The Constitutional Challenges Awaiting Police Reform—and How Congress Can Try to Address Them Preemptively

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INTRODUCTION

The horrifying death of George Floyd under the knee of a Minneapolis police officer has thrust police reform back into the national discussion. As it should. The deaths of Floyd and countless other unarmed Black men and women in police custody make clear that much remains to be done before the United States rights its course in a violent history surrounding race and policing. While some racial justice advocates are calling to defund police departments, others remain focused on more surgical reform efforts. As November elections loom, incumbents have responded to nationwide protests by advancing a panoply of police reform measures.[1] Some of these proposals are gaining momentum. This Article addresses the constitutional challenges that await federal reform efforts by discussing three of the more popular proposals.

First is the abolition of qualified immunity. This judicial doctrine bars civil suits against police acting in their official capacity, except where the legal or constitutional prohibition on the officer's conduct was "clearly established" at the time of the incident and a reasonable officer would have understood such

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1. *See, e.g.*, Grace Segers, *House Democrats unveil police reform bill amid nationwide protests*, CBS NEWS (June 8, 2020), https://www.cbsnews.com/news/house-democrats-unveil-bill-police-reform-bill-amid-nationwide-protests/ [https://perma.cc/QA4A-YDRJ]; Jill Colvin, Lisa Mascaro & Zeke Miller, *Trump Signs Executive Order on Police Reform After Weeks of Mass Protests*, TIME (June 16, 2020), https://time.com/5854368/trump-executive-order-police-reform/ [https://perma.cc/5YG8-3HPK]; Claudia Grisales, *Led By Tim Scott, Senate Republicans Begin Drafting Their Own Police Reform Plan*, NPR (June 9, 2020), https://www.npr.org/2020/06/09/873356229/led-by-tim-scott-senate-republicans-begin-drafting-their-own-police-reform-plan [https://perma.cc/6AYW-EYZY].

conduct to be prohibited.[2] Engineered to insulate from liability "all but the plainly incompetent or those who knowingly violate the law,"[3] qualified immunity purports to strike a balance between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[4] Critics of the doctrine nevertheless contend that it effectively shields even intentional lawbreakers from liability for the most egregious wrongdoing.[5] Indeed, even as some rightly question its actual efficacy as a defense in court,[6] qualified immunity wields tremendous power even beyond this use—from altering modern pleading standards[7] to discouraging untold numbers of potential plaintiffs from filing suit in the first place.[8] Calls for its abolition, therefore, come as little surprise.

Another measure urges the creation of a nationwide police use-of-force database. While the FBI[9] and private organizations[10] have amassed some of this data, laws making police disciplinary records secret or semi-secret in all but 12 states[11] have curtailed efforts to collect it.[12] Mandatory information-sharing would make this data more reliable and more useful. Chief among such a database's promised benefits: preventing officers terminated for misconduct in one police department from moving to another law enforcement agency that isn't privy to that information.[13] Creating a single, comprehensive database would also give the United States Justice Department a better sense of which law

2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

3. Burns v. Reed, 500 U.S. 478, 479–80 (1991).

4. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

5. *See, e.g.*, Institute for Justice, *Frequently Asked Questions About Ending Qualified Immunity*, https://ij.org/frequently-asked-questions-about-ending-qualified-immunity/ [https://perma.cc/XFR9-3RPR].

6. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (analyzing qualified immunity's actual effectiveness in court).

7. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) ("[W]e begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.").

8. *See id.* at 50 ("Available evidence suggests that just 1% of people who believe they have been harmed by the police file lawsuits against law enforcement.").

9. Federal Bureau of Investigation, *National Use-of-Force Data Collection*, https://www.fbi.gov/services/cjis/ucr/use-of-force [https://perma.cc/Z6KY-ERAF].

10. *E.g.*, Use of Force Project, *Use of Force Policy Database*, https://useofforceproject.org/database/ [https://perma.cc/99Z8-57BK].

11. WNYC, *Is Police Misconduct a Secret in Your State?*, https://project.wnyc.org/disciplinary-records/ [https://perma.cc/7DT3-LPEE].

12. Kimberly Adams, *FBI says new data on police use of force is coming this summer*, MARKETPLACE (June 1, 2020), https://www.marketplace.org/2020/06/01/fbi-police-use-of-force-database/ [https://perma.cc/H2MZ-ZF6S].

