

IN LIGHT OF THE EVIL PRESENTED: WHAT KIND OF PROPHYLACTIC ANTI-DISCRIMINATION LEGISLATION CAN CONGRESS ENACT AFTER *GARRETT*?

Abstract: In recent years, the Supreme Court has repeatedly invalidated congressional legislation enacted pursuant to Section 5 of the Fourteenth Amendment. The Court has severely restricted this avenue for Congress to remedy and prevent discrimination. Soon, the Court may have the opportunity to address this issue again and resolve a circuit split concerning the Family and Medical Leave Act of 1993. In light of this opportunity, this Note examines the evolution and scope of the Section 5 power. The Note traces the history and varied interpretations of the Fourteenth Amendment, as well as Section 5 legislation and Court precedents reviewing that legislation. The Note concludes that when faced with the issue again, the Court should return to its former deference to congressional efforts to remedy and prevent discrimination pursuant to Section 5.

INTRODUCTION

Much ink has been spilled over the increasingly restrictive stance of the Supreme Court of the United States toward Congress's power to legislate under Section 5 of the Fourteenth Amendment.¹ Since 1997, the Court has invalidated provisions in five different federal statutes on grounds that Congress lacked power to enact the legislation under Section 5.² This period represents the first time since Re-

¹ See, e.g., Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, Morrison, and the Future of Federal Antidiscrimination Law, 2000 SUP. CT. REV. 109 (2000); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Aviam Soifer, *Full and Equal Rights of Conscience*, 22 U. HAW. L. REV. 469 (2000).

² See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 627 (2000) (Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630, 647 (1999) (Patent and Plant Variety Protection Remedy Clarification Act); City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (Religious Freedom Restoration Act).

construction that the Court has denied Congress's power to enact antidiscrimination legislation.³ This trend, denounced as "fundamentally misguided" by one set of commentators, seriously calls into question Congress's continued efficacy in the protection of individual rights.⁴

Among the chief targets in this clash between the Court and Congress have been provisions of federal employment antidiscrimination laws that operate directly on the states.⁵ This leads some commentators to speculate that the Court is deliberately sapping Congress's ability to lead the fight against discrimination by repeatedly invalidating federal employment legislation.⁶ These analysts fear for the continued vitality of various pieces of federal legislation that many Americans regard as cornerstones of the nation's commitment to equality.⁷

The future of federal antidiscrimination legislation largely focuses on Congress's power to enforce the Fourteenth Amendment under Section 5.⁸ This is because the Commerce Clause, which Congress previously relied on as the constitutional basis for most of its post-New Deal antidiscrimination legislation, is—due to recent Court holdings—no longer a viable way for Congress to enforce antidiscrimination norms directly against the states.⁹ In light of the great amount of attention this area is receiving from the courts and legal academics, as well as the grave practical implications the Court's Section 5 rulings have for individual rights, it is useful to gauge more precisely where Congress's power to legislate under Section 5 stands today.¹⁰ Nevertheless, although the Court's Section 5 rulings are tremendously consequential for the national fight against discrimination, they are also notoriously imprecise.¹¹

³ Estreicher & Lemos, *supra* note 1, at 110; Post & Siegel, *supra* note 1, at 443.

⁴ Post & Siegel, *supra* note 1, at 513; see Soifer, *supra* note 1, at 488.

⁵ Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1091 (2001).

⁶ See Colker & Brudney, *supra* note 1, at 83–84.

⁷ See Hart, *supra* note 5, at 1092 (suggesting that the Court's current approach may eventually limit federal employment legislation to preventing only racial discrimination).

⁸ See Caminker, *supra* note 1, at 1129; Hart, *supra* note 5, at 1095.

⁹ Caminker, *supra* note 1, at 1129; Hart, *supra* note 5, at 1094; Post & Siegel, *supra* note 1, at 443, 451; see *infra* notes 107–108 and accompanying text.

¹⁰ See Hart, *supra* note 5, at 1095–96.

¹¹ Post & Siegel, *supra* note 1, at 443.

The Court may soon clarify its Section 5 rules if it takes the opportunity to consider another piece of federal antidiscrimination legislation, the Family and Medical Leave Act of 1993 (FMLA).¹² Recently, the United States Courts of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit split over the constitutionality of one of its provisions, as it applies to state employers.¹³ This legislation is different from legislation the Court has previously faced because section 2612 of the FMLA was enacted to combat discrimination against women, a quasi-suspect class.¹⁴ Until the Court speaks definitively, the way these Courts of Appeals treat this legislation may help us learn more about what the new Section 5 rules mean for Congress's power to enact prophylactic antidiscrimination legislation.¹⁵

Until the present era, the Court had not found that Congress lacked power to enact antidiscrimination legislation since Reconstruction.¹⁶ The Court's recent activity demonstrates a radical change in the types of discrimination the Court will allow Congress to attack and the methods it will allow Congress to use.¹⁷ This Note argues that by encouraging federal courts to uncover congressional motive, as exemplified by the treatment of the FMLA in the two Courts of Appeals, the Court's contemporary approach unjustifiably encroaches on congressional prerogatives and seriously threatens Congress's constitutional duty to contend with the most widespread forms of discrimination.¹⁸

Part I of this Note explores the role of history in interpreting Congress's power under the Fourteenth Amendment.¹⁹ It focuses primarily on the history of the Amendment's drafting and the precedents that followed, as well as what they reveal about the meaning and

¹² See *Family and Medical Leave Act: FMLA Ruling Triggers Split over States' Immunity from Suit*, 16 Andrews Empl. Litig. Rep. No. 8, at 10 (Jan. 8, 2002).

¹³ *Id.* Compare *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 858 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3597 (U.S. Mar. 11, 2002) (No. 01-1368) (concluding that this FMLA provision was properly enacted under Section 5), with *Kazmier v. Widmann*, 225 F.3d 519, 526 (5th Cir. 2000) (holding that the provision was not valid Section 5 legislation).

¹⁴ Brian Ray, Note, "Out the Window"? Prospects for the EPA and FMLA after *Kimel v. Florida Board of Regents*, 61 OHIO ST. L.J. 1755, 1779 (2000).

¹⁵ See *Hibbs*, 273 F.3d 844; *Kazmier*, 225 F.3d 519.

¹⁶ *Estreicher & Lemos*, *supra* note 1, at 110; Post & Siegel, *supra* note 1, at 443.

¹⁷ See *infra* notes 250-286 and accompanying text.

¹⁸ See *infra* notes 329-364 and accompanying text.

¹⁹ See *infra* Part I.

range of Section 5.²⁰ Part II surveys the Court's most recent cases addressing Congress's power under Section 5.²¹ Part III critically reviews a split between the United States Courts of Appeals for the Ninth Circuit and the Fifth Circuit over the constitutionality of a provision of another piece of Section 5 legislation, the FMLA.²² Part IV discusses the scope and reach of the Section 5 power; and contrasts the present treatment of Section 5 with that originally envisioned by its framers.²³ Finally, Part V analyzes Congress's power to enact prophylactic anti-discrimination legislation under Section 5 as it is informed by the courts' divergent treatment of the FMLA.²⁴

I. THE FOURTEENTH AMENDMENT: ITS TEXT, FRAMING, AND SUBSEQUENT HISTORY

Section 1 of the Fourteenth Amendment demands that no 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."²⁵ Section 5 reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."²⁶ Despite this seemingly straightforward text, however, Congress's power to enforce the Fourteenth Amendment is, and has long been, very controversial.²⁷ Much of the controversy stems from the degree of independence Congress may assume in interpreting the Amendment's guarantees.²⁸ Is Congress strictly bound by the Court's interpretations of Section 1, or is Congress armed by Section 5 with some degree of independent interpretive power?²⁹

It is important to consider the Section's drafting history because the Court and observers have offered various interpretations of it and, in so doing, have drawn conflicting inferences from it regarding the

²⁰ See *id.*

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ See *infra* Part V.

²⁵ U.S. CONST. amend. XIV, § 1.

²⁶ U.S. CONST. amend. XIV, § 5.

²⁷ See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-16, at 936 (3d ed. 2000); Soifer, *supra* note 1, at 491.

²⁸ See Caminker, *supra* note 1, at 1132; McConnell, *supra* note 1, at 170-73.

²⁹ McConnell, *supra* note 1, at 170-73.

scope of congressional power.³⁰ For example, the current Supreme Court underscores the importance of historical evidence concerning Section 5's drafting for the conclusion that Congress's power was always meant to be remedial, not substantive.³¹ As support for its deduction, the Court consistently notes the opposition waged against the first draft of the Amendment.³² This draft read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.³³

This version was ultimately rejected in favor of the Amendment in its current form, with prohibitions against the states enumerated in Section 1 and Congress's enforcement power granted in Section 5.³⁴ From this structural change, the Court has inferred that "Congress' power was no longer plenary but remedial."³⁵ By reading the Amendment's drafting history in this particular way, the Court uncovers a reduced role for Congress.³⁶

Even so, scholars question the present Court's characterization of the drafting history of Section 5.³⁷ They criticize the Court for, for example, relying on isolated quotations in opposition to the first draft from the floor debate without demonstrating how those statements related to the final version of the Amendment.³⁸ It is possible, likely even, that the changes made to the Amendment had nothing at all to do with whether Congress was to have independent interpretive

³⁰ Compare *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997) (relying on Amendment's drafting in concluding that Section 5 was intended to be remedial, not substantive, power), with Caminker, *supra* note 1, at 1158–59 (questioning the Court's historical methodology and arguing that history does not provide argument for more scrutiny to Section 5 legislation), and McConnell, *supra* note 1, at 164, 176–83 (disputing the Court's conclusions in *Boerne* and arguing that the Amendment's framers never intended the judiciary to have exclusive power over defining unconstitutional state acts).

³¹ *City of Boerne*, 521 U.S. at 520–24; McConnell, *supra* note 1, at 164; see *infra* notes 80–83 and accompanying text.

³² See *City of Boerne*, 521 U.S. at 520.

³³ *Id.*

³⁴ See *id.* at 522.

³⁵ *Id.*

³⁶ See *id.* at 520–24.

³⁷ See Caminker, *supra* note 1, at 1159–62; McConnell, *supra* note 1, at 164.

³⁸ McConnell, *supra* note 1, at 164.

authority under Section 5.³⁹ What is clear, at least, is that the Court's reasoning from history in *City of Boerne v. Flores* is not conclusively supported.⁴⁰

It may ultimately be futile to attempt to define precisely the intentions of the Fourteenth Amendment's framers regarding the scope of Congress's power.⁴¹ Nevertheless, evidence from its drafting history solidly supports the proposition that the framers of the Fourteenth Amendment "intended to improve society" by guaranteeing to all persons their natural rights under the Constitution.⁴² In order to accomplish this goal, the Amendment's drafters employed two main tools: first, they gave Congress, not the Court, the primary role in securing the Amendment's protections, and second, they neutralized state resistance to equality in civil rights with robust federal power.⁴³

The framers designed a special role for Congress in the enforcement of the Fourteenth Amendment through Section 5.⁴⁴ According to former Chief Justice Earl Warren, "[Section 5] was a rather clear mandate to Congress to undertake the task of *defining* and securing the rights guaranteed . . . by the amendment."⁴⁵ In fact, Section 5 can be seen in large part as a reaction to the perceived hostility of the Court to Reconstruction goals, evidenced by the Court's contemporaneous decisions, and as a determination that the Court should not be trusted with the primary role in protecting Fourteenth Amendment rights.⁴⁶ Further, evidence from the immediate post-Amendment legislative record makes it clear that Congress itself did

³⁹ *Id.* at 178-81.

