# Judicial Usurpation of Legislative Power: Why Congress Must Reassert its Power to Determine What is "Appropriate Legislation" to Enforce the Fourteenth Amendment

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## INTRODUCTION

Throughout the past decade, the United States Supreme

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Court has pursued a rather meticulous course of evaluating the constitutional bases for legislative enactments passed by Congress. This trend has not been limited to legislation enacted pursuant to Congress's authority under Article I of the United States Constitution, but has extended to measures designed to enforce the Fourteenth Amendment. At the same time, the Court has vigorously defended its own authority to delineate the rights of criminal defendants in various contexts, particularly with regard to *Miranda v. Arizona*[1] and its progeny. These seemingly unrelated matters have produced anomalous results regarding the authority of each branch of the Federal Government to enforce individual rights secured by the Constitution. For the sake of the delicate balance of power that the Constitution was designed to maintain, and for the welfare of those individuals who rightly invoke its provisions in court, the U.S. Supreme Court must retreat from its present course of overreaching activism and permit Congress to exercise its constitutional authority to enact more sweeping legislation designed to protect individual rights.

As Justice Scalia noted in his dissenting opinion in *Dickerson v. United States*, "[w]here the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so."[2] He was referring to provisions such as Section Five of the Fourteenth Amendment, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[3] *Dickerson* stands as perhaps the most obvious example of the Court's insistence that it somehow possesses the authority to demand a little more than the Constitution actually requires in order to guarantee that its provisions will not be eroded. Nevertheless, while the Court has recently taken such steps to expand its own prophylactic power, it has simultaneously begun to limit Congress's authority to enact prophylactic legislation designed to enforce the rights protected by the Fourteenth Amendment. The net result has been an unfortunate shift of constitutional prophylactic power from Congress to the federal courts.

The Court began to curtail congressional authority with regard to prophylactic legislation in its 1997 decision in *City of Boerne v. Flores*,[4] a year after its decision in *Seminole Tribe of Florida v. Florida*.[5] In *Seminole Tribe*, the Court held that the Indian Commerce Clause did not give Congress the authority to

1 384 U.S. 436 (1966).
2 530 U.S. 428, 460 (2000) (Scalia, J., dissenting).
3 U.S. CONST. amend. XIV, § 5.
4 521 U.S. 507 (1997).
5 517 U.S. 44 (1996).

abrogate the Eleventh Amendment immunity enjoyed by the states.[6] The case stands for the more general proposition that while Congress may abrogate the states' Eleventh Amendment immunity when it validly enacts legislation under Section Five of the Fourteenth Amendment, it does not have that authority when it acts pursuant to its powers under Article I.

Subsequently, these two decisions ended up on a collision course. Congressional attempts to enforce various legal rights against the states became subject to a complicated judicial inquiry into the constitutional bases of the underlying statutes creating substantive rights. Since Congress possesses the power to abrogate the states' Eleventh Amendment immunity when it enacts legislation to enforce the Fourteenth Amendment, the *Flores* rationale has begun to further limit Congress's abrogation power. Given the fact that legislation is often based on more than one constitutional grant of power, some cases have presented the question of whether Congress has the power to use the abrogation of Eleventh Amendment immunity as an enforcement mechanism to vindicate statutory rights that were created pursuant to Article I authority in conjunction with the powers derived from the Fourteenth Amendment's Enforcement Clause. Consequently, the abrogation option has been denied to Congress in instances where the Court has deemed the prophylactic legislation to be in excess of the power granted in Section Five of the Fourteenth Amendment, even where the underlying substantive statutes have been concededly valid exercises of Article I power.

The net result of these cases has been a judicial usurpation of the power to enforce the guarantees of the Constitution. On the one hand, the U.S. Supreme Court has created its own prophylactic rules to protect the rights of criminal defendants and has even divested Congress of the authority to replace them.[7] On the other hand, the Court has curtailed Congress's authority to enforce the rights contained within the Fourteenth Amendment, notwithstanding the fact that the Constitution clearly grants such enforcement authority to Congress and lacks any provision implying that such authority exists in the Judiciary. If the Court continues on this perilous course, Congress will have to take the steps necessary to reassert its power to determine what legislation is "appropriate" in order to enforce the Fourteenth Amendment.

6 *Id.* at 76.

7 *Dickerson*, 530 U.S. at 444 (declaring *Miranda* to be "a constitutional rule that Congress may not supersede legislatively").

## I. THE BATTLE OVER THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

On November 16, 1993, President Bill Clinton signed the Religious Freedom Restoration Act into law.[8] The Act was passed unanimously by the House of Representatives and with only three dissenting votes in the Senate.[9] It was enacted in response to the U.S. Supreme Court's decision in *Employment Division v. Smith*, which held that the Free Exercise Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment's Due Process Clause, does not require neutral laws of general application that indirectly burden the free exercise of religion to be narrowly tailored to secure a compelling state interest.[10] As the Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[11] *Church of the Lukumi Babalu Aye, Inc.*, which was decided just five months before the Act was signed into law, held that a challenged enactment must be "justified by a compelling interest" and "narrowly tailored to advance that interest" in circumstances where "the object of a law is to infringe upon or restrict practices because of their religious motivation."[12]

In the "Findings and Declaration of Purposes" section of the Act, Congress stated that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[13] The purposes of the Act were "to restore the compelling interest test as set forth in *Sherbert v. Verner*[14] and *Wisconsin v. Yoder*[15] and to guarantee its application in all cases where free exercise of religion is substantially burdened," as well as "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[16] The statute stated that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the relevant governmental actor could demonstrate that the application of the burden to the individual was both "in furtherance of a

8 Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2000).
9 Mockaitis v. Harcleroad, 104 F.3d 1522, 1529 (9th Cir. 1997).
10 494 U.S. 872 (1990).
11 508 U.S. 520, 531 (1993).
12 *Id.* at 533.
13 42 U.S.C. § 2000bb(a)(2) (2000).
14 374 U.S. 398 (1963).
15 406 U.S. 205 (1972).
16 42 U.S.C. § 2000bb(1)–(2).

compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[17] The Act permitted "[a] person whose religious exercise [had] been burdened in violation" of the statutory mandate to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[18]