13. Joe Pagonakis, *Local experts: More accountability needed in regards to police use of force issues*, ABC NEWS CLEVELAND (May 29, 2020), https://www.news5cleveland.com/news/local-news/cleveland-metro/local-experts-more-accountability-needed-in-regards-to-police-use-of-force-issues [https://perma.cc/BZ7K-D9HN].

enforcement agencies warrant closer scrutiny, stricter enforcement through civil rights litigation, or better training.

The final measure: setting national standards for the use-of-force guidelines, many of them woefully outdated,[14] that govern the more than 15,000 police and sheriffs' departments across the country. Federal guidelines would help to revamp use-of-force training practices. They would ban deadly police tactics, such as placing detainees in chokeholds, pressing knees on detainees' necks, discharging lethal weapons against unarmed individuals, and executing no-knock warrants. These guidelines could even curb the increased militarization of police departments seen over the past three decades, a proposal that has grown in popularity as police militarization's benefits have proven illusory.[15]

Yet each proposed reform faces constitutional hurdles. Contrary to the blithe dismissals of its detractors, qualified immunity has arguably inherited a constitutional quality that will it make it difficult to dislodge legislatively. Absent constitutional amendment or judicial sea change, qualified immunity in some form is probably here to stay. Federal regulatory and data collection efforts, however, are eminently achievable. No doubt each will trigger constitutional scrutiny, including arguments sure to be raised by opponents of federal intervention of any kind. But so long as legislators know what they're up against, several of these challenges appear surmountable.

I.
QUALIFIED IMMUNITY: POSSIBLE CONSTITUTIONAL LIMITS ON LEGISLATIVE REVISION

Even if Congress tries to abolish it, qualified immunity will likely remain. And reformers would do well to resist the temptation to view qualified immunity as an easily vanquished foe—or even as the most pressing issue to address. Lately, critics have come to describe qualified immunity as "a judicially created doctrine that isn't grounded in the Constitution—which means that Congress has the power to alter that doctrine however it chooses."[16] I'm not so sure. Indeed, doctrinal history suggests qualified immunity has attained a certain constitutional veneer that legislation alone may not penetrate, all thanks to its doctrinal cousin: sovereign immunity.

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14. *See, e.g.*, Mike Catalini & Wayne Parry, *New Jersey to Overhaul Police Use-of-Force Guidelines for 1st Time in 20 Years, AG Says*, NBC NEW YORK (June 3, 2020), https://www.nbcnewyork.com/news/local/new-jersey-to-overhaul-police-use-of-force-guidelines-for-1st-time-in-20-years-ag-says/2443123/ [https://perma.cc/2SMP-JM5T].

15. *See* Nsikan Akpan, *Police militarization fails to protect officers and targets black communities, study finds*, PBS (Aug. 21, 2018), https://www.pbs.org/newshour/science/police-militarization-fails-to-protect-officers-and-targets-black-communities-study-finds [https://perma.cc/6S5Y-STZV].

16. Ian Millhiser, *Why police can violate your constitutional rights and suffer no consequences in court*, VOX (June 3, 2020), https://www.vox.com/2020/6/3/21277104/qualified-immunity-cops-constitution-shaniz-west-supreme-court [https://perma.cc/2NBA-9CKN].

Qualified immunity occupies a peculiar space in U.S. legal history. The Supreme Court only first recognized qualified immunity (also called "good faith immunity") as an available bar to suits against law enforcement in 1967.[17] Yet its origins as a doctrine in U.S. law date back nearly two centuries earlier. Under the English common law tradition, with which the Constitution's drafters were intimately familiar, the British Crown could not be sued without its consent. Incorporating this principle into the Constitution, the drafters likely assumed that states, too, would enjoy at least some of that protection.[18] Early constitutional history illustrates this understanding. In 1793, the Supreme Court held that Article III's Citizen-State Diversity Clause[19] had actually abrogated states' sovereign immunity from suits brought by citizens of other states.[20] Congress and state legislatures responded almost immediately by adopting the Eleventh Amendment. Overruling the Court in a single sentence, the amendment declared that

> [t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[21]