⁴⁰ See Soifer, *supra* note 1, at 490 ("The [*Boerne*] majority invoked '[s]cholars of successive generations' but relied on nothing published later than 1966.").

⁴¹ See *id.*

⁴² Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 110, 123 (David E. Kyvig ed., 2000); see Soifer, *supra* note 1, at 485.

⁴³ See TRIBE, *supra* note 27, § 7-2, at 1299; Earl Warren, *Fourteenth Amendment: Retrospect and Prospect*, in THE FOURTEENTH AMENDMENT 212, 216 (Bernard Schwartz ed., 1970).

⁴⁴ Warren, *supra*, note 43, at 216.

⁴⁵ *Id.* (emphasis added). But see McConnell, *supra* note 1, at 174 ("The supporters of the Fourteenth Amendment never seriously entertained the 'substantive' interpretation of Section Five . . .").

⁴⁶ See Caminker, *supra* note 1, at 1163; McConnell, *supra* note 1, at 182; Soifer, *supra* note 1, at 486. The framers were especially angry about recent decisions such as *Dred Scott v. Sandford* that threatened Reconstruction's goals. McConnell, *supra* note 1, at 182; Soifer, *supra* note 1, at 486.

not understand its role under the Fourteenth Amendment as merely enforcing judicially defined rights.⁴⁷

In addition to designing a special role for Congress, the Amendment's drafters also intended to dramatically alter the balance of power between the federal and state governments.⁴⁸ Before Reconstruction, the states were the primary guarantors of individuals' liberties; after the Fourteenth Amendment, constitutional rights were nationalized.⁴⁹ As part of the balance shift, the drafters empowered Congress to protect fundamental rights against infringement by states and even, some have suggested, private individuals.⁵⁰ Even so, the Court has not always seen fit to afford Congress such an expansive role.⁵¹ Beginning in 1883 with its *Civil Rights Cases* decision, the Court limited the scope of the Section 5 power by declaring that Congress cannot directly regulate the actions of private actors.⁵² The Court concluded that the legislation in question had impermissibly altered the balance of power between the federal government and the states.⁵³ The Court reached this conclusion even though there is solid evidence that the Fourteenth Amendment's framers intended such a shift.⁵⁴

Despite its early resistance to the Fourteenth Amendment's equality guarantees, the Court eventually, with Congress's help, began

⁴⁷ McConnell, *supra* note 1, at 175, 176 ("Between 1866 and 1875, Congress engaged in extensive debates over the substantive reach of the various Reconstruction era Civil Rights Acts. . . . All of these claims followed from the congressmen's own readings of the Constitution, without reference to judicial construction.")

⁴⁸ CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 377-85 (1997); Post & Siegel, *supra* note 1, at 512; see Soifer, *supra* note 1, at 493 ("Contemporary federalism claims almost surely would have greatly surprised supporters of . . . the Fourteenth Amendment. Deference to the states was hardly the lesson that the [framers] drew from a gruesome war fought in large measure exactly to defeat states' rights claims.")

⁴⁹ McConnell, *supra* note 1, at 192-93; Warren, *supra* note 43, at 220.

⁵⁰ See ANTIEAU, *supra* note 48, at 385.

⁵¹ Warren, *supra* note 43, at 216.

⁵² See 109 U.S. 3, 11 (1883); Warren, *supra* note 43, at 219. According to former Chief Justice Warren, the state action limitation was "unnecessary and unjustified" and wounded the Fourteenth Amendment at its heart. Warren, *supra* note 43, at 220. It was unjustified because Section 5 purposefully expanded national power at the expense of the state power. *Id.* Furthermore, under a conception of legal protection, the states had an affirmative duty to provide protection to its citizens equally, and Congress had the power to step in with federal legislation if the states neglected this duty. *Id.* at 221; see Soifer, *supra* note 1, at 485.

⁵³ See *Civil Rights Cases*, 109 U.S. at 11.

⁵⁴ See Caminker, *supra* note 1, at 1190; Warren, *supra* note 43, at 220.

to fulfill the Amendment's promises.⁵⁵ Following the early civil rights cases of the 1950s, "the Court established a relationship with Congress that was fluid and dynamic."⁵⁶ The Court learned from Congress the people's understanding of what American equality norms should be.⁵⁷ This interbranch give and take "enabled the Court to interpret the Equal Protection Clause in a manner that was attentive to evolving and contested social norms."⁵⁸ The Court's present insistence that it retain primary, perhaps exclusive, control over the Amendment's substantive guarantees represents a dramatic change from the old working relationship.⁵⁹ The current uncertainty surrounding the federal role in combating discrimination suggests, in part, a shift in the nature of the relationship between Congress and the Court.⁶⁰

II. *BOERNE* AND ITS PROGENY: THE COURT'S CONTEMPORARY APPROACH TO THE SECTION 5 POWER

A. *City of Boerne v. Flores: The Court's Handmade Requirements, Congruence and Proportionality, Defeat RFRA*

In 1997, in *City of Boerne v. Flores*, the Supreme Court of the United States dramatically curtailed Congress's power under Section 5 of the Fourteenth Amendment to remedy and prevent discrimination.⁶¹ *Boerne* arose as a challenge to the Religious Freedom Restoration Act of 1993 (RFRA), a direct legislative response to a recent Court holding.⁶² Through RFRA, Congress explicitly attempted to reverse the holding in *Employment Division, Department of Human Resources v. Smith*, that neutral, generally applicable laws may be applied to religious practices without violating the Free Exercise Clause of the First Amendment, even when not supported by a compelling governmental interest.⁶³ The plaintiff in *Boerne*, the Archbishop of San Antonio, sued under RFRA for relief from a municipality's refusal to issue a building permit to a church that was burdened by a historic preserva-

⁵⁵ Post & Siegel, *supra* note 1, at 446.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Hart, *supra* note 5, at 1108-10.

⁶⁰ See Post & Siegel, *supra* note 1, at 446.

⁶¹ See 521 U.S. 507, 512 (1997).

⁶² See *id.* at 514-15.

⁶³ *Id.*

tion regulation.⁶⁴ The United States District Court for the Western District of Texas concluded that, by applying RFRA to state statutes, Congress exceeded its power under Section 5.⁶⁵ The United States Court of Appeals for the Fifth Circuit reversed, finding RFRA constitutional.⁶⁶ The Supreme Court, in turn, reversed.⁶⁷

The Court in *Boerne* addressed the issue of whether RFRA as applied to the states was a proper exercise of Congress's Section 5 power to enforce by appropriate legislation the guarantees of the Fourteenth Amendment.⁶⁸ The Court initially observed that Section 5 is a positive grant of legislative power to Congress.⁶⁹ The Court explained that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view . . . is brought within the domain of congressional power."⁷⁰ Furthermore, Congress is empowered to enact legislation that deters or remedies constitutional violations even if, in so doing, it prohibits conduct that is not itself unconstitutional.⁷¹

Nevertheless, focusing on the text of the Fourteenth Amendment, the Court in *Boerne* emphasized the remedial nature of the Section 5 power.⁷² The power, the Court stated, extends only to *enforcing* the provisions of the Fourteenth Amendment, not to decreeing the Amendment's substance.⁷³ Emphatically, the Court declared that "Congress does not enforce a constitutional right by changing what the right is."⁷⁴ The power to determine what constitutes a constitutional violation, then, does not belong to Congress.⁷⁵ Furthermore, although the line between remedial measures and those that make a substantive change in the governing law is difficult to discern, it is a distinction that must be observed.⁷⁶ Famously, the Court determined that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that

⁶⁴ *Id.* at 512.

⁶⁵ *Id.*

⁶⁶ *City of Boerne*, 521 U.S. at 512.

⁶⁷ *Id.*

⁶⁸ *Id.* at 517.

⁶⁹ *Id.*

⁷⁰ *Id.* at 517-18 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

⁷¹ *City of Boerne*, 521 U.S. at 518.

⁷² *Id.* at 519.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *City of Boerne*, 521 U.S. at 519-20.

end. Lacking such a connection, legislation may become substantive in operation and effect.⁷⁷ The courts' role in evaluating legislation enacted under Section 5, then, is to police the line between remedy and substance.⁷⁸

The Court in *Boerne* justified its conclusion that the nature of the Section 5 power is remedial rather than substantive by pointing to two historical and structural issues: federalism and separation of powers.⁷⁹ According to Justice Kennedy, writing for the Court, the drafters of the Fourteenth Amendment specifically rejected a draft amendment submitted by Representative John Bingham of Ohio, which would have given Congress, some believed, too much power at the expense of the existing federal constitutional structure.⁸⁰ Under the revised amendment, Justice Kennedy observed, Congress's power against the states was "no longer plenary but remedial."⁸¹ Moreover, the drafters designed the amendment to respect the traditional separation of powers between the legislative and judicial branches.⁸² Although the Bingham proposal had given Congress the primary power to interpret and elaborate on the meaning of the amendment through legislation, the amendment as adopted maintained the Court's primary authority to interpret its prohibitions.⁸³

The Court's precedents confirmed that Congress's enforcement power was merely remedial and preventive, Justice Kennedy noted, relying especially on the *Civil Rights Cases*.⁸⁴ Additionally, he concluded, the Court's more recent holdings did not disturb the Court's consistent requirement that measures enacted under the Section 5 power be remedial.⁸⁵ For example, in 1966, in *Katzenbach v. Morgan*, the Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965, which prohibited a New York state literacy re-

⁷⁷ *Id.* at 520.

⁷⁸ *See id.* at 519-20.

⁷⁹ *See id.* at 520-24.

⁸⁰ *Id.* at 520-21.

⁸¹ *City of Boerne*, 521 U.S. at 522.

⁸² *Id.* at 523-24.

⁸³ *Id.* at 524.

⁸⁴ *Id.* (construing the *Civil Rights Cases* decision, 109 U.S. 3 (1883)). Professor Soifer disapproves of the Court's reliance on the *Civil Rights Cases* decision, arguing that "the *Boerne* Court's egregious use of the *Civil Rights Cases* as its key precedent, and the insistent exclusivity of its proclamation about constitutional wisdom . . . are striking attempts to knock most of the pieces off the board." Soifer, *supra* note 1, at 491-92.

⁸⁵ *City of Boerne*, 521 U.S. at 525-26 (construing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

quirement for certain Puerto Rican voters, even though the Court had previously determined that literacy requirements were constitutionally permissible.⁸⁶ Justice Kennedy acknowledged that *Morgan* could be read to recognize "a power in Congress to enact legislation that expands the rights contained in Section 1 of the Fourteenth Amendment."⁸⁷ Nevertheless, he stated, such a reading was not necessary or "best;" rather, *Morgan* could and should be read as the Court's having "perceived a factual basis on which Congress could have concluded that [the] literacy requirement 'constituted an invidious discrimination in violation of the Equal Protection Clause.'"⁸⁸ Such a narrow reading was preferable, Justice Kennedy reasoned, to protect the Constitution's role as "superior paramount law, unchangeable by ordinary means," as it would be if it were a mere legislative enactment.⁸⁹

Turning to consider RFRA's application to the states, the Court examined the fit between the means used by the Act and the perceived constitutional injuries.⁹⁰ The Court noted that "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."⁹¹ First, the Court examined the legislative record for modern examples of generally applicable laws passed because of religious bigotry.⁹² The Court found no modern instances of such legislation, noting that none had occurred within the past forty years.⁹³ Furthermore, the Court observed, RFRA was completely out of proportion to any "supposed remedial or preventive object," such that it could not be understood as anything but an attempt to change the substance of constitutional rights.⁹⁴

⁸⁶ See *id.* at 518, 528.

⁸⁷ *Id.* at 527-28.

