

Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?[†]

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INTRODUCTION

From a comparative law perspective, one of the most intriguing features in the recent Supreme Court jurisprudence is the congruence and proportionality test that marks the boundaries of all legislation enacted pursuant to Section 5 of the Fourteenth Amendment since the landmark case *City of Boerne v. Flores*.¹ Writing the opinion of the Court, Justice Kennedy provided a reminder of a forgotten dictum from *Oregon v. Mitchell*, namely that “[a]s broad as the congressional enforcement power is, it is not unlimited.”² Elaborating on this principle, he concluded that the said power would henceforth be subject to two conditions: (1) “there must be a congruence between the means used and the ends to be achieved”;³ and (2) legislation enacted in pursuance of that power cannot be “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.”⁴

Since *Boerne* applied the congruence and proportionality test to the Religious Freedom Restoration Act (“RFRA”),⁵ it was applied to four other remedial, preventive statutes: (1) the Patent and Plant Variety Protection Remedy Clarification Act (“Patent Remedy Act”)⁶ in *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank*;⁷ (2) the Age Discrimination in Employment Act of 1967

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1. 521 U.S. 507 (1997).

2. *Id.* at 518-19 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)).

3. *Id.* at 530.

4. *Id.* at 532.

5. “The stringent test RFRA demands of state laws reflects a lack of *proportionality* and *congruence* between the means adopted and the legitimate end to be achieved.” *Id.* at 533 (emphasis added).

6. 35 U.S.C. § 271 (2000).

7. 527 U.S. 627 (1999). “The Patent Remedy Act . . . is particularly *incongruous* in light of

("ADEA")⁸ in *Kimel v. Florida Board of Regents*;⁹ (3) the Violence Against Women Act ("VAWA")¹⁰ in *United States v. Morrison*;¹¹ and (4) the Americans With Disabilities Act of 1990 ("ADA")¹² in *Board of Trustees of the University of Alabama v. Garrett*.¹³

American legal scholars have received the new test with rather negative feelings. Except for a small minority,¹⁴ most of them do not like it because it sounds unfamiliar, dangerous for the protection of civil rights, and illustrative of the conservatism of the Court.¹⁵ From a comparative law perspective, however, the new test is not as bad as it sounds. Under the notions of congruence and proportionality, it introduces into American constitutional law a standard of judicial review that has proved to be useful in many continental European countries in enhancing judicial protection of civil rights.¹⁶ From Europe, the principle of proportionality migrated to the common law world. Proportionality developed in the United Kingdom in relation to the methods of judicial review of administrative action.¹⁷ In Canada, it developed as one of the four criteria that a law must satisfy in order to be considered as a reasonable limit on individual rights and freedoms in a democratic society.¹⁸ In Australia, proportionality

the scant support for unconstitutional conduct." *Id.* at 647 (emphasis added).

8. 29 U.S.C. §§ 621-34 (2000).

9. 528 U.S. 62 (2000). "Applying the . . . 'congruence and proportionality' test . . . we conclude that the ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment." *Id.* at 82-83 (emphasis added).

10. 42 U.S.C. § 13,981 (2000).

11. "[A]s we have phrased it in more recent cases, prophylactic legislation under § 5 must have a 'congruence or proportionality' between the injury to be prevented or remedied and the means adopted to that end. . . ." 529 U.S. 598, 626-27 (2000) (quoting *Fla. Prepaid and Boerne*) (emphasis added).

12. 42 U.S.C. §§ 12,111-12,117 (2000).

13. 531 U.S. 356 (2001). "[T]he remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 357 (emphasis added).

14. For favorable approaches, see David P. Currie, *RFRA*, 39 WM. & MARY L. REV. 637 (1998); Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999).

15. For critical views, see, for example, Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998).

16. See THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999); GEORGES XYNOPOULOS, LE CONTRÔLE DE PROPORTIONALITÉ DANS LE CONTENTIEUX DE LA CONSTITUTIONALITÉ ET DE LA LÉGALITÉ EN FRANCE, ALLEMAGNE ET ANGLETERRE (1995).

17. For an excellent analysis of the approach taken to proportionality by the U.K. courts in Human Rights Act cases, see Richard Clayton, *Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle*, 5 EUR. HUM. RTS. L. REV. 504 (2001). See P.P. CRAIG, ADMINISTRATIVE LAW 411-15 (3d ed. 1994); DE SMITH ET AL., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION §§ 13-046, 13-085 (5th ed. 1995); DIANE LONGLEY & RHODA JAMES, ADMINISTRATIVE JUSTICE: CENTRAL ISSUES IN UK AND EUROPEAN ADMINISTRATIVE LAW 196-201 (1999).

18. Proportionality was introduced in the constitutional law of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.), a case that "has taken on some of the character of holy writ" as wittily described in a recent treatise. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 35.8(b), at 878 (4th ed. 1997). See also Hogg's developments on the "proportionate effect." *Id.* § 35.12, at

may be relevant in cases where characterization of a law depends not on whether it relates to a definite subject matter, but whether it is conducive to a specific purpose.¹⁹ In addition, the principle of proportionality is accepted in Israel, as a constitutional requirement that a law violating a protected right and the exercise of administrative powers must meet the test of proportionality.²⁰ In South Africa, it was extensively discussed in an important case that struck down the death penalty in the face of large public support.²¹ Last but not least, proportionality is today a standard test of judicial review in the case law of the European Court of Justice ("ECJ"),²² as well as the European Court of Human Rights ("ECHR").²³ Despite its much hailed achievements in respect to the protection of rights and freedoms over the world, the principle of proportionality curiously has not aroused sympathy among American scholars. Why is it that the new principle of proportionality is so unappealing to the American legal community?

The reason lies in this one fact: The Supreme Court has used the proportionality principle to protect rights of states, not of individuals. To the question: "[t]o what must congressional statutes be proportional?" the Court's answer was they must be "proportional to 'a State's dignity,'"²⁴ not proportional to human dignity as one might

897. For an enthusiastic American approach to *Oakes*, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality', Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 606-23 (1999).

