in fact regulates interstate commerce accomplishes a legitimate constitutional end, and therefore is not pretextual. This is true even if Congress hopes

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which are *not prohibited*, but consist with the letter and spirit of the constitution, are constitutional") (emphasis added).

[43] *Id.*

[44] *Id.* at 423.

[45] *Id.*

[46] Professor Caminker recognized that the Court would resolve the "pretext" issue through review of means-end relationships. *See* Caminker, *supra* note 5, at 1136 (stating that Court "teasingly" suggested it would review for pretext, but "quickly made clear that its assessment of 'pretext' would consist merely of ensuring that law 'is really calculated to effect any of the objects entrusted to the government'").

[47] *See supra* note 32 and accompanying text.

to attain social or moral objectives through the commercial regulation.

C. Discerning Pretextual Legislative Action Through Means-End Analysis

McCulloch applied the term "pretext" to legislation that does not satisfy the Court's restrictions on permissible means-end relationships. Thus, one must read the pretext passage in light of the means-end limitations set forth in the opinion. But the converse is also true. The means-end limitations from *McCulloch* should be read in light of the pretext passage, and should be understood to assist in discerning pretextual exercises of power. Consequently, *McCulloch*'s means-end restraints should be interpreted to screen out legislation in which Congress purports to exercise its constitutional powers, but in reality pursues objectives beyond its constitutional authority.

The *McCulloch* test of congressional power suggests a three-stage process for determining whether Congress has acted pretextually. At the first stage, the test requires identification of a permissible constitutional end: "[l]et the end be legitimate, let it be within the scope of the Constitution."[48] The most obvious defect in a legislative means-end relationship arises if the acknowledged objective of the legislation does not lie within the scope of the constitutional power invoked.

This facet of the judicial inquiry requires a straightforward exercise in constitutional interpretation. Identification of legitimate ends depends on the particular constitutional provision in question. Sometimes, legitimate legislative ends can be discerned from the plain language of an enumerated power.[49] In other circumstances, the court may conclude that the Framers intended to permit congressional pursuit of incidental ends that do not fall within the express language of the constitutional grant. Such a holding may be justified on the ground that pursuit of the implied or incidental end is necessary to accomplish the purpose of the enumerated power in question.[50] However, if Congress avowedly and

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[48] *McCulloch*, 17 U.S. (4 Wheat.) at 421.

[49] For instance, the power to regulate commerce among the several states clearly authorizes Congress to pursue the end of controlling the movement of goods across state lines. *Darby*, 312 U.S. at 113 ("[T]he shipment of manufactured goods interstate is [interstate] commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (Commerce Clause confers power "to prescribe the rule by which commerce is to be governed.").

[50] *See supra* note 37. For instance, as the Court argued in *McCulloch*, the constitutional power to "establish" post offices and post roads, the Constitution, article I, section 8, should be interpreted to permit legislation for carrying the mail and punishing mail theft, even though these objects are not included within the express language of the enumerated

exclusively aims at objectives outside the scope of a constitutional power, invocation of that power is pretextual.[51]

At the second stage of *McCulloch*'s pretext inquiry, a court must decide whether the statute adopted by Congress serves as a "means" to the attainment of any legitimate end identified for the legislation. *McCulloch* permits Congress to employ "all *means* which are appropriate,"[52] and the court cannot determine propriety until satisfied that the statute does in fact constitute a means to the end. Legislation fails under *McCulloch* in the absence of any "telic" relationship to the desired object.[53] No telic relationship exists if one cannot describe a plausible chain of cause and effect relationships that would lead from enactment of the statute to the attainment of the professed goal.[54] If the statute does nothing to further the legitimate constitutional objective identified, then the court may properly conclude that Congress has acted pretextually.

McCulloch, then, rejects federal legislation where the acknowledged object lies outside the scope of the Constitution, as well as legislation that fails to serve as a means to a legitimate constitutional end. The more difficult question concerns the extent to which *McCulloch* restricts congressional discretion in enacting measures that could arguably attain legitimate constitutional objectives. Consider, for instance, legislation invoking the tax collection power as the basis for a federal law banning murder. The Constitution confers on Congress the express power to "lay and collect taxes,"[55] so there can be no doubt that tax collection represents a legitimate constitutional end. Tax collection requires tax collectors. It is possible to describe a chain of cause and effect relationships through which a federal law against murder would deter

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power. *McCulloch*, 17 U.S. (4 Wheat.) at 417. These incidental powers are "essential to the beneficial exercise of the power" to establish post offices and post roads, though they are "not indispensably necessary to its existence." *Id.*

[51] Of course, as noted above, the term "pretext" need not have a pejorative connotation in every case. Congress might simply have a good faith disagreement with the courts concerning the scope of a particular constitutional power. *See supra* note 9.

[52] 17 U.S. (4 Wheat.) at 421 (emphasis added).

[53] *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 14 & n.40 (1994) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2351 (3d ed. 1986)) (defining telic as "'[t]ending toward an end'").

[54] The requirement of a telic relationship flows from the Supreme Court's definition of the word "necessary" in the Necessary and Proper Clause, which the Court understood to require Congress to employ "means calculated to produce" a particular end. *McCulloch*, 17 U.S. (4 Wheat.) at 413-14. But a telic relationship would also seem to be implicit in the requirement that Congress employ means "proper" for carrying a given power into execution. *See* U.S. CONST., art. I, § 8, cl. 18.

[55] U.S. CONST. art. I, § 8, cl. 1.

the murder of tax collectors, among others, and thus prevent disruption of federal tax collection efforts.[56] Given this telic relationship between the legislation and a legitimate constitutional end, is there anything in *McCulloch* that might prevent Congress from federalizing the law of murder under its tax collection power?

On this issue, *McCulloch* indicates that a court must undertake a third inquiry in its review for pretextual exercises of congressional power. The Constitution requires something more than a bare telic or means-end relationship to sustain a federal statute. Once a legitimate end has been identified, *McCulloch* permits Congress to select only those means "which are *appropriate*, which are *plainly adapted* to that end."[57] Or as the Court specified in the pretext passage (which restates the requirement of an appropriate means-end relationship),[58] Congress must employ means that are *"really calculated* to effect . . . objects entrusted to the government."[59]

Elsewhere, I have pointed out that Marshall's anonymous essays interpret *McCulloch* as placing various limitations on congressional means-end relationships.[60] However, for purposes of this article, we need only consider two related means-end limitations clearly suggested by the language of the opinion itself. First, the requirement that Congress adopt legislation "really calculated" to effect a legitimate end supports a test of objective good faith.[61] Congress may only employ means one would utilize if the proffered end was *really* the goal of the legislation.[62] Second, *McCulloch* requires the means-end relationship to

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[56] It might also be argued that those who have been killed generate less taxable income than the living, and a murder statute could affect the number of murders committed. Thus, it is possible that a federal murder statute could serve the end of boosting federal tax revenues. However, while this might improve the outcome of tax collection efforts, this argument does not show a telic relationship between the statute and the actual tax collection process. A court addressing this justification for the statute would need to decide whether the power to lay and collect taxes was sufficiently broad to permit Congress to pursue the incidental end of generating greater taxable income. *See supra* notes 37 and 50 and accompanying text.

[57] *McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis added).

[58] *See supra* text accompanying note 37.

[59] *McCulloch*, 17 U.S. (4 Wheat.) at 423.

[60] Beck, *supra* note 37, at 603-15.

[61] *Id.* at 612.

[62] A good faith test would likely doom our federal murder statute, at least to the extent it was justified as a tax collection measure. *See supra* note 56 and accompanying text. It is doubtful that a legislature seeking a means to protect the lives of tax collectors would do so through a ban on all murders. Of course, there might be other justifications for a federal murder statute, but it is drastically over-inclusive when pitched as a tax collection effort. *See infra* notes 172-174 and accompanying text.

be obvious. The measure enacted by Congress must be "plainly" adapted to pursuit of the specified object.[63]

The requirement of objective good faith simply restates *McCulloch*'s prohibition on pretextual legislation. If Congress adopts means that are not *really* calculated to achieve a legitimate end, but instead seem better suited to the attainment of an end *beyond* congressional power, a court may legitimately conclude that Congress has acted pretextually. On the other hand, since *McCulloch* does not look for evidence of congressional motive outside the means-end relationship, a measure that, objectively speaking, constitutes a good faith means to attain a legitimate constitutional end cannot be deemed a pretext to accomplish ends beyond the scope of federal power.[64]

The obviousness requirement provides one of the indicia of objective good faith, and thus assists in detecting pretextual exercises of legislative power. An inference that Congress has acted pretextually, invoking an enumerated power to pursue some end outside the realm of its constitutional authority, can be justified where the nature of the purported means-end relationship is obscure.[65] In the next section, we will see how the analysis employed in the Court's recent Section Five cases tracks this *McCulloch* framework for detecting pretextual action by Congress.

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[63] Beck, *supra* note 37, at 613.