⁸⁸ *Id.* at 528 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966)). Former Chief Justice Warren viewed *Morgan* quite differently; he called the decision "a major step toward removing the restrictions that the *Civil Rights Cases* had imposed on congressional enforcement power" that "told Congress that it shared with the court the responsibility for construing and applying the provisions" of the Fourteenth Amendment. Warren, *supra* note 43, at 227.

⁸⁹ *City of Boerne*, 521 U.S. at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁹⁰ *Id.* at 530.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *City of Boerne*, 521 U.S. at 532.

RFRA's sweeping reach and scope, the Court determined, were far broader than any perceptible "mischief and wrong" Congress could have meant to prevent or remedy.⁹⁵ In sum, RFRA lacked the congruence and proportionality required of Section 5 legislation and was therefore invalid as applied to the states.⁹⁶

The dissenters in *Boerne* largely focused on their belief that the Court's decision in *Smith* was erroneous; only Justice O'Connor specifically addressed the issue of Congress's Section 5 power.⁹⁷ Justice O'Connor largely agreed with the Court's reasoning about the Section 5 power.⁹⁸ She was even more explicit about Congress's institutional limitations, arguing that "[i]n short, Congress lacks the ability to define or expand the scope of constitutional rights by statute."⁹⁹ She noted that this fact did not detract from Congress's duty to draw its own conclusions regarding the Constitution's meaning, but in so doing, Congress must make such conclusions consistent with the Court's exposition of the Constitution.¹⁰⁰

Boerne was an exceptional case in part because RFRA was an explicit attempt by Congress legislatively to overrule a politically unpopular decision of the Court.¹⁰¹ Some of the Court's language in *Boerne* reflects the Court's having interpreted RFRA as a direct institutional affront:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.¹⁰²

Because of the unusual circumstances surrounding the *Boerne* decision, one might have thought that its application and utility would be

⁹⁵ See *id.*

⁹⁶ *Id.* at 533, 536.

⁹⁷ See *id.* at 544-65 (O'Connor, J., dissenting); *id.* at 565-66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

⁹⁸ *Id.* at 545 (O'Connor, J., dissenting).

⁹⁹ *City of Boerne*, 521 U.S. at 545 (O'Connor, J., dissenting).

¹⁰⁰ *Id.* (O'Connor, J., dissenting).

¹⁰¹ See *id.* at 512-15.

¹⁰² See *id.* at 536.

fairly limited.¹⁰³ Nevertheless, the Court applied the *Boerne* test four times over the next four years, demonstrating the enduring impact of its new approach.¹⁰⁴

B. *Kimel v. Florida Board of Regents: Congress Prohibits Too Much State Action in the ADEA?*

Three years after *Boerne*, the Court faced Section 5 legislation that, unlike RFRA, did not deliberately attempt to enlarge substantive rights beyond the Court's definition.¹⁰⁵ In 2000, in *Kimel v. Florida Board of Regents*, the Supreme Court relied on *Boerne* in invalidating a portion of the Age Discrimination in Employment Act of 1967 (ADEA), which prohibited employers, including states, from discriminating against individuals because of age.¹⁰⁶ Justice O'Connor's opinion for the Court focused on the ADEA's private suit provision, as applied to the states, which required Congress validly to abrogate the states' sovereign immunity through use of its Section 5 power.¹⁰⁷ After it first determined that Congress explicitly intended to abrogate states' sovereign immunity under the ADEA, the Court then con-

¹⁰³ See *id.* at 512-15; see also McConnell, *supra* note 1, at 174 ("[T]he *Boerne* majority viewed congressional action as an irrelevance, if not an impertinence."); Post & Siegel, *supra* note 1, at 454 ("In *Boerne*, the Court was plainly provoked . . ."); Soifer, *supra* note 1, at 489 ("[T]he Court felt obliged . . . to rebuff emphatically what the Justices perceived to be Congress's intrusion onto turf the Court had staked out exclusively for itself.").

¹⁰⁴ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-74 (2001); *United States v. Morrison*, 529 U.S. 598, 665 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63-64 (2000); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999).

¹⁰⁵ See *Kimel*, 528 U.S. at 66. Unlike the circumstances surrounding RFRA, the ADEA was enacted prior to the Court's having defined the contours of age discrimination. See *id.*; *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (applying rationality review to sustain mandatory retirement age for state troopers).

¹⁰⁶ 528 U.S. at 66.

¹⁰⁷ *Id.* at 68, 73. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. This amendment has long been understood to mean that federal courts lack jurisdiction over suits by private parties against nonconsenting states. *Kimel*, 528 U.S. at 73. In *Seminole Tribe of Florida v. Florida*, the Court held that Congress cannot abrogate states' Eleventh Amendment sovereign immunity under its Article I powers, such as the Commerce Clause. 517 U.S. 44, 72-73 (1996). Nevertheless, Congress *can* abrogate states' sovereign immunity through legislation validly enacted under Section 5 of the Fourteenth Amendment. *Kimel*, 528 U.S. at 80.

cluded that the ADEA was not appropriate legislation under Section 5 of the Fourteenth Amendment.¹⁰⁸

The Court in *Kimel* began by reiterating its approach in *Boerne*.¹⁰⁹ Justice O'Connor recognized that Section 5 is a positive grant of power to Congress, but, nevertheless, one with inherent limitations.¹¹⁰ Although Congress can remedy and deter violations of rights guaranteed by the Fourteenth Amendment by prohibiting "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," it cannot independently determine what constitutes a constitutional violation.¹¹¹ To ensure that Congress does not cross the decidedly fine line between appropriate remedial legislation and inappropriate substantive redefinition of rights, a court examining legislation must find congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.¹¹²

Applying the congruence and proportionality test to the ADEA, Justice O'Connor determined that the Act was invalid in trumping state immunity.¹¹³ First, she observed, its provisions targeted a disproportionate level of "unconstitutional conduct."¹¹⁴ Because age is not a suspect classification under the Court's equal protection analysis, it followed, according to Justice O'Connor, that states are not constitutionally required to tailor narrowly their age distinctions to legitimate interests.¹¹⁵ In fact, states need only have a rational basis for drawing lines on the basis of age to satisfy the Constitution.¹¹⁶ Because states are allowed to discriminate by age if they have a rational basis for doing so, the ADEA provision was out of proportion to a supposed remedial or preventive object.¹¹⁷ Justice O'Connor emphasized that the ADEA's *broad* restriction on the use of age as a discriminating factor

¹⁰⁸ *Kimel*, 528 U.S. at 74, 82-83. To determine whether Congress has abrogated states' sovereign immunity, the Court applies a two-part test: first, did Congress unequivocally express its intent to abrogate that immunity; second, if it did, did Congress act pursuant to a valid grant of constitutional authority? *Id.* at 73 (citing *Seminole Tribe of Fla.*, 517 U.S. at 55).

¹⁰⁹ *Id.* at 80-82.

¹¹⁰ *Id.* at 80-81.

¹¹¹ *Id.* at 81.

¹¹² *Id.*

¹¹³ *Kimel*, 528 U.S. at 82-83.

¹¹⁴ *Id.* at 83.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 86.

¹¹⁷ *Id.*

prohibited substantially more conduct than would be held unconstitutional under the Court's equal protection, rational basis standard.¹¹⁸ The ADEA's increased burden on state employers was more like a strict scrutiny standard, the Court reasoned, a more stringent standard than the Court applies in adjudicating an Equal Protection claim based on age classifications.¹¹⁹

Besides prohibiting "very little conduct likely to be held unconstitutional," the provision of the ADEA also failed because it was not reasonably prophylactic.¹²⁰ To determine whether the ADEA was appropriately prophylactic or "merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination," the Court examined the ADEA's legislative record to identify the basis on which Congress might have decided there was a "difficult and intractable problem[]" requiring a robust remedy.¹²¹ The Court found that, on the contrary, the ADEA was "an unwarranted response to a perhaps inconsequential problem."¹²² Congress identified no pattern of age discrimination by state employers, Justice O'Connor observed, only "isolated sentences clipped from floor debates and legislative reports."¹²³ As a result, the Court concluded, Congress had insufficient reason to believe that states were unconstitutionally discriminating against employees on the basis of age and thus insufficient reason to enact such a harsh remedy as the ADEA.¹²⁴

C. *United States v. Morrison*: VAWA Fails for Lack of State Action

In 2000, in *United States v. Morrison*, the Supreme Court followed *Boerne* in striking down the civil remedy provided by the Violence Against Women Act of 1994 (VAWA).¹²⁵ The VAWA was enacted to combat perceived inadequate state remedies, including prosecution, for violent crimes motivated by gender.¹²⁶ The Court in *Morrison*, after first determining that Congress lacked power to enact the private

¹¹⁸ *Kimel*, 528 U.S. at 86.

¹¹⁹ *Id.* at 87-88.

¹²⁰ *Id.* at 88.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Kimel*, 528 U.S. at 89.

¹²⁴ *Id.* at 91.

¹²⁵ 529 U.S. at 602.

¹²⁶ *Id.* at 619-20.

damage suit provision of the VAWA under the Commerce Clause, considered Congress's power to enact it under Section 5.¹²⁷

Chief Justice Rehnquist, writing for the Court, began the Section 5 analysis in the same way as did the Court in *Boerne* and *Kimel*, by acknowledging Congress's authority and then observing its limitations.¹²⁸ The Court then laid out the manner in which it would analyze a gender discrimination problem under the Equal Protection Clause; it noted that state-sponsored gender discrimination violates Equal Protection unless it serves important governmental objectives through means that are substantially related to the fulfillment of those objectives.¹²⁹ Chief Justice Rehnquist acknowledged that gender classifications trigger heightened scrutiny by the Court, but also observed that the Court's Equal Protection analysis does not reach private individuals because the Clause requires state action.¹³⁰ The absence of state action proved fatal to the VAWA's private suit provision.¹³¹ Chief Justice Rehnquist concluded that the Act was not a congruent and proportional prophylactic measure because it was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."¹³² The Court was not convinced of the Act's remedial nature despite the alleged failure of state actors to enforce the law adequately because of their gender bias.¹³³

In dissent, Justice Breyer, joined by Justice Stevens for discussion of Section 5, primarily disagreed with the Court's narrow Commerce Clause analysis.¹³⁴ Nevertheless, Justice Breyer did briefly register his doubts regarding the Court's reasoning in rejecting Congress's power under Section 5 to enact the VAWA's private suit provision.¹³⁵ Although Justice Breyer agreed with the Court that Section 5 does not empower Congress to remedy purely private conduct, he reminded the Court that the government's argument in the case was that the

¹²⁷ *Id.* at 619. The VAWA was not a proper use of the Commerce Clause because it concerned noneconomic conduct. *Id.* at 617-18.

¹²⁸ *Id.* at 619.

¹²⁹ *Id.* at 620.

¹³⁰ See *Morrison*, 529 U.S. at 621.

¹³¹ *Id.* at 626-27.

¹³² *Id.* at 626.

¹³³ See *id.* at 624-25.

¹³⁴ See *id.* at 655-66 (Breyer, J., dissenting).

¹³⁵ *Morrison*, 529 U.S. at 664 (Breyer, J., dissenting).