At first blush, the amendment appeared simply to reinstate the status quo ante by reviving the bar on federal jurisdiction over cases against states by citizens of other states. But such seeming simplicity would prove misleading. Though originally thought a minor correction to the Supreme Court's erroneous construction of the Citizen-State Diversity Clause,[22] the Eleventh Amendment later came to embody a default presumption that states are generally immune from suit, regardless of the individual plaintiff's citizenship. Nearly a century after the amendment's ratification, the Supreme Court held that it also barred citizens from suing their own states in federal court.[23] The Court's surprising indifference toward the text of the amendment itself similarly shuttered suits by foreign countries[24] and Native American tribes.[25]

Accordingly, the Eleventh Amendment has come to be construed

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17. *See* Pierson v. Ray, 386 U.S. 547, 555–57 (1967).

18. *See* Chisholm v. Georgia, 2 U.S. 419, 434–50 (1793) (Iredell, J., dissenting) (examining American history, English tradition, and principles of state sovereignty).

19. U.S. Const. art. III, § 2, cl. 1.

20. *Chisholm*, 2 U.S. at 452 (Blair, J., concurring), 465 (Wilson, J., concurring), 468 (Cushing, J., concurring), 471–73 (Jay, C.J., concurring).

21. U.S. Const. amend. XI.

22. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting) ("The Eleventh Amendment can and should be interpreted in accordance with its original purpose to reestablish the ancient doctrine of sovereign immunity in state-law causes of action based on the state-citizen and state-alien diversity clauses; in such a state-law action, the identity of the parties is not alone sufficient to permit federal jurisdiction.")

23. Hans v. Louisiana, 134 U.S. 1, 13–15 (1890).

24. Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

25. Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 779–80 (1991).

> not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."[26]

As with all rules, exceptions have emerged. Individuals can sue states for injunctive relief, provided that relief is prospective.[27] States can voluntarily consent to federal jurisdiction in an individual suit or accept federal funds in exchange for a limited waiver of immunity—so long as the state does so expressly.[28] And in some cases, Congress itself may abrogate states' immunity pursuant to its enforcement powers under the Fourteenth Amendment.[29] (Notably, the consent and abrogation exceptions play an important role in the promise of federal reforms on data collection and use-of-force regulation. But more on that later.)

Simply put, sovereign immunity has proven a formidable foe. Despite Congress's general power to abolish common law doctrines, sovereign immunity has assumed a certain constitutional status that legislation alone cannot displace.[30]

As its close doctrinal cousin,[31] qualified immunity probably enjoys at least some of that protection. The Supreme Court's reliance upon common law tradition to interpret the Eleventh Amendment as incorporating sweeping sovereign immunity suggests that other common law doctrines protecting similar interests may prove equally enduring. Indeed, the Court has signaled as much over the years: When considering common law immunities other than sovereign

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26. *Id.* at 779.

27. Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002).

28. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999) (rejecting constructive waivers of sovereign immunity).

29. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

30. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 33–34 (1989) (Scalia, J., concurring in part and dissenting in part) (calling sovereign immunity "implicit in the Eleventh Amendment" and an "assumption adopted by the Eleventh Amendment"); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816–17, 1868–75 (2012) (noting that the Constitution's failure to displace longstanding common law doctrines like sovereign immunity gave these doctrines constitutional insulation); David P. Currie, *Inflating the Nation's Power*, 71 U. CHI. L. REV. 1229, 1237–38 (2004) ("If the case is not within Article III, Congress cannot bring it within the jurisdiction of a federal court."); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. UNIV. L. REV. 819, 821 (1999) ("By calling the local governments 'States,' the Framers intended that these governments possess some of the traditional immunities that states enjoyed. Thus, if Congress passes laws that abridge those immunities, it fails to treat the states as states.").