[64] One reviewer asked what would happen if the legislative history of a particular statute contained clear statements indicating that Congress was acting pretextually. *See also* SULLIVAN & GUNTHER, *supra* note 29, at 105 ("Are otherwise constitutional laws invalidated by impermissible 'pretext' statements by Congress?"). I have as yet come across no convincing evidence of how Chief Justice Marshall would approach that question. Perhaps the answer is that such statements would operate to override the presumption of constitutionality that otherwise attaches to legislation, leading to a more careful review of the means-end relationship to ensure that Congress has not exceeded its constitutional power. On the other hand, Marshall's comments in *Fletcher v. Peck* may suggest that he would simply ignore such evidence of subjective legislative motivation. *See supra* note 39.

[65] In the text, we have not discussed the portion of the *McCulloch* test that calls for judicial invalidation of federal legislation where Congress has employed means that are prohibited by or otherwise inconsistent with the letter or spirit of the Constitution. *McCulloch*, 17 U.S. (4 Wheat.) at 421. This limitation would apply if federal legislation violated some explicit constraint on congressional power, such as the free speech protections of the First Amendment, or some implicit limitation on congressional power, such as the principle that Congress may not commandeer state executive and legislative officials. *See* Printz v. United States, 521 U.S. 898, 935 (1997). This facet of the *McCulloch* test was not discussed because it is not designed to detect pretextual exercises of congressional power.

II. *McCULLOCH* AND THE FOURTEENTH AMENDMENT

McCulloch outlined a method for discerning pretextual congressional action under the Necessary and Proper Clause of Article I, Section 8. The Framers of the Fourteenth Amendment incorporated the *McCulloch* standards into the Section Five Enforcement Clause. The original draft of the Fourteenth Amendment would have echoed the Necessary and Proper Clause, permitting Congress to adopt laws "necessary and proper" to accomplish the amendment's goals.[66] The version of the Enforcement Clause ultimately adopted substituted the term "appropriate legislation," a shorthand for the phrase "all means which are appropriate" from *McCulloch*'s test of Necessary and Proper Clause power.[67]

Consistent with these observations, the courts have looked to *McCulloch* in defining the scope of congressional authority under Section Five. As the Supreme Court wrote in *Katzenbach v. Morgan*, "the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."[68] Cases under Section Five, and parallel enforcement provisions of other constitutional amendments, have explicitly invoked and applied the *McCulloch* test of congressional power.[69]

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[66] Katzenbach v. Morgan, 384 U.S. 641, 650 n.9 (1966). The Joint Committee on Reconstruction reported the following draft of the Fourteenth Amendment in February 1866:

> The Congress shall have power to make all laws which shall be *necessary and proper* to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

City of Boerne, 521 U.S. at 520 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)) (emphasis added).

[67] *Morgan*, 384 U.S. at 650 n.9 ("The substitution of the 'appropriate legislation' formula was never thought to have the effect of diminishing the scope of this congressional power."); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 825-26 (1999); Donald Francis Donovan, Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453, 458-59 (1982) ("The framers' use of the term 'appropriate' to limit the enforcement power — the term Chief Justice Marshall used to define the necessary and proper clause — indicates that they intended to adopt his analysis. Bits of legislative history confirm this view."); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison, *and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 153-55 (2000); Caminker, *supra* note 5, at 1159-65.

[68] *Morgan*, 384 U.S. at 650. The Court stated, "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Id.*

[69] City of Rome v. United States, 446 U.S. 156, 175 (1980); Oregon v. Mitchell, 400 U.S. 112, 142-44 (1970) (Douglas, J., dissenting); *Morgan*, 384 U.S. at 650-56; South Carolina v.

The previous section of the article showed that *McCulloch* sought through means-end analysis to distinguish appropriate legislation, pursuing a legitimate constitutional end, from pretextual legislation aimed at an objective beyond the federal purview. This *McCulloch* framework involves the same forms of analysis employed in the Court's recent Section Five cases. Subsection A will discuss the Court's restrictions on legitimate ends Congress may pursue under the Fourteenth Amendment. Subsection B will consider the Court's use of the "congruence and proportionality" standard to prevent pretextual invocation of Section Five in pursuit of ends the Court deems outside the amendment's scope.

A. Legitimate Fourteenth Amendment Ends

The Supreme Court's 1997 opinion in *City of Boerne v. Flores* serves as the fountainhead for subsequent Fourteenth Amendment rulings. *City of Boerne* must be understood against the backdrop of the Court's 1990 opinion in *Employment Division v. Smith.*[70] The *Smith* decision significantly altered the standards applied to claims based on the Free Exercise Clause of the First Amendment. Before *Smith*, the Court evaluated free exercise claims under the test of *Sherbert v. Verner*,[71] which required a compelling governmental interest to sustain a law placing a significant burden on the exercise of religion. In *Smith*, the Court abandoned the compelling interest test with respect to laws of general applicability — laws that applied even-handedly to all citizens, without targeting religious beliefs or conduct.[72]

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA).[73] The statute created a cause of action

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Katzenbach, 383 U.S. 301, 326 (1966). A now-classic early statement of the Section Five power echoed the *McCulloch* means-end test:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

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

[70] 494 U.S. 872 (1990).

[71] 374 U.S. 398 (1963).

[72] The compelling interest test continues to apply when lawmakers have targeted particular religious beliefs or practices. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[73] 42 U.S.C. §§ 2000bb to bb-4 (2000).

designed to restore the compelling interest test of *Sherbert v. Verner* whenever action by federal, state, or local government placed a substantial burden on the exercise of the plaintiff's religion.[74] Congress sought to justify RFRA as an exercise of its power under Section Five of the Fourteenth Amendment.[75]

In *City of Boerne*, the Court invalidated RFRA as exceeding the scope of congressional power under Section Five. The opinion spoke both to the ends Congress could pursue under the Fourteenth Amendment and the means Congress could employ. While the opinion intertwined these two issues to some extent,[76] I will attempt to separate them here for purposes of analysis. This subsection will address the former aspect of *City of Boerne* and the latter will be taken up in the following subsection.

With respect to legitimate Fourteenth Amendment ends, the *City of Boerne* Court drew a distinction between legislation designed to "enforce" the Fourteenth Amendment and legislation intended to change the substantive scope of Fourteenth Amendment protections.[77] According to the Court, the task of defining the constitutional rights protected by the amendment belongs to the courts, rather than Congress.[78] Congressional power under Section Five consists instead of the power to prevent or remedy violations of Fourteenth Amendment

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[74] City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (quoting 42 U.S.C. § 2000bb(b)).

[75] *Id.* at 516.

[76] *See infra* note 146 and accompanying text.

[77] The Court drew the distinction in the following terms:

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given power "to enforce," not the power to determine what constitutes a constitutional violation. . . .
>
> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.

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

[78] *Id.* at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."). Of course, Congress might need to make an initial judgment about the protections afforded by the Fourteenth Amendment if legislating in an area not yet addressed by the courts. But under the *City of Boerne* opinion, this initial congressional determination would be subject to judicial review.

rights as delineated by the judiciary.[79] The Supreme Court reasoned that if Congress could define the substantive scope of Fourteenth Amendment protections, there would be no principled limitation on the Section Five power.[80]

This article seeks to defend the Court's analytical framework for detecting pretextual exercises of Fourteenth Amendment power. That task does not require that I agree with the Court regarding the particular legislative ends that fall within the scope of the Fourteenth Amendment. Thus, I will not offer a defense of the Supreme Court's *Smith* decision, delineating the scope of constitutional protection afforded to the free exercise of religion.[81] Indeed, I will not even endorse the Court's distinction in *City of Boerne* between legislation enforcing constitutional protections defined by the courts and legislation altering the substantive scope of those protections. It may well be, as some have argued, that the Framers of the Fourteenth Amendment intended Congress to play a role in selecting from among plausible interpretations of the amendment's protections.[82]

Instead, this portion of the article stakes out a much more modest claim, one unlikely to generate significant controversy. The argument is merely that *McCulloch* permits, and indeed requires, judicial review of the ends pursued by Congress. To the extent recent cases reject

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[79] *Id.* at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct that is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'") (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[80] The Court expressed its concern in the following passage:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power.

Id. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), and citing William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292-303 (1996)).

[81] One unusual aspect of *Smith* was Justice Scalia's departure from his usual mode of constitutional interpretation in the course of distinguishing prior decisions like *Wisconsin v. Yoder*, 406 U.S. 205 (1972). It is odd to see a textualist like Justice Scalia suggesting that the *textual* right to free exercise of religion receives no protection against generally applicable legislation when asserted on its own, but that it may receive such protection when linked with a *non-textual* parental right to control the education of children. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 & n.1 (1990).

[82] *See* McConnell, *supra* note 4, at 194-95; Engel, *supra* note 7, at 152-53.

legislation on the ground that Congress has pursued an end outside the scope of the Fourteenth Amendment, those cases employ a form of means-end pretext review authorized by the *McCulloch* decision.[83] Whether or not the Court has correctly interpreted the Fourteenth Amendment, *McCulloch* clearly envisioned that courts would make decisions of this type. Under *McCulloch*, courts must accept certain legislative ends as constitutional and reject others as beyond the limits of congressional power.

Central to *McCulloch* was the view that congressional powers are limited and that courts may identify and enforce those limits. In this article, we have focused on *McCulloch*'s promise that the Court would refuse to enforce a statute "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government."[84] This passage assumes that there are "objects not entrusted to the government" and that courts have the duty of determining when legislation pursues such an object. The very notion of means-end pretext review presupposes judicial review of the constitutionality of ends pursued by Congress. If the Framers of the Fourteenth Amendment intended to incorporate the *McCulloch* test of congressional power into Section Five, then courts must identify the outer boundaries of congressional authority by designating which ends are "legitimate."