VAWA was a remedy for the (in)actions of state actors.¹³⁶ Moreover, Justice Breyer asked rhetorically, "[W]hy can Congress not provide a remedy against private actors?"¹³⁷ Even though private actors had not themselves violated the Constitution, under the Court's Section 5 analysis, Congress is empowered "at least sometimes" to enact remedial legislation that prohibits conduct that is not itself unconstitutional.¹³⁸ Because the VAWA intruded little upon states or private parties, Justice Breyer asked, "Why is the remedy 'disproportionate'?"¹³⁹ Given the close relationship between the injury (inadequate state remedies) and the remedy (a federal forum), Justice Breyer asked, "[W]here is the lack of 'congruence'?"¹⁴⁰ Justice Breyer believed the VAWA was properly enacted under the Commerce Clause, and left these probing questions regarding Congress's Section 5 power unanswered.¹⁴¹

D. Board of Trustees of the University of Alabama v. Garrett: ADA's Remedies Too Stringent

In 2001, in *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court invalidated provisions of the Americans with Disabilities Act of 1990 (ADA) that allowed for recovery of money damages against the states.¹⁴² The ADA prohibited certain employers, including states, from discriminating in employment against qualified individuals with disabilities and required employers to make reasonable accommodations for employees with disabilities.¹⁴³ The Court faced a similar issue as in *Kimel*: to abrogate the states' sovereign immunity effectively, the ADA must have been validly enacted under Section 5 of the Fourteenth Amendment.¹⁴⁴

In its most explicit terms to date, the Court expounded upon the contours of Congress's Section 5 power.¹⁴⁵ The Court observed that "Congress is not limited to mere legislative repetition of this Court's

¹³⁶ *Id.* (Breyer, J., dissenting).

¹³⁷ *Id.* at 665 (Breyer, J., dissenting).

¹³⁸ *Id.* (Breyer, J., dissenting) (citing *City of Boerne*, 521 U.S. at 518; *Morgan*, 384 U.S. at 651; *South Carolina v. Katzenbach*, 383 U.S. at 308).

¹³⁹ *Id.* (Breyer, J., dissenting).

¹⁴⁰ *Morrison*, 529 U.S. at 665 (Breyer, J., dissenting).

¹⁴¹ *Id.* at 666 (Breyer, J., dissenting).

¹⁴² 531 U.S. at 360.

¹⁴³ *Id.* at 361.

¹⁴⁴ *Id.* at 364.

¹⁴⁵ *See id.* at 365.

constitutional jurisprudence."¹⁴⁶ Rather, Congress retains a narrow window of authority whereby it can remedy and prevent violation of rights by prohibiting conduct that is not itself a violation of the Fourteenth Amendment.¹⁴⁷ Congress can enact Section 5 legislation "reaching beyond Section 1's actual guarantees" when the legislation exhibits congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.¹⁴⁸

The Court then followed its now familiar process of analyzing the legislation.¹⁴⁹ First, the Court outlined the scope of the constitutional right at issue—here, the states' treatment of the persons with disabilities.¹⁵⁰ By looking at its own precedents on this point, the Court observed that classifications involving disability trigger only rational basis review.¹⁵¹ As such, states can, without violating Section 1 of the Fourteenth Amendment, discriminate against individuals with disabilities if there is a rational relationship between the disparate treatment and a legitimate governmental purpose.¹⁵² Second, the Court examined the legislative record to see "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."¹⁵³ The Court concluded that Congress's *general* finding of systematic societal discrimination against individuals with disabilities did not explicitly implicate enough discrimination by the states.¹⁵⁴ The Court noted that the Respondents' brief cited "half a dozen examples" of relevant discrimination by the states.¹⁵⁵ Further, the record's most blatant examples of state discrimination were drawn from years long past.¹⁵⁶ Even if, in aggregate, the examples were found to be unconstitutional, they would not, the Court concluded,

¹⁴⁶ *Id.*

¹⁴⁷ *Garrett*, 531 U.S. at 365.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 366–67.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 366 (construing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). Despite Chief Justice Rehnquist's emphatic statement that the Court, in *Cleburne*, had employed mere rational basis review, many observers have concluded that the Court tacitly applied heightened scrutiny. Mark A. Johnson, Note, Board of Trustees of the University of Alabama v. Garrett: A Flawed Standard Yields a Predictable Result, 60 MD. L. REV. 393, 410 (2001).

¹⁵² *Garrett*, 531 U.S. at 367.

¹⁵³ *Id.* at 368.

¹⁵⁴ *See id.* at 369.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* n.6.

suggest "the pattern of unconstitutional discrimination" that would empower Congress to enact remedial legislation under Section 5.¹⁵⁷

Furthermore, the Court stated, even if it were to concede a pattern of unconstitutional discrimination by the states, "the rights and remedies created by the ADA against the States" would raise concerns as to congruence and proportionality.¹⁵⁸ The ADA was incongruous and disproportional in three ways: first, it would be rational for states to discriminate against persons with disabilities for financial reasons, but the ADA required employers to make reasonable accommodations; second, only undue hardship triggered the ADA's exception, but the Court's rational relationship test would impose a lesser duty; and, third, the employer bore the burden of proving an undue burden under the ADA instead of the employee, as would be true under the rational basis test.¹⁵⁹ Because the ADA failed the *Boerne* congruence and proportionality test, it did not validly abrogate the states' sovereign immunity.¹⁶⁰

Justice Kennedy, joined by Justice O'Connor, concurred with the Court in *Garrett*, writing separately to emphasize the importance of state sovereignty in the federal system.¹⁶¹ He noted the seriousness of accusing a state of "engag[ing] in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy."¹⁶² He observed that states are "neutral entities," which are responsible to their own citizens and which do not violate the Equal Protection Clause merely by failing to revise public policy to be in step with prevailing opinion.¹⁶³ Unequivocally, Justice Kennedy stated, "The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity."¹⁶⁴ Justice Kennedy's focus on the importance of federalism issues in the Section 5 context echoes his conclusions in *Boerne*.¹⁶⁵

¹⁵⁷ See *Garrett*, 531 U.S. at 370.

¹⁵⁸ *Id.* at 372.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 374.

¹⁶¹ See *id.* at 374-76 (Kennedy, J., concurring).

¹⁶² *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

¹⁶³ *Id.* (Kennedy, J., concurring).

¹⁶⁴ *Id.* at 376 (Kennedy, J., concurring).

¹⁶⁵ See *id.* at 374-76 (Kennedy, J., concurring); *City of Boerne*, 521 U.S. at 520-23.

Justice Breyer dissented vigorously in *Garrett*; Justices Stevens, Souter, and Ginsburg joined him.¹⁶⁶ He accused the majority of "[r]eviewing the congressional record as if it were an administrative agency record."¹⁶⁷ Arguing against the level of scrutiny with which the majority examined the legislative process, Justice Breyer insisted that Congress reasonably could have concluded that the ADA was an appropriate way to enforce the Equal Protection Clause.¹⁶⁸

Justice Breyer focused on the differences in institutional capacity between the courts and Congress.¹⁶⁹ For example, the majority noted that the evidence before Congress was insufficient to prove in court that "in each instance, the discrimination they suffered lacked justification from a judicial standpoint."¹⁷⁰ Justice Breyer suggested that the majority was holding Congress to an improper standard; he argued, "[A] legislature is not a court of law."¹⁷¹ Congress as an institution makes its decisions differently from the courts, often relying on anecdotal or opinion testimony to draw general conclusions.¹⁷² The Court in *Garrett*, Justice Breyer argued, deviated from its past practice of looking to the reasonableness of Congress's conclusions rather than requiring "extensive investigation of each piece of evidence."¹⁷³ Justice Breyer found no justification for the majority's heightened scrutiny in the Section 5 context.¹⁷⁴

According to Breyer, the Court's failure to find sufficient evidence in the legislative record to support the ADA stemmed from its erroneously holding Congress to judicial standards.¹⁷⁵ Limitations stemming from the nature of the judicial process, such as burden of proof, are inapposite when applied to Congress.¹⁷⁶ Indeed, rational basis review, which had by then condemned the ADA and the ADEA as invalid Section 5 legislation, inherently presumes constitutionality and is itself a limitation on judges.¹⁷⁷ The Court's approach to review-

¹⁶⁶ See *Garrett*, 531 U.S. at 376-89 (Breyer, J., dissenting).

¹⁶⁷ *Id.* at 376 (Breyer, J., dissenting).

¹⁶⁸ *Id.* at 377 (Breyer, J., dissenting).

¹⁶⁹ *Id.* at 380-89 (Breyer, J., dissenting).

¹⁷⁰ *Id.* at 379 (Breyer, J., dissenting).

¹⁷¹ *Garrett*, 531 U.S. at 379-80 (Breyer, J., dissenting).

¹⁷² *Id.* at 380 (Breyer, J., dissenting).

¹⁷³ *Id.* (Breyer, J., dissenting).

¹⁷⁴ *Id.* at 380-89 (Breyer, J., dissenting).

¹⁷⁵ *Id.* at 382 (Breyer, J., dissenting).

¹⁷⁶ *Garrett*, 531 U.S. at 383 (Breyer, J., dissenting).

¹⁷⁷ *Id.* (Breyer, J., dissenting).

ing Congress's power under Section 5 was flawed, then, because "the Congress of the United States is not a lower court."¹⁷⁸ The Court should not require Congress to adopt "rules or presumptions" that reflect a court's institutional capacity.¹⁷⁹ To do so, as the majority did, according to Justice Breyer, was to stand the principle of judicial restraint on its head.¹⁸⁰ If the Court had not improperly held Congress to a judicial standard, it would have found the legislative record more than adequate.¹⁸¹

Justice Breyer then analyzed the Court's alternative conclusion by applying the congruence and proportionality requirements to the ADA.¹⁸² He observed that the Court had in the past upheld disparate impact standards in contexts in which they were not constitutionally required, even though the perceived excess of the reasonable accommodation requirement bothered the Court here.¹⁸³ Justice Breyer noted that "what is 'reasonable' in the statutory sense and what is 'unreasonable' in the constitutional sense might differ. In other words, the requirement may exceed what is necessary to avoid a constitutional violation."¹⁸⁴ That, to Justice Breyer, was exactly the point.¹⁸⁵ Section 5 grants to Congress the power to do that which "'tends to enforce submission' to its 'prohibitions' and 'to secure to all persons . . . the equal protection of the laws.'"¹⁸⁶ It is a power the Court in the past equated with the authority granted to Congress in the Necessary and Proper Clause, a broad power.¹⁸⁷ Although the majority's current approach paid lip service to judicial deference to Congress and purported to follow that standard, Justice Breyer found nothing of it in practice in the Court's recent cases.¹⁸⁸

¹⁷⁸ *Id.* (Breyer, J., dissenting).

¹⁷⁹ *Id.* at 384 (Breyer, J., dissenting).

¹⁸⁰ *Id.* at 385 (Breyer, J., dissenting).

¹⁸¹ *Garrett*, 531 U.S. at 385 (Breyer, J., dissenting).

¹⁸² *Id.* at 385-87 (Breyer, J., dissenting).

¹⁸³ *Id.* at 385 (Breyer, J., dissenting) (citing *Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion); *City of Rome v. United States*, 446 U.S. 156, 172-73 (1980); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

¹⁸⁴ *Garrett*, 531 U.S. at 385-86 (Breyer, J., dissenting).

¹⁸⁵ *See id.* (Breyer, J., dissenting).

¹⁸⁶ *Id.* at 386 (Breyer, J., dissenting) (quoting *Ex parte Virginia*, 100 U.S. at 346).

¹⁸⁷ *Id.* (Breyer, J., dissenting) (citing *Morgan*, 384 U.S. at 650).

¹⁸⁸ *Id.* at 386-87 (Breyer, J., dissenting) (citing *Kimel*, 528 U.S. at 81; *Coll. Sav. Bank*, 527 U.S. at 639; *City of Boerne*, 521 U.S. at 536).