31. *See* Scheuer v. Rhodes, 416 U.S. 232, 239 (1974) ("The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity.").

immunity, the Court has indicated that simple legislative revision may not be enough to abrogate it.[32]

The similarities between sovereign immunity's and qualified immunity's respective trajectories concerning 42 U.S.C. § 1983, which authorizes individuals to sue police officers in federal court, are also telling. The Court's refusal to displace qualified immunity when considering available defenses to Section 1983 claims tends to underscore its view that the two doctrines derive from the same set of English common law immunities grafted into the United States' own common law tradition. Congress passed Section 1983 as part of a Reconstruction-era legislative effort to address the Ku Klux Klan's continued violence and civil rights violations against newly freed slaves. In so doing, Congress provided a federal forum to Black Americans in the South, where courts had proven either unwilling or unable to punish continued Klan atrocities.[33] Yet there were limits. Even after sparking a sort of Section 1983 renaissance nearly a century later,[34] the Supreme Court would go on to hold that the statute had neither abolished longstanding common law immunities like qualified immunity[35] nor abrogated states' sovereign immunity.[36]

This overlap counsels caution as the calls for Congress to eliminate qualified immunity continue to mount. As with sovereign immunity, qualified immunity's absence from constitutional text has proven no match for the English common law immunity's apparent infusion into our nation's charter. Thus, qualified immunity may well survive congressional intervention and require either a judicial change of heart or constitutional amendment to overcome.[37] Still, hope is not lost.

Even absent legislative intervention, sovereign immunity's modern decline may prove a harbinger for a similar dismantling of qualified immunity, albeit

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32. *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (calling congressional ability to abrogate legislative immunity "a big assumption"); *cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 88 (1996) (Stevens, J., dissenting) ("There is no reason why Congress' undoubted power to displace those common-law immunities should be either greater or lesser than its power to displace the common-law sovereign immunity defense.").

33. U.S. House of Representatives, *Historical Highlights: The Ku Klux Klan Act of 1871*, https://history.house.gov/HistoricalHighlight/Detail/15032451486 [https://perma.cc/673S-4DCG].

34. *See* Monroe v. Pape, 365 U.S. 167 (1961) (overruled on other grounds by Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)).

35. Pierson v. Ray, 386 U.S. 547, 554–55 (1967).

36. Quern v. Jordan, 440 U.S. 332, 343–45 (1979).

37. The Supreme Court's recent refusal to take up a case reconsidering the doctrine suggests that day remains far off, the small, ideologically diverse cadre of justices to question the doctrine notwithstanding. *See* Lawrence Hurley & Andrew Chung, *Supreme Court rejects cases over 'qualified immunity' for police*, REUTERS (June 15, 2020), https://www.reuters.com/article/us-usa-court-qualified-immunity-idUSKBN23M1YH [https://perma.cc/3FTE-BQQC]; *see also* Baxter v. Bracey, 590 U.S. ___ (2020) (slip op. at 6) (Thomas, J., dissenting from denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine."); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.")

only in state courts. Over the past century, sovereign immunity has receded from the height of its power as state courts and legislatures have chipped away at and even outright abolished the doctrine.[38] Again, its erosion at the state level has only made states amenable to tort liability in their own courts, not in federal court, and every state has clawed back at least some of its immunity by passing government tort claims statutes that limit government exposure to personal injury liability.[39] Yet states may limit qualified immunity in much the same way that they have limited sovereign immunity. In fact, some already have.[40]

Whether states are willing to waive sovereign or qualified immunity to suit in federal court, however, poses a different question. It's one thing for states to countenance limited exposure on their home turf. Removing jurisdictional bars to suit in federal court is something else entirely. Unlike many state tort claim statutes, Section 1983 includes no cap on compensatory damages, no bar against punitive damages, and no mandatory reduction in attorneys' fees.[41] Even as states find themselves under pressure to waive immunity, those financial incentives against waiver will be hard to ignore, especially as states are forced to tighten their fiscal belts in response to the ongoing coronavirus pandemic. Until that changes, calls for federal intervention will persist.

II.
POLICE DATA COLLECTION: AN IRRESISTIBLE YET UNCOERCIVE BARGAIN

A federal effort to compile a police use-of-force database poses far fewer obstacles. It has nothing to do with individual officer liability, so qualified immunity isn't an issue. Nor is sovereign immunity a concern—at least not an immediate one. Though it eventually could be used to support a claim for, say,

38. *See, e.g.*, Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961) ("After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust."); Cauley v. City of Jacksonville, 403 So. 2d 379, 386 n.14 (Fla. 1981) (collecting state legislative efforts and case law abrogating or limiting immunity); *see also* Vanderpool v. Oklahoma, 672 P.2d 1153, 1155 (Okla. 1983) (observing "a steady flow of case law away from the concept of governmental immunity and abrogating it in whole or in part, until today, there are not more than five states, including Oklahoma, which have not abolished the doctrine or have not, in some manner, retreated from its universal application as an immutable concept of the law"); Davis v. Fla. Dept. of Corr., 460 So. 2d 452, 462 (Fla. Dist. Ct. App. 1984) (Ervin, C.J., dissenting) ("The current national trend of legislative and judicial action has been toward the abandonment of the sovereign immunity doctrine.").