Judicial policing of Fourteenth Amendment ends did not begin with *City of Boerne*. Within a relatively short period following ratification of the amendment, the Court began restricting legitimate Fourteenth Amendment ends by enforcing the state action requirement. In *United States v. Harris*,[85] the Court held that a statute exceeded the scope of congressional power under Section Five, noting that "[a]s . . . the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution."[86] The next year, in the *Civil Rights Cases*,[87] the Court invoked the state action requirement to invalidate provisions of the Civil Rights Act of 1875, prohibiting discrimination by private persons in

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[83] *See supra* notes 44 and 45 and accompanying text.

[84] *McCulloch*, 17 U.S. (4 Wheat.) at 423.

[85] 106 U.S. 629 (1882).

[86] *Id.* at 640.

[87] 109 U.S. 3 (1883).

places of public accommodation.[88] Earlier decisions by the Court anticipated this state action limitation on Section Five.[89]

The state action principle serves as a judicially-enforced constraint upon the ends Congress may pursue under Section Five.[90] In the state action cases, the judiciary concluded that Section Five legislation was only constitutional if it aimed at controlling the conduct of states and those acting on their behalf.[91] Congressional attempts to regulate purely

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[88] *Id.* at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope."); *id.* at 18 ("This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force.").

[89] *See* United States v. Cruikshank, 92 U.S. 542, 554-55 (1875) ("The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another.... The power of the national government is limited to the enforcement of this guaranty."); Virginia v. Rives, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."); *Ex parte* Virginia, 100 U.S. 339, 347 (1879) ("Such [Section Five] legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are agents of the State in the denial of the rights which were intended to be secured.").

[90] In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court described the appropriate ends of Section Five legislation as follows:

> [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Id. at 11; *see id.* at 13-14 (holding that Congress may enact such legislation "as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking").

[91] Congress may legislate under the Fourteenth Amendment when private individuals act in collaboration with state actors. *See* United States v. Price, 383 U.S. 787, 794, 798-99 (1966) (upholding indictment alleging law enforcement officers conspired with private individuals to release certain prisoners and bring about their deaths in violation of Fourteenth Amendment).

private conduct under Section Five were pretextual because Congress was seeking to accomplish objectives the Fourteenth Amendment had not delegated to the Federal Government.[92]

One post-*City of Boerne* case presented an analogous situation in which the Court deemed invocation of Section Five pretextual due to the absence of any legitimate Fourteenth Amendment objective. In *College Savings Bank*,[93] Congress had subjected states to false advertising claims under the federal Lanham Act.[94] The petitioner argued that the legislation would enforce Fourteenth Amendment rights by preventing states from depriving their business competitors of property without due process of law.[95] The Supreme Court concluded that a state's false advertising could not be deemed a deprivation of "property" interests owned by a competitor.[96] Since the petitioner had not identified any potentially unconstitutional state conduct within the scope of the legislation, the statute could not be justified as an attempt to enforce Fourteenth Amendment rights.[97] The statute in *College Savings Bank* differed from those in *Harris* and the *Civil Rights Cases* in that it regulated state rather than private conduct. However, resort to Section Five was still pretextual because the regulation was not aimed at the end of preventing *unconstitutional* state action.

The absence of any legitimate Fourteenth Amendment end distinguishes *College Savings Bank* from the other recent Section Five cases. In other cases following *City of Boerne*, the Court identified some actual or potential state conduct violative of Fourteenth Amendment rights. This was true even in *United States v. Morrison*, where the Court invoked the state action requirement as a basis for its decision.[98] In cases other than *College Savings Bank*, the Court deemed invocation of Section Five pretextual due to the absence of an appropriate means-end relationship — a lack of "congruence and proportionality" between the statute at issue and a legitimate Fourteenth Amendment end. The next subsection will consider the Court's use of the "congruence and

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[92] A comparable limitation on Fourteenth Amendment ends appears in *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970), which concluded that a uniform mandatory minimum voting age of eighteen years in state and local elections was not within the scope of congressional authority under Section Five.

[93] Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

[94] *Id.* at 670.

[95] *Id.* at 672.

[96] *Id.* at 672-75.

[97] *Id.* at 675.

[98] *See infra* note 132 and accompanying text.

proportionality" standard to identify pretextual exercises of congressional power.

B. Appropriate Fourteenth Amendment Means

Section Five, as explained in *City of Boerne*, authorizes legislation designed to "enforce" the Fourteenth Amendment through preventative or remedial measures.[99] In five of the six recent Section Five cases, the proponent of Section Five power could identify actual or potential state conduct violating Fourteenth Amendment rights. These cases consequently involved a legitimate end. The question became whether Congress enacted "appropriate legislation" to attain that end within the meaning of Section Five. The *City of Boerne* Court, in addition to defining permissible Fourteenth Amendment ends, also set forth principles for identifying appropriate Section Five means.

The Court in *City of Boerne* took care to affirm that Congress may regulate conduct under Section Five that does not itself violate the Fourteenth Amendment.[100] It illustrated this proposition using *South Carolina v. Katzenbach*,[101] a case decided under the parallel enforcement provision of the Fifteenth Amendment.[102] The *Katzenbach* Court upheld congressional suspension of literacy tests as a means to prevent racial discrimination in voter registration.[103] Congress could suspend all literacy tests, notwithstanding earlier precedent indicating that some literacy tests are constitutional.[104] The ban was appropriately remedial, even though it potentially prohibited some otherwise permissible literacy tests along with those the Court would deem unconstitutional.

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[99] *See supra* notes 77-79 and accompanying text.

[100] City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

[101] 383 U.S. 301 (1966).

[102] The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST., amend. XV. Cases interpreting Section Two of the Fifteenth Amendment have been treated as more or less interchangeable with cases interpreting Section Five of the Fourteenth Amendment. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 & n.8. (2001).

[103] *City of Boerne*, 521 U.S. at 518 (citing *Katzenbach*, 383 U.S. at 308).

[104] *Id.* (citing Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959)).

But while the *City of Boerne* Court recognized the legitimacy of remedial Section Five legislation regulating some constitutionally permissible conduct, the Court saw the need for a limit to such regulation. Congressional attempts to control conduct the courts deemed constitutional would at some point cross the line between the legitimate end of enforcing constitutional rights and the illegitimate end of redefining the substance of Fourteenth Amendment guarantees.[105] The Court fashioned its "congruence and proportionality" test as a method for determining when Congress was pursuing a permissible remedial end, rather than an impermissible substantive end.[106]

The *City of Boerne* Court did not explain the difference, if any, between "congruence" and "proportionality."[107] Professor Caminker seeks to further clarify the "congruence and proportionality" test by assigning to each concept some of the particular concerns that have animated the Court in applying the standard.[108] He recognizes that the Court may not have had his distinction between the two terms clearly in mind in its recent opinions.[109] I, likewise, question whether the Court distinguished between "congruence" and "proportionality,"[110] but I agree with Professor Caminker that it serves analytical clarity to assign distinct content to each term. My hope is that the distinction drawn below will accurately reflect the analysis employed in *City of Boerne* and subsequent decisions, whether or not the Court actually conceptualized the analysis using the terms in precisely the fashion I suggest.

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[105] *Id.* at 519-20.

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

[107] *See* Caminker, *supra* note 5, at 1153 ("Throughout *Boerne* and its progeny, the Supreme Court never clearly defined the distinctive meanings of, or requirements imposed by, the two components of the composite phrase 'congruence and proportionality.'").

[108] *Id.* at 1153-56.

[109] *Id.* at 1153.

[110] For instance, the *City of Boerne* opinion uses the term "congruence" in a context reflecting concerns that Professor Caminker and I would both view as issues of "proportionality":

> While preventative rules are sometimes appropriate remedial measures, there must be a *congruence* between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

City of Boerne, 521 U.S. at 530 (citations omitted; emphasis added); *see* Caminker, *supra* note 5, at 1153 n.144.

In my view, the terms "congruence" and "proportionality" can reasonably be correlated with two different stages of the *McCulloch* framework described above for means-end pretext review. As we saw in the previous section, the judicial search for pretextual legislation involves a three-stage inquiry.[111] First, is there a legitimate constitutional end in view?[112] Second, does the legislation serve as a means to accomplish that legitimate constitutional end?[113] Third, are the means employed in the legislation "appropriate"? More specifically, did Congress utilize means reflecting objective good faith ("really calculated")? Is the means-end relationship obvious ("plainly adapted")?[114] We considered the first stage of this inquiry above, in discussing *City of Boerne's* treatment of legitimate Fourteenth Amendment ends. In my view, the term "congruence" can reasonably be correlated with the second stage of this pretext inquiry, and the "proportionality" requirement reflects an aspect of the third stage.

