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SYMPOSIUM

CONGRESSIONAL ENFORCEMENT OF TRANSGENDER RIGHTS: REMEDYING ANTI-TRANSGENDER CONSTITUTIONAL HARMS UNDER THE ENFORCEMENT CLAUSE

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INTRODUCTION

Over the past five years, trans Americans have faced a number of intrusions on their rights. States across the country have enacted laws that "bar trans participation on sports teams, ban the use of bathrooms consistent with one's gender identity, prevent access to accurate identification documents, prohibit drag shows, prevent the discussion of queer identities in public schools, and ban queer books."[1] Perhaps the most harmful and widespread of these laws are those banning trans youth from accessing gender-affirming care.[2] Going through puberty is a

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[1] Scott Skinner-Thompson, Trans Animus, 65 B.C. L. Rev. 965, 968 (2024).

[2] See Kiara Alfonseca, Record Number of Anti-LGBTQ Legislation Filed in 2023, ABC News (Dec. 28, 2023, 5:59 AM), https://abcnews.go.com/US/record-number-anti-lgbtq-legislationfiled-2023/story?id=105556010 [https://perma.cc/2VBX-K8F2] ("The vast majority of legislation passed across the country has impacted gender-affirming care for minors . . . ."); Christy Mallory & Elana Redfield, Williams Inst., UCLA Sch. of L., The Impact of 2023

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difficult experience for any adolescent. But for trans youth, the experience can be excruciating. Without access to gender-affirming care, trans youth may face "severe mental health problems, including depression, social anxiety, and suicidal thoughts and behavior."[3] Thus, "[e]very major medical association and leading world health authority supports health care for transgender people and youth."[4]

Under current law, even if these gender-affirming care bans are found to be unconstitutional, trans youth will have no remedy for the harms they face until the laws are struck down. States enjoy sovereign immunity from most actions seeking monetary relief.[5] With sovereign immunity in place, the only remedy available is prospective relief preventing the states from engaging in future unconstitutional conduct.[6] Trans youth must therefore bear the costs of puberty, and of reversing the changes that puberty causes, on their own.[7]

By enacting and enforcing anti-trans measures, however, states have opened the door—and their wallets—for congressional intervention. This Essay argues that, because the recent proliferation of anti-trans legislation amounts to violations of the Fourteenth Amendment's substantive provisions, the states have invited Congress to exercise its power under the Enforcement Clause to abrogate states' sovereign immunity. Using this power, Congress may permit trans people to, at a minimum, seek monetary relief for harms caused by unconstitutional bans on gender-affirming care.[8]

Legislation under the Enforcement Clause to enforce the rights of trans people would not come without challenges.[9] For example, the Supreme Court recently heard a challenge to bans on gender-affirming care for

Legislation on Transgender Youth 1, 4 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Legislation-Summary-Oct-2023.pdf [https://perma.cc/4X35-CQJQ].

[3] Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors, 134 Harv. L. Rev. 2163, 2168 (2021).

[4] GLAAD, Medical Association Statements in Support of Health Care for Transgender People and Youth (June 26, 2024), https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory/ [https://perma.cc/4X38-T72T].

[5] See, e.g., Hans v. Louisiana, 134 U.S. 1, 21 (1890); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53 (1996).

[6] See Edelman v. Jordan, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury." (citations omitted)).

[7] Id.

[8] See infra Part II.

[9] Id.

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minors under the Fourteenth Amendment's Equal Protection Clause. In *United States v. Skrmetti*, the Supreme Court will determine whether laws banning transgender youth from accessing gender-affirming care constitute unlawful sex or transgender status discrimination under the Equal Protection Clause.[10] Depending on the outcome of *Skrmetti*, Congress's power under the Enforcement Clause to enforce the rights of trans people may become much broader and powerful than it is now, or it may become more ambiguous and narrower. No matter the outcome of *Skrmetti*, however, the wave of anti-trans legislation throughout the nation is sufficient to enact some Enforcement Clause legislation.

Notwithstanding any difficulties Enforcement Clause legislation might face, Congress should seek to enact legislation enforcing the rights of trans people anyway. Enforcement Clause legislation would require the states, rather than trans people, to bear the cost of any constitutional violations. Similarly, Enforcement Clause legislation would deter states from enacting unconstitutional anti-trans legislation by opening the states to financial liability any time they cross the constitutional line.[11] And, as a coequal branch of government, Congress should seek to exercise its Enforcement Clause power to participate in the process of defining the rights guaranteed by the Fourteenth Amendment and to preserve the Enforcement Clause power into the future.

The Essay proceeds as follows. Part I examines Congress's power to abrogate state sovereign immunity under the Fourteenth Amendment's Enforcement Clause. Part II addresses the potential avenues Congress will have for Enforcement Power legislation after *Skrmetti*. Part III addresses why Congress should enact legislation abrogating sovereign immunity in response to anti-trans legislation.