Justice Breyer then took on the majority's primary motivation in curtailing Congress's Section 5 power: federalism.¹⁸⁹ Justice Breyer conceded that the ADA imposed a burden on states by abrogating their sovereign immunity.¹⁹⁰ Nevertheless, he observed that "[r]ules for interpreting § 5 that would provide States with special protection . . . run counter to the very object of the Fourteenth Amendment."¹⁹¹ The Fourteenth Amendment, then, overrides principles of federalism that might otherwise be impediments to Congress in enacting corrective legislation.¹⁹²

Neither federalism nor the majority's backward separation of powers arguments satisfied Justice Breyer.¹⁹³ He doubted "that [the] decision serves any constitutionally based federalism interest" and argued that "[t]he Court . . . improperly invades a power that the Constitution assigns to Congress."¹⁹⁴ What is left of the Section 5 power is but a shell, Justice Breyer concluded: "[*Garrett*] saps § 5 of independent force, effectively 'confin[ing] the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch [is] prepared to adjudge unconstitutional.'"¹⁹⁵ One might infer from Justice Breyer's analysis that all that remains of the Section 5 power is the authority to legislate against latent violations of Section 1, a power with very dubious independent value.¹⁹⁶

III. A CIRCUIT SPLIT OVER THE CONSTITUTIONALITY OF AN FMLA PROVISION

As previously discussed, the Court's recent Section 5 cases severely restrain Congress's ability to enact federal antidiscrimination legislation.¹⁹⁷ Yet, after *Board of Trustees of the University of Alabama v. Garrett*, it is still very unclear what legislation will survive the Court's new heightened scrutiny of Section 5 measures.¹⁹⁸ Currently, it is clear that legislation must be congruent and proportional to the constitu-

¹⁸⁹ *Garrett*, 531 U.S. at 387-88 (Breyer, J., dissenting).

¹⁹⁰ *Id.* at 388 (Breyer, J., dissenting).

¹⁹¹ *Id.* (Breyer, J., dissenting).

¹⁹² *Id.* (Breyer, J., dissenting).

¹⁹³ *See id.* at 376-89 (Breyer, J., dissenting).

¹⁹⁴ *Garrett*, 531 U.S. at 388-89 (Breyer, J., dissenting).

¹⁹⁵ *Id.* at 389 (Breyer, J., dissenting) (quoting *Morgan*, 384 U.S. at 648-49).

¹⁹⁶ *See id.* (Breyer, J., dissenting).

¹⁹⁷ *See supra* Part II.

¹⁹⁸ *See Post & Siegel, supra* note 1, at 526 ("[T]he Boerne test could easily invalidate large stretches of federal antidiscrimination law . . .").

tional violation to be remedied or prevented.¹⁹⁹ That is, for legislation to pass the Court's stricter approach, its remedy must be congruent and proportional to behavior that has previously been found to be a constitutional violation by a court.²⁰⁰ It would be wrong for this requirement to mean, however, that Congress can only remedy or prevent constitutional violations by specifically outlawing behaviors that would violate Section 1.²⁰¹ If that were the case, Section 5 would be redundant, a dead letter.²⁰² That interpretation would reduce Congress to the role of federal scrivener, merely codifying prohibitions on those behaviors federal courts have previously identified as violations of the Fourteenth Amendment.²⁰³

If we accept that Congress has power to protect court-identified constitutional rights by prohibiting otherwise constitutional behavior—as must be true if Section 5 is to have logical meaning and as the Court has reiterated—the question remains, when and under what circumstances?²⁰⁴ At least the following issues are still unresolved: how much deference the Court will afford to Congress to decide, as a matter of policy; which means are best suited to accomplishing its goals; the size of that narrow window wherein Congress can legislate against otherwise constitutional behavior; and whether the degree of deference changes and the size of the window expands and contracts in tandem with the level of scrutiny the Court applies to potential constitutional violations.²⁰⁵

Two United States Courts of Appeals recently addressed these issues in hearing challenges to a provision of the FMLA; they reached

¹⁹⁹ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

²⁰⁰ See *Garrett*, 531 U.S. at 389 (Breyer, J., dissenting); Caminker, *supra* note 1, at 1143–46.

²⁰¹ See *Garrett*, 531 U.S. at 389 (Breyer, J., dissenting).

²⁰² See *id.*

²⁰³ See Estreicher & Lemos, *supra* note 1, at 115.

²⁰⁴ See *Garrett*, 531 U.S. at 365 (“Congress is not limited to mere repetition of this Court’s constitutional jurisprudence.”); *Kimel*, 528 U.S. at 81 (“Congress’ § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.”).

²⁰⁵ See Hart, *supra* note 5, at 1092 (“In its recent Section 5 cases, the Court has suggested that the substance of the Fourteenth Amendment guarantee of ‘equal protection’ is different for different classes of people.”); Ray, *supra* note 14, at 1768–69 (suggesting that courts allow more deference with more important constitutional rights).

opposite conclusions.²⁰⁶ In 2000, in *Kazmier v. Widmann*, the United States Court of Appeals for the Fifth Circuit concluded that section 2612(a)(1)(C) of the FMLA, which requires employers to provide leave for employees to care for sick relatives, did not validly abrogate state sovereign immunity because it was not validly enacted under Section 5 of the Fourteenth Amendment.²⁰⁷ In 2001, in *Hibbs v. Department of Human Resources*, the United States Court of Appeals for the Ninth Circuit refused to follow *Kazmier* and concluded that the same provision of the FMLA was valid Section 5 legislation.²⁰⁸ This circuit split very likely could lead the Supreme Court to revisit the Section 5 issue.²⁰⁹

A. *Kazmier v. Widmann: The Fifth Circuit Concludes the Provision Is Unconstitutional*

In *Kazmier*, the Fifth Circuit laid out a two-part test it derived from *Kimel v. Florida Board of Regents*.²¹⁰ First, the court gauged the scope of Congress's potential authority to legislate in this area by identifying the constitutional right: "Congress's authority is most broad when 'we require a tight[] fit between [the discriminatory classifications in question] and the legitimate ends they serve,' as we do with classifications that are based on race or sex."²¹¹ Second, the court examined the legislative record specifically "to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions."²¹² The court emphasized that the legislative record must reveal "an *identified pattern* of actual constitutional violations by the States" rather than merely the potential for constitutional violations.²¹³

²⁰⁶ See *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 858 (9th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3597 (U.S. Mar. 11, 2002) (No. 01-1368); *Kazmier v. Widmann*, 225 F.3d 519, 526 (5th Cir. 2000).

²⁰⁷ 225 F.3d at 526.

²⁰⁸ 273 F.3d at 858.

²⁰⁹ See *Family and Medical Leave Act: FMLA Ruling Triggers Split over States' Immunity from Suit*, *supra* note 12, at 10.

²¹⁰ 225 F.3d at 524.

²¹¹ *Id.* (quoting *Kimel*, 528 U.S. at 84).

²¹² *Id.*

²¹³ *Id.* ("The respect that must be accorded the States as independent sovereigns within our federal system prevents Congress from restraining them from engaging in constitutionally permissible conduct based on nothing more than the mere invocation of perceived constitutional bogeymen.").

The court in *Kazmier* identified the constitutional issue as gender discrimination in employment, concluding that "Congress *potentially* has wide latitude under Section 5 to enact broad prophylactic legislation designed to prevent the States from discriminating on the basis of sex."²¹⁴ In spite of this, the court was highly skeptical about whether preventing gender discrimination was Congress's true intent, noting that "Congress was responding to findings that *private* sector employers frequently discriminate against *men* in granting leave to provide family care. . . . [T]he perverse effect of this reverse discrimination has actually been to push *women* out of the work force"²¹⁵ Even so, the *Kazmier* court acknowledged Congress's potentially great leeway for legislating in this area.²¹⁶

The *Kazmier* court concluded, however, that the legislative record did not reveal the "*actual, identified* constitutional violations by the States" that would support broad prophylactic legislation.²¹⁷ Notably, the court concluded that findings of discrimination in granting family leave from the private sector could not be extrapolated to the public sector.²¹⁸ Moreover, evidence in the record regarding parental leave was "not in the least probative of the question before [the court]."²¹⁹ The FMLA, the court reasoned, was "broad, prophylactic legislation [because] . . . [t]here is nothing in the Constitution that even closely approximates either a duty to give all employees up to twelve weeks of leave per year to care for ailing family members or a right of an employee to take such leave."²²⁰ As a result, the Fifth Circuit was faced with what it saw as broad legislation imposing a burden on the states without an adequate legislative record for support.²²¹

The *Kazmier* court refused to credit Congress's express declaration of legislative intent, concluding instead that "the FMLA is not designed to prevent discrimination at all, but rather is crafted to provide employees throughout the nation with a substantive statutory right to take leave from work for family and medical reasons."²²² The Fifth Circuit clearly attempted to sniff out improper congressional

²¹⁴ *Id.* at 525, 526.

²¹⁵ *Kazmier*, 225 F.3d at 525.

²¹⁶ *Id.* at 526.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 531.

²²⁰ *Kazmier*, 225 F.3d at 526.

²²¹ *Id.* at 526, 531.

²²² *Id.* at 532.

intent by first announcing that the right at issue is gender discrimination in employment but then proceeding to analyze the right as if it is the right to take family leave, a right that is not constitutionally guaranteed.²²³ From this, the Fifth Circuit held that Congress did not enact this FMLA provision pursuant to its enforcement power under Section 5.²²⁴

B. *Hibbs v. Department of Human Resources: The Ninth Circuit Holds the Provision Is Valid*

In *Hibbs*, the Ninth Circuit began its analysis in essentially the same way as the Fifth Circuit had in *Kazmier*, by defining the constitutional issue as gender discrimination.²²⁵ Because state-sponsored gender discrimination receives heightened scrutiny, the court explained, it produces a rebuttable presumption of unconstitutionality.²²⁶ Even so, the court acknowledged that the FMLA provision "sweeps more broadly than the Equal Protection Clause itself" because it does not merely prohibit gender discrimination in the granting of medical leave.²²⁷ Nevertheless, that fact was not fatal, according to the Ninth Circuit, because Congress can enact reasonably prophylactic legislation under Section 5.²²⁸

In determining whether gender discrimination in employment is the type of "difficult and intractable problem[] that would justify such broad remedies," the *Hibbs* court rejected the argument that judges should look only to the legislative record for adequate support.²²⁹ Rather, the court concluded, the legislative record was only one source of information by which a court could "determine whether the broad prophylactic legislation under consideration is justified by the

²²³ See *id.* at 525, 526.

²²⁴ *Id.* at 526.

²²⁵ See *Hibbs*, 273 F.3d at 854.

²²⁶ *Id.* at 855.

²²⁷ *Id.* at 856.

²²⁸ *Id.*

²²⁹ *Id.* at 856-57 (concluding that looking only at legislative record would be "in effect requiring that Congress gather and document sufficient evidence to support the exercise of its constitutionally granted powers [and] would raise fundamental separation of powers concerns—the courts would be treating Congress more like an administrative agency than like a co-equal branch of the federal government."); cf. Colker & Brudney, *supra* note 1, at 108 ("The Court [in *Kimel*] used the phrase 'one means' to describe this inquiry, but [the legislative record] was, in fact, the *only* means used to assess whether ADEA extension was reasonably prophylactic legislation.").

existence of sufficiently difficult and intractable problems."²³⁰ The court considered the legislative record, discriminatory state employment laws, previous attempted federal antidiscrimination legislation, and Supreme Court precedent in concluding that gender discrimination in employment is the type of difficult constitutional problem that deserves broad legislative remedies.²³¹

The *Hibbs* court then concluded that section 2616(a)(1)(C) was validly enacted Section 5 legislation.²³² First, the court reasoned that, because the FMLA involves gender discrimination, it is presumptively constitutional; therefore, the burden shifts to the challenger to prove that states have not engaged in pervasive unconstitutional conduct.²³³ Second, the court recognized that there is a long history of invidious gender discrimination by the states, unlike the situations in *Kimel* and *Garrett*.²³⁴ Thus, because the defendants failed to show that there was neither a pattern of state-sponsored gender discrimination in granting family leave nor an historical record of enforcing gender stereotypes, the FMLA was valid Section 5 legislation.²³⁵

In the alternative, the court concluded that even if it looked solely at the legislative record (a position the court rejected), that record contained enough evidence of pervasive gender discrimination in granting family leave to state employees to support the FMLA as reasonable prophylactic legislation.²³⁶ The court expressly noted that

²³⁰ *Hibbs*, 273 F.3d at 857.