My understanding of the distinction between "congruence" and "proportionality" substantially overlaps with that of Professor Caminker, but does differ in certain respects. Like Professor Caminker, I view "congruence" as reflecting a concern with "the instrumental relationship between Congress' means and ends."[115] However, he illustrates the requirement using *College Savings Bank*, which in his view failed the congruence test on the ground that it was "radically underinclusive as compared to the legitimate Section 5 end because it did not prevent or remedy any unconstitutional state conduct."[116] As I analyze *College Savings Bank*, it illustrates not lack of congruence, but rather failure at the initial stage of the *McCulloch* pretext inquiry, which precedes application of the "congruence and proportionality" test.[117] Since the Court could find no unconstitutional state conduct potentially implicated by the statute at issue, the Court never reached the question of whether the legislation represented a congruent and proportional response to a Fourteenth Amendment problem.[118] Without a legitimate

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[111] *See supra* notes 48-65 and accompanying text.

[112] *See supra* notes 48-51 and accompanying text.

[113] *See supra* notes 52-54 and accompanying text.

[114] *See supra* notes 57-65 and accompanying text.

[115] Caminker, *supra* note 5, at 1153.

[116] *Id.* at 1154.

[117] *See supra* text accompanying notes 93-98.

[118] Significantly, the Court does not reference the "congruence and proportionality" standard in the *College Savings Bank* opinion. *See* Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) ("Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City*

Fourteenth Amendment end in view, the Court in *College Savings Bank* had no need to evaluate the means-end relationship. I will instead illustrate failure of the "congruence" standard below using the decision in *United States v. Morrison*.[119]

With respect to "proportionality," Professor Caminker sees the test as "focusing on the calibration or balance between the magnitude of the prophylactic remedy and the magnitude of the wrong or problem being addressed."[120] In determining "the magnitude of the prophylactic remedy," the test reflects a "quantitative concern" with "the extent to which the measure is overinclusive, i.e., how much *constitutional* conduct does the measure prohibit or regulate, beyond the unconstitutional conduct that it purports to target."[121] The test also reflects a "qualitative concern" with "the nature and severity of the burden the measure imposes on the state wherever it applies."[122] The other side of the balance, "the magnitude of the wrong" or problem, includes a quantitative evaluation of the constitutional violations in question, and may include a qualitative element as well.[123]

Professor Caminker accurately describes the proportionality analysis, and I offer only one caveat to his description. Based on the cases decided to date, it may be that the "quantitative" and "qualitative" evaluations of the congressional remedy are simply different sides of the same coin. Where the Court has commented on the burden imposed by a congressional remedy, that burden has *flowed from* the statute's overinclusive reach. One may, therefore, question whether the Court would consider the qualitative burden placed upon states in evaluating remedial legislation that only reached conduct violating Fourteenth Amendment rights.

Apart from this minor qualification of Professor Caminker's descriptive analysis, I also take issue with his attempt to link the proportionality standard to the *McCulloch* Court's discussion of the term "necessary" in the Necessary and Proper Clause,[124] a point on which I will expand below. Professor Caminker acknowledges the alternative

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of Boerne would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of § 5 . . . was genuinely necessary to prevent violation of the Fourteenth Amendment.").

[119] *See infra* notes 127-137 and accompanying text.

[120] Caminker, *supra* note 5, at 1154.

[121] *Id.*

[122] *Id.* at 1155.

[123] *Id.* at 1155-56.

[124] *Id.* at 1156-57.

possibility that the proportionality standard implements *McCulloch*'s pretext inquiry.[125] While he rejects this alternative, I will attempt to defend this account of the relationship between *McCulloch* and the proportionality test. After considering the Court's application of the congruence and proportionality requirements, this section will conclude with a defense of proportionality as a test of congressional good faith, consistent with the Court's opinion in *McCulloch*.

1. Congruence

McCulloch requires federal legislation to serve as a means to an end within the scope of the Constitution.[126] This telic relationship requirement provides a plausible description of the content that should be ascribed to the term "congruence" in the recent Section Five cases. Legislation is "congruent" to a legitimate constitutional end if it represents a means to accomplish that end. In this context, where the permissible end is enforcement of the Fourteenth Amendment, legislation satisfies the congruence test if it will prevent or remedy violations of Fourteenth Amendment rights.

The statute at issue in *United States v. Morrison*[127] illustrates federal legislation that, in the view of the Supreme Court, failed to serve as a means to a legitimate end. The Court concluded in *Morrison* that Section Five did not authorize a provision of the Violence Against Women Act of 1994 (VAWA)[128] that created a private damages cause of action against the perpetrator of a crime of violence motivated by gender.[129] While Congress identified relevant state conduct that potentially violated equal protection rights, the Court rejected the statute because it failed to address that unconstitutional conduct.

One can explain *Morrison*, from one perspective, as a straightforward application of the state action requirement from *Harris* and the *Civil Rights Cases*.[130] The VAWA provision at issue created a cause of action directed against private conduct, and contained no requirement of involvement by state officials.[131] On the other hand, *Harris* and the *Civil*

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[125] *Id.* at 1157 n.157.

[126] *See supra* note 21 and accompanying text.

[127] 529 U.S. 598 (2000).

[128] Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994) (codified in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.).

[129] *See Morrison*, 529 U.S. at 627 (concluding that Section Five does not extend to enactment of 42 U.S.C. § 13981).

[130] *Id.* at 620-21; *see supra* notes 85-89 and accompanying text.

[131] *See Morrison*, 529 U.S. at 626.

Rights Cases are perhaps distinguishable on the grounds that Congress rested the relevant VAWA provision on evidence of pervasive gender stereotyping in state law enforcement and judicial systems. The legislation was accompanied by "a voluminous congressional record" showing that state actors held various stereotypes which, according to the petitioner, resulted in a denial of equal protection for victims of gender-motivated violence.[132]

While the Court seemed to concede that the petitioner had identified state conduct that could form the basis for remedial Section Five legislation,[133] it rejected the statute on the ground that it failed to exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[134] It reasoned that "the remedy is simply not 'corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.'"[135] The Court noted that the statutory cause of action "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[136] Thus, while the legislative record might well show a legitimate Fourteenth Amendment end supporting Section Five legislation — unconstitutional conduct by state actors — the Court held that the measure did not serve to accomplish the legitimate end of preventing or remedying those equal protection violations.[137]

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[132] *Id.* at 619-20.

> Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.

Id. at 620.

[133] *Id.* at 619-20.

[134] *Id.* at 625-26 (quoting Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639 (1999)).

[135] *Id.* at 625 (quoting Civil Rights Cases, 109 U.S. 3, 18 (1883)).

[136] *Id.* at 626.

[137] Because there was no congruence between the measure adopted and the legitimate end of preventing equal protection violations, the Court's reference to proportionality in *Morrison* was, in my view, surplusage.

2. Proportionality

Of the six recent Section Five cases, we have already considered *College Savings Bank* and *Morrison*. The former involved legislation that failed for lack of any relevant Fourteenth Amendment end and the latter dealt with a statutory provision that failed to serve as a means to the legitimate end identified. The statutes in the four remaining cases were also considered pretextual by the Court due to a lack of proportionality between the means adopted and a legitimate Fourteenth Amendment objective. The *City of Boerne* proportionality standard prohibits substantially overinclusive legislation. A measure lacks proportionality if it regulates far more conduct, and thus imposes a significantly greater burden, than is warranted to prevent or remedy a particular set of constitutional violations.[138] As the Court stated in *City of Boerne*, "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[139]

The respondent in *City of Boerne* contended that RFRA could be justified as "a reasonable means of protecting the free exercise of religion as defined by *Smith*," because it "prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices."[140] This argument did not suffer from the defects the Court later found in *College Savings Bank* and *Morrison*. Unlike *College Savings Bank*, the proponents of the statute in *City of Boerne* could identify actual or potential state conduct that would violate Fourteenth Amendment rights as defined by the Court. Consequently, Congress had a legitimate Fourteenth Amendment end in view. Further, unlike *Morrison*, the legislation in question served as a means to accomplish that remedial end. RFRA's compelling interest test would indeed invalidate any state or local legislation that would be unconstitutional under *Smith*.[141] Thus, RFRA survived the first two stages of means-end pretext review under the *McCulloch* framework.

The *City of Boerne* Court, however, found that RFRA violated the proportionality requirement, based upon a comparison of the asserted Fourteenth Amendment problem with the scope of the congressional remedy. Examining RFRA's legislative record, the Court saw little

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[138] City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.").

[139] *Id.* at 530.

[140] *Id.* at 529.

[141] *Id.*

modern evidence of generally applicable laws adopted for the purpose of targeting religious conduct.[142] For the most part, the hearings focused on generally applicable laws that imposed incidental burdens on religious conduct, and therefore would not violate the Fourteenth Amendment as interpreted in *Smith*.[143] On the other side of the balance, RFRA imposed a far-reaching remedy, applying the pre-*Smith* compelling interest test to "every agency and official of the Federal, State, and local Governments."[144] Its "[s]weeping coverage" resulted in "intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[145]

Finding RFRA greatly disproportionate to the legitimate end of overriding laws unconstitutional under *Smith*, the Court concluded that Congress had invoked the Section Five power to accomplish a different end: "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[146] While the Court did not cite *McCulloch* for this purpose, it clearly employed the proportionality standard in *City of Boerne* as part of a *McCulloch*-style pretext analysis. The lack of proportion between the means adopted and any legitimate remedial objective generated the conclusion that Congress sought to substantively change the legal obligations imposed on the states, rather than enforce the Fourteenth Amendment.