19. See, in particular, the opinion by Chief Justice Mason in *Nationwide News Pty. Ltd. v. Wills*, (1992) 177 CLR 1, 27-28 (Austr.), and the opinion by Justice Dawson, more deferent to traditional approach, *id.* at 89. For a comprehensive survey of proportionality in Australian constitutional law, see TONY BLACKSHIELD & GEORGE WILLIAM, *AUSTRALIAN CONSTITUTIONAL LAW & THEORY* 602-16 (2d ed., Found. Press 1998).

20. See Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581, 637-39 (2001).

21. See *S. v. Makwanyane and Another*, 1995 (3) SA 391, 436-40; 1995 SACLR LEXIS 218 (S. Afr. Constitutional Ct. June 6, 1995) (Chaskalson, P.). See also Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 242-47 (1998).

22. See NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* 171-74 (1996); DENYS SIMON, *LE SYSTÈME JURIDIQUE COMMUNAUTAIRE* § 102, at 153-54 (3d ed. 2001); Gráinne de Búrca, *The Principle of Proportionality and Its Application in EC Law*, 13 Y.B. EUR. L. 105, 114-15 (1993).

23. See the numerous references to "proportionality" in the index of a useful compilation by R.A. LAWSON & H.G. SCHERMERS, *LEADING CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS* 787 (2d ed. 1999). See also MARC-ANDRÉ EISSEN, *The Principle of Proportionality in the Case-Law of the Court*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 125 (R.St.J. McDonald, F. Matscher & H. Petzold eds., 1993); Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE*, *supra* note 16, at 23-35.

24. The "dignity of a State" seems to be central in the current jurisprudence of the Court on federalism. In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Court recalled that the purpose of the Eleventh Amendment was "to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 58 (quoting *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993)). However, as Justice Stevens explained in his dissent, the "preventing 'indignity' rationale" is "embarrassingly insufficient," *id.* at 97, in part because that rationale was put to rest by Chief Justice Marshall as

have expected in the light of European and foreign usages of the principle. To wit, in *Boerne*, the Court stigmatized RFRA's disproportionate and incongruous consequences because of its "sweeping coverage ensur[ing] its intrusion at every level of [State] government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."²⁵ The result of that decision was great disturbance to the "federal balance."²⁶ In the three cases that resurrected the doctrine of states' sovereign immunity, the Court invalidated congressional enactments that provided: (1) in *Florida Prepaid*, a scheme that "made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration";²⁷ (2) in *Kimel*, a "broad restriction on the use of age as a discriminating factor, prohibit[ing] substantially more state employment decisions and practices that would likely be held unconstitutional under the applicable equal protection, rational basis standard";²⁸ and (3) in *Garrett*, an abrogation of states' sovereign immunity based on "minimal evidence of unconstitutional state discrimination in employment against the disabled."²⁹ As to *Morrison*, the incongruity of the Act ("VAWA") came from the fact that the remedy was "directed not at any State or state actor, but at individuals,"³⁰ a result that did not conform to the purpose of Section 5, which since the *Civil Rights Cases*,³¹ is intended "to counteract and redress the operation of . . . prohibited State laws or proceedings of State officers."³²

The federalist agenda that the current conservative majority put behind the congruence and proportionality test is not the only one that can be attached to it. In all fairness, the new test is a legal tool that is neutral in itself. As with all legal institutions, it can be good or evil, depending on the use that is made of it. The fact that the proportionality principle was introduced by the Court to protect federalism and states rights need not prejudice in any way what can be done with it in the future. A constitutional Janus that offers two faces depending on the side it is looked at, the congruence and proportionality test is equally promising for both liberal and conservative judges. This is why no Justice has criticized or rejected the principle of congruence and proportionality per se. The disagreements have been over the test as applied, not over the test itself, which can be a very useful instrument in judicial review, as this Article will endeavor to demonstrate.

early as 1821 in *Cohens v. Virginia*, 19 U.S. 264, 405-07 (1821). Nevertheless, it does not keep some Justices from still adhering to a quasi-aristocratic approach to federalism. For them, due respect for states' sovereignty amounts to a need of referring to the "etiquette of federalism," an extraordinary terminology viewed from a European perspective insofar as "etiquette" was the rigid code of behavior of European aristocratic societies in the Eighteenth century. See *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

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

26. *Id.* at 536 (Justice Kennedy's opinion for the Court used suggestive terminology to show that, in his view, the major flaw of RFRA was to upset "the federal balance").

27. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999).

28. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000).

29. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001).

30. *United States v. Morrison*, 529 U.S. 598, 626 (2000).

31. 109 U.S. 3 (1883).

32. *Id.* at 18.

Part I of this Article will consider the rationale that may have led the Court to import into United States constitutional law that particular notion of proportionality that is the backbone of a judicial review test that is more elaborate and sophisticated, but also more intrusive and aggressive, than the traditional means-ends test usually applicable to judicial review of congressional implied powers. Part II will address the application of the principle of proportionality in Europe, and its meaning and scope within the European public law tradition, with a particular emphasis on Germany where the principle was born, and is now applied without any consideration for a federalist agenda—a further proof that proportionality is a powerful instrument which could better serve the protection of civil rights. The problem is to learn how to use it.

1. RATIONALE

In a thorough investigation on the “appropriate” constraints that should bear, in his view, on the powers carried out in pursuance of Section 5 of the Fourteenth Amendment, Professor Evan H. Caminker raises a key question—if not THE question—on the new test. He says: “[T]he question remains what *justifies* this insistence uniquely in the Section 5 context.”³³ The answer in my opinion is deceptively simple: Section 5 gives Congress an “enforcement” power. Here is the problem.

“Enforcement” contains the word “force.” As its etymology suggests, “enforcement” means resorting to force in order to compel obedience to the law. An enforcement power necessarily implies a power to coerce, to punish, to inflict a certain amount of harm, and to bring about one’s will. There is, of course, nothing especially remarkable about Congress having the power to enforce. From the beginning of the American republic in 1787, the Congress of the United States has been wielding the power to coerce. Indeed, it is with that power that the federal government became a “real” government, radically different from the former confederation, which was—according to Hamilton—“a government destitute even of the shadow of constitutional power to enforce the execution of its own laws.”³⁴ All this is well-known and does not deserve extensive analysis. What does deserve careful attention is the exact reach that was given in 1787 to congressional enforcement powers and what happened to that great design with the civil rights revolution.