I. CONGRESS'S ENFORCEMENT CLAUSE POWER

Section Five of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of" the Amendment.[12] The Supreme Court has interpreted this Clause to grant

[10] See L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Petition for a Writ of Certiorari at I, United States v. Skrmetti, No. 23-477 (U.S. Nov. 6, 2023).

[11] Cf. Russell M. Gold, Compensation's Role in Deterrence, 91 Notre Dame L. Rev. 1997, 2003–07 (2016) (articulating the role of damages in deterring private actors from committing wrongdoing).

[12] U.S. Const. amend. XIV, § 5.

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Congress the power to enforce the substantive provisions of the Fourteenth Amendment by enacting "[l]egislation which deters or remedies constitutional violations" by the states.[13] And, while Congress ordinarily passes antidiscrimination legislation under its commerce power,[14] the Enforcement Clause has played an important role in some of our most important antidiscrimination statutes, including the Civil Rights Act of 1875,[15] the Voting Rights Act of 1965,[16] the Americans with Disabilities Act of 1990,[17] and the Family and Medical Leave Act of 1993.[18]

Congress relies on the Enforcement Clause to fill in an important gap in the Commerce Clause's power: state sovereign immunity.[19] Since the Supreme Court's 1890 decision in *Hans v. Louisiana*,[20] the Court has held that the states are entitled to sovereign immunity from private suits seeking retrospective monetary relief.[21] And in *Seminole Tribe of Florida v. Florida*, the Court held that Congress may not abrogate sovereign immunity under the Commerce Clause.[22] Thus, in enacting antidiscrimination laws under its commerce power, Congress is limited to causes of action that provide for prospective equitable relief (such as injunctive relief) and may not allow private parties to pursue retrospective relief.[23]

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[13] See City of Boerne v. Flores, 521 U.S. 507, 518 (1997); Tennessee v. Lane, 541 U.S. 509, 518 (2004) ("We have thus repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.' " (quoting Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–38 (2003))).

[14] Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 36 (2010) ("Since the civil rights revolution of the 1960s[,] Congress has passed most of [its antidiscrimination laws] using its commerce power.").

[15] Ex parte Virginia, 100 U.S. 339, 347 (1880).

[16] Oregon v. Mitchell, 400 U.S. 112, 132 (1970) (plurality opinion).

[17] *Lane*, 541 U.S. at 533–34.

[18] *Hibbs*, 538 U.S. at 734–35.

[19] Isaac Park, Congressional Guesswork and the Separation of Powers, 77 Fla. L. Rev. (forthcoming 2025) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4948996 [https://perma.cc/WTM6-6LJ6] ("Without Section Five, it is fiendishly difficult to design an effective system of antidiscrimination law that ensures compliance by states and their employees.").

[20] 134 U.S. 1, 21 (1890).

[21] Alden v. Maine, 527 U.S. 706, 712 (1999).

[22] 517 U.S. 44, 53 (1996).

[23] Edelman v. Jordan, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief

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Legislation under the Fourteenth Amendment's Enforcement Clause is not subject to such constraints. By its own terms, the Enforcement Clause limits state power by permitting the federal government to enact legislation restricting states from intruding on the rights afforded under the Fourteenth Amendment's substantive provisions.[24] In this way, the Fourteenth Amendment represented a "shift in the federal-state balance" that permits "intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."[25] In *Fitzpatrick v. Bitzer*, the Supreme Court held that, because the Fourteenth Amendment represents a limitation on state sovereignty, state sovereign immunity must give way to Congress's Enforcement Clause power.[26] Thus, when enacting legislation under the Enforcement Clause, Congress may abrogate state sovereign immunity and permit private parties to sue states for monetary relief.[27]

The Enforcement Clause thus serves an important dual role in effective antidiscrimination legislation that is not available under the Commerce Clause. First, permitting private parties to sue states for monetary relief provides parties a remedy for past constitutional harms that would otherwise go uncompensated. Second, if sovereign immunity is not abrogated, states may experiment with potentially unconstitutional conduct knowing that, in most cases, the only consequence for crossing the constitutional line is equitable relief preventing the state from future unconstitutional conduct. Exposing states to monetary liability for unconstitutional conduct provides a powerful additional deterrent to crossing that line in the first place.[28]

The Supreme Court's modern conception of the Enforcement Clause began with *City of Boerne v. Flores*.[29] There, Congress enacted the Religious Freedom Restoration Act ("RFRA") under the Enforcement Clause in an effort to overturn the Supreme Court's narrow reading of the

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and may not include a retroactive award which requires the payment of funds from the state treasury." (citations omitted)).

[24] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[25] Id. at 455.

