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Kimberly E. Dean

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

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

INTRODUCTION

Much ink has been spilled over the increasingly restrictive stance of the Supreme Court of the United States toward Congress’s power to legislate under Section 5 of the Fourteenth Amendment. Since 1997, the Court has invalidated provisions in five different federal statutes on grounds that Congress lacked power to enact the legislation under Section 5. This period represents the first time since Re-
construction that the Court has denied Congress’s power to enact antidiscrimination legislation. This trend, denounced as “fundamentally misguided” by one set of commentators, seriously calls into question Congress’s continued efficacy in the protection of individual rights.

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

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

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5 Estreicher & Lemos, supra note 1, at 110; Post & Siegel, supra note 1, at 443.
6 Post & Siegel, supra note 1, at 513; see Soifer, supra note 1, at 488.
7 Melissa Hart, Conflating Scope of Right with Standard of Review: The Supreme Court’s “Strict Scrutiny” of Congressional Efforts to Enforce the Fourteenth Amendment, 46 VILL. L. REV. 1091, 1091 (2001).
8 See Colker & Brudney, supra note 1, at 89–84.
9 See Hart, supra note 5, at 1092 (suggesting that the Court’s current approach may eventually limit federal employment legislation to preventing only racial discrimination).
10 See Caminker, supra note 1, at 1129; Hart, supra note 5, at 1095.
11 Caminker, supra note 1, at 1129; Hart, supra note 5, at 1094; Post & Siegel, supra note 1, at 443, 451; see infra notes 107–108 and accompanying text.
12 See Hart, supra note 5, at 1095–96.
13 Post & Siegel, supra note 1, at 443.
The Court may soon clarify its Section 5 rules if it takes the opportunity to consider another piece of federal antidiscrimination legislation, the Family and Medical Leave Act of 1993 (FMLA).\(^\text{12}\) Recently, the United States Courts of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit split over the constitutionality of one of its provisions, as it applies to state employers.\(^\text{13}\) This legislation is different from legislation the Court has previously faced because section 2612 of the FMLA was enacted to combat discrimination against women, a quasi-suspect class.\(^\text{14}\) Until the Court speaks definitively, the way these Courts of Appeals treat this legislation may help us learn more about what the new Section 5 rules mean for Congress's power to enact prophylactic antidiscrimination legislation.\(^\text{15}\)

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

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


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


\(^{15}\) See Hibbs, 273 F.3d 844; Kazmier, 225 F.3d 519.

\(^{16}\) Estreicher & Lentos, supra note 1, at 110; Post & Siegel, supra note 1, at 443.

\(^{17}\) See infra notes 250-286 and accompanying text.

\(^{18}\) See infra notes 329-364 and accompanying text.

\(^{19}\) See infra Part I.
range of Section 5. Part II surveys the Court's most recent cases addressing Congress's power under Section 5. Part III critically reviews a split between the United States Courts of Appeals for the Ninth Circuit and the Fifth Circuit over the constitutionality of a provision of another piece of Section 5 legislation, the FMLA. Part IV discusses the scope and reach of the Section 5 power; and contrasts the present treatment of Section 5 with that originally envisioned by its framers. Finally, Part V analyzes Congress's power to enact prophylactic anti-discrimination legislation under Section 5 as it is informed by the courts' divergent treatment of the FMLA.

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

Section 1 of the Fourteenth Amendment demands that no state "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Despite this seemingly straightforward text, however, Congress's power to enforce the Fourteenth Amendment is, and has long been, very controversial. Much of the controversy stems from the degree of independence Congress may assume in interpreting the Amendment's guarantees. Is Congress strictly bound by the Court's interpretations of Section 1, or is Congress armed by Section 5 with some degree of independent interpretive power?

It is important to consider the Section's drafting history because the Court and observers have offered various interpretations of it and, in so doing, have drawn conflicting inferences from it regarding the
scope of congressional power. For example, the current Supreme Court underscores the importance of historical evidence concerning Section 5's drafting for the conclusion that Congress's power was always meant to be remedial, not substantive. As support for its deduction, the Court consistently notes the opposition waged against the first draft of the Amendment. This draft read:

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

This version was ultimately rejected in favor of the Amendment in its current form, with prohibitions against the states enumerated in Section 1 and Congress's enforcement power granted in Section 5. From this structural change, the Court has inferred that "Congress' power was no longer plenary but remedial." By reading the Amendment's drafting history in this particular way, the Court uncovers a reduced role for Congress.

Even so, scholars question the present Court's characterization of the drafting history of Section 5. They criticize the Court for, for example, relying on isolated quotations in opposition to the first draft from the floor debate without demonstrating how those statements related to the final version of the Amendment. It is possible, likely even, that the changes made to the Amendment had nothing at all to do with whether Congress was to have independent interpretive

50 Compare City of Boerne v. Flores, 521 U.S. 507, 520–24 (1997) (relying on Amendment's drafting in concluding that Section 5 was intended to be remedial, not substantive, power), with Caminker, supra note 1, at 1158–59 (questioning the Court's historical methodology and arguing that history does not provide argument for more scrutiny to Section 5 legislation), and McConnell, supra note 1, at 164, 176–83 (disputing the Court's conclusions in Boerne and arguing that the Amendment's framers never intended the judiciary to have exclusive power over defining unconstitutional state acts).
51 City of Boerne, 521 U.S. at 520–24; McConnell, supra note 1, at 164; see infra notes 80–83 and accompanying text.
52 See City of Boerne, 521 U.S. at 520.
53 Id.
54 See id. at 522.
55 Id.
56 See id. at 520–24.
57 See Caminker, supra note 1, at 1159–62; McConnell, supra note 1, at 164.
58 McConnell, supra note 1, at 164.
authority under Section 5. What is clear, at least, is that the Court’s reasoning from history in *City of Boerne v. Flores* is not conclusively supported.