A. The Great Design of 1787

It is true that the Federal Constitution gave enforcement powers to the Congress from the very beginning of the American republic in 1787. But it never granted Congress unlimited, unrestricted powers to coerce. Particularly wary of keeping the federal structure of the Union, the Founders gave the new government the power to coerce individuals only, not states. Empowering the federal government to reach the individual beyond and over the state was “one of the great discoveries of political science in our age,” according to Alexis de Tocqueville.³⁵ The truth of the matter is

33. Caminker, *supra* note 15, at 1168 (emphasis in original).

34. THE FEDERALIST NO. 21, at 124 (Alexander Hamilton) (Robert Scigliano ed., 2000).

35. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 142 (George Lawrence trans., Harper & Row 1966) (1835).

that, in doing so, the Founders invented federalism.³⁶ Federalism does not mean that the Constitution cannot reach states and exercise on them a form of coercion by stripping them of some of their powers. The Constitution does reach the states—it does coerce them—but it does so always in a negative manner by imposing prohibitions on them or by forbidding them to do certain things, as is exemplified in the long list of prohibitions of Article I, Section 10.³⁷ The crucial point is that the Constitution does not give the federal government the power to coerce the states by subjecting them to positive obligations to do certain things. On the contrary, the Constitution was carefully designed to keep states as immune as possible from the reach of the federal government, save, of course, for the limited and enumerated powers transferred to the federal government. Everything was designed to keep the federal government from imposing positive obligations, or affirmative duties on states.

The great design of the Founders did not mean that states were immune from any form of constraint whatsoever. States assuredly could be coerced. But the coercion they were subject to was that of the Constitution, not that of the federal government.³⁸ It was the Constitution, not Congress or the President, that directed state authorities to deliver felons found on their territory to the state having jurisdiction of the crime,³⁹ or that obligated state courts to implement and give priority to federal law even over state constitutional law.⁴⁰ Even within the framework of the two narrow exceptions that give Congress the power to direct states with respect to federal elections⁴¹—a power itself

36. In choosing to reach individuals instead of states, the Founders discovered the ways of subjecting states to a higher law. To that extent, they discovered modern international law, which in contradistinction with European legal thinking, circumvents sovereignty by empowering the individual with obligations and rights that gave him or her the means of subjecting the sovereign state to the law. For an exposition of the contribution of American federalism to modern international law, see ELISABETH ZOLLER, *Aspects internationaux du droit constitutionnel: Contribution à la théorie de la fédération d'Etats*, in RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE ¶¶ 152-53 (forthcoming 2003).

37. Article I, Section 10, written in a negative form, lays down prohibitions against states:

[1] No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No state shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another state, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10.

38. For an interpretation more favorable to congressional power over states, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1032 (1995).

39. See U.S. CONST. art. IV, § 2, cl. 2.

40. See U.S. CONST. art. VI, cl. 2.

41. See U.S. CONST. art. I, § 4, cl. 1.

subject to exceptions as to the places of choosing senators—and of calling forth and organizing the militia,⁴² the Federal Constitution does not expressly grant Congress the power to coerce states in their corporate capacities. Even supposing some coercion had to be resorted to with respect to these two clauses because of a hypothetical noncompliance by states, the question remains open whether Congress could lawfully do anything other than coerce individuals, not states. It is, at best, very doubtful that Congress could lawfully take, for instance, economic sanctions against delinquent states.

That the federal government was given the power to coerce individuals only, not states, is plainly clear in the Philadelphia debates. According to the report that Madison made of the May 30, 1787, debate at the Federal Convention:

Mr. Mason observed that the present confederation was not only deficient in not providing for coercion & punishment agst. delinquent States; but argued very cogently that punishment could not in the nature of things be executed on the States collectively, and therefore that such a Govt. was necessary as could operate on individuals, and would punish those only whose guilt required it.⁴³

The Founders scrupulously applied the ingenious idea. They applied it so well that on July 14, when Madison called “for a single instance in which the Genl. Govt. was not to operate on the people individually,” he did not get a single one from the delegates because by that time, as he had understood it well from the beginning, “[t]he practicability of making laws, with coercive sanctions, for the States as Political bodies, had been exploded on all hands.”⁴⁴

A few months later, Hamilton made, in substance, the same point. As he explained to the people of New York what had been done to remedy the defects of the Confederation, he recalled that there were two ways to enforce the law: “by the COERCION of the magistracy, or by the COERCION of arms.”⁴⁵ Then, expounding the superiority of the proposed government over all the other federal arrangements that had existed before, Hamilton insisted on the fact that this was because the new government would operate on the individuals, not on the states directly. In Hamilton’s own words, the government established by the Constitution would “substitut[e] *violence* in the place of *law*, or the destructive *coercion* of the *sword* in place of the mild and salutary *coercion* of the *magistracy*.”⁴⁶

The inspired idea of obtaining compliance with the supreme law of the land by coercing individuals instead of states underwent great changes after the Civil War. The problem came from the fact that in order to eradicate all badges and incidents of slavery, coercing individuals was not enough. States, too, had to be coerced, and in

42. See U.S. CONST. art. I, § 8, cl. 15-16.

43. *Debate of 30 May 1787*, in NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON, at 35 (W.W. Norton & Co. 1966) [hereinafter NOTES BY MADISON].

44. *Debate of 14 July 1787*, in NOTES BY MADISON, *supra* note 43, at 294.

45. THE FEDERALIST NO. 15, *supra* note 34, at 91 (Alexander Hamilton) (emphasis in original).

46. THE FEDERALIST NO. 20, *supra* note 34, at 123 (Alexander Hamilton) (emphasis in original).

particular, the former confederate states, whose defiant legislatures and arrogant officers did not want to apply the new principle of freedom and equality before the law. In conformity with the federal principle discovered at Philadelphia, Congress resolved that the states would be coerced by law, not by force; coerced indirectly, not directly. The need to coerce states by law was so vital that the first version of the Fourteenth Amendment as it was introduced in February 1866 by Mr. Bingham provided as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all the 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.⁴⁷

However, the final version that came into force in 1868 reads:

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.⁴⁸

What happened between the two versions? What was the reason for the change?