39. *See* Clouse ex rel. Clouse v. Arizona, 16 P.3d 757, 760 (Ariz. 2001) ("Although most states have waived their sovereign immunity, either through judicial abrogation or legislative waiver, all fifty states have enacted some form of a 'Tort Claims Act' to define, and sometimes to re-establish, the parameters of governmental liability.").

40. *See* Mendez v. California, 897 F.3d 1067, 1083 (9th Cir. 2018) ("Under California law, the officers here are not entitled to qualified immunity for [failure to knock and announce]. Under California law, unlike under 42 U.S.C. § 1983, the failure to knock and announce can be a basis of liability." (citations omitted)).

41. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (damages for actual, compensable injuries); Smith v. Wade, 461 U.S. 30, 56 (1983) (punitive damages); 42 U.S.C. § 1988(b) ("reasonable attorney's fee").

municipal liability,[42] data collection on its own poses no immediate threat to the presumption against state amenability to federal liability. Thus, there is no need for state waiver or congressional abrogation. The only challenge: finding a deal that entices states to collect and share such data.

Though immunity from liability won't save states from federal data collection, the Tenth Amendment—more specifically, the anti-commandeering doctrine—does limit Congress's options for implementation. The anti-commandeering doctrine bars federal conscription or circumscription of state power.[43] It has thwarted a number of federal efforts in the past, including efforts to make states develop waste disposal policies,[44] to require state and local police to administer background checks for gun owners,[45] to force states to implement the Affordable Care Act's (ACA) Medicaid expansion,[46] and most recently, to bar state legislatures from authorizing professional and amateur sports gambling.[47] The failure of each of these efforts stands for the Tenth Amendment principle that states retained whatever sovereignty they didn't explicitly cede to the federal government. Nothing in the Constitution gives Congress the power to direct state affairs.[48] But it has other options.

While Congress cannot order states around, it can coax them into compliance. If it wants states' data, Congress has to offer states something in return—most often, federal funding. Had the federal government offered subsidies to states that adopted its waste management policies or to police departments that agreed to conduct background checks on would-be gun owners instead of attempting to force their hands, those policies might well have proven successful. Still, money is only part of the equation. In striking down the ACA's Medicaid expansion, a plurality of the Supreme Court explained that while new funding could be used to induce state compliance, conditioning states' continued receipt of existing funding on adopting a new federal policy was unduly coercive.[49] Each new federal interest must be accompanied by its own incentive. Conditioning existing Medicaid funding on states' expansion of the program penalized states simply for maintaining the status quo—or so the rationale goes.[50]

The upshot: Congress would be wise to avoid the appearance of penalizing states who resist sharing police use-of-force data and instead try to make the deal

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42. *See Monell*., 436 U.S. at 690 (allowing municipal Section 1983 liability where injury results from government "policy or custom"); City of Canton v. Harris, 489 U.S. 378, 380 (1989) (permitting municipal liability "for constitutional violations resulting from its failure to train municipal employees").

43. Matthew J. Stanford & David A. Carrillo, *Judicial Resistance to Mandatory Arbitration as Federal Commandeering*, 71 FLA. L. REV. 1397, 1419 (2019).

44. New York v. United States, 505 U.S. 144 (1992).

45. Printz v. United States, 521 U.S. 898 (1997).

46. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

47. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

48. Stanford & Carrillo, *supra* note 43, at 1419.

49. *Sebelius*, 567 U.S. at 575–85.

50. *See id.* at 578–80.

irresistible. This shouldn't be too difficult, considering the widespread budget shortfalls brought on by the coronavirus pandemic's devastation of state and local economies. As Congress mulls another round of pandemic relief, it might consider conditioning state or local government "bailouts" on collecting and sharing this important use-of-force data with the federal government.