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

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

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39 Id. at 178-81.
41 See id.
44 Warren, supra, note 43, at 216.
45 Id. (emphasis added). But see McConnell, supra note 1, at 174 (“The supporters of the Fourteenth Amendment never seriously entertained the ‘substantive’ interpretation of Section Five . . . .”).
46 See Caminker, supra note 1, at 1163; McConnell, supra note 1, at 182; Soifer, supra note 1, at 486. The framers were especially angry about recent decisions such as *Dred Scott v. Sandford* that threatened Reconstruction’s goals. McConnell, supra note 1, at 182; Soifer, supra note 1, at 486.
not understand its role under the Fourteenth Amendment as merely enforcing judicially defined rights. 47

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

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

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

48 Chester James Antieau, The Intended Significance of the Fourteenth Amendment 377-85 (1997); Post & Siegel, supra note 1, at 512; see Soifer, supra note 1, at 493 (“Contemporary federalism claims almost surely would have greatly surprised supporters of ... the Fourteenth Amendment. Deference to the states was hardly the lesson that the [framers] drew from a gruesome war fought in large measure exactly to defeat states’ rights claims.”).

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

50 See Antieau, supra note 48, at 585.

51 Warren, supra note 43, at 216.

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

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

54 See Caminker, supra note 1, at 1190; Warren, supra note 43, at 220.
to fulfill the Amendment's promises.55 Following the early civil rights cases of the 1950s, "the Court established a relationship with Congress that was fluid and dynamic."56 The Court learned from Congress the people's understanding of what American equality norms should be.57 This interbranch give and take "enabled the Court to interpret the Equal Protection Clause in a manner that was attentive to evolving and contested social norms."58 The Court's present insistence that it retain primary, perhaps exclusive, control over the Amendment's substantive guarantees represents a dramatic change from the old working relationship.59 The current uncertainty surrounding the federal role in combating discrimination suggests, in part, a shift in the nature of the relationship between Congress and the Court.60

II. Boerne and Its Progeny: The Court's Contemporary Approach to the Section 5 Power

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

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

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

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

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64 Id. at 512.
65 Id.
66 City of Boerne, 521 U.S. at 512.
67 Id.
68 Id. at 517.
69 Id.
70 Id. at 517-18 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1879)).
71 City of Boerne, 521 U.S. at 518.
72 Id. at 519.
73 Id.
74 Id.
75 Id.
76 Id.
77 See City of Boerne, 521 U.S. at 519-20.
end. Lacking such a connection, legislation may become substantive in operation and effect. The courts’ role in evaluating legislation enacted under Section 5, then, is to police the line between remedy and substance.

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

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

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77 Id. at 520.
78 See id. at 519-20.
79 See id. at 520-24.
80 Id. at 520-21.
81 City of Boerne, 521 U.S. at 522.
82 Id. at 523-24.
83 Id. at 524.
84 Id. (construing the Civil Rights Cases decision, 109 U.S. 3 (1883)). Professor Soifer disapproves of the Court’s reliance on the Civil Rights Cases decision, arguing that “the Boerne Court’s egregious use of the Civil Rights Cases as its key precedent, and the insistent exclusivity of its proclamation about constitutional wisdom ... are striking attempts to knock most of the pieces off the board.” Soifer, supra note 1, at 491-92.
85 City of Boerne, 521 U.S. at 525-26 (construing South Carolina v. Katzenbach, 388 U.S. 301 (1967)).
requirement for certain Puerto Rican voters, even though the Court had previously determined that literacy requirements were constitutionally permissible. Justice Kennedy acknowledged that Morgan could be read to recognize "a power in Congress to enact legislation that expands the rights contained in Section 1 of the Fourteenth Amendment." Nevertheless, he stated, such a reading was not necessary or "best," rather, Morgan could and should be read as the Court's having "perceived a factual basis on which Congress could have concluded that [the] literacy requirement 'constituted an invidious discrimination in violation of the Equal Protection Clause.'" Such a narrow reading was preferable, Justice Kennedy reasoned, to protect the Constitution's role as "superior paramount law, unchangeable by ordinary means," as it would be if it were a mere legislative enactment.

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

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86 See id. at 518, 528.
87 Id. at 527-28.
88 Id. at 528 (quoting Katzenbach v. Morgan, 384 U.S. 641, 656 (1966)). Former Chief Justice Warren viewed Morgan quite differently; he called the decision "a major step toward removing the restrictions that the Civil Rights Cases had imposed on congressional enforcement power" that "told Congress that it shared with the court the responsibility for construing and applying the provisions" of the Fourteenth Amendment. Warren, supra note 43, at 227.
89 City of Boerne, 521 U.S. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
90 Id. at 530.
91 Id.
92 Id.
93 Id.
94 City of Boerne, 521 U.S. at 532.
RFRA's sweeping reach and scope, the Court determined, were far broader than any perceptible "mischief and wrong" Congress could have meant to prevent or remedy. In sum, RFRA lacked the congruence and proportionality required of Section 5 legislation and was therefore invalid as applied to the states.96

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

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

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

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

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95 See id.
96 Id. at 588, 536.
97 See id. at 544-65 (O'Connor, J., dissenting); id. at 565-66 (Souter, J., dissenting); id. at 566 (Breyer, J., dissenting).
98 Id. at 545 (O'Connor, J., dissenting).
99 City of Boerne, 521 U.S. at 545 (O'Connor, J., dissenting).
100 Id. (O'Connor, J., dissenting).
101 See id. at 512-15.
102 See id. at 536.
fairly limited. Nevertheless, the Court applied the *Boerne* test four times over the next four years, demonstrating the enduring impact of its new approach.

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

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

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


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

106 528 U.S. at 66.