Prior to its invalidation as applied to the states in *City of Boerne v. Flores*, the Act was upheld by three Courts of Appeals in different applications. In *Equal Employment Opportunity Commission v. Catholic University of America*, the U.S. Court of Appeals for the District of Columbia Circuit rejected a separation of powers challenge to the statute brought by a litigant who contended that the law was an attempt by Congress to "overturn the Supreme Court's interpretation of the Free Exercise Clause."[19] The Court of Appeals declared that the objective of Congress "was to overturn the *effects* of the *Smith* decision, not the decision itself."[20] The Act, according to the Court of Appeals, did "nothing more than substitute a statutory test for the constitutional test that *Smith* found not to be mandated by the Free Exercise Clause in cases where the right of free exercise was burdened by a neutral law of general application."[21] Nevertheless, *Catholic University* was an easy case with regard to the Act because the relevant governmental actor was an agency of the federal government rather than that of a state.[22] Congress undoubtedly possesses the authority to create exceptions to the application of its own laws, provided that the exceptions themselves do not suffer from distinct constitutional infirmities. *Catholic University* involved an application of Title VII of the Civil Rights Act of 1964, making it unnecessary for the Court to address the constitutionality of the Religious Freedom Restoration Act's application to the states. Consequently, it was easy for the Court to affirm the authority of Congress "to determine against whom, and under what circumstances, Title VII and other federal laws will be enforced."[23]

It is worthy of note that the U.S. Supreme Court recently applied the Religious Freedom Restoration Act in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, which involved a claim by a small religious sect that its members were entitled to "receive[] communion by drinking a sacramental tea, brewed

17 *Id.* § 2000bb-1(a), (b)(1)–(2).
18 *Id.* § 2000bb-1(c).
19 83 F.3d 455, 469 (D.C. Cir. 1996).
20 *Id.*
21 *Id.*
22 *Id.* at 457.
23 *Id.* at 470.

from plants unique to the [Amazon Rainforest], that contain[ed] a hallucinogen regulated under the Controlled Substances Act by the Federal Government."[24] The sect had obtained a preliminary injunction blocking enforcement of the federal ban on the sacramental tea, and this grant of a preliminary injunction was ultimately affirmed by the U.S. Supreme Court. The Court concluded that the courts below had not erred "in determining that the [Federal] Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the [sect's] sacramental use of [the tea]."[25] Absent such a showing, the Religious Freedom Restoration Act provided the sect with an exemption from the operation of the Controlled Substances Act.

The U.S. Court of Appeals for the Ninth Circuit was presented with a much more difficult case in *Mockaitis v. Harcleroad*,[26] which involved the Religious Freedom Restoration Act's application to the State of Oregon. Coincidentally, it was Oregon that had secured a victory in *Smith*, prompting Congress to enact the statute in the first place. In *Mockaitis*, the Court of Appeals relied on the Act, in part, to approve declaratory and injunctive relief against the taping of confessions in an Oregon prison.[27]

Conan Wayne Hale was a suspect in three murders and two burglaries.[28] While he was in prison, nearly all of his conversations with visitors were taped, with the sole exception being those conversations that he had with his attorney.[29] The prison authorities were implicitly authorized by an Oregon statute[30] to "intercept and record conversations between inmates and all visitors save their counsel."[31] Hale was fully aware of the fact that approximately ninety percent of his conversations were being recorded.[32]

On April 22, 1996, Father Timothy Mockaitis heard Hale's confession in the jail's visiting booths.[33] Even though Hale was not a Catholic, he was eligible to participate in the Sacrament of Reconciliation because of his status as a baptized Christian.[34] Following the usual protocol, the conversation was recorded. Al-

24 126 S. Ct. 1211, 1216 (2006).
25 *Id.* at 1225.
26 104 F.3d 1522 (9th Cir. 1997).
27 *Id.* at 1534.
28 *Id.* at 1525.
29 *Id.*
30 OR. REV. STAT. § 165.540(2)(a)(B) (2005).
31 *Mockaitis,* 104 F.3d at 1529.
32 *Id.* at 1525, 1533.
33 *Id.* at 1525.
34 *Id.*

though Hale was probably aware of the fact that the recording was taking place, the Court of Appeals was clearly of the view that Father Mockaitis had absolutely no knowledge whatsoever about the taping of the confession.[35]

The very next day, Detective Jeffrey James Carley sought a search warrant to obtain the tape of the confession, which was issued by Judge Bryant Hodges.[36] Shortly thereafter, District Attorney Douglass Harcleroad obtained an order from Judge Kip Leonard to "retain and seal the tape and to prohibit anyone who knew its contents from divulging them without further order of the court."[37] Ultimately, Father Mockaitis and Archbishop Francis E. George brought an action in the U.S. District Court for the District of Oregon seeking the destruction of both the tape itself and the transcript which had been made from it.[38] Judge Owen Panner dismissed the action, and Father Mockaitis and Archbishop George appealed to the U.S. Court of Appeals for the Ninth Circuit, relying on the Religious Freedom Restoration Act.

Without extended debate, the Court of Appeals rejected the State's argument that the Act was an unconstitutional exercise of Congress's power to enforce the provisions of the Fourteenth Amendment. Using the U.S. Supreme Court's language in *Katzenbach v. Morgan*, the Court of Appeals described Section Five of the Fourteenth Amendment as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[39] The Court found the taping of the confession to be in violation of the Act because it substantially burdened the cleric's free exercise of religion. Although the State's interest in obtaining evidence of criminal activity was assumed to be compelling, the taping of the confession was not the "least restrictive means of furthering that [compelling governmental] interest" because the same kind of evidence could be obtained through diligent work on the part of the police and the detectives.[40] The Court also found the recording to be in violation of the Fourth and Fourteenth Amendments because Oregon's rules of evidence, coupled with the "uniform respect for the character of sacramental confession," gave Father Mockaitis a reasonable expectation of privacy in the contents of the conversation.[41]

35 *Id.*
36 *Id.* at 1524–25.
37 *Id.* at 1526.
38 *Id.* at 1526–27.
39 *Id.* at 1529 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
40 *Id.* at 1530.
41 *Id.* at 1532.