[26] Id.

[27] Id. at 456.

[28] Cf. Gold, supra note 11, at 2003–07 (articulating damages' role in deterrence in the context of private actors).

[29] 521 U.S. 507 (1997).

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Free Exercise Clause in *Employment Division v. Smith*.[30] The Court held that the Enforcement Power did not provide Congress the power to enact RFRA.[31] According to the Court, "[t]he design of the Amendment and the text of [the Enforcement Clause] are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[32] Thus, while "Congress must have wide latitude in determining" what measures are necessary to "remedy or prevent unconstitutional actions,"[33] Congress may not use this power to alter the meaning of the constitutional text.[34] The Court announced a new test for striking this balance: for Enforcement Clause legislation to survive judicial review, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[35] "The appropriateness of remedial measures must be considered in light of the evil presented."[36]

City of Boerne has been widely criticized for departing from Enforcement Clause precedent and leaving the doctrine unmoored from the text and purpose of the Enforcement Clause.[37] In particular, several scholars have criticized *City of Boerne* for deemphasizing the role of Congress in defining constitutional rights.[38] And indeed, *City of Boerne*'s test has led to disagreement among members of the Supreme Court,

[30] Id. at 512–15; see also Emp. Div. v. Smith, 494 U.S. 872, 882 (1990) (holding that the First Amendment's Free Exercise Clause does not guarantee an individual the right to use illegal drugs for religious purposes).

[31] *City of Boerne*, 521 U.S. at 536.

[32] Id. at 519.

[33] Id. at 519–20.

[34] Id.

[35] Id. at 520.

[36] Id. at 530.

[37] See Calvin Massey, Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power, 76 Geo. Wash. L. Rev. 1, 21 n.95 (2007) (collecting scholarship criticizing *City of Boerne*).

[38] See, e.g., Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 194 (1997) ("In *Boerne*, the Court erred in assuming that congressional interpretation of the Fourteenth Amendment is illegitimate."); Steven G. Calabresi & Nicholas P. Stabile, On Section 5 of the Fourteenth Amendment, 11 J. Const. L. 1431, 1432–33 (2009) (stating that *Boerne* is "overly-judge-centric" and that "Congress's power" should not be limited to "provid[ing] remedies for violations that the Court has already identified"); Christopher W. Schmidt, Originalism and Congressional Power to Enforce the Fourteenth Amendment, 75 Wash. & Lee L. Rev. Online 33, 51 (2018) ("[O]riginalism challenges the premise of judicial interpretive supremacy in Section 5 jurisprudence . . . .").

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especially regarding "the scope of Congress's 'prophylactic' enforcement powers under" the Enforcement Clause.[39]

Nevertheless, the Court has settled for now on an application of the "congruence and proportionality" test that differs depending on the right Congress seeks to enforce. When Congress enacts legislation to enforce a right subject to heightened scrutiny, such as sex or race, it has broad, prophylactic, and remedial power to protect that right.[40] But when Congress seeks to enforce a right subject to rational basis review, it must first find proof of "pervasive unequal treatment"[41] or "actual violations"[42] of the Fourteenth Amendment's substantive provisions. In either case, Congress must engage in "deliberation and investigation"[43] to demonstrate "the States' record of unconstitutional" action.[44] Indeed, in striking down RFRA in *City of Boerne*, the Supreme Court emphasized that Congress lacked a record of states engaging in religious persecution, unlike "the record which confronted Congress and the Judiciary in the voting rights cases."[45]

Notably, the Court has not had the occasion to consider abrogation of state sovereign immunity under the Enforcement Clause since its 2012 plurality opinion in *Coleman v. Court of Appeals*.[46] Since 2012, the Supreme Court has undertaken a renewed examination of several

[39] United States v. Georgia, 546 U.S. 151, 158 (2006).

[40] See, e.g., Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (holding that the Family and Medical Leave Act is an appropriate prophylactic under the Enforcement Clause to prevent discrimination on the basis of sex); Oregon v. Mitchell, 400 U.S. 112, 132, 134 (1970) (holding that the Voting Rights Act of 1965 was an appropriate exercise of Congress' Enforcement Clause power to "solve the problems of racial discrimination").

[41] Tennessee v. Lane, 541 U.S. 509, 524 (2004) (holding that a criminal defendant may sue the state under the ADA for money damages because the provision at issue was enacted "against a backdrop of pervasive unequal treatment" of persons with disabilities).

[42] See, e.g., *Georgia*, 546 U.S. at 157 (holding that a disabled prisoner may sue the state under Title II for damages because he had alleged a violation of his constitutional right not to be subjected to cruel and unusual punishment).

[43] *Lane*, 541 U.S. at 516.

[44] *Hibbs*, 538 U.S. at 735 ("In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic [Enforcement Clause] legislation.").