107 Id. at 68, 73. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. This amendment has long been understood to mean that federal courts lack jurisdiction over suits by private parties against nonconsenting states. *Kimel*, 528 U.S. at 73. In *Seminole Tribe of Florida v. Florida*, the Court held that Congress cannot abrogate states' Eleventh Amendment sovereign immunity under its Article I powers, such as the Commerce Clause, 517 U.S. 44, 72-73 (1996). Nevertheless, Congress *can* abrogate states' sovereign immunity through legislation validly enacted under Section 5 of the Fourteenth Amendment. *Kimel*, 528 U.S. at 80.
cluded that the ADEA was not appropriate legislation under Section 5 of the Fourteenth Amendment.108

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

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

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108 *Kimel*, 528 U.S. at 74, 82–83. To determine whether Congress has abrogated states' sovereign immunity, the Court applies a two-part test: first, did Congress unequivocally express its intent to abrogate that immunity; second, if it did, did Congress act pursuant to a valid grant of constitutional authority? *Id.* at 73 (citing *Seminole Tribe of Fla.*, 517 U.S. at 55).
109 *Id.* at 80–82.
110 *Id.* at 80–81.
111 *Id.* at 81.
112 *Id.*
113 *Kimel*, 528 U.S. at 82–83.
114 *Id.* at 83.
115 *Id.*
116 *Id.* at 86.
117 *Id.*
prohibited substantially more conduct than would be held unconstitutional under the Court's equal protection, rational basis standard. The ADEA’s increased burden on state employers was more like a strict scrutiny standard, the Court reasoned, a more stringent standard than the Court applies in adjudicating an Equal Protection claim based on age classifications.

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

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

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

118 Kimel, 528 U.S. at 86.
119 Id. at 87–88.
120 Id. at 88.
121 Id.
122 Id.
123 Kimel, 528 U.S. at 89.
124 Id. at 91.
125 529 U.S. at 602.
126 Id. at 619–20.
damage suit provision of the VAWA under the Commerce Clause, considered Congress’s power to enact it under Section 5.127

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

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

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127 Id. at 619. The VAWA was not a proper use of the Commerce Clause because it concerned noneconomic conduct. Id. at 617–18.
128 Id. at 619.
129 Id. at 620.
130 See Morrison, 529 U.S. at 621.
131 Id. at 626–27.
132 Id. at 626.
133 See id. at 624–25.
134 See id. at 655–66 (Breyer, J., dissenting).
135 Morrison, 529 U.S. at 664 (Breyer, J., dissenting).
VAWA was a remedy for the (in)actions of state actors. Moreover, Justice Breyer asked rhetorically, "[W]hy can Congress not provide a remedy against private actors?" Even though private actors had not themselves violated the Constitution, under the Court's Section 5 analysis, Congress is empowered "at least sometimes" to enact remedial legislation that prohibits conduct that is not itself unconstitutional. Because the VAWA intruded little upon states or private parties, Justice Breyer asked, "Why is the remedy 'disproportionate'?" Given the close relationship between the injury (inadequate state remedies) and the remedy (a federal forum), Justice Breyer asked, "[W]here is the lack of 'congruence'?" Justice Breyer believed the VAWA was properly enacted under the Commerce Clause, and left these probing questions regarding Congress's Section 5 power unanswered.

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

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

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

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136 Id. (Breyer, J., dissenting).
137 Id. at 665 (Breyer, J., dissenting).
138 Id. (Breyer, J., dissenting) (citing City of Boerne, 521 U.S. at 518; Morgan, 384 U.S. at 651; South Carolina v. Katzenbach, 383 U.S. at 308).
139 Id. (Breyer, J., dissenting).
140 Morrison, 529 U.S. at 665 (Breyer, J., dissenting).
141 Id. at 666 (Breyer, J., dissenting).
142 531 U.S. at 360.
143 Id. at 361.
144 Id. at 364.
145 See id. at 365.
constitutional jurisprudence." Rather, Congress retains a narrow window of authority whereby it can remedy and prevent violation of rights by prohibiting conduct that is not itself a violation of the Fourteenth Amendment. Congress can enact Section 5 legislation "reaching beyond Section 1's actual guarantees" when the legislation exhibits congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

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

146 Id.
147 Garrett, 531 U.S. at 365.
148 Id.
149 See id. at 366-67.
150 Id.
151 Id. at 366 (construing Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)). Despite Chief Justice Rehnquist's emphatic statement that the Court, in Cleburne, had employed mere rational basis review, many observers have concluded that the Court tacitly applied heightened scrutiny. Mark A. Johnson, Note, Board of Trustees of the University of Alabama v. Garrett: A Flawed Standard Yields a Predictable Result, 60 Md. L. Rev. 393, 410 (2001).
152 Garrett, 531 U.S. at 367.
153 Id. at 368.
154 See id. at 369.
155 Id.
156 Id. n.6.
suggest "the pattern of unconstitutional discrimination" that would empower Congress to enact remedial legislation under Section 5.\textsuperscript{157}

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

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

\begin{itemize}
\item \textsuperscript{157} See \textit{Garrett}, 531 U.S. at 370.
\item \textsuperscript{158} \textit{Id.} at 372.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 374.
\item \textsuperscript{161} See \textit{id.} at 374–76 (Kennedy, J., concurring).
\item \textsuperscript{162} \textit{Garrett}, 531 U.S. at 375 (Kennedy, J., concurring).
\item \textsuperscript{163} \textit{Id.} (Kennedy, J., concurring).
\item \textsuperscript{164} \textit{Id.} at 376 (Kennedy, J., concurring).
\item \textsuperscript{165} See \textit{id.} at 374–76 (Kennedy, J., concurring); \textit{City of Boerne}, 521 U.S. at 520–23.
\end{itemize}
Justice Breyer dissented vigorously in *Garrett*; Justices Stevens, Souter, and Ginsburg joined him. He accused the majority of "[r]eviewing the congressional record as if it were an administrative agency record." Arguing against the level of scrutiny with which the majority examined the legislative process, Justice Breyer insisted that Congress reasonably could have concluded that the ADA was an appropriate way to enforce the Equal Protection Clause.