III.
FEDERAL USE-OF-FORCE STANDARDS: AN UMBRELLA FOR A CENTURIES-LONG RAINSTORM

Federal use-of-force standards present a closer question. If Congress opts for a federal enforcement scheme, the constitutional limits on federal intervention into state affairs brings immunity back into play. To be sure, states could ultimately be open to police reform, and where volunteerism fails, the transactional approach discussed in Part II might suffice. Should either of those fall short, however, Congress may find it necessary to abrogate states' sovereign immunity to instate federal use-of-force standards that prevent, address, and discipline excessive uses of force, particularly against Black communities. In so doing, it would have to provide not only a clear statement of its intent to abrogate states' sovereign immunity,[51] but also the findings necessary to support legislative intervention proscribing unconstitutional police conduct.[52] This is something easier said than done—but given the longstanding relationship between race and policing in this country, the odds seem favorable.

Of course, there isn't a federal solution for everything. This author remains both mindful and skeptical of reflexive calls for a federal cure to every social ill.[53] So does the Supreme Court. Congress cannot abrogate sovereign immunity under any of its Article I heads of power.[54] Rather, as the Court has explained, Congress may only do so by enacting "appropriate legislation" pursuant to the Fourteenth Amendment's Enforcement Clause,[55] which "necessarily limited" state sovereignty by empowering Congress to enact "appropriate legislation" to

51. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

52. *See* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

53. *See, e.g.*, David A. Carrillo & Matthew Stanford, *All of a Sudden, Everyone Loves the Tenth Amendment*, THE RECORDER (Apr. 17, 2020), https://www.law.berkeley.edu/wp-content/uploads/2020/05/Federalism-The-Recorder-author-reprint.pdf [https://perma.cc/EUM9-LZWD]; Matthew Stanford, *The pandemic exposes the need to fix the federalism debate*, SCOCABLOG (Apr. 17, 2020), http://scocablog.com/the-pandemic-exposes-the-need-to-fix-the-federalism-debate/ [https://perma.cc/Y8JW-ZRCL].

54. *Id.* at 727 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996)); *but see* Central Va. Cmty. College v. Katz, 546 U.S. 356, 377 (2006) ("[T]he power to enact bankruptcy legislation [under Article I, § 8, clause 4 of the Constitution] was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.").

55. U.S. Const. amend. XIV, § 5.

ensure state compliance with the Amendment's "substantive provisions."[56] Unsurprisingly, most disputes concern the word "appropriate"—namely, what prerequisites must Congress meet to abrogate states' sovereign immunity? Relatedly, by meeting the same prerequisites, might Congress supplement federal case law with its own list of "clearly established"[57] federal rights, which qualified immunity does not shield police officers for violating?

Fortunately, the Supreme Court has given us a few clues over the years about what would constitute "appropriate legislation" abrogating state sovereign immunity. We know that legislation protecting a general interest in procedural due process alone ordinarily won't suffice;[58] that legislation addressing age discrimination is likelier to exceed the bounds of the Enforcement Clause than legislation addressing race or gender discrimination,[59] though legislation addressing disability discrimination may pass muster;[60] and that Congress has considerable discretion in crafting the remedy necessary "to prevent and deter unconstitutional conduct."[61] We also know that the Court expects Congress to show its work. Successful abrogation requires a showing of unconstitutional behavior at a level that justifies congressional intervention.[62] And the remedy must be closely tailored to righting that wrong, or rather, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[63]

Distilled to its component parts: Congress first must detect a state-level violation of constitutional rights and select a remedy. Next, the Supreme Court, as the final word on constitutional meaning,[64] will determine whether the substantive right flagged by Congress is constitutionally protected, as well as whether Congress has adequately shown a "widespread pattern" of state violations of that right[65]—not exactly a free pass for Congress to reign in any controversial state action it might dislike. Conversely, the Court has construed the Enforcement Clause as an extraordinary remedy reserved for extraordinary problems. Federal intervention requires both a chronic constitutional problem that states can't or won't contain and a carefully crafted solution that responds

56. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

57. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

58. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673–76 (1999).

59. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000).

60. United States v. Georgia, 546 U.S. 151, 158–59 (2006); Tennessee v. Lane, 541 U.S. 509, 530–34 (2004).

61. Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 727–28 (2003).