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

[46] 566 U.S. 30, 43–44 (2012) (holding that a provision of the FMLA providing state employees a cause of action to sue states for refusing to provide unpaid "self care" leave was not properly enacted under the Enforcement Clause and, thus, was barred by state sovereign immunity).

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constitutional provisions under a "history and tradition" methodology,[47] meaning that the Enforcement Clause abrogation cases are likely ripe for reconsideration. Nevertheless, whether and how a "history and tradition" test might alter the Enforcement Clause is, in large part, outside the scope of this Essay and, in any event, has already been analyzed thoroughly by other scholars.[48] And, while I argue below that Enforcement Clause legislation responding to anti-trans legislation should survive judicial scrutiny, I would not expect such legislation to easily pass scrutiny in the Supreme Court today.

That said, the Court's decision in *Trump v. Anderson* may be instructive about the direction the Supreme Court may take.[49] There, the Court held that a state's decision to remove Donald Trump from its ballot for inciting insurrection was an improper exercise of the Insurrection Clause in Section Three of the Fourteenth Amendment.[50] In reaching this conclusion, the Court reasoned that, if the states could enforce the Insurrection Clause, the power must have first been granted to the states by Congress under the Enforcement Clause.[51] Interestingly, the Court conveyed a broad view of the Enforcement Clause: "The Constitution empowers Congress to prescribe how . . . determinations" about when the Insurrection Clause "applies to a particular person"—or, defining when someone qualifies as an insurrectionist—"should be made."[52] True, there are some distinguishing features of *Trump v. Anderson*, including, as the Court points out, that Section Three "proscribes conduct of individuals" rather than the states.[53] But *Trump v. Anderson* invites Congress to the interpretative table in a way that has not been seen since *City of Boerne* struck down RFRA.

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[47] See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128 (2022) (announcing a "history and tradition" test for the Second Amendment); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (reversing *Roe v. Wade* under a "history and tradition" conception of the Fourteenth Amendment); Vidal v. Elster, 144 S. Ct. 1507, 1517–18 (2024) (applying a "history and tradition" test to the Free Speech Clause of the First Amendment); see also Randy E. Barnett & Lawrence B. Solum, Originalism After *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 452 (2023) (describing "historical traditionalism" as an independent constitutional theory).

[48] See, e.g., Schmidt, supra note 38, at 51; William D. Araiza, Arming the Second Amendment—and Enforcing the Fourteenth, 74 Wash. & Lee L. Rev. 1801, 1811 (2017).

[49] 144 S. Ct. 662 (2024) (per curiam).

[50] Id. at 667.

[51] Id. at 668–70.

[52] Id. at 667.

[53] Id. at 670.

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In the event that the broad conception of *Trump v. Anderson* will not govern future disputes about sovereign immunity, it suffices for purposes of this Essay to make two additional points. First, those that have engaged in historical and textual analyses of the Enforcement Clause have found evidence for the proposition that Congress' interpretation of the Fourteenth Amendment should be given deference by the court.[54] Second, even the strongest critics on the Supreme Court of a broad reading of the Enforcement Clause power have recognized that an extensive record of constitutional violations may justify congressional abrogation of state sovereign immunity.[55] Take, for example, Justice Scalia's dissents in *Nevada Department of Human Resources v. Hibbs* and *Tennessee v. Lane*. In *Lane*, Scalia argued that Congress may only exercise its Enforcement power to respond to state action that "*itself* violate[s] any provision of the Fourteenth Amendment."[56] Still, Scalia would have permitted Congress, on stare decisis grounds, to enact prophylactic legislation abrogating sovereign immunity in the face of "an identified history of relevant constitutional violations."[57] And in *Hibbs*, Scalia recognized that a prophylactic statute abrogating sovereign immunity enacted under such a record would survive a facial challenge.[58] But, he argued that the statute would fail an as-applied challenge to its constitutionality if the plaintiff could not show that the particular state had itself engaged in the unconstitutional behavior.[59]

II. ANTI-TRANS MEASURES ARE STATE CONSTITUTIONAL VIOLATIONS JUSTIFYING ENFORCEMENT CLAUSE LEGISLATION

Congress has the power under the Enforcement Clause to enact legislation enforcing the rights of trans people. To enact legislation, Congress must start by building a record of unequal or unconstitutional conduct implicating the right it seeks to enforce. That job has been made easier in recent years. By proliferating anti-trans legislation, states have created the record that Congress needs and have opened the door to Enforcement Clause legislation. Courts and scholars have found numerous examples of unconstitutional legislation and other state action

[54] See supra notes 37–38.
[55] See Tennessee v. Lane, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting).
[56] Id. at 559.
[57] Id. at 564.
[58] Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 741–43 (2003) (Scalia, J., dissenting).
[59] Id.