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

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

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166 See *Garrett*, 531 U.S. at 376–89 (Breyer, J., dissenting).
167 Id. at 376 (Breyer, J., dissenting).
168 Id. at 377 (Breyer, J., dissenting).
169 Id. at 380–89 (Breyer, J., dissenting).
170 Id. at 379 (Breyer, J., dissenting).
172 Id. at 380 (Breyer, J., dissenting).
173 Id. (Breyer, J., dissenting).
174 Id. at 380–89 (Breyer, J., dissenting).
175 Id. at 382 (Breyer, J., dissenting).
176 *Garrett*, 531 U.S. at 383 (Breyer, J., dissenting).
177 Id. (Breyer, J., dissenting).
ing Congress's power under Section 5 was flawed, then, because "the Congress of the United States is not a lower court." The Court should not require Congress to adopt "rules or presumptions" that reflect a court's institutional capacity. To do so, as the majority did, according to Justice Breyer, was to stand the principle of judicial restraint on its head. If the Court had not improperly held Congress to a judicial standard, it would have found the legislative record more than adequate.

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

178 Id. (Breyer, J., dissenting).
179 Id. at 384 (Breyer, J., dissenting).
180 Id. at 385 (Breyer, J., dissenting).
181 Garrett, 531 U.S. at 385 (Breyer, J., dissenting).
182 Id. at 385–87 (Breyer, J., dissenting).
184 Garrett, 531 U.S at 385–86 (Breyer, J., dissenting).
185 See id. (Breyer, J., dissenting).
186 Id. at 386 (Breyer, J., dissenting) (quoting Ex parte Virginia, 100 U.S. at 346).
187 Id. (Breyer, J., dissenting) (citing Morgan, 384 U.S. at 650).
188 Id. at 386–87 (Breyer, J., dissenting) (citing Kinel, 528 U.S. at 81; Coll. Sav. Bank, 527 U.S. at 639; City of Boerne, 521 U.S. at 536).
Justice Breyer then took on the majority's primary motivation in curtailing Congress's Section 5 power: federalism. Justice Breyer conceded that the ADA imposed a burden on states by abrogating their sovereign immunity. Nevertheless, he observed that "[r]ules for interpreting § 5 that would provide States with special protection . . . run counter to the very object of the Fourteenth Amendment." The Fourteenth Amendment, then, overrides principles of federalism that might otherwise be impediments to Congress in enacting corrective legislation.

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

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

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

189 Garrett, 531 U.S. at 887–88 (Breyer, J., dissenting).
190 Id. at 888 (Breyer, J., dissenting).
191 Id. (Breyer, J., dissenting).
192 Id. (Breyer, J., dissenting).
193 See id. at 876–89 (Breyer, J., dissenting).
194 Garrett, 531 U.S. at 888–89 (Breyer, J., dissenting).
195 Id. at 899 (Breyer, J., dissenting) (quoting Morgan, 384 U.S. at 648–49).
196 See id. (Breyer, J., dissenting).
197 See supra Part II.
198 See Post & Siegel, supra note 1, at 526 ("[T]he Boerne test could easily invalidate large stretches of federal antidiscrimination law . . . ").
tional violation to be remedied or prevented.\textsuperscript{199} That is, for legislation to pass the Court's stricter approach, its remedy must be congruent and proportional to behavior that has previously been found to be a constitutional violation by a court.\textsuperscript{200} It would be wrong for this requirement to mean, however, that Congress can only remedy or prevent constitutional violations by specifically outlawing behaviors that would violate Section 1.\textsuperscript{201} If that were the case, Section 5 would be redundant, a dead letter.\textsuperscript{202} That interpretation would reduce Congress to the role of federal scrivener, merely codifying prohibitions on those behaviors federal courts have previously identified as violations of the Fourteenth Amendment.\textsuperscript{203}

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

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


\textsuperscript{200} See Garrett, 531 U.S. at 389 (Breyer, J., dissenting); Caminker, \textit{supra} note 1, at 1143–46.

\textsuperscript{201} See Garrett, 531 U.S. at 389 (Breyer, J., dissenting).

\textsuperscript{202} See id.

\textsuperscript{203} See Estreicher & Lemos, \textit{supra} note 1, at 115.

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

\textsuperscript{205} See Hart, \textit{supra} note 5, at 1092 (“In its recent Section 5 cases, the Court has suggested that the substance of the Fourteenth Amendment guarantee of ‘equal protection’ is different for different classes of people.”); Ray, \textit{supra} note 14, at 1768–69 (suggesting that courts allow more deference with more important constitutional rights).
opposite conclusions. In 2000, in *Kazmier v. Widmann*, the United States Court of Appeals for the Fifth Circuit concluded that section 2612(a)(1)(C) of the FMLA, which requires employers to provide leave for employees to care for sick relatives, did not validly abrogate state sovereign immunity because it was not validly enacted under Section 5 of the Fourteenth Amendment. In 2001, in *Hibbs v. Department of Human Resources*, the United States Court of Appeals for the Ninth Circuit refused to follow *Kazmier* and concluded that the same provision of the FMLA was valid Section 5 legislation. This circuit split very likely could lead the Supreme Court to revisit the Section 5 issue.

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

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

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

207 225 F.3d at 526.

208 273 F.3d at 858.

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

210 225 F.3d at 524.

