

Less than Meets the Eye:  
Antidiscrimination and the Development of  
Section 5 Enforcement and Eleventh  
Amendment Abrogation Law Since  
*City of Boerne v. Flores*

by JUSTIN SCHWARTZ\*

**Introduction**

In a series of cases over the last decade, the Supreme Court has developed a novel interpretation of the Eleventh Amendment.<sup>1</sup> The

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1. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as an invalid use of Congress's Fourteenth Amendment enforcement powers); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that the Eleventh Amendment protects states from private patent lawsuits); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that states have sovereign immunity against private suits under Fair Labor Standard Act in state as well as federal court); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act ("ADEA") does not abrogate state's sovereign immunity); *United States v. Morrison*, 529 U.S. 598 (2000) (holding, inter alia, that civil remedies provision of the Violence Against Women Act of 1994 ("VAWA") failed as valid Section 5 action); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Title I (employment discrimination) of the Americans with Disabilities Act ("ADA") failed to abrogate Eleventh Amendment); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress successfully abrogated state sovereign immunity in enacting the Family Medical Leave Act ("FMLA")); *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding the same with respect to Title II (public accommodation) of the ADA in the context of access to the courts); *United States v. Georgia*, 546 U.S. 151 (2006) (holding

conventional wisdom is that, for good or ill, the new interpretation has made it far more difficult for private citizens to sue a state under a statute enacted by Congress.<sup>2</sup> The innovative doctrine may be called “the *Boerne* Doctrine,” after *City of Boerne v. Flores*,<sup>3</sup> the first in the line of cases that made this interpretation the law. As understood for the last hundred and twenty years, the Eleventh Amendment conferred on the states sovereign immunity from suit by individuals unless the state consented to be sued or Congress clearly abrogated the state’s immunity in enacting a statute.<sup>4</sup> Because the new

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that Title II of the ADA abrogated Eleventh Amendment immunity insofar as it also involved a constitutional violation of the Eighth Amendment).

2. See, e.g., Rebecca E. Zeitlow, ‘*Free at Last*’: *Anti-subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 310 n.454 (2010) (stating that *City of Boerne* restricted Congress’s authority to enact civil rights legislation); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2069 (2009); William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 73 (2009) (stating that instead of “validating approaches that promise to vindicate meritorious claims at the cost of allowing some non-meritorious ones to go forward, the Court flips the default in the other direction, prohibiting all claims of a certain type, even when some of them might be meritorious”); Mary Ziegler, *Ways to Change: A Reevaluation of Article V Campaigns and Legislative Constitutionalism*, 2009 B.Y.U. L. REV. 969, 971 (2009) (*City of Boerne* placed “stringent limits on Congress’s fourteenth-amendment authority to define constitutional rights or remedies differently than the Court.” (emphasis added)); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (stating that in the *Boerne* Doctrine cases to date, “the Court has imposed ever more restrictive conditions on Congress’s ability to exercise its Section 5 power”); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 297 (2005) (“The congruence and proportionality standard . . . [is] a means of restricting government power in accordance with specific injuries or problems that give rise to the power.”); THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 239 (2004) (Section Five cases are particularly notable since they “significantly narrow[ed] Congress’s authority in the civil rights field.”); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 445 (2000) (“However interpreted, the Court’s decisions in *Kimel* and *Morrison* [applying the *Boerne* framework] impose[d] new and substantial restrictions on Congress’s power to enact antidiscrimination laws under Section 5.”); David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 973 (2001) (arguing that the *Boerne* Court’s “congruence and proportionality” test “reflects . . . new distrust of congressional judgments” about “what is needed to protect constitutional rights”). Examples could be further multiplied.

3. *City of Boerne*, 521 U.S. 507.

4. See *Hans v. Louisiana*, 134 U.S. 1 (1890). The “State” includes “agencies acting under [State] control.” *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Welch v. Tex. Highways & Pub. Transp. Dep’t*, 483 U.S. 468, 480 (1987).

interpretation made Section 5 of the Fourteenth Amendment<sup>5</sup> the only power under which Congress could create a private claim for relief against nonconsenting states, this new construction had particular impact on antidiscrimination law. However, it also had general implications for any right applied against the states through the Fourteenth Amendment or enforcement legislation passed pursuant to, or requiring the authority of, Section 5.<sup>6</sup>

The Court's novel reading is less than wholly transparent. It has been widely thought to "handcuff Congress' ability to respond to pressing public concerns"<sup>7</sup> as well as to lack constitutional grounding.<sup>8</sup> Commentators have said that the new doctrine sends "ominous signals about the future of federal antidiscrimination law."<sup>9</sup> "The stakes are . . . potentially very high. [In principle, v]irtually the entire class of modern civil rights litigation might be barred by an expansive reading of the immunity of the states . . ."<sup>10</sup> Other writers, more favorable to modern day, state-centered New Federalism, agree about the effects but find them encouraging.<sup>11</sup> I share the critics' concerns

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5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The reasoning of the *Boerne* Doctrine has also been applied to the Thirteenth and Fifteenth Amendments and legislation thereunder, such as the Voting Rights Act of 1965, which the Court consistently holds up as setting a standard for successful Section 5 legislation. See *infra* notes 52, 84 and accompanying text.

6. *City of Boerne* itself concerned the Free Exercise Clause of the First Amendment. *Florida Prepaid*, concerned Due Process rights to intangible property. *Alden* concerned the Fair Labor Standards Act; *Lane*, Due Process rights of access to judicial services; and *United States v. Georgia*, Eighth Amendment rights to be free of cruel or unusual punishment. The discrimination claims in this line included *Kimel* (age), *Garrett* (disability in employment), *Morrison* and *Hibbs* (sex discrimination), *Lane* (disability in public accommodations), and *United States v. Georgia* (same). See *supra* note 2.

7. Bryan Dearing, Note, *The State of the Nation, Not the State of the Record: Finding Problems with Judicial 'Review' of Eleventh Amendment Abrogation Legislation*, 53 *DRAKE L. REV.* 421, 475 (2005).

8. *Id.*; see also JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 11 (2002) (In "the Battle of Boerne" . . . the Supreme Court invented criteria for Congress that invaded the legislative domain.").

9. Post & Siegel, *Equal Protection by Law*, *supra* note 2, at 441.

10. Peter W. Low & John C. Jeffries, Jr., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 932 (5th ed. 2004) (noting that, read broadly enough, the immunity could in principle be extended to sub-state governmental entities and local officials—although it has not been so extended, and the *Boerne* Doctrine does not do this).

11. See, e.g., Michael Kennan, *Is United States v. Morrison Antidemocratic?: Political Safeguards, Deference, and the Countermajoritarian Difficulty*, 48 *HOW. L.J.* 267, 293–94 (2004) (defending judicial review to enforce federalism and offering a useful summary of the literature to that date, *id.* at 307); see also Samuel Estreicher & Margaret H. Lemos,

about the internal logic, legal grounds, and to some degree the potential policy implications of the new doctrine, but in this Article I make a different simple and direct point that has largely been overlooked, despite its signal importance for legislators, judges, litigants, and lawyers. The point is that doctrine *as it now stands* is considerably less drastic in its content and consequences than either its many critics or some advocates have thought. Under it, “the sky has not fall[en]”<sup>12</sup> for antidiscrimination law, nor has a New Federalist bulwark been drawn up protecting the states from federal incursion—at least not one that is deep or high.

Instead, the *Boerne* Doctrine changed shape as it has developed, becoming more amenable to Congress’s power to act under Section 5 and to suits against a state.<sup>13</sup> *City of Boerne* included both expansive language about congressional powers to enforce constitutional rights and also precatory warnings about the limits of those powers. In addition it set forth a “congruence and proportionality” test for whether Congress had validly exercised its Section 5 powers, a condition of abrogation of state sovereign immunity. Up through *Morrison*, the test was applied stringently and set a high bar to invoke Section 5 legislation—one not cleared until *Hibbs*, but cleared and

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*The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 110 (2000) (approving of the early *Boerne* cases).

12. Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1553 (2003) (reviewing NOONAN, *supra* note 8); see also LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1377, 1381 n.25 (3d ed. 2000) (underlining the importance of the development of the *Boerne* Doctrine as developed in *City of Boerne*, *Alden*, and *Florida Prepaid*, and considering whether a “‘Chicken Little’ cry that the sky was falling” was justified).

13. A few scholars have made somewhat similar observations in the context of particular cases but, as far as I can tell, without extensive development or systematic analysis of the whole range of cases. This Article appears to be the first systematic analytical overview of this relatively little noted but very important change in the law. See, e.g., William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39, 86 (2004) (“*Lane* represents an important, yet an incremental, step toward a more expansive Section 5 power.”); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 112–13 (2006) (“It is hard to see *Hibbs* and *Lane* as anything other than a withdrawal from the narrow interpretation of Section 5 taken in the earlier cases, and therefore as an expansion of the federal courts’ jurisdiction to hear claims against state defendants alleged to have violated plaintiffs’ federal statutory rights.”); see also Kristin Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 390 (2008) (“prescriptively” arguing that *City of Boerne* and other precedents call for more deference to Congress in Section 5 legislation). The thesis of this Article is *descriptive*. The law *as it stands*, I contend, has *already* lowered the bar, though for quite different reasons than Kristen Clarke urges.

perhaps lowered there and in the two following cases, *Lane* and *United States v. Georgia*. That is, the Court found successful Section 5 action in the last three *Boerne* Doctrine cases.<sup>14</sup> It is surprising to find relaxation of a doctrine that initially limited federal power from a Court that holds generally to an overall “New Federalist” perspective.<sup>15</sup> We can explain the shift at least in part internally through the development of the *Boerne* Doctrine to include a wider range of resources than indicated in *City of Boerne*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Morrison*, which made it easier to satisfy the new conditions on Section 5 action and Eleventh Amendment abrogation. Why this happened, apart from the internal unfolding of the logic of legal doctrine itself, is a subject for another time. The tendency might be halted, as *City of Boerne*, its predecessors<sup>16</sup> and immediate progeny halted a previous contrary trend. My object here, however, is not to offer a critique of, or an alternative to, the *Boerne* Doctrine, nor to speculate about its future. It is to expound the law as it has developed and to show that it is different from the conventional wisdom. As things stand, there are greater resources for effective Section 5 action, abrogation of Eleventh Amendment immunity, and private lawsuits against the states than has been widely believed.

In Part I.A, I briefly review the history of the Eleventh Amendment up to the development of the *Boerne* Doctrine. Part I.B

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14. This is a tendency. As Auric Goldfinger says in the James Bond movie *Goldfinger* (1964): “Once is happenstance. Twice is coincidence. The third time is enemy action.” That characterization “enemy action” represents a point of view solicitous of the states and skeptical of federal power. Some (and I am one) who have different policy preferences or who hold a legal framework with a more extensive view of federal power to defend individual rights would characterize the developments otherwise, as friendly action.

15. See, e.g., Manning, *supra* note 2, at 2004 (“[T]he Rehnquist Court’s . . . most distinctive mark in constitutional law has been its revival of meaningful federalism constraints on the exercise of federal power prescribed by Acts of Congress.”); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003) (same); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 23 (2004) (same). Some of the important cases include: *United States v. Lopez*, 514 U.S. 549 (1995) (finding a limit on Congress’s Commerce powers for the first time in sixty years); *New York v. United States*, 505 U.S. 144 (1992) (holding that the Low-Level Radioactive Waste Policy Amendments Act’s take-title provision, requiring states to accept ownership of waste or submit to congressional regulation, violates the Tenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Brady Act’s requirement that state officials conduct background checks on gun purchasers violates federalism); and, of course, *City of Boerne v. Flores*, 521 U.S. 507 (1997), and most of the cases in its line.

16. Notably *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

sets forth the Court's official statement of the *Boerne* Doctrine itself, focusing on the requirement that an abrogating enactment must be "congruent and proportional,"<sup>17</sup> to the evil to be remedied. This involves more or less intensive judicial review of the legislative record and examination of the scope of the remedy. I elucidate the link that the Court made between the intensity of review of the record and the degree of scrutiny of state conduct (the "Inverse Relation Principle," as termed here): The lower the degree of scrutiny accorded to the underlying substantive right, the more intense the review of the legislative record and the remedy, and vice versa. In Part II.A–C.1, I examine, via a careful analysis of the cases, the application and development of the Doctrine in its restrictive mode. In Part II.C.2 and II.D, I show how the Court used the new resources it has created, notably augmentation of the record with independent research and reframing the issue to raise the level of review, to open a space for more relaxed interpretation that makes it easier to find the evidence support that triggers Congress's Section 5 remedial powers and permits abrogation of state sovereign immunity. A summary and brief discussion of the practical meaning of the development chronicled in this Article follow in Part III, with an illustration of the *Boerne* Doctrine's transformation by showing, hypothetically, how an application of today's standards to *Kimel* might well have changed the outcome.

## **I. Eleventh Amendment Immunity Abrogation Through the Rise of the *Boerne* Doctrine**

### **A. Between *Hans* and *City of Boerne*: Eleventh Amendment Abrogation Doctrine from a Clear Statement Approach to a Powers Analysis**

#### *I. Hans and State Sovereign Immunity Against All Private Suits*

Modern Eleventh Amendment jurisprudence began with *Hans v. Louisiana*,<sup>18</sup> which imposed a radically nontextual interpretation of the plain language of the Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

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17. *City of Boerne*, 521 U.S. at 532.

18. *Hans v. Louisiana*, 134 U.S. 1 (1890).

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>19</sup>

The Amendment was adopted in 1795 to overrule the 1793 case of *Chisholm v. Georgia*.<sup>20</sup> There the Supreme Court held that private citizens might sue the states in federal court—or at least other states than their own. The Amendment, by its plain terms, unambiguously prohibited such suits and was adopted for that end. However, in 1890, the Court in *Hans* read the Amendment to bar citizen suits against *any* state that does not consent to be sued, *including one's own*.<sup>21</sup> The pre-*Hans* history of the Eleventh Amendment and the “original” meaning of the constitutional text, are topics of a vast body of scholarly literature and, until recently, much judicial debate that need not concern us here.<sup>22</sup> We begin with *Hans's* jurisdictional<sup>23</sup> prohibition on citizen (or alien) suits against any state.<sup>24</sup> The bar

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19. U.S. CONST. amend. XI.

20. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

21. *Hans*, 134 U.S. at 17. As expressly conceded by the Court itself, this was an atextual reading. *See id.* at 10 (“[I]t is true that the amendment does so read,” i.e., to bar *only* citizen suits against other states.); *Principality of Monaco v. Miss*, 292 U.S. 313, 323–31 (1934) (reading *Hans* to bar suits by aliens against nonconsenting states and defending the atextual reading).

22. For discussion of the original meaning of the Amendment, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 300–01 (1985) (Brennan, J., dissenting) (defending “diversity interpretation,” which argues that the Amendment only overruled citizen (and alien) diversity jurisdiction). *But cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); John V. Orth, *The Interpretation of the Eleventh Amendment, 1793–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423 (1983). *See also* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 111 n.8 (1996); AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 334 & n.27 (2005) (stating that the broader language barring any suits against nonconsenting states “was floated by *Chisholm's* critics . . . but this language was never seriously considered”).

23. *Seminole Tribe*, 517 U.S. at 64 (noting that the Eleventh Amendment “limits the federal courts’ jurisdiction under Article III”). *But see* *Kimel*, 528 U.S. 62, 108 (2000) (Thomas, J., dissenting and concurring) (stating that under the “traditional view” maintained by Justice James Iredell, the lone dissenter in *Chisholm*, “the sovereign immunity defense as recognized as a matter of comity when asserted in the courts of another sovereign rather than as a limitation on . . . jurisdiction”).

24. Moreover, in many Eleventh Amendment cases, the question was framed in terms of whether the states were subject to private suits for *money damages* in federal or state

stated in *Hans* was not, however, absolute. This provides our theme: What is required for Congress to enact legislation over Eleventh Amendment immunity? The *Boerne* Doctrine, dating roughly to *City of Boerne v. Flores*<sup>25</sup> and *Kimel v. Florida Board of Regents*,<sup>26</sup> around the turn of the present century, is the Court's latest word on the subject. Understanding the new requirements involves seeing how the Court replaced its prior focus on congressional intent with emphasis on congressional power. Congressional intent remains obligatory, but the *Boerne* Doctrine concerns the powers under which Congress may act and what it must do to act under those powers.

Three main exceptions emerged to *Hans*'s discovery of a general state sovereign immunity in the Eleventh Amendment. First, under *Ex parte Young*,<sup>27</sup> a state officer acting in his official capacity who is in alleged violation of the Fourteenth Amendment might be sued for prospective injunctive relief, although not for retrospective monetary damages. Second, a state may consent to suit, or (formerly) be treated as having waived its immunity if the state adopted language or engaged in conduct that allowed for no other interpretation.<sup>28</sup> Third,

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court. See, e.g., *Kimel*, 528 U.S. at 66 (mentioning that petitioners sought money damages); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (stating that the question presented was the recoverability of money damages); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) (same); *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004) (same). However, the *Hans* limitation on judicial power imposed by the Eleventh Amendment encompasses immunity from suit “in law or equity,” and not merely for money damages, arising under either federal or state law. *Hans*, 134 U.S. at 11. *In re New York* 256 U.S. 490 (1921) extended the immunity to suits in admiralty. See also *Principality of Monaco*, 292 U.S. at 322.

25. *City of Boerne*, 521 U.S. 507.

26. *Kimel*, 528 U.S. 62. *Kimel* and *City of Boerne* were the core cases in the official early statement of the doctrine; *City of Boerne* sets forth the key test for effective Section 5 action, and *Kimel* was the first case to fully apply it in a sovereign immunity context. See *infra* Part II.B.1.i.

27. *Ex parte Young*, 209 U.S. 123 (1908). *Garrett* reaffirms that private individuals may seek injunctive relief against state officials via *Ex parte Young* actions. *Garrett*, 531 U.S. at 374 n.9.

28. The Court permitted *implied* “clear statements” and “constructive” consent or waiver to suffice for abrogation from *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184, 198–99 (1964), up to *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). *Parden*'s constructive waiver theory was formally overruled in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 681 (1999). The modern clear statement rule is that the statement must be express and clear from the statutory language alone. See *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989); see also *Green v. Mansour*, 474 U.S. 64, 68 (1985) (same); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (same). In contrast, the *Boerne* Doctrine made close examination of the legislative history the core of the abrogation inquiry, while



Congress may override the sovereign immunity of a nonconsenting state—that is, Congress may, in contemporary terms, “abrogate” that immunity.<sup>29</sup>

What must Congress have done to “bring the states to heel in the sense of lifting their immunity from suit . . . ?”<sup>30</sup> This required: (1) a clear statement of congressional intent to abrogate sovereign immunity; and (2) appropriate congressional action to abrogate under a valid power.<sup>31</sup> Any lawful action by Congress or indeed by any branch of the federal government must derive from a valid power based in the Constitution. However, for most of the post-*Hans* history of the Eleventh Amendment, the Court directed its attention almost exclusively to the degree of clarity of the statement of congressional intent.<sup>32</sup>

## 2. *The Rise of the Powers Analysis*

The courts did not wholly ignore the source of congressional power to trump Eleventh Amendment immunity was not wholly ignored during the long era when they focused on clear statements and consent, but it was rare that they gave the issue extended analytical attention to power. In 1964, *Parden v. Terminal Railway of*

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the current clear statement rules still disallow any attention to the legislative record. See *Seminole Tribe*, 517 U.S. at 55; *Dellmuth*, 491 U.S. at 228.

29. “Abrogation” is a term that has changed meaning with the doctrine. The older cases, prior to *Atascadero*, *Green*, or *Dellmuth* used it, in practice, to mean that Congress expressed a clear intent to override state sovereign immunity. Even *Fitzpatrick v. Bitzer*, the predecessor of *City of Boerne*, used the term “abrogate” only once, and in the traditional sense of overriding state sovereign immunity through clear expression of “congressional intent.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451–52 (1976). The powers issue was characterized in terms of “limitations” or “restrictions” on state power rather than in terms of abrogation. See *id* at 454–56; see also *infra* notes 32, 38 and accompanying text.

30. *Emps. v. Mo. Pub. Health Dep’t*, 411 U.S. 279, 283 (1973).

31. *Kimel*, 528 U.S. at 73.

32. See *Parden*, 377 U.S. at 187–88 (stating that in making the Federal Employers’ Liability Act, 45 U.S.C. §§ 51–60 (1908) “applicable to ‘every’ common carrier by railroad in interstate commerce,” Congress had shown that it meant the statute was to apply to all such railroads, whether state-owned or not); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (“When we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state’s intention to submit its fiscal problems to other courts than those of its own creation must be found.”) (internal citations omitted); *Atascadero*, 473 U.S. at 242 (stating that “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute,” and therefore holding that satisfaction of the new clear statement rule was the basis for abrogation).

*Alabama State Docks Department*<sup>33</sup> stated, on the way to holding that the state had impliedly waived its sovereign immunity by its conduct, that the Commerce Clause Congress with the power to subject a nonconsenting state to suit by private citizens.<sup>34</sup> This anticipated *Pennsylvania v. Union Gas Co.*, which directly so held.<sup>35</sup> The powers question was again addressed in detail in *Fitzpatrick v. Bitzer* in 1976, a Title VII case expressly upholding what we now call abrogation.<sup>36</sup> The modern power-centered rule began to find expression in dicta in the abrogation cases of the 1980s.<sup>37</sup> These cases stated that some valid exercise of a power—generally Section 5, citing *Fitzpatrick*—was necessary to overcome Eleventh Amendment immunity, but addressed themselves virtually exclusively to whether Congress had made its intentions sufficiently clear.<sup>38</sup>

In 1988, a four member plurality of the Court expressly held in *Pennsylvania v. Union Gas Co.*,<sup>39</sup> that the Commerce Power under the Article I Interstate Commerce Clause was a sufficient basis to abrogate state sovereign immunity, because its near-plenary reach and its limitation of state power.<sup>40</sup> The *Union Gas* rule survived only seven years. In *Seminole Tribe of Florida v. Florida*,<sup>41</sup> a 5-4 majority overruled *Union Gas*,<sup>42</sup> reasoning that to allow Commerce power abrogation would eviscerate *Hans*.<sup>43</sup> Stare decisis did not, therefore,

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33. *Parden*, 377 U.S. at 191.

34. *Id.* at 196 (allowing the inference that the state had impliedly waived its sovereign immunity by operating a railroad in interstate commerce).

35. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

36. 427 U.S. 445 (1976).

37. *Halderman*, 465 U.S. at 98 (stating that “Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity”); *Atascadero*, 473 U.S. at 238 (citing *Fitzpatrick*, 427 U.S. at 456) (stating that “when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States’ consent”); *Dellmuth*, 491 U.S. at 227; *Green*, 474 U.S. at 68.

38. *See, e.g., Dellmuth*, 491 U.S. at 227. Here, the Court, invoking the need for exercise of a valid power to abrogate, went on to state that to determine whether a federal statute, here the Education of the Handicapped Act, had successfully abrogated state sovereign immunity, “we have applied a simple but stringent test,” viz., whether the intention was “unmistakably clear in the language of the statute.” *Id.*

39. *Union Gas*, 491 U.S. 1.

40. *Id.* at 15–17.

41. *Fitzpatrick v. Bitzer*, 517 U.S. 44 (1996) (involving the Indian Commerce Clause).

42. *Id.* at 48.