The unique aspect of this case lies in the fact that Hale was actually against the destruction of the tape.[42] He contended that he had confessed to committing the two burglaries but that he had expressly denied committing the murders. Ironically, even though Detective Carley originally sought the tape in order to make the case against Hale, it was Hale who ultimately wanted the tape for his defense. In fact, the Court of Appeals even noted that it was "reasonable to infer that Hale hoped that his words would be recorded and preserved."[43]

In the end, the Court of Appeals agreed with Father Mockaitis and Archbishop George in their argument for declaratory relief, holding that the secret taping of the confession violated the Religious Freedom Restoration Act as well as the Fourth and Fourteenth Amendments.[44] The clergymen also obtained an injunction to "restrain Harcleroad and his agents and employees from further violation of [the Act] and the Fourth Amendment by assisting, participating in or using any recording of a confidential communications [sic] from inmates of the Lane County Jail to any member of the clergy in the member's professional character."[45] These requests for relief were to be granted by the District Court, on remand from the Court of Appeals. Nevertheless, the Court did not see fit to order the destruction of the tape, reasoning that the preservation of the tape for Hale's trial did not substantially burden Father Mockaitis and Archbishop George in the exercise of their religion.[46] After all, Hale was always free to reveal the contents of his own confession. Therefore, the Court permitted the tape to be preserved even as it instructed the District Court to enjoin further violations of the Act and the Fourth and Fourteenth Amendments.

The U.S. Court of Appeals for the Fifth Circuit likewise upheld the Religious Freedom Restoration Act in *Flores v. City of Boerne*,[47] but its decision was ultimately reversed by the U.S. Supreme Court. In *City of Boerne v. Flores*,[48] the Supreme Court invalidated the Act as applied to the states. The case involved St. Peter Catholic Church, which had been built in 1923 and was only able to seat about 230 people.[49] Archbishop P.F. Flores granted permission to the parish to enlarge the building in order to provide seating for the forty to sixty parishioners who were not

42 *Id.* at 1533.
43 *Id.*
44 *Id.* at 1533–34.
45 *Id.* at 1534.
46 *Id.* at 1531.
47 73 F.3d 1352, 1363 (5th Cir. 1996), *rev'd* 521 U.S. 507 (1997).
48 521 U.S. 507 (1997).
49 *Id.* at 511–12.

accommodated at some Sunday Masses, but the City of Boerne's Historic Landmark Commission later denied the Archbishop's request for the necessary building permit on the ground that St. Peter Church was located in a district that was designated as historic. The Archbishop proceeded to bring a suit in the U.S. District Court for the Western District of Texas challenging the permit denial and using the Act as a basis for relief.[50] Although the District Court concluded that the Act exceeded Congress's authority under the Fourteenth Amendment, its judgment was reversed by the Court of Appeals on interlocutory appeal.[51] Ultimately, however, the U.S. Supreme Court granted certiorari.[52]

The Court noted at the outset that the Act was specifically designed to protect the free exercise of religion, applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment, beyond the requirements of the *Smith* decision.[53] Justice Kennedy, who authored the Court's opinion, reiterated the language in *Ex parte Virginia* by declaring:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."[54]

He also stated that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[55]

Nevertheless, Justice Kennedy drew a sharp distinction between legislation designed to enforce the Fourteenth Amendment and legislation which attempts "to determine what constitutes a constitutional violation."[56] In *Catholic University*, the U.S. Court of Appeals for the District of Columbia Circuit had said that "Congress's objective in enacting the [Religious Freedom Restoration Act] was to overturn the *effects* of the *Smith* decision, not the decision itself."[57] In other words, while Congress lacked the authority to overrule the U.S. Supreme Court's interpretation of the

50 Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

51 *Flores*, 73 F.3d at 1362–65 (5th Cir. 1996), *rev'd* 521 U.S. 507 (1997).

52 City of Boerne v. Flores, 519 U.S. 926 (1996).

53 *Flores*, 521 U.S. at 512–13.

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

55 *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

56 *Id*. at 519.

57 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 469 (D.C. Cir. 1996).

Free Exercise Clause of the First Amendment, the Court of Appeals sustained Congress's power to "substitute a statutory test for the constitutional test that *Smith* found not to be mandated by the Free Exercise Clause in cases where the right of free exercise was burdened by a neutral law of general application."[58] *Catholic University*, however, did not involve the Act's application to the states, making it easy for the Court of Appeals to assert that Congress possesses "at least the facial authority to determine against whom, and under what circumstances, Title VII and other federal laws will be enforced."[59] There was no question that Congress had legislative jurisdiction to limit the application of neutral federal laws of general application, but *Flores* posed a more difficult question because the Act purported to limit the application of state law.

Although the U.S. Supreme Court agreed that Section Five of the Fourteenth Amendment gave Congress the power to enforce the Free Exercise Clause of the First Amendment, given that the latter was incorporated within the Fourteenth Amendment's Due Process Clause, the Court did not view the Act as a valid enforcement measure. Instead, the Court saw the statute as an encroachment on its own interpretive authority and declared that "Congress does not enforce a constitutional right by changing what the right is."[60] Justice Kennedy explained the applicable test for evaluating the constitutionality of Section Five legislation by stating that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[61]

The Religious Freedom Restoration Act was found to fail the congruence and proportionality test because it was not limited to the deterrence of actual Free Exercise Clause violations. Instead, it was designed to displace the application of various state laws even in instances where no constitutional violations were present. The statute reached every incidental burden placed on the exercise of religion by neutral laws of general application, while the Constitution only reached those laws which directly targeted religious practices for special legal burdens. The Court noted that "[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious be-

58 *Id.*
59 *Id*. at 470.
60 *Flores*, 521 U.S. at 519.
61 *Id*. at 520.

liefs."[62] Therefore, the Act was invalidated as applied to the states, and it could not be used to vindicate Archbishop Flores in his efforts to win an exemption from the application of the City of Boerne's ordinance governing the designation and maintenance of historic landmarks.

Justice Stevens authored a short concurring opinion in which he expressed the view that the Religious Freedom Restoration Act violated the Establishment Clause of the First Amendment. As he saw it, the statute had "provided the Church with a legal weapon that no atheist or agnostic [could] obtain."[63] Citing the Court's decision in *Wallace v. Jaffree*,[64] he declared that "[t]his governmental preference for religion, as opposed to irreligion, [was] forbidden by the First Amendment."[65] Although he did not specifically mention a distinction between the Act's application to federal or state law, Justice Stevens' opinion can only be read as a contention that the statute is likewise unconstitutional as applied to federal law.