In three subsequent cases, the Court again applied the proportionality standard to find that Congress acted beyond the scope of its Section Five power. In each case, Congress subjected states to statutory schemes created initially for the regulation of private actors. The issue in these cases was not whether the federal government could regulate the state conduct in question, something that was permissible in each instance under Article I. Rather, the plaintiffs sought to show that the legislation was *also* permissible under Section Five of the Fourteenth Amendment, allowing Congress to override state sovereign immunity and provide for private damage actions against state entities.

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[142] *Id.* at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.").

[143] *Id.* at 530-31.

[144] *See id.* at 532.

[145] *Id.*

[146] *Id.*

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[147] the plaintiff sued Florida under the Patent and Plant Variety Protection Remedy Clarification Act,[148] which permitted a damages action for patent infringement by a state government. The Court recognized that a patent constitutes "property" and that nonnegligent patent infringement by a state could amount to a deprivation of property without due process of law, at least if the state offered inadequate remedies to the aggrieved patent owner.[149] However, in enacting the legislation, Congress "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[150] Moreover, "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed."[151]

Finding a lack of proportionality between the means (subjecting states to liability for *all* patent infringement) and the legitimate end (remedying *unconstitutional* patent infringement), the Court once again concluded that the statute was pretextual: "The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."[152] The Court acknowledged that these were legitimate aims under the Article I powers of Congress.[153] Invocation of Section Five as authority for the legislation was pretextual, however, since these objects were not within the scope of congressional power under the Fourteenth Amendment.

The Court applied the proportionality standard again in *Kimel v. Florida Board of Regents*.[154] It concluded that Section Five would not support application of the Age Discrimination in Employment Act of

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[147] 527 U.S. 627 (1999).

[148] Pub. L. No. 94-12, 106 Stat. 4230 (1992) (current version available at 7 U.S.C. § 2570 and 35 U.S.C. § 296 (2000)).

[149] *Fla. Prepaid*, 527 U.S. at 643-45.

[150] *Id.* at 640.

[151] *Id.* at 646-47. The Court noted that Congress also did nothing "to confine the reach of the Act by limiting the remedy to certain types of infringement, such as non-negligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement." *Id.* at 647.

[152] *Id.* at 647-48.

[153] *Id.* at 648.

[154] 528 U.S. 62, 81-83 (2000).

1967 (ADEA)[155] to state government employers.[156] The Court once again made clear that its proportionality analysis sought to detect pretextual invocation of the Section Five power:

> Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination.[157]

While the Court recognized that state employment decisions based upon age could violate the Fourteenth Amendment's Equal Protection Clause, courts evaluate such claims under a deferential "rational basis" test.[158] The legislative record again failed to demonstrate a Fourteenth Amendment problem warranting the substantially disproportionate remedy of prohibiting nearly all age-based employment decisions. "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[159]

The Court employed proportionality analysis most recently in *Board of Trustees of the University of Alabama v. Garrett*,[160] concluding that Section Five did not authorize extension of the Americans with Disabilities Act of 1990 (ADA)[161] to state government employers.[162] The Court again found a rational basis test applicable under the Equal Protection Clause, this time drawing on its decision in *Cleburne v. Cleburne Living Center, Inc.*[163] The ADA was overbroad in the sense that it imposed obligations

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[155] 29 U.S.C. §§ 621-634 (2000).

[156] *Kimel*, 528 U.S. at 91. The Court noted its earlier holding that Congress validly subjected the states to ADEA requirements under its commerce power. *Id.* at 78. The Court once again addressed the Section Five issue to determine whether Congress could abrogate state sovereign immunity. *Id.* at 78-80.

[157] *Id.* at 88.

[158] *See id.* at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

[159] *Id.* at 89.

[160] 531 U.S. 356, 365-74 (2001).

[161] 42 U.S.C. §§ 12101-12213 (2000).

[162] *See Garrett*, 531 U.S. at 373-74. The Court emphasized that ADA requirements still applied to the states, presumably by virtue of the commerce power, and could be enforced either by the United States or in an action for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). *Garrett*, 531 U.S. at 374 n.9.

[163] 473 U.S. 432, 440-50 (1985).

on the states that would not be required under a rational basis standard.[164] The legislative history of the ADA did not show the need for such a prophylactic remedy because it failed to demonstrate a pattern of irrational state discrimination against disabled employees.[165] Applying the ADA to the states would not enforce Fourteenth Amendment requirements, but instead would change those requirements: "[T]o uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*."[166]

3. Proportionality as a Measure of Good Faith

As we have observed, the Supreme Court employed the proportionality standard in *City of Boerne* and three subsequent cases to conclude that Congress had exceeded the scope of its Section Five power. In each case, the Court sought to determine whether Congress acted to accomplish the legitimate end of enforcing judicially-recognized Fourteenth Amendment rights, or instead pursued an object outside the scope of Section Five by imposing new, non-remedial legal obligations on the states.[167] While the Court did not use the term "pretext," and did not cite *McCulloch*'s pretext passage, the Court clearly found in these cases that "Congress, under the pretext of executing its powers," had passed laws "for the accomplishment of objects not entrusted to the government" under Section Five.[168] A number of scholars have confirmed this observation, linking the Section Five congruence and proportionality inquiry with *McCulloch*'s pretext passage.[169]

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[164] *See Garrett*, 531 U.S. at 372.

[165] *See id.* at 369-70.

[166] *Id.* at 374.

[167] *See City of Boerne v. Flores*, 521 U.S. 507, 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.")

[168] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

[169] Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 720 (2000) ("I have suggested elsewhere that the Court's recent cases may reflect in part a skepticism about the validity of Congress' purposes, and a sub silentio reinvigoration of the 'pretext' line of *McCulloch* stemming from a perception that Congress behaves in 'pretextual' ways too much of the time."); Ira C. Lupu, *Why the Congress was Wrong and the Court was Right — Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 816-17 (1998) (portraying *City of Boerne* as implementing pretext language of *McCulloch*); Stephen L. Mikochik, *Enforcing the Fourteenth Amendment:* City of Boerne v. Flores *and the Americans with Disabilities Act*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 262, 263 n.39 (1998) ("The requirement of

Proportionality analysis does not assist in the first two stages of *McCulloch*-style means-end pretext review. The Court in these cases rejected invocation of Section Five, even though the legislation in question could serve as a means to prevent Fourteenth Amendment violations. Instead, the defect in the legislation lay in its overbreadth. Congress had regulated conduct far exceeding the scope of any applicable Fourteenth Amendment restraints. This overbreadth analysis constitutes a facet of the third stage in *McCulloch*'s review for pretextual legislation, which asks whether a statute represents an "appropriate" means to a legitimate end.[170] Specifically, proportionality analysis allows the Court to determine whether the means selected exhibit objective good faith — whether, in the words of *McCulloch*, the means are "*really* calculated" to accomplish the end of enforcing the Fourteenth Amendment.[171]

Substantial overbreadth of legislation gives rise to a plausible inference that Congress has acted pretextually.[172] When a legislator, in good faith, seeks to accomplish a relatively narrow end, and when pursuit of a broader end would exceed the scope of congressional power, one naturally expects some legislative tailoring to fit the narrower end legitimately pursued. If Congress "launches a missile to kill a mouse,"[173] a court may reasonably conclude that the mouse was not the real target.

McCulloch did not specifically address whether the Constitution requires some degree of proportionality between legislative means and ends. However, the Court's prohibition on pretextual legislation would have little substance absent a proportionality limitation. If legislation survives judicial scrutiny whenever it furthers some end within the

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'proportionality' and 'congruence' is evidently intended to make specific the condition in *McCulloch v. Maryland*, that a law be 'really calculated to effect any of the objects entrusted to the government' in order to insure against a pretextual exercise of congressional power.") (citation omitted); Post & Siegel, *supra* note 4, at 457 ("Insofar as the point of the *Boerne* test is to distinguish substantive from remedial legislation, its basic thrust, in the words of Chief Justice Marshall's venerable opinion in *McCulloch v. Maryland*, is to ascertain whether 'congress, under the pretext of executing its powers,' has passed 'laws for the accomplishment of objects not intrusted to the government.'").

[170] *See McCulloch*, 17 U.S. (4 Wheat.) at 421. Significantly, the Court characterized its test as a way of determining whether legislation is "appropriate" within the meaning of Section Five. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000) ("Applying the same 'congruence and proportionality' test in these cases, we conclude that the ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment.").

[171] *See McCulloch*, 17 U.S. (4 Wheat.) at 423.

[172] *See* Caminker, *supra* note 5, at 1140 n.53.

[173] The metaphor is borrowed from Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting) ("Today the Court launches a missile to kill a mouse.").

power of Congress, no matter how much additional conduct it controls, creative federal legislators could regulate any conduct they chose by simply ensuring that the legislation had some slight impact on activity within their regulatory domain.[174] If the standards for judicial review leave Congress free to pursue any end it desires, so long as it drafts broadly enough, the *McCulloch* distinction between pretextual and good faith legislation effectively disappears.