43. *Id.* at 64. The Court also reasoned, inter alia, the *Union Gas* rationale did not wholly persuade a majority of the Court, and even that Justice Byron White’s

control, and Article I abrogation should be abandoned.<sup>44</sup> *Union Gas* and *Seminole Tribe*, however, put the powers-centered analysis in the foreground, especially in light of the *Fitzpatrick*-inspired dicta of the 1980s cases. *Seminole Tribe* did not hold positively that there was *any* power under which Congress might abrogate, although it did briefly note that Section 5 was the only remaining power that had been expressly found to allow for abrogation.<sup>45</sup> It was not until *Kimel* that the Court decreed, without explanation, that Section 5 was the *only* valid power under which Congress could abrogate.<sup>46</sup>

### 3. *The Enforcement Power Under Section 5 Before City of Boerne*

Prior to *City of Boerne*, there was little jurisprudence on “effective” Section 5 legislation “enforcing” the substantive guarantees of the Fourteenth Amendment. *The Civil Rights Cases*<sup>47</sup> had limited Congress’s Section 5 powers to cases involving state (here meaning governmental) action. *Fitzpatrick* itself stated only that: (1) the Fourteenth Amendment “embod[ied] significant limitations on state authority;”<sup>48</sup> (2) Section 5 “necessarily limited” state sovereignty;<sup>49</sup> and that (3) Congress’s enforcement powers under Section 5 are “plenary.”<sup>50</sup> The Court stepped back from the “plenary” authority doctrine in *City of Boerne*.<sup>51</sup> One way to put the

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“concurrence must be taken on its face to disavow’ the plurality’s theory.” *Id.* (citation omitted). This is debatable. After a lengthy clear statement discussion, Justice White laconically stated that he “agree[d] with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity . . . although [he did] not agree with *much of* [the plurality’s] reasoning.” *Union Gas*, 491 U.S. at 57 (emphasis added). He did not explain what he found problematic. That is not an unqualified rejection.

44. *Seminole Tribe*, 517 U.S. at 64.

45. *Id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

46. *Kimel*, 528 U.S. at 80.

47. *The Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883). *But cf.* *United States v. Guest*, 383 U.S. 745, 755, 760 (1966) (addressing a *private* conspiracy under a Reconstruction statute barring interference with interstate travel, 42 U.S.C. § 241 (1944)). *Guest* contemplated the prospect that Congress might enact “other and broader legislation” under that Section. *Id.* at 755. This hint was not developed.

48. *Fitzpatrick*, 427 U.S. at 456; *see also id.* at 453–56 (citing and discussing *Ex parte Virginia*, 100 U.S. 339 (1879)).

49. *Id.* at 456.

50. *Id.* (“When Congress acts pursuant to § 5 . . . it is exercising legislative authority that is plenary within the terms of the constitutional grant.”).

51. *But cf.* *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (stating that Congress may not exercise “unrestrained” plenary authority—which was not quite to say that it *altogether* lacked plenary authority under Section 5, merely that any such power it had was

thesis of this Article is that the trajectory of the *Boerne* Doctrine cases has tended to revert, if not all the way, to the wider scope of the enforcement powers stated in *Fitzpatrick*.

That Section 5 powers were extensive was underlined in two cases repeatedly cited with approval and discussed in detail in *City of Boerne* and its progeny. *Katzenbach v. Morgan*, a Voting Rights Act (“VRA”) case regarding a New York State literacy requirement,<sup>52</sup> read Congress’s Section 5 powers as coextensive with “the same broad powers expressed in the necessary and proper clause.”<sup>53</sup> Justice William J. Brennan’s 7-2 majority opinion stated that “Congress’ power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment; Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.”<sup>54</sup> Justices John Marshall Harlan and Potter Stewart, dissenting, worried that this conceded to Congress the power to define the content of Equal Protection.<sup>55</sup> In *Oregon v. Mitchell*,<sup>56</sup> regarding Congress’s power to lower the voting age fixed by the states, Justice Hugo Black’s plurality opinion restated the understanding of the limits of Section 5 powers that prevailed until *City of Boerne*. The opinion set forth “at least three limitations” on Congress:<sup>57</sup> The legislature (1) may not, under Section 5, legislatively repeal other constitutional provisions; (2) strip

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not “unrestrained”). The Court has never expressly overruled *Fitzpatrick* on whether Section 5 powers are plenary, but it has done so impliedly. *See, e.g., City of Boerne*, 521 U.S. at 522 (discussing the legislative history of Section 5): “Under the revised [Fourteenth] Amendment [draft then being considered by Congress during Reconstruction,] Congress’ power was no longer plenary but remedial.”)

52. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In this case the Court upheld a congressional bar on English language literacy tests for voting in New York State under Section 4(e) of the Voting Rights Act (“VRA”), although it had previously ruled that nondiscriminatory literacy tests were constitutional. *See Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). A third case to which the Court has repeatedly adverted as a touchstone for proper exercise of Section 5 powers is *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the VRA’s suspension of various voting tests and devices that lowered minority voting rates in districts where racial discrimination had been found).

53. *Morgan*, 384 U.S. at 650–51.

54. *Id.* at 651 n.10.

55. *Id.* at 668. Justice John Marshall Harlan II repeated this concern in his separate opinion, concurring and dissenting, in *Oregon v. Mitchell*, 400 U.S. at 154 (Harlan, J., concurring and dissenting). This theme is prominent in the *Boerne* Doctrine cases.

56. *Mitchell*, 400 U.S. 112 (plurality opinion) (striking down the section of the Voting Rights Acts Amendments of 1970 that enfranchised eighteen-year-olds in state and local elections; holding mooted by the adoption of the Twenty-Sixth Amendment, ratified in 1971).

57. *Id.* at 128.

the states of their power of self-government or exercise “unrestrained” plenary authority; and (3) “may only ‘enforce’ the provisions of the amendments and may do so only by ‘appropriate legislation.’”<sup>58</sup> Justice Black’s third point restated Section 5 nearly verbatim. The sentence immediately following presumably explained what was meant by “‘enforce[ment]’ . . . by ‘appropriate legislation.’” Congress might not “undercut” the Fourteenth Amendment’s guarantees against discrimination or “undermine” other rights incorporated through the Amendment against the states.<sup>59</sup> This was widely taken to mean that the Congress had “the power only to broaden the scope of fourteenth amendment rights, not to narrow it.”<sup>60</sup> Beyond that, “enforcement” was undefined. The *Boerne* Doctrine purported to rectify that omission (and vindicate Justices Harlan and Stewart) by rejecting any congressional power to expand any constitutional right.<sup>61</sup> I now turn, in the following Section, to parse *City of Boerne* and analyze the *Boerne* Doctrine as set forth in subsequent cases.

## **B. The *Boerne* Doctrine: The Court Audits Congress’s Books**

### *1. The New Limitations*

In *City of Boerne*,<sup>62</sup> the Court erected the skeleton of the modern framework for successful abrogation of state sovereign immunity, in particular the conditions for successful use of congressional remedial powers under Section 5. The case did not address abrogation of Eleventh Amendment immunity because that was not an issue in a suit against a city, an entity ineligible for state sovereign immunity.<sup>63</sup> The significance of *City of Boerne* for the Eleventh Amendment was

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58. *Id.*

59. *Id.*

60. Stephen L. Carter, *The Morgan ‘Power’ and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 820 (1986) (citing *Morgan*, 384 U.S. at 651 n.10) (noting that while this “power” was discussed in only a handful of cases and never again used by a Court majority in deciding a case, until “recently” [1986] “its critics were not taken seriously”).

61. *City of Boerne*, 521 U.S. at 527–29 (declining to interpret *Morgan* as “acknowledging a power [under Section 5] . . . to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment,” and citing Justice Potter Stewart’s reservations in his concurrence in *Mitchell*, 400 U.S. at 296, about any such power).

62. *United States v. Morrison*, 529 U.S. 598 (2000), was also a Section 5 rather than an Eleventh Amendment case because, again, the suit was not against a state.

63. See generally *City of Boerne*, 521 U.S. 507.

that it explained the requirements for valid exercise of Congress's enforcement powers, which is necessary for abrogation. The *Boerne* Doctrine could in principle be applied to *any* antidiscrimination legislation or congressional action under Section 5.<sup>64</sup> Apart from *City of Boerne* and *Morrison*, the Court has so far applied the *Boerne* Doctrine only in Eleventh Amendment cases.<sup>65</sup> Whether it will be extended again is an open question.

The pertinent language from the Fourteenth Amendment is:

Section 1: [. . . No] State [shall] 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: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>66</sup>

The *Boerne* Doctrine directed the courts to apply a three-step analysis. First, they are to “identify with some precision the scope of the constitutional right at issue.”<sup>67</sup> Second, having determined the “metes and bounds” of the right,<sup>68</sup> they “examine whether Congress has identified a history and pattern of unconstitutional . . . [action] by the States.”<sup>69</sup> This involved a more or less intensive examination of the record for the evidence of such a pattern.<sup>70</sup> While Congress may

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64. Any congressional action to which the *Boerne* Doctrine might apply would have to be directed against unconstitutional governmental conduct. But other governmental entities than the states can engage in such conduct—for example, as Archbishop Flores alleged, the City of Boerne itself. See *City of Boerne*, 521 U.S. at 517. Furthermore, Congress may direct its powers against government misconduct by regulation of private behavior. See discussion *infra* Part I.B.2.

65. I have found one more Supreme Court case outside an Eleventh Amendment context. See *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–83 (1999) (a VRA case citing *City of Boerne* for the proposition that Congress's Section 5 powers allow it to legislate outside the sphere of constitutional violations in areas traditionally reserved to the states to deter or remedy constitutional violations).

66. U.S. CONST. amend. XIV, §§ 1, 5.

67. *Garrett*, 531 U.S. at 365.

68. *Id.* at 367.

69. *Id.* at 368.

70. See *City of Boerne*, 521 U.S. at 530–32 (contrasting the legislative record of the Religious Freedom Restoration Act (“RFRA”) and the Voting Rights Act); *Fla. Prepaid*, 527 U.S. at 640–43 (1999) (finding no evidence in legislative record of a pattern of state patent infringement); *Kimel*, 528 U.S. at 90 (finding in congressional record virtually no evidence of pattern of unconstitutional discrimination); *Morrison*, 529 U.S. at 626–27 (finding that record does not show that problem of gender motivated violence exists in

regulate behavior that is constitutional, exercise of its enforcement powers in that broader swath can be only “remedial and preventative”<sup>71</sup> of state constitutional violations. Third, the court was to inquire whether the “rights and remedies created” by the legislation were “proportional[.]” and “congruen[t]” to the state constitutional harm identified.<sup>72</sup> “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>73</sup> The scope and reach of the legislation must be appropriately limited. A remedy exceeding the evil to be corrected may be fatal to Section 5 action and abrogation.<sup>74</sup>

## 2. Remedial Versus Substantive Measures and the ‘Broader Swath’

Congress’s Section 5 enforcement powers took in a broader “swath”<sup>75</sup> than merely enforcing the terms of the Fourteenth Amendment itself. *City of Boerne* insisted on the distinction between Congress’s power to enforce the Amendment’s substantive guarantees in a “remedial and preventative” way<sup>76</sup> and its lack of power to “decree the substance of the Fourteenth Amendment’s restrictions . . . .”<sup>77</sup> The line “is not easy to discern,”<sup>78</sup> but the separation of powers required it to be drawn.<sup>79</sup> The Court, and not Congress, had the power to say what the laws are.<sup>80</sup> Retreat from

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most states); *Garrett*, 531 U.S. at 368–74 (same for employment discrimination against the disabled, with contrast to congressional findings supporting the Voting Rights Act); *Hibbs*, 538 U.S. at 729–32 (finding in congressional record and other sources evidence of extensive sex discrimination); *Lane*, 541 U.S. at 522–23 (likewise with a record partly grounded in legislative findings and partly constructed by the Court, the Court held that there was discrimination against the disabled in access to judicial services and other Fourteenth Amendment Due Process rights).

71. *City of Boerne*, 521 U.S. at 525. Legitimate use of Section 5 powers apart from action against unconstitutional state conduct must be merely “prophylactic.” *Kimel*, 528 U.S. at 81.

72. *Garrett*, 531 U.S. at 372.

73. *City of Boerne*, 521 U.S. at 530.

74. Cases where the excessive reach of the remedy was decisive included, inter alia, *United States v. Morrison*, 529 U.S. at 625–36 (emphasizing that the civil remedy in challenged provision of VAWA was not directed to state officials). For reservations about *Morrison* on its own terms, see the discussion in Part II.C.1.

75. *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 517–18; *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

76. *City of Boerne*, 521 U.S. at 524.

77. *Id.* at 519.

78. *Id.*

79. *Id.* at 524, 529, 535–36.

80. *Id.* at 524; see also *Kimel*, 528 U.S. at 81.

judicial review of constitutional provisions would reduce them to ordinary legislation subject to shifts in political winds.<sup>81</sup> If Congress could determine what constitutes a constitutional violation or alter the substance of constitutional rights as decreed by the courts, it would “no longer be [enforcing], in any meaningful sense, the ‘provisions of the Fourteenth Amendment.’”<sup>82</sup>

The *Boerne* Doctrine pointed two ways on how to draw the line. *City of Boerne* introduced its discussion of the intended breadth of the enforcement power in familiar terms suggesting a relaxed and deferential approach. “It is for Congress in the first instance to determine . . . what legislation is needed to secure the guarantees of the Fourteenth Amendment’ and its conclusions are entitled to much deference.”<sup>83</sup> *City of Boerne* acknowledged Congress had power under Section 5 to pass “appropriate” legislation “that is, [legislation] adapted to carry out the objects the [Thirteenth, Fourteenth, and Fifteenth] amendments have in view” [and do] whatever tends to enforce submission to the prohibitions they contain.”<sup>84</sup> Section 5 was a “positive grant of legislative power,”<sup>85</sup> which operated in a “wide latitude”<sup>86</sup> that included a “somewhat broader swath of conduct”<sup>87</sup> than prohibited by the Fourteenth Amendment. Even the more restrictive *Boerne* Doctrine cases held up as exemplary provisions of the Voting Rights Act that ban states from imposing literacy tests that

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81. *City of Boerne*, 521 U.S. at 529 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). Moreover, the legislative and early judicial history of the Amendment showed that drawing a line was the Framers’ intent. *Id.* at 520–23.

82. *Id.* at 519 (citation omitted).

83. *Id.* at 536 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). Section 5 itself used the “talismanic” word “appropriate,” invoking the broad powers the Court granted Congress to regulate commerce in *McCulloch v. Maryland*, 17 U.S. 316 (1819), where the Court read the Commerce Clause as permitting Congress to do what was “necessary and proper,” *id.* at 420, to encompass all “legitimate” ends and all “appropriate” means, “which are plainly adapted to that end,” *id.* at 421. *Cf. Mitchell*, 400 U.S. at 128. This and similar language was quoted in *Flores v. City of Boerne*, the opinion of the Fifth Circuit finding for the plaintiff. 73 F.3d 1352, 1357 (5th Cir. 1996), *rev’d on other grounds*, 521 U.S. 507 (1997).

84. *City of Boerne*, 521 U.S. at 517–18 (quoting *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879)). The enforcement sections of the Thirteenth and Fifteenth Amendments, virtually identical in language, are in Section 2 of those provisions. Hereinafter, like the Court, I speak only of Section 5 of the Fourteenth Amendment, incorporating by reference the other enforcement sections of the other Reconstruction Amendments.

85. *Id.* at 517 (quoting *Morgan*, 384 U.S. at 651).

86. *Id.* at 519–20.

87. *Kimel*, 528 U.S. at 81; *see also* *United States v. Georgia*, 546 U.S. 151, 158 (2006); *Lane*, 541 U.S. at 518; *Hibbs*, 538 U.S. at 737; *Garrett*, 531 U.S. at 367.



had been upheld as constitutional, in order to “combat racial discrimination in voting.”<sup>88</sup> The *Boerne* Doctrine, then, did not hold that under Section 5, Congress might legislate *only* against “actual violations of th[e] provisions” of those Amendments<sup>89</sup>—in effect that the narrowest reading of the holding of *United States v. Georgia* (more generously, that Congress might *also* legislate against actual constitutional violations) exhausted its Section 5 powers. Those powers were “not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.”<sup>90</sup> State constitutional violations were both the target and the trigger of the legitimate operation of Section 5 powers. They were required in sufficient number for valid enforcement action, but did not exhaust it. However, valid Section 5 legislation might operate in the broader swath *only* in order “to remedy and to deter violation of [Fourteenth Amendment] rights.”<sup>91</sup> Before *Fitzpatrick*, the Court had made little of this limitation. Until *City of Boerne*, it was largely idle despite repeated recitation in dicta. Things, however, have changed.

A major point of the *Boerne* Doctrine was to underline that Section 5 enforcement power “is not unlimited.”<sup>92</sup> Starting with *City of Boerne*, the Court significantly narrowed Congress’s power to legislate in the extra-constitutional swath. It would be easy to read the *Boerne* Doctrine as *merely* a set of limitations reining in congressional power and plaintiffs’ rights against the states.<sup>93</sup> Two-thirds of the time, from *City of Boerne* on, the Court determined that despite Congress’s clear intent, it failed to satisfy the requirements for valid Section 5 action and, thus did not abrogate sovereign immunity, where that was an issue.<sup>94</sup> Nonetheless, the Court’s own more recent

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88. See, e.g., *City of Boerne*, 521 U.S. at 518, 525–27 (discussing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

89. *United States v. Georgia*, 546 U.S. at 158 (citing *Fitzpatrick*, 427 U.S. at 456).

90. *Kimel*, 528 U.S. at 81; see also *Garrett*, 531 U.S. at 365.

91. *Kimel*, 528 U.S. at 81; see also *Lane*, 541 U.S. at 520; *City of Boerne*, 521 U.S. at 518.

92. *Id.* at 518–19 (quoting *Mitchell*, 400 U.S. at 128); see *Lane*, 541 U.S. at 520; *Hibbs*, 538 U.S. at 728; *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81.

93. See *supra* note 2 (citing much scholarship arguing this proposition).

94. Of the nine *Boerne* Doctrine cases that the Court has considered, it found that Congress exceeded its Section 5 limits in six of them (*City of Boerne* itself, *Morrison*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Alden*), thus failing to abrogate sovereign immunity, where that was an issue. It was not in *City of Boerne* and *Morrison*. In only three of these cases (*Hibbs*, *Lane*, and *United States v. Georgia*) Congress had satisfied the requirements to permit a private suit against a state.

expansive reconstruction of the *Boerne* Doctrine showed a change from the Court's earlier, more restrictive interpretations. Over time, the outcomes shifted from denials of effective Section 5 action, upholding state sovereign immunity against the challenged legislation, to the later affirmations of such action, leading to abrogation of that immunity in the latest cases. This shift was linked to the Court's later willingness to expand the record and reframe the cases to increase the likelihood of a finding of state constitutional violations and therefore the probability that the legislation in question would pass the "congruence and proportionality" test for effective Section 5 action.

3. *Congruence and Proportionality as the Test for Valid Exercise of Section 5 Powers*

"The test" for whether the distinction between remedial legislation and substantive redefinition had been respected was whether the statute satisfied congruence and proportionality.<sup>95</sup> These terms were not self-explanatory. *City of Boerne* indicated that for effective Section 5 action, the measures cannot be "so out of proportion to a supposed remedy or preventative object that it cannot be understood as . . . designed to prevent[] unconstitutional behavior."<sup>96</sup> Or as the *Garrett* Court put it, "there must be a pattern of discrimination by the states which violates the Fourteenth Amendment and the remedy imposed by Congress must be congruent and proportional to the targeted violation."<sup>97</sup> The issue was the fit between the strength of the measure and the extent of the evil to be remedied. What mattered, in the words of Gilbert and Sullivan's

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95. *Garrett*, 531 U.S. at 374; see *Lane*, 541 U.S. at 520; *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 519–20, 530; see also *Morrison*, 529 U.S. at 626 (seemingly identifying the two requirements). An alternative statement distinguishing them can be found in the dissent in *Nevada Department of Human Resources v. Hibbs*, which stated that the Voting Rights Act was "both congruent, because it 'aimed at areas where voting discrimination has been most flagrant,' and proportional, because it was necessary to 'banish the blight of racial discrimination in voting, . . . has infected the electoral process in parts of our country for nearly a century.'" 538 U.S. 721, 757 (2000) (Kennedy, J., dissenting.). Here, "congruence" emphasized the extent of the evidence for evils (constitutional violations), and "proportionality" whether and how much the legislation would extend the "broader swath" beyond strictly constitutional violations to prevent and deter such violations. Perhaps this is parsing terms too finely.

96. *City of Boerne*, 521 U.S. at 532. See also *id.* at 530–33 (discussing RFRA's "sweeping coverage" and contrasting its "reach and scope" with that of the Voting Rights Act, which had "termination dates, geographic restrictions, or egregious predicates" all of which RFRA lacked).

97. *Garrett*, 531 U.S. at 374.

*Mikado*, was that “the punishment fit the crime.”<sup>98</sup> The key things were that (1) the remedy be framed to address the constitutional evil, and (2) there be a constitutional evil to remedy. Section 5 legislation might regulate constitutionally permitted state and other behavior—but only so far as was prophylactic against unconstitutional state behavior. However, this did not tell a court how to determine or Congress to predict when evils or harms called for strong measures or what latitude Congress had in framing remedial legislation. How to tell which ones or how much?

We may summarize the core of the test as officially as follows. First, the courts must determine that the legislative record established by Congress showed a sufficiently grave ongoing or threatened pattern of unconstitutional state behavior to warrant federal legislation. In principle, *City of Boerne* acknowledged that Congress had wide discretion in making this determination. Normal “judicial deference [to Congress] . . . is based on “due regard for the decision of the body constitutionally appointed to decide,”<sup>99</sup> that is, on the very separation of powers principles in virtue of which the judiciary reserved the right to interpret the law. In practice, the Court found that proper exercise of its own constitutionally appointed interpretative powers often required it to police congressional factfinding in Section 5 contexts with considerable rigor.<sup>100</sup> However, in practice, the Court became increasingly willing to expand the record beyond congressional findings, augmenting the legislative record with its own research into both patterns of litigation<sup>101</sup> and social realities.<sup>102</sup>

Second, the intensity with which the Court reviewed the legislative record and the statutory remedy varied inversely with the degree of scrutiny appropriate for judicial evaluation of the alleged underlying constitutional violation. That was the significance of taking the determination of “the scope of the constitutional right at

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98. ARTHUR SULLIVAN & W.S. GILBERT, *THE MIKADO* 41 (Dover 1992) (1885).

99. *City of Boerne*, 521 U.S. at 531–32 (quoting *Mitchell*, 400 U.S. at 207 (Harlan, J., concurring and dissenting)) (internal quotation marks omitted). “As a general matter it is for Congress to determine the method by which it will reach a decision.” *Id.* at 532.

100. The intensified examination of the legislative record and congressional findings was not limited to the Eleventh Amendment context. For an extensive review of the recent (post-1995) Court’s decreased deference to Congress, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV 80 (2001).

101. See *infra* notes 145, 191–97, 263–65, 303–10 and accompanying text.

102. See *infra* notes 273, 280, 303, and accompanying text.

issue”<sup>103</sup> to be a matter of applying the appropriate level of scrutiny to assess the evidence of a pattern of state constitutional violations in the legislative record. Courts have typically granted state classifications by age<sup>104</sup> or disability,<sup>105</sup> for instance, far more deference than state classifications by sex<sup>106</sup> or acts or laws implicating fundamental rights and liberties such as due process.<sup>107</sup> More deferential scrutiny meant that the state laws or acts had less “significant likelihood of being unconstitutional,”<sup>108</sup> than laws or acts involving more demanding scrutiny. Violations sufficient to trigger Section 5 powers would generally be harder to find in those cases. The standard would be more easily met where the scrutiny implicated in the underlying right was higher and more difficult where it was lower. This is the “Inverse Relation Principle.” The courts normally subjected the legislative record to far more rigorous examination when the legislation was targeted at state actions that received deferential review than when the level of review was more searching.

Third, the scope of “proportional” measures required a reasonable relation to the constitutional evil. The Court looked askance at one-size-fits-all sweeping, open-ended remedies for patterns of violations that the evidence showed to be more limited. Time and again the Court recurred to the Voting Rights Act, with its temporal and geographical limits, as exemplary. The provisions there at issue banned constitutionally permitted but racist literacy tests for specific renewable periods in areas with demonstrated histories of racial discrimination in voting. In short, the Court found that “stronger” measures taking in a broader “swath” of constitutional state conduct intended as “prophylactic” against actual state violations were more likely to be found “proportional” to the constitutional harm when that harm was “worse,” in that the courts examined state action affecting a protected class or fundamental right more strictly, and vice versa.