The other Justices approached the issue as one regarding legislative jurisdiction, with Justices O'Connor, Souter and Breyer expressing the dissenting view that the underlying holding in *Smith* should be reexamined, and Chief Justice Rehnquist and Justices Kennedy, Thomas, Scalia and Ginsburg adhering to the view that the Act was simply in excess of Congress's power to enforce the Fourteenth Amendment.[66] To these eight Justices, there would be no reason to question the constitutionality of the Act as applied to the federal government because Congress would not need to rely on Section Five of the Fourteenth Amendment to restrict the application of its own laws. Since Justice Stevens saw the Act as a violation of the Establishment Clause, however, his position must necessarily be that the Act is unconstitutional in all of its applications. This logic can be inferred from the fact that the Establishment Clause operates as a substantive limit on the powers of Congress even when legislative jurisdiction is otherwise present. Although Justice Stevens joined the opinion of the Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, which involved the Act's application to the federal government and vindicated the religious sect seeking relief under the Act, there was no constitutional challenge brought against the statute in that case.[67]

62 *Id.* at 535.

63 *Id.* at 537 (Stevens, J., concurring).

64 Wallace v. Jaffree, 472 U.S. 38, 52–55 (1985).

65 *Flores*, 521 U.S. at 537 (Stevens, J., concurring).

66 *Id.* at 544–45 (O'Connor, J., dissenting); *Id.* at 565–66 (Souter, J., dissenting); *Id.* at 566 (Breyer, J., dissenting); *Id.* at 511 (majority opinion).

67 126 S. Ct. 1211, 1225 (2006).

While invalidating the Religious Freedom Restoration Act in *Flores*, the Court relied to some degree on *South Carolina v. Katzenbach*,[68] a precedent upholding the Voting Rights Act of 1965 as a valid exercise of Section Two of the Fifteenth Amendment. The Court viewed the Voting Rights Act as being more directly related to enforcing the Constitution than the Religious Freedom Restoration Act, leaving one to infer that the Enforcement Clauses of the Fourteenth and Fifteenth Amendments should be construed in a similar manner because of the similarities in their wording.

Nevertheless, the Court made no attempt to distinguish its precedents involving the power of Congress to enforce the Thirteenth Amendment. In *Jones v. Alfred H. Mayer Co.*, the Court declared that, "[b]y its own unaided force and effect, the Thirteenth Amendment abolished slavery, and established universal freedom."[69] Justice Stewart, who delivered the opinion of the Court, went on to say that "[w]hether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*."[70] *Jones* upheld 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[71]

In *Runyon v. McCrary*,[72] the Court again upheld sweeping legislation as a valid exercise of Section Two of the Thirteenth Amendment. *Runyon* upheld 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[73]

It cannot be doubted that these two statutes would fail the "congruence and proportionality" test described in *Flores* if it

68 383 U.S. 301, 308 (1966).
69 392 U.S. 409, 439 (1968) (internal quotation marks omitted).
70 *Id.* at 439 (internal quotation marks omitted).
71 42 U.S.C. § 1982 (2000).
72 427 U.S. 160 (1976).
73 42 U.S.C. § 1981(a) (2000).

were to be applied in the Thirteenth Amendment context. These legislative acts, though passed pursuant to Section Two of the Thirteenth Amendment, cannot be said to be limited to the mere enforcement of the underlying constitutional provision. There are many actions which would violate either § 1981 or § 1982 without violating the Thirteenth Amendment itself. By choosing to rely on its Fifteenth Amendment cases while ignoring its Thirteenth Amendment precedents, the Supreme Court left both a hole in its rationale and a cloud over Congress's power to enforce the Civil War Amendments. The similar wording of these three constitutional provisions, all of which delegated legislative power to Congress that did not exist under the original Constitution, leaves no principled reason for treating one radically different from the other two.

It is, of course, true that the Thirteenth Amendment operates against a broader array of potential transgressors. While the Fourteenth and Fifteenth Amendments limit only governmental entities, the Thirteenth Amendment limits governmental and private actors alike.[74] Although the Thirteenth Amendment's prohibitions have a broader target, the prohibitions themselves are far narrower than those contained in the Fourteenth Amendment. The category of conduct which violates the Fourteenth Amendment is far more inclusive than that which violates the Thirteenth Amendment, potentially leading one to the conclusion that Section Five of the Fourteenth Amendment should be construed as a broader delegation of legislative authority than Section Two of the Thirteenth Amendment. Notwithstanding this reality, the holding in *Flores* appears to indicate the contrary, especially in light of the sweeping legislative enactments upheld in *Jones* and *Runyon*.

The U.S. Supreme Court has not always reconciled its various decisions interpreting the Civil War Amendments, and its cases have often led to implicit anomalies.[75] Perhaps no anomaly is more glaring in this area of the law, however, than the Court's recent practice of meticulously scrutinizing prophylactic legislation designed to enforce the Fourteenth Amendment after upholding such broad legislative mandates passed pursuant to Section Two of the Thirteenth Amendment in *Jones* and *Runyon*.

## II. THE COLLISION BETWEEN *FLORES* AND *SEMINOLE TRIBE*

When the U.S. Supreme Court decided *Flores* in 1997, it had

74 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); *Runyon,* 427 U.S. 160.

75 *See* Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L., 735, 736 (2002).

already decided *Seminole Tribe of Florida v. Florida*[76] a year earlier. In *Seminole Tribe*, the Court held that the Indian Commerce Clause did not provide Congress with the authority to abrogate the Eleventh Amendment immunity enjoyed by the states.[77] In so holding, the Court rejected its prior plurality decision in *Pennsylvania v. Union Gas Co.*, which held that the Interstate Commerce Clause gave Congress the power to abrogate state sovereign immunity and declared that the federal power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages."[78] Chief Justice Rehnquist, who authored the opinion of the Court in *Seminole Tribe*, made it clear that "[t]he Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[79] The Court distinguished its decision in *Fitzpatrick v. Bitzer*,[80] which held that Section Five of the Fourteenth Amendment did grant Congress the authority to abrogate the states' Eleventh Amendment immunity. In *Seminole Tribe*, Chief Justice Rehnquist explained that "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment."[81]

The principle that Article I does not give Congress the authority to abrogate the states' Eleventh Amendment immunity remains the law despite the Court's recent decision in *Central Virginia Community College v. Katz*.[82] In *Central Virginia Community College*, the Court declared that "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere."[83] Justice Stevens, who delivered the opinion of the Court, explained that, "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[84] He went on to state that "Congress may, at its option, either treat States in the same way as other creditors insofar as