Of course, proportionality represents a question of degree. To be consistent with *McCulloch*, the degree of proportionality required by the Court must be calibrated to the goal of distinguishing between good faith and pretextual legislative action.[175] Too aggressive an insistence on means-end tailoring could sweep away good faith congressional attempts to address constitutional wrongs. There is little question that *South Carolina v. Katzenbach*'s ban on all literacy tests represented a good faith effort to prevent unconstitutional use of literacy tests to exclude minority voters. If the Court engages in an overbroad application of its overbreadth standard, it will no longer serve the goal of detecting pretextual legislation, and will instead impinge on legitimate Section Five powers.[176]

Thus, perhaps the real question is whether the Supreme Court has applied the proportionality standard too stringently in the cases decided to date. On this issue, if one accepts the Supreme Court's view of legitimate Fourteenth Amendment ends, there is good evidence that the Court accurately discerned pretextual invocation of the Section Five power in *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*. The

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[174] I suggest below that the statute in *Lopez*, the commerce power case, would have been constitutional in the absence of a proportionality limitation. If Congress may freely adopt overbroad legislation, the *Lopez* statute should have been upheld on the ground that *some* of the conduct regulated by Congress fell within the scope of the commerce power. *See infra* notes 209-210 and accompanying text.

[175] In other words, the Court should demand the level of means-end tailoring one would expect of a legislator, seeking in good faith to accomplish the legitimate end in question. This might be conceptualized in terms of a "reasonable legislator" standard. Like other questions concerning the scope of congressional power, the proportionality inquiry should be pursued in light of the presumption of constitutionality, so that close cases should be decided in favor of congressional power. *See* McConnell, *supra* note 4, at 185.

[176] Ironically, the Court's use of the proportionality standard to search for pretextual legislation can itself be evaluated through a form of pretext review. In other words, the Court may properly be criticized if it employs proportionality analysis for a substantive purpose, rather than for the legitimate purpose of detecting whether Congress has acted in good faith. *Cf.* TRIBE, *supra* note 28, at 91 (stating that while one may disagree with constitutional interpretation offered in *McCulloch*, one cannot plausibly dismiss interpretation as "pretextual").

surrounding circumstances suggest that the real goal of the legislation in each case was something other than enforcement of Fourteenth Amendment rights as defined by the courts.

In *City of Boerne*, the legislative record offered substantial evidence that Congress disagreed with the Supreme Court's decision in *Smith* regarding the scope of constitutional protection for free exercise of religion. While that disagreement with the Court was genuine and, in my view, justified, it makes plausible the Court's conclusion that RFRA was designed less to enforce *Smith* than to circumvent the decision by statute.[177] In the other three proportionality cases, Congress amended pre-existing Article I legislation to include states as defendants, without any tailoring to reflect Fourteenth Amendment standards.[178] This suggests Congress was addressing Article I concerns in these statutes, rather than seeking to enforce Fourteenth Amendment rights. These circumstances add weight to the finding of pretextual action and suggest that the Court did not apply the proportionality standard too strenuously in these cases.

Professors Caminker and Tribe both draw upon *McCulloch*'s treatment of the term "necessary" in the Necessary and Proper Clause to suggest that the Court's proportionality standard intrudes upon the legislative arena.[179] However, while *McCulloch* did indicate that it was the role of Congress to determine "the degree of [the] necessity" for particular legislation, it nevertheless authorized courts to review whether the legislation is "appropriate," a standard derived from the Necessary and Proper Clause.[180] The *McCulloch* Court envisioned the judicial propriety inquiry as a way to distinguish between good faith and pretextual

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[177] Professor Caminker appears to acknowledge this point:

> Congress itself did not even try to hide its antipathy toward *Smith* and justify RFRA as consistent with Court-defined free exercise norms. Instead, Congress candidly proclaimed its fundamental disagreement with, and desire to displace, the Court's constitutional interpretation of the Free Exercise Clause. As the Court noted, RFRA's findings and purposes expressly took issue with *Smith* and purported to restore the prior judicial 'compelling state interest' test that *Smith* itself had overruled, and RFRA's passage followed floor debates in which numerous members of Congress directly criticized *Smith*'s reasoning and result.

Caminker, *supra* note 5, at 1182-83

[178] *See supra* notes 147-166 and accompanying text.

[179] Caminker, *supra* note 5, at 1157; TRIBE, *supra* note 28, at 958-59 & n.166.

[180] *See supra* notes 40-47 and accompanying text (stating that Congress determines degree of necessity for measure, but courts must use means-end evaluation to discern whether measure is appropriate); Caminker, *supra* note 5, at 1136-38, 1161-62.

legislation.[181] Professor Caminker appears to acknowledge the evidentiary value of overinclusiveness in ferreting out pretextual measures.[182] So long as the Court is using the proportionality test for this purpose, as appears to be true in recent Section Five cases, there seems no reason to view it as usurping the congressional role.[183]

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[181] The commentaries of Justice Joseph Story, a member of the *McCulloch* Court, confirm that the term "proper" authorizes evaluation of legislative good faith: "It requires, that the means should be, *bona fide*, appropriate to the end." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 613 (1833) (Carolina Academic Press 1987). Significantly, Story links the word "proper" in the Necessary and Proper Clause, the term "appropriate" from *McCulloch*, and the requirement that Congress adopt good faith (*"bona fide"*) means to a legitimate end.

While Professor Caminker acknowledges that means chosen by Congress must meet the standard of propriety, he appears to construe the term "proper" to require nothing more than a minimal means-end relationship. Thus, he links the propriety requirement with his understanding of the term "congruence":

> The Court's first inquiry in the Section 5 context is whether a particular measure is *conducive to* preventing or remedying a judicially defined Section 1 violation, in the sense that at least some of the conduct it proscribes or redresses is actually unconstitutional. This "congruence" requirement mimics the requirement that executory Article I legislation be "proper," in the sense that such legislation must actually to some degree execute or promote the function of a primary governmental power.

Caminker, *supra* note 5, at 1156 (emphasis added). The *McCulloch* Court identified the term "necessary" as the source of the requirement that a legislative measure be "conducive to" a legitimate end. *McCulloch*, 17 U.S. (4 Wheat.) at 418. Professor Caminker uses that phrase to describe the propriety limitation. However, *McCulloch* indicated clearly that the term "proper" places restrictions on the means-end relationship *beyond* those conveyed by the necessity requirement. *Id.* at 418-19. Therefore, if legislation must be "conducive to" a legitimate end to be "necessary," then something more must be required before the legislation can be deemed "proper." That "something more," as Justice Story confirms, is that the legislation must reflect congressional good faith — it must not be pretextual. The *McCulloch* Court described "appropriate" legislation as that which was "plainly" adapted and "really" calculated to achieve a legitimate end, adverbs which suggest the need for something beyond a bare telic or means-end relationship. *Id.* at 421, 423.

[182] *See* Caminker, *supra* note 5, at 1140 n.53.

[183] The same comment can be made with respect to the Supreme Court's reiteration of the *McCulloch* standard in later cases. For instance, in emphasizing the deference courts pay to congressional selection of means, Professor Caminker quotes *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934), which states,

> [I]f it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone.

Caminker, *supra* note 5, at 1138. But the *Burroughs* language requires judicial deference to congressional choices only "if it *can be seen* that the means adopted are *really calculated* to attain the end," i.e., if the means-end relationship satisfies the requirements of obviousness and good faith. *Burroughs*, 290 U.S. at 547-58.

Nevertheless, one aspect of the recent Section Five cases could use further explanation, even if the proportionality standard is consistent with *McCulloch*. In light of past practice, the Court seems to have attributed unusual significance in these cases to the absence of an adequate legislative record supporting an exercise of Section Five power. At first blush, this emphasis on the state of the legislative record seems out of step with the Court's practice elsewhere. As a general rule, Congress need not make any findings to support an exercise of power.[184]

To date, however, the legislative record has only been reviewed in situations where the contours of the statute did not demonstrate the requisite means-end relationship, and where there was substantial reason to suspect a pretextual exercise of legislative power.[185] This aspect of the Section Five cases may perhaps be understood as an application of the obviousness limitation from *McCulloch*: the requirement that Congress select means "*plainly* adapted" to a legitimate end. In situations where an adequate means-end relationship does not readily appear, it may be that the Court gives Congress the opportunity to cure the defect through the legislative record.[186] If an appropriate means-end relationship is not apparent to the court, and if the circumstances suggest pretextual legislative action, perhaps Congress must supply the defect by making the means-end relationship plain in the legislative process.

The Court's Section Five proportionality standard, then, can be reconciled with *McCulloch* as a method of reviewing legislative good faith and screening out pretextual exercises of congressional power. Professor Caminker does not really deny the evidentiary value of substantial overbreadth in identifying pretextual exercises of power. He instead argues that the Court should not employ a more stringent level of means-end pretext review in the Section Five context than it does under Article I. However, I will seek to demonstrate below that when one considers the most recent Article I case law, the Court has not confined pretext review, or even the proportionality standard, to Section Five. A comparable form of means-end pretext review underlies the

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[184] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 562 (1995) ("Congress is normally not required to make formal findings as to the substantial burdens that an activity has on interstate commerce").

[185] *See supra* notes 177-178 and accompanying text.

[186] It is noteworthy that the Court also commented on the absence of any record demonstrating the means-end relationship underlying the statute in *Lopez*, a case under the Article I commerce power. 514 U.S. at 562-63. The Court explained that such findings would assist the Court where the effect of the regulated activity on interstate commerce was not "visible to the naked eye," *id.* at 563, a phrase that discloses a concern with the plainness of the means-end adaptation.