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against the trans community.[60] And state actors have been remarkably clear at times that these actions are designed to treat trans people unequally.[61]

Even so, Enforcement Clause legislation enforcing the rights of trans people would not be without challenges. For example, in *United States v. Skrmetti*,[62] the Supreme Court will weigh in for the first time on the question of how the Equal Protection Clause applies to discrimination against trans people. That decision will impact Congress's power under the Enforcement Clause in two ways. First, *Skrmetti* may determine the level of scrutiny that applies to laws discriminating against trans people, which will then determine the extent of Congress's power to enforce the rights of trans people under the Enforcement Clause. Second, if the gender-affirming care ban is upheld in *Skrmetti*, that may narrow the laws that Congress may point to as evidence of unconstitutional conduct justifying Enforcement Clause legislation.

No matter how *Skrmetti* comes out, Congress can and should enact legislation under the Enforcement Clause. To illustrate this point, this Part will consider hypothetical legislation abrogating state sovereign immunity and permitting persons to sue the states to recover monetary relief for injuries caused by unconstitutional gender-affirming care bans under three potential outcomes in *Skrmetti*: (i) the gender-affirming care ban is subject to intermediate scrutiny; (ii) the Supreme Court does not decide which level of scrutiny is applicable to the gender-affirming care ban; and (iii) the gender-affirming care ban is subject to rational basis review.

A. Intermediate Scrutiny

Congress's power to enact the hypothetical abrogation legislation is the most obvious if the court determines in *Skrmetti* that laws discriminating against trans people are subject to intermediate scrutiny.[63] Where a right

[60] See Katie Eyer, Transgender Constitutional Law, 1406 U. Pa. L. Rev. 1405, 1407–08 n.4 (2023) (collecting sources); see also id. at 1407 (describing trends in trans rights litigation).

[61] See Skinner-Thompson, supra note 1, at 969–71 (describing the trans animus motivating anti-trans legislation).

[62] L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

[63] The Court may determine that the gender-affirming care ban discriminates on the basis of trans identity itself or on the basis of sex. The right that the Court rests on will impact the character of Congress's power to legislate under the Enforcement Clause. For example, if the Court rests on sex discrimination doctrine to strike down the statute, Congress would need to

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is subject to "a heightened level of scrutiny . . . it [is] easier for Congress to show a pattern of state constitutional violations."[64] And Congress may respond to those violations with broader legislation, including prophylactic schemes.[65] For example, in the Family and Medical Leave Act, Congress enacted a requirement that employers provide twelve weeks of unpaid leave, in part based on evidence showing that fewer opportunities for leave existed for men than for women.[66]

The congressional record would be replete with constitutional violations if gender-affirming care bans are found to fail intermediate scrutiny, too. Twenty-five states have passed gender-affirming care bans for trans kids,[67] and some states have sought to restrict gender-affirming care for adults.[68] And Texas investigated families for providing their children with gender-affirming care until the investigations were enjoined.[69]

Enforcement Clause legislation permitting persons to recover damages for injuries caused by gender-affirming care bans would thus easily survive under current Enforcement Clause jurisprudence. The law would be "congruent and proportional to its remedial object" because it would do no more than permit individuals to recover for constitutional harms caused by the states.[70] Indeed, Congress could likely go much further,

tailor its Enforcement Clause legislation to resolve sex discrimination, rather than trans status discrimination by states. Nevertheless, the differences between these rights under the Equal Protection Clause are subtle and difficult, and it is not necessary to delve into the topic to resolve here that Congress has the power in the first instance to legislate under the Enforcement Power to enforce the rights of trans persons.

[64] Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003).

[65] Id. at 737–38.

[66] Id.

[67] Lindsey Dawson & Anna Rouw, KFF, Half of All U.S. States Limit or Prohibit Youth Access to Gender Affirming Care (May 29, 2024), https://www.kff.org/other/issue-brief/half-of-all-u-s-states-limit-or-prohibit-youth-access-to-gender-affirming-care/ [https://perma.cc/Z9Y6-HL67].

[68] See Azeen Ghorayshi, Many States Are Trying to Restrict Gender Treatments for Adults, Too, N.Y. Times (Apr. 22, 2023).

[69] See Emma Tucker, Amir Vera & Ashley Killough, Texas Appeals Court Blocks State From Investigating Families Seeking Gender-Affirming Care for Trans Youth, CNN (Mar. 30, 2024, 6:00 PM), https://www.cnn.com/2024/03/30/us/texas-gender-affirming-care-investigation-blocked/index.html [https://perma.cc/8MWV-6TBB]; Eleanor Klibanoff, Texas Resumes Investigations Into Parents of Trans Children, Families' Lawyers Confirm, Tex. Trib. (May 20, 2022, 2:00 PM), https://www.texastribune.org/2022/05/20/trans-texas-child-abuse-investigations/ [https://perma.cc/N7QH-78SN].

[70] *Hibbs*, 538 U.S. at 740.

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such as by creating a private right of action against the state if its state medical institutions fail to provide gender-affirming care.

B. Level of Scrutiny Left Unresolved

The Supreme Court may decide to leave for another day the question of the level of scrutiny applicable to laws that discriminate against trans people. For example, the Court could assume without deciding that intermediate scrutiny applies to the gender-affirming care ban and hold that it survives. Such a holding would leave the Enforcement Clause analysis in an odd position. *City of Boerne* makes clear that the Supreme Court, not Congress, has "the power to determine what constitutes a constitutional violation."[71] If the Supreme Court declines to weigh in at this juncture, Congress would be legislating in an area where the constitutional violation at issue has not been clearly defined. This would not preclude Enforcement Clause legislation, however.

First, the abrogation case law does not seem to bar Congress from enacting legislation on the basis of constitutional rights violations that have not yet been recognized by the Supreme Court. *City of Boerne* was written in the context of a congressional statute that expressly intended to overturn a Supreme Court decision. And even in that context, the Court was careful to say that "Congress must have wide latitude in determining where" the "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law" lies.[72] Indeed, the Supreme Court has never interrogated the right that Congress claimed to be enforcing. Rather, decisions have been critical of whether Congress had sufficiently demonstrated a pattern of the rights violation or whether the rights violation was attributable to the state.[73]

Second, Congress would have at least some support from the judicial branch. The Fourth,[74] Seventh,[75] Eighth,[76] and Ninth[77] Circuits have all

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[71] 521 U.S. 507, 519 (1997).
[72] Id. at 519–20.
[73] See supra Part I.
[74] B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 555–57 (4th Cir. 2024).
[75] Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020).
[76] Brandt v. Rutledge, 47 F.4th 661, 669–70 (8th Cir.).
[77] Hecox v. Little, 104 F.4th 1061, 1073–80 (9th Cir. 2024).

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applied intermediate scrutiny to laws discriminating against trans people. And while the Sixth[78] and Eleventh[79] Circuits have held that only rational basis review applies to laws discriminating against trans people, that does not change the analysis. So long as Congress is not taking for itself "the power to determine what constitutes a constitutional violation,"[80] there is nothing prohibiting it from aligning with the majority of courts absent guidance from the Supreme Court on the issue. In any event, as explained below, Congress's exercise of its Enforcement Clause power would be appropriate even if rational basis applies to laws discriminating against trans people.

This scenario would also complicate the Enforcement Clause analysis by upholding a gender-affirming care ban under intermediate scrutiny. If one ban can survive intermediate scrutiny, it may be the case that many others would likewise survive intermediate scrutiny. And if the bans are not unconstitutional, then assembling a record of unconstitutional behavior by the states may prove more difficult. Nevertheless, that one gender-affirming ban survives intermediate scrutiny does not mean they all will.[81]

Indeed, an exercise of the Enforcement Clause power may be especially appropriate in these circumstances. If the Supreme Court declines to weigh in on the level of scrutiny, that is good evidence that the question is difficult to resolve. Determining which bans would or would not pass constitutional muster would thus be messy business without the Supreme Court's guidance and may lead to missteps, allowing constitutional violations to stand. In this situation, Congress could step in to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[82] "[P]rohibiting a somewhat broader swath of conduct, including that which is not forbidden by the Amendment's text,"[83] such as bans upheld under

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[78] L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 486 (6th Cir. 2023).

[79] Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1227–28 (11th Cir. 2023).

[80] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[81] Without the benefit of the decision in *Skrmetti*, it is difficult to predict what differences in a given law would warrant different treatment under the Equal Protection Clause. To illustrate the point, however, perhaps one law that relies on definitions of both "gender" and "sex" to ban gender-affirming care could implicate the Equal Protection Clause differently than one that relies only on "sex." Compare Tenn. Code § 68-33-102(9) (defining "sex," but not "gender"), with N.C. Gen. Stat. § 90-21.150(1)–(3) (defining both "sex" and "gender").

[82] Tennessee v. Lane, 541 U.S. 509, 518 (2004) (quoting Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003)).

[83] *Hibbs*, 538 U.S. at 727 (quoting Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001)).

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intermediate scrutiny, would serve to guarantee that fewer people's rights are violated. This is especially true considering how quickly anti-trans legislation has proliferated, and thus how quickly courts are asked to weigh in.

C. Rational Basis Review

Enforcement Clause legislation would still be appropriate if the Supreme Court determines that the gender-affirming care ban is subject to rational basis review and upholds the law as constitutional. Admittedly, the Supreme Court has made clear that enforcing a right subject to rational basis scrutiny is more difficult because Congress must first show "a 'widespread pattern' of irrational reliance on" the person's identity.[84] Thus, if laws discriminating against trans people are subject only to rational basis review, Enforcement Clause legislation in response to anti-trans legislation would likely face difficulties upon judicial review. Nevertheless, a law permitting trans people to recover monetary relief for injuries caused by unconstitutional gender-affirming care bans should withstand judicial review.

First, just as in the situation where the gender-affirming care ban is upheld under intermediate scrutiny, upholding the gender-affirming care ban under rational basis review does not mean that every gender-affirming care ban is constitutional. Gender-affirming care bans could, for example, address sex in different ways and, thus, implicate sex discrimination in some cases but not others.[85] And, as the Supreme Court recognized in *Bostock v. Clayton County*, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[86] Deciding which statutes implicate sex discrimination enough to trigger heightened review would raise difficult questions and, as argued above, trade potential constitutional violations of trans persons for the time to allow the issues to percolate and be resolved by the courts.

Further, even if all gender-affirming care bans are subject only to rational basis review, Congress could still establish "a 'widespread pattern' of irrational reliance on" trans identity.[87] In his Article *Trans*

[84] Id. at 735 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000)).
[85] See supra note 81 and accompanying text.
[86] 140 S. Ct. 1731, 1741 (2020).
[87] *Hibbs*, 538 U.S. at 735 (quoting *Kimel*, 528 U.S. at 90).

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Animus, for example, Scott Skinner-Thompson collected evidence of widespread hostility underlying legislation against trans people throughout the country, including "direct evidence of . . . lawmakers at times denying the existence and openly making fun of transgender people."[88] Even if laws discriminating against trans people are not subject to intermediate scrutiny, laws "motivated by animus, or a 'bare desire to harm'" are unconstitutional "when such laws are significantly overbroad or underinclusive in their approach to achieving their purported goals."[89] A congressional record collecting evidence of widespread trans animus may therefore be sufficient to establish unconstitutional behavior by the states warranting the invocation of the Enforcement Clause.

Perhaps the most significant impact of a potential *Skrmetti* holding that the gender-affirming care ban is subject to rational basis review would be on the congruence and proportionality test. The scope of appropriate Enforcement Clause legislation enforcing rights subject to rational basis review has been the subject of sharp debate within the Supreme Court.[90] But "no one doubts that [the Enforcement Clause] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."[91]

Thus, at the very least, Congress could pass legislation permitting persons to recover monetary relief for *unconstitutional* gender-affirming care bans. Under such a statute, if the plaintiff could prove that a gender-affirming care ban is unconstitutional, then the state would be exposed to monetary liability. But if no constitutional violation is found, then sovereign immunity would stand to block the claim for monetary relief. This approach would be directly congruent and proportional to the constitutional harm: the plaintiff would recover exactly the amount of harm they could prove they endured due to an Equal Protection violation by the state. The Supreme Court has upheld laws permitting abrogation in these circumstances.[92] Congress may, then, appropriately exercise its

[88] See Skinner-Thompson, supra note 1, at 1007.
[89] Id. at 969.
[90] See, e.g., United States v. Georgia, 546 U.S. 151, 158 (2006) ("Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement power under [the Enforcement Clause].").
[91] Id.
[92] See id. at 159.

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Enforcement Clause power in response to anti-trans legislation at least to this extent.

Whether Congress may legislate further is a more difficult question that goes beyond the purpose of this Essay, which is to show that Enforcement Clause legislation in response to anti-trans legislation is at least possible. But the Court's decision in *Trump v. Anderson* invites the possibility that Congress may indeed go further.[93] As the Court held in *Anderson*, "[t]he Constitution empowers Congress to prescribe how" to determine which individuals are insurrectionists, and are therefore barred from holding public office, "subject of course to judicial review."[94] By permitting Congress to first define the meaning of insurrection under Section Three of the of the Fourteenth Amendment, *Anderson* appears to reject a narrow reading of *City of Boerne* that would prevent Congress from voicing what it thinks "constitutes a constitutional violation."[95] So long as Congress does not "chang[e] what the right is," then, Congress should get a say in the meaning of the Constitution.[96] And if that understanding of the Enforcement Clause carries through to Congress's enforcement of the Equal Protection Clause,[97] then Congress's perspective on what it means to treat trans people equally under the laws should likewise be taken with deference.

III. CONGRESS HAS AN INSTITUTIONAL INTEREST IN ENACTING ENFORCEMENT CLAUSE LEGISLATION

While Congress has the power to enact Enforcement Clause legislation enforcing the rights of trans people, doing so would not be without difficulty. And Congress already has the power under the Commerce Clause to enact legislation that would prevent the states from enforcing

[93] 144 S. Ct. 662 (2024) (per curiam).
[94] Id. at 667.
[95] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
[96] Id.
[97] The *Anderson* Court noted that Section Three may sit in a different posture than other Sections of the Fourteenth Amendment. See *Anderson*, 144 S. Ct. at 666–67. Thus, it is difficult to say without further clarification from the Supreme Court whether *Anderson*'s reading of the Enforcement Clause should extend beyond Section Three. But if Congress has the power to assist in the project of defining one Section of the Amendment under the Enforcement Clause, then it is difficult to imagine why Congress would be left out of that conversation for another Section given the Enforcement Clause's express grant of constitutional power to Congress.

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gender-affirming care bans.[98] Thus, it is important to say a few words about why Congress should enact Enforcement Clause legislation in this context.

First, trans people have already been harmed by gender-affirming care bans. Trans youth throughout the country are facing puberty, along with its permanent changes, without access to puberty blockers. When trans youth begin their transition, once the bans are overturned or they reach adulthood, they may wish to reverse some of those changes. For some changes, that may not be possible. For others, expenses can exceed $10,000.[99] Trans youth should not be responsible for those expenses. Rather, the states that caused the delay in transition should bear the cost.[100]

Second, abrogation legislation adds an additional cost for states engaging in unconstitutional conduct that legislation passed under the Commerce Clause alone cannot. When states engage in unconstitutional conduct, the most serious consequence they often face is to be stopped, usually through an injunction. By enacting abrogation legislation, Congress can further deter states from unconstitutionally restricting the rights of trans people. If the states cross the constitutional line and engage in unconstitutional behavior, it will literally cost them.[101]

Third, the Enforcement Power affords Congress a unique position in the constitutional structure for the Fourteenth Amendment that it should seek to preserve. By exercising that power now, while the Fourteenth Amendment is being applied to a new context, Congress will have a voice

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[98] See Balkin, supra note 14, at 36–39.

[99] Taylor Medine, How to Afford Transgender Surgery Expenses, Forbes (Nov. 11, 2022, 2:00 PM), https://www.forbes.com/advisor/personal-loans/transgender-surgery-cost/ [https://perma.cc/F4JR-DLSK].

[100] This is especially true given that very few trans youth regret transitioning or decide to detransition in adulthood. See, e.g., Maria Anna Theodora Catharina van der Loos, Sabine Elisabeth Hannema, Daniel Tatting Klink, Martin den Heijer & Chantal Maria Wiepjes, Continuation of Gender-Affirming Hormones in Transgender People Starting Puberty Suppression in Adolescence: A Cohort Study in the Netherlands, 6 Lancet Child & Adolescent Health 869, 869–75 (2022), https://www.sciencedirect.com/science/article/abs/pii/S23524642 22002541 [https://perma.cc/7GCG-JMA9] (finding a 98% satisfaction rate for gender-affirming care provided to trans youth); Lindsey Tanner, How Common Is Transgender Treatment Regret, Detransitioning?, AP News (Mar. 5, 2023, 8:55 AM), https://apnews.com/article/transgender-treatment-regret-detransition-371e927ec6e7a24cd9c77b5371c6ba2b [https://perma.cc/2SD3-A62K] ("In a review of 27 studies involving almost 8,000 teens and adults who had transgender surgeries, mostly in Europe, the U.S. and Canada, 1% on average expressed regret.").

[101] See Gold, supra note 11, at 2003–07.

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in the project of interpreting and enforcing the Amendment. And failing to exercise that power now may dilute it in the future. Indeed, Congress's silence on this issue now may very well be used as proof in future Enforcement Clause decisions that Congress did not have, rather than did not exercise, the power to weigh in.[102]

CONCLUSION

Under the Fourteenth Amendment's Enforcement Clause, Congress has the power to respond to constitutional violations carried out by states. In the face of increasing intrusion into the lives of—and violence directed toward—trans people, it is time for Congress to step in. And no matter the Supreme Court's conception of the rights of trans people in *Skrmetti*, Congress has the power to do so by abrogating state sovereign immunity and imposing liability on the states for violating the rights of trans people. However, Congress need not stop there—especially if *Skrmetti* determines that heightened scrutiny applies. Not only is there further evidence of different kinds of discrimination being enacted by states, but state sovereign immunity abrogation is not the full extent of its powers under the Fourteenth Amendment. Finally, Congress has an institutional interest in exercising its Enforcement Clause power to maintain its role in the project of the Fourteenth Amendment.

[102] See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." (quoting Free Enterprise Fund v. PCAOB, 561 U.S. 477, 505 (2010))); see also Leah M. Litman, Debunking Antinovelty, 66 Duke. L.J. 1407, 1411–12 (2017) ("Every Justice on the Supreme Court has joined an opinion promoting the idea that legislative novelty is evidence of a constitutional defect.").