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

212 *Id.*

213 *Id.* (“The respect that must be accorded the States as independent sovereigns within our federal system prevents Congress from restraining them from engaging in constitutionally permissible conduct based on nothing more than the mere invocation of perceived constitutional bogeymen.”).
The court in Kazmier identified the constitutional issue as gender discrimination in employment, concluding that “Congress potentially has wide latitude under Section 5 to enact broad prophylactic legislation designed to prevent the States from discriminating on the basis of sex.”\textsuperscript{214} In spite of this, the court was highly skeptical about whether preventing gender discrimination was Congress’s true intent, noting that “Congress was responding to findings that private sector employers frequently discriminate against men in granting leave to provide family care. . . . [T]he perverse effect of this reverse discrimination has actually been to push women out of the work force . . . .”\textsuperscript{215} Even so, the Kazmier court acknowledged Congress’s potentially great leeway for legislating in this area.\textsuperscript{216}

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

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

\textsuperscript{214} Id. at 525, 526.
\textsuperscript{215} Kazmier, 225 F.3d at 525.
\textsuperscript{216} Id. at 526.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 531.
\textsuperscript{220} Kazmier, 225 F.3d at 526.
\textsuperscript{221} Id. at 526, 531.
\textsuperscript{222} Id. at 532.
intent by first announcing that the right at issue is gender discrimination in employment but then proceeding to analyze the right as if it is the right to take family leave, a right that is not constitutionally guaranteed. From this, the Fifth Circuit held that Congress did not enact this FMLA provision pursuant to its enforcement power under Section 5.

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

In Hibbs, the Ninth Circuit began its analysis in essentially the same way as the Fifth Circuit had in Kazmier, by defining the constitutional issue as gender discrimination. Because state-sponsored gender discrimination receives heightened scrutiny, the court explained, it produces a rebuttable presumption of unconstitutionality. Even so, the court acknowledged that the FMLA provision “sweeps more broadly than the Equal Protection Clause itself” because it does not merely prohibit gender discrimination in the granting of medical leave. Nevertheless, that fact was not fatal, according to the Ninth Circuit, because Congress can enact reasonably prophylactic legislation under Section 5.

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

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225 See id. at 525, 526.
224 Id. at 526.
223 See Hibbs, 273 F.3d at 854.
226 Id. at 855.
227 Id. at 856.
228 Id.
229 Id. at 856–57 (concluding that looking only at legislative record would be “in effect requiring that Congress gather and document sufficient evidence to support the exercise of its constitutionally granted powers [and] would raise fundamental separation of powers concerns—the courts would be treating Congress more like an administrative agency than like a co-equal branch of the federal government.”); cf. Colker & Brudney, supra note 1, at 108 (“The Court [in Kimel] used the phrase ‘one means’ to describe this inquiry, but [the legislative record] was, in fact, the only means used to assess whether ADEA extension was reasonably prophylactic legislation.”).
existence of sufficiently difficult and intractable problems."\textsuperscript{230} The court considered the legislative record, discriminatory state employment laws, previous attempted federal antidiscrimination legislation, and Supreme Court precedent in concluding that gender discrimination in employment is the type of difficult constitutional problem that deserves broad legislative remedies.\textsuperscript{231}

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

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

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\textsuperscript{230} \textit{Hibbs}, 273 F.3d at 857.
\textsuperscript{231} \textit{Id.} at 858-64. The court wrote:

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

\textit{Id.} at 864.

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

\textsuperscript{233} \textit{Id.} at 857-58.

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

\textsuperscript{235} \textit{Hibbs}, 273 F.3d at 858.

\textsuperscript{236} \textit{Id.} at 858-59.
\end{flushleft}
heightened scrutiny of gender discrimination impacted its analysis, explaining that "courts have more latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination than in drawing inferences from the histories of statutes like the ADA and the ADEA, which aim to remedy discrimination with respect to nonsuspect classifications." The court credited evidence of widespread gender discrimination by private sector employers and testimony that public sector policies are similar to private sector policies in determining that unconstitutional state-sponsored gender discrimination is "significant" and "widespread." The court acknowledged that the evidence in the legislative record related specifically to parental leave, but it reasoned that such indicators "constitute strong circumstantial evidence of state-sponsored gender discrimination in the granting of leave to care for a sick family member, because if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." Ultimately, the Ninth Circuit sustained the family leave provision of the FMLA on the basis of its legislative record as well, a record the Fifth Circuit had found grossly inadequate.

IV. THE SCOPE AND REACH OF SECTION 5 POWER

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

237 *Id.* at 859–60.
238 *Id.* at 859.
239 *Id.*
240 *Hibbs*, 273 F.3d at 860; *Kazmier*, 225 F.3d at 526.
242 *Garrett*, 531 U.S. at 865; *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 520.
243 See *Garrett*, 531 U.S. at 366–67; *Kimel*, 528 U.S. at 83.
ble unconstitutional conduct in which states could be engaging. The Court examines the legislative record as one means of determining the state conduct Congress is addressing. The Court decides whether there is a specific history and pattern of recent conduct that would be judged unconstitutional by a court and whether that specific conduct is targeted by the legislation. If the conduct prohibited by Congress would also be considered a violation of Section 1 by a court, then the measure is appropriate Section 5 legislation. If not, a very small window of constitutional conduct may still be prohibited as a prophylactic means of preventing future constitutional violations. If Congress targets constitutional conduct outside of that small window, however, the measure attempts a substantive redefinition of rights and is therefore not appropriate Section 5 legislation.

The Boerne-Garrett line of cases represents the Court’s clear attempt to diminish Congress’s power under Section 5. The Boerne test unduly restricts Congress’s choice of both ends and means. Legitimate ends of Congress’s Section 5 power are those state actions that a court itself would adjudge to be violations of Section 1 of the Fourteenth Amendment; this is what is meant by “congruence.”