62. *See id.* at 735 ("Congress must identify, not just the existence of [state-perpetrated discrimination], but a 'widespread pattern' of irrational reliance on such criteria.").

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

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

65. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 90 (2000); *see also City of Boerne*, 521 U.S. at 519–20.

directly to that ill. Federally imposed police reform as a remedy to longstanding unequal protection of racial minorities could check those boxes.

Our criminal justice system's structural ties to slavery and the Jim Crow era are well-known.[66] Study after study has shown that our police departments have yet to fully purge the taint of these shameful parts of our history from their practices, notwithstanding the simultaneously undeniable progress our country has made on race matters. Black people remain nearly twice as likely to be stopped by police, more likely to be searched after being stopped, more likely to be shot by the police officer who stopped them, more likely to be arrested for and convicted of petty crimes and minor drug offenses, more likely to be wrongly convicted, more likely to receive the death penalty, less likely to receive favorable plea bargains, and less likely to receive leniency at sentencing than their white counterparts.[67] None of these disparities can be explained away by nonracial factors like offense seriousness, criminal history, or crime rates.[68] Thus, federal intervention here stands to satisfy even the strictest evidentiary expectations articulated by the Supreme Court—at least so far.[69]

And the remedy appears to fit the wrong. Abolishing deadly tactics like chokeholds and no-knock warrants, setting minimum standards for officer training and screening, and strengthening use-of-force standards all tend to steer clear of redefining substantive constitutional rights. Indeed, the Supreme Court's approval of the Family and Medical Leave Act as an appropriate remedy for widespread gender discrimination in employment suggests reformers might dream bigger.[70] For instance, a statutorily prescribed payment to individuals killed or injured by police officers—with an exception for individuals who were

66. *See* Connie Hassett-Walker, *From slavery to Jim Crow, history shows the racist roots of American policing — and the need to reckon with them*, BUSINESS INSIDER (June 2, 2020), https://www.businessinsider.com/history-shows-racist-roots-of-american-policing-need-to-reckon-2020-6 [https://perma.cc/4TJF-WSJZ]; *see also* Ramos v. Louisiana, 590 U.S. ___, slip op. at 1–2 (2020) (acknowledging Jim Crow roots of non-unanimous convictions); *id.* at 12–15 (Kavanaugh, J., concurring) (same).

67. *See* Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/ [https://perma.cc/PGM6-6PLJ] (collecting studies).

68. *See id.*

69. *See, e.g.*, *City of Boerne*, 521 U.S. at 530 ("In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, [the Religious Freedom Restoration Act's] legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."); *Kimel*, 528 U.S. at 91 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."); Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 742 (2003) (Scalia, J., dissenting) (demanding proof of individual state constitutional violations to justify abrogation of each state's immunity); *id.* at 746–47 (Kennedy, J., dissenting) (criticizing Congress's evidence of gender discrimination by *private* employers to justify abrogation of state immunity).

70. *Hibbs*, 538 U.S. at 722.

themselves armed and threatening the officer or the public—might also fall within Congress's remedial toolkit. This fix seems especially reasonable given the almost universal indemnification of officers found liable for misconduct, which suggests police departments are at least usually adequately resourced to fund such a scheme.[71]

* * *

The primary pitfall to these and other reform proposals instead seems to lie down the road, perhaps even after some initial success against judicial scrutiny. For instance, the demise of the Voting Rights Act's coverage formula, which Congress used to determine which states required preclearance of changes to voting laws, tell us that, even if initially approved, police reforms will be subject to recurrent litigation and thus also to regular judicial scrutiny[72]—especially if Congress decides (or the Court requires) that reform must be administered on a state-by-state basis. Congress would therefore do well to ensure that any reform legislation that makes it to the President's desk includes periodic reauthorization at a frequency sufficient to assure the Court of Congress's ongoing assessment of the legislation's propriety, as well as provisions for the data collection necessary to make the requisite showing at each reauthorization. Otherwise, Congress will risk losing yet another umbrella for Black communities before the storm has passed.[73]

71. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

72. *See* Shelby Cty. v. Holder, 570 U.S. 529, 554 (2013) ("But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.").

73. *See id.* at 590 (Ginsburg, J., dissenting) ("Throwing out [Voting Rights Act] preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.")