According to the explanations given by Mr. Bingham in response to a question raised by Rep. Farnsworth on March 31, 1871:

I answer the gentleman, how I came to change the form of February to the words now in the first section of the fourteenth amendment, as they stand . . . in the Constitution . . . I had read—and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States—the great decision of Marshall in *Barron vs. the Mayor and City Council of Baltimore*, wherein the Chief Justice said . . . “The Amendments [to the Constitution] contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them”—7 Peters, p. 250.

In reexamining that case of *Barron* . . . after my struggle in the House in February, 1866 . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: “Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.”

Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said “no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;” imitating their example and imitating it to the letter, I prepared the provision of the first section of

47. CONG. GLOBE, 42d Cong., 1st Sess. 83 app. (1871).

48. U.S. CONST. amend. XIV, § 2, cl. 2.

the fourteenth amendment as it stands in the Constitution⁴⁹

The change made in Section 1 of the Fourteenth Amendment had important consequences on the eventual scope of Section 5. In addition to the fact that the final version hampered Congress in the primary and direct implementation of the commands of the amendment, the negative stylistic form of Section 1, which incidentally was duplicated in the Fifteenth Amendment, made enforcement of both the Fourteenth and the Fifteenth Amendments, conditional upon, and subject to, state action.

As the Supreme Court put it in the *Civil Rights Cases* when it construed “the last section of the amendment [that] invests Congress with power to enforce it by appropriate legislation”⁵⁰ there is one possible answer, and only one, to that question about Section 5, “[t]o enforce what?”⁵¹ The answer is, “[t]o enforce the prohibition.”⁵²

But enforcing the prohibition is not enforcing the rights given by the amendment. First, it may not become a reality and be meaningful unless the prohibition is actually transgressed. Second, and more importantly, it confines Congress to defining the operation, not the extent, of the amendment’s rights. Concretely speaking, the combination of the enabling clauses with the negative stylistic form of the prohibitive clauses means that congressional enforcement powers are subject in their operation to preliminary states’ transgressions. Congressional enforcement powers under both the Fourteenth and Fifteenth Amendments are indirect and secondary. Time becomes the essence, so to speak.

Most civil rights advocates wish that these powers were direct and primary so that Congress could reach the individual, and empower him or her with those rights and entitlements that are common in advanced democratic societies. There is no doubt that their desires and expectations are legitimate as a matter of policy. The difficulty, however, is that Congress was given the power to reach the individual directly within the scope of enumerated powers only. Should these limits be ignored, that is, should Congress be given the power to reach the individual beyond them, the federal government would no longer be “federal,” but “consolidated,” just as the government of a unitary state. It would become exactly what the Founders did not want it to be when they chose to establish “a more perfect Union.”⁵³

The only exception to the necessary limits of congressional powers with respect to civil rights is to be found in the Thirteenth Amendment, which is subject to very different standards than the Fourteenth Amendment. As the Court made clear in the *Civil Rights Cases*, “[u]nder the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not”⁵⁴ According to the Court, Section 2 of the Thirteenth Amendment invests “Congress with power to pass all laws necessary and

49. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (citations omitted) (emphasis in original).

50. 109 U.S. 3, 11 (1883).

51. *Id.*

52. *Id.*

53. U.S. CONST. pmbl.

54. *Civil Rights Cases*, 109 U.S. at 23.

proper for abolishing all badges and incidents of slavery in the United States”⁵⁵ This is not the place to discuss the wisdom or legitimacy of putting congressional enforcement powers under the Thirteenth Amendment in a sanctuary regulated by a law of exception. Suffice it to say that, in the light of American constitutional and political history, this judicial policy had its own logic that satisfied both common sense and justice.

B. The Turning Point of the Civil Rights Revolution

The logic of federalism was lost to sight in the 1960s, when Congress responded to the civil rights movement with landmark legislation. At that time, Congress had to resort to the Commerce Clause in order to protect the Civil Rights Act of 1964 from the lethal reach of the state action doctrine under the *Civil Rights Cases*. This ingenious device proved successful, and the Court acquiesced to it without difficulty.⁵⁶ These two cases made a great impression on American legal minds. Not only did they give the impression that, once again, the Commerce Clause was virtually without limits,⁵⁷ but they also led enthusiastic supporters of the civil rights movement to believe that the enforcement of civil rights was an implied power of Congress since it, too, was subject to the same means-end test that has applied to the construction of implied powers since *McCulloch v. Maryland*. In that case, Marshall defined the rule of interpretation applicable to implied powers as follows: “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.”⁵⁸

A common constitutional belief since the 1960s, the fungibility of congressional powers, whether they are commerce or enforcement powers, into a single unique category, raises certain difficulties in relation to the constitutional foundation of federalism. The Commerce Clause and the Fourteenth Amendment are different in terms of the powers they both give to Congress. While the former gives Congress a proper power, the latter gives it nothing, so to speak, except an enforcement power that is neither primary nor direct, because it is subject to state action. As a result, enforcement legislation enacted in pursuance of proper powers may certainly be reviewed lightly only under a generously construed means-ends test, because such powers are not directly coercive on states. However, subjecting enforcement legislation in pursuance to Section 5 of the Fourteenth Amendment to the same test puts federalism at risk. Should there not be some congruence between the origin and basis of a power and its object or purpose? The question deserves some consideration.

It is one thing to make law in accordance with the enumerated powers of the Constitution; it is quite another to enforce it by punishment and coercion. In the first case, it makes perfectly good sense to say, “Let the end be legitimate . . . and all means which are appropriate . . . are constitutional.”⁵⁹ However, applying the same rule of

55. *Id.* at 20.

56. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252 (1964); *Katzenbach. McClung*, 379 U.S. 294, 305 (1964).

57. See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942).

58. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

59. *Id.*

construction to punitive, coercive measures taken against states for allegedly unconstitutional conduct would soon turn federalism into a constitutional relic. To avoid such an extremity, the *Boerne* Court implicitly decided that congressional enforcement powers under Section 5 of the Fourteenth Amendment are no longer to be regarded as implied or incidental powers, at least for constitutional interpretation purposes.⁶⁰ What remains unclear at this point is whether the same approach will apply to congressional enforcement powers under Section 2 of the Fifteenth Amendment.