²³¹ *Id.* at 858–64. The court wrote:

Although the FMLA's legislative history does not specifically recount this background, as we hold above, when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress, separately and redundantly, to provide detailed findings of such discrimination in order to exercise its Fourteenth Amendment powers.

Id. at 864.

²³² *Id.* at 858, 860, 871. The court offered three distinct rationales, but this Note will discuss only the first two. *See id.* at 858, 860. The third rationale, that the FMLA provision was a proper remedy for past gender discrimination, while persuasive, is beyond the scope of this Note. *See id.* at 860–71.

²³³ *Id.* at 857–58.

²³⁴ *Id.* at 858 (citing *Kimel*, 528 U.S. at 83) ("persons who suffer discrimination on the basis of gender have been 'subjected to a history of purposeful unequal treatment'"). Under the Ninth Circuit's third rationale for upholding this provision of the FMLA, the court recounted a lengthy historical record of state-sponsored gender discrimination. *Id.* at 861–64.

²³⁵ *Hibbs*, 273 F.3d at 858.

²³⁶ *Id.* at 858–59.

heightened scrutiny of gender discrimination impacted its analysis, explaining that "courts have more latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination than in drawing inferences from the histories of statutes like the ADA and the ADEA, which aim to remedy discrimination with respect to nonsuspect classifications."²³⁷ The court credited evidence of widespread gender discrimination by private sector employers and testimony that public sector policies are similar to private sector policies in determining that unconstitutional state-sponsored gender discrimination is "significant" and "widespread."²³⁸ The court acknowledged that the evidence in the legislative record related specifically to parental leave, but it reasoned that such indicators "constitute strong circumstantial evidence of state-sponsored gender discrimination in the granting of leave to care for a sick family member, because if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other."²³⁹ Ultimately, the Ninth Circuit sustained the family leave provision of the FMLA on the basis of its legislative record as well, a record the Fifth Circuit had found grossly inadequate.²⁴⁰

IV. THE SCOPE AND REACH OF SECTION 5 POWER

The line of cases from *City of Boerne v. Flores* to *Board of Trustees of the University of Alabama v. Garrett*, plots the Court's new course for evaluating the appropriateness of Section 5 legislation that attempts to abrogate states' sovereign immunity.²⁴¹ That new course involves evaluating the legislation's congruence and the proportionality between the remedy provided and the injury to be prevented.²⁴² First, the Court identifies the scope of the constitutional right Congress seeks to protect through legislation.²⁴³ Second, the Court examines its own precedents to determine the level of review a court would use to identify a constitutional violation; this quantifies the amount of possi-

²³⁷ *Id.* at 859–60.

²³⁸ *Id.* at 859.

²³⁹ *Id.*

²⁴⁰ *Hibbs*, 273 F.3d at 860; *Kazmier*, 225 F.3d at 526.

²⁴¹ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–74 (2001); *United States v. Morrison*, 529 U.S. 598, 665 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63–64 (2000); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

²⁴² *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 520.

²⁴³ See *Garrett*, 531 U.S. at 366–67; *Kimel*, 528 U.S. at 83.

ble unconstitutional conduct in which states could be engaging.²⁴⁴ Third, the Court examines the legislative record as one means of determining the state conduct Congress is addressing.²⁴⁵ The Court decides whether there is a specific history and pattern of recent conduct that would be judged unconstitutional by a court and whether that specific conduct is targeted by the legislation.²⁴⁶ If the conduct prohibited by Congress would also be considered a violation of Section 1 by a court, then the measure is appropriate Section 5 legislation.²⁴⁷ If not, a very small window of constitutional conduct may still be prohibited as a prophylactic means of preventing future constitutional violations.²⁴⁸ If Congress targets constitutional conduct outside of that small window, however, the measure attempts a substantive redefinition of rights and is therefore not appropriate Section 5 legislation.²⁴⁹

The *Boerne-Garrett* line of cases represents the Court's clear attempt to diminish Congress's power under Section 5.²⁵⁰ The *Boerne* test unduly restricts Congress's choice of both ends and means.²⁵¹ Legitimate ends of Congress's Section 5 power are those state actions that a court itself would adjudge to be violations of Section 1 of the Fourteenth Amendment; this is what is meant by "congruence."²⁵² This limitation defies the Framers' intent that Congress, not the Court, would play the primary role in protecting Fourteenth

²⁴⁴ See *Garrett*, 531 U.S. at 366; *Morrison*, 529 U.S. at 620; *Kimel*, 528 U.S. at 83.

²⁴⁵ See *Garrett*, 531 U.S. at 368; *Kimel*, 528 U.S. at 88-89; see also Colker & Brudney, *supra* note 1, at 105-07 (arguing that requiring Congress to provide adequate legislative record is like forcing Congress to use a crystal ball to predict the Court's conclusions when enacting legislation).

²⁴⁶ See *Garrett*, 531 U.S. at 368; *Kimel*, 528 U.S. at 89; *City of Boerne*, 521 U.S. at 530.

²⁴⁷ See *Garrett*, 531 U.S. at 368; *Kimel*, 528 U.S. at 89; *City of Boerne*, 521 U.S. at 530.

²⁴⁸ See *Kimel*, 528 U.S. at 88-89; *City of Boerne*, 521 U.S. at 532; *TRIBE*, *supra* note 27, § 5-16, at 959-60. Professor Tribe writes:

Stepping back momentarily from *City of Boerne* and subsequent cases, one can say that *Katzenbach v. Morgan* and all its progeny, spanning nearly 34 years by the turn of the century, have now settled beyond question that, in order to enforce § 1 of the Fourteenth Amendment, Congress may, acting pursuant to § 5, outlaw practices that are not themselves violations of § 1 in any sense—provided one can show that outlawing those practices is a rational way to deter or to remedy actions that would violate § 1.

TRIBE, *supra* note 27, § 5-16, at 959-60.

²⁴⁹ See *Kimel*, 528 U.S. at 89; *City of Boerne*, 521 U.S. at 532.

²⁵⁰ See Caminker, *supra* note 1, at 1129.

²⁵¹ *Id.* at 1143-47.

²⁵² *Id.* at 1144, 1153-54.

Amendment rights through a degree of independent definitional power.²⁵³

The *Boerne* test also unjustifiably restricts Congress's choice of means to enforce the Fourteenth Amendment.²⁵⁴ The Court's current approach departs from its traditional method of evaluating Congress's legislative power, the one pronounced in *McCulloch v. Maryland*.²⁵⁵ Under *McCulloch*, the Court defers to Congress's choice of means so long as it is "plainly adapted" or "conducive" to a legitimate end.²⁵⁶ The Court does not independently evaluate the prudence of Congress's choice, preferring instead to credit its legislative judgment.²⁵⁷ Further, the Court does not independently assess the degree of the problem to be solved or the need for legislation in the first place.²⁵⁸

The Court followed this deferential approach in the Section 5 context until the *Boerne* line of cases.²⁵⁹ *Katzenbach v. Morgan* typifies the Court's approach before *Boerne*.²⁶⁰ In *Morgan*, voters in New York City challenged the constitutionality of section 4(e) of the Voting Rights Act of 1965, which prohibited states' use of literacy as a prerequisite to voting when the voter had successfully completed sixth grade in a public or accredited private school in Puerto Rico.²⁶¹ Although the Court had previously held that literacy requirements do not always violate the Fourteenth Amendment, the *Morgan* Court concluded that section 4(e) was a proper exercise of Congress's Section 5 power.²⁶² The Attorney General of New York urged the Court to conclude that Congress could only exercise its enforcement power under Section 5 against a state when the judiciary determines that the state has violated the provision of the Amendment that Congress seeks to enforce.²⁶³ Justice Brennan, writing for the Court, disagreed

²⁵³ See *id.* at 1163; Warren, *supra* note 43, at 216.

²⁵⁴ Caminker, *supra* note 1, at 1146-47.

²⁵⁵ *Id.* at 1143.

²⁵⁶ *Id.* at 1134-43; Estreicher & Lemos, *supra* note 1, at 118.

²⁵⁷ Caminker, *supra* note 1, at 1136.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 1143.

²⁶⁰ See 384 U.S. 641, 641 (1966); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-56 (1976); *Ex parte Virginia*, 100 U.S. 339, 346 (1879); cf. *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (interpreting Fifteenth Amendment's similar enforcement clause); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (same).

²⁶¹ *Morgan*, 384 U.S. at 643.

²⁶² *Id.* at 646, 649 (citing *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959)).

²⁶³ *Id.* at 648.

and concluded that "[n]either the language nor history of § 5 supports such a construction," noting that the Attorney General's construction "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."²⁶⁴

Given that New York's literacy requirement was not *per se* unconstitutional, the Court asked whether the legislation could still be appropriate to enforce the Equal Protection Clause.²⁶⁵ To answer that question, the Court laid out the reach of the Section 5 power, the breadth of which it equated with the congressional power announced in *McCulloch*.²⁶⁶ Applying the *McCulloch* test to the legislation in question, the Court credited what Congress both declared explicitly and might have believed.²⁶⁷ Justice Brennan emphasized that

[i]t is not for us to review the congressional resolution of . . . factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did Any contrary conclusion would require us to be blind to the realities familiar to the legislators.²⁶⁸

Justice Brennan consistently used deferential language such as "Congress might well have questioned" and "Congress might well have concluded" to evaluate the factual basis upon which Congress legislated.²⁶⁹ Notably, only two Justices dissented from the *Morgan* opinion.²⁷⁰

This deferential approach makes sense in the constitutional realm because of the different institutional capacities of Congress and the Court.²⁷¹ There are many devices that federal courts use in evaluating legislation to limit themselves because they are not part of a democratic branch of government.²⁷² One scholar notes that judicial

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Morgan*, 384 U.S. at 650.

²⁶⁷ *Id.* at 653-54.

²⁶⁸ *Id.* at 653. This deferential approach is common when the Court evaluates non-suspect legislation. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955).

²⁶⁹ *Morgan*, 384 U.S. at 654.

²⁷⁰ *Id.* at 659. Justice Harlan, joined by Justice Stewart, argued that Congress had overstepped the bounds of its Section 5 power, although he placed considerable emphasis on the fact that this legislation involved voting, an area of traditional state concern. See *id.* at 670 (Harlan, J., dissenting).

²⁷¹ See *Garrett*, 531 U.S. at 379-85 (Breyer, J., dissenting); McConnell, *supra* note 1, at 156; Post & Siegel, *supra* note 1, at 464.