Court's modern commerce power decisions in *Lopez* and *Morrison*.

III. PRETEXT REVIEW AS A CONCOMITANT OF ENUMERATED POWERS

The argument to this point has sought to demonstrate that the forms of analysis employed in the Supreme Court's recent Fourteenth Amendment case law conform to *McCulloch*'s framework for identifying pretextual exercises of congressional power. But even if we can reconcile the Section Five cases with *McCulloch*, there remains Professor Caminker's concern that the Court employs stricter standards under Section Five than those applied to Article I legislation.[187] This section of the article will seek to show that the recent decisions under the Article I Commerce Clause, though identifying a different defect in the means-end relationship, also engage in a form of means-end pretext review comparable to that employed under Section Five. Serious *McCulloch*-style pretext review under both Section Five and Article I reflects a revived interest in identifying judicially-enforceable limits on the enumerated powers of Congress and constitutes the most significant element of the Court's ongoing federalism revival.

A. Means-End Review and the Commerce Clause

Perhaps even more surprising to scholars than the Court's Section Five cases have been two modern decisions in which the Supreme Court found that Congress had exceeded its authority under its Article I commerce power. In *United States v. Lopez*, the Court struck down a provision of the Gun-Free School Zones Act of 1990[188] outlawing gun possession near schools.[189] The Court relied upon *Lopez* five years later in *United States v. Morrison*, finding that the VAWA cause of action for crimes of violence motivated by gender could not be sustained under the Commerce Clause.[190]

Both statutes were enacted against a backdrop of case law permitting Congress to regulate a class of activities that, in the aggregate, produces a substantial affect on interstate commerce.[191] The Court found that, with

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[187] Caminker, *supra* note 5, at 1167-68 ("[E]ven if a desire to screen out pretextual uses of Congress' Section 5 power *explains* the Court's insistence on a carefully tailored means-ends nexus, the question remains what *justifies* this insistence uniquely in the Section 5 context.").

[188] Pub. L. No. 101-647, Title XVII, § 1702, 104 Stat. 4844 (1990).

[189] 514 U.S. at 551.

[190] United States v. Morrison, 529 U.S. 598, 617-19 (2000).

[191] *See* Wickard v. Filburn, 317 U.S. 111 (1942).

exceptions inapplicable in *Lopez* or *Morrison*, the power to regulate conduct substantially affecting interstate commerce extends only to regulation of economic or commercial activity.[192] Since gun possession in a school zone and gender-motivated violence could not be categorized as commercial or economic in nature, the regulations at issue could not be sustained under the commerce power.[193]

Just as with the Section Five cases, one can explain *Lopez* and *Morrison* in terms of *McCulloch*'s restrictions on means-end relationships.[194] In articulating the constitutional rationale for the affecting commerce cases, the Court has pointed to *McCulloch*, concluding that Congress may regulate "activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[195] Perhaps more broadly, one might describe the permissible constitutional end recognized in the "affecting commerce" cases as the control of the interstate economic system.[196] In both *Lopez* and *Morrison*, it was possible to identify a telic relationship between the means adopted and this legitimate end. The proponents of each statute articulated a chain of cause and effect relationships through which the regulated conduct might impact interstate markets.[197] Thus, the statutes in question satisfied the first two stages of means-end pretext review under

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[192] *Lopez*, 514 U.S. at 560-61; *Morrison*, 529 U.S. at 610-11. The Court suggested that a regulation of noncommercial conduct could survive Commerce Clause scrutiny if it constituted "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," or if it contained a "jurisdictional element which would ensure, through case-by-case inquiry, that the [conduct] in question affects interstate commerce." *Lopez*, 514 U.S. at 561.

[193] *Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."); *Morrison*, 529 U.S. at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

[194] I made this argument at some length in a recent law review article. *See* Beck, supra note 37, at 615-26. We need only summarize that discussion here.

[195] United States v. Darby, 312 U.S. 100, 118 (1941); *see* Beck *supra* note 37, at 618.

[196] *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

[197] *Morrison*, 529 U.S. at 615-16 (addressing congressional findings regarding various ways that gender-motivated violence could lead to impacts on interstate economy); *Lopez*, 514 U.S. at 563-65 (addressing arguments that school-zone gun possession could produce violent crime or undermine educational process, either of which would affect interstate economy).

McCulloch.[198]

The means-end defect the Court identified in *Lopez* and *Morrison* arose from the attenuated causal chain between the regulated conduct and the asserted impact on interstate commerce.[199] Congress employed means remote from the legitimate end it purported to pursue. In his anonymous essays defending *McCulloch*, on the other hand, Chief Justice Marshall indicated that constitutionally-permissible means do not produce an end through a lengthy chain of cause and effect relationships. In his view, the *McCulloch* opinion "plainly show[ed] that no remote, no distant conduciveness to the object, [was] in the mind of the court."[200]

I have argued that this prohibition on remote legislative means derives from *McCulloch*'s good faith and obviousness requirements.[201] Legislators seeking in good faith to accomplish a given end will seldom address the problem using means remote from that end.[202] Moreover, a means-end connection that can only be explained through an extended and complex string of cause and effect relationships will seldom satisfy the requirement of a means plainly adapted to the end.[203]

Given this relationship between legislative enlistment of remote means and the *McCulloch* good faith and plainness principles, one can plausibly explain the outcomes in *Lopez* and *Morrison* in terms of a desire to prevent pretextual invocation of the commerce power. It seems highly doubtful that Congress regulated gun possession near schools or gender-motivated violence in order to prevent adverse impacts on interstate commerce. It pursued gun-free school zones and the elimination of gender-motivated violence as ends in themselves, and not as means to control the interstate economy. "[U]nder the pretext of executing its [commerce] powers," Congress "pass[ed] laws for the accomplishment of objects not entrusted to the government."[204] Commentator David Wille has recognized that the *McCulloch* prohibition on pretextual legislation precludes regulation of activities far removed from interstate

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[198] *See supra* notes 48-54 and accompanying text.

[199] *See Morrison*, 529 U.S. at 612 ("[O]ur decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated."); *id.* at 615 ("The reasoning that petitioners [in *Morrison*] advance seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.").

[200] A FRIEND TO THE UNION NO. 2, *supra* note 35, at 100 .

[201] Beck, *supra* note 37, at 612-13.

[202] *Id.*

[203] *Id.* at 613.

[204] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

commerce. As he puts it, "[r]egulating activities that have a remote effect on interstate commerce is not plainly adapted to the end of regulating commerce. Rather, it allows the use of the Commerce Clause as a pretext to regulate purely intrastate activities."[205]

The recent commerce power cases, then, comport with the Fourteenth Amendment decisions in employing means-end scrutiny to detect pretextual legislation.[206] In several of the Fourteenth Amendment cases, the Court deemed legislation pretextual because Congress employed means grossly disproportionate to the legitimate constitutional end.[207] In the commerce power cases, the Court reached the same conclusion because Congress adopted means unduly remote from a legitimate end. *McCulloch*-style pretext review explains both sets of decisions, though the Court has focused on different defects in the means-end relationship in these two contexts.

But the fact that the Court strikes down pretextual legislation under both Section Five and Article I does not necessarily answer Professor Caminker's critique. It might still be the case that the Court applies more stringent standards under Section Five than under Article I. Professor Caminker's argument would be valid, for instance, if the Court refused to apply the Section Five requirement of proportionality in the commerce power context. However, there is no reason to believe the Court would refuse to strike down substantially disproportionate Commerce Clause legislation, should an appropriate case arise.[208]

Indeed, the *Lopez* decision appears to contain an implicit proportionality requirement. In the absence of an overbreadth limitation on Article I powers, the "jurisdictional element" discussion in *Lopez*

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[205] David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1084 (1996).

[206] *See* McConnell, *supra* note 4, at 166 (describing means-end scrutiny employed in *City of Boerne* as "reminiscent" of *Lopez*).

[207] *See supra* notes 140-166 and accompanying text.

[208] There may be a difference in the scope of congressional power under Section Five and the Commerce Clause, and a resulting difference in the nature of judicial review under each. The difference I refer to here, however, flows not from a difference in the level of means-end scrutiny applied, but rather from a difference in the range of legislative objects permitted. Under Section Five, Congress may only pursue a fairly limited array of ends — the prevention or remediation of Fourteenth Amendment violations recognized by the courts. The delineation of permissible and impermissible state conduct flows from the Fourteenth Amendment itself, as construed by the courts, and the only role for Congress is enforcement of the restraints fixed by the amendment. When Congress regulates interstate commerce, it has much greater policy discretion in the selection of ends it will pursue. The Commerce Clause does not itself delineate between permissible and impermissible commercial behavior.

would make no sense. The Court refused to permit Congress to regulate *all* gun possession in school zones, but suggested the legislation would be permissible if it contained an "express jurisdictional element which might *limit its reach* to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[209] Since the statute before the *Lopez* Court reached all guns, a portion of the regulated conduct lay within the scope of the commerce power. From this perspective, the defect in the Gun-Free School Zones Act was its overbreadth. The statute was unconstitutional because it included guns that had no nexus with interstate commerce. Absent a constitutional limitation on overbroad Article I legislation, the Court should have upheld the statute in *Lopez*.[210] Thus, *Lopez* suggests that the Court requires proportionality between means and ends both under Section Five and Article I.