Whether they are carried out in pursuance of the Fourteenth or the Fifteenth Amendments, congressional enforcement powers are based upon, and derive from, previous state action, not from proper powers. Like the implied powers, they certainly do contribute to "the happiness and prosperity of the nation," and they are granted "for the public good," as Marshall put it in *McCulloch v. Maryland*.⁶¹ However, unlike implied powers, congressional enforcement powers are not necessary for "the execution of those great powers on which the welfare of a nation essentially depends;"⁶² they are neither "calculated to subserve the legitimate objects of th[e] government,"⁶³ nor "incidental to those powers which are expressly given, if it be a direct mode of executing them."⁶⁴ Had they not be given to Congress, the operations of the federal government would not have become "difficult, hazardous, and expensive."⁶⁵ The truth of the matter is that enforcement powers are not similar to the other implied powers of Congress. They serve different objects and purposes. Therefore, as the Court seems to have decided in *Boerne*, there is effectively no logic in applying to them the *McCulloch* means-ends test. For the Court, Congress has no proper powers in the field of civil rights, nor does it have implied or incidental ones; it has in that field enforcement powers only, and what it does with them must be congruent with the federal structure. According to the Court, that result will be achieved by subjecting congressional enforcement powers to a test of proportionality. If that is the rationale of *Boerne*, what can be expected from the new test remains to be seen.

II. APPLICATIONS

The congruence and proportionality test that now applies to congressional enforcement powers is a foreign transplant. It bears witness that we live in a global world where the Justices of the Supreme Court of the United States travel, talk to foreign colleagues, occasionally read their opinions, and exchange ideas with them. Whether it takes place conscientiously or not, cross-pollination between legal systems is a reality.⁶⁶ Some legal scholars defend a totally different approach to the new

60. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

61. *McCulloch*, 17 U.S. at 408.

62. *Id.* at 415.

63. *Id.* at 411.

64. *Id.*

65. *Id.* at 408.

66. Justice O'Connor's address to the Worldwide Common Law Judiciary Conference in 1998 is a perfect illustration of the reality still much overlooked in American legal academia. She said, "Laws are organic, and they benefit from cross-pollination. We should keep our eyes open for innovations in foreign jurisdictions that, with some grafting and pruning, might be

congruence and proportionality test on the grounds that the notion of proportionality comes from the law of remedies, and that the new test derived therefrom is nothing but a reaffirmation of the means-ends test invented by Marshall in *McCulloch v. Maryland* to review the constitutionality of implied powers.

A. True and False Proportionality

The word "proportionality" is not unknown in the American legal system, and it has been invoked in the law of remedies. But it is seldom applied as a legal concept. In the field of civil or criminal remedies, the idea of proportionality is not germane to American legal thinking. Whether the remedy is colossal punitive damages that serve to deter future wrongdoers and induce compliance with the law, or the death penalty, which carries out retribution for the victims and avenges society, the idea that the punishment must be proportionate to the wrong is still very remote in American legal culture, to say the least.⁶⁷ For better or for worse, the American legal system has

transplanted to our own legal system." Sandra Day O'Connor, Commentary, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Law., Sept. 1998, at 20. Interestingly, Justice O'Connor also declared:

As the American model of judicial review of legislation spreads further around the globe, I think that I, and the other justices of the Supreme Court, will find ourselves looking more frequently to the decisions of other constitutional courts. . . .

I have had the wonderful opportunity to participate in several exchanges—exchanges with judges and lawyers in Great Britain, in France, in India, in Canada, and in Australia, for example. We have compared approaches to criminal law, to administrative law, to court management, and to constitutional law. There are many interesting examples of borrowing foreign legal ideas one from another.

Id. at 20-21.

American legal scholars set great store by Justice Scalia's memorable unconditional rejection in *Printz v. United States* of Justice Breyer's suggestion to turn to the federal systems of Switzerland, Germany, and the European Union when interpreting the Constitution of the United States. See *Printz v. United States*, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting). Authoring the majority opinion, Justice Scalia in a footnote expressed the view that "such comparative analysis [was] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one The fact is that our federalism is not Europe's." *Id.* at 921 n.11. One should pay close attention to the energetic response of Justice Ginsburg to Justice Scalia's refusal of foreign transplants, which reads, "In my view, comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups." Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) (emphasis in original). That response is particularly important in the light of what can be done with the principle of proportionality. See discussion *supra* notes 5-32 and accompanying text.

67. As far as criminal punishment is concerned, cases like *Harmelin v. Michigan*, 501 U.S. 957 (1991), apparently put proportionality to rest once and for all. In that case, Justice Scalia, writing the judgment of the Court, joined only by Chief Justice Rehnquist on that excerpt, affirmed:

We think it enough that those who framed and approved the Federal Constitution

chosen to make disproportion the yardstick of punishment for deterrence purposes. It still stands in many respects as one of the most severe, if not the harshest system, among common and civil law countries belonging to the Western legal tradition. An evolution, however, is under way, as exemplified by the recent case law on the Excessive Fines Clause.⁶⁸ But this development is much too recent and has not yet matured enough to conclude that proportionality is a well-established notion in the law of American remedies.

Professors Hamilton and Schoenbrod suggest that the congruence and proportionality test is nothing but a reaffirmation of “time-honored constitutional and remedial principles that have long limited Congress’s power under the Fourteenth Amendment.”⁶⁹ According to this view, there is no difference between the means-end test of *McCulloch* and the congruence-proportionality test of *Boerne*: “Proportionality review requires that the means fit the end, the means being legislation and the end being enforcement of the Fourteenth Amendment’s constitutional proscriptions.”⁷⁰ This analysis sticks too much to the narrative of the opinions and fails to take into consideration the context in which the two tests actually operate. Professor Hamilton does not see that the Court’s thorough and meticulous constitutional review of RFRA in *Boerne* has nothing in common with the light overall judicial review of the Act Incorporating the Bank of the United States in *McCulloch*. There are major differences between the two cases and the two tests. The former differs in terms of the object and the purpose of the congressional powers at stake. The latter operates on different premises and looks for different results. The means-end test bears witness to the trust the judge has in the legislature: “Let the end be legitimate,”⁷¹ an admonition that means, “Let us not intrude into the motives of the legislature. Let us assume that the end is legitimate.” It is aimed at empowering Congress to the fullest possible extent, “all means which are appropriate . . . are constitutional.”⁷² On the contrary, the congruence and proportionality test operates on a premise of distrust of Congress: “Congress’ power under [Section] 5, however, extends *only* to ‘enforc[ing]’ the provisions of the Fourteenth Amendment.”⁷³ It is directed at calling Congress to order: “When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the

chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. . . . The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

Id. at 985-86 (emphasis in original).