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103. *Garrett*, 531 U.S. at 365. The determination of the “metes and bounds” of the right was similarly significant. *Id.* at 367.

104. *See, e.g., Kimel*, 528 U.S. at 83–86.

105. *See, e.g., Garrett*, 531 U.S. at 365–68.

106. *See, e.g., Hibbs*, 538 U.S. at 722; *Morrison*, 529 U.S. at 620.

107. *See Lane*, 541 U.S. at 523, 528–29.

108. *City of Boerne*, 521 U.S. at 532.

## II. Congruence and Proportionality: Explicating the Test: From *City of Boerne* to *Lane*

In this section I survey how the Court has articulated and developed the test. In the first two cases considered, *City of Boerne* itself and *Florida Prepaid*, the Court found no evidence at all in the congressional record to support the legislation at issue. In the second pair of cases, *Kimel* and *Garrett*, the Inverse Relation Principle came into play. These cases involved legislation directed at discrimination against older people and the disabled, respectively. The Court reviewed this legislation under a deferential rational basis standard. In both cases the Court was faced with substantial evidence of discrimination in the legislative record. In both the Court discounted the evidence in the record because the state action underlying the substantive rights affected involved a low level of scrutiny and therefore a lower likelihood of unconstitutionality. The third pair, *Morrison* and *Hibbs*, concerned legislation protecting rights touching on sexual equality evaluated, substantively, under heightened scrutiny. The Court here split the difference, invalidating the one and upholding the other. *Hibbs* marked the watershed. After a series of cases finding ineffective Section 5 action that failed to abrogate sovereign immunity (where pertinent), the Court, from *Hibbs* on, determined that the legislation was effective Section 5 action that did abrogate that immunity. In *Hibbs*, *Lane* and *United States v. Georgia*, the Court deployed two new analytical resources: (1) augmentation of the legislative record with its own research, and in the latter two cases, (2) recasting the issues to raise the degree of scrutiny of the underlying substantive right, and thus, by the Inverse Relation Principle, lowering the intensity of the review of record and remedies.

### A. No Evidence in the Record: *City of Boerne* and *Florida Prepaid*

As the King of Hearts instructed,<sup>109</sup> I begin at the beginning, with *City of Boerne*.<sup>110</sup> This involved a claim of religious discrimination. The city refused to issue a requested building permit for renovation of a church that was located in a designated historic district. Archbishop Flores sued under the Religious Freedom Restoration

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109. LEWIS CARROLL, *ALICE IN WONDERLAND* 106 (1971) (1865) (“Begin at the beginning,” the King said, very gravely, “and go on until you come to an end: then stop.”).

110. *City of Boerne*, 521 U.S. at 512. Justice Kennedy wrote the 6-3 majority opinion, with Justices O’Connor, Souter, and Breyer dissenting; Justice Stevens concurring; and Justice Scalia concurring in part.

Act (“RFRA”).<sup>111</sup> The Court invalidated the statute because Congress had overstepped the bounds of its Section 5 powers, intruding on the power of the judiciary to determine the substance of the right to Free Exercise of religion.<sup>112</sup> In so doing the Court established a test for effective Section 5 action. RFRA failed the test because Congress’s legislative record did not adduce sufficient evidence of intentional religious discrimination<sup>113</sup> to justify a measure of this “reach and scope.”<sup>114</sup> With respect to the three-step analysis above,<sup>115</sup> the Court disregarded “the scope of the constitutional right at issue,”<sup>116</sup> the Free Exercise Clause of the First Amendment. In *City of Boerne*, the Court formulated what became the third step, the congruence and proportionality test, which required attention to the second step, the state of the legislative record.

The Court found that “RFRA’s legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry.”<sup>117</sup> In particular, “the history of persecution in this country detailed in the hearings mentions *no episodes* occurring in the last 40 years.”<sup>118</sup> The Court characterized

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111. *Id.* (citing 42 U.S.C. § 2000bb (1993)). Congress enacted RFRA to overturn the Court’s decision in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 874 (1990) (rejecting a First Amendment Free Exercise challenge to state drug laws in the context of religious use of peyote by Native Americans).

112. *City of Boerne*, 521 U.S. at 519–20. Congressional has rarely overridden the Court’s statutory interpretations. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 313, 416 (1991). But a congressional confrontation with a judicial interpretation of a constitutional right was a gage on the floor. It was not surprising that the Court rebuffed Congress’s attempt to override *Smith*, invoking the separation of powers. See *City of Boerne*, 521 U.S. at 523–24. See also *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (A “constitutional decision of this court may not in effect be overridden by an act of Congress.”).

113. *City of Boerne*, 521 U.S. at 535.

114. *Id.* at 533. The Court also gave some weight to the statute’s adoption of, in effect, a legislatively imposed strict scrutiny test to ascertain whether a measure substantially burdened the free exercise of religion. *Id.* at 533–34. This rationale suggests that the Court may have felt that Congress went too far in giving legislative directions to the judiciary, legislatively imposing standards that the Court devised for constitutional review of state law.

115. The Court did not fully articulate that analysis until *Kimel* and *Garrett*. See *supra* Part II.B.1. *City of Boerne* mentioned the level of scrutiny, but only in passing. See *City of Boerne*, 521 U.S. at 533. *City of Boerne* did not use the Inverse Relation Principle. See *infra* notes 132, 135 and accompanying text.

116. *Garrett*, 531 U.S. at 365.

117. *City of Boerne*, 521 U.S. at 531.

118. *Id.* (emphasis added). Some of the evidence Congress heard denied that “deliberate persecution” is the “usual problem” at least today. *Id.* at 530. The Court,

the evidence as “anecdotal”<sup>119</sup> or involving only “incidental burdens” that resulted from enforcement of laws of general applicability that were not plausibly motivated by “animus or hostility.”<sup>120</sup> In contrast, provisions of the Voting Right Act, like the limited prohibition of constitutionally permissible literacy tests, were supported by extensive evidence in the record “reflecting the subsisting and pervasive discriminatory and therefore unconstitutional use of literacy tests.”<sup>121</sup>

The “reach and scope”<sup>122</sup> of RFRA was an additional problem “[r]egardless of the state of the legislative record.”<sup>123</sup> RFRA had “[s]weeping coverage . . . [intruding] at every level of government.”<sup>124</sup> Unlike the Voting Rights Act, which was targeted “at areas where voting discrimination has been most flagrant,”<sup>125</sup> and was limited to voting laws and terminable absent further violations,<sup>126</sup> RFRA lacked such limitations.<sup>127</sup> Appropriate Section 5 legislation does not, said the Court, “require ‘termination dates, geographic restrictions, or

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however, had a short memory. Four years before *City of Boerne*, it had decided *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), which found that a school’s refusal to allow religious organizations access to its facilities to engage in expression constituted impermissible viewpoint discrimination. In 1981, it had decided *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that a state university may not exclude religious groups because of the content of their views from use of open forums made available for registered student groups. If Congress neglected to mention relevant cases, the Court might have supplied the deficiency by augmenting the record sua sponte, as it was shortly to do in *Florida Prepaid*, 527 U.S. 627, 646 (1999). See *infra* note 142. In 2010, the Court decided *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), finding no unconstitutional anti-religious animus in a state law school’s requirement of compliance with nondiscrimination on the basis of sexual orientation for official student groups. The need to decide the case at this date illustrates that the issue of alleged religious bigotry is hardly a thing of the past.

119. *City of Boerne*, 521 U.S. at 530–31.

120. *Id.* at 531. The evidence included reports of autopsies objectionable under some religions and zoning regulations that had incidental effects on churches and synagogues. *Id.* The Court then stated that “it is difficult to maintain that [these] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination.” *Id.*

121. *Id.* at 525 (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)); see also *id.* at 525–27, 530.

122. *Id.* at 533.

123. *Id.* at 532.

124. *Id.*

125. *Id.* at 525, 533; *South Carolina v. Katzenbach*, 383 U.S. at 315.

126. *City of Boerne*, 521 U.S. at 533.

127. *Id.* at 532.

egregious predicates.”<sup>128</sup> However, the reasons the Court gave for the lack of proportionality referred largely to the same lack of evidence in the legislative record. “Preventative measures . . . may be appropriate when there is reason to believe that many of the laws affected . . . have a significant likelihood of being unconstitutional.”<sup>129</sup> Because there was no such evidence of religious discrimination, any statute as broad as RFRA or even, perhaps, any such statute at all, would be too broad. “RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones motivated by religious bigotry.”<sup>130</sup> This is essentially the same point about the purported paucity of instances of unconstitutional religious discrimination.

Missing from *City of Boerne* and *Florida Prepaid* was any account of the intensity of the review of the legislative record and the statutory remedy. This was significant because, the substantive rights at issue in these cases, Free Exercise and Due Process, received the highest level of review. In *Kimel* and subsequent cases that employed the Inverse Relation Principle, intensive review was explained by the

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128. *Id.* at 533. The Court, however, repeatedly invoked these limitations. See *Fla. Prepaid*, 527 U.S. at 646–47 (1999) (“An unlimited range of state conduct would expose a State” to liability under the Patent Remedy Act, and there was “no attempt to confine the reach of the Act by limiting the remedy to certain types of infringement . . . or providing for suits only against States with . . . a high incidence of infringement”); *Morrison*, 529 U.S. at 626–27 (“Section 13981 . . . applies uniformly throughout the Nation . . . [but] Congress’ findings indicate that the problem of discrimination against the victims of gender motivated crime does not exist in . . . most States.”); *Garrett*, 531 U.S. 356, 373–74 (2001) (contrasting the VRA’s limits to the ADA’s “comprehensive national mandate,” unwarranted absent a showing of a pattern of unconstitutional state discrimination against the disabled); *Hibbs*, 538 U.S. at 737–38 (approving an “across the board, routine employment benefit” [the FLMA], which the Court found appropriate in view of the effects of “formerly State-sanctioned stereotypes,” but providing a remedy “narrowly targeted at the faultline between work and family . . . and affect[ing] only one aspect of the employment relationship”); *Lane*, 541 U.S. at 531–32 (“The remedy [Title II of the ADA, prohibiting disability discrimination in public accommodations] is a limited one” because it requires only reasonable modifications and would not affect the nature of the service provided.). Apparently, broad, sweeping, inclusive congressional legislation to enforce Fourteenth Amendment rights must have something else, so far undefined, if it is not geographically, temporally, or otherwise limited, to be effective Section 5 action. Only *United States v. Georgia*, 546 U.S. 151 (2006), fails, without offering any explanation, to mention any such limitations. See *infra* Part II.D.

129. *City of Boerne*, 521 U.S. at 533. The prediction about a “significant likelihood” of unconstitutionality played a central role in *Boerne* Doctrine cases. See *infra passim*.

130. *City of Boerne*, 521 U.S. at 535.



low level of scrutiny accorded to the rights at issue, and vice versa.<sup>131</sup> In *City of Boerne*, the Court found no current “subsisting and pervasive” evil<sup>132</sup> that RFRA might counteract at any level of review, so that the appropriate degree of scrutiny for a Free Exercise case, to which the Court made passing reference, was not a major issue. Congress had essentially pleaded itself out of Court.<sup>133</sup> However, the Court observed that Congress might be acting within its Section 5 powers when there is “significant likelihood” of unconstitutional legislation,<sup>134</sup> but with RFRA the affected laws were not “likely to be unconstitutional.”<sup>135</sup> This foreshadowed the Court’s later use of its own predictions of the likelihood of unconstitutionality based on the Inverse Relation Principle, not used here.

The Court’s first application of the proportionality and congruence test in a specifically Eleventh Amendment context was *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.<sup>136</sup> This was a patent infringement case implicating Due Process. College Savings Bank had patented a financing methodology to ensure that investors could cover college tuition costs. It sued the defendant Board, which administered a state program using an allegedly similar methodology, for infringement.<sup>137</sup> The statute at issue was the Patent Remedy Act (“PRA”), the language of which expressly stated Congress’s intent to abrogate the state’s Eleventh Amendment immunity from such suits.<sup>138</sup> The Court reaffirmed that Congress lacked the power to abrogate under any of

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131. See *Lane*, 541 U.S. at 522–23; *Hibbs*, 538 U.S. at 728; *Garrett*, 531 U.S. at 366–67; *Morrison*, 529 U.S. at 620; *Kimel*, 528 U.S. at 82–84.

132. *City of Boerne*, 521 U.S. at 525; see also *Fla. Prepaid*, 527 U.S. at 640–43. *City of Boerne* raised as an objection to the statute the consideration that it “nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. . . , a considerable congressional intrusion into the States’ traditional prerogatives,” *City of Boerne*, 521 U.S. at 533, but it did not give the Inverse Relation Principle as a reason for close examination of the record, perhaps because it concluded that there was no record of violations to even consider and discount, unlike the situation with *Kimel* and *Garrett*.

133. See *id.* at 530–31.

134. *Id.* at 532.

135. *Id.* at 535.

136. *Fla. Prepaid*, 527 U.S. at 634. The decision was 5-4, with Chief Justice William Rehnquist writing for the Court and Justice John Paul Stevens dissenting, joined by Justices David Souter, Stephen Breyer, and Ruth Bader Ginsburg.

137. *Id.* at 630–31.

138. *Id.* at 632–33 (citing 35 U.S.C. § 271 (1994)).

its Article I powers—here, the Patent Clause.<sup>139</sup> But patents are property, subject to the substantive protection of the Due Process Clause.<sup>140</sup> As with *City of Boerne*, the level of scrutiny involved received no meaningful mention. The Court instead focused on the lack of evidence in the record. Congress’s own legislative record “identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.”<sup>141</sup>

Significantly, but without fanfare, *Florida Prepaid* marked the first judicial augmentation of the record, which was to play a large role in later cases. The Court looked beyond the legislative record established by Congress to what the courts themselves had independently determined to be evidence of the dimensions of the problem the legislation was meant to correct. In a quiet departure from the Court’s willingness in *City of Boerne* to ignore even its own case law in finding a pattern of recent unconstitutional conduct, the *Florida Prepaid* Court remarked that in the case on appeal, the Federal Circuit was able to identify “only eight patent infringement suits prosecuted against the States in the 110 years between 1880 and 1990.”<sup>142</sup> The meaning of the Court’s consideration of cases much older than *City of Boerne*’s implicit forty-year cutoff, was ambiguous,<sup>143</sup> but older cases came into their own in *Hibbs*.<sup>144</sup> With *Florida Prepaid*, a “handful of instances of state patent infringement that do not necessarily violate the Constitution”<sup>145</sup> would support neither Section 5 action nor abrogation of state sovereign immunity. *City of Boerne* and *Florida Prepaid* together set forth the outlines of the congruence and proportionality test as well as putting into play the Court’s own independent research, outside of the legislative record, in assessing the existence of a pattern of constitutional violations. In the cases discussed in the next Section, the Court

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139. *Id.* at 633.

140. *Id.* at 641.

141. *Id.* at 640. The record here involved frank admissions by lawmakers that there was no such pattern. *Id.* at 640–41. Moreover a patent infringement by a state was not itself unconstitutional unless the state provided no adequate remedy. *Id.* at 643; *see also infra* notes 350–52 and accompanying text. But Congress failed to establish that state remedies were inadequate rather than, perhaps, uncertain, tenuous, and not nationally uniform. *Fla. Prepaid*, 527 U.S. at 643–44.

142. *Id.* at 640 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1353–54 (Fed. Cir. 1998)).

143. *See City of Boerne*, 521 U.S. at 531.

144. *See Hibbs*, 538 U.S. at 729.

145. *Fla. Prepaid*, 527 U.S. at 646.

articulated the standard for assessment of the record in light of the scrutiny appropriate for the underlying right.

**B. The Likelihood of Constitutional Violations under Rational Basis Review: The Inverse Relation Principle in *Kimel* and *Garrett*.**

1. *The Review of the Record in Kimel and Garrett*

i. Similarities and Differences

In *Kimel v. Florida Board of Regents*,<sup>146</sup> and *Board of Trustees of University of Alabama v. Garrett*,<sup>147</sup> the Court considered suits against state institutions that under statutes that were backed with what appeared to be substantial evidence of discrimination in the legislative record. *Kimel* was brought by employees of Florida State University under the Age Discrimination in Employment Act (“ADEA”).<sup>148</sup> *Garrett* was a lawsuit against Alabama State schools under Title I of the Americans with Disabilities Act (“ADA”), which required, inter alia, reasonable accommodation for qualified individuals with disabilities.<sup>149</sup> Under *City of Boerne*, the Court had to

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146. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). The highly fractured opinion of the Court by Justice O’Connor, was in its essential parts 5-4, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Clarence Thomas. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented from the main result and concurred in other respects; Justice Thomas, joined by Justice Kennedy, concurred in the main result and dissented from others.

147. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2000). This was another 5-4 decision, written by Chief Justice Rehnquist and joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Kennedy, joined by Justice O’Connor, wrote an important concurrence to which I will return to below. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.

148. It was here consolidated with a similar case, *MacPherson v. University of Montevallo*, 922 F.2d 776 (11th Cir. 1991). See *Kimel*, 528 U.S. at 69. All of the cases involved fairly straightforward claims for disparate treatment and disparate impact discrimination in compensation because of age. *MacPherson*, 922 F.2d at 768–70.

149. See 42 U.S.C. §§ 12111(2), (5), (7), 12112(a), 12112(b)(5)(A) (1990) (cited in *Garrett*, 531 U.S. at 361). In *Garrett*, the named plaintiff was forced to give up a Director of Nursing position for a lower paid position as nurse manager at Birmingham Hospital, a state institution, after taking a long leave for breast cancer treatment. See *Garrett*, 531 U.S. at 362. The Eleventh Circuit consolidated the case with *Ash v. Alabama Department of Youth Services* under *Garrett*’s name as lead plaintiff. *Garrett v. Bd. of Trs. of Univ. of Ala.*, 193 F.3d 1214 (11th Cir. 1999). Milton Ash, an asthmatic security officer was denied modification of his duties to avoid exposure to cigarette smoke and an assignment to the day shift to accommodate his sleep apnea. See *Garrett*, 531 U.S. at 362. Both sought money damages available for failure to reasonably accommodate and for retaliation under the ADA. *Id.* at 363. The question presented in *Garrett* was whether an individual may sue a state for money damages under the ADA, *id.*, although as the Court had noted in

assess the evidence to determine whether the statute was a congruent and proportional response to a pattern of state constitutional violations. In both cases, the Court found the legislative record wanting after searching review, and so the intended abrogation failed because the legislation was not valid under the Section 5 enforcement power. In these cases, the Court articulated an Inverse Relation Principle, that the review of the record is more intense when the degree of scrutiny applicable to the underlying substantive right is more deferential—and, it emerged subsequently, vice versa. Because of their close parallels, we may treat *Kimel* and *Garrett* together.

Noting in both cases that Eleventh Amendment immunity was a jurisdictional bar to a suit against any nonconsenting state,<sup>150</sup> the Court stated that to abrogate that immunity: “[W]e must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate . . . ; and second, . . . whether [it] acted pursuant to a valid grant of constitutional authority.”<sup>151</sup> Both the ADEA and the ADA satisfied the requirement for a clear statement of intent to abrogate Eleventh Amendment immunity.<sup>152</sup> The powers question was a different matter. In *EEOC v. Wyoming*,<sup>153</sup> the Court found that the ADEA was enforceable against the state under the Commerce Power over a *Tenth* Amendment challenge.<sup>154</sup> That holding could not survive an *Eleventh* Amendment challenge after *Seminole Tribe*.<sup>155</sup>

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*Seminole Tribe*, Eleventh Amendment immunity precludes any suit in law or equity, not merely a suit for money damages. See *Seminole Tribe*, 517 U.S. 44, 58 (1996) (citation omitted); see also *Garrett*, 531 U.S. at 363 (“The ultimate guarantee of the Eleventh Amendment is that nonconsenting states may not be sued by private individuals in federal court.”); *id.* at 374 n.9 (stating that private individuals may seek injunctive relief against the states under Title I of the ADA via *Ex parte Young* actions against the appropriate state officials).

150. *Kimel*, 528 U.S. at 73; see also *Garrett*, 531 U.S. at 363.

151. *Kimel*, 528 U.S. at 73 (citing *Seminole Tribe*, 517 U.S. at 55); *Garrett*, 531 U.S. at 363–64.

152. See *Kimel*, 528 U.S. at 73 (“Congress must ‘mak[e] its intention [to abrogate] unmistakably clear in the language of the statute.’” (quoting *Dellmuth*, 491 U.S. at 228)). It was on its own terms meant to be enforceable against “the government of a State or political subdivision thereof.” *Id.* at 73–74 (quoting, inter alia, 29 U.S.C. §§ 203(x), 216(b) (1938)). *Garrett* acknowledged that the ADA easily passes the clear statement test. 531 U.S. at 364 (“A state shall not be immune under the eleventh amendment from an action in a . . . court of competent jurisdiction for a violation of this chapter.” (quoting 42 U.S.C. § 12202 (1990))).

153. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

154. *Id.* at 243.

155. *Kimel*, 528 U.S. at 79–80 (citing *Seminole Tribe*, 517 U.S. at 72–73); accord *McGinty v. New York*, 251 F.3d 84, 91 (2d Cir. 2001).

No such precedent was on point for the ADA. Moreover, with the ADA, the Court also faced one of its main previous disability cases, *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>156</sup> which had invalidated the challenged governmental action under heightened rational basis review.<sup>157</sup>

ii. *Kimel*: Valid Exercise of Section 5 Power Necessary as Well as Sufficient for Abrogation

The *Kimel* Court significantly enhanced the holdings of *Fitzpatrick* and subsequent cases regarding Section 5 powers. Hitherto the Court had held that valid action under Section 5 of the Fourteenth Amendment was a *sufficient* basis for Eleventh Amendment abrogation.<sup>158</sup> In *Kimel*, the Court decreed for the first time that the enforcement power was a *necessary* as well as a sufficient condition for abrogation. “[T]he private petitioners [here] . . . may maintain their ADEA suits against the States . . . , *if, and only if*, the ADEA is appropriate legislation under § 5.”<sup>159</sup> The Court did not here or elsewhere explain the additional limitation.

iii. Rational Basis Scrutiny and Intensive Review of the Record

*City of Boerne* and *Florida Prepaid* were easy cases, once the initial apparatus of the *Boerne* Doctrine was in place. In both, the Court found that legislative record failed to show that there were *any* constitutional violations that required prophylactic remedy. If the record showed no unconstitutional religious discrimination by the state for forty years<sup>160</sup> or no pattern of unconstitutional patent infringements by the state,<sup>161</sup> then there was essentially no evil for Congress to rectify. No legislation could be proportional to a nonexistent evil. If it is not broke, the Court held in those cases, Congress may not fix it.

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156. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (invalidating a denial of a zoning permit for a home for the “retarded” [developmentally disabled] as a violation of equal protection). In *Garrett*, the Court devoted most of its attention on the degree of scrutiny to *City of Cleburne*. See *Garrett*, 531 U.S. at 366.

157. *City of Cleburne*, 473 U.S. at 447–50.

158. See *Kimel*, 526 U.S. at 80 (citing *Fitzpatrick*, 427 U.S. at 454–55, and other cases).

159. *Id.*

160. See *City of Boerne*, 521 U.S. at 530. *But cf. Hibbs*, 538 U.S. at 729 (citing much older cases).

161. See *Fla. Prepaid*, 527 U.S. at 645–46 (“[A] handful of instances . . . that do not necessarily violate the Constitution.”).