This limitation defies the Framers’ intent that Congress, not the Court, would play the primary role in protecting Fourteenth

244 See Garrett, 531 U.S. at 366; Morrison, 529 U.S. at 620; Kimel, 528 U.S. at 83.
245 See Garrett, 531 U.S. at 368; Kimel, 528 U.S. at 88–89; see also Colker & Brudney, supra note 1, at 105–07 (arguing that requiring Congress to provide adequate legislative record is like forcing Congress to use a crystal ball to predict the Court’s conclusions when enacting legislation).
246 See Garrett, 531 U.S. at 368; Kimel, 528 U.S. at 89; City of Boerne, 521 U.S. at 530.
247 See Garrett, 531 U.S. at 368; Kimel, 528 U.S. at 89; City of Boerne, 521 U.S. at 530.
248 See Kimel, 528 U.S. at 88–89; City of Boerne, 521 U.S. at 532; Tribe, supra note 27, § 5–16, at 959–60. Professor Tribe writes:

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

TRIBE, supra note 27, § 5–16, at 959–60.
249 See Kimel, 528 U.S. at 89; City of Boerne, 521 U.S. at 532.
250 See Caminker, supra note 1, at 1129.
251 Id. at 1143–47.
252 Id. at 1144, 1153–54.
Amendment rights through a degree of independent definitional power.253

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

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

253 See id. at 1163; Warren, supra note 43, at 216.
254 Caminker, supra note 1, at 1146-47.
255 Id. at 1143.
256 Id. at 1154-43; Estreicher & Lemos, supra note 1, at 118.
257 Caminker, supra note 1, at 1136.
258 Id.
259 Id. at 1143.
261 Morgan, 384 U.S. at 643.
262 Id. at 646, 649 (citing Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959)).
263 Id. at 648.
and concluded that "[n]either the language nor history of § 5 supports such a construction," noting that the Attorney General's construction "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."\(^{264}\)

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

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

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

This deferential approach makes sense in the constitutional realm because of the different institutional capacities of Congress and the Court.\(^{271}\) There are many devices that federal courts use in evaluating legislation to limit themselves because they are not part of a democratic branch of government.\(^{272}\) One scholar notes that judicial
restraint "will give elected officials the benefit of the doubt with respect to governmental purpose, will assume facts favorable to the government in assessing effect, will seek to avoid gratuitous conflict with legislative authority, and will accept reasonable interpretations of the Constitution that support legislative action." These devices do not define the meaning of the constitutional text; they are tools of judicial restraint with respect to the states. These judicial standards of decision-making, which sometimes lead courts to choose less intrusive alternatives, should not apply to Congress, a democratically-elected branch of government, in its process of decision-making. Furthermore, these judicially imposed constraints should not bind Congress when it exercises its Section 5 power because they are "predicated on the need to protect the discretionary judgments of representative institutions from uncabined judicial interference," and "there is no reason for Congress—the representatives of the people—to abide by them. Congress need not be concerned that its interpretations . . . will trench upon democratic prerogatives, because its actions are the expression of the democratic will of the people." As a result, Congress should logically be able to enforce the Fourteenth Amendment fully, without deferring to state judgments as the courts do.

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

275 Id.
274 Id.; Post & Siegel, supra note 1, at 464.
273 McConnell, supra note 1, at 156, 189; Post & Siegel, supra note 1, at 464.
276 McConnell, supra note 1, at 156.
277 Id. at 189; Post & Siegel, supra note 1, at 467.
278 Caminker, supra note 1, at 1143–46; McConnell, supra note 1, at 165.
279 Kazmier v. Widmann, 225 F.3d 519, 530 (5th Cir. 2000) ("It could not be clearer that congruence and proportionality is a considerably more stringent standard of review than is rational basis."); see Caminker, supra note 1, at 1143–46; McConnell, supra note 1, at 165.
280 Caminker, supra note 1, at 1143–46; McConnell, supra note 1, at 170.
281 Caminker, supra note 1, at 1154.
contains both quantitative and qualitative elements. The quantitative element calculates how much constitutional conduct the measure sweeps into its prohibitions; the more overinclusive a measure is, the less proportional. The qualitative element analyzes the nature and severity of the measure's burden on the states; the greater the burden, the less likely it is to be proportional. The Boerne test's searching inquiry renders the deferential McCulloch approach unrecognizable. In its choice of both ends and means, Congress's hands are now tied.

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

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

282 Id.
283 Id. at 1154–55.
284 Id. at 1155.
285 See id. at 1156–58.
286 Caminker, supra note 1, at 1143–46.
287 See supra Part II.
288 See supra notes 25–47 and accompanying text.
289 See supra notes 43–54 and accompanying text.
290 See supra notes 259–270 and accompanying text.
291 See supra notes 254–258 and accompanying text.
292 See supra notes 271–277 and accompanying text.
The Court justifies its new approach by appealing to two sets of values, federalism and separation of powers.\textsuperscript{293} The new test, which evaluates legislation’s congruence and proportionality, restricts Congress’s choice of both ends and means.\textsuperscript{294} It requires narrow tailoring between the constitutional injury to be prevented, as federal courts define that injury, and the legislative remedy.\textsuperscript{295} Nevertheless, there must still be some window of opportunity in which Congress can act so that Section 5 does not become superfluous.\textsuperscript{296} After all, the Court states time after time that Congress can, under Section 5, sometimes prohibit conduct that is not per se unconstitutional in order to prevent constitutional violations.\textsuperscript{297} It may be that the level of judicial suspicion the federal legislation’s putative beneficiaries raise may determine the size of the window Congress retains in which it may act without infringing upon separation of powers or federalism concerns.\textsuperscript{298} Even so, the contrasting approaches of the United States Courts of Appeals for the Fifth and Ninth Circuits reveal that how judicially suspect the beneficiaries are may not be determinative and that the congruence and proportionality test may serve yet another role, that of sniffing out judicially disfavored congressional motive and legislative substance.\textsuperscript{299}

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

\textsuperscript{293} See \textit{supra} notes 79–96 and accompanying text; \textit{supra} notes 189–196 and accompanying text.
\textsuperscript{294} See \textit{supra} notes 250–286 and accompanying text.
\textsuperscript{295} See \textit{supra} notes 250–286 and accompanying text.
\textsuperscript{296} See \textit{supra} notes 197–203 and accompanying text.
\textsuperscript{298} Hart, \textit{supra} note 5, at 1092; Ray, \textit{supra} note 14, at 1768–69.
\textsuperscript{299} See \textit{supra} Part III.A–B.
\textsuperscript{300} See id.
\textsuperscript{301} See id.
gress: first, how they defined the constitutional right; second, how they allocated the burden of proof; and third, how they assessed the role of the legislative record. The courts' different treatment of congressional intent exposes the way the congruence and proportionality test can lead courts to view their role in reviewing federal antidiscrimination legislation. It also reveals how a court's fundamental conception of that role determines how much latitude Congress has to exercise its constitutionally granted power to enact prophylactic antidiscrimination legislation.

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

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

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502 See id.
503 See id.
504 See supra Part III.A–B.
505 Hibbs v. Dep't of Human Res., 273 F.3d 844, 854 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3597 (U.S. Mar. 11, 2002) (No. 01-1368); Kazmier v. Widmann, 225 F.3d 519, 525 (5th Cir. 2000).
506 Compare Hibbs, 273 F.3d at 854 ("The United States defends [the provision] on the ground that it is meant to remedy and prevent unconstitutional gender discrimination.") with Kazmier, 225 F.3d at 525 ("Congress's express intent in enacting this provision was to prevent employers from granting [family] leave discriminatorily on the basis of sex.").
507 See Hibbs, 273 F.3d at 858–60; Kazmier, 225 F.3d at 525.
508 See Kazmier, 225 F.3d at 525, 532.
509 See id. at 526–27.
der discrimination in employment.\textsuperscript{310} The Ninth Circuit credited Congress's conclusion that providing a minimum amount of family leave for employees on a gender-neutral basis is instrumentally useful in preventing gender discrimination in employment.\textsuperscript{311}

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

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

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

\begin{footnotesize}
\textsuperscript{310} See \textit{Hibbs}, 273 F.3d at 858-60.

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

\textsuperscript{312} See \textit{Hibbs}, 273 F.3d at 858-60; \textit{Kazmier}, 225 F.3d at 526-27.

\textsuperscript{313} See \textit{Hibbs}, 273 F.3d at 858-60; \textit{Kazmier}, 225 F.3d at 526-27.

\textsuperscript{314} See \textit{Hibbs}, 273 F.3d at 858-60; \textit{Kazmier}, 225 F.3d at 526-27.

\textsuperscript{315} \textit{Kazmier}, 225 F.3d at 524, 526.

\textsuperscript{316} \textit{Hibbs}, 273 F.3d at 858.

\textsuperscript{317} \textit{Id.} at 858-60; \textit{Kazmier}, 225 F.3d at 526.

\textsuperscript{318} \textit{Hibbs}, 273 F.3d at 85-4 (citing \textit{United States v. Virginia}, 518 U.S. 515, 518 (1996)).

\textsuperscript{319} \textit{Kazmier}, 225 F.3d at 526 (same).

\textsuperscript{319} \textit{Colker & Bradney, supra} note 1, at 124.
\end{footnotesize}
court took this difference seriously.\textsuperscript{320} Having already decided that the FMLA provision was constitutional through its burden-shifting technique, the Ninth Circuit then concluded, in the alternative, that it was constitutional because it was supported by an adequate legislative record.\textsuperscript{321} Again, the heightened scrutiny of gender discrimination was important to the \textit{Hibbs} court.\textsuperscript{322} The \textit{Hibbs} court admitted certain weaknesses in the legislative record, such as its extrapolation of public sector behavior from private sector behavior and inference of discrimination in family leave from similar discrimination in parental leave.\textsuperscript{323} Nevertheless, it still found the legislative record adequate because "courts have more latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination than in drawing inferences from the histories of statutes like the ADA and the ADEA."\textsuperscript{324} In \textit{Kazmier}, the Fifth Circuit gave no such deference to the legislative record.\textsuperscript{325}

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

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

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

\textsuperscript{321} Id. at 858-60.

\textsuperscript{322} Id. at 859.

\textsuperscript{323} See id.

\textsuperscript{324} Id. at 859-60.

\textsuperscript{325} See 225 F.3d at 526.

\textsuperscript{326} See id.

\textsuperscript{327} \textit{Hibbs}, 273 F.3d at 853-54.

\textsuperscript{328} See id.
a close case that the independent judgment of Congress on a constitutional question should make a difference." As noted above, however, the Court's treatment of Section 5 legislation from Boerne through Garrett has hardly been characterized by deference to Congress. Rather, the Court has required narrow tailoring between legitimate ends and means in order to protect two stated values, separation of powers and federalism. The contrast between the Fifth Circuit's approach in Kazmier and the Ninth Circuit's approach in Hibbs demonstrates that congruence and proportionality may serve a function other than the ones the Court acknowledges, a motive-searching function that seriously calls the courts' role into question.