²⁷² McConnell, *supra* note 1, at 189.

restraint "will give elected officials the benefit of the doubt with respect to governmental purpose, will assume facts favorable to the government in assessing effect, will seek to avoid gratuitous conflict with legislative authority, and will accept reasonable interpretations of the Constitution that support legislative action."²⁷³ These devices do not define the meaning of the constitutional text; they are tools of judicial restraint with respect to the states.²⁷⁴ These judicial standards of decision-making, which sometimes lead courts to choose less intrusive alternatives, should not apply to Congress, a democratically-elected branch of government, in its process of decision-making.²⁷⁵ Furthermore, these judicially imposed constraints should not bind Congress when it exercises its Section 5 power because they are "predicated on the need to protect the discretionary judgments of representative institutions from uncabined judicial interference," and "there is no reason for Congress—the representatives of the people—to abide by them. Congress need not be concerned that its interpretations . . . will trench upon democratic prerogatives, because its actions are the expression of the democratic will of the people."²⁷⁶ As a result, Congress should logically be able to enforce the Fourteenth Amendment fully, without deferring to state judgments as the courts do.²⁷⁷

The *Boerne* line of cases, however, clearly diverges from the deferential approach apparent in *Morgan*.²⁷⁸ Instead of the traditional rational relationship test, Section 5 laws are now held to a stricter congruence and proportionality test.²⁷⁹ The only legitimate means Congress may now use are those that can withstand heightened scrutiny as narrowly tailored to address unconstitutional conduct—perhaps including a small amount of constitutional conduct.²⁸⁰ This is what is meant by "proportionality": the magnitude of the remedy must closely resemble the magnitude of the violation.²⁸¹ The proportionality factor

²⁷³ *Id.*

²⁷⁴ *Id.*; Post & Siegel, *supra* note 1, at 464.

²⁷⁵ McConnell, *supra* note 1, at 156, 189; Post & Siegel, *supra* note 1, at 464.

²⁷⁶ McConnell, *supra* note 1, at 156.

²⁷⁷ *Id.* at 189; Post & Siegel, *supra* note 1, at 467.

²⁷⁸ Caminker, *supra* note 1, at 1143–46; McConnell, *supra* note 1, at 165.

²⁷⁹ *Kazmier v. Widmann*, 225 F.3d 519, 530 (5th Cir. 2000) ("It could not be clearer that congruence and proportionality is a considerably more stringent standard of review than is rational basis."); see Caminker, *supra* note 1, at 1143–46; McConnell, *supra* note 1, at 165.

²⁸⁰ Caminker, *supra* note 1, at 1143–46; McConnell, *supra* note 1, at 170.

²⁸¹ Caminker, *supra* note 1, at 1154.

contains both quantitative and qualitative elements.²⁸² The quantitative element calculates how much constitutional conduct the measure sweeps into its prohibitions; the more overinclusive a measure is, the less proportional.²⁸³ The qualitative element analyzes the nature and severity of the measure's burden on the states; the greater the burden, the less likely it is to be proportional.²⁸⁴ The *Boerne* test's searching inquiry renders the deferential *McCulloch* approach unrecognizable.²⁸⁵ In its choice of both ends and means, Congress's hands are now tied.²⁸⁶

V. ANALYSIS: CAN THE CIRCUIT COURTS' TREATMENT OF THE FMLA INFORM WHAT IT MEANS TO BE REASONABLY PROPHYLACTIC?

The Supreme Court, from *City of Boerne* to *Board of Trustees of the University of Alabama v. Garrett*, has transformed the manner in which Congress can protect individual liberties when it uses its Section 5 power.²⁸⁷ Section 5 of the Fourteenth Amendment is a positive grant of power to Congress to enforce the substantive rights Section 1 guarantees; it may even be read as granting Congress a degree of independent definitional power.²⁸⁸ The Amendment's Framers intended Congress to take a primary role in guaranteeing civil rights nationwide through this special enforcement power, regardless of changes in the accepted federal-state balance.²⁸⁹ Prior to *Boerne*, the Court had accorded Congress a great deal of deference in its exercise of Section 5 power, as shown in cases such as *Katzenbach v. Morgan*.²⁹⁰ This former deference to both legislative ends and means is similar to the Court's evaluation of legislation passed under other positive grants of power to Congress since *McCulloch v. Maryland*.²⁹¹ It also squares with the different institutional capacities of Congress and the Court that are relevant in a democratic society.²⁹²

²⁸² *Id.*

²⁸³ *Id.* at 1154–55.

²⁸⁴ *Id.* at 1155.

²⁸⁵ See *id.* at 1156–58.

²⁸⁶ Caminker, *supra* note 1, at 1143–46.

²⁸⁷ See *supra* Part II.

²⁸⁸ See *supra* notes 25–47 and accompanying text.

²⁸⁹ See *supra* notes 43–54 and accompanying text.

²⁹⁰ See *supra* notes 259–270 and accompanying text.

²⁹¹ See *supra* notes 254–258 and accompanying text.

²⁹² See *supra* notes 271–277 and accompanying text.

The Court justifies its new approach by appealing to two sets of values, federalism and separation of powers.²⁹³ The new test, which evaluates legislation's congruence and proportionality, restricts Congress's choice of both ends and means.²⁹⁴ It requires narrow tailoring between the constitutional injury to be prevented, as federal courts define that injury, and the legislative remedy.²⁹⁵ Nevertheless, there must still be some window of opportunity in which Congress can act so that Section 5 does not become superfluous.²⁹⁶ After all, the Court states time after time that Congress can, under Section 5, sometimes prohibit conduct that is not per se unconstitutional in order to prevent constitutional violations.²⁹⁷ It may be that the level of judicial suspicion the federal legislation's putative beneficiaries raise may determine the size of the window Congress retains in which it may act without infringing upon separation of powers or federalism concerns.²⁹⁸ Even so, the contrasting approaches of the United States Courts of Appeals for the Fifth and Ninth Circuits reveal that how judicially suspect the beneficiaries are may not be determinative and that the congruence and proportionality test may serve yet another role, that of sniffing out judicially disfavored congressional motive and legislative substance.²⁹⁹

The *Kazmier v. Widmann* and *Hibbs v. Department of Human Resources* opinions demonstrate that courts can use the congruence and proportionality test to make sure Congress doesn't improperly invade the province of the courts or the states, or can use it to invalidate legislation when they disagree with its substance and motivating purpose.³⁰⁰ The courts in *Kazmier* and *Hibbs* reached opposite conclusions about the constitutionality of the FMLA provision at issue primarily because they applied congruence and proportionality differently to scrutinize Congress's means and ends.³⁰¹ The Fifth and Ninth Circuits differed in three basic ways, the sum of which is deference to Con-

²⁹³ See *supra* notes 79–96 and accompanying text; *supra* notes 189–196 and accompanying text.

²⁹⁴ See *supra* notes 250–286 and accompanying text.

²⁹⁵ See *supra* notes 250–286 and accompanying text.

²⁹⁶ See *supra* notes 197–203 and accompanying text.

²⁹⁷ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

²⁹⁸ Hart, *supra* note 5, at 1092; Ray, *supra* note 14, at 1768–69.

²⁹⁹ See *supra* Part III.A–B.

³⁰⁰ See *id.*

³⁰¹ See *id.*

gress: first, how they defined the constitutional right; second, how they allocated the burden of proof; and third, how they assessed the role of the legislative record.³⁰² The courts' different treatment of congressional intent exposes the way the congruence and proportionality test can lead courts to view their role in reviewing federal antidiscrimination legislation.³⁰³ It also reveals how a court's fundamental conception of that role determines how much latitude Congress has to exercise its constitutionally granted power to enact prophylactic antidiscrimination legislation.³⁰⁴

The courts in *Kazmier* and *Hibbs* agreed that Congress's stated intent in enacting this portion of the FMLA was to prevent gender discrimination in employment.³⁰⁵ Nevertheless, the cases characterized that gender discrimination differently.³⁰⁶ Although the *Kazmier* court focused narrowly on the issue of gender discrimination in leave-granting, the *Hibbs* court broadened the scope somewhat by connecting leave-granting policies to the larger problem of gender discrimination in employment.³⁰⁷ The *Kazmier* court was highly skeptical of Congress's express intention, namely, remedying gender discrimination in employment, ultimately concluding that Congress had a different motive in enacting the FMLA.³⁰⁸ By framing the issue narrowly, the *Kazmier* court readily concluded that the FMLA was improper congressional overreaching; because the Constitution does not require state employers to grant employees twelve weeks of family leave, the court reasoned, Congress cannot do so.³⁰⁹

In contrast, the *Hibbs* court deferred greatly to Congress, willing to make explicit the connections between employers' family leave policies, the marginalization of female employees in the way employers think about them because of leave-taking, and the resultant gen-

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See *supra* Part III.A-B.

³⁰⁵ *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 854 (9th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3597 (U.S. Mar. 11, 2002) (No. 01-1368); *Kazmier v. Widmann*, 225 F.3d 519, 525 (5th Cir. 2000).

³⁰⁶ Compare *Hibbs*, 273 F.3d at 854 ("The United States defends [the provision] on the ground that it is meant to remedy and prevent unconstitutional gender discrimination.") with *Kazmier*, 225 F.3d at 525 ("Congress's express intent in enacting this provision was to prevent employers from granting [family] leave discriminatorily on the basis of sex.").

³⁰⁷ See *Hibbs*, 273 F.3d at 858-60; *Kazmier*, 225 F.3d at 525.

³⁰⁸ See *Kazmier*, 225 F.3d at 525, 532.

³⁰⁹ See *id.* at 526-27.

der discrimination in employment.³¹⁰ The Ninth Circuit credited Congress's conclusion that providing a minimum amount of family leave for employees on a gender-neutral basis is instrumentally useful in preventing gender discrimination in employment.³¹¹

For the *Kazmier* court, the FMLA was not an appropriate means of remedying gender discrimination in employment—discrimination that would be unconstitutional—because the court rejected those connections that the *Hibbs* court explicitly embraced; implicitly, the *Kazmier* court found them to be too attenuated.³¹² By refusing to credit those connections, the *Kazmier* court was able to infer that Congress's intent in enacting the FMLA was not a proper one—to prevent unconstitutional gender discrimination—but rather was an improper one—to grant state employees a substantive benefit.³¹³

The two courts' treatments of the burden of proof and the legislative record also reveal different ideas about congressional intent.³¹⁴ By presuming unconstitutionality, *Kazmier* in essence assigns to Congress the role of defending the FMLA as appropriate legislation, apparently because of federalism concerns.³¹⁵ *Hibbs*, on the other hand, approaches the FMLA as presumptively constitutional because it seeks to prevent gender discrimination and therefore assigns to the defense the burden of proving that there was no evidence of state-sponsored gender discrimination before Congress.³¹⁶

The two courts also approached the legislative record differently.³¹⁷ The enactment of the FMLA to combat gender discrimination is key to the analysis because classifications based on gender receive heightened scrutiny.³¹⁸ This differs from *Kimel* and *Garrett* because "the *City of Boerne* test left Congress little room to enact legislation to protect nonsuspect groups or to enforce nonfundamental rights despite the purported deference to Congress."³¹⁹ The *Hibbs*

³¹⁰ See *Hibbs*, 273 F.3d at 858–60.

³¹¹ See *id.*; see also Post & Siegel, *supra* note 1, at 457 (asking whether legislative means used is proximate enough to gender discrimination "to be 'instrumentally useful' in preventing or deterring [unconstitutional] behavior").

³¹² See *Hibbs*, 273 F.3d at 858–60; *Kazmier*, 225 F.3d at 526–27.

³¹³ See *Hibbs*, 273 F.3d at 858–60; *Kazmier*, 225 F.3d at 526–27.

³¹⁴ See *Hibbs*, 273 F.3d at 858–60; *Kazmier*, 225 F.3d at 526–27.

³¹⁵ *Kazmier*, 225 F.3d at 524, 526.

³¹⁶ *Hibbs*, 273 F.3d at 858.

³¹⁷ *Id.* at 858–60; *Kazmier*, 225 F.3d at 526.

³¹⁸ *Hibbs*, 273 F.3d at 854 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).
Kazmier, 225 F.3d at 526 (same).

³¹⁹ Colker & Brudney, *supra* note 1, at 124.

court took this difference seriously.³²⁰ Having already decided that the FMLA provision was constitutional through its burden-shifting technique, the Ninth Circuit then concluded, in the alternative, that it was constitutional because it was supported by an adequate legislative record.³²¹ Again, the heightened scrutiny of gender discrimination was important to the *Hibbs* court.³²² The *Hibbs* court admitted certain weaknesses in the legislative record, such as its extrapolation of public sector behavior from private sector behavior and inference of discrimination in family leave from similar discrimination in parental leave.³²³ Nevertheless, it still found the legislative record adequate because "courts have more latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination than in drawing inferences from the histories of statutes like the ADA and the ADEA."³²⁴ In *Kazmier*, the Fifth Circuit gave no such deference to the legislative record.³²⁵

The *Kazmier* court analyzed the legislative record in almost the exact same way as the Supreme Court did in *Kimel*, even though that case concerned legislation preventing discrimination against older persons, a non-suspect class, as opposed to women, a quasi-suspect class.³²⁶ In most cases, state-sponsored age discrimination does not violate the Fourteenth Amendment; in most cases, state-sponsored gender discrimination, however, does violate the Fourteenth Amendment.³²⁷ Yet, the Fifth Circuit required the FMLA's legislative record to contain the same pattern of actual constitutional violations by the states as the Supreme Court did in *Kimel* and *Garrett*, even though the range of possible unconstitutional conduct by the states is much wider in the area of gender discrimination than in age or disability discrimination.³²⁸

In the end, reasonable minds could decide that the provision of the FMLA in question is a close case. Nevertheless, "[i]t is precisely in

³²⁰ *Hibbs*, 273 F.3d at 854-60 (concluding that the heightened scrutiny that gender classifications receive warrants burden shift court employs and greater deference to legislative record).

³²¹ *Id.* at 858-60.

³²² *Id.* at 859.

³²³ *See id.*

³²⁴ *Id.* at 859-60.

³²⁵ *See* 225 F.3d at 526.

³²⁶ *See id.*

³²⁷ *Hibbs*, 273 F.3d at 853-54.

³²⁸ *See id.*

a close case that the independent judgment of Congress on a constitutional question should make a difference."³²⁹ As noted above, however, the Court's treatment of Section 5 legislation from *Boerne* through *Garrett* has hardly been characterized by deference to Congress.³³⁰ Rather, the Court has required narrow tailoring between legitimate ends and means in order to protect two stated values, separation of powers and federalism.³³¹ The contrast between the Fifth Circuit's approach in *Kazmier* and the Ninth Circuit's approach in *Hibbs* demonstrates that congruence and proportionality may serve a function other than the ones the Court acknowledges, a motive-searching function that seriously calls the courts' role into question.³³²

This FMLA provision need not raise serious separation of powers questions such as those raised in *Boerne*.³³³ In fact, few serious separation of powers questions arise regarding the legitimacy of Congress's express ends—here, preventing unconstitutional gender discrimination.³³⁴ This is unlike the situations in *Kimel* and *Garrett*, where the Court was faced with federal legislation designed to protect groups of Americans whom the Court had already deemed (in words at least, if not in deed) non-suspect, older persons and persons with disabilities.³³⁵ In those cases, the Court could plausibly conclude that its duty to say what the law is was crowded by congressional overreaching, raising separation of powers concerns.³³⁶ Here, however, the Court has already declared that gender classifications receive heightened scrutiny and must be defended by exceedingly persuasive justifications.³³⁷ In the FMLA, Congress has not provided heightened constitutional protection to a group the Court has denied heightened protection.³³⁸

³²⁹ McConnell, *supra* note 1, at 155.

³³⁰ See *supra* Part IV.

³³¹ See *supra* Part IV..

³³² See *supra* Part IV; see also Soifer, *supra* note 1, at 490 ("As a legal standard, 'proportionality and congruence' necessarily requires judges to make discretionary judgments. No benchmark is set in advance, and the inquiry required to adjudicate proportionality and congruence pushes judges into doubly subjective decision-making about policy and politics, apparently unwilling to be aided by the views of Congress.").

³³³ See *supra* notes 72–83 and accompanying text.

³³⁴ See *supra* notes 197–205 and accompanying text.

³³⁵ See *supra* Part II.B; *supra* notes 142–160 and accompanying text; *supra* notes 241–253 and accompanying text.

³³⁶ See *supra* Part II.B; *supra* notes 142–160 and accompanying text; *supra* notes 241–253 and accompanying text.

³³⁷ See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

³³⁸ See *supra* notes 105–124 and accompanying text; *supra* notes 142–160 and accompanying text.

For that reason, there seem to be no serious separation of powers concerns with the end of the FMLA.³³⁹

Are there separation of powers concerns raised by the means Congress employs in the FMLA?³⁴⁰ Again, it would appear not. As discussed before, the Court seems to be on pretty shaky footing when it talks about means related to separation of powers.³⁴¹ Means—at the least the selection of means—seems to be part of Congress's specialty in policy-making.³⁴² If any separation of powers concerns arise in this area, it would seem that the Court infringes on separation of powers values when it restricts Congress's choice of means to effectuate otherwise legitimate ends.³⁴³

If the Court is to be concerned here, that concern is more likely to be founded on federalism interests.³⁴⁴ The end of the FMLA provision should not raise federalism concerns because, as the Court has acknowledged, there is very little gender-based classification by states that is constitutional.³⁴⁵ If there are federalism concerns to be found, they are more likely to be found in the FMLA's means.³⁴⁶ The Fifth Circuit in *Kazmier* explicitly voiced such concerns, noting that "[t]he respect that must be accorded the States as independent sovereigns within our federal system" constrains this type of congressional activity.³⁴⁷ At the same time, as noted previously, this invocation of federalism begs the question in reference to properly remedial or prophylactic federal antidiscrimination legislation under Section 5.³⁴⁸ The Framers of the Fourteenth Amendment vested in the federal government, specifically in Congress, the power to protect individual liberties.³⁴⁹ They did so at the expense of state autonomy.³⁵⁰ To invoke

³³⁹ See *supra* notes 197–205 and accompanying text; *supra* notes 241–253 and accompanying text.

³⁴⁰ See *supra* notes 72–83 and accompanying text; *supra* notes 254–258 and accompanying text.

³⁴¹ See *supra* notes 271–277 and accompanying text.

³⁴² See *supra* notes 271–277 and accompanying text.

³⁴³ See *supra* notes 271–277 and accompanying text.

³⁴⁴ See *supra* notes 79–80 and accompanying text; *supra* notes 189–196 and accompanying text.

³⁴⁵ See *Virginia*, 518 U.S. at 531; *supra* notes 278–286 and accompanying text.

³⁴⁶ See *supra* notes 189–196 and accompanying text; *supra* notes 250–258 and accompanying text.

³⁴⁷ See 225 F.3d at 524.

³⁴⁸ See *supra* notes 48–54 and accompanying text.

³⁴⁹ See *supra* notes 48–54 and accompanying text.

³⁵⁰ See *supra* notes 48–54 and accompanying text.

concerns about disrupting the carefully crafted federal-state balance in the Fourteenth Amendment context is anomalous at best.³⁵¹

In any event, invalidating Section 5 legislation based on such concerns is not unprecedented.³⁵² *United States v. Morrison* is an example of a case in which the end of the legislation—preventing gender discrimination—was proper, but the Court used congruence and proportionality to dispute the legislation's means.³⁵³ The Court took issue with the means Congress used to remedy and to prevent state-sponsored discrimination—there, giving women the right to sue private individuals in federal court through the use of a federal cause of action.³⁵⁴ By rejecting the private suit provision of the VAWA because it did not involve state action, the Court decided that the Act's means violated federalism values.³⁵⁵ This reasoning is unpersuasive because, as has been noted,

[i]t is hard to understand this argument as anything other than a flat rejection of Congress's judgment as to how best to effectuate its goals. . . . The fact that reasonable minds can disagree over whether the means Congress has chosen to achieve its goal will in fact be successful should itself put an end to the inquiry.³⁵⁶

It is possible that the Court, if it settles this split between the Fifth and Ninth Circuits, could go out of its way to find a similar federalism-based objection to the means used in the FMLA, as it did with the VAWA in *Morrison*.³⁵⁷

The Fifth Circuit's approach in *Kazmier* demonstrates that courts can use the congruence and proportionality test to disagree with the substance of legislation and with Congress's motive by invoking federalism values when analyzing Congress's choice of means.³⁵⁸ *Morrison* is a clear precedent for this approach.³⁵⁹ This result does not seem to be consistent with *Kimel* and *Garrett*, however, because those cases relied

³⁵¹ See *supra* notes 48–54 and accompanying text.

³⁵² See Post & Siegel, *supra* note 1, at 445; *supra* notes 125–141 and accompanying text.

³⁵³ See *supra* notes 125–141 and accompanying text.

³⁵⁴ See *supra* notes 125–141 and accompanying text.

³⁵⁵ See *supra* notes 125–141 and accompanying text.

³⁵⁶ Estreicher & Lemos, *supra* note 1, at 157, 158.

³⁵⁷ See *supra* notes 125–141 and accompanying text; *supra* notes 197–240 and accompanying text.

³⁵⁸ See *supra* notes 210–224 and accompanying text.

³⁵⁹ See *supra* notes 125–141 and accompanying text.

so heavily on the involvement of non-suspect groups.³⁶⁰ There, courts used congruence and proportionality to demonstrate that Congress had acted vigorously where the Court does not grant high constitutional priority.³⁶¹ The same cannot be said about the FMLA provision because, as did the Ninth Circuit, courts acknowledge that deference is due to Congress.³⁶² The possibility that courts, both the Supreme Court and lower federal courts, can use congruence and proportionality to disagree with the substance of legislation rather than simply to protect separation of powers and federalism values directly refutes the purpose of Section 5.³⁶³ By using congruence and proportionality to locate disfavored congressional motive and legislative substance, the courts themselves raise serious separation of powers questions for a democratic society.³⁶⁴

CONCLUSION

The Framers of the Fourteenth Amendment intended to transform society by guaranteeing to all people basic individual rights. Congress, in the first place, was to effectuate the Amendment's promises through its special enforcement power granted in Section 5. Although the Court for more than a century traditionally recognized Congress's special role under Section 5 and deferred to congressional judgment, its recent opinions seriously threaten Congress's continued ability to fulfill its fundamental, constitutionally granted role. The congruence and proportionality test found in cases from *Boerne* to *Garrett* restricts Congress's choice of means and ends in enacting prophylactic antidiscrimination legislation. It turns the principle of deference to Congress on its head out of separation of powers and federalism concerns that ultimately are unjustifiable. It allows courts to hide improper inquiries into congressional motive and legislative substance under a cloak of narrow tailoring requirements. As a result, it threatens Congress's ability to fulfill its constitutional duty to remedy and prevent discrimination. Moreover, the congruence and propor-

³⁶⁰ See *supra* notes 105-124 and accompanying text; *supra* notes 142-160 and accompanying text.

³⁶¹ See *supra* notes 105-124 and accompanying text; *supra* notes 142-160 and accompanying text..

³⁶² See *supra* notes 225-240 and accompanying text.

³⁶³ See *supra* notes 241-286 and accompanying text.

³⁶⁴ See *supra* notes 241-286 and accompanying text.

tionality test, when misused by courts, tramples on congressional prerogatives and threatens healthy separation of powers values.

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