The Court concluded in *Kimel* that the amendments to the ADEA that licensed private suits against the states, added in 1974, were “an unwarranted response to a perhaps inconsequential problem.”<sup>162</sup> Likewise the Court found in *Garrett* that Congress failed to “identify a pattern of irrational state discrimination in employment against the disabled.”<sup>163</sup> The record of discrimination against the disabled examined in *Garrett* offered a “stark” and unfavorable contrast with the sort of evidence of racial discrimination presented in the Voting Rights Act cases.<sup>164</sup> In fact Congress had amassed much evidence of discrimination against, respectively, older people and the disabled. This may explain why the *Kimel* majority opinion did not begin with a discussion of the state of the record, deferring that for eight star pages<sup>165</sup> until it spelled out the Inverse Relation Principle, which gave the Court jurisprudential resources to comb the record and discount much of it. In *Garrett*, too, the discussion of the standard of review preceded the analysis of the record.<sup>166</sup> I take the issues in the reverse order to demonstrate in some detail the ruthlessness with which the Court examined the record.<sup>167</sup>

In sifting the record in *Kimel*, the problem that the Court discerned with the evidence was that it did not go directly to *unconstitutional state* age discrimination as opposed to age discrimination at other levels of government or in the private sector, and was not embodied in formal findings so designated.<sup>168</sup> This ratcheted up the demands on the record for effective enforcement legislation in three ways: (1) the evidence had to go directly to unconstitutional discrimination; (2) the violations had to be by the

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162. *Kimel*, 528 U.S. at 89 (Congress “never identified any pattern of age discrimination by the states, much less discrimination that rose to the level of a constitutional violation.”).

163. *Garrett*, 531 U.S. at 368.

164. *Id.* at 373. *Kimel*, by contrast, did not involve an extended comparison between the record supporting the ADEA and that supporting the Voting Rights Act characteristic in the *Boerne* Doctrine cases.

165. *Kimel*, 528 U.S. at 82–89.

166. *Garrett*, 531 U.S. at 365–68.

167. As Professors James Brudney and Ruth Colker have noted, the Court’s lack of deference to Congress was part of a larger pattern under which, in various contexts, “the Court has undermined Congress’ ability to decide for itself how and whether to create a record in support of pending legislation.” See Colker & Brudney, *supra* note 100, at 83 (citing cases).

168. *Kimel*, 528 U.S. at 90. “Congress made no such findings with respect to the States.” *Id.* at 91.

states themselves,<sup>169</sup> and (3) formally designated congressional findings had more weight than other evidence.<sup>170</sup>

As the Court characterized the evidence, the legislative record for the ADEA consisted “almost entirely of isolated sentences slipped from floor debates and legislative reports.”<sup>171</sup> The Court addressed evidence from two Senate reports and two House reports. Unlike its treatment of the evidence, such as it was, in *City of Boerne* and *Florida Prepaid*, the Court relied almost entirely on conclusory characterizations rather than on specific citations. For the most part and in contrast to the prior cases, the Court did not discuss the content of the Reports or say, for example, whether the “isolated sentences” were main conclusions or summaries of important instances or major studies. It did examine congressional hearings that relied on a California legislative study, which the Court said, had not shown that “the State had engaged in any *unconstitutional* age discrimination.”<sup>172</sup> In fact, the Court said, “the majority of the age limits uncovered” were legal under state law and would pass muster under the ADEA.<sup>173</sup> How the Court knew that the limits in question were lawful without any court having adjudicated the is an interesting and constitutionally troubling question.<sup>174</sup>

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169. *City of Boerne*, of course emphasized that preventing Fourteenth Amendment violations was the purpose of Section 5 legislation and that there must be enough such violations to trigger Section 5. See, e.g., *City of Boerne*, 521 U.S. at 519. However, it did not insist that only unconstitutional state discrimination counted. Indeed, it suggested the contrary, dismissing the evidence, little if any of which involved state conduct at all, as not showing “animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country,” rather than because it was not unconstitutional action by a state. *Id.* at 531; see also *supra* note 118. Under later cases the words “unconstitutional State” would accompany the term “pattern” in the quoted passage. The Court in *Florida Prepaid* stated that Congress had “identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations,” but neither discussed nor dismissed any other sort of evidence because it adopted the determination of Federal Circuit that there was none. *Fla. Prepaid*, 527 U.S. at 640.

170. *City of Boerne* made no mention of congressional findings at all. The only reference to “findings” in *Florida Prepaid* was in Justice Stevens’s dissent. See *Fla. Prepaid*, 527 U.S. at 654 (Stevens, J., dissenting) (“It is quite unfair for the Court to strike down Congress’ Act based on an absence of findings supporting a requirement this Court had not yet articulated.”).

171. *Kimel*, 528 U.S. at 89; see also *id.* at 90 (stating that *Kimel* had “cobble[d] together assorted sentences . . . from a decade’s worth of congressional reports and floor debates”).

172. *Id.* at 90.

173. *Id.*

174. A prediction that a case that was never litigated would survive constitutional review (or not) skirted violation of the rule against advisory opinions. See *Michigan v.*

The *Kimel* Court noted the comments in the Congressional Record of six legislators. Among these, it discussed only the statement of Senator Lloyd Bentsen of Texas. He had said “there is ample evidence that age discrimination is broadly practiced in government employment.”<sup>175</sup> The Court found that Senator Bentsen’s sources were “newspaper articles about *federal* employees.”<sup>176</sup> The Court ignored without comment the Senator’s statement that “[l]etters from my own State have revealed that *state* and local governments have been guilty of discrimination towards older employees.”<sup>177</sup> This was not deference to the “decision of the body constitutionally appointed to decide.”<sup>178</sup> It did not reflect the “respect for Congress regularly voiced since the New Deal and solidly embedded in legal doctrine through the mid 1970s.”<sup>179</sup>

Likewise the Court dismissed as “beside the point” the “substantial age discrimination [that Congress found] in the private sector.”<sup>180</sup> Despite evidence of “broadly practiced” federal age discrimination, local government discrimination, and “substantial” private age discrimination, the Court “doubt[ed]” that congressional findings about the private sector “could be extrapolated to support a finding of *unconstitutional* age discrimination in the public sector.”<sup>181</sup> The Court insisted on direct evidence of unconstitutional action by the states themselves.<sup>182</sup> Justice Stephen Breyer, dissenting in *Garrett*, remarked that “[t]here is no reason to believe that [states] are immune from the ‘stereotypical assumptions’ and pattern of ‘purposeful unequal treatment’ that Congress found prevalent among private persons and local governments.”<sup>183</sup> Whether or not he was

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Long, 463 U.S. 1032, 1033 (1983) (reaffirming the “need to avoid advisory opinions”); Ala. State Fed’n of Labor v. McAdory, 325 U.S. 450, 461 (1945) (“This Court is without power to give advisory opinions.” (citing *Hayburn’s Case*, 2 U.S. 409 (1792))). My object in this Article is exposition and not critique, but a discussion of whether the *Boerne* Doctrine is constitutional on these grounds is called for.

175. *Kimel*, 528 U.S. at 89 (internal quotation marks omitted).

176. *Id.* (emphasis added).

177. *Id.* (emphasis added).

178. *City of Boerne*, 521 U.S. at 531 (citation omitted).

179. See Colker & Brudney, *supra* note 100, at 89.

180. *Kimel*, 528 U.S. at 90.

181. *Id.*

182. See *Garrett*, 531 U.S. at 365 (refusing plaintiff’s contention that unconstitutional local government discrimination should be considered on the grounds that “only the States are beneficiaries of the Eleventh Amendment”).

183. *Id.* at 378 (Breyer, J., dissenting) (ADA context).



right, the Court's refusal to accept this evidence was not deferential to Congress.

The Court's treatment of the legislative record in *Garrett* was likewise harrowing. Congress had failed to show a "pattern of irrational state [disability] discrimination."<sup>184</sup> The Court discounted evidence of disability discrimination by "units of local government, such as cities and counties,"<sup>185</sup> because these entities lacked Eleventh Amendment immunity.<sup>186</sup> It dismissed a general finding of societal discrimination against the disabled as unhelpful because "the great majority of the[] instances [in the record] do not deal with the activities of States."<sup>187</sup> Likewise, it determined that evidence of "discrimination on the basis of disability in the areas of *employment in the private sector*" was irrelevant for the same reasons.<sup>188</sup> The Court even found that the legislative record was self-undermining. Because Congress had noted that in 1990, the year that the ADA was enacted, some 43 million Americans were disabled and that the states then employed more than 4.5 million people, the Court concluded that the half-dozen examples of modern day state discrimination that the plaintiffs cited fell "far short of even suggesting the pattern of unconstitutional discrimination [required]."<sup>189</sup>

In dissent, Justice Breyer culled a more extensive set of allegations of state discrimination, in fact a fifty-state survey, from the congressional record.<sup>190</sup> As in *Kimel*, the Court discounted this as "unexamined anecdotal evidence"<sup>191</sup> of conduct not necessarily amounting to constitutional violations. In reply the Court also remarked on the lack of any formal "legislative findings" of "a

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184. *Id.* at 368 (majority opinion) (emphasis added).

185. *Id.*

186. *Id.* at 369. *But cf. Kimel*, 528 U.S. at 90–91 (skepticism about extrapolation). There was no more to the Court's reasoning in rejecting local government discrimination in *Garrett* than this.

187. *Garrett*, 531 U.S. at 369.

188. *Id.* at 371.

189. *Id.* at 370. The Court did not explain the relevance of the plaintiffs' briefs to the adequacy of Congressional record was not explained. Augmentation of the record with such evidence was not mentioned in the *Boerne* Doctrine case law or as far as I can determine elsewhere.

190. *Id.* at 376, apps. at 390–424 (Breyer, J., dissenting).

191. *Id.* at 371. The *Garrett* Court further notes that the data on which Justice Breyer relied was submitted to a Task Force rather than directly to Congress itself, *id.* at 370–71, but did not explain why that mattered.

pattern of unconstitutional behavior by the States.”<sup>192</sup> The Court said that this lack “reflects [Congress’s] judgment that no pattern of unconstitutional state action had been documented.”<sup>193</sup> This went beyond attributing special weight to formal congressional findings. It suggested that the lack of such findings amounts to an unstated negative conclusion.<sup>194</sup>

In concurrence, Justice Anthony Kennedy, joined by Justice Sandra Day O’Connor, further attributed negative significance to the fact that the record lacked evidence of *case law* on the issue. “If the States had been transgressing the Fourteenth Amendment by [disability discrimination] . . . one would have expected to find . . . extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist.”<sup>195</sup> The courts were thereby invited to assess the legislative record in part by the results of judicial research at least into this body of adjudicative facts,<sup>196</sup> an invitation the Court was to accept with gusto in *Hibbs* and *Lane*.<sup>197</sup>

## 2. *The Inverse Relation Principle*

In both *Kimel* and *Garrett*, the Court had to deconstruct and recharacterize extensive legislative records and, in the case of the ADA, express findings, if only to dismiss them. Two questions arise:

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192. *Id.* at 371; *see also Kimel*, 528 U.S. at 92 (no such findings of state age discrimination). The relevant pattern here was specified as one of unconstitutional state action. *Contra City of Boerne*, 521 U.S. at 519 (1997); *see also supra* note 182.

193. *Garrett*, 531 U.S. at 391 (“Had Congress truly understood this information as reflecting [such a pattern], one would expect some mention of that conclusion in the Act’s legislative findings.”); *see also id.* at 372.

194. The general rule in statutory interpretation has been that “congressional silence” “lacks persuasive significance.” *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (internal citations omitted) (internal quotation marks omitted). “Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.” *Zuber v. Allen*, 396 U.S. 168, 185–86 n.21 (1969). *But cf. Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1517 (2009) (“Evidence that Congress confronted an issue in some parts of a statute, while leaving it unaddressed in others, can demonstrate that Congress meant its silence to be decisive.”).

195. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).

196. *See Fla. Prepaid*, 527 U.S. at 640 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1353–54 (Fed. Cir. 1998)) (citing independent judicial research on the infrequency of patent infringement cases against the states); *see also supra* note 142 and accompanying text. The concurrence did not cite this as a precedent for using such research to assess the record.

197. *See Lane*, 541 U.S. at 524–26 nn.5–14 (citing cases); *Hibbs*, 538 U.S. at 729 (citing cases).

(1) what accounted for the intensity of this review of the record and remedy?; and (2) what was the significance of the Court's emphasis on the need for direct evidence of *unconstitutional state* discrimination? The answers take us to the treatment of the degree of scrutiny for the substantive constitutional rights at issue that preceded these interrogations of the record. The *Garrett* Court called this the determination of "the scope of the constitutional right at issue."<sup>198</sup> In *Kimel* and *Garrett*, the Court developed the Inverse Relation Principle, linking the degree of deference accorded to actions affecting underlying substantive rights to the intensity of review of the record and remedy for Section 5 purposes. In the abrogation or Section 5 context, the appropriate degree of deference was accorded to the state action that Congress seeks to regulate and not to the federal legislation regulating such action.

The "degree of scrutiny" is a term of art referring to how much deference the judiciary has usually given governmental action implicating the substantive guarantees of the Fourteenth Amendment or affecting fundamental rights and liberties.<sup>199</sup> Most classifications have received "rational basis" review and generally have been treated deferentially by the courts.<sup>200</sup> "Strict" scrutiny, the least deferential sort of review, has been reserved for classifications based on race, color or national origin.<sup>201</sup> Outside the Equal Protection context,

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198. *Garrett*, 531 U.S. at 365. The characterization is misleading because the level of scrutiny does not determine the "substance of the constitutional guarantee." *Id.* The "substance of the constitutional guarantee," in *Garrett* for example, is that the disabled may not be subject to irrational discrimination. *Id.* at 367. The term "irrational" signifies deferential scrutiny. *Id.* It does not say what the right is (its substance), but how stringently cases involving it are reviewed.

199. Under long established precedent, there are three levels of scrutiny. In dicta in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), the Court distinguished between two levels, roughly, legislation affecting "discrete and insular" minorities which might have immutable characteristics, lack political power, and be marked by immutable characteristics, on the one hand, which called for heightened scrutiny, and ordinary social and economic legislation, on the other, which received what is now called "rational basis" scrutiny. The concept that discrimination because of race, color, or national origin in particular required especially heightened review—later called "strict" scrutiny—was introduced in the disgraceful case of *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the detention of Japanese Americans during World War II). Somewhat less heightened "intermediate scrutiny," appropriate mainly for gender discrimination, was introduced later. See *Reed v. Reed*, 401 U.S. 71 (1971) (citing cases); see also *infra* note 203.

200. See also *infra* notes 205-14, 218-220 and accompanying text for discussion.

201. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995); *Shaw v.*

governmental actions affecting fundamental due process or other basic rights and liberties also typically have received strict or very heightened scrutiny.<sup>202</sup> “Intermediate” scrutiny, heightened but not strict, effectively has applied mainly to classification based on sex.<sup>203</sup>

In view of these well known standards, *Kimel* and *Garrett* imported into the congruence and proportionality test an Inverse Relation Principle: The lower the degree of scrutiny appropriate for the underlying right, the more intense the Court’s review of the adequacy of congressional evidence to support Section 5 measures of whatever strength is involved, and later emerged, vice versa.<sup>204</sup> The question was the relation between the scope of the right and the state

Reno, 509 U.S. 630, 644–45 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494–95 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305–06 (1978).

202. With regard to fundamental rights, Justice Thomas, concurring in *McDonald v. City of Chicago*, cites with approval an 1823 case that stated, “[w]hen describing those ‘fundamental’ rights it ‘would perhaps be more tedious than difficult to enumerate’ them all, but suggested that they could ‘be all comprehended under’ a broad list of ‘general heads,’ such as ‘[p]rotection by the government,’ ‘the enjoyment of life and liberty, with the right to acquire and possess property of every kind,’ ‘the benefit of the writ of habeas corpus,’ and the right of access to ‘the courts of the state,’ among others.” 130 S. Ct. 3020, 3067 (2010) (Thomas, J., concurring) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (E.D. Pa. 1823) (No. 3230)) (providing a partial list). The list has lengthened considerably since.

A less-than-inclusive list of fundamental liberties was included by the Court in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997): “In addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one’s children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, [*Griswold v. Connecticut*, 381 U.S. 479 (1965)]; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)].”

203. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982) (same); see also *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (stating for illegitimacy, “[s]uch restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest”).

204. See *Lane*, 541 U.S. at 529; *Hibbs*, 538 U.S. at 735–36; *Morrison*, 529 U.S. at 620. Part of the idea underlying the principle was mentioned but not developed in this way or so used in *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (noting that the statute “nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation . . . , a considerable congressional intrusion into the States’ traditional prerogatives”). Here the attention was directed to intrusion on state prerogatives rather than intensity of review of the record.

of record. The more deferential the treatment of the record, the less deferential the review of the right.

Both *Kimel* and *Garrett* began their analyses with an extensive discussion of the deferential rational basis scrutiny for review of an Equal Protection claim against government action based on age or disability.<sup>205</sup> Age was “not a suspect classification under the Equal Protection Clause,”<sup>206</sup> and so did not call for heightened scrutiny. Disability too was not even “quasi-suspect.”<sup>207</sup> State classifications by

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205. Rational basis review requires only that the legislative end be legitimate and the means be rationally related to that end. *Garrett*, 531 U.S. at 367; *Kimel*, 528 U.S. at 83. Classifications subject to such review were “presumptively rational,” *id.* at 84, and would as a rule survive a constitutional challenge. They would be overturned only if the Court concluded that they were irrational. *Id.* The state need not articulated its reasoning because the burden is on the opposing party must show that no “reasonably conceivable state of facts . . . could provide a rational basis for the classification.” *Garrett*, 531 U.S. at 367.

Rational basis review has not always been so deferential. *See, e.g., City of Cleburne*, 473 U.S. 436 (1985) (invalidating municipal refusal to issue a permit for a home for the developmentally disabled). Disability, as discussed there, involves rational basis review, but the governmental action in that case was not upheld. *See City of Cleburne*, 473 U.S. at 445–56; *see also infra* notes 211, 213–14 and accompanying text. *City of Cleburne* has been thought to have involved “heightened” rational basis review, “Equal Protection [or rational basis with] bite,” less stringent than the intermediate or strict scrutiny but less deferential than ordinary deferential rational basis review. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972). Such cases are more common than one might have thought. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (finding that between 1971 and 1996, the Court applied heightened rational basis scrutiny in ten of one hundred cases); *see also, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (finding a liberty right to private consensual sexual conduct between adults under rational basis review). Had the Court invoked the heightened rational basis review it used in *City of Cleburne*, its review of the record might have been less aggressive and the outcome different.

206. *Kimel*, 528 U.S. at 83 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam)). Older people have not been subject to a “history of purposeful unequal treatment,” *Kimel*, 528 U.S. at 83 (quoting *Murgia*, 427 U.S. at 313), nor did they constitute a “discrete and insular minority.” *Id.* (explaining that these are among the criteria for suspect class status and heightened scrutiny under the *Carolene Products* footnote four standard). *See infra* note 207. *Kimel* elaborated that a state may even constitutionally “rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the state’s legitimate interests.” *Kimel*, 528 U.S. at 84. And the state may rationally do so even if age is an unintentionally false proxy for the characteristic in question. *See id.*

207. *Garrett*, 531 U.S. at 366 (quoting *City of Cleburne*, 473 U.S. at 445); *see also Hibbs*, 538 U.S. at 728; *Heller v. Doe*, 509 U.S. 312, 319 (1993). With disability, unlike age, the *City of Cleburne* Court allowed that the developmentally disabled (the Court used “retarded,” the term then in common parlance, 473 U.S. at 445) had “perhaps immutable

age or disability received only the most deferential level of judicial scrutiny and so would probably be upheld as constitutional. “[A]dverse disparate treatment *often does not amount to a constitutional violation* where rational basis scrutiny applies.”<sup>208</sup> According to the Court, age and disability, unlike sex or race, were not “so seldom relevant to the achievement of any legitimate state end that laws grounded in such considerations are deemed to reflect” irrational bias.<sup>209</sup> Rational basis classifications based *merely* on “‘negative attitudes’ or ‘fear’” would fail as irrational,<sup>210</sup> like the one in *City of Cleburne*.<sup>211</sup> But even irrational prejudice “alone does not a

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disabilities setting them off from others . . . , cannot themselves mandate the desired legislative responses, and . . . claim some degree of prejudice from the public at large.” *Garrett*, 531 U.S. at 366 (quoting *City of Cleburne*, 473 U.S. at 445–46). Logically, that was to say, the disabled qualified as a suspect class.

However, the Court was “reluctant” to include the disabled in the list of suspect classifications because “it would be difficult to find a principled way to distinguish a variety of other groups . . .” with these characteristics—including the “aging.” *City of Cleburne*, 473 U.S. at 445–46. The list included the “aging, the disabled, the mentally ill and the infirm.” *Id.* (emphasis added). *City of Cleburne* was decided in 1985, after *Murgia* (1976) and *Bradley* (1979), where the Court had denied that the “aging” fit the *Carolene Products* footnote four criteria. In the ADA, Congress made formal findings that the disabled satisfied those criteria. See *Lane*, 541 U.S. at 516 (quoting 42 U.S.C. § 12101(a)(7) (1990)). As Oliver Wendell Holmes, Jr., quipped, “[t]he life of the law has not been logic; it has been experience.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1991) (1881). (Whose experience, he did not say.)

208. *Garrett*, 531 U.S. at 370 (emphasis added).

209. *Kimel*, 528 U.S. at 83.

210. *Garrett*, 531 U.S. at 367 (quoting *City of Cleburne*, 473 U.S. at 448).

211. *City of Cleburne*, 473 U.S. at 450. This was one of the Court’s two precedents addressing disability, and the one most discussed by the *Garrett* Court. The other was *Heller v. Doe*, 509 U.S. 312, 319 (1993) (upholding Kentucky’s involuntary commitment statute for the developmentally disabled under rational basis review). The attention the *Garrett* Court devoted to *City of Cleburne* might have been devoted in part to distinguishing the heightened rational basis review used there from the ordinary deferential rational basis used in *Heller*. See *id.* Alternatively, the Court might have relied primarily on *Heller*, with or without comment on *City of Cleburne*, as precedent for application of traditional rational basis review in disability cases.

Curiously, the Court did neither. It used *City of Cleburne* as its primary grounds for explicating rational basis review in a disability context and applying the normally extremely deferential treatment involved in such review to State disability classifications, without even remarking on the fact that the municipal action in *City of Cleburne* failed under “rational basis with bite.” That is, it treated *City of Cleburne* as if it were no different from *Heller* or any other relatively toothless rational basis case. Perhaps that the Court wished to cabin the meaning of *City of Cleburne* by suggesting that it was to be treated no differently than *Heller*. This would be more comprehensible if the Court had not repeatedly reaffirmed its willingness to use “rational basis with bite” to invalidate state action in other contexts. See *supra* note 205.

constitutional violation make,”<sup>212</sup> as long as there was some conceivable rational basis for the discrimination in the mix,<sup>213</sup> or perhaps if the discrimination was motivated by mere indifference as opposed to unvarnished animus.<sup>214</sup>

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212. *Garrett*, 531 U.S. at 367.

213. *Id.* at 372. The *Garrett* Court further hinted that analysis of a classification for rational basis review in the Section 5 analysis context may not be subject to the “pretext” inquiry that can defeat a claim of legitimate nondiscriminatory reason in an antidiscrimination statute context. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (rebuttal of employer’s legitimate nondiscriminatory reason for disparate treatment part of prima facie case); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (disbelief in Title VII defendant’s nondiscriminatory reason sufficient grounds to find for plaintiff).

The Court might seem to have rejected application, for Section 5 purposes in rational basis cases, of the *Price-Waterhouse v. Hopkins* mixed-motive analysis, allowing a finding of liability if any part of the defendant’s motive is unlawfully discriminatory. *See Price-Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (superseded and modified in part by statute) (“[E]mployer may not . . . prevail . . . if [a legitimate reason did not motivate it[s] . . . decision,” or did “only in part. . .”). Analysis of the record for effective Section 5 action is subject to rational basis review.

Thus in *Garrett*, reluctance to pay the costs of even the minimal *reasonable* accommodation required by the ADA, 42 U.S.C. §§ 12111(9), 12112(a), (b)(5)(A) (1990) would be a properly cognizable factor that would make a discriminatory classification pass rational basis review even if it was also motivated by irrational fear and animus. “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job requirements that do not make allowance for the disabled.” *Garrett*, 531 U.S. at 367–68; *see also id.* at 372. Such cost may not be very great to become *statutorily* unreasonable. *See, e.g., Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995) (holding inter alia that \$150 cost of lowering sink made this requested accommodation for wheelchair-using employee unreasonable).

However, this would be to plainly misread *City of Cleburne*. What the Court held impermissible there was the denial of a permit based “merely” on “negative attitudes, or fear *unsubstantiated by factors that are properly cognizable in a zoning proceeding.*” *City of Cleburne*, 473 U.S. at 448 (emphasis added). That implied that if negative attitudes and fear are involved, they must be substantiated by factors that are “properly cognizable” in that sort of classification; i.e., the negative attitudes and fear must be justifiable and not “mere.” Disability discrimination could withstand Equal Protection review if motivated by cost (or some other purportedly rational ground for disparate treatment) *and* by fear and negative attitudes, but only if those attitudes were themselves rationally linked to (“substantiated by”) to the sort of classification at issue and justifiable (“properly cognizable”) in that sort of proceeding. The mere existence of a rational basis, would not be enough, if there were also unconnected negative attitudes and fear in the mix.

214. The *Garrett* concurrence further stated that discriminatory action based on prejudice due to “indifference or insecurity” rather than “malicious ill will” could pass constitutional muster because such discriminatory conduct “does not always constitute the purposeful and intentional conduct required to make out a violation of the Equal Protection Clause.” 531 U.S. at 375 (Kennedy, J., concurring) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). This was puzzling. One can see how indifference (not caring) might fail to rise to constitutional intent or purpose, but insecurity would seem to be a

Congress might legislate prophylactically against constitutionally permitted state conduct under Section 5, but there must have been enough unconstitutional state conduct to trigger the enforcement power, because the purpose of Section 5 is to deter unconstitutional state action.<sup>215</sup> With a right involving rational basis scrutiny, the likelihood was that there would be too few constitutional violations to warrant prophylactic application of measures like the ADEA or the Title I of the ADA against a state. Were the Court actually to have adjudicated any purported instance of state discrimination in the legislative record, it would probably have held that the provision or action was constitutional. It was unlikely that the Court would have determined that Section 5 enforcement powers had been validly triggered on such a basis even if the legislative record showed a fair amount of evidence of state discrimination in the record. Accordingly, the Court would give the record exacting review to determine whether the instances of discrimination adduced really did establish a “pattern of . . . discrimination by the States . . . that rose to the level of constitutional violation.”<sup>216</sup> The *Hibbs* Court later expressly stated the converse: “[B]ecause the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.”<sup>217</sup>

Here, where the rights at stake involved only rational basis review, the Court examined the legislative record in demanding manner. The *Garrett* dissent characterized the Court’s approach uncharitably but not unfairly as “reviewing the congressional record as if it were an administrative agency record,”<sup>218</sup> subject to something

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different creature entirely, basically indistinguishable from the mere “fear” prohibited as free-standing motive for discrimination in *City of Cleburne*.

215. See, e.g., *Fla. Prepaid*, 527 U.S. at 645–47; *City of Boerne*, 521 U.S. at 518, 534–35. This does not explain why the Court was reluctant to draw inferences about unconstitutional state behavior from that of governmental units, e.g., federal or municipal, or from discrimination in private contexts.

216. *Kimel*, 528 U.S. at 89.

217. *Hibbs*, 538 U.S. at 735–36; see also *Morrison*, 529 U.S. at 620 (there noting the higher degree of scrutiny but finding no pattern of violations). See *infra* Part II.C.1 for an analysis of the odd treatment of the record in *Morrison*. This was the idea behind the Court’s reframing the issue to raise the standard, as in its consideration of Title II of the ADA in *Lane*, 541 U.S. at 529 (right of judicial access to courts and other fundamental rights involved in case “call for a standard of judicial review at least as searching and in some cases more searching than the standard that applies to sex-based classifications”).

218. *Garrett*, 531 U.S. at 374 (Breyer, J., dissenting). The current “arbitrary and capricious” standard of review for agency rulemaking has been called the “hard look”



like the very high standards for review of agency rulemaking. The ADEA and Title I of ADA were not “‘appropriate’ legislation’ under § 5,”<sup>219</sup> ultimately because they “‘prohibit[ ] very little conduct *likely* to be held unconstitutional.”<sup>220</sup>

To summarize: Whether Section 5 legislation would be congruent and proportional involved a *prediction by the Court* about whether it would be likely to hold actual state practices (if any) adduced in the legislative record unconstitutional if plaintiffs were to bring lawsuits and the Court were to actually adjudicate them.<sup>221</sup> The Inverse Relation Principle linked involved a generalization about the probability, given the evidence and the degree of scrutiny to which the right involved was subject, of finding certain state actions to be unconstitutional—a low probability with discrimination, like age or disability discrimination, scrutinized under deferential rational basis review. The likelihood was higher, and review of the record more relaxed, under kinds of discrimination that received less deferential review. The intensity of review of the record and remedy varied inversely with the judicial prediction of the likelihood of the state constitutional violations needed to trigger Fourteenth Amendment enforcement powers. In Eleventh Amendment contexts, this meant

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doctrine. See Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 387 (2009) (citations omitted). “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made . . . [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . ., or is [highly] implausible . . . The reviewing court should not attempt itself to make up for such deficiencies. . . .” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29, 42–44 (1983) (citations omitted).

219. *Kimel*, 528 U.S. at 82–84; see also *Garrett*, 531 U.S. at 374.

220. *Kimel*, 528 U.S. at 88 (citing *Fla. Prepaid*, 527 U.S. at 645–47). The cited text from *Florida Prepaid* said nothing about the *likelihood* of any state patent infringement being unconstitutional beyond observing that the record involved “a handful of instances that do not necessarily violate the Constitution.” *Fla. Prepaid*, 527 U.S. at 645–47 (emphasis added). *Florida Prepaid* did allude to the likelihood of unconstitutionality is a passing citation to *City of Boerne*, see *id.* at 639, but made little of the issue. Neither did *Florida Prepaid* mention the standard of review or invoke the Inverse Relation Principle. *City of Boerne v. Flore* also mentioned the likelihood of constitutional violation three times, 521 U.S. 507, 32, 5343, 534–35 (1997), without stating or using the Inverse Relation Rule. Subsequently, in *Tennessee v. Lane*, the Court explained that infringements of Due Process like those at stake in *Florida Prepaid* and *Lane* itself, “are subject to more searching judicial review,” *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004); see also *Garrett*, 531 U.S. at 372–73.

221. *Kimel*, 528 U.S. at 86 (emphasis added); see also *id.* at 83.

that the intensity of the review of the record crucial to the congruence and proportionality test depended on the level of scrutiny appropriate for the constitutional violation that activated Congress's Section 5 powers.

### 3. *Congruence and Proportionality in Kimel and Garrett*

In *Kimel* and *Garrett*, the outcomes of the congruence and proportionality test were virtually a foregone conclusion with broad, sweeping legislation like the ADEA or the ADA, lacking "termination dates, geographic restrictions, or egregious predicates"<sup>222</sup> and unsupported under these exacting standards by evidence of patterns of unconstitutional state action. After the Court found no acceptable evidence under the rigorous review of the record called for by the Inverse Relation Principle that the ADEA was warranted by "any pattern of age discrimination by the States, much less [one] . . . that rose to the level of a constitutional violation,"<sup>223</sup> it was no surprise that the Court found that "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."<sup>224</sup> Likewise, the Court determined the rights and remedies created by the ADA against the states . . . ADA "far exceed[] what [would be] constitutionally required,"<sup>225</sup> "even if it were possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States."<sup>226</sup> *Garrett* noted the "stark"<sup>227</sup> contrast in between the legislation upheld in the Voting Rights Act cases and the ADA. The VRA was premised on a showing of a "marked pattern of unconstitutional action by the States,"<sup>228</sup> and offered a "detailed but limited remedial scheme."<sup>229</sup> The ADA presented no such evidence, but involved a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>230</sup> No statute with such a scope and such a record, the Court said here (it would change its tune in *Hibbs*), could survive the test for Section 5

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222. *City of Boerne*, 521 U.S. at 533.

223. *Kimel*, 528 U.S. at 89.

224. *Id.*

225. *Garrett*, 531 U.S. at 372 (reasonable accommodation requirement).

226. *Id.*

227. *Id.* at 373.

228. *Id.*

229. *Id.*

230. *Id.* (quoting 42 U.S.C. § 12101(b)(1) (1990)).

enforcement action. Therefore, it could not abrogate state sovereign immunity.

### C. Heightened Review, Opposites Outcomes: *Morrison* and *Hibbs*

*United States v. Morrison*<sup>231</sup> was the last *Boerne* Doctrine case to date in which the legislation was determined to be insufficient. *Hibbs*<sup>232</sup> was the first of the most recent three cases where the results were the opposite. Both were sex discrimination cases where the underlying right involved heightened review. In *City of Boerne* and *Florida Prepaid*, the basic rights implicated also called for elevated scrutiny, but this consideration played no part in the analysis.<sup>233</sup> In *Morrison* and *Hibbs*, however, the degree of scrutiny received mention, and in *Hibbs* it had a crucial analytical role. *Morrison*, however, is something of an outlier, because virtually the entire weight of the Section 5 analysis was carried by the scope and nature of the remedy rather than the record, unlike in *Hibbs*. The case might have had a different outcome had it been treated more like *Hibbs*, where the Court gave the record a detailed but relaxed review and found the evidence adequate and the remedy appropriate.

#### 1. *The Outlier: Morrison and Desperately Unconstrained Remedies*

*United States v. Morrison*<sup>234</sup> involved a challenge to the civil remedies in the Violence Against Women Act of 1994 (“VAWA”),<sup>235</sup> providing for monetary damages and other relief against the perpetrator of “a crime of gender motivated violence.”<sup>236</sup> *Morrison*, a student at Virginia Polytechnical Institute (“Virginia Tech”), a state institution, admittedly sexually assaulted a female fellow student, Christy Brozonkala, who sued him in federal court under VAWA.<sup>237</sup> The Supreme Court affirmed the dismissal of her complaint, holding,

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231. *United States v. Morrison*, 529 U.S. 598 (2000).

232. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

233. *See supra* notes 112, 132–35, 220 and accompanying text.

234. The decision was 5-4, with an opinion of the Court by Chief Justice Rehnquist, a separate concurrence by Justice Thomas, who also joined the opinion of the Court, and dissents by Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, and by Justice Breyer, joined by the same minority.

235. 42 U.S.C. § 13981 (1994). The case also addressed and rejected Congress’s attempt to use the Commerce power to support the challenged statute, a topic not discussed here. *See Morrison*, 529 U.S. at 608–19

236. 42 U.S.C. § 13981(b)–(c).

237. *See Morrison*, 529 U.S. at 603. *See infra* note 254 for further details of the procedural history.

inter alia, that the relevant provision of VAWA failed the congruence and proportionality test for effective Section 5 enforcement action, in particular because it was not directed against state—here in the sense of governmental—action. *Morrison*, like *City of Boerne*, concerned only the requirements for Section 5 powers, and not state sovereign immunity. *Morrison* was not a state actor with Eleventh Amendment immunity and *Virginia Tech*, which was a state actor, was not a party. Nonetheless, because abrogate state sovereign immunity requires Section 5 powers, *Morrison* is pertinent to Eleventh Amendment issues.

The Court began by noting that “state sponsored gender discrimination” received heightened “intermediate” review,<sup>238</sup> and so would be more likely to be found unconstitutional. Therefore, other things being equal, a federal gender discrimination law would be more likely to be a valid exercise of Section 5 powers in the “broader swath.” Here the Court found that other things were not equal. *Morrison* was unique among the *Boerne* Doctrine cases in that the outcome turned almost exclusively on the remedy.<sup>239</sup> The primary problem was that the civil remedy provided in section 13981 failed the state action requirement.<sup>240</sup> This is the constraint that the substantive provisions of Fourteenth Amendment “‘have reference to State Action exclusively and not to any action of private individuals.’”<sup>241</sup> The pertinence of the state action requirement as applied to this particular case was unclear, as opposed to whether section 13981 fell within the broader swath outside the sphere of strict state constitutional violations. Despite this, *Morrison* did not limit Section 5 action to “legislation that merely parrots the precise wording of the Fourteenth Amendment.”<sup>242</sup> Rather, *Morrison* said that Section

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238. *Id.* at 626.

239. The state of the record provided an alternative basis for the decision, which, however, received only the briefest of discussions. *See id.* at 626–27.

240. *Id.* at 621.

241. *Id.* (citing *United States v. Harris*, 106 U.S. 629 (1883) (striking down § 2 of the Civil Rights Act of 1871 as an invalid attempt to exercise Congress’s enforcement powers because that provision was directed at “private persons” who conspired to deprive anyone of equal protection); *The Civil Rights Cases*, 109 U.S. 3 (1883) (similar)). Under these and other Reconstruction precedents, the substantive provisions of the Fourteenth Amendment were determined to “‘have reference to State [meaning, here, governmental] action exclusively.’” *Id.* (quoting *Virginia v. Rives*, 100 U.S. 313, 318 (1879)).

242. *Kimel*, 528 U.S. at 81; *see also Garrett*, 531 U.S. at 365. Legislation in “the broader swath” was approved in *Hibbs* and *Lane*. *Morrison* itself indicates that legislation prohibiting “discrimination by officials which the Fourteenth Amendment might not itself

13981 was “not *aimed* at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is not *directed* at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”<sup>243</sup> Section 13981 “visits no consequence whatever on any Virginia public official,”<sup>244</sup> unlike, e.g., the Voting Rights Act, which regulated the conduct of state officials and states.<sup>245</sup> The Court offered no explanation of the terms “aimed at” and “directed against.” The most natural reading is that these terms impose no further requirements beyond the demand that legislation in the “broader swath” be designed to “remedy and deter” state constitutional violations.<sup>246</sup>

*Morrison* squared poorly with *Fitzpatrick*. *Fitzpatrick* held that Title VII abrogated the state’s Eleventh Amendment immunity, even though that statute created a private cause of action against “employers”<sup>247</sup> and was not *primarily* directed against discrimination

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proscribe,” *Morrison*, 529 U.S. at 626, could satisfy the requirements of Section 5 even if Section 13981 did not.

243. *Id.* (emphasis added).

244. *Id.*

245. *Id.*

246. *See Kimel*, 528 U.S. at 81; *see also City of Boerne*, 521 U.S. at 518.

247. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Of course, Section 5 action, unlike abrogation, was not required to meet a clear statement test. *See Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). However, Congress’s invocation of state action and clear intention to subject the state to private suit was much clearer in Section 13981 than in Title VII. The core of Title VII was that “[i]t shall be . . . unlawful . . . for an *employer* . . . to discriminate against any *individual* with respect to his . . . terms [or] conditions . . . of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e -2(a) (1964) (emphasis added). “Employer” was not expressly defined to include any governmental entity. *Id.* § 2000e(b) (“[E]mployer” means a person engaged in an industry affecting commerce.). *Fitzpatrick* stated that the 1973 amendments “includ[ed] . . . the States within its purview.” *Fitzpatrick*, 427 U.S. at 449 n.2 (“The term ‘person’ includes . . . governments, [and] governmental agencies. . . .” (quoting 42 U.S.C. § 2000e(a))). However, the basic prohibition of Title VII ran to “employers” and not “persons.”

*Fitzpatrick* stated that “[t]here is no dispute that in enacting the 1972 Amendments . . . extend[ed] coverage to the States as employers,” citing the legislative history—viz. two congressional reports. *Id.* at 453 n.9. That might suffice for a state action requirement, but the express language in Section 13981 was absolutely unambiguous (“A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State. . . .”). That included more than the states, but as frequently noted, Congress may exercise its Section 5 powers to regulate constitutionally permissible conduct as long as there is a pattern of state constitutional violations for the broader prohibition to prevent and deter. With Section 13981, Congress expressly so found, as the Court admitted. *See Morrison*, 529 U.S. at 614 (Section 13981 “is supported by numerous

by governmental employers. Neither did Congress target Title VII narrowly at state employers—although in 1972 it amended the statute to include them. Section 13981 did not *exclude* civil action against state officials who commit acts of gender-motivated violence, on the contrary. In fact, Congress expressly built in a state action jurisdictional element in terms familiar from civil rights law: Included in scope of the law were crimes committed “under [the] color of any [state law] . . . [or] custom . . .”<sup>248</sup> The Court acknowledged in principle the respect due “for the decisions of a coordinate branch of Government,”<sup>249</sup> but rejected Congress’s conclusion that a private right of action against non-state *and state* actors for constitutionally permissible discrimination could deter and prevent state constitutional violations.

The Court offered, as an alternative ground for decision, a brief and conclusory discussion of the record,<sup>250</sup> saying that “Congress’ findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.”<sup>251</sup> Accordingly a uniform, national law like section 13981, applying to all states, was not congruent or proportional to the documented evil.<sup>252</sup> The Court recurred to the usual contrast with the

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findings” [Commerce Clause context.]; *see also id.* at 620. *See also infra* note 254 and accompanying text.

248. *See* 42 U.S.C. § 13981(c) (1994). *Compare* 18 U.S.C. § 242 (1948) (“Whoever, under color of any law . . . or custom, willfully subjects any person in any State . . . to the deprivation of any [legal] rights . . . , shall be fined under this title or imprisoned not more than one year, or both; . . . or if such acts include . . . , aggravated sexual abuse . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.”), *with* 42 U.S.C. § 1983 (1979) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .”).

249. *Morrison*, 529 U.S. at 607.

250. *Id.* at 626, 627.

251. *Id.* at 626.

252. *Id.* at 625–26. That is the Court’s entire discussion of the record with respect to Section 5. The discussion of the record supporting the Commerce power basis for the provision was, by contrast, highly comprehensive and elaborately reasoned—perhaps because of the felt need to justify the Court’s determination in view of the long tradition of extreme deference to legislation under the Commerce Clause. *See id.* at 607–19. At the time, in sixty years, the Court had struck down only one Commerce power statute, the Gun Free School Zone Act, in large part on insufficiency of the record and the findings. *See United States v. Lopez*, 514 U.S. 549 (1995); *see also supra* note 15 and accompanying text.

Voting Rights Act, which targeted “only . . . the State[s] where the evil found by Congress existed.”<sup>253</sup> This lack of discussion might seem puzzling in light of the Court’s observation that the statute “is supported by a voluminous Congressional record.”<sup>254</sup> Congress’s findings of state constitutional violations in *Morrison* are no thinner than in *Hibbs*. It is difficult to avoid the conclusion that *Morrison* was wrongly decided on the Court’s own terms.<sup>255</sup>

The justifiability of the Court’s conclusion in *Morrison*, however, is not at issue here. The question is an explanatory one. Why, after the rigorous examination of the record in *Kimel* and *Garrett*, did the *Morrison* Court essentially ignore the “voluminous” evidence that it admitted existed? The Inverse Relation Principle suggests an *analytical* answer: At a higher standard of scrutiny for the underlying right, the Court gave the record less rigorous attention. However, that Principle also indicated a more deferential approach to the record and the remedy. In *Hibbs* and *Lane* the Court’s treatment of

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253. *Morrison*, 529 U.S. at 626–27.

254. *Id.* at 619–20. This evidence supported the conclusion “that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions.” *Id.* at 620 (citing House and Senate Reports). “Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.” *Id.* The Court ignored the new salience it had given express Congressional findings. *Cf. Garrett*, 531 U.S. at 365 (“[H]ad Congress truly understood this information as reflecting [such a pattern], one would expect some mention of that conclusion in the Act’s legislative findings.”); *see also Kimel*, 528 U.S. at 90, 91. In *Morrison*, the formal findings did reflect Congress’s belief in the existence of a pattern, but that made no difference to the outcome.

The facts of *Morrison* exemplified Congress’s findings. A state educational institution’s disciplinary board heard evidence that Morrison had raped the plaintiff. *Morrison*, 529 U.S. at 603 (He “admitted having sexual conduct with [plaintiff] despite the fact that she twice told him ‘no.’”). Rape was a felony punishable by five years to life in Virginia. *See* VA. CODE § 18.2-61 (B) (1950); *see also* 18 U.S.C. § 241 (1948) (a potential capital crime) (summarized in *supra* note 248). The Board sentenced Morrison to two semesters suspension from school. *Morrison*, 529 U.S. at 603, 607. Then, at a second hearing, the charges “changed from ‘sexual assault’ to ‘using abusive language,’” because the school policy prohibiting rape “had not been widely circulated among the students,” who were apparently therefore not on notice that rape was against school policy as well as the criminal law. *Id.* The Board resented Morrison to two months suspension, and set aside *this* disciplinary action on administrative appeal as “excessive” in comparison to other violations of school policy. *Id.* If that was not insufficient prosecution of gender-motivated crime and unacceptably lenient punishment for someone who was admittedly guilty of gender-motivated violence, it will do till the real thing comes along.

255. Estreicher & Lemos, *supra* note 11, at 110 (“*Morrison* is troubling precisely because it cannot be squared with the reasoning of these earlier cases.”).

the record was both more comprehensive and more deferential. It appears that in *Morrison* the Court determined that the remedy was so defective that no degree of deference to the record at any level of scrutiny could save section 13981. This was the converse of *City of Boerne* or *Florida Prepaid*, where the records were so threadbare that they justified no remedy. Nonetheless, in this first application of the Inverse Relation Principle where the substantive right was subject to heightened scrutiny, the Court gave the record a review that, if dismissive rather than deferential, was at least predictably not rigorous.

## 2. Hibbs: *The Turning of the Tide*

In *Hibbs*,<sup>256</sup> the Court affirmed the right of state employees to recover money damages for violations of the Family Medical Leave Act (“FMLA”).<sup>257</sup> In *Hibbs*, for the first time in the *City of Boerne* line of cases, the Court found that Congress had appropriately exercised its enforcement powers and thus abrogated the state’s Eleventh Amendment immunity. *Hibbs* marked the turning point in the articulation of the *Boerne* Doctrine in two ways. First, beginning with *Hibbs*, the Court upheld the challenged statutes in which it considered Eleventh Amendment abrogation or the reach of Section 5 power.<sup>258</sup> Second, in all three post-*Morrison Boerne* Doctrine cases, the Court achieved this result by deploying the new resources it in the earlier cases, notably the Inverse Relation Principle and judicial augmentation of the record.<sup>259</sup> The *Hibbs* majority opinion allowed for more kinds of evidence than the Court had hitherto treated as even relevant to congruence and proportionality. Moreover, the FLMA was precisely the kind of broad, sweeping measure that the Court had hitherto found problematic.

*Hibbs*, like *Morrison*, involved a sex discrimination statute that triggered heightened scrutiny in a constitutional case,<sup>260</sup> but unlike

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256. *Branch v. Smith*, 538 U.S. 721 (2003). Chief Justice Rehnquist wrote the opinion of the Court in this 6-3 decision, joined by Justices O’Connor, Souter, Ginsburg, and Breyer. Justice Souter also concurred, joined by Justices Ginsburg and Breyer. Justice Scalia dissented, as did Justice Kennedy, joined by Justices Scalia and Thomas.

257. *Id.* at 726 (citing 29 U.S.C. §§ 2612-2617 (the FMLA)).

258. *See also* *United States v. Georgia*, 546 U.S. 151, 158 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004).

259. A third approach, reframing the issue, will emerge in *Lane* and *United States v. Georgia*.

260. *Id.* at 729 (citing *United States v. Virginia*, 518 U.S. 515 (1996) (striking down all male admissions to the Virginia Military Institute)).



*Morrison*, the Court gave the record in *Hibbs* a review that was anything but cursory but was also highly deferential. Noting that in *Garrett* and *Kimel*, the Court had come out the other way on broadly similar sorts of evidence, *Hibbs* explicitly distinguished them by invoking the Inverse Relation Principle. Unlike disability and age discrimination, said the Court, “state gender discrimination . . . triggers a heightened level of scrutiny . . . [under which] it was easier for Congress to show a pattern of state constitutional violations.”<sup>261</sup> This was the first express statement that a *higher* standard of scrutiny meant, other things being equal, less intensive, more deferential examination of the record. Previously, this side of the Principle had only been implied.

Under the relaxed review of the record for congruence and proportionality appropriate for state action examined under heightened scrutiny, the Court deployed the range of new means to evaluate the evidence that the Court had developed over prior cases, and in fact supplemented them considerably. The Court no longer insisted, as it had in *Kimel* and *Garrett*, on direct evidence of nothing but a pattern of specifically state constitutional violations. Evidence of other sex discrimination, like that discounted under the searching review of the record where the underlying right was subject only to rational basis review, became relevant (even in the dissent’s view<sup>262</sup>) and in fact persuasive when heightened scrutiny was involved. *Hibbs* also augmented the congressional record with its own findings, both judicial and factual. Taking up the hint in the *Garrett* concurrence that “[i]f the States had been transgressing the Fourteenth Amendment, . . . one would have expected to find . . . extensive litigation,”<sup>263</sup> the Court looked into the history of litigation around gender-discriminatory laws. The Court ignored the implicit forty-year limit for evidence of violations that it had invoked in *City of*

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261. *Id.* at 736 (citing *Virginia*, 518 U.S. 515; *Craig v. Boren*, 429 U.S. 190 (1976)). The Court did not discuss its finding of a constitutional violation for disability discrimination under heightened rational basis scrutiny in *City of Cleburne* or its inability to find a pattern of constitution violations under intermediate scrutiny in *Morrison*.

262. *Hibbs*, 538 U.S. at 746–47 (Kennedy, J., dissenting) (“While the evidence of discrimination by private entities *may be relevant*, it does not, by itself, justify the abrogation of States’ sovereign immunity.” (emphasis added)); see also *Lane*, 541 U.S. at 541 (Kennedy, J., dissenting) (similar with respect to the potential relevance of this evidence).

263. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). See also *Florida Prepaid*, 527 U.S. at 640, where the Court took cognizance of the Federal Circuit’s review of the sparse history of patent suits against the states. See *supra* note 142 and accompanying text.

*Boerne*.<sup>264</sup> *Hibbs* cited cases involving sexist state laws from 30 to 140 years ago, from *Frontiero v. Richardson* (1973) to *Bradwell v. State* (1873).<sup>265</sup> Moreover, for the first time, the Court used the *bare fact of prior Congressional legislation* against sex discrimination in employment (Title VII), thirty-six years before *Hibbs*, as support for the continuing need for legislation of that general sort. The Court noted that it had upheld the Title VII abrogation of state sovereign immunity was upheld in *Fitzpatrick*.<sup>266</sup> The Court even invoked, also for the first time in the *Boerne* Doctrine jurisprudence, *its own factual findings*, including its then thirty-year old factual findings in *Frontiero* (1973)—a case involving *federal* sex discrimination—“that . . . women still face pervasive, though at times more subtle, discrimination in the job market.”<sup>267</sup>

Turning to the congressional record proper,<sup>268</sup> the Court stated that “States continue to rely on invalid gender stereotypes in the

264. *City of Boerne*, 521 U.S. at 531 (stating that “the history of persecution in this country detailed in the hearings mentions *no episodes* occurring in the last 40 years”). The Court there established no rule that thirty-nine years was the sell-by date of a violation with evidentiary weight for congruence and proportionality purposes. It simply dismissed older evidence—and, as we have seen, ignored more recent evidence. See *supra* note 118.

265. *Hibbs*, 538 U.S. at 729 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971)). While these cases were “only” twenty-seven and twenty-nine years old at the time, one might doubt whether the *City of Boerne* plaintiff would have fared any better had he relied upon cases of that vintage. The Court also cited *Hoyt v. Florida*, 368 U.S. 62 (1961) (upholding a law differentially granting women exemption from jury duty so that they could discharge their maternal functions); *Goesart v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan law barring women from tending bar); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a state law limiting women’s waged working hours); and *Bradwell v. State*, 83 U.S. 130 (1873) (upholding Illinois law barring women from practicing law)). None of the pre-*Reed* cases would have the same outcome on the merits *today*, but the Court in those instances and at the time had found the gender discrimination at issue in those cases was in fact *constitutional*, so this was interestingly extended evidence of a pattern of unconstitutionality. The spectre of advisory opinions haunts the *Boerne* Doctrine case law again. The only recent Supreme Court litigation invoked by the *Hibbs* Court was *United States v. Virginia*, 518 U.S. 515 (1996).

266. *Hibbs*, 538 U.S. at 729–30 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Chief Justice Rehnquist wrote both opinions—twenty-seven years apart to be sure. He made nothing of the fact that that *Fitzpatrick* had been a race rather than a sex discrimination case.

267. *Id.* at 730 (citing *Frontiero*, 411 U.S. at 686). Compare the Court’s dismissive treatment of Senator Lloyd Bentsen’s evidence in *Kimel*, 528 U.S. at 89, where the Court researched the subject of the letters that the Senator cited to dismiss evidence of *federal* discrimination as irrelevant a widespread pattern of state discrimination. See *supra* notes 175–77 and accompanying text; see also *infra* note 269 and accompanying text.

268. *Hibbs*, 538 U.S. at 730 (considering the “evidence [of the scope of discrimination] that was before Congress when it enacted the FMLA”).

employment context, specifically in the administration of leave benefits.”<sup>269</sup> In so doing, it here sanctioned Congress’s use of evidence of *private sector* discrimination in maternity leave policies, as well as “public sector” discrimination not specifically identified as state discrimination, abandoning “doubts whether [evidence about private sector discrimination] could be extrapolated to support a finding of *unconstitutional* . . . discrimination in the public sector, [much less] a widespread pattern of . . . discrimination by the States.”<sup>270</sup> The Court did cite congressional evidence that “[m]any states”<sup>271</sup> offered discriminatory maternity leave and “fifteen states provided women with up to one year of extended maternity leave, while only four provided men with the same.”<sup>272</sup> And the Court supplemented the *legislative* record with its own further research into the state legislative landscape as well as the case law. The Court referred to specific discriminatory laws in seven states, and three where leave was

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269. *Id.* For this conclusion about employment markets and the holding that “[r]eliance on such stereotypes cannot justify the States’ gender discrimination in this area,” *id.*, the Court cited *United States v. Virginia*, 518 U.S. at 533, an *educational* discrimination case. Whether under the standards of *Kimel* or *Garrett* this “extrapolation” from education to employment contexts would have been allowed was doubtful. *See, e.g., Kimel*, 528 U.S. at 90–91.

270. *Id.* Among other things, *Hibbs* used private sector evidence from the legislative record of “widespread” “employers’ reliance” on “stereotype-based beliefs about the allocation of family duties . . . in establishing discriminatory leave policies,” including: “[A] 1990 Bureau of Labor Statistics (“BLS”) survey [that] stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies.” *Hibbs*, 538 U.S. at 730 (internal citation omitted). *Hibbs* remarked that the numbers from “a similar BLS survey the previous year were 33 percent and 16 percent, respectively. . . . show[ing] a widening of the gender gap during the same period.” *Id.*

*Hibbs* also gave weight to evidence of general, not specifically state-identified “public sector” discrimination: “[A] 50-state survey also before Congress demonstrated that ‘[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.’” *Id.* at 730 n.3. And *Hibbs* treated such evidence as equally cogent: “Parental leave for fathers . . . is rare. Even . . . [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave.” *Id.* at 731.

271. *Id.*

272. *Id.* at 372. The other evidence in the legislative record was of the same kind, e.g., that state employer’s union contracts “often” granted discriminatory women-only maternity leave,” and that state leave laws “often” authorized leave without pay for maternity and not for paternity purposes, *id.* at 371 nn.5, 7. The Court cited testimony before Congress that “facially gender-neutral state laws and policies were applied in a discriminatory way.” *Id.* at 732. Although as the dissent noted, this conclusion was derived from a study of *federal* employers. *Id.* at 749 (Kennedy, J., dissenting). This was precisely the same sort of evidence it had dismissed as irrelevant in *Garrett*.

discretionary, although it did not say that the laws were applied in a discriminatory manner, and mentioned twelve states that provided no family leave at all.<sup>273</sup>

The dissent gave this evidence the sort of close analysis to which the Court subjected the record in *City of Boerne*, *Kimel*, and *Garrett*, and found evidence of unconstitutional state behavior in only three states. The dissent stated that this was insufficient for proportionality and congruence.<sup>274</sup> The record that *Hibbs* approved as adequate evidence of a pattern of sex discrimination in employment would not have passed muster even in *Morrison*, where congressional findings were fatally deficient for Section 5 purposes because they did not show that “the problem of discrimination . . . [to which the statute at issue was directed] . . . exist[s] in all States, or even in most States.”<sup>275</sup>

The adequacy of the record, augmented here by the Court’s own research, did the brunt of the work the congruence and proportionality test, but the scope of the remedy also mattered. Here too, *Hibbs* presented a striking contrast to *Morrison* and earlier *Boerne* Doctrine cases. The Court had consistently praised limited legislation with “termination dates, geographic restrictions,” and other limitations of scope.<sup>276</sup> However, the *Hibbs* Court itself characterized the FMLA as an “across-the-board routine employment benefit for *all* eligible employees,”<sup>277</sup> intended to impose “uniform parental and medical leave policies.”<sup>278</sup> The statute had no temporal or geographic restrictions limiting its application to states where state constitutional violations were found. This had been a problem for previous employment discrimination statutes in *Boerne* Doctrine cases—the ADEA (*Kimel*) and Title I of the ADA (*Garrett*). *Hibbs* distinguished these statutes because they “applied

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273. *Id.* at 733–34. Under the standards of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1964), pregnant and nonpregnant persons must be treated “the same” since equal treatment was not discrimination. *See Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (“Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . .”).

274. *Id.* at 753.

275. *Morrison*, 529 U.S. at 626.

276. *City of Boerne*, 521 U.S. at 533. Here as usual, the Court held up the Voting Rights Act as exemplary. *See id.* at 532–33.

277. *Hibbs*, 538 U.S. at 737 (emphasis added).

278. *Id.* at 732 (citation omitted). The Court had rejected imposition of uniformity as a justification for immunity-abrogating Section 5 action in *Florida Prepaid*, 527 U.S. at 644, and *Morrison*, 529 U.S. at 627).

broadly to every aspect of state employers' operations."<sup>279</sup> The FMLA, by contrast was "narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest<sup>280</sup>—and affects only one aspect of the employment relationship."<sup>281</sup> The conclusion about the location and strength of "the faultline between work and family" was another judicial factual finding, not identified as based on the legislative record. The *Hibbs* Court found adequate such limitations on the coverage of the FMLA<sup>282</sup> that it had rejected as sufficient in *Kimel* and *Garrett*.<sup>283</sup> With a statute implicating intermediate review, these limitations on a broad statute intended to create uniformity were good enough for congruence and proportionality, and thus for abrogation of Eleventh Amendment immunity.

In sum, under heightened review for the underlying rights, *Hibbs* admitted as support for a pattern of unconstitutional state discrimination: (1) case law regarding litigation about state sex discrimination uncovered by its own research and not attributed to the legislative record; (2) that was well past the *City of Boerne* forty-year sell-by date for currency; (3) and in which the Court at the time had found the challenged statutes constitutional rather than unconstitutional; (4) the fact that Congress had found the problem of sex discrimination in employment serious enough to prohibit it thirty-six years previously; (5) its own thirty-year old factual findings about the persistence of subtle sex discrimination.

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279. *Hibbs*, 538 U.S. at 738. The Court did not remark, as it had in *Garrett*, 531 U.S. at 368–69, that *City of Boerne* was not a suit against a state and did not involve sovereign immunity.

280. *Hibbs*, 538 U.S. at 738.

281. *Id.*

282. *Id.* at 738–39. These new sorts of limitations did not impress the dissent, which recited again the geographic and other limitations implicated in the Voting Rights Act. *Id.* at 744, 757 (Kennedy, J., dissenting).

283. See *Kimel*, 528 U.S. at 86–87, 90 (stating Petitioner erroneously relied on the Bona Fide Occupational Qualification ("BFOQ") defense, 29 U.S.C. § 623(a)(1) (1967)); *Kimel*, 528 U.S. at 88 (reasonable factors other than age defense, 29 U.S.C. § 623(f)(1)); *Garrett*, 531 U.S. at 372 ("reasonable accommodation," 42 U.S.C. § 12112(b)(5)(A) (1990)). The Court did not discuss in either *Garrett* or *Lane* the restrictive requirement that the ADA apply only to "qualified [individuals] with a disability." 42 U.S.C. §§ 12112(2), (5), (7), 12112(a) (emphasis added); see also Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 362 (2000) ("[L]itigation in an employment discrimination case . . . on the threshold question of whether the plaintiff's disabilities even qualify for protection under the ADA.").

The Court also (6) allowed extrapolation to a pattern of unconstitutional state discrimination in public accommodations based on (a) a *federal* sex discrimination case (*Frontiero*), (b) a state *educational* discrimination case (*United States v. Virginia*), (c) congressional evidence, augmented by judicial research, of discriminatory laws or practices in at most thirty-five states, sometimes referring to “many” states, (d) discriminatory leave practices in a *federal* union contract, (e) undifferentiated evidence of sex discrimination in the “public” sector, and (f) congressional findings of widespread maternity leave discrimination in the *private* sector.

The Court found that this evidence was enough to establish the congruence and proportionality of a (7) uniform national statute without (a) geographical or (b) temporal limits, (8) the limitations to which were that it affected (a) only one aspect of the employment relationship and (b) specifically what the Court itself determined to be the “faultline between work and family.” My point is not that the Court was mistaken. It is that the Court was highly deferential.

With the Inverse Relation Principle in play, what a difference the level of scrutiny makes!

#### **D. Recasting the Issue to Raise the Level of Review: *Lane* and *United States v. Georgia***

*Tennessee v. Lane*<sup>284</sup> was the Court’s most recent significant (though not its latest) statement on Section 5 action and Eleventh Amendment abrogation.<sup>285</sup> *Lane* was a companion piece to *Garrett*. It addressed Title II of the ADA, prohibiting disability discrimination by any public entity in public accommodations.<sup>286</sup> The facts of *Lane* were graphic and appalling. Compelled to answer criminal charges on the second floor of a handicapped-inaccessible county courthouse, Lane, a wheelchair-using paraplegic, crawled up two flights of stairs to reach the courtroom. On a subsequent trip to the courthouse for a

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284. *Tennessee v. Lane*, 541 U.S. 509 (2004).

285. *Lane* was another 5-4 decision, with the opinion of the Court written by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer. Justice O’Connor provided the crucial fifth vote. Justice Kennedy joined the dissenting opinion of Chief Justice Rehnquist, along with Justice Thomas. Justices Thomas and Scalia each filed their own dissenting opinions.

286. *Id.* at 513 (citing 42 U.S.C. § 12132 (1990)) (“No qualified individual with a disability shall, by reason of such disability . . . be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.”).

hearing, Lane refused to crawl or be carried. He was arrested and jailed for failure to appear.<sup>287</sup> He sued under Title II, seeking money damages and equitable relief.<sup>288</sup>

*Garrett* had decided that a state could not be sued under Title I of the ADA, banning employment discrimination because of disability. But it expressly left open whether Title II of the ADA allowed for suits for money damages against the state.<sup>289</sup> The question in *Lane* was whether *Garrett* would control, barring Title II public accommodation suits against the states even in face of such “egregious predicates.”<sup>290</sup> The degree of scrutiny for disability discrimination (rational basis) and the legislative record set forth by Congress were essentially similar to those in Title I, but the Court imaginatively used the Inverse Relation Principle to lower the intensity of review of the record and remedies.

The Court’s key innovation introduced in *Lane* was to reframe the issue in a way that implicated underlying substantive fundamental constitutional rights that called for heightened scrutiny.<sup>291</sup> The majority opinion stated that, “[i]n addition to enforcing irrational State discrimination against the disabled, Title II also seeks to enforce . . . other basic constitutional guarantees, infringements of which are subject to more searching judicial review.”<sup>292</sup> These guarantees included the “right of access to the Courts at issue in this case, . . . protected by the due process clause of the Fourteenth Amendment.”<sup>293</sup> They included as well a criminal defendant’s Sixth

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287. *Id.* at 513–14. Lane’s co-respondent Beverly Jones, a court reporter, also a wheelchair user, alleged that she had lost work and the opportunity to participate in the judicial process because she was effectively barred from several similarly inaccessible county courthouses. *Id.*

288. *Id.* at 514 (citing *Garrett*, 531 U.S. at 360 n.1).

289. *Id.*

290. *City of Boerne*, 521 U.S. at 533.

291. *See Lane*, 541 U.S. at 522–23. The Court was invited to do so by the parties, who raised Due Process in their Petition for Writ of Certiorari at \*i, *Lane*, 539 U.S. 941 (2003) (No. 02-1667), and briefed and argued the issue. The Court might have but did not use a twist on *Hibbs*, finding the legislative record adequate for Title II purposes under heightened “rational basis” scrutiny “with bite.” *See supra* notes 205–14 and accompanying text.

292. *Lane*, 541 U.S. at 522–23. The Court did not specify that the scrutiny was “strict,” merely that it was as or more elevated than intermediate review. *See id.* at 529.

293. *Id.* at 523.

Amendment rights to trial by jury and the public's First Amendment right of access to criminal proceedings."<sup>294</sup>

Spelling out the Inverse Relation Principle in terms that will now be familiar, the Court said that this made it easier to show a pattern of state discrimination rising to the level of constitutional violations "than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational basis review."<sup>295</sup> The reasoning was the same made explicit in *Hibbs*: The lower the standard of review for the underlying rights, the less likely any particular state action was to be a constitutional violation, but the *higher* the standard of review involved the *more likely* the record was to exhibit a pattern of constitutional violations.<sup>296</sup> The *Lane* Court did not specify the applicable level of review, but stated that "Title II is aimed at the enforcement of a variety of rights . . . that call for a standard of review at least as searching, and in some cases more searching, than the [intermediate] standard that applies to sex-based classifications."<sup>297</sup> Against this background the Court did four striking things.

First, in explaining the reach of Congress's Section 5 powers, the *Lane* Court revived a much more expansive notion of those powers than it had used in the earlier *Boerne* Doctrine cases. Once more citing *Ex parte Virginia*, it said that Section 5 legislation was "appropriate" if "adapted to the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain."<sup>298</sup> *Lane* emphasized rather than merely acknowledged Congress's power to enact prophylactic legislation against discrimination that was not itself unconstitutional in order "to carry out the basic objectives" of the substantive parts of the Fourteenth Amendment.<sup>299</sup> The legislation at issue was no less sweeping than the employment discrimination law at issue in *Garrett*.

In *City of Boerne*, it was unclear how much enforcement was permitted even under the newly emphasized limits. RFRA might

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294. *Id.* The *Lane* dissent nominally accepted this reframing of the issue and accompanying heightened scrutiny for the underlying rights. *Id.* at 540–41 (Rehnquist, C.J., dissenting).

295. *Id.* at 529 (majority opinion).

296. See *Hibbs*, 538 U.S. at 736.

297. *Lane*, 541 U.S. at 529.

298. *Id.* at 520 n.3 (quoting *Ex parte Virginia*, 100 U.S. 339, 355–56 (1879)) (citing *City of Boerne*, 521 U.S. at 517–23).

299. *Id.* at 520.



have failed even under a generous construction of Section 5 because of the state of the legislative record as the Court interpreted it, that is to say, empty. In subsequent cases the Court adopted, via the Inverse Relation Principle, a restrictive reading. This repeatedly led the Court to find that Congress had failed to abrogate state sovereign immunity or enact effective Section 5 legislation in a variety of contexts, even one involving heightened review, i.e., *Morrison*. With *Hibbs* the Court's Section 5 and thus its abrogation analysis expanded again. *Lane* confirmed that *Hibbs* was not an aberration.

Second, in *Lane*, the Court reinforced the generous view of what would count as pertinent evidence that it had adopted in *Hibbs*. It referred to “hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions.”<sup>300</sup> Courts and other providers of judicial services were “typically treated as an ‘arm of the state’ for Eleventh Amendment purposes,”<sup>301</sup> even when the government involved was not a state proper. The Court also stated unequivocally that “our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry.”<sup>302</sup>

Third, the *Lane* Court augmented the Congressional record by citing as evidence of unconstitutional treatment of the disabled information turned up by its own research into cases, statutes and “undisputed findings of fact” from previous cases.<sup>303</sup> *Lane* presented extensive citations to prior judicial decisions and statutes uncovered

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300. *Id.* at 526 (emphasis added) (citing Justice Breyer's dissent in *Garrett*, 531 U.S. 356, 379 (2001), and Appendix C to that dissent, the fifty-state survey of evidence of violations, *id.* at 391). Dissenting in *Lane*, Chief Justice Rehnquist, who had relied on federal and non-State-identified discrimination as well as private discrimination in *Hibbs*, 538 U.S. at 730–31, reverted to the previous *Boerne* Doctrine dismissal of evidence regarding discrimination by nonstate governmental actors. *Lane*, 541 U.S. at 542.

301. *Id.* at 527 n.16 (citing cases).

302. *Id.* at 528 & n.17. The *Lane* majority pointedly cited *Hibbs* on the use of this sort of evidence. 541 U.S. at 228 n.17; see also *supra* notes 268–74. It might have cited the *Hibbs* dissent's concession that use of such evidence “would be relevant if the Court were considering the constitutionality of the statute as a whole,” *Lane*, 541 U.S. at 541 (emphasis added) (Kennedy, J., dissenting); cf. *Hibbs*, 538 U.S. at 746–47 (Kennedy, J., dissenting), although not under the majority's approach limiting its consideration to judicial services. *Lane* noted that in *South Carolina v. Katzenbach*, one of the touchstone cases for valid Section 5 action: “[M]uch of the evidence in . . . involved the conduct of county and city officials rather than the states.” *Lane*, 541 U.S. at 527 n.16 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 312–15 (1966)).

303. *Id.* at 525 n.10 (citing *Halderman*, 465 U.S. at 127). Here the *Lane* majority followed *Hibbs*'s reliance on the Court's own prior findings of fact. See *Hibbs*, 538 U.S. at 730 (citing *Frontiero*, 411 U.S. at 686); see also *supra* note 267.

by its own research rather than gleaned from the legislative record to “demonstrate a pattern of unconstitutional treatment in the administration of justice.”<sup>304</sup> In this regard it followed earlier hints and practices,<sup>305</sup> to which the *Lane* dissent belatedly objected as being no part of the “legislative record.”<sup>306</sup> The dissent also criticized the majority’s use of cases “arising after the enactment of the ADA or [not] contain[ing] findings of . . . constitutional violations”<sup>307</sup> because these did not show that Title II was, when enacted, a “valid response to documented constitutional violations.”<sup>308</sup> Whatever the merits of these objections,<sup>309</sup> they did not square with the Court’s own precedent in *Hibbs* for use of such evidence.<sup>310</sup>

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304. *Lane*, 541 U.S. at 525; see also *id.* at 524–26 & nn.5–14 (citing statutes and cases).

305. The *Lane* Court followed in the footsteps of *Florida Prepaid*, which used the Federal Circuit’s independent research into the sparse history of patent suits against the states, 527 U.S. 627, 640 (1999), as well as the *Garrett* concurrence’s expectation that the record would show “confirming judicial documentation,” 531 U.S. at 375, if there were unconstitutional state discrimination against the disabled, and the *Hibbs* Court’s provision of such independently generated supporting judicial and statutory confirmation to show the pervasiveness of sex discrimination. *Hibbs*, 538 U.S. at 729–30.

306. *Lane*, 541 U.S. at 544 (Rehnquist, C.J., dissenting). As the *Lane* majority observed, in *Hibbs*, Chief Justice Rehnquist used precisely this sort of augmentation in the opinion of the Court. See *supra* notes 265–67, 302–03.

307. *Lane*, 541 U.S. at 541 n.5. As the *Lane* majority observed, the ADA in fact contained formal findings that the disabled satisfied the criteria for a suspect class and suffered extensive discrimination. *Id.* at 516 (quoting 42 U.S.C. § 12101(a)(7) (1990)). Further, Section 12101(a)(3) of the findings contained implicit reference to state discrimination (in “education . . . institutionalization, health services, voting, and access to public services”). Ten of the cases cited by the *Lane* majority are pre-1990. See *id.* at 525–26.

308. *Id.* (emphasis added).

309. The legislative record in the ADA did in fact involve the extensive record of disability discrimination, in many cases by states. See *Garrett*, 531 U.S. at 391 fol. (Breyer, J., dissenting) (Appendix C to Justice Breyer’s dissent). However, the *Garrett* majority treated as “unexamined anecdotal accounts” rather than legislative findings, *id.* at 370, and made reference to constitutional challenges to discrimination against the disabled in the form of the eugenics and involuntary sterilization laws upheld in *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”). The *Garrett* Court had specifically dismissed that case as too old and no longer relevant because “there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted.” *Garrett*, 531 U.S. at 369 n.6.

*Hibbs* cited, as evidence of employment discrimination against women, cases up to 140 years old which, like *Bradwell v. State*, 83 U.S. 130 (1873) (upholding Illinois law barring women from practicing law), were no longer law in any state, and would not survive constitutional challenge today. Moreover, as the *Lane* majority noted, in 1979, eleven years prior to the enactment of the ADA, most states excluded “idiots’ from voting,” 541 U.S. at 525, and at the time of the *Lane* decision, the majority of these laws remained on the books and had been challenged in litigation. *Id.*

Finally, under the *Boerne* Doctrine the *Lane* majority had to show that Title II of the ADA was an appropriately *limited* response, proportional and congruent to the state constitutional violations that triggered Section 5. Under the Inverse Relation Principle as applied in *Hibbs*, one would predict that this requirement would be substantially weakened under heightened review, although *Morrison* suggested that the Court could be of two minds on this point. *Lane* followed *Hibbs* in two ways. First, the Court cited as a limiting factor the consideration that Title II required only “reasonable modification” to accommodate the disabled.<sup>311</sup> This did not conflict with *Garrett*’s determination that almost any non-invidious rationale, such as “hard-heartedly” saving money, would pass the test of rationality,<sup>312</sup> because *Lane* involved heightened review.<sup>313</sup> “[O]rdinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.”<sup>314</sup> Second, the Court limited its own holding to provision of *judicial* rather than any other state services.<sup>315</sup>

The dissent objected that the ADA’s provisions swept more broadly, including many programs that receive only rational basis scrutiny. “A requirement of accommodation for the disabled [e.g.] at a state-owned amusement park . . . bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights.”<sup>316</sup> Whether or not the dissent was

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Neither the *Lane* dissent nor the *Garrett* majority discussed, as evidence of unconstitutional discrimination (perhaps because it was not state), *City of Cleburne*, 473 U.S. 432 (1985), only five years before the enactment of the ADA. There the Court agreed that the “retarded” met the criteria for a suspect class, *id.* at 445, but refused to so treat them because of the danger of a slippery slope leading to what the Court regarded as too great an expansion of constitutional antidiscrimination protection, *id.* at 445–46.

310. See, e.g., *Hibbs*, 538 U.S. at 730 (statement that “women *still* [at the time of the decision] face pervasive, though at times more subtle, discrimination in the job market” (emphasis added)) (a fact not in the legislative record); *id.* at 733–34 (reference to state laws at time of decision rather than before enactment).

311. *Lane*, 541 U.S. at 532, 533.

312. See *Garrett*, 531 U.S. at 367–68.

313. See *Lane*, 541 U.S. at 533 n.20 (“Because this case implicates the right of access to the courts, we need not consider whether Title II’s duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*’s prohibition on irrational discrimination.”).

314. *Id.* at 533.

315. *Id.* at 533 & n.20. *Lane* does not hold that Title II abrogated state sovereign immunity only with respect to state judicial services, but the opinion went no further than that leaving open the possibility of further extension.

316. *Id.* at 550.

correct on this point—the FMLA was no less broad—lower courts indeed took *Lane* as approval of Title II as effective Section 5 legislation that abrogates Eleventh Amendment immunity across the board.<sup>317</sup> In practice today, a state-owned amusement park would be virtually certain to fall under Title II.

The defensibility and effect of the particular limitations adumbrated in *Lane*, however, is beside the point here. What *Lane* established was that whether a congressional measure was proportional and congruent to a constitutional evil depended in part on how the Court framed the evil against which the legislation was directed. If the Court chose to treat the case as one involving a substantive Fourteenth Amendment right that received deferential scrutiny, the likelihood of finding constitutional violations would be low, and the record would be likely to receive the harrowing negative scrutiny that it did in *Kimel* or *Garrett*. In that case, the legislation would not likely to be found to be effective Section 5 enforcement action that could abrogate state sovereign immunity. However, if the Court treated the case as involving heightened scrutiny, the “presumption of validity”<sup>318</sup> would evaporate and the review of the record relaxed, along with the demands on the tightness of fit of the remedy to the evil. Together with the Court’s authorization to augment the record with its own research in heightened scrutiny cases, that would be reasonably likely to lead to a different outcome unless, as in *Florida Prepaid*, there really was no evidence of constitutional violation to be found at all.

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317. Thus in typical recent discussions of the Title II, selected almost at random, one finds the statement, here applied to education, that “[p]ublic institutions are covered by Title II . . . , which addresses discrimination in the provision of public service by *state* and local governments.” Paul A. Race & Seth M. Dornier, *ADA Amendments Act of 2008: The Effect on Employers and Educators*, 46 WILLAMETTE L. REV. 357, 396 (2009) (emphasis added) (no discussion of the *Lane* judicial services limitation); accord Judith Stiliz Ogden & Lawrence Menter, *Inaccessible School Webpages: Are Remedies Available?*, 38 J.L. & EDUC. 393, 398–99 (2009) (same, no qualification); see also Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691, 694 (2009) (“Title II applies to *state* and local governmental programs, which means that *state licensing boards* are covered.” (emphasis added)); Erin E. Patrick, Comment, *Lose Weight or Lose Out: The Legality of State Medicaid Programs that Overweight Beneficiaries’ Receipt of Funds Contingent Upon Healthy Lifestyle Choices*, 58 EMORY L.J. 249, 270 (2008) (“Title II of the ADA applies to . . . *state Medicaid programs*. . . .” (emphasis added)). Examples might be multiplied almost indefinitely.

318. See *Heller*, 509 U.S. at 319 (“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.”).

The Court quietly did the same sort of reframing in *United States v. Georgia*,<sup>319</sup> a pro se prisoner case, advertised in the opinion itself as standing for the none-too-startling proposition that Congress's Section 5 powers include stopping actual constitutional violations.<sup>320</sup> The case arose under the ADA Title II and section 1983,<sup>321</sup> but the Court treated it as implicating the Eighth Amendment.<sup>322</sup> The real unstated lesson of *United States v. Georgia*, like that of *Lane*, was in the judicial reframing. The plaintiff's Title II ADA reasonable accommodation claims essentially overlapped with his section 1983 claims. The Court treated these as alleging Eighth Amendment deliberate indifference, and therefore in essence as constitutional claims coextensive with the Title II claims. "[The] same [alleged] conduct that violated the Eighth Amendment also violated Title II of the ADA."<sup>323</sup>

Unlike *Lane*<sup>324</sup> and every other *Boerne* doctrine case, regardless of the outcome, and despite extensive briefing and argument on the issue by the parties, the opinion of the Court made no mention whatsoever of any pattern of constitutional violations to be deterred and prevented, despite the fact that Title II of the ADA swept more broadly than the Eighth Amendment or any constitutional

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319. *United States v. Georgia*, 546 U.S. 151 (2006). This was a unanimous opinion written by Justice Scalia. Justice Stevens, joined by Justice Ginsburg, also wrote a separate concurrence.

320. *Id.* at 158. As observed below, *see infra* note 347, Justice Scalia's treatment of previous *Boerne* Doctrine cases is tendentious. In *United States v. Georgia*, 546 U.S. at 157, he suggests that no previous case in this line alleged any actual constitutional violation, which was in fact untrue.

321. *Id.* at 154–55. Tony Goodman (the Petitioner), a wheelchair-using inmate, alleged a variety of claims for relief relating to the prison's refusal to accommodate his disability. *See id.* at 154–56. His initial complaint was unclear and was dismissed without prejudice by the District Court as too vague to pass even the Federal Rules of Civil Procedure Rule 8(a)(2) notice pleading standards, *id.* at 155, although it did include Section 1983 claims of constitutional violations, *id.* at 154–55. Goodman found excellent pro bono representation (Jones Day). *See id.* at 153. The parties quickly raised and fully briefed argued the issue of a pattern of constitutional violations and standards of review. *See, e.g.*, Petition for Writ of Certiorari, *Goodman v. Georgia*, 125 S. Ct. 2266 (2005) (No. 04-1236); *see also* Reply Brief for Petitioner, *United States v. Georgia*, 544 U.S. 1031 (2005) (No. 04-1203).

322. *United States v. Georgia*, 546 U.S. at 157.

323. *Id.*

324. Dictum in *Garrett* suggested that Title II might be treated differently. *Garrett*, 531 U.S. at 360 n.1 ("We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment. . ."). Probably after *Garrett*'s severe treatment of Title I, the Court felt that the result in *Lane*, addressing Title II in a Due Process context, had to be distinguished carefully.

violation.<sup>325</sup> Only Justice Stevens in his concurrence, joined by Justice Ginsburg, set forth evidence from the record of such a pattern.<sup>326</sup>

Also absent from *United States v. Georgia* was any clear analysis of the legislative remedy for congruence and proportionality. The Court held that “insofar as Title II creates a private cause of action for damages against the states that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”<sup>327</sup> The opinion set forth no limiting principles on the breadth of Section 5 legislation used to attack actual constitutional violations. The Court majority did not expressly invoke the proportionality and congruence test either in any review of the record or in the analysis of the scope of the remedy. The remand order might be read as an indirect allusion to the test.<sup>328</sup> In any event, *United States v. Georgia* and *Lane* establish that the Court may frame or reframe the issue of the nature of violation, and whether and how it does so may have a decisive effect on the analysis and outcome of the case.

### III. The Sky Is Not Falling: The Shift to a More Relaxed *Boerne* Doctrine

#### A. *Kimel* Reloaded: A Thought Experiment

It may illuminate the changes in the *Boerne* Doctrine to see how *Kimel v. Florida Board of Regents*,<sup>329</sup> the first full statement of the original *Boerne* Doctrine applied in an Eleventh Amendment context, might have come out differently if the Court had had the precedents and deployed the resources that it developed from *Kimel* through *United States v. Georgia*. My point is not that *Kimel* was wrongly or rightly decided at the time, but to illustrate how the law

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325. After *United States v. Georgia*, it is logically conceivable, under the latest version of the *Boerne* Doctrine, when an allegation of an actual constitutional violation overlaps with a violation of putative Section 5 legislation, that the record would not have to show a pattern of state constitutional violations to satisfy the congruence and proportionality test. See *infra* notes 324–26 and accompanying text. That would not seem, however, to be a particularly safe proposition, or a prudent litigation strategy, whether or not the Court chooses to ignore the evidence of such a pattern or limits in this case.

326. *United States v. Georgia*, 546 U.S. at 159.

327. *Id.*

328. *Id.* (“[T]he lower courts will be best situated to determine[.] . . . insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is valid.”).

329. *Kimel*, 528 U.S. at 108.

and its application changed by examining the older case through the lens of the present law. Nor do I say that the hypothetical reasoning and result sketched here in *Kimel* would be required if the case were to be decided today—merely that they are possible and, in view of the latest case law, plausible. I designate the parties and case names in the thought experiment with an asterisk (\*) to clearly indicate which statements are part of the hypothetical and which refer to actual cases and parties, which are not so marked.

The first step a court would take would be to reduce the intensity of the review of the record and the stringency of the proportionality requirements by reframing the case, as did the Court in *Lane* and *United States v. Georgia*, in terms of rights involving a more rigorous degree of scrutiny, thereby engaging the Inverse Relation Principle on the side that lowers the demands on the record and the remedy by operating in a sphere where state constitutional violations are more likely.<sup>330</sup> *Kimel*\* and his co-plaintiffs,\* as well as *MacPherson*\* and *Narz*,\* the plaintiffs in the consolidated *Kimel* case,<sup>331</sup> sued state universities under the ADEA. Age classifications receive deferential rational basis review, and so are likely to be upheld as constitutional.<sup>332</sup>

But the plaintiffs'\* claims also concerned terms and conditions of state employment. State jobs are, constitutionally, property, subject to the Due Process clause of the Fourteenth Amendment under *Board of Regents v. Roth*.<sup>333</sup> *Roth* stated that the Fourteenth Amendment's "procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."<sup>334</sup> "[The person] must . . . have a legitimate claim of entitlement to [the interests]."<sup>335</sup> If *Kimel*\* and *MacPherson*'s\* claims for relief had been based, unlike *Roth*'s, on discharge because of age from state jobs in which they had reasonable expectations of continued employment,<sup>336</sup> reframing the issue would be relatively easy. They would be suing for age discrimination in the form of

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330. See *supra* Part II.D.

331. *Kimel*, 528 U.S. at 69–70. Hereinafter I refer only to *Kimel* and *MacPherson* as plaintiffs, incorporating their co-plaintiffs by reference. I discuss both because their situations are different in a potentially significant way.

332. *Id.* at 83; see also *supra* Part II.B.2.

333. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

334. *Id.* at 576.

335. *Id.* at 577.

336. *Id.*

deprivation of property in state jobs to which they had a legitimate claim in violation of the Fourteenth Amendment. The “same conduct that violated [Due Process would also have] violated Title II.”<sup>337</sup>

Kimel’s and MacPherson’s actual cases, however, concerned, respectively, the defendant’s refusal to allocate funds for a previously agreed-upon raise, which had a disparate impact on older employees (Kimel)<sup>338</sup> and the use of an evaluation system that allegedly had a disparate impact on older faculty (MacPherson).<sup>339</sup> These claims posed more challenging issues. Unlike disparate treatment claims against public actors, disparate impact claims involving protected classes generally do not implicate heightened—or any—constitutional review.<sup>340</sup> “[T]he invidious quality of a law claimed to be . . . discriminatory must ultimately be traced to a . . . discriminatory purpose.”<sup>341</sup> “Disproportionate impact is not irrelevant, but . . . [s]tanding alone, it does not trigger [strict scrutiny].”<sup>342</sup> Kimel\*, however, could contend that the Board’s refusal to pay intentionally deprived him of property—an entitlement to a legitimate claim that he had already acquired<sup>343</sup>—because of his age. Depending on the nature of the agreement and the state of the evidence, he could argue that the Board violated “existing rules or understandings derived

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337. See *United States v. Georgia*, 546 U.S. 151, 157 (2006).

338. *Kimel*, 528 U.S. at 70.

339. *Id.* at 69; see also *Garrett*, 531 U.S. at 372–73 (stating that evidence of disparate impact “*alone* is insufficient even . . . [under] strict scrutiny” (emphasis added)).

340. See *Washington v. Davis*, 426 U.S. 229 (1976). This must be carefully phrased and precisely understood. In principle governmental practices and laws with disparate impact could raise constitutional considerations without being evidence of purposeful discrimination. See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (discussing why the Court’s statutory decision regarding disparate impact in *Ricci v. DiStefano*, 129 S. Ct. 2658 (2010), is of potential constitutional import). My point here is merely that a claim to have suffered disparate impact will not, under current law, trigger a claim of an intentional constitutional violation sufficient to begin to implicate Section 5 by itself.

341. *Davis*, 426 U.S. at 242.

342. *Id.* at 240. The “purpose to discriminate [that] must be present . . .,” *id.* at 236, but can be proven by circumstantial evidence. MacPherson\* might have a constitutional claim if he had more than disparate impact, but as the *Kimel* Court summarizes the facts, that was all he had. See *Kimel*, 528 U.S. at 69.

343. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Other possibilities for constitutional violations might include a Contract Clause or a Takings claim. MacPherson’s\* claim would fall directly under a Due Process violation of property only in the unlikely event that he could establish an *independent* entitlement to the promotion he was denied as well as additional evidence of an *intentional* deprivation. Disparate impact *alone* would not establish a constitutional violation, in policy if not in his particular case: given other evidence, it might.



from independent sources such as state law—rules or understandings that secure certain benefits and that support entitlement to those benefits,”<sup>344</sup> which can be the basis of an entitlement to property in state employment.<sup>345</sup>

The issue is whether the plaintiffs could maintain an ADEA claim against the state as appropriate Section 5 action that abrogated Eleventh Amendment immunity, not whether Kimel\* would win a direct Due Process property deprivation claim if he were to litigate the claim. A Due Process claim need only be *part* of the evidence of a pattern of age discrimination involving state employment property deprivations that triggers Section 5 powers. Moreover, it need not be the plaintiff’s *own* claim as long as there is a pattern of state violations. Section 5 gives Congress power to regulate conduct that is not itself unconstitutional as a prophylactic against state constitutional violations, and a plaintiff may sue in that “broader swath” without alleging a state constitutional violation. Therefore, MacPherson\* and Kimel\* might have claims based in the ADEA’s disparate impact provisions alone. In *United States v. Georgia*, the unanimous Court treated as legitimate and even normal Section 5 cases where the claims for relief were *not* “based, at least in large part based on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment.”<sup>346</sup> Some of the cases, so characterized,<sup>347</sup> were successful. The issue in *Kimel\** then would be whether the plaintiffs’ harm fell into the broader swath.<sup>348</sup> It would

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344. *Id.*

345. *Id.* For some of the legislative history and congressional findings of the 1967 ADEA, see *Age Discrimination in Emp’t: Hearings Before the Gen. Subcomm. on Labor of the Comm. on Educ. & Labor*, 90th Cong. 417 fol. (1967) (discussing prevalence of problem of age discrimination in employment); *Age Discrimination in Emp’t: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Comm. on Labor & Pub. Welfare*, 90th Cong. 23 fol. (1967) (discussing same).

346. *United States v. Georgia*, 564 U.S. 151, 157 (2006).

347. As remarked, the characterization of the *Boerne* Doctrine in *United States v. Georgia* was highly questionable. It relied on dissents contrary to the opinion of the Court on the point at issue in those cases (*Lane, Hibbs*), *id.* at 157, and treated plain allegations of constitutional violations that the Court rejected without adjudicating on the merits as “unlikely” or unsupported (*City of Boerne, Florida Prepaid, Garrett, and Kimel*). *Id.* The Supreme Court here “assumes without deciding” that the plaintiff’s constitutional claims were correct. *Id.*

348. It is true that the *Garrett* Court looked askance at disparate impact in the proportionality context. See *Garrett*, 531 U.S. at 373. However, this was before the turn in *Hibbs* and *Lane*’s approval of Title II, which embodied a disparate impact provision. *But see Ricci v. DiStefano*, 129 S. Ct. 2658 (2010) (not addressing Section 5, abrogation, or any constitutional issues, but suggesting deep skepticism and perhaps a troubled constitutional

still be necessary to show evidence of a pattern of state constitutional violations. Under the Inverse Relation Principle, given the relaxed evidentiary standards applying under heightened review,<sup>349</sup> this would be far less difficult than in the original *Kimel* case.

Finally, recall *Florida Prepaid's* statement that lack of an adequate state remedy may be the basis for a Due Process claim. In *Alden v. Maine*,<sup>350</sup> the Court had held that “States retain immunity from private suit in their own courts,”<sup>351</sup> so in that case there was no remedy for violations of the Fair Labor Standards Act (“FSLA”), nor, here, for an age discrimination in employment claim against a nonconsenting state in federal *or* state court. *Alden* applied to age discrimination and any other claim under the substantive provisions of the Fourteenth Amendment. Under *Florida Prepaid*, a pattern of intentional deprivation of property in state employment because of age discrimination (whether or not it involved Kimel\* and MacPherson\*) might well be a Due Process issue after *Alden* because of lack of adequate remedy.<sup>352</sup>

Kimel\* might then argue that the sort of evidence dismissed in the actual *Kimel* case should be treated very differently here. The legislative record for the ADEA was if anything, more exhaustive than the record in *Hibbs*. The congressional reports and floor debates cited in Senate reports preparatory to the enactment of the ADEA about the coverage of family leave policies provided comprehensive evidence of a national pattern of age discrimination.<sup>353</sup>

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future for disparate impact claims); *see also supra* note 348. Nonetheless, even if MacPherson’s “broader swath” disparate impact claim would not wash, as evidence of a pattern, Kimel’s property deprivation claim arguably might.

349. *See supra* Parts II.B.2, I.C.2.

350. *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act (“FSLA”) not enforceable in state court by private suit under Article I powers).

351. *Id.* at 754; *see also supra* note 141.

352. The holding of *Alden* also renders somewhat disingenuous the actual *Kimel* Court’s statement a year later that “State employees are protected by state age discrimination statutes and may recover money damages from their State employers in almost every State in the Union.” *Alden*, 528 U.S. at 91; *see also id.* at 91–92 (“Those avenues of relief remain available today just as they were before this decision.”) (listing State age discrimination in employment statutes without identifying which, if any, include waivers of state sovereign immunity). Unless such a statute did waive the state’s immunity, the Supreme Court’s reassurance was misleading.

353. *See Kimel*, 528 U.S. at 89, 90 (congressional reports and floor debates); *cf. Hibbs*, 538 U.S. at 730 (BLS statistics cited in a congressional report); *id.* at 731 (floor testimony from witnesses at Joint Hearing); *see also id.* at 731 nn.4–5 (congressional reports and witnesses testimony), *and id.* at 732 (same). An age discrimination provision had initially been included in early drafts of Title VII in 1963. *See HUGH DAVIS GRAHAM, THE CIVIL*

In the 1967 Act itself, Congress also made formal findings about the extent and harms of age discrimination.<sup>354</sup> Under the standards of *Hibbs*, a court would not treat “the *findings* Congress made [of] “substantial age discrimination in the private sector”<sup>355</sup> would not be treated as dismissively as they were in the (the actual) *Kimel* case as “beside the point . . . [because] Congress made no such findings with respects to the States.”<sup>356</sup> In *Hibbs*, the Court allowed evidence—not even findings—of sex discrimination “both in the public and private sectors”<sup>357</sup> to be “extrapolated to support a finding of unconstitutional discrimination in the public sector.”<sup>358</sup> The *Kimel*\* Court could treat evidence of “broadly practiced” federal and local government age discrimination,<sup>359</sup> as relevant despite not being direct evidence of age discrimination by the state in particular.

Furthermore, a court might augment the legislative record with the court’s own factual findings. It might, as in *Hibbs*, cite the Supreme Court’s repeated determination that<sup>360</sup> age discrimination in

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RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 97 (1990). It was dropped from that statute because of opposition from the African-American civil rights coalition, which sought to minimize complications but “a series of congressional investigations had at least probed field of age discrimination.” *Id.* at 138, 158. See also the extensive legislative record of the 1967 Act summarized in *EEOC v. Wyoming*, 460 U.S. 226, 229–33 (1983). See *infra* note 361.

354. See 29 U.S.C. § 621(a)–(b) (1967); *Kimel*, 528 U.S. at 90 (emphasis added) (insisting on the importance of formal congressional findings for Section 5 action).

355. *Hibbs*, 538 U.S. at 729 n.2 (noting and underscoring the existence of formal findings of sex discrimination).

356. *Kimel*, 528 U.S. at 90.

357. *Hibbs*, 538 U.S. at 731 (failing to identify the public sector discrimination specifically as state discrimination but accepting it as evidence of a pattern of unconstitutional state violations).

358. See *id.* at 730, 731 (citing evidence in the record about discriminatory leave policies in the private sector); cf. *Kimel*, 528 U.S. at 90 (expressing doubt about such extrapolation); see also *id.* at 89 (dismissively referencing evidence of age discrimination by “local governments” and unidentified “governmental units”).

359. See *Hibbs*, 538 U.S. at 730 (federal age discrimination as a basis for Section 5 action under heightened review (citing *Frontiero*, 411 U.S. at 686)); cf. *Kimel*, 528 U.S. at 89 (not such a basis under deferential review, including the Court’s dismissal of Senator Bentsen’s remarks about “age discrimination [being] broadly practiced in government employment.”). In *Kimel*\* the Court might not choose to dig to determine that the basis of some of the Senator’s evidence concerned federal employment. See *id.* It would be unlikely to ignore the fact that some of his evidence expressly referenced age discrimination in “State . . . governments.” *Id.*

360. Cf. *Hibbs*, 538 U.S. at 730, 738 (citing *Frontiero*, 411 U.S. at 686, for the proposition that women face pervasive employment discrimination and noting that the family leave benefits of the FMLA are “narrowly targeted precisely where sex-based

employment is, and was prior to the enactment of the 1967 Act, a pervasive problem based on false stereotypes.<sup>361</sup> A court might make (though the plaintiffs could not count on this) pronouncements to that effect *ipse dixit*, as the Supreme Court was content to do in *Hibbs*.<sup>362</sup> Perhaps most importantly, in view of both *Lane*'s and *Hibbs*'s invocation of age discrimination litigation with a constitutional dimension against the states as evidence of a pattern of such unconstitutional state discrimination,<sup>363</sup> a court might include in the record age discrimination cases that were filed *after* the passage of the ADEA.<sup>364</sup> The Appendix to this Article comprises a fifty-state survey with at least one ADEA case raising a potential Due Process property deprivation issue in almost every state from 1990 through 2010, thereby unambiguously implicating Due Process concerns calling for heightened review.<sup>365</sup>

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overgeneralization remains the strongest," a claim based on no authority at all given in the opinion).

361. The Court took notice of congressional determinations to this effect in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."). See also *EEOC v. Wyoming*, 460 U.S. at 231 ("[A]ge discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact. . . .").

362. See, e.g., *Hibbs*, 538 U.S. at 730 ("[T]he persistence of such unconstitutional discrimination justifies Congress' passage of prophylactic § 5 legislation."); see also *Frontiero*, 411 U.S. at 684 ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.").

363. *Hibbs*, 538 U.S. at 729–30; see also *Lane*, 541 U.S. at 524–26 nn.5–14.

364. In Fiscal Year 2007, there were 19,103 age discrimination charges filed with the Equal Employment Opportunity Commission ("EEOC"). EQUAL EMP'T OPPORTUNITY COMM'N, AGE DISCRIMINATION IN EMPLOYMENT ACT (2009), available at <http://archive.eeoc.gov/stats/adea.html>; see also Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 896 (2004) ("Age discrimination litigation is among the fastest growing types of employment discrimination cases.").

As observed, see *supra* note 308, the *Lane* dissent's objection that post facto evidence of cases filed after the enactment of the ADEA did not show that the statute was a "valid response to documented constitutional violations," 541 U.S. at 544 n.5, was inconsistent with the Court's use of post facto evidence in *Hibbs*, such as *United States v. Virginia*, 518 U.S. 515, 729 (1996), decided three years after the FMLA was enacted.

365. Our research was not able to locate such cases from every state, but we found cases in forty-four states and Puerto Rico. Further research or a wider temporal scope might fill in the gap of six states and the District of Columbia, but it would be hard to deny that such cases like this in so many states are evidence of a national pattern of unconstitutional state age discrimination. *Lane* invoked far fewer. *Lane*, 541 U.S. at 524–26 nn.5–14.

Finally, there is the congruence and proportionality inquiry. The hypothetical *Kimel*\* might follow either the *Lane* strategy of limiting its holding to a smaller subset of ADEA cases, such as those implicating Due Process property deprivations,<sup>366</sup> or the *Hibbs* strategy of approving as appropriate limitations the sort rejected under the intense review associated with rational basis scrutiny,<sup>367</sup> and its broad approval of “an across-the board, routine employment benefit for *all* eligible employees . . . [to] attack them . . . stereotype[s], here, behind age discrimination],”<sup>368</sup> or both.

The long and short of it is that *Kimel*, assessed under the standards of the *Boerne* Doctrine as it has evolved, might well come out the other way if the Court were assess it using the resources it has evolved and applied in the development of Section 5 and Eleventh Amendment abrogation analysis to date. This illustrates the main point of this Article, that while the *Boerne* Doctrine tightened restrictions on Congress’s powers to enact Section 5 enforcement legislation and to abrogate the sovereign immunity of the states, it did so, in the first place, far less than has been widely thought, and in the second, increasingly less stringently over time. A private plaintiff wishing to sue a nonconsenting state or bring litigation on the basis prophylactic legislation in the broader swath of constitutionally permitted behavior has a great deal of precedent and a good many tools supplied by the Court, especially if he or she can see a way to raise the level of scrutiny appropriate for the underlying right at issue.

## **B. The *Boerne* Doctrine Restated**

It is untrue that in developing the *Boerne* Doctrine the Court has barred the courthouse door against private law suits against nonconsenting states or raised an impassible barrier against Section 5 legislation. Rather, the Court developed standards for abrogation of Eleventh Amendment immunity and effective Section 5 enforcement action. These standards replaced the former de facto clear statement abrogation standards of the pre-*Union Gas* period with a powers-centered approach foreshadowed in *Fitzpatrick*.<sup>369</sup> I now restate the the *Boerne* Doctrine in terms that are importantly different from the

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366. *See id.* at 533–34.

367. *See Hibbs*, 538 U.S. at 738–39; *cf. Kimel*, 528 U.S. at 86–88 (citing the Bona Fide Occupational Qualification defense, 29 U.S.C. § 623(f)(1) (1967), and the limitation that employers may discriminate on “reasonable factors other than age,” *id.*).

368. *Hibbs*, 538 U.S. at 737.

369. *See supra* Part I.A.1–3.

“official version” set forth above,<sup>370</sup> reflecting its current content and evolution. Speaking analytically rather than chronologically, the *Boerne* Doctrine, first, in *Kimel*, limited the power under which Congress might abrogate to Section 5.

In *City of Bourne*, second, the Court began to develop a complex congruence and proportionality test for effective enforcement legislation to prophylaxis, that is, deterrence and prevention of state constitutional violations: It might regulate constitutionally permitted behavior in the “broader swath” outside the sphere of the rights protected by the Fourteenth Amendment itself,<sup>371</sup> as long as it did not affect the substance of the rights involved. This effectively foreclosed without expressly overruling the former *Morgan* “ratchet” theory of Section 5 action, under which Congress might expand but not constrict those rights.<sup>372</sup>

The congruence and proportionality test involved analysis of the evidence in the record that heightened the bar from *City of Boerne* through *Garrett*, in two ways.<sup>373</sup> The test required (1) direct evidence of a pattern of such violations by States in the record.<sup>374</sup> The Inverse Relation Principle, which tied the intensity of review of the record to the degree of scrutiny accorded the underlying substantive right at issue,<sup>375</sup> enabled the Court to discount much of the evidence of any such patterns in the legislative record of statutes such as the ADEA and Title I of the ADA protecting that called for deferential scrutiny, because under such scrutiny constitutional violations would be unlikely. The test also required, in practice, (2) limitations on the scope of Section 5 legislation, in time, space, or structure, or object to ensure that it was proportional to the pattern of violation and also merely prophylactic, although such specific limitations of the Section 5 remedies were officially stated not to be a requirement.<sup>376</sup> Earlier

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370. See *supra* Part I.B.1–3.

371. See *supra* Part I.A.1–3.

372. See *supra* Part I.B.2.

373. I treat *Morrison* as an outlier for reasons explained above in Part II.C.1. As argued there, *Morrison* fits roughly with the analysis presented in this Article, but was wrongly decided by the Court’s own standards.

374. From *City of Boerne* and *Florida Prepaid* up until (possibly) *United States v. Georgia*, there had to be evidence of a pattern, which was plainly lacking in *Florida Prepaid*, and also in *City of Boerne*, at least as the Court analyzed the records in those cases.

375. See *supra* Part II.C.2.

376. See *City of Boerne*, 521 U.S. at 533; see also *supra* note 128 (listing insistence or invocation of the limitations on Section 5 legislation in every *Boerne* Doctrine case).

*Boerne* Doctrine cases were more rigorous than the pre-*City of Boerne* Section 5 and abrogation cases, so much so that some scholars of discrimination law, including writers such as Professor Laurence Tribe, worried that “the sky was falling” on Congress’s ability to create private claims for relief from discrimination and protection of basic rights against the states and perhaps more broadly.<sup>377</sup>

Subsequently, in *Hibbs* through *United States v. Georgia*, the Court, using the resources developed in the earlier cases, relaxed those standards, at least where underlying rights received heightened scrutiny, thereby enhancing the likelihood of finding a pattern of state constitutional violations.<sup>378</sup> The key resources that the Court deployed were (1) using the Inverse Relation Principle to reframe the question presented in a way that raised the degree of scrutiny to which the underlying right was subject; (2) willingness to consider a wider range of evidence in the legislative record where the law affecting the underlying right received heightened scrutiny; (3) augmentation of the record in various ways; and (4) relaxation of the restrictions on what sorts of measures would count as appropriately limited to remedy the evil at issue without risking changing the substance of the right. The result was to reduce the intensity of review of the record,<sup>379</sup> and evinced increased willingness to find that Congress had satisfied the congruence and proportionality test.

The Court lowered the rigors of the earlier version of the *Boerne* Doctrine, without expressly overruling any of the earlier cases in that line. Nonetheless, the more recent and more relaxed cases are the most recent word on the subject of abrogating state sovereign immunity that that the Court has pronounced. The existence of three such cases, which, furthermore, used resources from the more stringent earlier cases to relax the demands for Section 5 action and abrogation in the later cases, indicates a direction rather than an anomaly. These cases define the current state of the law.

### Conclusion

The *Boerne* Doctrine properly understood, provides litigants, counsel, and judges with a reasonably good, if far from guaranteed, set of GPS directions on how to successfully characterize a case as effective Section 5 enforcement legislation, and in a private suit

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377. See *supra* note 12 and accompanying text.

378. For a summary, see the penultimate paragraph of Part II.C.2.

379. In *United States v. Georgia*, 546 U.S. 151 (2006) seemingly, perhaps, to zero.

against a nonconsenting state, how to clear the *Hans* jurisdictional hurdle and overcome Eleventh Amendment immunity. The cases in this line, interpreted I have indicated, also suggest to defendants the specific route necessary to defeat such claims, arguing in each instance that the relaxed criteria do not apply or are not satisfied. Finally, they provide legislators with fairly clear guidelines on how to write discrimination and other Fourteenth Amendment statutes that do not exceed Congress's Section 5 enforcement powers and, where desired, to abrogate state sovereign immunity beyond saying that was the intent. If the Court finds some such Section 5 or abrogation legislation inadequate, the legislature might also in principle supply any deficiencies retroactively in the manner of *United States v. Lopez*,<sup>380</sup> amplifying the legislative record and amending the statute to provide the necessary findings and limitation. This strategy has not so far been tested and would be a good deal more complicated in these sorts of cases than in *Lopez*.

I have largely confined myself in this Article to expounding and clarifying the new law of Section 5 and Eleventh Amendment abrogation. I conclude by observing that the Court's approach is problematic for several reasons beyond the fact that a tendency that has not been expressly acknowledged and endorsed, is fragile, particularly since the Roberts Court is, to put it mildly, not strongly committed to stare decisis.<sup>381</sup> Indeed, the *Boerne* Doctrine itself, although a later Rehnquist Court development, is free with precedent—although not, in attempting to develop standards for the powers analysis, necessarily for the worse, at least in that respect. Nothing the Roberts Court has done to date seems to suggest that the

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380. *United States v. Lopez*, 514 U.S. 549 (1995). Shortly after the Court struck down the Gun Free School Zones Act, by its decision in *Lopez*, Congress amended the Gun Free School Zones Act to correct the defect found by the Court, adding to the law the following language to create the necessary nexus in interstate commerce: "It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A) (1968) (emphasis added). Because with the new language federal jurisdiction turns upon a "thing" (the gun) that moved in interstate commerce, the deficiency the Court noted in *Lopez* was corrected. See *The New Federalism*, 16 *TOURO L. REV.* 265, 274–75 (2000).

381. Senator Charles E. Schumer, Keynote Speech to the American Constitution Society (July 27, 2007), available at [http://schumer.senate.gov/new\\_website/record.cfm?id=280107](http://schumer.senate.gov/new_website/record.cfm?id=280107) ("In case after case, our most recently confirmed Justices have appeared to jettison decisions recently authored by their immediate predecessors. Although Justices Roberts and Alito both expressed their profound respect for stare decisis at their confirmation hearings, many of their decisions have flouted precedent.").



*Boerne* Doctrine as it now stands is up for a significant change. However, I cannot read the tea leaves and decline to speculate.

More deeply, the underlying method and assumptions of the *Boerne* Doctrine are profoundly troubling. As the analysis above has demonstrated over and over, the new test for effective enforcement action is, first, highly subjective and arbitrary. Time and again the Court decrees (or dissents) that evidence in the record, when it dislikes a putative Section 5 statute, is “anecdotal.” When it likes a statute, it happily supplements the record with anything within reach. “Principled” is not a word that comes to mind. I do not here claim that the Court’s *Boerne* Doctrine decisions are merely opportunistic and result-driven. On the contrary, I have spent a great many pages attempting to explicate their intricate and demanding inner logic. Moreover, the Court on the whole has adhered to this logic—setting aside *Morrison*—even when specific results run counter to the New Federalist and ideologically conservative bent of the majority. That is both praiseworthy and encouraging. Nonetheless, it does not address the serious concern that evaluations and augmentations of the record, as well as assessments of proportionality, are fundamentally standardless.

Second, basing decisions about the adequacy of the record in view of the Inverse Relation Principle between the degree of scrutiny implicated in the review of legislation regarding the underlying substantive right and the likelihood of state constitutional violations skirts constitutional problems. It threatens to violate the prohibition on advisory opinions. The inner structure and driving mechanism of the *Boerne* Doctrine, ironically, itself a jurisdictional doctrine, appears to violate the fundamental rule of jurisdiction, that the Court decides only actual cases and controversies. The Inverse Relation Principle may give fairly predictable results, which is a virtue. But the structure is unsound. It is based on the Court’s predictions about the likely outcomes of cases that no one has ever litigated—in most instances, that no one has ever brought. The resulting tension between the Article III powers of the judiciary and the Section 5 powers of Congress is considerable. No obvious solution suggests itself. This calls for further and more critical analysis than I have given it here.

Third and finally, and subjecting the legislative record to the sort of interrogation required by the *Boerne* Doctrine as currently framed itself violates the basic principle on which the doctrine is based: respect for separation of powers. It fails to give proper deference, not merely to a coordinate and coequal branch of government, but

specifically to the one charged with, and especially competent to, make findings that the appropriate legislation is necessary. Congress cannot and should not get a free pass when it comes to findings and evidence. It can exceed its Section 5 powers and should be pulled back when it does so. But the constitutional structure and two centuries of precedent call for a different and more deferential treatment of what Congress finds in light of the evidence to be necessary and proper. The Court should not be analyzing the record as if it were something like an administrative agency record, and least of all should it be doing so in the haphazard manner that it has so far under this line of cases. In future work I will suggest an alternative approach might look like.

For our purposes here, however, it suffices that the *Boerne* Doctrine as it has evolved, taken at face value on its own terms, has progressively become far less harsh, limiting, and restrictive than the initial post-*City of Boerne* cases suggested and is still generally held to be. Two souls did always dwell within its breast: First, the crabbed and constrained jealous defender of the judiciary's prerogatives that upheld the rights of states to discriminate, and which blocked the exercise of the enforcement power of the Fourteenth Amendment designed to prevent precisely such violations. The second was the relaxed, expansive reading with a wide view of the scope of Congress's Section 5 powers and ability to abrogate. The *Boerne* construction was narrower than the very broad latitude afforded in *Union Gas* and prior cases. Nonetheless, it expressly acknowledged the "broad grant of legislative power" conferred on Congress by Section 5, the wide swath of constitutional discrimination that Congress might prohibit, and that, while Congress may not reshape the substance of the constitutional rights it enforces, it has much leeway in the choices it makes in enforcing those rights. At present the more relaxed view is predominant. If the Court respects its own precedents, then the relaxed view will remain in place, so as long as litigants, lawyers, and Congress follow its guidance.

**APPENDIX****A. Selected ADEA Cases Implicating Due Process Property Interests in State Jobs 1980–2010.**

Arevalo v. Or. Dep't of Transp., 2010 WL 1169795 (D. Or. 2010) (claims brought under ADEA dismissed).

Bailey v. S.C. Dep't of Soc. Servs., 851 F. Supp. 219 (D.S.C. 1993) (plaintiff failed to establish prima facie case of age discrimination given inconsistencies in EEOC findings).

Bapat v. Conn. Dep't of Health Servs., 815 F. Supp. 525, (D. Conn. 1992) (holding that state defendants had qualified immunity on ADEA due process claim challenging personnel decisions short of employment termination).

Bearely v. Fla. Dep't of Corr., 2002 WL 400779 (M.D. Fla. 2002) (dismissing ADEA claim with prejudice).

Black v. Goodman, 736 F. Supp. 1042 (D. Mont. 1990) (Eleventh Amendment barred ADEA claims against state university and other defendants for discharge of university program officer).

Brogdon v. Ala. Dep't of Econ. & Cmty. Affairs, 864 F. Supp. 1161 (M.D. Ala. 1994) (upholding suit of tenured merit system employee of state agency against Eleventh Amendment challenge).

Chouinard v. N.H. Dep't of Corr., 2005 WL 23334 (D.N.H. 2005) (summary judgment appropriate in favor of state agency in ADEA case).

Coger v. Bd. of Regents of Tenn., 154 F.3d 296 (6th Cir. 1998) (affirming abrogation of Eleventh Amendment immunity in ADEA suit by senior faculty members of Memphis State University).

Corrigan v. R.I., Dep't of Bus. Regulation, 820 F. Supp. 647 (D.R.I. 1993) (dismissing ADEA case of former employee for demotion because of failure to establish prima facie case).

Court v. Admin. Office of Third Judicial Dist., 764 F. Supp. 168 (D. Utah 1991) (rejecting state employee's ADEA suit because defendants were not "employer" under statute).

Cox v. Ky. Dep't of Transp., 53 F.3d 146 (6th Cir. 1995) (holding that state agency employee's ADEA failed to meet burden of proof on pretext).

Edwards v. Bd. of Regents of Univ. of Ga., 2 F.3d 382 (11th Cir. 1993) (upholding retaliation claim for teacher's complaint about age discrimination).

EEOC v. Bd. of Regents of the Univ. of Wisc., 288 F.3d 296 (7th Cir. 2003) (Eleventh Amendment did not bar lawsuit by state university employments alleging termination because of age in violation of ADEA).

EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (enjoining forced retirement of state judges at seventy as a violation of the ADEA and rejecting Tenth Amendment defense).

Gehrt v. Univ. of Ill. at Urbana-Champaign Coop. Extension Serv., 974 F. Supp. 1178 (C.D. Ill. 1997) (claims under ADEA against state university were not barred by Eleventh Amendment immunity).

Goss v. Arkansas, 164 F.3d 430 (8th Cir. 1999) (ADEA did not abrogate states' Eleventh Amendment sovereign immunity in employee suit against state under ADEA).

Hatheway v. Bd. of Regents of Univ. of N.M., 1994 WL 732002 (D.N.M. 1994) (dismissing ADEA termination claim for failure to state prima facie case).

Hilburn v. Dep't of Corr., 2010 WL 703202 (D.N.J. 2010) (dismissing ADEA count against state agency for termination because of age).

Humenansky v. Regents of Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (dismissing former employee's ADEA claim against state university under Eleventh Amendment on clear statement grounds).

Hurd v. Pittsburg State Univ., 109 F.3d 1540 (10th Cir. 1997) (affirming District Court judgment that discharged Kansas State employee could maintain ADEA suit over Eleventh Amendment immunity).

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Jolly v. Univ. of N.C. Wilmington, 2010 WL 2024094 (E.D.N.C. 2010) (former employee claims under ADEA allowed to proceed against University).

Jungels v. State Univ. Coll. of N.Y., 922 F. Supp. 779 (W.D.N.Y. 1996) (upholding Eleventh Amendment defense against ADEA termination claim by tenured professor).

Kaplan v. Cal. Pub. Emps.' Ret. Sys., 1998 WL 575095 (N.D. Cal. 1998) (dismissing for failure to state an ADEA claim based on California Public Employees' Retirement System's formula for calculating disability retirement allowances).

Keeton v. Univ. of Nev. Sys., 150 F.3d 1055 (9th Cir. 1998) (upholding abrogation of Eleventh Amendment immunity in ADEA class action brought by state university employees and educators).

McGuire v. Washington, 2010 WL 1286830 (W.D. Wash. 2010) (dismissing terminating employees' ADEA claims against state because of Eleventh Amendment).

McKay v. Del. State Univ., 2000 WL 1481018 (D. Del. 2000) (granting defendants' motion for summary judgment with respect to both the ADEA).

Meredith v. Jackson State Univ., 2010 WL 606402 (S.D. Miss. 2010) (dismissal of university professor's ADEA claims based on Eleventh Amendment).

Milligan-Jensen v. Mich. Tech. Univ., 767 F. Supp. 1403 (W.D. Mich. 1991) (granting summary judgment on state university employee's ADEA suit for dismissal because of age), *rev'd* 975 F.2d 302 (6th Cir. 1992).

Miranda v. Univ. of Md., 2006 WL 6083775 (D. Md. 2006) (granting summary judgment against former University employee).

Nardo v. Hawaii, 2008 WL 5082758 (D. Haw. 2008) (motion under consideration not proper to raise Eleventh Amendment objection).

Nuchims v. West Virginia, 914 F.2d 248 (4th Cir. 1990) (reversing dismissal of ADEA claim brought faculty at state colleges).

Pease v. Univ. of Cincinnati Med. Ctr., 6 F. Supp. 2d 706 (S.D. Ohio 1998) (denying Eleventh Amendment defense against ADEA suit).

Pechon v. La. Dep't of Health & Hosps., 2009 WL 2046766 (E.D. La. 2009) (denying employee's ADEA claim against state agency).

Petitti v. Mass. Dep't of Mental Health, 859 F. Supp. 33 (D. Mass. 1993) (denying age discrimination and retaliation claim for discharge for failure to establish prima facie case).

Rademaker v. Nebraska, 906 F.2d 1309 (8th Cir. 1990) (affirming verdict for plaintiff in ADEA discriminatory discharge case).

Reiff v. Phila. Cnty. Court of Common Pleas, 827 F. Supp. 319 (E.D. Pa. 1993) (court employee could maintain ADEA claim over Eleventh Amendment and summary judgment on that claim).

Simpson v. Tex. Dep't of Crim. Justice, 975 F. Supp. 921 (W.D. Tex. 1997) (upholding ADEA suit of former state employee against Eleventh Amendment challenge).

Swanson v. Dep't of Health, 773 F. Supp. 255 (D. Colo. 1991) (holding that Eleventh Amendment did not bar employee's ADEA suit against state agency).

Tuttle v. Mo. Dep't of Agric., 172 F.3d 1025 (8th Cir. 1999) (affirming judgment as a matter of law against former state employee's ADEA claim because of insufficiency of evidence).

Ullman v. Rector & Visitors of Univ. of Va., 1997 WL 134557 (W.D. Va. 1997) (refusing to allow Eleventh Amendment defense against employee's ADEA claim).

Van Pilsum v. Iowa State Univ. of Sci. & Tech., 863 F. Supp. 935 (S.D. Iowa 1994) (Eleventh Amendment did not bar ADEA claim).

Vicenty Martell v. Estado Libre Asociado de P.R., 48 F. Supp. 2d 81 (D.P.R. 1999) (plaintiff failed to make prima facie case for age discrimination against Commonwealth but did state claim for ADE retaliation).

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*Weeks v. Maine*, 871 F. Supp. 515 (D. Me. 1994) (action against state alleging retaliation in violation of ADEA).

*Wichmann v. Bd. of Trs. of S. Ill. Univ.*, 180 F.3d 791 (7th Cir. 1999) (affirming judgment for willful violation of ADEA in state employee termination over Eleventh Amendment objection).

*Ying Shen v. Okla. State Dep't of Health*, 947 F.2d 955 (10th Cir. 1991) (affirmed jury verdict for defendant in ADEA case).

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