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

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329 McConnell, supra note 1, at 155.
330 See supra Part IV.
331 See supra Part IV.
332 See supra Part IV; see also Soifer, supra note 1, at 490 ("As a legal standard, 'proportionality and congruence' necessarily requires judges to make discretionary judgments. No benchmark is set in advance, and the inquiry required to adjudicate proportionality and congruence pushes judges into doubly subjective decision-making about policy and politics, apparently unwilling to be aided by the views of Congress.").
333 See supra notes 72–83 and accompanying text.
334 See supra notes 197–205 and accompanying text.
335 See supra Part II.B; supra notes 142–160 and accompanying text; supra notes 241–253 and accompanying text.
336 See supra Part II.B; supra notes 142–160 and accompanying text; supra notes 241–253 and accompanying text.
338 See supra notes 105–124 and accompanying text; supra notes 142–160 and accompanying text.
For that reason, there seem to be no serious separation of powers concerns with the end of the FMLA.\textsuperscript{359}

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

If the Court is to be concerned here, that concern is more likely to be founded on federalism interests.\textsuperscript{344} The end of the FMLA provision should not raise federalism concerns because, as the Court has acknowledged, there is very little gender-based classification by states that is constitutional.\textsuperscript{345} If there are federalism concerns to be found, they are more likely to be found in the FMLA’s means.\textsuperscript{346} The Fifth Circuit in Kazmier explicitly voiced such concerns, noting that “[t]he respect that must be accorded the States as independent sovereigns within our federal system” constrains this type of congressional activity.\textsuperscript{347} At the same time, as noted previously, this invocation of federalism begs the question in reference to properly remedial or prophylactic federal antidiscrimination legislation under Section 5.\textsuperscript{348} The Framers of the Fourteenth Amendment vested in the federal government, specifically in Congress, the power to protect individual liberties.\textsuperscript{349} They did so at the expense of state autonomy.\textsuperscript{350} To invoke

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\textsuperscript{359} See supra notes 197–205 and accompanying text; supra notes 241–258 and accompanying text.
\textsuperscript{340} See supra notes 72–83 and accompanying text; supra notes 254–258 and accompanying text.
\textsuperscript{341} See supra notes 271–277 and accompanying text.
\textsuperscript{342} See supra notes 271–277 and accompanying text.
\textsuperscript{343} See supra notes 271–277 and accompanying text.
\textsuperscript{344} See supra notes 79–80 and accompanying text; supra notes 189–196 and accompanying text.
\textsuperscript{345} See Virginia, 518 U.S. at 551; supra notes 278–286 and accompanying text.
\textsuperscript{346} See supra notes 189–196 and accompanying text; supra notes 250–258 and accompanying text.
\textsuperscript{347} See 225 F.3d at 524.
\textsuperscript{348} See supra notes 48–54 and accompanying text.
\textsuperscript{349} See supra notes 48–54 and accompanying text.
\textsuperscript{350} See supra notes 48–54 and accompanying text.
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concerns about disrupting the carefully crafted federal-state balance in the Fourteenth Amendment context is anomalous at best.\(^3\)

In any event, invalidating Section 5 legislation based on such concerns is not unprecedented.\(^3\) \textit{United States v. Morrison} is an example of a case in which the end of the legislation—preventing gender discrimination—was proper, but the Court used congruence and proportionality to dispute the legislation’s means.\(^3\) The Court took issue with the means Congress used to remedy and to prevent state-sponsored discrimination—there, giving women the right to sue private individuals in federal court through the use of a federal cause of action.\(^3\) By rejecting the private suit provision of the VAWA because it did not involve state action, the Court decided that the Act’s means violated federalism values.\(^3\) This reasoning is unpersuasive because, as has been noted,

\[\text{[i]t is hard to understand this argument as anything other than a flat rejection of Congress’s judgment as to how best to effectuate its goals… The fact that reasonable minds can disagree over whether the means Congress has chosen to achieve its goal will in fact be successful should itself put an end to the inquiry.}\(^3\)

It is possible that the Court, if it settles this split between the Fifth and Ninth Circuits, could go out of its way to find a similar federalism-based objection to the means used in the FMLA, as it did with the VAWA in \textit{Morrison.}\(^3\)

The Fifth Circuit’s approach in \textit{Kazmier} demonstrates that courts can use the congruence and proportionality test to disagree with the substance of legislation and with Congress’s motive by invoking federalism values when analyzing Congress’s choice of means.\(^3\) \textit{Morrison} is a clear precedent for this approach.\(^3\) This result does not seem to be consistent with \textit{Kimel} and \textit{Garrett}, however, because those cases relied

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\(^3\) See supra notes 48–54 and accompanying text.
\(^3\) See Post & Siegel, supra note 1, at 445; supra notes 125–141 and accompanying text.
\(^3\) See supra notes 125–141 and accompanying text.
\(^3\) See supra notes 125–141 and accompanying text.
\(^3\) See supra notes 125–141 and accompanying text.
\(^3\) See supra notes 125–141 and accompanying text; supra notes 197–240 and accompanying text.
\(^3\) See supra notes 210–224 and accompanying text.
\(^3\) See supra notes 125–141 and accompanying text.
so heavily on the involvement of non-suspect groups.\textsuperscript{360} There, courts used congruence and proportionality to demonstrate that Congress had acted vigorously where the Court does not grant high constitutional priority.\textsuperscript{361} The same cannot be said about the FMLA provision because, as did the Ninth Circuit, courts acknowledge that deference is due to Congress.\textsuperscript{362} The possibility that courts, both the Supreme Court and lower federal courts, can use congruence and proportionality to disagree with the substance of legislation rather than simply to protect separation of powers and federalism values directly refutes the purpose of Section 5.\textsuperscript{363} By using congruence and proportionality to locate disfavored congressional motive and legislative substance, the courts themselves raise serious separation of powers questions for a democratic society.\textsuperscript{364}

\textbf{CONCLUSION}

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

\textsuperscript{360} See \textit{supra} notes 105–124 and accompanying text; \textit{supra} notes 142–160 and accompanying text.

\textsuperscript{361} See \textit{supra} notes 105–124 and accompanying text; \textit{supra} notes 142–160 and accompanying text.

\textsuperscript{362} See \textit{supra} notes 225–240 and accompanying text.

\textsuperscript{363} See \textit{supra} notes 241–286 and accompanying text.

\textsuperscript{364} See \textit{supra} notes 241–286 and accompanying text.
rationality test, when misused by courts, tramples on congressional prerogatives and threatens healthy separation of powers values.

Kimberly E. Dean