One interesting question for future cases will be whether the Court enlists additional means-end restrictions — beyond overbreadth and remoteness — to ferret out pretextual exercises of congressional power. For instance, if we deem overbroad legislation pretextual on the ground that it regulates too much conduct, could there be a similar limitation on underinclusive legislation? Suppose that Congress enacted a statute redressing a form of unconstitutional state conduct, but only made the remedy available against one particular state. In the absence of any legislative record suggesting a basis for singling out the targeted state, could severely underinclusive legislation be deemed pretextual on the ground that good faith legislators would redress unconstitutional conduct wherever found?[211]

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[209] United States v. Lopez, 514 U.S. 549, 562 (1995) (emphasis added). For instance, Congress might include a provision confining the statute's reach to possession of a gun that had traveled across a state line. If one takes the view that it is a permissible commerce power end to control the use of goods that have traveled in interstate commerce, then a statute so limited would fall within the scope of the commerce power.

[210] Indeed, if there is no overbreadth limitation on Article I legislation, the Religious Freedom Restoration Act reviewed in *City of Boerne* could arguably have been sustained on Commerce Clause grounds. RFRA applied to actions of state and local governments that placed a substantial burden on religious conduct, including (according to some courts) actions taken in an employment relationship. Since the Commerce Clause has been frequently invoked as the basis for upholding federal regulation of state government employers, see, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000), some of the conduct covered by RFRA fell within the commerce power. In the absence of an overbreadth or proportionality limitation, the fact that the statute applies to some conduct within the scope of the commerce power should be enough to sustain the statute's regulatory provisions, though presumably not its attempt to abrogate state sovereign immunity.

[211] Targeted restrictions under the Voting Rights Act have previously been challenged

The commerce power and Section Five cases demonstrate a renewed Supreme Court emphasis on policing legislative means-end relationships to keep Congress within defined constitutional boundaries. Together, the cases stand for the proposition that "appropriate" legislation under *McCulloch* standards must reflect proportionality and proximity to a constitutional end recognized by the courts. The next subsection of the article will suggest that this invigoration of means-end pretext review constitutes the most significant facet of the Court's ongoing federalism revival.

B. Means-End Pretext Review as the Heart of Federalism

The Fourteenth Amendment and commerce power opinions represent part of a broader pattern of recent Supreme Court rulings reflecting a renewed interest in federalism values. In a number of contexts, the Court's decisions have provided enhanced legal safeguards to the states, shielding them against incursions by the Federal Government. However, none of the Court's state autonomy protections constrain Congress to the same degree as *City of Boerne* and *Lopez* and their progeny.

In the area of statutory construction, the Court has protected states against federal action through enforcement of plain statement rules. If Congress wishes to alter the usual federal-state balance,[212] or to abrogate state sovereign immunity,[213] its intention must be clearly reflected in the statute. Such clear statement requirements protect states against inadvertent congressional intrusions. Moreover, they enhance the "political safeguards of federalism,"[214] offering states notice of congressional action that may affect their interests, and allowing them to exert political influence with members of Congress.[215] But a plain statement rule does not serve as a bar to congressional action. Congress may navigate around the rule in the legislative drafting process by including an unambiguous indication of its intent to act in a manner affecting the states.[216]

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as unconstitutional. In upholding the Act, the Court stated that Congress could "limit its attention to the geographic areas where immediate action seemed necessary." South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[212] Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787 (2000).

[213] *Kimel*, 528 U.S. at 73 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

[214] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 548 & n.11 (1985).

[215] My colleague, Peter Appel, drew my attention to this effect of plain statement rules.

[216] *See Kimel*, 528 U.S. at 74 ("Read as a whole, the plain language of [the ADEA] clearly

In another set of cases, the Court has limited the power of Congress to abrogate state sovereign immunity.[217] Congress may authorize damage actions against the states only when it enacts legislation pursuant to its Section Five power,[218] and not when it legislates pursuant to Article I.[219] However, the sovereign immunity cases place no limit on the scope of federal regulatory power over the states.[220] They merely narrow the range of remedies from which Congress may select. When Congress regulates state conduct under Article I, it may provide for enforcement of the legislation by means other than private suits for damages. For instance, a lawsuit against state officials for injunctive relief,[221] or a suit by the United States,[222] are still available enforcement options, notwithstanding the sovereign immunity decisions. In any event, these restrictions on abrogation of sovereign immunity only matter because of the Court's contemporaneous limitations on congressional power under the Fourteenth Amendment.

The Court has adopted additional restrictions on congressional action in its anti-commandeering cases. It has ruled that Congress cannot "commandeer" state government officials by compelling state legislators to enact, or state executives to enforce, a federal regulatory program.[223] While this anti-commandeering principle offers substantial protection to the states, it is nevertheless limited. The principle does nothing to prevent federal preemption of state laws,[224] nor does it prevent implementation of federal mandates by other means, such as

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demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.").

[217] *See* Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[218] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[219] Bd. of Trs. of the Univ. of Alab. v. Garrett, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 78-79.

[220] *See Alden*, 527 U.S. at 754-55.

[221] *Id.* at 757 ("The rule, however, does not bar certain actions against state officers for injunctive or declaratory relief.").

[222] *Id.* at 755 (citing Principality of Monaco v. Miss., 529 U.S. 313, 328-29 (1934)) ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.").

[223] Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

[224] Indeed, Congress can even use the threat of preemption as a stick to encourage state regulation pursuant to federal standards. *New York*, 505 U.S. at 167 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

enforcement by federal officers. Moreover, in a subsequent decision, the Court defined the anti-commandeering principle narrowly, so as not to interfere with substantive federal regulatory power over the states.[225] Finally, the fact that Congress has only seldom resorted to outright commandeering of state legislative or executive processes suggests that the anti-commandeering cases have only limited significance as a constraint on the federal legislature.[226]

The recent commerce power and Section Five cases, by contrast, impose more substantive restraints on Congress than the Court's other federalism protections. The plain statement cases enforce only a procedural rule designed to ensure deliberate action by Congress. The sovereign immunity and anti-commandeering cases place no limits on congressional objectives, but only narrow the means Congress may employ. The commerce power and Section Five cases, on the other hand, actively police the ends Congress may pursue. The Court has exercised this boundary policing function through reinvigorated pretext review of means-end relationships.

Confining the ends of congressional power serves to preserve state autonomy in at least two ways. First, it limits the purposes for which the federal government can directly regulate state governments. Second, by limiting federal regulation of private conduct, it leaves a larger sphere of activities for exclusive regulation by the states.[227] As the Supreme Court recognized long ago, "every addition of power to the general government involves a corresponding diminution of the governmental powers of the States."[228] Conversely, by enforcing limitations on the powers of Congress, the Court preserves a correspondingly larger domain for states to exert exclusive control.

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[225] Reno v. Condon, 528 U.S. 141 (1999) (upholding federal statute regulating state disclosure of information obtained from drivers against anti-commandeering challenge).

[226] *Printz*, 521 U.S. at 917-18 (indicating that statutes commandeering state executives can only be found in recent years, and many of these are distinguishable).

[227] Professor Caminker recognizes this dichotomy when he distinguishes between "jurisdictional values" and "sovereignty values" of federalism:

> "Jurisdictional values" concern the allocation of law-making authority between the federal and state governments, and protect the states' proper sphere of exclusive regulatory jurisdiction. "Sovereignty values" concern intergovernmental relations, and protect the states from federal regulatory burdens, thereby preserving the states' status and dignity as co-equal sovereigns.

Caminker, *supra* note 5, at 1186.

[228] *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

Certainly, not everyone will be equally persuaded by arguments in favor of federalism. While means-end pretext review may serve to enhance federalism values, it also inhibits beneficent exercises of federal power. But if one wishes to maintain that Congress possesses only enumerated powers, some form of pretext review seems unavoidable. Absent a way to distinguish between federal legislation that pursues legitimate constitutional ends and federal legislation that does not, there can be no judicially-enforceable limit on the reach of congressional authority. The recent decisions employing means-end scrutiny to detect pretextual legislation may simply reflect the Supreme Court's unwillingness to silently abandon the canonical proposition that the powers of the federal government are limited, a proposition that lacks doctrinal substance in the absence of pretext review.[229]

CONCLUSION

The Court's review for pretextual exercises of congressional power under the Commerce Clause and Section Five of the Fourteenth Amendment has been the most significant element of the Court's recent federalism revival. While one may question the Court's account of the legitimate ends of congressional action, its use of means-end limitations such as proportionality and proximity to prevent pretextual legislation comports with the Court's earlier decision in *McCulloch*. It will be interesting in coming years to see whether the Court expands the list of means-end defects beyond those identified above, and whether it extends its search for pretextual legislation to other congressional powers.

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[229] The prospect of effectively unlimited congressional power drove the Court's decisions in both *City of Boerne* and *Lopez*. *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (indicating that if Congress could change meaning of Fourteenth Amendment, "it is difficult to conceive of a principle that would limit congressional power"); United States v. Lopez, 514 U.S. 549, 564 (1995) ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate").