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THE SECTION 5 MYSTIQUE, MORRISON, AND THE FUTURE OF FEDERAL ANTIDISCRIMINATION LAW

In *United States v Morrison*,[1] the Supreme Court held that Congress lacks the power under both the Commerce Clause and Section 5 of the Fourteenth Amendment to enact a provision of the Violence Against Women Act creating a civil remedy for the victims of gender-motivated violence.[2] *Morrison* is but one of a recent string of cases in which the Court has atrempted to delineate judicially enforceable limits on Congress's authority to legislate in furtherance of the substantive guarantees of the Fourteenth Amendment.[3]

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[1] 120 S Ct 1740 (2000).

[2] Pub L No 103-322, Tit IV, § 40302, 108 Stat 1941-1042 (1994) (codified at 42 USC § 13981 (Supp IV 1998)).

[3] See *Kimel v Fla. Bd. of Regents*, 120 S Ct 631 (2000) (holding that Congress lacked power under Section 5 to abrogate state sovereign immunity for suits under the Age Discrimination in Employment Act, 29 USC §§ 621–34 (1994 & Supp IV 1998)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 527 US 621 (2000) (same, for suits under Patent Remedy Act, 35 USC §§ 271(h), 296(a) (1994)), *City of Boerne v Flores*, 521 US 507 (1997) (striking down Religious Freedom Restoration Act, Pub L No 103-141, 107 Stat 1488 (codified at 42 USC § 2000bb (1994)) as beyond the scope of Congress's Section 5 power).

Several commentators have argued that the federal balance is best protected by the politi-

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These cases appear at first glance to depart from the spirit, if not the letter, of relevant precedent; indeed, last Term marks the first time since Reconstruction that the Court has held that antidiscrimination laws fall outside of the reach of Congress's Section 5 authority.

The Court's recent Section 5 jurisprudence has met with both confusion and consternation in the legal academy. In particular, several commentators have faulted the Court for what they see as its unduly crabbed understanding of Congress's ability—and authority—to act as a partner to the courts in giving meaning to constitutional guarantees.[4] While we agree with much of what has been written on the subject, we believe that a closer look at the cases leading up to *Morrison* reveals that they are, in the main, justifiable. *Morrison* is troubling precisely because it cannot be squared with the reasoning of these earlier cases. In order to understand what is wrong about *Morrison* and right about the cases that preceded it, a clear understanding of Congress's Section 5 power is called for. Much rides on the Court's willingness to reexamine some of the aspects of its decision in *Morrison*, lest ill-founded concerns regarding the balance of power both between Congress and the courts and between the federal government and the states result in a narrowing of the scope of federal antidiscrimination law, and in the capacity of the national government to address problems of inequality.[5]

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cal processes, and that the judiciary need not (and should not) play a role in policing its bounds. See, e.g., Jesse Choper, *Judicial Review and National Political Process* (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum L Rev 215 (2000); Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485 (1994); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543 (1954). The current Court, however, seems intent on finding some judicially enforceable limits on Congress's power. Accordingly, as good limits are better than bad ones, we proceed on the assumption that such limits do indeed exist, and attempt to explain where they should lie.

[4] See, e.g., David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 Supreme Court Review 31, 59–71; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 Wm & Mary L Rev 743, 763–67 (1998); Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv L Rev 153, 169–74, 184–89 (1997); Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 Yale L J 441, 509–22 (forthcoming 2000).

[5] The Section 5 question has taken on added importance in recent years due to the Court's apparent willingness to impose nontrivial limits on Congress's authority to regulate commerce, confining the permissible reach of commerce-based enactments to regulation of "economic," as opposed to social, conduct. See *Morrison*, 120 S Ct at 1750–52; *United States v Lopez*, 514 US 549, 567 (1995). Since the Justices' famous 1937 "switch in time

The debate over Congress's enforcement power under Section 5 has been clouded by two fundamental misconceptions of the nature of that power. The first source of confusion stems from the Fourteenth Amendment's peculiar structure, which invests Congress and the courts with complementary authority to see that its substantive provisions are enforced against the states. It is widely understood that the power of the courts to "enforce" the provisions of the Constitution necessarily embraces the power to interpret those provisions. Accordingly, the judicial act of enforcement is inextricably linked to the power of the courts to "say what the law is."[6] Section 5 thus seems to pose a constitutional conundrum. On the one hand, Congress's power to enforce the Fourteenth Amendment could be understood to mirror that of the courts. Congress, on this view, enjoys broad authority independently and authoritatively to interpret the meaning of the constitutional provisions it "enforces." Such definitional authority, however, seems to violate well-settled principles of separation of powers, and indeed to call into question the supremacy of the Constitution, for if Congress can alter constitutional meaning through ordinary legislation, then "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[7]

Separation of powers concerns, therefore, might lead us to give

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that saved nine," which heralded a willingness to give expansive readings to congressional authority, especially under the Commerce Clause, it commonly had been thought that the reach of federal authority was essentially a "political" question. Congress could be expected, under this view, to intrude on state interests no more than necessary to address national problems, because the very structure of the national government provided ample safeguards for the states. As long as the Court was prepared to view congressional authority in these terms, the precise reach of Congress's Section 5 power was not a matter of great practical urgency. Thus, the civil rights laws enacted in the 1960s—which one would have thought were the natural province of Section 5 power—were sustained by the Court as instances of Congress's power to regulate interstate commerce. See *Katzenbach v McClung*, 379 US 294 (1964); *Heart of Atlanta Motel v United States*, 379 US 241 (1964). Even though these laws were principally about equality rather than commerce, interstate commerce was found implicated, for example, in every workplace having fifteen or more employees. See Civil Rights Act of 1964, Tit VII, 42 USC § 2000e(b) (1994). Section 5 authority was, of course, in the background in these cases, but both Congress and the Court found it unnecessary to reacb that issue given the capacious reading the Justices were prepared to accord to Congress's authority to regulate interstate commerce. The Court's recent cases limiting Congress's power under the Commerce Clause suggest that antidiscrimination legislation can no longer rest comfortably on the commerce power, bringing to the fore the reach of its authority under Section 5.

[6] *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

[7] *City of Boerne v Flores*, 521 US 507, 529 (1997).

a much more limited scope to Congress's Section 5 enforcement power. On this view, the courts' interpretations of the Fourteenth Amendment would mark both the floor and the ceiling of constitutional protections; Congress may neither restrict those protections nor enhance them. Its authority to enforce the provisions of the Fourteenth Amendment would include only the power to codify the courts' constitutional holdings. Congress's contribution to the scheme of constitutional protection would lie in its ability to fashion complex or wide-reaching remedies for those constitutional violations identified by the courts in particular cases.

This narrow understanding of Congress's Section 5 power still seems unsatisfactory, however, because it denies Congress any independent role in determining "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[8] For this reason, the Court consistently has stated that Congress's Section 5 power is not restricted to legislating against those state actions a court would find unconstitutional if asked.[9]

Here we find ourselves at an apparent impasse: Either Congress can interpret the Constitution in the same way courts do, or Congress never can engage in any independent interpretation. The former solution gives Congress too much interpretive authority; the latter too little. But this is a false conflict if we understand that whatever "interpretation" inheres in Section 5 legislation is in no sense a species of constitutional adjudication, and in no sense derogates from judicial supremacy over the meaning of the Constitution. There is a difference between what, for example, the Equal Protection Clause requires of its own force and thus is a matter of self-enforcement by the courts, and what sort of legislation might be "appropriate" to ensure full practical enjoyment of the constitutional values that inhere in the Equal Protection Clause,

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[8] *Katzenbach v Morgan*, 384 US 641, 651 (1966).

[9] See, e.g., *United States v Morrison*, 120 S Ct 1740, 1755 (2000) (stating that Congress's Section 5 power includes authority to "'prohibit conduct which is not itself unconstitutional'" (quoting *Boerne*, 521 US at 518)); *Kimel v Fla. Bd. of Regents*, 120 S Ct 631, 644 (2000) (noting that Congress's power to enforce Fourteenth Amendment includes authority to remedy and prevent constitutional violations by prohibiting conduct that "is not itself forbidden by the Amendment's text"); *Morgan*, 384 US at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress would violate the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.").

as interpreted by the courts. Once we recognize that statutorily enhancing a constitutional guarantee is not the same thing as changing it, the institutional conflict suggested by the Fourteenth Amendment's grant of concurrent authority to enforce its substantive provisions dissolves from view. It is possible, therefore, to respect separation of powers while according Congress an important role in giving practical meaning to constitutional guarantees.

Section 5 is perplexing, not only because of separation of powers concerns, but also because the potential sweep of congressional authority threatens to upset the federal balance. As a general matter, Section 5 should raise no more federalism concerns than any other of Congress's enumerated powers. Any legislation—whether based on Section 5 or Article I—will result in an expansion of the federal power and a corresponding restriction of that of the states.[10] In one sense, however, Section 5 *is* different. In *Fitzpatrick v Bitzer*,[11] the Court held that Congress may abrogate the states' Eleventh Amendment immunity from suit when it exercises its Section 5 enforcement power. Then, in *Seminole Tribe v Florida*,[12] the Court made clear that Section 5 is the *only* basis for such authority: Congress cannot subject nonconsenting states to suit under the Commerce Clause, for example.[13]

The rationale of *Fitzpatrick* was reasonably straightforward. Given that the Fourteenth Amendment constitutes an explicit expansion of the powers of the federal government and a consequent diminution of state sovereignty,[14] Congress's power to legislate pursuant to Section 5 could not readily be limited by

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[10] It has been suggested that because the due process guarantee of the Fourteenth Amendment protects all "life, liberty [and] property," US Const, Amend IV, § 1, Congress's Section 5 power, if not properly limited, could overtake the states entirely, rendering them mere instrumentalities of congressional will. But Congress's Section 5 power is not unlimited, for, as we demonstrate below, Congress can act only in areas of heightened constitutional concern, as identified by the Court either in advance of or subsequent to legislation. See Parts I.B, III.B.

[11] 427 US 445 (1976).

[12] 517 US 44 (1996).

[13] Id at 63–73 (holding that Congress lacks power under Article I to subject nonconsenting states to suit in federal court). See also *Alden v Maine*, 527 US 706 (1999) (extending *Seminole Tribe*'s sovereign immunity bar to suits brought against states in their own courts).

[14] See *Fitzpatrick*, 427 US at 456 ("When Congress acts pursuant to Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority.").

the principles of sovereign immunity embodied in the Eleventh Amendment.[15] The Court's recent Section 5 cases demonstrate, however, that what the Court giveth, the Court taketh away. Because the Court has vested Congress with more power to restrict state sovereignty—by abrogating sovereign immunity—under Section 5 than under Article I, it now seems prepared to subject Section 5–based legislation to more searching scrutiny in order to protect against congressional overreaching.

The Eleventh Amendment question does raise the practical stakes, and the Court is right to insist that particular legislation represent an appropriate exercise of Section 5 power. But concern over the states' immunity from suit should not drive the Section 5 inquiry. Congress's role in enforcing Fourteenth Amendment guarantees, when appropriately exercised, works "no invasion of state sovereignty"[16] because that sovereignty is limited by the amendment. The central task, therefore, should be to work out appropriate ground rules for Section 5 authority that give full effect to the design of the Framers, rather than hobble the capacity of the national legislature in order to shield the states from suit.

In this article, we argue that Congress's power to legislate pursuant to Section 5 should be analyzed, like legislation enacted under Article I, under the deferential necessary and proper standard. In accordance with that standard, Congress should be accorded substantial deference both in its identification of valid ends of national legislation and in its choice of the means by which to achieve its goals. Section 5, properly understood, raises no more separation of powers concerns than any other grant of power to Congress. Any limits on Congress's Section 5 power, therefore, should stem, not from an artificial distinction between legislation that is "substantive" in effect and that which enforces (but does not purport to change) the constitutional guarantees in question, but from a theory of the appropriate objects of Section 5 legislation.

We argue that Congress acts within its Section 5 power when it seeks to ensure full enjoyment of constitutional rights the Court

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[15] See id at 454–56. See also *Alden*, 119 S Ct at 2267 ("[I]n adopting the Fourteenth Amendment, the people required the states to surrender a portion of the sovereignty that had been preserved for them by the original Constitution, so Congress may authorize private suits against nonconsenting states pursuant to its § 5 enforcement power.").

[16] *Ex Parte Virginia*, 100 US 339, 346 (1879).

has identified (or is prepared to identify). Thus, Congress is not limited to codifying the Court's constitutional decisions, but can legislate within the areas of constitutional concern the Court has marked out. That is, the Court's interpretations of Section 1 of the Fourteenth Amendment provide the starting point for Section 5–based legislation; Congress can create statutory rights beyond what the Constitution requires of its own force when it finds such extra-constitutional protections to be necessary in order to effectuate the more general constitutional values recognized by the Court.

In Part I.A, we discuss the Court's early explications of the Section 5 power in *Katzenbach v Morgan*[17] and the cases that followed it. *Morgan*, we explain, has spawned a great deal of confusion in that it can be taken to imply that Congress has power under Section 5 to alter the meaning of the constitutional provisions it enforces. The question raised in *Morgan* regarding whether Section 5 accords Congress a definitional role with respect to constitutional meaning was answered definitively in the negative in the Supreme Court's recent decision in *City of Boerne v Flores*.[18] In Part I.B, we discuss the *Boerne* decision, and argue that, while the *Boerne* Court was correct to identify a separation of powers problem with the Religious Freedom Restoration Act,[19] the problem was more limited than the Court suggested. We then turn to the congruence and proportionality test introduced in *Boerne*, and explain how the test was used (until *Morrison*) to identify and assess the ends of Section 5–based legislation, rather than question the means Congress employs in the service of objectives properly within the scope of its Section 5 authority.

In Part II, we address the Court's decision in *Morrison*, which, we argue, was marred by two crucial errors. First, the Court misunderstood the state action limitation in Section 1 of the Fourteenth Amendment; second, the Court misapplied the congruence and proportionality test, transforming it from a tool to divine whether Congress's objectives were constitutionally proper into a limitation on the means Congress permissibly may adopt to achieve otherwise valid legislative ends. Finally, in Part III, we apply our proposed framework to the Americans with Disabilities

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[17] 384 US 641 (1966).

[18] 521 US 507 (1997).

[19] Pub L No 103-141, 107 Stat 1488 (1993) (codified at 42 USC § 2000bb (1994)).

Act[20] so as to illustrate the role of Section 5 as a basis for federal antidiscrimination legislation to enforce values the Court has identified under Section 1.

I. The Mystique of Section 5

The Fourteenth Amendment is something of a constitutional anomaly. Like the provisions of the Bill of Rights, the first section of the Fourteenth Amendment prohibits certain governmental incursions on individual rights; these prohibitions are self-executing and enforceable by the courts. However, the Fourteenth Amendment does more than guarantee citizens a set of negative rights against the government. Rather, the Fourteenth Amendment—like the Thirteenth and Fifteenth—contains an affirmative grant of power to Congress to enforce its prohibitions.[21] It envisions an important role for the federal government in giving full effect to the rights it guarantees. Given our tendency to think of the Court as the primary protector of individual rights, it is easy to forget that the main purpose of the Reconstruction Amendments was to enlarge the power of Congress.[22] Although the drafters of the amendments were careful to ensure that the judiciary would have the power to compel adherence to the self-enforcing provisions of these amendments,[23] they believed that federal legislation pursuant to the amendments' enforcement provisions was necessary in order to make them "fully effective."[24]

Section 5's grant of power to Congress to "enforce, by appropriate legislation," the Fourteenth Amendment raises deep and puzzling questions regarding the proper role of Congress in interpreting and effectuating constitutional guarantees. Although Congress has broad enforcement power under Article I—power that, unconstrained, could reach countless facets of daily life—the potential sweep of congressional authority under the Fourteenth

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[20] 42 USC § 12101 et seq (1994 & Supp IV 1998).

[21] US Const, Amend XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

[22] *Ex Parte Virginia*, 100 US at 345 ("It is the power of Congress which has been enlarged."). See also text accompanying notes 28–29.

[23] See notes 187–95 and accompanying text.

[24] *Ex Parte Virginia*, 100 US at 345.

Amendment is nothing short of breathtaking.[25] Section 5 thus requires us to think seriously about how meaningfully to confine congressional power under Section 5 while remaining faithful to the structure of the amendment, which unquestionably means to enlist the power of the federal government in ensuring that its guarantees of liberty and equality enjoy full practical effect.

A. KATZENBACH V MORGAN'S TWO RATIONALES

What, then, does it mean for Congress to "enforce" the provisions of the Fourteenth Amendment? The Court first addressed this question in *Ex Parte Virginia*,[26] in which it upheld a statute prohibiting state officials from excluding citizens from jury service on account of their race.[27] Emphasizing that the Reconstruction Amendments "were intended to be, what they really are, limitations of the power of the states and enlargements of the power of Congress,"[28] the Court explained that Section 5 vests Congress with expansive authority to give effect to the guarantees of the Fourteenth Amendment:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[29]

As this language suggests, Congress would seem to enjoy the same broad power under Section 5 as under the Necessary and

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[25] See, e.g., Cole at 54–55 (cited in note 4) (noting that, because most provisions of Bill of Rights have been incorporated into Fourteenth Amendment's guarantee of due process, Congress's Section 5 authority conceivably could support legislation imposing additional warrant requirements to enforce Fourth Amendment, requiring provision of legal counsel in all interrogatories pursuant to Fifth Amendment, or prohibiting the regulation of obscenity under First Amendment).

[26] 100 US 339 (1879).

[27] Act of March 1, 1875, ch 114, § 4, 18 Stat 336 (codified as amended at 18 USC § 243 (1994)).

[28] *Ex Parte Virginia*, 100 US at 345.

[29] Id at 345–46.

Proper Clause of Article I.[30] Under the standard set forth by Chief Justice Marshall in *McCulloch v Maryland*,[31] Congress traditionally is accorded substantial discretion in choosing the means by which to pursue permissible legislative goals: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[32]

The lesson of *McCulloch* is not limited, however, to deference to congressional choice of means. Marshall's famous admonition that "it is a constitution we are expounding"[33] did not, as is commonly assumed, speak to the authority of the judiciary to read meaning into the Constitution's vague pronouncements. Rather, in the context of *McCulloch* (which, after all, upheld the constitutionality of legislation creating the Bank of the United States), those words counseled judicial deference to Congress's rational identification of legitimate legislative ends. The Constitution is painted in broad strokes, Marshall reminds us, and within the rough outline the document itself provides, Congress should be accorded wide discretion in identifying the need for federal legislation and the appropriate means to effectuate constitutional guarantees.

The Court affirmed this reading in *Katzenbach v Morgan*.[34] Explicitly linking congressional authority under Section 5 to the unquestionably plenary grants of Article I, including the Necessary and Proper Clause, the Court made clear that Congress's Section 5 authority is not limited to prohibiting acts identified by the Court as unconstitutional.[35] In other words, the question whether a legislative "end" is "legitimate" under *McCulloch* does not turn

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[30] See *Katzenbach v Morgan*, 384 US 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same hroad powers expressed in the Necessary and Proper Clause, Art. 1, § 8, cl. 18."). See also Part II.B (explaining that the history of Fourteenth Amendment supports this reading).

[31] 17 US (4 Wheat) 316 (1819).

[32] Id at 421.

[33] Id at 407.

[34] 384 US 641 (1966).

[35] See id at 648 (rejecting argument that legislation cannot be sustained as "appropriate" under Section 5 unless it prohibits governmental action that the Fourteenth Amendment, as interpreted by Court, forbids of its own force).

on whether the Court has interpreted the Fourteenth Amendment to require the same result by its own force.

If Congress were limited under Section 5 merely to prohibiting constitutional violations under Section 1 of the Fourteenth Amendment, the Court would have been compelled to invalidate the provision of the Voting Rights Act of 1965 at issue in *Morgan*. Section 4(e) of the Voting Rights Act[36] prevented the states from enforcing a literacy requirement for voting in the case of persons educated in American-flag schools in which the predominant classroom language was other than English; its primary effect was to bar New York from applying an English literacy requirement to New York City residents from Puerto Rico. However, the Court previously had held in *Lassiter v Northampton Election Board*[37] that state literacy qualifications for voting do not, on their face, violate the Fourteenth and Fifteenth Amendments. Accordingly, the Attorney General of New York argued that Congress could not prohibit under the fifth section of the Fourteenth Amendment state action the Court was unwilling to proscribe under the first.[38] The Court rejected this narrow view of Section 5 authority: "Correctly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[39] The proper inquiry, therefore, was whether the Court could "perceive a basis" for the congressional determination that an occasion justifying national legislation was present.[40]

In his opinion for the Court, Justice Brennan offered two distinct rationales for holding section 4(e) to be "appropriate legislation" to "enforce" the Fourteenth Amendment, notwithstanding the facial validity of state literacy barriers. Under the first rationale, which might be termed "remedial" or "preventative," Congress is empowered by Section 5 to enact preventative measures reaching conduct that does not expressly violate the Fourteenth

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[36] Voting Rights Act of 1965, § 4(e), Pub L No 89-110, 79 Stat 439 (codified as amended at 42 USC § 1973b(e) (1994)).

[37] 360 US 45 (1959).

[38] See *Morgan*, 384 US at 648.

[39] Id at 651.

[40] Id at 653. Compare *Katzenbach v McClung*, 379 US 294, 303–04 (1964) ("[W]here we find [that Congress had a] rational basis for finding the chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

Amendment in order to ensure practical enjoyment of the amendment's guarantees as well as to remove obstacles to the states' performance of their obligations under the amendment. Justice Brennan reasoned that Section 4(e) "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services."[41] Thus, despite the absence in the record of any actual discrimination by New York in the provision of such services, the *Morgan* Court held that Congress appropriately could act in a prophylactic fashion to ensure that Puerto Ricans have the political power that will enable them "better to obtain 'perfect equality of civil rights and the equal protection of the laws.' "[42]

Justice Brennan's remedial justification was supported by the Court's ruling earlier that term in *South Carolina v Katzenbach*[43] upholding, as "appropriate legislation" under the Enforcement Clause of the Fifteenth Amendment,[44] provisions of the Voting Right Act[45] that authorized the suspension of literacy tests and other practices in particular states even though discriminatory application of such requirements had not been demonstrated for all of the covered jurisdictions.[46] The *South Carolina* Court, while noting that Congress could not reach "evils not comprehended by the Fifteenth Amendment,"[47] rejected a narrow and "artificial" reading of the Fifteenth Amendment that would limit Congress's power to generally forbidding violations of the amendment and perhaps crafting additional sanctions for such violations.[48] Instead, it emphasized, as it would again in *Morgan*,[49] that the framers of the Reconstruction Amendments intended that "Congress was to

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[41] *Morgan*, 384 US at 652.

[42] Id at 653 (quoting *Ex Parte Virginia*, 100 US 339, 346 (1879)).

[43] 383 US 301 (1966).

[44] US Const, Amend XV ("The Congress shall have the power to enforce this article by appropriate legislation.").

[45] 42 USC §§ 1973i, 1973j(a)–(c) (1994).

[46] See *South Carolina*, 383 US at 329–30.

[47] Id at 326.

[48] Id at 327.

[49] *Katzenbach v Morgan*, 384 US 641, 648 & n 7 (1966).

be chiefly responsible for implementing the rights created" by those amendments.[50]

The second, and more controversial, rationale offered by the *Morgan* Court was that Section 5 confers independent authority on Congress to find that a state practice violates the Fourteenth Amendment even if the Court is unwilling to make the same determination.[51] This second rationale suggests that Congress has power under Section 5 to determine the substantive scope of the Fourteenth Amendment, and accordingly typically is referred to as Morgan's "substantive" theory.

It is unclear, however, that the *Morgan* Court meant what its words have been taken to imply. Some commentators point to Justice Brennan's statement that "it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause"[52] as evidence that the Court accorded Congress some substantive or definitional[53] authority with respect to the meaning of the Fourteenth Amendment.[54] But since *Morgan* involved what was essentially an alienage classification restricting the exercise of voting, a judicially denominated "fundamental right,"[55] Justice Brennan's second rationale could be read narrowly to acknowledge only that Congress's power under Section 5 allows it to subject a state's justification for such a classification to its own demanding scrutiny.[56] Under this reading, Congress's superior fact-finding re-

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[50] *South Carolina*, 383 US at 326. As the Court later explained in *City of Rome v United States*, 446 US 156, 173 (1980), the holding in *South Carolina* made clear "that Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination."

[51] See *Morgan*, 384 US at 656.

[52] Id.

[53] For our view that the terms "substantive" and "definitional" mean different things and should not be confused, see Part I.B.1.

[54] See, e.g., Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont L Rev 39, 47–48 (1995); Eugene Gressman and Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St L J 65, 70 n 17 (1996).

[55] See *Harper v Va. Bd. of Elections*, 383 US 663, 667 (1966) (citing *Reynolds v Sims*, 377 US 533, 561–62 (1961); *Yick Wo v Hopkins*, 118 US 356, 370 (1886)).

[56] See *City of Boerne v Flores*, 521 US 507, 528 (1997) (suggesting that *Morgan*'s second rationale turned on whether Court could "perceive[] a factual basis on which Congress

sources would enable it to override a state justification that the Court, necessarily engaging in a more limited inquiry because of institutional constraints, might sustain.

Nor does a definitional role for Congress necessarily follow from Justice Brennan's famous "ratchet" limitation on Section 5–based legislation. In his *Morgan* dissent, Justice Harlan accused the majority of clothing Congress with "the power to define the substantive scope of the [Fourteenth] Amendment," and thus "to exercise its Section 5 'discretion' by enacting statutes so as in effect to dilute the equal protection and due process decisions of this Court."[57] Rather than deny that the majority opinion recognized any definitional authority in Congress, Justice Brennan responded only to Justice Harlan's suggestion that Congress could, pursuant to its Section 5 powers, restrict constitutional protections established by the Court:[58] "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[59]

Some have understood this language to support a broad definitional role for Congress under the auspices of Section 5.[60] Yet, again, it is not clear that this is the best reading of *Morgan*. It does not follow from the fact that Congress cannot dilute constitutional protections that it is free to enlarge them. Moreover, the fact that Congress has discretion to reach conduct that the Fourteenth Amendment does not prohibit of its own force does not mean that Congress has any authority to define the meaning of the Fourteenth Amendment. Rather, it simply means that, within the constitutional framework set forth by the Court, Congress is entitled to substantial deference; it may enact appropriate legislation re-

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could have concluded that New York's literacy requirement 'constituted an invidious discrimination in violation of the Equal Protection Clause'" (quoting *Morgan*, 384 US at 656)).

[57] *Morgan*, 384 US at 668 (Harlan dissenting).

[58] See id at 651 n 10 ("[Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'").

[59] Id.

[60] See, e.g., Thomas W. Beimers, *Searching for the Structural Vision of City of Boerne v. Flores: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 Hastings Const L Q 789, 797 (1999); Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U Chi L Rev 819, 830 (1986); Brief for Petitioner at 38, *City of Boerne v Flores*, 521 US 507 (1997) (No 95-2074).

sponsive to due process and equal protection concerns that the Court itself has identified.[61] Indeed, nothing in *Morgan* grants to Congress anything more than another fairly generous basis of legislative authority, analogous in breadth to the Commerce Clause and other powers enumerated in Article I. What *Morgan*, and *South Carolina* before it, accomplished was to bring Section 5–based legislation within the *McCulloch* tradition of deferential review of congressional authority to legislate as against the reserved powers of the states.

Four years after *Morgan*, the Court had occasion to reevaluate the scope of congressional power under Section 5. In *Oregon v Mitchell*,[62] the Court reviewed the 1970 amendments to the Voting Rights Act, which lowered to eighteen years the age barrier for voting in state and federal elections.[63] The case provided an ideal test for Congress's supposed definitional authority. Because the Court already had recognized voting as a fundamental constitutional right,[64] a definitional theory would argue that Congress could interpret the Constitution to prohibit an arbitrary judgment that maturity in voting does not occur until twenty-one years of age. In *Mitchell*, however, a sharply divided Court ruled against the assertion of Section 5 authority for state elections. Four Justices squarely rejected the notion that Congress has any authority to define the substantive requirements of the Constitution, while Justice Black cast the deciding vote on non–Fourteenth Amendment grounds.[65] Only Justice Brennan, writing also for Justices

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[61] Once we understand that Congress has no power under Section 5 (or any other provision of the Constitution, for that matter) to define the meaning of the Constitution, Justice Brennan's ratchet footnote makes sense: Legislation that purported to restrict constitutional rights would, in fact, authorize constitutional violations and so would be invalid on that ground. An example of such legislation is the proposed Human Life Bill, S 158, 97th Cong, 1st Sess, 127 Cong Rec S8429 (daily ed July 24, 1981), introduced in Congress in 1981 as a response to the Court's ruling in *Roe v Wade*, 410 US 113 (1973). The bill would have prohibited federal courts from invalidating or restraining the operation of state laws prohibiting abortions—laws the Court had held violate the Constitution. The problem with the Human Life Bill was not that it would have redefined the meaning of the Constitution (for there is no reason to think a statute could do so), but that it explicitly authorized unconstitutional state action and shielded such action from judicial review. See Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 Va L Rev 333 (1982).

[62] 400 US 112 (1970).

[63] Voting Rights Act Amendments of 1970, Pub L No 91-285, 84 Stat 314.

[64] See, e.g., *Kramer v Union Free Sch. Dist.*, 395 US 621 (1969). See also note 55.

[65] See *Mitchell*, 400 US at 117, 119–30 (opinion of Justice Black) (reasoning that Congress had power to regulate federal elections under Article I, Section 4 and the Necessary and

Marshall and White, would have sustained the eighteen-year-old vote for all elections under the second rationale of *Morgan*, arguing that Section 5 empowers Congress to "determine whether the factual basis necessary to support a state legislative discrimination actually exists."[66] Although, as in *Morgan*, Justice Brennan and those in agreement with him endorsed broad language that arguably recognized Congress's definitional authority under Section 5, the emphasis of Justice Brennan's opinion in *Mitchell* was on Congress's superior fact-finding competence, which enables it to subject state restrictions on the fundamental right to vote to its own heightened scrutiny.

Morgan's first rationale—recoguizing congressional power to act prophylactically "to secure" Fourteenth Amendment guarantees—appears to have survived *Mitchell* intact, and was reaffirmed in *City of Rome v United States.*[67] After *Mitchell*, however, the continued vitality of the second branch of the *Morgan* opinion, to the extent that it acknowledged congressional authority to define the reach of the amendment, was far from clear. Although *Mitchell*'s fractured holding cannot be said to have dealt a decisive death blow to the definitional theory, none of the Justices seemed prepared to sign on to the broadest possible reading of *Morgan.* The rationale's disuse in subsequent opinions, moreover, is unmistakable.[68] Nevertheless, the question whether Congress has authority under Section 5 independently to determine the meaning of the Fourteenth Amendment was not decided conclusively until the Supreme Court's 1997 decision in *City of Boerne v Flores.*[69]

Proper Clause, but that the power to determine qualifications for state elections was expressly delegated to states under Article I, Section 2).

[66] Id at 248 (Brennan, White, and Marshall concurring in part and dissenting in part).

[67] 446 US 156 (1980). Although recognizing that the Fifteenth Amendment prohibits only purposeful discrimination, the Court in *City of Rome* upheld the Voting Rights Act's ban on electoral changes that are discriminatory in effect only, see id at 167, reasoning that "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." Id at 177.

[68] For example, the Court in *City of Rome* relied solely on *Morgan*'s remedial theory, although the case could easily have been decided on grounds of Congress's definitional authority. For a discussion of the Court's treatment of *Morgan*'s "substantive" theory, see Estreicher at 436–38 & nn 338, 340–42 (cited in note 61).

[69] 521 US 507 (1997).

B. CITY OF BOERNE V FLORES'S REJECTION OF THE DEFINITIONAL THEORY

In *Department of Human Resources v Smith*,[70] the Supreme Court rejected the claim that the Free Exercise Clause requires that neutral, nondiscriminatory, generally applicable laws be subjected to strict scrutiny whenever they impose a burden on religious activities. The *Smith* Court reasoned that the compelling state interest test set forth in *Sherbert v Verner*[71] was unworkable in the context of religious exemptions; however, the decision rested more fundamentally on the Court's view that it would be a "constitutional anomaly" to use the compelling state interest test to secure for religious believers "a private right to ignore generally applicable laws."[72] Congress emphatically disagreed. With the Religious Freedom Restoration Act (RFRA or Act),[73] Congress sought to restore the compelling state interest test as the operative standard for neutral, generally applicable laws that burden religiously motivated conduct.

RFRA, from its statement of purpose to its substantive components, had an undeniably constitutional tenor. The Act began by stating that "[t]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[74] Its substantive test likewise was framed in patently constitutional terms. Faced with a claimant whose religiously motivated conduct had been burdened by a law of general applicability, a court applying RFRA would ask, as it had under the Court's pre-*Smith* First Amendment jurisprudence, whether the claimant's "exercise of religion" had been "substantially burdened," and, if so, would apply the "compelling state interest" test.[75] For the purposes of the Act, the term "exercise of religion" was defined as "the exercise of religion under the

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[70] 494 US 872 (1990).

[71] 374 US 398 (1963).

[72] *Smith*, 494 US at 886.

[73] Religious Freedom Restoration Act of 1993, Pub L No 103-141, 107 Stat 1488 (codified at 42 USC § 2000bb (1994)).

[74] Id § 2000bb(a)(1).

[75] Id § 2000bb-1(a) to (b).

First Amendment to the Constitution."[76] Moreover, RFRA's express purpose was to "restore" the compelling state interest test rejected in *Smith* and "guarantee its application in all cases where free exercise of religion is substantially burdened."[77] Thus, in *Boerne*, the Court was confronted directly with the question whether Section 5 grants Congress the power to define the meaning of the Constitution. Not surprisingly, the Court's answer was an emphatic—and unanimous—no.[78]

The Court began with the obvious. After reaffirming its prior holdings according Congress broad discretion under Section 5 to remedy or prevent constitutional violations—"even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States'"[79]—the Court reiterated that, "'[a]s broad as the congressional enforcement power is, it is not unlimited.'"[80] It then squarely rejected the notion that Congress's authority to enforce Section 5 embraces the power to define the meaning of the Constitution:

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a right by changing what the right is.[81]

All this seems clear enough, and, indeed, fairly uncontroversial. RFRA rather obviously sought to change the operative meaning of the Free Exercise Clause; as Justice Ginsburg noted at oral argument, the question whether the Act *actually* redefined the clause

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[76] Id § 2000bb-2(4).

[77] Id § 2000bb(b)(1). Indeed, when President Clinton signed it into law, he commented that RFRA "reverses the Supreme Court's decision [in] Employment Division against Smith." Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub Papers 2000 (Nov 16, 1993).

[78] *City of Boerne v Flores*, 521 US 507, 519 (1997). Justices Breyer and Souter expressed no view on the merits of the question whether RFRA was a valid exercise of Congress's Section 5 power and instead wrote separately to renew their objection to the holding in *Smith*. See id at 565–66 (Souter dissenting); id at 566 (Breyer dissenting).

[79] Id at 518 (quoting *Fitzpatrick v Bitzer*, 427 US 445, 455 (1976)).

[80] Id (quoting *Oregon v Mitchell*, 400 US 112, 128 (1970)).

[81] Id at 519.

was academic where its practical effect was to render *Smith* a dead letter.[82] Thus, the Court easily could have decided *Boerne* on the narrow ground that Congress's power to enforce the Fourteenth Amendment, while broad, does not allow it to compel the courts to adopt a particular construction of the Constitution.

On this view, the true infirmity of RFRA was one of congressional co-optation of judicial authority.[83] The Court long ago made clear that it will reject any attempts by Congress to prescribe a "rule of decision" for future cases. In *United States v Klein*,[84] the Court invalidated legislation providing that proof of a presidential pardon was to be deemed by the courts as conclusive evidence that the recipient had "given . . . aid or comfort" to the confederate forces during the Civil War.[85] The Court earlier had held that presidential pardons had precisely the opposite effect: They effectively erase whatever wrong the pardon's recipient had committed. As Professor Sager has explained, what was so displeasing to the *Klein* Court was that Congress had attempted to conscript the "articulate authority" of the judiciary; "the Justices were being asked to implicate themselves in what they saw as an injustice, and furthermore, to do so in the public light of judicial reason-giving for articulate reasons that went to the heart of the injustice."[86] Thus, Sager identifies as "*Klein*'s first principle" the notion that "the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees."[87]

RFRA seems a particularly egregious violation of this principle. The fact that it, like the legislation at issue in *Klein*, created prohibitions grounded in a statute as opposed to the Constitution itself, does little to remove the sting. Sager has us consider the aftermath of *Boerne* had the Court upheld RFRA in full:

> Throughout the federal judiciary, judges in dozens or perhaps hundreds of cases would apply something called the Religious Freedom Restoration Act. They would determine whether the

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[82] Oral Argument at *39, *Boerne* (No 95-2074) (statement of Justice Ginsburg).

[83] See Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 Geo L J 2525, 2532 (1998).

[84] 80 US (13 Wall) 128 (1871).

[85] Id at 146–47.

[86] Sager at 2529 (cited in note 83).

[87] Id.

> complainants' "exercise of religion" had been "substantially burdened." Then they would determine whether the offending governmental act was "the least restrictive means" of furthering "a compelling state interest." Each of these terms would be analyzed and given operational content, the application of one or more would be contested in each case, lawyers would plead these terms and argue to them, and judges would rule and offer these terms as central to the motivation of their ruling. In high visibility cases, newspapers would report on these terms as they appeared in courthouse step declamations, legal briefs, and judicial opinions.[88]

Such a picture clearly is inconsistent with well-accepted principles of separation of powers. The separation of powers difficulties, however, are both narrow in scope and rare.[89] The problem with RFRA was not that Congress had attempted, by statute, to create rights not required by the Constitution, but that Congress had defined those extra-constitutional rights in constitutional terms. Just as Congress has no power to change the content of the Constitution by ordinary legislation, so it is powerless to change the effective meaning of constitutional provisions by forcing the judiciary to act as its constitutional ventriloquist. Respect for separation of powers means, in this context, that Congress may not require the courts to say that the "exercise of religion under the First Amendment" means one thing when the Court has determined it means another. RFRA therefore violated the principle of *Klein* by enlisting the judiciary in Congress's constitutional misrepresentation. That alone was sufficient to render the Act unconstitutional, for reasons wholly unrelated to its status as Section 5–based legislation.

The *Boerne* Court did not, however, rest its decision on these grounds. Instead, it attempted to distinguish between a "substantive" and "remedial" role for Congress. In what has been aptly described as "the understatement of the Term,"[90] the Court noted that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern."[91] With this statement,

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[88] Id at 2535.

[89] For discussion of another similarly rare and limited instance where separation of powers concerns are implicated in the context of Section 5–based legislation, see note 61.

[90] Cole at 46 (cited in note 4).

[91] *City of Boerne v Flores*, 521 US 507, 519 (1997).

the Court came face to face with the mystique of Section 5, and understandably left the encounter wholly mystified. It is indeed difficult—if not impossible—to distinguish between measures that properly can be deemed remedial or preventative and those that are appropriately viewed as substantive. *All* legislation, even that which is obviously remedial, works "a substantive change in the governing law." As a practical matter, there often is little difference between creating a new right and remedying or preventing the violation of an existing right. From the perspective of the right-holder, both types of legislation are "substantive" in that they enable her to assert a claim or obtain relief where previously she could not.[92]

If Congress has remedial authority to act in a prophylactic manner to prevent violations from occurring, as the Court repeatedly has held,[93] it necessarily exercises a substantive authority. But if we recognize that remedial or preventative legislation can and often does have substantive effects, must we conclude that Congress can, through ordinary legislation, define the meaning of the constitutional provisions it "enforces"?

1. *Demystifying Section 5: Separation of powers and federalism.* Much of the mystique of Section 5 lies in the notion that when Congress enacts legislation that might be termed "substantive"—for example, legislation that imposes statutory requirements above and beyond that which the Constitution requires on its own—it has somehow changed the meaning of the Constitution. This notion finds its roots in *Morgan*'s second rationale, which hinted at such a definitional role for Congress. However, a much more satis-

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[92] This assumes, of course, that there may be a gap between right and remedy. The Court's distinction between substantive and remedial legislation might make sense if we imagined that the only rights individuals have under the Constitution are those they can vindicate in court; that the constitutional guarantee of equality, for example, is coterminous with the Court's enforcement of the Equal Protection Clause. On this view, Congress may remedy or prevent constitutional violations only to the extent that a court could do the same in, say, a nationwide class action. However, the Court consistently has rejected such a narrow view of Congress's Section 5 power. See note 35 and accompanying text. See also *United States v Morrison*, 120 S Ct 1740, 1755 (2000); *Kimel*, 120 S Ct at 644; *Boerne*, 521 US at 518–20.

[93] See *Boerne*, 521 US at 526 (noting that, "[a]fter *South Carolina v. Katzenbach*, the Court continued to acknowledge the necessity of using strong remedial and preventative measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination" (citing *City of Rome v United States*, 446 US 156 (1980); *Oregon v Mitchell*, 400 US 112 (1970); *Katzenbach v Morgan*, 384 US 641 (1966))).

fying (and significantly less puzzling) interpretation of the Section 5 authority recognized in *Morgan* is that, rather than granting authority over the interpretation of the Constitution itself, Section 5 is simply a source of legislative authority to create statutory rights enhancing the constitutional values identified by the Court. Although these values, or areas of constitutional concern, are found in the Court's decisions, Congress's legislative authority is not tied to the particular resolutions struck by the Court. In effect, the Constitution—and the Court's authoritative interpretations of it—supplies an appropriate source of norms upon which legislation may rest.[94] The distinction is between what, for example, the Equal Protection Clause requires of its own force, and thus is a matter of self-enforcement through the courts, and what Congress may require in enacting appropriate legislation pursuant to that clause.

We will go a long way toward demystifying the question of congressional authority under Section 5 once we recognize that "substantive" and "definitional" are not synonymous. That Congress, under its authority to enforce the provisions of the Fourteenth Amendment, may reach conduct that the Constitution does not prohibit by its own force, does not, by itself, implicate the separation of powers concerns raised by RFRA and discussed above. The problem with RFRA was that it purported to change—effectively, if not literally—the meaning of the First Amendment. Rather than effectuate First Amendment values within the constitutional framework set forth by the Court, RFRA sought to change that framework by reviving a constitutional test the Court had rejected and mandating its application in every case involving the exercise of religion. The *Klein* problem raised by RFRA is not only rare, but also quite obvious: it arises only when Congress defines statutory rights using constitutional language and so requires the Court to act as its mouthpiece in explaining and applying terms like "exercise of religion."[95] Thus, if we revisit the Court's attempt to de-

[94] Compare Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv L Rev 1 (1975). Monaghan's theory of constitutional common law—in which the Court refers to the Constitution as a source of law permitting the development of supplementary common law rules—is, in a sense, the judicial version of the theory of legislative power advanced here.

[95] At oral argument in *Boerne*, Justice Souter asked whether the particular separation of powers concern identified by the petitioners was simply a question of congressional candor. See Oral Argument at *5–*6, *Boerne* (No 95-2074) (statement of Justice Souter) (suggesting that argument against RFRA "would be different had Congress simply kept its cards closer to its vest"). The answer should have been yes. The separation of powers problem at issue

lineate the bounds of Congress's Section 5 authority, substituting "definitional" for "substantive," it turns out that the line between preventative or remedial measures that give full effect to constitutional guarantees the Court has identified, and those that profess to (re)define the meaning of those guarantees, is not particularly difficult to discern after all.

But if "substantive" legislation that avoids the definitional problems of RFRA does not raise concerns about Congress usurping the power of the courts, it may raise a different set of concerns. The Court in *Boerne* reaffirmed the principle that Congress is entitled to deference, not only in its choice of legislative means, but also in its identification of appropriate legislative ends.[96] Yet the Court was well aware that, to the extent that Congress is granted discretion independently to identify a need for federal legislation under its Section 5 enforcement power, the sphere of federal power expands and that reserved to the states contracts. Thus, even if we recognize that the Court properly can defer to Congress's rational conclusions regarding the need for federal legislation to address matters of constitutional concern without intruding upon the province of the judiciary, we might still worry about ceding to Congress too much power to determine the bounds of its own authority vis-à-vis that of the states. It is crucial to understand that *this has nothing to do with separation of powers and everything to do with federalism.* Nor is this concern specific to Section 5. In this respect, Section 5 is no more mysterious than any of the provisions in Article I granting Congress authority to act. With regard to the latter provisions, courts consistently[97] defer to Congress's reasoned judgment regarding the appropriateness of federal legislation. It is true that in such circumstances Congress is in a sense independently interpreting the Constitution, but the Court remains the final arbiter of constitutional meaning, as is clear from its recent decisions overturning legislation based on what it saw as an un-

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in *Boerne* was very simple, limited, and could indeed have been cured by a different choice of language. That is not to say that there were not other problems with RFRA. However, those problems had nothing to do with separation of powers. See Part I.B.2.

[96] *Boerne*, 521 US at 536 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." (quoting *Katzenbach v Morgan*, 384 US 641, 651 (1966))).

[97] Until recently, that is. See note 98.

reasonably broad congressional understanding of the Commerce Clause.[98] Those decisions rested on grounds, not of separation of powers, but of federalism.[99]

2. *Congruence and proportionality: The question of legislative ends.* The Court in *Boerne* proposed the following test to distinguish between acceptably remedial or preventative legislation, and that which is unacceptably "substantive": "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[100] This test, the Court explained, is designed to ensure that "the object of valid § 5 legislation [is] the carefully delimited remediation or prevention of constitutional violations."[101] It is, in other words, an inquiry into whether Congress's legislative ends are "legitimate."[102] But it is not immediately apparent how an inquiry into congruence and proportionality between legislative means and ends can provide any useful guidance in determining whether Congress has acted within its enumerated powers so as to maintain the proper balance of state-federal power.

The Court long has recognized that the purpose of the Fourteenth Amendment was to "limit[ ] the power of the states and enlarge[ ] . . . the power of Congress."[103] Accordingly, it is both inevitable and entirely appropriate that Section 5–based legislation will increase the power of the federal government in relation to

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[98] See *United States v Morrison*, 120 S Ct 1740, 1747–54 (2000) (holding that Congress lacked power under the Commerce Clause to enact civil remedy provision of VAWA); *United States v Lopez*, 514 US 549 (1995) (holding that Congress exceeded its commerce power in enacting the Gun Free School Zones Act of 1990, 18 USC § 922(q)(1)(A)).

[99] See, e.g., *Morrison*, 120 S Ct at 1752–53 (expressing concern about potential intrusion of Congress's commerce power into traditional areas of state concern); *Lopez*, 514 US at 556–57 (warning against extending commerce power so as to "'effectively obliterate the distinction between what is national and what is local and create a completely centralized government'" (quoting *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 37 (1937))). Compare *Printz v United States*, 521 US 898 (1997) (holding that the Tenth Amendment bars the federal government from commandeering state executive); *New York v United States*, 505 US 144 (1992) (holding that the Tenth Amendment forbids Congress to commandeer state government by forcing states to choose between legislating in accordance with federal scheme or taking title to radioactive waste).

[100] *Boerne*, 521 US at 520.

[101] *Fla. Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 527 US 627, 647 (1999).

[102] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 421 (1819).

[103] *Ex Parte Virginia*, 100 US 339, 345 (1879).

that of the states. The question for the Court in any case concerning the validity of such legislation is whether the legislative end is legitimate, that is, whether the "injury to be prevented or remedied" is one properly understood to reside within the constitutional provision in question. If the legislation is a proper exercise of Congress's Section 5 authority, it will alter the federal balance in favor of the federal government and against the states. But the same will be true if the legislation is not a valid Section 5 enactment. We cannot assess the appropriateness of Section 5–based legislation by looking to whether the legislation intrudes on the provinces of the states, because *any* Section 5–based legislation, whether permissible or impermissible, necessarily will so intrude. Nor can we determine whether Congress has exceeded its power under Section 5 by reference to the magnitude of the intrusion on state affairs. The question whether a burden on the states is valid or invalid turns on whether Congress has the requisite Section 5 authority to impose it: If such authority exists, the imposition is valid even if it is quite significant; conversely, if such authority is lacking, the imposition is invalid no matter how slight.

Thus, in cases in which the legislative end is evident, either on the face of the statute or from the legislative record, the congruence and proportionality test is neither necessary nor sufficient to the determination of whether the end is a legitimate one. The test does have a proper role to play, however, in cases where it is unclear what constitutional concern informs a Section 5 enactment. As the Court has explained, its initial task in any case involving the constitutionality of Section 5–based legislation is to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy."[104] In some cases, it may be difficult for the Court to identify with any specificity the injury Congress is seeking to redress or prevent, because the legislative record may be devoid of any congressional findings with regard to the injury it has targeted.

It is, of course, preferable that Congress put its superior fact-finding capabilities to use. Congress should, whenever possible, compile a detailed legislative record identifying the injury it hopes to remedy or prevent, and the ways in which its chosen means will help achieve its object. But in some situations, the object of Section

[104] *Florida Prepaid*, 119 S Ct at 2207.

5–based legislation—the injury to be remedied or prevented—is not well documented in the legislative record. In such circumstances, the congruence and proportionality test can prove useful: The Court is faced with post hoc rationalizations for congressional action, but it is unclear from the statute in question and its legislative history that Congress actually identified a problem of constitutional concern so as to bring the measure within its Section 5 power. The Court, however, wants to give Congress the benefit of the doubt. So it begins with the assumption that the legislative end is a legitimate one, that the injury to be prevented or remedied is within an area of constitutional concern, as identified by the Court. The Court then looks at the means Congress adopted to reach this hypothetical end; it attempts to identify what Congress intended to do by looking at what it did.[105]

The *Boerne* Court's application of the congruence and proportionality test, while unnecessary,[106] was consistent with this reasoning. In its brief and in oral argument before the Court, the United States attempted to characterize RFRA as a remedial measure aimed at rooting out intentional discrimination that might not be captured by the *Smith* test.[107] This characterization is more than a little implausible, but the Court correctly declined to dismiss it out of hand. It first examined RFRA's legislative record to assess whether Congress had reason to believe that legislation was necessary in order to remedy or prevent the sort of invidious discrimination the Constitution forbids. Finding that Congress had not identified any recent instances in which generally applicable laws were in fact passed because of religious bigotry,[108] the Court went on

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[105] Professors Hamilton and Schoenbrod have defended the congruence and proportionality test on different grounds. See Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 Cardozo L Rev 469 (1999). They argue that the test may be justified by reference to the law of remedies, which requires that any judicially crafted remedy must respond proportionally to the wrong it seeks to redress. Hamilton and Schoenbrod's argument is both thoughtful and thought provoking. In our view, however, it is ultimately unpersuasive, for it fails satisfactorily to explain why Congress's power should be adjudged by the same standards that govern the ability of lower courts to fashion remedies for constitutional or statutory violations.

[106] As discussed above, the Court could have disposed of RFRA on the narrow ground that it violated the principle of *Klein*. See notes 74–83.

[107] Oral Argument at *53–*56, *Boerne* (No 95-2074) (statements of Acting Solicitor General Dellinger); Brief for the United States at 28–35, *Boerne* (No 95-2074). See also Brief for Respondent Flores at 30–34, *Boerne* (No 95-2074).

[108] See *Boerne*, 521 US at 530–31.

to inquire into the operation of the Act to determine whether the ends it actually accomplished were, in fact, permissible. What it found was a measure notable for its "sweeping coverage," which promised to intrude into every level of government, displacing countless laws of general applicability and unquestionable constitutionality.[109] In short, RFRA failed the congruence and proportionality test, and badly.[110] The costs it imposed on the states were wholly out of proportion to any constitutional gains it might have secured.

It is important to note here that the question for the Court was not whether RFRA would result in exemptions for religiously motivated conduct that were not themselves required by *Smith*. If RFRA had targeted only a certain category of state laws—say, prison grooming requirements arguably burdening Muslim observance—that would have passed muster under *Smith*, the case would have been a much closer one. The Court then would have been forced to inquire whether it could "perceive a basis" on which Congress could have concluded that the targeted group of laws implicated First Amendment concerns. The congruence and proportionality test, however, allows the Court to avoid this difficult inquiry in cases like *Boerne*, where there was an immense gap between what Congress did and what Congress plausibly could have done under the deferential *McCulloch* standard.

C. KIMEL AND FLORIDA PREPAID: CONGRUENCE AND PROPORTIONALITY APPLIED

The Court's subsequent decision in *Kimel v Florida Board of Regents*[111] provides another useful example of the operation of the congruence and proportionality test. The question for the Court in *Kimel* was whether the Age Discrimination in Employment Act (ADEA)[112] could be sustained as a valid exercise of Congress's power under Section 5. Previous cases had established that the Fourteenth Amendment permits states to discriminate on the basis

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[109] Id at 532–34.

[110] See id at 532 ("RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

[111] 120 S Ct 631 (2000).

[112] 29 USC §§ 621–633a (1994).

of age as long as the age classification at issue is rationally related to a legitimate state interest.[113] Age-based classifications, the Court reasoned, do not raise the same constitutional concerns as classifications based on race or gender, as they often serve as a useful proxy for characteristics relevant to the state's legitimate interests. Moreover, given that old age happens to all of us, such classifications also are less likely to be based on the kind of irrational prejudice the Constitution forbids.

It was therefore no easy task for Congress to justify on Section 5 grounds the ADEA's comprehensive prohibition of all age-based employment decisions by the states.[114] The Court correctly recognized that the ADEA was not doomed simply because it prohibited conduct the Court had permitted (or would in the future permit) in the context of constitutional litigation.[115] Congress legitimately could "prohibit a somewhat broader swath of conduct, including that which is not prohibited by the [Fourteenth] Amendment's text" in the course of giving full effect to the rights guaranteed thereunder.[116] But if differential treatment of the elderly was not, according to the Court's equal protection precedents, an area of heightened constitutional concern, then the ADEA could qualify as "appropriate legislation" under Section 5 only if the Court could perceive a rational basis for a congressional judgment that broad prophylactic measures were necessary in order to protect the elderly from arbitrary and invidious discrimination.

Had Congress found that state employers had engaged in systematic arbitrary age-based discrimination, the Court's inquiry would have been limited to traditional highly deferential assessment of the means Congress employed to achieve the permissible goal of rooting out such discrimination. The problem in *Kimel* was that Congress had not identified any evidence that states generally were discriminating against their employees on the basis of age.[117] This made the Court's task significantly more difficult. Judicial

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[113] *Kimel*, 120 S Ct at 645–46 (citing *Gregory v Ashcroft*, 501 US 452 (1991); *Vance v Bradley*, 440 US 93 (1979); *Mass. Bd. of Retirement v Murgia*, 427 US 307 (1976) (per curiam)).

[114] See 29 USC § 623(a)(1).

[115] See *Kimel*, 120 S Ct at 645.

[116] Id.

[117] See id at 648–49.

deference typically does not require legislative findings. Deference is owed not because of the state of the legislative record Congress compiles, but out of respect for the principle that Congress is entitled to decide in the first instance whether legislation is needed.[118] At the same time, however, Congress has no authority to act under Section 5 except to effectuate the constitutional values residing in the Fourteenth Amendment. Thus, before the Court can defer to Congress's judgment that Section 5–based legislation is needed to remedy or prevent constitutional harms or to ensure full enjoyment of constitutional rights, it must first satisfy itself that Congress did make—or rationally could have made[119]—such a judgment. When, having utilized its fact-finding capabilities to study the issue in question, Congress does decide that there exists a problem of constitutional proportions, the Court must defer to that judgment as long as it can "perceive a basis" for it.[120] But when, as in *Kimel*, Congress did not in fact legislate on the basis of a reasoned judgment, supported by appropriate findings, that the elderly generally were in need of statutory protections in order to ward off unconstitutional discrimination by state employers, the Court must ask whether Congress, had it studied the problem, could rationally have concluded that such legislation was needed. Rather than engage in an abstract hypothetical inquiry into Congress's subjective intent, in such circumstances the Court looks instead at the measures Congress adopted to determine whether they are plausibly designed to target an area of constitutional concern.

Consistent with this analysis, the Court in *Kimel* invoked the congruence and proportionality test as a means of assessing whether the ADEA could be seen as permissibly remedial or preventative or whether it was impermissibly "substantive"[121]—that

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[118] *City of Boerne v Flores*, 521 US 507, 531–32 (1997).

[119] Admittedly, record evidence was absent in *Morgan*, but the Court was satisfied that Congress rationally could have made findings adequate to support its suspension of literacy tests for individuals education in U.S.-flag schools.

[120] *Katzenbach v Morgan*, 384 US 641, 656 (1966).

[121] *Kimel*, 120 S Ct at 644. The Court in *Kimel* appears to have repeated the mistake it had made previously in *Boerne* of conflating separation of powers concerns—that is, concerns over a definitional role for Congress—with federalism concerns. To the extent that the Court in either case meant to suggest that legislation that goes too far in overprotecting constitutional rights "effects a *substantive* redefinition" of the rights at issue, id (emphasis added), the Court's terminology should be revisited. The Fourteenth Amendment rights at issue have not changed one iota, and mean precisely the same thing before the ADEA's extension to the states as after it. What has changed, however, is the balance of state-federal power.

is, whether the Act strayed too far beyond the bounds of constitutional concern as identified by the Court.[122] Like RFRA, the ADEA failed the test. Of primary importance to the Court was that the ADEA, even with its "extremely narrow"[123] exception for bona fide occupational qualifications,[124] made a state employer's reliance on age presumptively unlawful. This across-the-board statutory presumption against the use of age-based classifications struck the Court as grossly disproportionate to the requirements of the Constitution. Because the means Congress had adopted to effectuate its legislative goal went so far beyond what the Constitution accomplishes of its own force, the Court refused to presume that the object of the ADEA was to enhance or protect constitutional values under Section 1.

The Court undertook a similar analysis in *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*,[125] in which it considered whether the Patent Remedy Act[126] could be sustained as an exercise of Congress's power under Section 5. The Court began its analysis by identifying the "evil" or "wrong" that Congress intended to remedy or prevent.[127] That evil, it appeared, was state infringement of patents and the use of state sovereign immunity to deny patent owners compensation for invasion of their patent rights.[128] In enacting the Patent Remedy Act, however, Congress had neglected to adduce any evidence of a pattern of patent infringement by the states, "let alone a pattern of constitutional [due process] violations."[129] Nor did Congress appear to have considered

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[122] Concededly, the inquiry in *Kimel* did not follow the sequence we recommend. Rather, the Court first applied the congruence and proportionality test and, finding that the ADEA did not satisfy it, proceeded to ask whether the legislative record revealed that Congress had identified a problem the Court might have missed. That the inquiry was somewhat inverted, however, is not significant. What is important to note about *Kimel* is that the Court appeared prepared to defer to a reasoned congressional judgment regarding a legitimate object of Section 5 legislation. Finding that such a judgment had not, in fact, been made, the Court was forced to rely on the congruence and proportionality test to determine whether such a judgment, had it been made, would have supported the ADEA.

[123] *Western Air Lines, Inc. v Criswell*, 472 US 400, 412 (1985) (interpreting ADEA provision recognizing defense based on bona fide occupational qualifications).

[124] 29 USC § 623(f)(1).

[125] 119 S Ct 2199 (1999).

[126] 35 USC §§ 271(h), 296(a) (1994 & Supp IV 1998).

[127] Id at 2207.

[128] See id.

[129] Id.

the availability of state remedies for patent infringement, which, if adequate, would belie any suggestion that states were acting unconstitutionally by using their sovereign immunity to deprive individuals of their patent rights without due process of law.[130]

Because of the lack of findings to support Congress's purported conclusion that federal legislation was needed to remedy or prevent widespread due process violations by the states, the Court turned to the congruence and proportionality test. Congress, the Court maintained, had subjected the states to expansive liability, yet had done nothing to limit the coverage of the Act to cases involving arguable constitutional violations (where the state failed to offer adequate remedies for patent infringement, for example).[131] The Court concluded that the conduct Congress was attempting to remedy or prevent was almost entirely constitutional and thus could not serve as the basis for Section 5–based legislation: "The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."[132] Such aims, while entirely proper, were the province of the Patent Clause of Article I,[133] not Section 5.

As *Kimel* and *Florida Prepaid* illustrate, the congruence and proportionality test can best be understood as implementing a judicial presumption of good lawmaking. The Court will assume, as a general proposition, that there typically is some proportionality between legislative means and ends. Thus, where the Court has no other good way to identify the legislative end in order to determine whether it is "legitimate"—whether federal legislation is needed to enhance or protect constitutional values identified by the Court—it will examine the operation of the legislation to see if it achieves some legitimate end.

Florida Prepaid suggests a second (albeit related) function for the congruence and proportionality test. It is difficult to read the case without being struck by the apparent incongruity of treating the Patent Remedy Act as Section 5–based legislation. As its name suggests, the Patent Remedy Act is first and foremost a patent law

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[130] See id at 2209.

[131] See id at 2210.

[132] Id at 2211.

[133] US Const, Art I, § 8, cl 3.

and, as such, sensibly should be based on Congress's power under the Patent Clause. In the post–*Seminole Tribe* world, however, Congress could provide a patent infringement remedy against nonconsenting states only if the Act could be shoehorned into a Section 5 framework. Thus, in *Florida Prepaid* we see the congruence and proportionality test with a twist: The question remains whether the congressional end is legitimate, but the emphasis now is on whether the end is legitimate for the purposes of Section 5.

The argument for allowing Congress to abrogate state sovereign immunity under Section 5 but not under Article I rests on the notion that it makes little sense to say that the Eleventh Amendment bars Congress from restricting state sovereignty when the Fourteenth Amendment grants Congress the power to enforce the substantive provisions of the Fourteenth Amendment, which "themselves embody significant limitations on state authority."[134] Thus, while Congress's ability to legislate under its Article I powers is inherently limited by the Eleventh Amendment, the reverse is true for Section 5–based legislation: "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[135] If the basic premise of this argument is sound, it follows that Congress is authorized to abrogate state sovereign immunity only when it legislates with a rationally defensible purpose of effectuating one of the Fourteenth Amendment's prohibitions on state action. The Court's application of the congruence and proportionality test in *Florida Prepaid* suggests that the Court is not willing to permit Congress to circumvent this limitation simply by dressing Article I–based legislation in Section 5 garb. Rather, when it appears that Congress did not in fact have a legitimate Section 5 objective in mind when enacting the legislation in question—when it was driven by concerns about commerce rather than concerns about equality, for example—the Court will ask whether the means Congress has chosen are congruent and proportional to the prevention or remediation of an arguably *constitutional* injury as opposed to a merely commercial one. If the answer is no, the Court will reject Congress's attempt to abrogate state sovereign immunity.

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[134] *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976).

[135] Id.

Even as an inquiry of sorts into the legitimacy of Congress's legislative ends, the congruence and proportionality test should not be cause for great concern. Congress's conclusions regarding "'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment . . . are entitled to much deference.'"[136] Deference, however, is premised on the assumption that Congress has in fact identified a problem within the realm of constitutional concern and has devoted its unique lawmaking expertise to crafting an appropriate response to the problem. That assumption will not always hold true. Indeed, the Court's recent Eleventh Amendment jurisprudence creates powerful incentives for Congress to find a Section 5 footing for legislation that was inspired by patently extra–Fourteenth Amendment concerns. Accordingly, the congruence and proportionality test may have an important role to play in ensuring that Section 5–based legislation be rationally grounded in such concerns rather than Article I legislation in disguise. It is equally important, however, that the test retain this limited role.

The congruence and proportionality test thus can play a salutary role in helping the Court monitor the state-federal balance, but only if the test is confined to settings where Congress either does not make clear it is invoking Section 5 authority or where the gap between what the legislation provides and plausible Fourteenth Amendment concerns suggests that the statute is not in fact animated by such concerns. As we shall see below, if the test is allowed to stray from its original purpose of ensuring that the *object* of Section 5 legislation is the prevention or remediation of constitutional violations, to an ill-defined inquiry into the appropriateness of Congress's legislative *means*, the promise of Section 5 as an alternative foundation for national civil rights protection soon will be lost.

II. Revisiting United States v Morrison

In the preceding part we argued that Congress has broad power under Section 5 to effectuate the rights secured by the Fourteenth Amendment. Section 5 is no different from other enforcement powers, such as Congress enjoys under Article I; under

[136] *City of Boerne v Flores*, 521 US 507, 536 (1997) (quoting *Katzenbach v Morgan*, 384 US 641, 651 (1966)).

the *McCulloch* standard, Congress is owed substantial deference as to both its identification of ends and its choice of means. But we recognize that this deference—at least as to ends—must have limits. Congress has no power to define for itself the bounds of the constitutional provisions it enforces; this remains the exclusive province of the judiciary. Accordingly, we proposed an additional limit to Congress's power under Section 5: While Congress is not limited simply to codifying those prohibitions the Fourteenth Amendment erects of its own force, it can act only in areas of constitutional concern identified by the Court.

All government classifications are subject to equal protection challenge in court at least for scrutiny as to their "rational basis."[137] A reading of Section 5 authority that gives Congress "authority . . . in the premises"[138] simply because the classification would be subject to rational basis scrutiny by a court would indeed endow Congress with the ability to federalize all law and thus threaten the federal-state balance. The only way to avoid this difficulty while still according the national legislature ample latitude to address national problems in the social arena—other than reviving disingenuous readings of the Commerce Clause to permit Congress to reach such issues—is to limit Section 5 authority to those areas the Court has identified (or is prepared to identify) as implicating the constitutional values that inhere in the Fourteenth Amendment.

With this conception of Section 5 authority in mind, we now address the Court's decision in *Morrison*, holding that the civil enforcement provision of the Violence Against Women Act (VAWA)[139] exceeds Congress's power under Section 5. *Morrison* rests on two fundamental mistakes: first, its reading of the "state action" limitation of the Fourteenth Amendment as it bears on congressional enforcement authority, and second, its application of the congruence and proportionality test to assess the propriety of Congress's choice of legislative means.

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[137] As we demonstrate below in the context of disability discrimination, see Part III, while the fact that a government classification is subject to "rational basis" scrutiny is not, by itself, a sufficient predicate for Section 5 authority, not all classifications warranting only rational basis review when challenged in the courts fall outside of the purview of appropriate Section 5 legislation.

[138] *The Civil Rights Cases*, 109 US 3, 34 (1883) (Harlan dissenting).

[139] 42 USC § 13981.

A. STATE ACTION

The first, and most obvious, objection to VAWA is that it is addressed to purely private conduct. Because it is well settled that Section 1 of the Fourteenth Amendment "prohibits only state action"[140]—and therefore "does not . . . add anything to the rights which one citizen has under the Constitution against another"[141]—it appears at first blush that Congress has no power under Section 5 of the Amendment to reach private conduct.[142] This could mean one of two things, however. First, it could mean that the *object* of Section 5–based legislation cannot be the remediation or prevention of a purely private wrong. On this reading, the state action limitation contained in Section 1 translates into an ends-based limitation on Congress's power under Section 5. Simply put, private actors cannot, themselves, violate the Fourteenth Amendment. Thus, if Section 5 authorizes Congress to remedy or prevent constitutional violations, and if the Fourteenth Amendment is violated only by state action, then Congress has no power to premise Section 5–based legislation purely on the actions of private individuals. Because private wrongs are "evils not comprehended by the [Fourteenth] Amendment,"[143] targeting such evils is not a legitimate legislative goal.[144]

Second, the state action limitation in Section 1 could be under-

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[140] *United States v Morrison*, 120 S Ct 1740, 1756 (2000).

[141] *United States v Cruikshank*, 92 US 542, 554–55 (1875); *Shelley v Kraemer*, 334 US 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

[142] See, e.g., Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 Loyola L Rev 1351, 1359 (2000) (recounting common argument that, "because Section 5 merely authorizes Congress to 'enforce' Section 1, and Section 1 merely proscribes state conduct, Congress's Section 5 power is limited to directly proscribing state conduct").

[143] *South Carolina v Katzenbach*, 383 US 301, 326 (1966).

[144] Professor Sager has advocated a similar ends-based reading of the state action requirement of Section 1. See Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 NYU L Rev 150, 153–54 (2000). As Professor Sager correctly points out, a means-based understanding of the state action limitation such as that discussed below, see text accompanying note 145, applies the limitation not once, but twice (that is, to both the ends and the means of Section 5–based legislation). We break rank with Professor Sager in that we identify as the constitutional wrong VAWA permissibly could redress current state action denying the victims of gender motivated violence equal treatment in the criminal justice system, while he focuses primarily on historical discrimination against women.

stood to create a corresponding limitation on the *means* Congress permissibly may employ to achieve its legitimate ends. Therefore, because Section 1 prohibits only state action, Congress's power under Section 5 to "enforce" Section 1 is limited to proscribing state action. This reading was adopted by the Fourth Circuit in the *Morrison* litigation, where it reasoned that, "because Section 1 provides only rights against the States . . . Section 5 only grants Congress power to enforce the rights provided in Section 1 through legislation directed against state action, not a power to regulate purely private conduct."[145]

The constitutionality of VAWA turns on which of these competing understandings of the state action limitation is correct. Congress enacted VAWA in the face of evidence of widespread bias in state criminal and civil justice systems against the victims of gender-motivated violence; the purpose of the Act was to remedy the effects of such state bias so as to ensure practical enjoyment of the constitutional guarantee of equal protection of the laws. In order to effectuate this goal, Congress created a private right of action for women victimized by gender-motivated violence. Rather than subject themselves to discriminatory treatment at the hands of state officials, women could sue their attackers in federal court and recover compensatory and punitive damages as well as injunctive and declaratory relief.[146] Thus, if the state action requirement of Section 1 means simply that Section 5–based legislation must have as its object the prevention or remediation of unconstitutional state action, then VAWA easily passes constitutional muster. If, however, the state action limitation applies not only to legislative ends, but also to the means Congress adopts to achieve those ends, then VAWA must fall: Although Congress's goal was to remedy gender-based discriminatory treatment by state officials, VAWA's civil remedy operated directly upon private actors—the perpetrators of gender-motivated violence against women.

The Court in *Morrison* began its analysis by noting the "voluminous congressional record" containing evidence that "many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions" that "often result in in-

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[145] *Brzonkala v Va. Polytechnic Inst. & State Univ.*, 169 F3d 820, 865 (4th Cir 1999), aff'd as *United States v Morrison*, 120 S Ct 1740 (2000).

[146] 42 USC § 13981.

sufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[147] The Court did not dispute Congress's determination that such "state-sponsored gender discrimination" could violate the Equal Protection Clause.[148] Instead, it went on to emphasize that "the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct," foremost among which is the "state action" requirement of Section 1.[149]

From the perspective of the first, ends-based reading of the state action limitation discussed above, this is a non sequitur. On this reading, the appropriate question is whether the object of Section 5–based legislation is unconstitutional state action. The Court conceded that VAWA satisfied this requirement: It questioned neither the accuracy of Congress's findings of pervasive bias in state criminal and civil justice systems, nor the validity of Congress's conclusion that discriminatory treatment based on such bias is unconstitutional unless supported by, and substantially related to, an important state interest.[150] But, for the *Morrison* Court, the undisputed fact that Congress's legislative end was a legitimate one did not end the inquiry, for, in its view, the state action requirement also speaks to the *manner* in which Congress may permissibly act.

To support its acceptance of the second, means-based reading of the state action limitation, the Court relied on *United States v Harris*,[151] and the *Civil Rights Cases*,[152] two nineteenth-century decisions striking down antidiscrimination legislation as beyond Congress's Section 5 power.[153] However, it is far from clear that

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[147] *Morrison*, 120 S Ct at 1755.

[148] Id.

[149] Id at 1755–56.

[150] See id at 1755.

[151] 106 US 629 (1883).

[152] 109 US 3 (1883).

[153] The continued validity of *Harris* and the *Civil Rights Cases* is open to question. Writing for the majority in *Boerne*, Justice Kennedy conceded that the holdings in the *Civil Rights Cases* and other early cases limiting Congress's power under Section 5 "had been superseded or modified." *City of Boerne v Flores*, 521 US 507, 525 (1997). In *Morrison*, the government argued (unsuccessfully) that *Harris* and the *Civil Rights Cases* were effectively overruled by the Court's subsequent decisions in *United States v Guest*, 383 US 745 (1966), and *District*

either of these cases supports the conclusion that Congress may not target private conduct as a means to remedy or prevent unconstitutional state action.

In *Harris*, the Court struck down Section 2 of the Voting Rights Act of 1871,[154] which sought to punish private persons for "conspiring to deprive any one of the equal protection of the laws enacted by the State."[155] The Court concluded that the law exceeded Congress's power under Section 5 because it was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers."[156] But the Court emphasized that the primary problem with Section 2 was one of ends, not means:

> When the state has been guilty of no violation of [the Fourteenth Amendment's] provisions, when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognized and protect the rights of all persons, the amendment imposes no duty and confers no power upon congress.[157]

This language is entirely consistent with the ends-based reading of the state action limitation. As explained in Part I, when assessing the validity of Section 5–based legislation, the question for the Court is whether the "injury to be prevented or remedied"[158] is one properly understood as residing within the constitutional provision in question. In other words, a necessary prerequisite for congressional power under Section 5 is the existence of a wrong con-

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of Columbia v Carter, 409 US 418 (1973). See *Morrison*, 120 S Ct at 1756–58. Commentators likewise have questioned the appropriateness of "extract[ing] an account of the national government's powers from cases decided in 1883 and mechanically apply[ing] it to a federal civil rights statute enacted more than one hundred years later." Post and Siegel at 485 (cited in note 4). Post and Siegel argue persuasively that changes in our understanding of the role of the federal government in effecting civil rights guarantees suggest that *Harris* and the *Civil Rights Cases* are best understood as relics of a bygone era.

[154] Act of April 20, 1861, § 2, 17 Stat 13.

[155] *Harris*, 106 US at 639.

[156] Id at 640.

[157] Id at 639.

[158] *Boerne*, 521 US at 520.

templated by Section 1 of the Fourteenth Amendment. *Harris* makes clear that only wrongs committed by the states or their agents can satisfy this requirement: Because the Fourteenth Amendment does not address purely private wrongs, the "injury" of private discrimination, unsupported by state action, cannot be said to fall within the scope of the amendment, and hence standing alone gives Congress no warrant to act to prevent or remedy such private wrongs.

The Court reiterated this point in the *Civil Rights Cases*, where it struck down the public accommodation provisions of the Civil Rights Act of 1875,[159] which prohibited private discrimination against former slaves in "the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement."[160] The Court began by noting that Section 1 "is prohibitory in character, and prohibitory upon the states."[161] Thus, the Court reasoned, the power of Congress to "enforce" the provisions of the Fourteenth Amendment means the power "[t]o adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectively null, void, and innocuous."[162] Accordingly, valid Section 5–based legislation "must necessarily be predicated upon such [unconstitutional] state laws or state proceedings, and be directed to the correction of their operation and effect."[163] As in *Harris*, the Court in the *Civil Rights Cases* focused on the legitimacy of Congress's legislative ends, holding that, "until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity."[164]

Both cases, therefore, stand for the limited proposition that "civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of indi-

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[159] Act of March 1, 1875, 18 Stat 335.

[160] *The Civil Rights Cases*, 109 US 3, 10 (1883).

[161] Id.

[162] Id at 11.

[163] Id at 11–12.

[164] Id at 13.

viduals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings."[165] As such, while supporting the ends-based reading of the state action limitation, these decisions provide no basis for the conclusion that Congress lacks the power to legislate against private conduct as a means to remedy or prevent unconstitutional state action. This point did not escape VAWA's supporters, who argued in *Morrison* that *Harris* and the *Civil Rights Cases* could be distinguished on the ground that Congress had ample evidence of gender-based disparate treatment by state authorities, whereas there was no indication in either *Harris* or the *Civil Rights Cases* of such state action.[166]

The Court rejected this argument in a rather remarkable fashion: It reasoned that the legislative history of the Civil Rights Acts of 1871 and 1875 disclosed that the Congresses that enacted those laws were driven by similar concerns about discriminatory enforcement of state laws protecting the newly freed slaves.[167] One can search the opinions in *Harris* and the *Civil Rights Cases* in vain, however, for *any* mention of such discriminatory action on the part of state officials. Not only did the Court in those cases decline to reach the question whether congressional findings of unconstitutional state action could support legislation targeting private conduct, there is no hint in either case that the Court was even aware of the historical evidence cited in *Morrison.*

It is a well settled, if frequently ignored, rule of stare decisis that the Court will not consider itself bound by dicta in previous decisions. Indeed, the Court paid homage to this rule in *Morrison*, rejecting the government's argument that the validity of both *Harris* and the *Civil Rights Cases* had been called into question by dicta in subsequent cases.[168] Nevertheless, in concluding that *Harris* and the *Civil Rights Cases* support a limitation on Congress's power well beyond what their holdings require, the *Morrison* Court relied, not

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[165] Id at 17.

[166] See *United States v Morrison*, 120 S Ct 1740, 1758 (2000).

[167] See id. The Fourth Circuit likewise engaged in an extensive description of the legislative history of the Civil Rights Acts of 1871 and 1875, concluding that the Reconstruction Congress was trying to "remedy" failures in state enforcement of the rights of African Americans. See *Brzonkala v Va. Polytechnic Inst. & State Univ.*, 169 F3d 820, 871 (4th Cir 1999), aff'd as *United States v Morrison*, 120 S Ct 1740 (2000).

[168] See *Morrison*, 120 S Ct at 1757 ("[I]t would take more than naked dicta . . . to cast any doubt upon the enduring validity of the *Civil Rights Cases* and *Harris*."); note 153.

merely on what the Court said in dicta in those earlier decisions, but on what the Court in 1883 presumably *would have said* had it considered an issue it apparently ignored. We are unaware of any other instance in which a court has gone to such lengths to derive controlling meaning from the presumed, yet unspoken, premises of century-old precedent.

If neither *Harris* nor the *Civil Rights Cases* compels us to adopt the means-based reading of the state action requirement, is there any other reason we should prefer that reading to one that requires only that state action be the object of Section 5–based legislation? One could argue that a state action limitation on the means Congress employs to accomplish its legitimate ends—the prevention or remediation of unconstitutional state action—is implied by the word "enforce" in Section 5.[169] "Enforce," the argnment goes, means to "compel obedience to."[170] Section 5–based legislation therefore is not "appropriate" unless it will tend to compel state actors to obey the prohibitions set forth in Section 1. Because legislation that targets only private actors presumably will not lead state actors to conform their conduct to the requirements of the Equal Protection Clause, this understanding of "enforce" suggests that Congress can never reach purely private conduct under Section 5.

There are two obvious problems with this argument. The first is that the Court has never adopted such a cramped reading of Congress's power to "enforce" the provisions of the Fourteenth Amendment. The Court's repeated references to Congress's power to "remedy" *or* "prevent" constitutional violations[171] itself suggests that "enforce" must mean something more than "compel submission to." If one assumes that the Court has not simply been engaging in an exercise in redundancy, it follows that "some measures that redress but do not prevent unconstitutional state action must

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[169] See, e.g., Brief for Respondent Antonio J. Morrison at 36–37, *Morrison* (Nos 99-5, 99-29).

[170] See id at 36 (quoting *Random House Unabridged Dictionary* 644 (2d ed 1993)).

[171] See, e.g., *Kimel v Fla. Bd. of Regents*, 120 S Ct 631, 644 (2000) (referring to Congress's "authority both to remedy and to deter violations of [constitutional] rights"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 119 S Ct 2199, 2207 (1999) (holding that Congress must tailor remedial scheme to remedying or preventing unconstitutional conduct); *City of Boerne v Flores*, 521 US 507, 524 (1997) (discussing "remedial and preventative nature of Congress's enforcement power").

'enforce' Section 1 provisions, undermining the claim that prevention is the sine qua non of 'enforcement.'"[172]

Moreover, even in the *Civil Rights Cases*—seldom viewed as the Court's most expansive moment with regard to the power of the federal government to effectuate the guarantees of the Reconstruction Amendments—the Court embraced an understanding of Congress's enforcement power that reached beyond the authority to force state actors to comply with the prohibitions of the Fourteenth Amendment. The Court reasoned that Section 5's grant of power to Congress to "enforce" the amendment meant that Congress could enact legislation to "correct[ ] the *effects*" of state actions prohibited by Section 1.[173] As VAWA illustrates, Congress can act to redress the ill effects of unconstitutional state action without directly and explicitly compelling state actors to obey the strictures of the Constitution: The private right of action it creates allows the victims of gender-motivated bias to obtain legal redress against their attackers without subjecting themselves to discriminatory state justice systems.

VAWA likewise illustrates the second problem with the argument that Congress can never "compel obedience to" the Fourteenth Amendment by legislating against private conduct. VAWA's enactment was well publicized,[174] drawing media and public attention not only to the problem of gender-motivated violence against women, but also to the widespread bias in state criminal and civil justice systems that gave rise to the need for federal legislation. Such legislation can help "enforce" gender-neutral administration of state laws by changing the legal culture to one more receptive to claims of gender-based violence, much as the Civil Rights Act of 1964 changed the legal culture surrounding the acceptability of race discrimination in employment and public accommodations, even before Congress applied the law to state and local governments.[175]

[172] Caminker at 1360 (cited in note 142).

[173] *The Civil Rights Cases*, 109 US 3, 11 (1883). See also text accompanying note 162.

[174] See, e.g., Michael Kranish, *Crime Bill Is Approved in Senate*, Boston Globe (Aug 24, 1994), at A1; Michael Ross, *House OK's Crime Bill*, LA Times (Aug 22, 1994), at 1; Robert Shepard, *Female Agenda Takes Long Way to Become Law*, Chi Trib (Sept 25, 1994), at 1; George F. Will, *Touchy-Feely Crime Bill*, Wash Post (July 14, 1994), at A23.

[175] Though not presented by the situation addressed by VAWA, private violence can also effectively hamstring the efforts of state governments to meet their obligations under the Fourteenth Amendment to, say, desegregate schools or other institutions. Even if the state is not acting in collusion with the private parties, and thus state action cannot be found, legislation visiting criminal and other sanctions on the perpetrators of such violence would

We have seen that neither precedent nor text compels acceptance of the means-based reading of the state action limitation. This alone should be enough to suggest that the alternate, ends-based reading is appropriate, for as a general matter courts will—and should—refrain from setting limitations, not grounded in the Constitution, on Congress's ability to perform its constitutionally designated responsibilities. However, we have additional reason to prefer the ends-based understanding of the state action limitation. The Court in recent years has expressed considerable concern about preserving the balance of federal-state power.[176] Considerations of federalism are furthered by federal legislation that secures civil rights guarantees for citizens while intruding as little as possible on the sovereign powers of the states. VAWA did just that: Rather than acting directly on state actors such as prosecutors, judges, policemen, and caseworkers, Congress devised a way to help women overcome the effects of state-sponsored bias by suing their attackers themselves.

Perhaps recognizing the various deficiencies of the means-based reading of the state action limitation, the *Morrison* Court stopped short of stating that Congress can never target private conduct as a means to remedy or prevent unconstitutional state action. Instead, putting to the side the state action question, the Court turned to the congruence and proportionality test to determine whether VAWA's civil remedy was appropriately remedial or preventative in character.

B. MORRISON'S APPLICATION OF THE CONGRUENCE AND PROPORTIONALITY TEST

The *Morrison* Court's application of the congruence and proportionality test is at best puzzling. The Court introduced the test in *Boerne*—and applied it in *Kimel*[177] and *Florida Prepaid*[178]—as a way to assess whether the object of Section 5–based legislation is legitimate. In other words, the congruence and proportionality test speaks to the question of power in the premises: Is this an issue

represent an effort to "enforce" Fourteenth Amendment obligations and values. See Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U Cin L Rev 199 (1971).

[176] See note 99.

[177] See notes 111–24 and accompanying text.

[178] See notes 125–33 and accompanying text.

with regard to which Congress is authorized to act? Understood this way, the congruence and proportionality test is consistent with the Court's traditional deference to Congress under the *McCulloch* standard, pursuant to which Congress is afforded substantial discretion both in its identification of legislative ends and in its choice of the means by which to carry out those ends. Though it is the prerogative of Congress to decide, in the first instance, whether national legislation is needed, concern for maintaining the proper balance between state and federal power suggests that the Court may properly play a role in policing the bounds of Congress's authority.[179] As we explained above,[180] the congruence and proportionality test allows the Court to engage in this sort of oversight when it is unclear that Congress independently investigated the issue in question to determine that an injury of constitutional proportion existed such that federal intrusion into the traditional prerogatives of the states was appropriate. By looking at what Congress has done so as to discern what Congress intended to do, the test helps the Court assess whether the object of Section 5–based legislation is "to prevent and remedy constitutional violations."[181]

It is difficult, however, to understand *Morrison* in these terms. The Court did not dispute that gender-based disparate treatment by state authorities constitutes the sort of equal protection violation that Congress may properly address under Section 5.[182] Nor did the Court question the accuracy of Congress's findings—well detailed in the "voluminous"[183] legislative record—that such disparate treatment was commonplace in state criminal and civil justice systems. Accordingly, *Morrison* was precisely the sort of case in which the congruence and proportionality test is unnecessary and inappropriate. The object of VAWA was clear: The "injury to be prevented or remedied"[184] was that of being subjected to biased and discriminatory treatment at the hands of the state authorities responsible for administering state laws proscribing violence. Moreover, as the Court itself conceded, that injury fit quite com-

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[179] But see note 3.

[180] See Part I.C.

[181] *City of Boerne v Flores*, 521 US 507, 535 (1997).

[182] See *United States v Morrison*, 120 S Ct 1740, 1755 (2000).

[183] Id.

[184] *Boerne*, 521 US at 520.

fortably within the recognized zone of equal protection concern. Thus, the initial question for the Court when it is called upon to determine the legitimacy of Section 5–based legislation—what is "the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy[?]"[185]—could be answered quite easily. Congress plainly had identified the evil, and the Court had no need to use the congruence and proportionality test as a way to infer congressional intent on that issue.

The use of the congruence and proportionality test in *Morrison* is puzzling precisely because it diverges so starkly from the Court's earlier explanations and applications of the test. Instead of using the congruence and proportionality test to identify the object of Section 5–based legislation where congressional intent is unclear—an exercise in superfluity, given the clarity (not to mention girth) of VAWA's legislative record—the Court proceeded on the assumption that the goal of VAWA was a legitimate one, and applied the test to evaluate the means Congress had adopted to achieve that goal.[186] Used in this fashion, the congruence and proportionality test is quite problematic.

As an initial matter, it bears mention that the test provides scant guidance for either Congress or lower courts as to the degree of congruence and proportionality required between legislative ends and means. But the indeterminate nature of the congruence and proportionality test is not its most serious failing. More fundamentally, the test is at odds with the long-standing principle that courts are not—and should not be—in the business of second-guessing Congress's reasoned judgment regarding how best to implement its valid legislative goals. That principle is no less applicable to Section 5–based legislation than to legislation enacted pursuant to Congress's Article I powers.

The history of the Fourteenth Amendment has been subject to exhaustive treatment elsewhere,[187] and we will not recount it in

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[185] *Fla. Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 119 S Ct 2199, 2207 (1999).

[186] See *Morrison*, 120 S Ct at 1758.

[187] See, e.g., Horace E. Flack, *The Adoption of the Fourteenth Amendment* (1908); Joseph B. James, *The Framing of the Fourteenth Amendment* (1956); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988); Jacobus TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment: The Original Understanding of Section Five*, 3 Const Commentary 103 (1986).

detail here. The crucial point for the purposes of the present discussion is that it was widely understood—at the framing of the amendment, and by the Court in its earliest interpretations of it—that the word "appropriate" in Section 5 was meant to invoke the necessary and proper standard set forth in *McCulloch*, and therefore to apply to Section 5–based legislation the tradition of legislative discretion and judicial deference recognized under that standard. The original draft of the Fourteenth Amendment made this explicit, echoing the text of Article I, Section 8:

> The Congress shall have power to make all laws 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.[188]

The proposal met with substantial opposition, much of which, as the *Boerne* Court noted, focused on the fact that "[t]he proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."[189] Behind this general complaint, however, lay a wide variety of more specific critiques. For example, some expressed concern that the proposed language would grant Congress uncabined power to enact legislation concerning any matrer touching on life, liberty, or property, and so would upset the balance of federalism.[190] Others worried that the equal protection language of the proposed amendment would vest Congress with the power to pass legislation equalizing laws among the states.[191] Still others complained that the proposal relied too heavily on Congress as the sole protector of constitutional rights.[192]

As a result of these critiques, a second version of the amendment was proposed. The new proposal contained several important changes. First, the newly minted Section 1 made the provisions of the amendment self-executing and limited to prohibiting only state

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[188] Cong Globe, 39th Cong, 1st Sess, 1034 (1866).

[189] *Boerne*, 521 US at 520 (citing legislative record).

[190] See, e.g., Steven A. Engel, *Note: The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 Yale L J 115, 125 (1999).

[191] See id.

[192] See id at 125–26.

action. Second, Section 5 now read: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[193] As such, it tracked the language of the Enforcement Clause of the Thirteenth Amendment.[194] Accordingly, any suggestion that the change from "necessary and proper" to "appropriate" signaled a constriction of Congress's enforcement power under Section 5 must contend with the settled view that Congress chose the word "appropriate" in the Thirteenth Amendment with the *McCulloch* standard in mind.[195] Moreover, from its first explication of Congress's Section 5 power in *Ex Parte Virginia*, the Court has reasoned that the grant of power to Congress to enact "appropriate legislation" suggested that Congress enjoyed the same broad discretion under Section 5 as under the *McCulloch* standard.[196] The link between the *McCulloch* necessary and proper standard and Section 5 was cemented in *Morgan*, where the Court stated that, "[b]y including § 5 the draftsmen sought to grant Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."[197]

The *McCulloch* standard requires courts to refrain from substituting their judgment for Congress's as to how to effectuate legislative goals:

> Congress must have a wide discretion as to the choice of means; and the only limitation upon the discretion would seem to be, that the means are appropriate to the end. And this must admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable as to strike the eye of every observer.[198]

Such deference to Congress's choice of means is grounded in the principle of separation of powers. For if the end is legitimate, Con-

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[193] Cong Globe, 39th Cong, 1st Sess, 2286 (1866).

[194] US Const, Amend XIII, Section 2 ("Congress shall have power to enforce this article by appropriate legislation.").

[195] See, e.g., Akhil Reed Amar, *Intratextualism*, 112 Harv L Rev 747, 823–26 (1999); Engel at 131 & n 76 (cited in note 190). See also *Jones v Alfred Mayer Co.*, 392 US 409, 439 (1968) (recognizing that enforcement clause of Thirteenth Amendment "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'" (quoting *The Civil Rights Cases*, 109 US 3, 20 (1883))).

[196] See *Ex Parte Virginia*, 100 US 339, 345–46 (1879). See also text accompanying note 29 (quoting *Ex Parte Virginia*, 100 US at 345–46).

[197] *Katzenbach v Morgan*, 384 US 641, 650 (1966).

[198] Joseph Story, *Commentaries on the Constitution of the United States* 417 (1883).

gress is in a far better institutional position than the judiciary to craft appropriate means to accomplish that objective.

The *Morrison* Court attempted to bring its analysis of VAWA into line with this principle by suggesting that VAWA's private remedy was obviously different from the legislation upheld in previous cases.[199] If this were correct, then the Court's invocation of the congruence and proportionality test would be significantly less startling: It would simply reflect a different nomenclature for traditional deferential rational basis scrutiny of congressional enactments. But VAWA was not, in fact, so easily distinguishable from previous remedial legislation as the Court implied. For example, the Court complained that VAWA's civil remedy "applies uniformly throughout the nation."[200] But so did the prohibition on literacy tests unanimously upheld in *Oregon v Mitchell.*[201] Similarly, though Congress did not gather evidence of discrimination against the victims of gender-motivated crimes in each and every state,[202] the absence of "state-by-state findings" did not trouble the Court in *Mitchell.* Indeed, Justice Stewart made clear in that case that the justification for a nationwide remedy "need not turn on" whether a constitutional violation could be found in every state, as Congress "may paint in a much broader brush than may this

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[199] See *Morrison*, 120 S Ct at 1758–59.

[200] Id at 1759.

[201] 400 US 112, 131–34 (1970). The *Mitchell* Court upheld the prohibition as an exercise of Congress's power under Section 2 of the Fifteenth Amendment. See id at 132; id at 216 (Harlan concurring in part and dissenting in part); id at 235–36 (Brennan, White, and Marshall concurring in part and dissenting in part); id at 282 (Stewart concurring in part and dissenting in part). The Court has long interpreted Section 5 of the Fourteenth Amendment as coextensive with the parallel enforcement provision of Section 2 of the Fifteenth Amendment. See, e.g., *Katzenbach v Morgan*, 384 US 641, 651 (1966) (noting similarity between Fourteenth and Fifteenth Amendments).

[202] See *Morrison*, 120 S Ct at 1759. It is worth noting, moreover, that, contrary to the Court's assertion that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most states," the legislative record included, among other things, a letter signed by thirty-eight State Attorneys General supporting VAWA on the ground that "the problem of violence against women is a national one, requiring federal attention." Letter from Robert Abrams, Attorney General of New York, et al, to Jack Brooks, Chair, House Judiciary Committee (July 22, 1993), reprinted in *Crimes of Violence Motivated by Gender: Hearing Before Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103d Cong, 34–36 (1993). Moreover, as Justice Breyer noted in dissent, Congress also "had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so." *Morrison*, 120 S Ct 1779 (Breyer dissenting).

Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records."[203]

There is, however, one way in which VAWA differed from other remedial legislation: its penalties were directed against private individuals who committed crimes motivated by gender bias. The Court seized on this factor, suggesting that although neither the text of the Fourteenth Amendment nor the Court's precedents interpreting Section 5 mandated a means-based reading of the state action limitation, the congruence and proportionality test did. VAWA, the Court explained, "visits no consequence whatsoever on any Virginia public official involved in investigating or prosecuting [plaintiff's] assault."[204] In the Court's view, this alone distinguished VAWA's civil remedy from the Section 5–based legislation upheld in *Morgan* and *South Carolina*, thus exposing the Act's lack of congruence and proportionality.[205]

It 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. Recall that the Court had declined to hold that the state action requirement of Section 1 sets limits on the means Congress may permissibly employ to achieve its legislative goals.[206] Instead, it proceeded on the assumption that VAWA was appropriately premised on unconstitutional conduct by state officials. Thus, the Court turned to the congruence and proportionality test on the premise that neither *Harris* nor the *Civil Rights Cases* compelled the conclusion that VAWA was invalid because it failed to satisfy the state action requirement. If we take the Court at its word (as presumably we must), the problem with VAWA's civil remedy was not a state action problem, but rather a lack of sufficiently narrow tailoring between legislative ends and means. It is far from obvious, however, that this is a necessary or even reasonable conclusion. As Justice Breyer noted in dissent:

> [W]hy can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "[l]egislation . . . [that]

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[203] *Mitchell*, 400 US at 284 (Stewart concurring in part and dissenting in part).

[204] *Morrison*, 120 S Ct at 1758.

[205] See id.

[206] See id.

> prohibits conduct which is not itself unconstitutional." . . . The statutory remedy . . . intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy "disproportionate"? And given the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of "congruence"?[207]

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. If deference means anything—if the "presumption of constitutionality"[208] is not merely a phrase courts invoke out of politeness but ignore in fact—it means that courts must respect the institutional division of labor the Constitution creates. It is Congress's job to make law, to make difficult and complex judgments about when legislation is needed and what form it should take. When the Court agrees that Congress has acted within the bounds of its enumerated powers—that the end is legitimate, and that the means chosen plausibly are directed to achieving that end—the Court should sustain the law, whether grounded on Congress's Section 5 power or Article I.

III. Antidiscrimination Legislation after Morrison: The Americans with Disabilities Act

Morrison is troubling, not just for its rejection of the Violence Against Women Act, but for its implications for other antidiscrimination legislation. Until recently, such legislation has rested comfortably within the aegis of Congress's power under the Commerce Clause. However, the Court's recent decisions holding that Congress may abrogate state sovereign immunity under Section 5, but not under Article I,[209] have created powerful incentives

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[207] Id at 1779 (Breyer dissenting).

[208] Id at 1748. See also id ("Due respect for the decisions of a coordinate branch of government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

[209] See notes 12–13 and accompanying text.

to test the validity of federal antidiscrimination statutes as Section 5–based legislation.[210]

In this Part, we demonstrate how the theoretical framework we have proposed for analyzing Section 5–based legislation can be applied to such antidiscrimination statutes. We use as our model Titles I[211] and II[212] of the Americans with Disabilities Act (ADA).[213]

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[210] See, e.g., *Holman v Indiana*, 211 F3d 399 (7th Cir 1999) (challenging Title VII); *In re Employment Discrimination Litig.*, 198 F3d 1305 (11th Cir 1999) (challenging Title VII); *Bd. of Trustees of Univ. of Ala. v Garrett*, 193 F3d 1214 (11th Cir 1999), cert granted in part, 120 S Ct 1669 (2000) (challenging ADA); *Fitzwater v First Judicial District of Pa.*, No Civ A 99-3274, 2000 US Dist LEXIS 4931 (ED Pa April 11, 2000) (challenging Title VII); *Sandoval v Hogan*, 197 F3d 484 (11th Cir 1999) (challenging Title VI); *Lesage v Texas*, 158 F3d 213 (5th Cir 1998) (challenging Title VI); *Litman v George Mason Univ.*, 186 F3d 544 (4th Cir 1999) (challenging Title IX), cert denied, 120 S Ct 1220 (2000).

[211] 42 USC §§ 12111–12117 (1994 & Supp IV 1998). Title I of the ADA targets discrimination by employers, including state and local governments. Id §§ 12111(2), (5)(A), (7). It provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Id § 12112(a). "Discriminate" is defined to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [a] disability," as well as the use of employment criteria that "screen out or tend to screen out" persons with disabilities, unless the criteria are "job related for the position in question and [are] consistent with business necessity." Id §§ 12112(b)(1), (b)(6). Unlawful discrimination also includes the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodation "would impose an undue hardship" on the employer. Id § 12112(b)(5)(A). A "qualified individual with a disability" is a person who "can perform the essential functions of the job with or without reasonable accommodation." Id § 12111(8).

[212] Title II of the ADA addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation. Id §§ 12131–12165. It prohibits "public entities"—defined to include "any State or local government and its components," id §12131(1)(A)-(B)—from discriminating against or excluding "qualified individual[s]" from participation in or enjoyment of the benefits of its services, programs, or activities "by reason of" their disability. Id §12132. Under Title II, a "qualified individual with a disability" is a person "who, with or without reasonable modifications . . . meets the essential eligibility requirements" for the governmental program or service, including employment. Id § 12131(2); 28 CFR 35.140. Title II normally does not require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new facilities must be made accessible. See 28 CFR 35.150(a)(1), 35.151. With the exception of new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, activity or in undue financial and administrative burdens." 28 CFR 35.150(a)(3). See also 28 CFR 35.130(b)(7), 35.164; *Olmstead v L.C.*, 527 US 581, 606 n 16 (1999).

[213] 42 USC § 12101 et seq (1994 & Supp IV 1998). The Supreme Court granted certiorari in *Board of Trustees of the University of Alabama v Garrett*, 193 F3d 1214 (11th Cir 1999), cert granted in part, 120 S Ct 1669 (2000), to determine whether Titles I and II of the ADA are proper exercises of Congress's Section 5 power. Title III of the Act—which is not at issue in *Garrett*—addresses discrimination in public accommodations operated by private entities. See id §§ 12181–12189. We do not consider Title III because it does not

In one sense, a Section 5–based challenge to the ADA is entirely proper. Although the provisions we consider—which prohibit, respectively, disability-based discrimination by employers and by public entities providing public services—clearly bear some relationship to interstate commerce, it is equally clear that the concern driving those who passed the Act was not commerce as such, but equality. Thus, it seems desirable, from the perspective of legislative candor, that such legislation be linked explicitly to Congress's power to give full effect to the constitutional guarantee of equal protection.

In a different sense, however, the inevitable testing of the ADA and statutes like it is cause for great concern. Both Titles I and II of the ADA may be enforced through private suits against governmental entities.[214] Hence the need to determine whether the Act can pass muster as a Section 5 enactment: After *Seminole Tribe*, Congress can abrogate state sovereign immunity only when it acts pursuant to its Section 5 authority.[215] Accordingly, however valid the ADA may be as an exercise of Congress's commerce power, without the Section 5 footing Congress could not grant individuals a federal right of action for damages against nonconsenting states. Thus, the question whether the ADA and like legislation can be sustained as an exercise of Congress's Section 5 power is heavily laden with federalism concerns that threaten to obscure any attempt to discern appropriate and practicable limits on congressional enforcement authority.

The ADA is an appropriate candidate for testing our framework for another reason as well. The ADA imposes obligations on state governments that arguably exceed Fourteenth Amendment requirements. The legislation authorizes both disparate impact challenges that the Court has made clear are not available under the Constitution,[216] and an obligation to reasonably accommodate "qualified individuals with handicaps" that extends the antidis-

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implicate the state sovereign immunity question and therefore is less likely to be the subject of a Section 5–based challenge.

[214] See 42 USC §§ 12117(a), 12133. Moreover, Congress unequivocally expressed its intent for the ADA to abrogate state sovereign immunity. Id § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA].").

[215] *Seminole Tribe v Florida*, 517 US 44, 55 (1996).

[216] See *Washington v Davis*, 426 US 229 (1976).

crimination principle considerably further than the Court has ever been prepared to do, even in race and sex discrimination cases, under the Equal Protection Clause.

Moreover, unlike *Morrison*, which involved gender discrimination, conduct which the Court has indicated merits a heightened judicial scrutiny, the ADA involves disability discrimination, a category of conduct that the Court has held warrants only rational basis review. In *City of Cleburne v Cleburne Living Center*,[217] the Court found that the zoning ordinance in question, which required a special use permit for a home for the mentally disabled but not, for example, for a boarding house or a hospital, was based on irrational prejudice and so violated the Equal Protection Clause.[218] Yet the Court explicitly rejected the argument that legislative classifications based on mental disability should be subject to anything other than traditional rational basis review.[219] At first blush, therefore, *Kimel*'s invalidation of legislation prohibiting age-based discrimination—which, like discrimination against the disabled, is reviewed under the rational basis standard—would seem to signal a similar fate for the ADA. However, on closer inspection, the differences between the two statutes become clear.

A. CONGRESSIONAL FINDINGS IN SUPPORT OF THE ADA

Like the Violence Against Women Act, the ADA is supported by a voluminous legislative record replete with findings of unconstitutional state action. Congress engaged in extensive fact-finding concerning the problem of discrimination against persons with disabilities, holding thirteen hearings devoted specifically to the consideration of the ADA,[220] and considering several reports and sur-

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[217] 473 US 432 (1985).

[218] Id at 448–50.

[219] Id at 442–46.

[220] See Americans with Disabilities Act: Hearing on HR 2273 and S 993 Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong, 1st Sess (1990); Americans with Disabilities Act: Hearings on HR 2273 Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 101st Cong, 1st Sess (1990); Americans with Disabilities Act: Hearing Before the House Committee on Small Business, 101st Cong, 2d Sess (1990); Americans with Disabilities Act: Telecommunications Relay Services, Hearing on Title V of HR 2273 Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong, 1st Sess (1990); Americans with Disabilities Act of 1989: Hearings on HR 2273 Before the House Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights, 101st Cong, 1st Sess (1989); Americans with Disabilities Act of 1989: Hearing on HR 2273 Before the Subcommittee

veys.[221] In addition, a congressionally designated Task Force held sixty-three public forums across the country, which were attended by more than 7,000 individuals.[222] The Task Force presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities—often at the hands of state and local governments.[223]

Moreover, the Congress that enacted the ADA brought to that legislative process decades of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. Prior to enacting the ADA, Congress attempted to combat disability discrimination in a number of discrete areas, including architectural barriers to government buildings and courthouses,[224] education,[225] transportation,[226] voting,[227] and housing.[228] Only after witnessing the failure of more limited measures did Congress con-

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on Select Education of the House Committee on Education and Labor, 101st Cong, 1st Sess (1989); Hearing on HR 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcommittee on Employment Opportunities and Select Education of the House Committee on Education and Labor, 101st Cong, 1st Sess (July 18 & Sept 13, 1989) (two hearings); Oversight Hearing on HR 4498, Americans with Disabilities Act of 1988: Hearing Before the House Committee on Select Education of the House Committee on Education and Labor, 100th Cong, 2d Sess (1989); Americans with Disabilities Act of 1989: Hearings on S 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong, 1st Sess (1989); Americans with Disabilities Act of 1988: Joint Hearing on S 2345 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources and the Subcommittee on Select Education of the House Committee on Education and Labor, 100th Cong, 2d Sess (1989).

[221] See S Rep No 116, 101st Cong, 1st Sess 6 (1989); HR Rep No 485, 101st Cong, 2d Sess Pt 2, at 28 (1990); Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (1990) ("*Task Force Report*").

[222] See *Task Force Report* at 18 (cited in note 221).

[223] See 2 Staff of the House Committee on Education and Labor, 101st Cong, 2d Sess, Legis Hist of Pub L No 101-336: The Americans with Disabilities Act, 100th Cong, 2d Sess 1040 (Comm Print 1990); *Task Force Report* at 16 (cited in note 221).

[224] See Architectural Barriers Act of 1968, 42 USC 4151 et seq (1994).

[225] See Education of the Handicapped Act, Pub L No 91-230, Tit VI, 84 Stat 175 (reenacted in 1990 as the Individuals with Disabilities Education Act, 20 USC 1400 et seq (1994)).

[226] See Urban Mass Transportation Act of 1970, 49 USC § 1612 (1994); Air Carrier Access Act of 1986, 49 USC § 41705 (1994).

[227] See Voting Accessibility for the Elderly and Handicapped Act, 423 USC § 1973ee-1 (1994).

[228] See Fair Housing Amendments of 1988, 42 USC § 3604 (1994).

clude that the ADA's "comprehensive national mandate for the elimination of discrimination against individuals with disabilities" was required.[229]

Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[230] Specifically, discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[231] Although most—if not all—states had enacted laws prohibiting discrimination against the disabled, such laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing."[232] Even in the face of state antidiscrimination legislation, persons with disabilities:

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to the existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.[233]

"The continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunities for which our free society is justifiably famous."[234]

In light of these findings, the Court should have no difficulty finding that the ADA was animated by a purpose to address and

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[229] 42 USC § 12101(b)(1).

[230] Id § 12101(a)(2).

[231] Id § 12101(a)(3).

[232] S Rep No 116 at 18; HR Rep No 485 at 47.

[233] 42 USC § 12101(a)(5). See also id § 12101(a)(7) (finding that people with disabilities have been "faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society").

[234] Id § 12101(a)(9).

remedy disability discrimination by state governments as employers and places of public accommodation, unless the fact that constitutional claims of disability discrimination merit only rational basis scrutiny from courts changes the Section 5 analysis.

B. THE QUESTION OF RATIONAL BASIS REVIEW

Much ink has been spilled on the question whether the Court in *Cleburne* in fact applied the rational basis standard, or whether it subjected the ordinance at issue to some form of heightened scrutiny under the guise of traditional rational basis review.[235] For the purposes of determining Congress's power to remedy and prevent discriminatory treatment of the disabled, however, the answer to that puzzle is irrelevant. What matters is not the verbal formulation the Court applies when determining whether a given classification violates the Equal Protection Clause, but rather the constitutional norms that inform the various tests.[236]

The great bulk of legislation, both state and federal, classifies

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[235] See, e.g., Lawrence H. Tribe, *American Constitutional Law* 1612 (2d ed 1988) (describing Court's review in *Cleburne* as "covertly heightened scrutiny"); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 Case W L Rev 695, 726 (1996) (suggesting that *Cleburne* applied something "more stringent than garden-variety" rational basis review); Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky L J 591, 598 (1999) ("While *Cleburne* purported to apply rational basis review, both its explication and application of the rational basis standard proved difficult to square with the sort of judicial deference that the paradigm clearly requires."); David O. Stewart, *Supreme Court Report: A Growing Equal Protection Clause?* 17 ABA J 108, 112 (Oct 1995) (describing analysis in *Cleburne* as "rational basis with teeth"). As one Justice noted at oral argument in *Garrett:*

> *Cleburne* does—the result seems at odds with the—with just anything goes, which had been what rational basis meant. I thought that the *Cleburne* decision was very much like *Reed v. Reed* in the gender area. That is, the Court purported to apply rational basis, but came to a result that didn't square with any prior rational basis decision.

Oral Argument at 52, *Univ. of Ala. v Garrett* (No 99-1240) (statement of unidentified Justice).

[236] In its brief to the Court in *Garrett*, the United States argued that it is counterintuitive to limit Congress's Section 5 authority on the ground that the classification in question is subject to rational basis review by the courts. See Brief for United States at 38, *Garrett* (No 99-1240). Given that rational basis scrutiny is premised on the principle of judicial restraint, see *FCC v Beach Communications*, 508 US 307, 315 (1993) (observing that rational basis review "is a paradigm of judicial restraint"), it does seem odd to suggest that the fact that a *court* will review a given classification under the rational basis standard should translate into a limitation on what *Congress* can do with regard to that same classification. As we argue below, however, it does not follow that the fact that a certain classification is subjected to rational basis scrutiny under Section 1 is wholly unrelated to the question of the scope of Congress's enforcement authority under Section 5.

individuals in some way.[237] All those classifications conceivably could be challenged on equal protection grounds, and most, if not all, would be reviewed under the highly deferential rational basis standard. This reflects, not only the "presumption of constitutionality" and corresponding principles of judicial restraint,[238] but, more fundamentally, the notion that "the prohibition of the Equal Protection Clause goes no further than . . . invidious discrimination."[239] The Equal Protection Clause simply is not concerned about every type of classification (or about classifications as such), even those that rest on rather dubious rationales.[240] To take the paradigmatic example of a classification subject to rational basis review, Congress surely lacks authority under Section 5 to enact regulations protecting opticians.[241] We reach this conclusion, however, not *because* courts review laws that distinguish between opticians and optometrists under the rational basis standard, but because of the typical reasons advanced for *why* such a classification merit only the most deferential scrutiny.

The applicability of rational basis review generally is related to the likelihood that the state has a legitimate reason for treating otherwise similarly situated individuals or groups differently. From an institutional perspective, it is entirely proper, indeed unavoidable, for courts to proceed on the assumption that the politically accountable branches of government (both state and federal) generally act constitutionally and in good faith.[242] Even if it were possible for a court to determine what *really* motivated legislators

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[237] See *Romer v Evans*, 517 US 620, 631 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

[238] See note 208.

[239] *Williamson v Lee Optical*, 348 US 483, 489 (1955).

[240] See, e.g., *Romer*, 517 US at 632 ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works tot he disadvantage of a particular group, or if the rationale for it seems tenuous."). See also *New Orleans v Dukes*, 427 US 297 (1976) (holding that tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson*, 348 US at 488–89 (rejecting equal protection challenge to regulation, based on assumed health concerns, burdening opticians but not optometrists or ophthalmologists); *Railway Express Agency, Inc. v New York*, 336 US 106 (1949) (holding that potential traffic hazards justified exemption of vehicles advertising owner's products from general advertising bar).

[241] See *Williamson*, 348 US at 489.

[242] See, e.g., *Mueller v Allen*, 463 US 388, 394 (1983) (noting Court's "reluctance to attribute unconstitutional motives" to legislature).

when they passed a certain law containing a classification harming a particular group, it would be inappropriate for the judiciary customarily to second-guess the motivations of a coordinate branch of government. Accordingly, rather than inquire, in each case, whether the classification in question truly is based on rational, legitimate considerations, the Court will assume the truth of any explanations given, and will sustain the legislation if any plausible rational objective can be advanced for it.

The Court departs from this deferential approach when it has reason to be skeptical that legitimate objectives in fact inform the legislation, because it harms "discrete and insular"[243] minority groups whose participation in the political process is hampered by societal prejudice, or because the classification is such that it is likely to reflect irrational prejudice, "negative attitudes," or "vague, undifferentiated fears."[244] Classifications based on race and national origin, for example, are subjected to strict scrutiny not because individuals in the identified groups have different, or greater, rights under the Equal Protection Clause than do others, but because laws targeting those groups are extraordinarily unlikely to admit of any rational justification: Factors such as race or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are *deemed to reflect* prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[245] The state may, in theory, overcome the presumption that race-based classifications and the like are illegitimately motivated by showing that such classifications are necessary to a compelling state interest, but it is generally understood that the required showing is almost impossible to make.

Other classifications, like those based on gender, call for a heightened, but somewhat less stringent, standard of review. Heightened scrutiny is appropriate because gender "generally provides no sensible ground for differential treatment."[246] However, to the extent that men and women are, in fact, different, there sometimes will be legitimate reasons for treating them differently.

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[243] *Carolene Prods. v United States,* 304 US 144, 153 n 4 (1938).

[244] *City of Cleburne v Cleburne Living Ctr.,* 473 US 432, 448–49 (1985).

[245] Id at 440 (emphasis added).

[246] Id at 440–41.

Accordingly, while gender-based classifications are viewed with disfavor, we recognize that they do not always "reflect outmoded notions of the relative capabilities of men and women."[247] The state therefore bears a slightly less exacting burden of justification when it differentiates between individuals on the basis of gender: it must show that the gender-based classification is "substantially related" to an "important governmental objective."[248]

Finally, some classifications—such as those based on age—are far more likely than not to reflect legitimate legislative concerns. As a result, the state need show only that such classifications are rationally related to a legitimate governmental interest.[249]

It is important to recognize, however, that although rational basis review tends to reflect a judicial conclusion that the classification in question is unlikely to implicate concerns of constitutional stature, this is not always the case. Indeed, *Cleburne* aptly illustrates the prudential considerations that often drive the Court's application of the rational basis standard. The Court reasoned that disability discrimination should receive rational basis review by the courts, not because persons with disabilities lack the traditional indicia of a suspect class, but because heightened scrutiny would unduly restrict legislative solutions: "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals."[250] Thus, the Court's application of rational basis

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[247] Id at 441.

[248] *Miss. Univ. for Women v Hogan*, 458 US 718, 724 (1982); *Wengler v Druggists Mut. Ins. Co.*, 446 US 142, 150 (1980); *Craig v Boren*, 429 US 190, 197 (1976).

[249] See, e.g., *Romer v Evans*, 517 US 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *Mass. Bd. of Retirement v Murgia*, 427 US 307, 314 (1976) (recognizing that legislative classifications are unavoidable, and stating that "[p]erfection in making the necessary classification is neither possible nor necessary," so legislation will be upheld so long as classification "rationally furthers the purposes identified by the State"); *Dandridge v Williams*, 397 US 471, 485 (1970) (stating that legislation "does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect"). See also *Cleburne*, 473 US at 441–42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to the interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

[250] *Cleburne*, 473 US at 442–43. See also id at 443–45 (expressing concern that heightened scrutiny of legislation singling out disabled for special treatment could dissuade legislators from passing laws to benefit disabled).

scrutiny in the disability discrimination context was explicitly tied to Congress's ability independently to address the problem.[251]

The probabilistic approach of the Court's tiered system of review—reflecting the recognition that some classifications are more likely than others to fall within the scope of equal protection concern—can be transferred to the context of Congress's Section 5 authority. The idea is generally the same, but the burden of justification is inverted: When Congress legislates to protect a group whose defining characteristics may, in some circumstances, merit differential treatment, it must explain why federal legislation is necessary in order to protect members of the group from the sort of invidious discrimination the Constitution forbids.[252] Congress's task, in other words, is to demonstrate that the injury it seeks to prevent or remedy is one of constitutional concern.[253] In the context of antidiscrimination legislation, this means, not that the Court would conclude that classifications involving the group in question should be subjected to heightened scrutiny, but that Congress has identified a problem that implicates constitutional values the Court has recognized, such as the guarantee that no citizen shall be subjected to "arbitrary and irrational"[254] discrimination based on "antipathy" or "prejudice."[255] Indeed, Congress's experience with regard to certain issues and its superior fact-finding ability will often enable it to identify, in a way courts cannot, instances of governmental action that violate the constitutional principles found in the Court's decisions.

The problem with the ADEA, the *Kimel* Court tells us, was that Congress failed to make such a showing: It "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional viola-

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[251] See id at 439 (noting that rational basis scrutiny applies "absent controlling congressional direction"); id at 443–44 (citing with approval federal legislation prohibiting discrimination against mentally disabled individuals).

[252] Conversely, when Congress acts on behalf of a racial minority, for example, whose characteristics will seldom (if ever) be rationally related to a legitimate state interest so as to justify differential treatment, its bears a lower burden of justification, because one doesn't need extensive proof of unconstitutional discrimination to recognize that classifications based on race implicate constitutional concerns.

[253] See Part I.B.

[254] *Cleburne*, 473 US at 446.

[255] Id at 443.

tion."[256] The ADA, by contrast, is premised on Congress's finding—based on extensive evidence from across the country—that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right."[257] The result, Congress concluded, "is massive, society-wide discrimination."[258] The Court repeatedly has emphasized that the Equal Protection Clause is violated by differential treatment founded on such "invidious, overbroad, and archaic stereotypes" about the relative ability of certain individuals or groups.[259] The object of the ADA, then, is a legitimate one: the prevention and remediation of unconstitutional discrimination against the disabled.[260]

C. IS THE ADA "APPROPRIATE LEGISLATION"?

Having determined that the injury Congress sought to address with the ADA implicates the equality-based values embodied in the Equal Protection Clause, as interpreted by the Court, we must now assess whether the means Congress adopted are "plainly adapted" to the goal of remedying or preventing that injury.[261] Does the ADA "tend[ ] . . . to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws"?[262]

The ADA's substantive provisions, on the whole, reflect the con-

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[256] *Kimel v Florida Bd. of Regents*, 120 S Ct 631, 649 (2000).

[257] S Rep No 116, at 8–9.

[258] Id.

[259] *J.E.B. v Alabama ex rel. T.B.*, 511 US 127, 130–31 (1994); *United States v Virginia*, 518 US 515, 553 (1996); *Miss. Univ. for Women v Hogan*, 458 US 718, 725 (1982).

[260] The Court in *Cleburne* recognized that discrimination against the mentally disabled could violate the Constitution: "Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms." *Cleburne*, 473 US at 446.

[261] *McCulloch v Maryland*, 17 US (4 Wheat) 315, 421 (1819).

[262] *Ex Parte Virginia*, 100 US 339, 345–46 (1879). As discussed above, the congruence and proportionality test is inapposite where, as here, it is clear from the legislative record that "the object of [the legislation in question is] the carefully delimited remediation or prevention of constitutional violations." *Fla. Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 527 US 627, 647 (1999). See notes 100–104 and accompanying text; Part II.B.

siderations that inform the Court's tiered system of review. The Act's principal provisions target only unreasonable discrimination, namely, discrimination in circumstances in which the government's interest in excluding an individual from a certain job or program "by reason of such disability" is minimal at most and is unlikely to bear a rational relationship to some legitimate interest.[263] Under the ADA, the states may exclude disabled individuals from employment, programs, services, or benefits for any lawful reason unrelated to their disability (after due consideration of the ameliorating effects of reasonable accommodation). Moreover, the ADA permits disqualification of a disabled individual if she is unable to perform "the essential functions" of the employment position,[264] or "meet[ ] the essential eligibility requirements" of the governmental program or service.[265] Thus, the ADA's core prohibition of discrimination applies only in those circumstances in which it is unlikely that differential treatment of the disabled can be justified by reference to valid, rational considerations.

Any debate over the ADA likely will center upon the Act's authorization of disparate impact challenges and its requirement of "reasonable accommodation" in employment[266] and "reasonable modification" in public services,[267] as these rules are not required by the Equal Protection Clause.[268] This is, in large part, a red herring. The Court repeatedly—and recently—has stated that Congress is not limited to prohibiting conduct the Constitution forbids of its own force.[269] Certainly, had Congress garnered little or no evidence of ongoing governmental discrimination against the disabled, it might be appropriate to inquire into the reach of the ADA to determine whether it is likely to achieve a legitimate end, or whether some unacceptable proportion of the conduct it prohibits falls outside the reach of constitutional protections. But such an inquiry is both inappropriate and unnecessary where Congress has

[263] 42 USC § 12132.

[264] Id § 12111(8).

[265] Id § 12131(2).

[266] Id §§ 12111(8), 12111(b) (5)(A).

[267] Id § 12131(2).

[268] This is, for example, the position taken by the petitioners in *Garrett*. Brief for Petitioners at 29–30, 42–44, *Garrett* (No 99-1240).

[269] See note 9.

found, based on the substantial evidence before it, that the disabled have been subject to continuing unconstitutional discrimination. In such cases, the proper question is whether Congress reasonably could have concluded that broad prophylactic legislation was needed to root out instances of discrimination that might escape judicial attention, and to secure for the disabled full practical enjoyment of the constitutional guarantee of equality.

It seems clear that the ADA satisfies this deferential standard. Given the nature of disability, to treat the disabled in precisely the same way one would treat other citizens will often result in practical inequality.[270] Similarly, in light of the history of widespread discrimination against the disabled,[271] to merely forbid future constitutional violations may accomplish little in the sense of guaranteeing disabled citizens the full equality the Constitution promises. Thus, by targeting governmental practices with discriminatory impact, Congress has attempted to eliminate the "built in headwinds"[272] faced by disabled individuals, as well as to smoke out discriminatory treatment that may be based on "subconscious stereotypes and prejudices."[273] Indeed, it is through crafting legislative solutions that go beyond the minimum requirements of the Constitution in order to ensure practical enjoyment of constitutional guarantees that Congress fulfills its role within the institutional division of labor envisioned by the Fourteenth Amendment.

Admittedly, the ADA's disparate impact and reasonable accommodation requirements will apply to some state employers who have no previous history of discrimination. But that does not gainsay the useful preventative role such requirements play in promoting general adherence on the part of covered employers and public accommodations to legislation that seeks to promote the integration of groups previously excluded from employment and other mainstream activities because of their disability. Whether Congress could have legislated in a narrower fashion, or should have been more receptive to compliance costs in imposing these re-

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[270] A similar argument was raised by amici in *Garrett*, who noted that, "[g]iving a person who is mobility-impaired an equal right to vote or be a juror, without concomitant changes in polling places or courtrooms, will accomplish nothing practical." Brief for Amici Curiae Law Professors at 25, *Garrett* (No 99-1240).

[271] See Part III.A (discussing congressional findings of discrimination against disabled).

[272] *Griggs v Duke Power Co.*, 401 US 424, 432 (1971).

[273] *Watson v Fort Worth Bank & Trust*, 487 US 977, 990 (1988).

quirements—these are questions of legislative design and policy. Under *McCulloch*, and the principle of deferential review accorded actions of a coordinate branch of government that it stands for, they do not place in question whether ADA is an "appropriate" exercise of Section 5 authority.

IV. Conclusion

This article is, first and foremost, a call to demystify the Section 5 power of Congress. Correctly understood, Section 5 enactments raise no issue of separation of powers. The infirmity of the statute struck down in *Boerne* was not due to its provenance in Section 5. Rather, the statute sought directly to enlist the judiciary in implementing a congressional substitute for the equal protection analysis the courts ordinarily would perform; in effect, Congress was commandeering the courts to do its bidding in the course of engaging in constitutional adjudication. *Boerne* involved an unusual statute. Unlike RFRA, Section 5 legislation generally should be understood as providing supplemental protection of groups, supplemental regulation of conduct that implicate no separation of powers concerns. Thus, while Congress unquestionably exercises substantive authority under Section 5, it enjoys no definitional authority over the Constitution's meaning.

Section 5 enactments do raise federalism concerns, and the Court properly should inquire whether the ends of the legislation can be said plausibly to "enforce" the self-operative provisions of the Fourteenth Amendment. But enforcement authority is not limited to codifying, or providing additional sanctions, for conduct that courts on their own would find unconstitutional. Congress enjoys a remedial authority to act in a prophylactic fashion to prevent violations ever from occurring; to establish an environment conducive to the practical enjoyment of equal protection and due process of the laws. On the issue of permissible ends of Section 5 legislation, the question ordinarily should be whether Congress has acted in an area that the Court has identified (or will agree) is one warranting heightened constitutional concern. Classifications that the Court has subjected to intermediate or strict scrutiny are such areas, while classifications that are held to merit only rational basis scrutiny generally are not. However, classifications in the latter category may be proper subjects of Section 5 legislation when they

are found to implicate the constitutional values that inhere in the Equal Protection Clause.

The Court's congruence and proportionality test plays a useful role in cases, like *Kimel*, where despite the invocation of Section 5, the absence of findings and the size of the gap between what the statute requires and what the Fourteenth Amendment requires of its own force raise the question whether Congress was, in fact, animated by Fourteenth Amendment concerns in passing the law. The test is unnecessary in cases like *Boerne;* it is inappropriate in cases like *Morrison*, for it results in a judicial scrutiny of the means Congress has chosen to advance an otherwise legitimate Section 5 objective.

On one level, we should welcome the renewed attention to Congress's Section 5 authority, for an appropriate set of ground rules can serve both to quiet legitimate concerns that Congress impermissibly will overtake state functions and to initiate a new era of candor in legislation, encouraging Congress to legislate in the service of equality and due process norms under Section 5 rather than under the guise of regulation of commercial activity under the Commerce Clause. *Morrison* gives pause, however, and presents a threat to the capacity of the national legislature to address national problems through national solutions.