68. See, for instance, *United States v.ajakajian*, 524 U.S. 321, 334 (1998), where Justice Thomas, delivering the opinion of the Court, affirmed, “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”

69. Hamilton & Schoenbrod, *supra* note 14, at 470.

70. *Id.* at 473.

71. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

72. *Id.* (emphasis added).

73. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (emphasis added).

Constitution.”⁷⁴ Therefore, the alleged similarity between the two tests rests too much on their appearances and misses the actual purpose of each test.

If an analogy to the proportionality principle had to be found in current American law, the closest would be the overbreadth doctrine that comes into play to invalidate laws that sweep in too much speech. The Supreme Court unknowingly summarized very well the thrust of the European principle of proportionality in *NAACP v. Alabama ex rel. Flowers*: “This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”⁷⁵ This statement sounds very much like what the Swiss jurist Fritz Fleiner said in 1911 when he epitomized the test of proportionality as follows: “You must not shoot sparrows with cannons.”⁷⁶ Indeed, the doctrine of proportionality calls for an appropriate and reasonable relationship between the ends sought by a public authority and the means chosen to attain them. The difference, however, between the principle of proportionality and the overbreadth doctrine is that whereas the American judge under the latter claims not to balance the respective interests in the case,⁷⁷ the European judge under the proportionality principle does take an active part in the law-making process, and actually decides what the proper balance is. The proportionality principle enhances and aggrandizes the power of judicial review.

74. *Id.* at 535.

75. 377 U.S. 288, 307 (1964).

76. FRITZ FLEINER, *INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS* (1911) (quoted by PIERRE MOOR, *Systématique et illustration du principe de proportionnalité*, in *MÉLANGES EN L'HONNEUR DE MICHEL FROMONT: LES DROITS INDIVIDUELS ET LE JUGE EN EUROPE* 319 (2001)). The British equivalent metaphor was recently given by Lord Diplock in *R. v. Goldstein*, “You must not use a steam hammer to crack a nut, if a nutcracker would do.” [1983] 1 W.L.R. 151, 155, [1983] 1 C.M.L.R. 244, 247 (H.L. 1983).

77. See, for instance, Chief Justice Warren’s disavowal of any substantive “balancing” in *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967):

In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way “balanced” those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. There is, of course, nothing novel in that analysis. Such a course of adjudication was enunciated by Chief Justice Marshall when he declared: “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.” *McCulloch v. State of Maryland*, 4 Wheat. 316, 421 4 L.Ed. 579 (1819) (emphasis added). In this case, the means chosen by Congress are contrary to the “letter and spirit” of the First Amendment.

As exemplified by this excerpt, the proportionality test as applied in the recent cases under review in this symposium has nothing in common with the means-ends test of *McCulloch* that was still the standard test in 1967. The judicial modesty that it then purported to illustrate is today a story of the past.

B. The Principle of Proportionality in Germany and in Europe

The congruence and proportionality test comes from Europe.⁷⁸ It is the American version of a principle that initially originated in German administrative law almost two centuries ago, and that eventually became a central feature of human rights judicial protection in constitutional democracies. In the Nineteenth century, the Prussian administrative tribunal used to verify that the interventions of the administrative authorities into economic and social life under their police powers were necessary. Originally used as a means of limiting police powers, the proportionality principle became the yardstick to evaluate administrative, discretionary executive action. Concretely, German administrative courts always addressed two separate questions: (1) whether the intervention had a legal basis; and (2) whether the rule was proportionate to the goal sought by the administration.⁷⁹

After 1945, due to the activism of the German Constitutional Court eager to compensate for the egregious violations of human rights committed under the Nazi regime, the principle of proportionality was transplanted from administrative law into constitutional law, the leading case on that score being the *Pharmacy Case*.⁸⁰ In constitutional law, the concept of proportionality took on a new dimension. In addition to being a test for judicial review of administrative discretionary action, proportionality became, over the years, a principle of constitutional interpretation. Thus, in contemporary German public law, the two faces of the proportionality principle are closely intertwined, not separate. Two sides of the same coin, they give life to a principle that must be considered as a basic tenet of the rule of law as it is understood in Germany through the concept of *Rechtsstaat*. The dual meaning of the principle of proportionality can be presented as follows.

First, the principle of proportionality is a test for reviewing the conformity to the

78. In many ways, this could be viewed as a just and fair return of history. Over the last fifty years, the ECJ turned numerous times to American constitutional law to decide issues of the EC Treaty—a ‘constitution’ by its substance, if not by its title—and it developed Community law in line with United States constitutional law on several issues, such as the rules and principles necessary to protect the Community market against assertions of national power, or the implied competences of the European Commission. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 31-36, 317-18 (1993). The influence of the implied powers theory is manifest in the famous case, *Commission v. Council (ERTA)*, Case 22/70, 1971 E.C.R. 263, in which the Court decided that the Commission must be granted the powers (to wit, in that particular case, the treaty-making power) necessary to carry out a common policy explicitly provided for in the treaty. See KOENRAAD LENAERTS, *LE JUGE ET LA CONSTITUTION AUX ÉTATS-UNIS D’AMÉRIQUE ET DANS L’ORDRE JURIDIQUE EUROPÉEN* (1988), for the leading book on American transplants in European Community law. See also, Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

79. On the historical developments of the proportionality principle in Germany, see ERNST FORSTHOFF, *LEHRBUCH DES VERWALTUNGSRECHTS* (9th ed. 1966); HARTMUT MAURER, *ALLGEMEINES VERWALTUNGSRECHT* (10th ed. 1995).

80. 7 BVerfGE 377 (1958). The German Constitutional Court held that a law limiting the number of pharmacies within a district in order to avoid the harmful effects of competition entailed disproportionate restriction on the freedom to choose one’s profession. See *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 274-78 (Donald P. Kommers trans., 1997) [hereinafter Kommers] (translating the *Pharmacy Case* into English).

law of any public discretionary action, whether it is an act of Parliament,⁸¹ or an administrative decision.⁸² It is the yardstick for measuring the appropriate relationship between the ends and the means of discretionary action. The principle of proportionality is considered to be satisfied if three conditions are met: (1) the act must be appropriate (*geeignet*), which implies a choice of means tailored to the achievement of the ends (as the idiomatic expression goes: "one has to cut the coat according to the cloth"); (2) the act must be necessary (*erforderlich, notwendig*), which would not be the case if the ends could be achieved with less restrictive or burdensome means; and (3) the act must be proportionate strictly speaking (*verhältnismässig*), which means that its costs must remain less than the benefits secured by its ends.⁸³

Second, the principle of proportionality is a principle of constitutional interpretation. This is so because in order for the balancing test of proportionality between ends and means to be meaningful, it must be effectuated in consideration of a third element, a *tertium comparationis* (insofar as a comparison between two things is necessarily made in relation to third parameters).⁸⁴ In constitutional law, the parameters of the balancing test are by logical implication the values enshrined in the Constitution. The appropriateness, or the fitness, of the relationship between the ends and means of the act takes place in, and depends on, a broad context of fundamental values (*Grundrechte*, i.e., basic rights), structuring principles (*Bundesstaat*, i.e., federal

81. For important developments on the principle of proportionality in German constitutional law, see KONRAD HESSE, *GRUNDZÜGE DER VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* § 10, at 142 (20th ed. 1995). See also CHRISTIAN AUTEXIER, *INTRODUCTION AU DROIT PUBLIC ALLEMAND* § 97, at 107-08 (1997); DAVID CAPITANT, *LES EFFETS JURIDIQUES DES DROITS FONDAMENTAUX EN ALLEMAGNE* §§ 213-23, at 158-66 (2001).

82. On the principle of proportionality in German administrative law, see MAURER, *supra* note 79, § 10, at 233. Georg Nolte, *General Principles of German and European Administrative Law—A Comparison in Historical Perspective*, 57 *MOD. L. REV.* 191, 193, 201-02 (1994).

83. See HESSE, *supra* note 81, at 142. See also Ben-Atiya, 49(5) *P.D.* at 12-13 for a definition of the principle of proportionality by Justice Barak of the Israeli Supreme Court.

In the majority of legal systems, in which the principle of proportionality is accepted, it has been held that it comprises three elements, or subsidiary tests. The first element of the proportionality test states that there must be compatibility between the purpose and the means. The means which the administration applies must be shaped to achieve the purpose which the administration wishes to achieve. The means must lead in a rational manner to the realization of the purpose. This is the test of the suitable means or the rational means. . . .

The second element which makes up the proportionality, holds that the means which the administration selects must injure the individual to the least possible extent. The administrative tailor must sew the administrative suit in such a manner that it is tailored to the purpose guiding him, while choosing the means least injurious to the person. This is the test of the means of least injury. . . .

The third element of the proportionality test states that the means which the administration chooses is not proper, if the injury to the individual is disproportionate to the benefit which it achieves in implementing the purpose. This is the test of the proportional means (or the proportionality in the 'narrow sense').

Bracha, *supra* note 20, at 638 n.285.

84. For illuminating explanations of what "comparison" means in German legal theory, see OLIVIER JOUANJAN, *LE PRINCIPE D'ÉGALITÉ DEVANT LA LOI EN DROIT ALLEMAND* 233-34 (1992).

state), or constitutional principles (*Demokratie, Sozialstaat*, i.e., welfare state) formally written in the black letter law of the Constitution (*Grundgesetz*), and regarded as directly applicable by the Federal Constitutional Court.⁸⁵ Crucial for the determination of the appropriate character of the relationship between ends and means of parliamentary enactments are Articles 1-19 of the Constitution, which enumerate the fundamental rights of the German people, together with Article 20(1), which provides: "The Federal Republic of Germany is a democratic and social federal state."⁸⁶

A milestone in German constitutional history took place in 1951, when the Constitutional Court established in the *Southwest State Case*⁸⁷ the concept of the Constitution as a structural unity (*Einheit des Verfassung*) governed by a principle of concordance, or harmony, or congruence (*praktischer Konkordanz*), according to which constitutional values must be reconciled with one another whenever they happen to conflict. As Kommers rightly comments: "One constitutional value may not be realized at the expense of a competing constitutional value."⁸⁸ In case of conflict between two values, everything must be done so that both values can be regarded as congruent with each other. A leading German constitutional law expert, former justice Konrad Hesse, comments on the self-regulating principle of congruence and proportionality as follows:

The principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.⁸⁹

Taken this far, the principle of proportionality is no longer a test of judicial review of state discretionary action only; it is a principle of constitutional interpretation aimed at avoiding policies that are excessive and promoting mutual toleration.⁹⁰ Under such an encompassing approach, congruence and proportionality are not severable; they are two sides of the same coin.

Against this German background, the reading of *Boerne, Florida Prepaid, Kimel, Morrison*, and *Garrett* leaves the European reader with an impression of déjà-vu. In particular, the famous phrase in *Boerne*, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"⁹¹ sets out the guiding law applicable to congressional implementation of Section 5 of the Fourteenth Amendment, and rings familiar to European ears. The oddity comes from the fact that the Court adapted the proportionality principle to the

85. See Kommers, *supra* note 80, at 30, 34, 38-39.

86. *Id.* at 507-10.

87. 1 BVerfGE 14 (1951). See also Kommers *supra* note 80, at 62-66.

88. Kommers, *supra* note 80, at 46. A landmark case on the congruence principle is the *Classroom Crucifix II Case* (1995), 93 BverfGE 1, translated and commented on by Kommers, *supra* note 80, at 472-83.

89. HESSE, *supra* note 81, § 72, at 28; Kommers, *supra* note 80, at 46.

90. This approach is well explained in David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 82, 91 (2001).

91. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

specific needs of the American constitutional system in a painstaking effort to rescue federalism. This has never been done before. Courts usually apply the criteria of the proportionality principle to laws that infringe on the rights of individuals, not of States. This is why proportionality plays such an important role in human rights cases.

Curiously, in none of the cases previously mentioned (*Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, or *Garrett*) did the Court apply the balancing test of proportionality for the benefit of individuals. Clearly, in these five cases, the Court was not concerned with the impact of congressional action on individual rights.⁹² The real and sole concern of the Court was the negative impact of congressional enactments on States rights.⁹³ What apparently was under threat for the majority was the fate of the seminal “doctrine of coordinate sovereignty that . . . place[s] limits on even the enumerated powers of the National Government in favor of protecting States prerogatives.”⁹⁴ The Court had long looked for a principled way to rescue this doctrine that still is, for better or for worse, the genius of American federalism. It apparently found it in the proportionality analysis. Against the German background previously explained, it looks, indeed, as if the Court discovered that states too had rights just like individuals, that they could be abused just like the latter, and that their “fundamental rights” ought to be guaranteed by the same principle of congruence and proportionality that protects human rights.

Theoretically, it is not inconceivable to apply a proportionality analysis to constitutional issues unrelated to human rights, such as the thorny distribution of powers between the states and the federal government of a union of states. Such is the case in the European Union, where the principle of proportionality is recognized as a “principle” of Community law in Treaty of the European Union Article 5(3) [ex Article

92. Had the Court, for instance, carried out a proportionality analysis for the benefit of individuals in the three cases dealing with states’ sovereign immunity, it would have balanced the rights of authors and inventors (in *Florida Prepaid*), aged people (in *Kimel*), and disabled people (in *Garrett*) against the right of the states not to be sued. Then, the only relevant question in terms of an authentic proportionality analysis would have been: Do the rights of the former outweigh the rights of the latter in light of the ends pursued by Congress? The question leaves no great doubts as to what the answer would have been.

For powerful criticisms of the Court’s application of the congruence and proportionality test, see Sylvia A. Law, *In The Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspirations*, 113 HARV. L. REV. 29 (1999).

93. To some extent, *Boerne* takes place as a logical consequence of *New York v. United States*, 505 U.S. 144 (1992). For, if Congress must abide by the three prerequisites of the congruence and proportionality test (appropriateness, necessity, and proportionality) before enacting any piece of legislation in pursuance of Section 5 of the Fourteenth Amendment, it definitely could no longer be in a position to “commandeer” states. Threats of suits in federal courts could even induce Congress to literally “negotiate” with states the most appropriate, most necessary, and better fitted legislation to prevent or to remedy injuries to civil rights. A civilized dialogue would supplant the former authoritative commandments. That some Justices may welcome such developments is possible. Whether their expectations are realistic remains to be seen.

94. *Monell v. Dep’t of Soc. Serv. of New York*, 436 U.S. 658, 676 (1978).

3b]: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of [the] Treaty.”⁹⁵ Still, when the ECJ happens to apply the said principle, it is always in relation to individual rights, more precisely in the ECJ vocabulary, the rights of “economic operators,” not States’ rights.⁹⁶ As to the relations between the Member States and the European Union, they are governed by other principles than the principle of proportionality, in particular the principle of loyalty⁹⁷ and the principle of subsidiarity.⁹⁸

Whether or not the congruence and proportionality test will succeed in restoring the American “federal balance” is still an open question. The test has already been applied in several instances,⁹⁹ mostly in relation to state sovereign immunity, which is perhaps not the topic with respect to which it may prove to be the most useful.¹⁰⁰ At any rate, it will take a few years before we can appreciate the size and the taste of fruit produced by the tree. The only thing that matters at this point is that the tree is planted.

This Article has tried to demonstrate that it is not possible to explain *Boerne* without reaching the inevitable conclusion that the Court decided, apparently unanimously, to sever congressional enforcement powers from other ordinary powers of the national legislature usually subject to a means-end test, and to consider them as a category of powers governed by a principle of proportionality. If the thesis advanced in this Article proves to be true, the consequences are vertiginous, particularly in relation to the Equal Protection Clause. Assuming that legislation enacted pursuant to the Equal Protection Clause must conform to the principle of proportionality, at least two major constitutional changes would ensue. First, there would no longer be a need to

95. Treaty of Amsterdam Amending the Treaty on European Union, Oct. 2, 1997, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, art. 5 (ex art. 3b) O.J. (C 340) 173, 183 (1997).

96. See, e.g., Case 15/83, *Denkavit Nederland BV v. Hoofdprodukschap voor Akkerbouwprodukten*, 1984 E.C.R. 2171, § 24-33; Joined Cases 279, 280, 285 & 286/84, *Rau v. Comm’n*, 1987 E.C.R. 1069 § 146-56; Case 265/87, *Schröder v. Hauptzollamt Gronau*, 1989 E.C.R. 2237, § 21-22.

97. Article 10 Treaty of the European Union [ex Article 5]:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the Institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

98. Article 5(2) Treaty of the European Union [ex Article 3b]:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

See also George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and The United States*, 94 COLUM. L. REV. 331 (1994).

99. See, e.g., *Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000).

100. Lauren K. Robel, *Sovereignty and Democracy: The States’ Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543 (2003).

differentiate between different levels of judicial scrutiny.¹⁰¹ All levels of judicial scrutiny would be smoothed away under one single test of proportionality, all minorities would be equally protected against discrimination, and “race” would no longer require a level of scrutiny more “strict” than the other classifications between people. Second, and conversely, proportionality is a flexible test that can be adjusted to all kinds of situations. Thus, affirmative action programs would no longer be likely to be struck down because, depending on the circumstances, such programs may be “appropriate,” “necessary,” and “proportionate” to remedy past injustices.

Whatever the future of proportionality will be in United States constitutional law, it will take a few years before we can decide whether the congruence or proportionality test was a cosmetic change, a facelift of an old much-honored test, or a velvet revolution that opened American constitutional law to the beneficial influence of a long, solid, and now-entrenched European legal tradition.

101. Currently, there is an incredibly complex scheme of different standards of review under the Equal Protection Clause. As Professor Kelso perspicuously remarks: “[R]ecent Supreme Court cases suggest that the Justices are at a crucial point in their elaboration of the doctrine regarding standards of review.” R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225 (2002).