76 Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
77 *See id.* at 76.
78 491 U.S. 1, 19 (1989) (plurality opinion), *overruled by Seminole Tribe*, 517 U.S. 44.
79 517 U.S. at 72–73.
80 427 U.S. 445, 456 (1976).
81 *Seminole Tribe,* 517 U.S. at 65–66.
82 126 S. Ct. 990 (2006).
83 *Id.* at 1004.
84 *Id.* at 1005.

concerns Laws on the subject of Bankruptcies or exempt them from operation of such laws."[85] This power, according to the Court, "arises from the Bankruptcy Clause itself" and is not dependent on any purported abrogation of the states' Eleventh Amendment immunity by Congress.[86] Therefore, *Seminole Tribe* remains good law despite the Court's holding in *Central Virginia Community College* that "[a] proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies" is not barred by sovereign immunity.[87]

At first glance, one might conclude that *Flores* and *Seminole Tribe* addressed wholly unrelated matters that one could not implicate in the same case. Nevertheless, the holdings in these two decisions later collided to produce a situation in which Congress was stripped of its power to provide the abrogation remedy in circumstances where federal legislative jurisdiction to enact the substantive statutory provisions was beyond question. The problem began just two years after *Flores* was decided.

### A. The *College Savings Bank* and *Florida Prepaid Cases*

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court held that the Trademark Remedy Clarification Act did not validly abrogate the states' sovereign immunity.[88] Similarly, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that the Patent and Plant Variety Protection Remedy Clarification Act did not validly abrogate the states' Eleventh Amendment immunity.[89] Although the Patent Clause unambiguously gives Congress legislative jurisdiction to regulate the subject matter, that provision could not be the basis for an abrogation of Eleventh Amendment immunity because it is contained in Article I of the Constitution. Congress amended the patent laws in 1992 and "expressly abrogated the States' sovereign immunity from claims of patent infringement,"[90] but *Seminole Tribe* foreclosed any argument to the effect that the Patent Clause, an Article I power, provided Congress with the constitutional authority to do so. Therefore, pursuant to *Fitzpatrick*, the statutory abrogations involved in these two cases could only be sustained if they were validly enacted by Congress under Section Five of the Fourteenth Amendment.

85 *Id.* (internal quotation marks omitted).
86 *Id.*
87 *Id.* at 994.
88 527 U.S. 666, 691 (1999).
89 527 U.S. 627, 647 (1999).
90 *Id.* at 630.

In *College Savings Bank*, the Court rejected the argument that the Trademark Remedy Clarification Act, which subjected the states to suits brought under section 43(a) of the Trademark Act of 1946 for "false and misleading advertising,"[91] was a valid exercise of Congress's power to enforce the Due Process Clause of the Fourteenth Amendment. Justice Scalia, who delivered the opinion of the Court, noted at the outset that under *Flores*, the object of Section Five legislation "must be the carefully delimited remediation or prevention of constitutional violations."[92] College Savings Bank contended that Congress had passed the Act to prevent state deprivations, without due process of law, of two species of property rights. The first was characterized as "a right to be free from a business competitor's false advertising about its own product," and the second was described as "a more generalized right to be secure in one's business interests."[93] The Court was not convinced that either right qualified as a property right protected by the Fourteenth Amendment.

Rejecting the first asserted right, the Court declared that "[t]he hallmark of a protected property interest is the right to exclude others."[94] The Trademark Remedy Clarification Act bore "no relationship to any right to exclude,"[95] making College Savings Bank's argument all the more difficult. Justice Scalia explained that "Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which [College Savings Bank] had exclusive dominion."[96] He went on to say that even if the tort of unfair competition could be viewed as a mechanism to protect property interests, "not everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests."[97]

The Court likewise rejected College Savings Bank's second alleged property interest. Reasoning that no business asset of College Savings Bank was impinged upon by Florida Prepaid's false advertising, Justice Scalia made it clear that there was no deprivation of property at issue in the case. While it was conceded that any state taking of business assets would qualify as a deprivation of property under the Due Process Clause, College Savings Bank was wholly unable to identify a loss of such an asset. Since the Court found no underlying violation of the Fourteenth Amendment, it saw no reason to consider whether the

91 *Coll. Sav. Bank,* 527 U.S. at 669.
92 *Id.* at 672.
93 *Id.*
94 *Id.* at 673.
95 *Id.*
96 *Id.*
97 *Id.* at 674.

prophylactic measure taken pursuant to Section Five was "genuinely necessary" to prevent an actual constitutional violation.[98] It was also determined that Florida's activities in interstate commerce did not constitute a waiver of the state's Eleventh Amendment immunity, leaving the federal courts without jurisdiction to entertain the suit.

Justice Stevens, in a dissenting opinion, took issue with the Court's determination that the Trademark Remedy Clarification Act was not a valid exercise of Section Five of the Fourteenth Amendment. He viewed a state's "deliberate destruction of a going business" as "a deprivation of property within the meaning of the Due Process Clause."[99] Emphasizing that the Act was a valid exercise of Congress's Section Five power, even if Florida Prepaid's allegedly false advertising did not itself amount to a constitutional violation, he declared that "the validity of a congressional decision to abrogate sovereign immunity in a category of cases" depended on "whether Congress had a reasonable basis for concluding that abrogation was necessary to prevent violations that would otherwise occur" rather than on "the strength of the claim asserted in a particular case within that category."[100] Justice Stevens concluded his dissent by noting that Congress's judgment commanded more respect, especially in light of "the presumption of validity that supports all federal statutes."[101]

In *Florida Prepaid*, the U.S. Supreme Court rejected a similar attempt by College Savings Bank to take advantage of a purported abrogation of the states' Eleventh Amendment immunity. College Savings Bank, a New Jersey chartered savings bank, obtained a patent for a financing methodology "designed to guarantee investors sufficient funds to cover the costs of tuition for college[]."[102] The Florida Prepaid Postsecondary Education Expense Board, which was created by the State of Florida, administered similar "tuition prepayment contracts" that were available to residents of Florida. College Savings Bank ultimately brought a patent infringement action against Florida Prepaid pursuant to 35 U.S.C. § 271(a), arguing that Florida Prepaid had infringed its patent by administering a distinct tuition prepayment program. Two years before the action was brought, Congress had enacted the Patent and Plant Variety Protection Remedy Clarification Act, which abrogated the states' sovereign immunity in patent in-

98 *Id*. at 675.

99 *Id*. at 693 (Stevens, J., dissenting).

100 *Id*.

101 *Id*.

102 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 631 (1999).

fringement cases.[103] Nonetheless, Congress enacted the Act, with its purported abrogation, before *Seminole Tribe* and *Flores* were decided, making it necessary for the Court to determine the Act's constitutionality pursuant to the standards enunciated in those cases.

Article I, Section Eight of the U.S. Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[104] This provision, however, could not sustain an abrogation of the states' Eleventh Amendment immunity because of the rule of *Seminole Tribe*. Since Article I could not provide a basis for such an abrogation, College Savings Bank contended that the Patent Remedy Act was a valid exercise of Congress's power to enforce the Fourteenth Amendment.[105] Because *Seminole Tribe* foreclosed the arguments under the Patent and Interstate Commerce Clauses, College Savings Bank sought refuge under the rule of *Fitzpatrick*.

Chief Justice Rehnquist, who delivered the opinion of the Court, first pointed out that Congress had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[106] Moving on to the inquiry required under *Flores*, he noted that under *Brown v. Duchesne*[107] and *Consolidated Fruit-Jar Co. v. Wright*,[108] patents are property protected by the Due Process Clause of the Fourteenth Amendment. Although College Savings Bank likewise argued that the Fifth Amendment's Just Compensation Clause, applicable to Florida by virtue of the Fourteenth Amendment's Due Process Clause, provided an additional reason to justify prophylactic legislation under the Enforcement Clause, the Court did not agree. Due to the fact that Congress had been "so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment," the Court viewed the omission of the Just Compensation Clause from the statutory text and the legislative history of the Patent Remedy Act as fatal to College Savings Bank's argument that the Just Compensation Clause provided an alternative ground to uphold the statute.[109]

103 *See id.* at 631–32.
104 U.S. CONST. art. I, § 8, cl. 8.
105 *Fla. Prepaid*, 527 U.S. at 633.
106 *Id.* at 640.
107 60 U.S. (19 How.) 183 (1857).
108 94 U.S. 92 (1877).
109 *Fla. Prepaid,* 527 U.S. at 642 n.7.

Reviewing the Patent Remedy Act under the *Flores* standard, the Court sought to identify the underlying constitutional violation that Congress attempted to remedy. Relying on its prior decisions in *Parratt v. Taylor*,[110] *Hudson v. Palmer*,[111] and *Zinermon v. Burch*,[112] the Court declared that "a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution."[113] This is because a deprivation of a constitutionally protected property interest by a state actor does not violate the Fourteenth Amendment if the state actor provides due process. What is unconstitutional, in this context, "is the deprivation of such an interest *without due process of law*."[114] Therefore, the Court made it clear that "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."[115] It was likewise noted that Florida provided both a legislative remedy[116] and a judicial remedy[117] "to patent owners for alleged infringement on the part of the State."[118]

While the Court was sympathetic to the "need for uniformity in the construction of patent law," it insisted that such a factor belonged to the "Article I patent-power calculus" and not "to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law."[119] The Court went on to say that Congress, while enacting the Patent Remedy Act, had focused on negligent infringements of patents by the states and not on examples of reckless or intentional infringements. Under *Daniels v. Williams*, negligent conduct by a state actor which results in an unintended injury to a person's liberty or property does not constitute a "deprivation" for Due Process Clause purposes.[120] Consequently, the Court was persuaded that Congress's purported abrogation of the states' Eleventh Amendment immunity was in response to various patent infringements by states in which no deprivations of property could be established, let alone deprivations of property without due

110 451 U.S. 527 (1981).
111 468 U.S. 517 (1984).
112 494 U.S. 113 (1990).
113 *Fla. Prepaid,* 527 U.S. at 643.
114 *Zinermon,* 494 U.S. at 125.
115 *Fla. Prepaid,* 527 U.S. at 643.
116 *See* Fla. Stat. § 11.065 (2005).
117 *See* Jacobs Wind Elec. Co. v. Fla. Dept. of Transp, 626 So.2d 1333, 1337 (Fla. 1993).
118 *Fla. Prepaid,* 527 U.S. at 644 n.9.
119 *Id*. at 645.
120 474 U.S. 327, 331 (1986).

process of law. The Court emphasized that "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed."[121] Congress made no "attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy," nor did it provide for suits "only against States with questionable remedies or a high incidence of infringement."[122] Therefore, the Patent Remedy Act, unable to pass the "congruence and proportionality" test established in *Flores*, was invalidated as being in excess of Congress's power under Section Five of the Fourteenth Amendment. This was largely because the underlying state conduct, in most instances reached by the statute, was not itself unconstitutional.

Justice Stevens, in a dissenting opinion joined by Justices Souter, Ginsburg and Breyer, questioned whether the *Daniels* standard for identifying a deprivation of a constitutionally protected property interest applied in the patent infringement context.[123] He contended that "the *Daniels* line of cases ha[d] only marginal relevance" to the case at hand because College Savings Bank was alleging that Florida Prepaid's infringement had been willful.[124] He also noted that it was reasonable for Congress to assume that state remedies for patent infringement did not exist because it "had long ago pre-empted state jurisdiction over patent infringement cases."[125] Justice Stevens went on to point out that *Alden v. Maine*, which was decided that same day, and which held that "the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts,"[126] would likely preclude Congress from requiring state courts to "entertain infringement actions when a State is named as a defendant."[127] He asserted that the Patent Remedy Act passed the "congruence and proportionality" test established in *Flores* because its sole purpose was to "abrogate the States' sovereign immunity as a defense to a charge of patent infringement."[128] He reasoned that "congruence [was] equally precise whether infringement of patents by state actors [was] rare or frequent," since the impact of

121 *Fla. Prepaid,* 527 U.S. at 646–47.
122 *Id*. at 647.
123 *Id*. at 653 (Stevens, J., dissenting).
124 *Id*.
125 *Id*. at 658.
126 527 U.S. 706, 712 (1999).
127 *Fla. Prepaid,* 527 U.S. at 659 (Stevens, J., dissenting).
128 *Id*. at 662.

the statute would "expand in precise harmony with the growth of the problem that Congress anticipated and sought to prevent."[129] This was because the statute would only apply in instances where a state raised its sovereign immunity as a defense to a patent infringement action, regardless of how common or rare such infringements were.

*Florida Prepaid* and *College Savings Bank*, which were decided on the same day, were only the first examples of the problems created as a result of the collision between *Seminole Tribe* and *Flores*. Nonetheless, they continue to serve as a stark illustration of the resulting enforcement anomaly. Although Article I undoubtedly confers on Congress the legislative jurisdiction to regulate patents and trademarks, *Seminole Tribe* prevents Congress from using that power to abrogate the states' Eleventh Amendment immunity in infringement cases. While *Fitzpatrick* permits such an abrogation pursuant to Section Five of the Fourteenth Amendment, the narrow construction given to that constitutional provision in *Flores* significantly impedes the use of that legislative option.

The power vested in Congress by the Copyright and Patent Clause is very extensive, as was recently illustrated by the U.S. Supreme Court's decision in *Eldred v. Ashcroft*.[130] In *Eldred*, the Court declared that "the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future."[131] In so holding, the Court rejected the argument that "a time prescription, once set, becomes forever fixed or inalterable."[132] Justice Ginsburg, who authored the opinion of the Court, likewise noted that the "congruence and proportionality" standard established in *Flores* was not applicable in *Eldred* and could not be invoked to ensure that legislation extending copyrights was appropriately in pursuit of the purposes of the Copyright and Patent Clause. She contrasted the two different constitutional provisions by saying that "Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment," while the Copyright and Patent Clause "empowers Congress to *define* the scope of the substantive right."[133] Consequently, the deference given to Congress in the Article I context is much broader than that shown in *Flores*, which involved an interpretation of the Enforcement Clause.

129 *Id*. at 662–63.
130 537 U.S. 186 (2003).
131 *Id*. at 199.
132 *Id*. (internal quotation marks omitted).
133 *Id*. at 218.

This deference, however, did not help College Savings Bank because of the rule enunciated in *Seminole Tribe*. Notwithstanding the extensive nature of Congress's authority under the Copyright and Patent Clause, the Eleventh Amendment operated as a barrier to federal adjudicatory jurisdiction in *Florida Prepaid* and *College Savings Bank*. The U.S. Supreme Court's description of the Trademark Remedy Clarification Act and the Patent Remedy Act as disproportionate attempts to enforce the Fourteenth Amendment may make some sense, but the broad nature of these statutes is unsurprising when the timing of their enactment is considered. The Patent Remedy Act, for instance, was enacted in response to *Chew v. California*,[134] which was a 1990 decision of the U.S. Court of Appeals for the Federal Circuit. It held that the patent statutes did not contain the clear statement of Congress's intent to abrogate the states' sovereign immunity required under the U.S. Supreme Court's decision in *Atascadero State Hospital v. Scanlon*.[135] The U.S. Supreme Court's decision in *Pennsylvania v. Union Gas Co.*, issued in 1989, affirmed Congress's authority to abrogate the states' Eleventh Amendment immunity pursuant to the Commerce Clause.[136] Congress, relying on *Union Gas Co.*, passed the Patent Remedy Act in 1992 and abrogated the states' Eleventh Amendment immunity in patent infringement cases pursuant to its powers under the Patent Clause, the Commerce Clause, and Section Five of the Fourteenth Amendment. Four years later, *Seminole Tribe* overruled *Union Gas Co.* and made it clear that Article I powers cannot be used to effect such abrogations.[137] When the Patent Remedy Act was passed, however, Congress saw no need to tailor the remedy to the limits of its authority under the Enforcement Clause of the Fourteenth Amendment, given that two clauses in Article I were also being invoked and that *Seminole Tribe* had not yet been decided.

### B. *Kimel v. Florida Board of Regents*

The enforcement anomaly that began in 1999 with *Florida Prepaid* and *College Savings Bank* continued into the Court's next term. In *Kimel v. Florida Board of Regents*, the U.S. Supreme Court held that the Age Discrimination in Employment Act of 1967, as amended in 1974 to cover the states by abrogating their sovereign immunity, was in excess of Congress's power to

134 893 F.2d 331 (Fed. Cir. 1990).

135 473 U.S. 234 (1985).

136 491 U.S. 1, 13–14 (1989) (plurality opinion), overruled by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

137 *Seminole Tribe*, 517 U.S. at 72–73.

enforce the Fourteenth Amendment.[138] The Act makes it illegal for an employer, governmental or private, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[139] It protects individuals age forty and over, subject to certain exceptions specifically enumerated in the text of the Act. Various plaintiffs sued their state employers under the Act, alleging that they were discriminated against on the basis of age.[140] The defendants contended that the Eleventh Amendment barred the suits. The cases were consolidated on appeal by the U.S. Court of Appeals for the Eleventh Circuit, which held that the states were immune from suits brought in federal court for violations of the Act.[141] Ultimately, the cases reached the U.S. Supreme Court.

After conceding that Congress had unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity, the Court went on to decide whether the Age Discrimination in Employment Act was a valid exercise of Congress's power under Section Five of the Fourteenth Amendment. The opinion of the Court in *Kimel* was delivered by Justice O'Connor, who noted at the outset that the application of the Act's substantive provisions to the states had already been upheld.[142] In *EEOC v. Wyoming*, the U.S. Supreme Court held that the Act was a valid exercise of Congress's authority to regulate interstate commerce, making it unnecessary for the Court to determine whether Section Five of the Fourteenth Amendment provided an alternative ground for upholding the statute.[143] The Eleventh Amendment, of course, does not bar suits brought by the United States against a state.[144]

In *Kimel*, however, the Court had to resolve the Enforcement Clause question. Although *EEOC* had found the Act to be a valid exercise of Congress's power under the Interstate Commerce Clause, the rule of *Seminole Tribe* prevented the plaintiffs in *Kimel* from using that precedent to assert federal adjudicatory jurisdiction.[145] The Court began its discussion of the Enforcement Clause issue by declaring that Congress's power to enforce the Fourteenth Amendment "includes the authority both to remedy

138 528 U.S. 62, 91 (2000).
139 29 U.S.C. § 623(a)(1) (2000).
140 *Kimel*, 528 U.S. at 66.
141 Kimel v. Fla. Bd. of Regents, 139 F.3d 1426, 1433 (1998), *aff'd*, 528 U.S. 62.
142 *See Kimel,* 528 U.S. at 78.
143 460 U.S. 226 at 243 (1983).
144 *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).
145 *Kimel*, 528 U.S. at 78–79.

and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[146] Nonetheless, it was also noted that the determination of "whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult."[147]

Despite any perceived difficulty posed by the question, the Court concluded that the Age Discrimination in Employment Act was not a valid exercise of Section Five of the Fourteenth Amendment because the Act's substantive provisions were "disproportionate to any unconstitutional conduct that conceivably could be targeted."[148] Relying on its prior decisions in *Gregory v. Ashcroft*,[149] *Vance v. Bradley*,[150] and *Massachusetts Board of Retirement v. Murgia*,[151] the Court explained that "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[152] This is because age is not a suspect classification for Equal Protection Clause purposes. Age classifications made by a state are not inherently suspect because older persons have not been subject to a "history of purposeful unequal treatment,"[153] nor are they members of a "discrete and insular minority."[154] Unlike classifications based on race or gender, age classifications cannot properly be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[155] Therefore, as the Court made clear in *Kimel*, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," even though age may prove to be an "inaccurate proxy" from time to time.[156]

According to the Court, the Age Discrimination in Employment Act required far more of state employers than did the Equal Protection Clause of the Fourteenth Amendment. The Act included exceptions permitting employers to defend themselves against suits by demonstrating that age was "a bona fide occupa-

146 *Id.* at 81 (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).
147 *Id.* at 81 (citing *Flores,* 521 U.S. at 519–20).
148 *Id.* at 83.
149 501 U.S. 452, 473 (1991).
150 440 U.S. 93, 111 (1979).
151 427 U.S. 307, 317 (1976) (per curiam).
152 *Kimel,* 528 U.S. at 83.
153 *Murgia,* 427 U.S. at 313.
154 *Kimel,* 528 U.S. at 83.
155 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).
156 *Kimel,* 528 U.S. at 84.

tional qualification reasonably necessary to the normal operation of the particular business" or that "the differentiation [was] based on reasonable factors other than age."[157] The plaintiffs argued that these exceptions narrowed the reach of the Act, thereby making it a more "congruent" and "proportional" prophylactic measure designed to enforce the Equal Protection Clause.[158] The Court rejected this argument, however, because it had narrowly construed these exceptions in *Western Air Lines, Inc. v. Criswell*[159] and *Hazen Paper Co. v. Biggins*,[160] leaving the Act's substantive requirements "at a level akin to [the Court's] heightened scrutiny cases under the Equal Protection Clause."[161] The Act, so construed, prohibited employers from using age as a proxy for other characteristics related to an employee's work. Given that construction, the Act's protection was deemed to extend far beyond that provided by the Fourteenth Amendment.

The Court went on to say that "Congress's failure to uncover any significant pattern of unconstitutional discrimination" only served to confirm that "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[162] Justice O'Connor explained that Congress's purpose for enacting the Act was to raise the level of scrutiny applicable in age discrimination cases rather than to enforce the guarantees of the Fourteenth Amendment. This purpose, of course, justified a valid exercise of the Commerce Clause power, but the rule of *Seminole Tribe* prevented that provision from being used to effect an abrogation of the states' Eleventh Amendment immunity. Since the Act was not viewed as a valid abrogation of the Eleventh Amendment immunity enjoyed by the defendant state entities, the suits were dismissed.

Justice Stevens authored a dissenting opinion, joined by Justices Souter, Ginsburg and Breyer.[163] Focusing more on the rule enunciated in *Seminole Tribe* than on the *Flores* standard, Justice Stevens insisted that "Congress's power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place."[164] In his view, *Seminole Tribe* had been wrongly decided, forcing the Court to "resolve vexing questions of constitutional law" respecting Congress's authority

157 29 U.S.C. § 623(f)(1) (2000).
158 *Kimel,* 528 U.S. at 82–83.
159 472 U.S. 400, 423 (1985).
160 507 U.S. 604, 616 (1993).
161 *Kimel,* 528 U.S. at 88.
162 *Id.* at 91.
163 *Id.* at 92 (Stevens, J., dissenting).
164 *Id.* at 93.

to enforce the Fourteenth Amendment.[165] After all, the substantive provisions of the Age Discrimination in Employment Act had already been upheld in *EEOC v. Wyoming* as a valid exercise of Congress's power to regulate interstate commerce.[166] Had *Union Gas Co.* not been overruled by *Seminole Tribe*, Article I would have provided a constitutionally adequate basis for effecting the desired abrogation of the states' sovereign immunity. He also questioned the idea that the Judicial Branch should serve as the guardian of state sovereignty.

In an intricate manner, Justice Stevens described the structural protections provided to the states by the Constitution. He referred to Article I's allocation to the states of equal representation in the Senate as the Constitution's "principal structural protection for the sovereignty of the several States."[167] After emphasizing that point, he went on to note that "[t]he electors who choose the President are appointed in a manner directed by the state legislatures," providing structural protection for the states as they fulfill their role in selecting the only governmental figure who can sign or veto statutes passed by Congress.[168] These structural safeguards in the Constitution, according to Justice Stevens, made the Court's "ancient judge-made doctrine of sovereign immunity" unnecessary.[169]

Finally, Justice Stevens highlighted his contempt for the holding in *Seminole Tribe* by declaring that the Eleventh Amendment only placed "a textual limitation on the diversity jurisdiction of the federal courts."[170] In his view, the Eleventh Amendment did not apply to federal question cases, making it wholly inapplicable to the *Kimel* case. He suggested that it made no sense to permit Congress to abrogate the states' Eleventh Amendment immunity since it was a jurisdictional limit akin to those contained in Article III, but he nevertheless construed the Amendment's text to preclude its application to the case before the Court.

Perhaps the U.S. Supreme Court's broad construction of the Age Discrimination in Employment Act in *Kimel* benefits most older workers, particularly those who work for private employers. Interpreting the Act more narrowly would likely have preserved the abrogation of the states' Eleventh Amendment immunity, providing a more effective remedy for state workers but sacrific-

165 *Id.* at 98.
166 460 U.S. 226, 243 (1983).
167 *Kimel*, 528 U.S. at 93 (Stevens, J., dissenting).
168 *Id.* at 95 n.4.
169 *Id.* at 93.
170 *Id.* at 97.

ing some of the substantive protections that the Act currently provides to non-state workers. The Court's subsequent decision in *Smith v. City of Jackson* further illustrates the breadth of the Act's protection by holding that the Act permits recovery under a disparate-impact theory of liability in certain instances.[171] The Court's recent decision in *Clark v. Martinez* makes it clear that the same statute cannot be construed differently in some cases merely because some applications raise serious constitutional questions while others do not.[172] Therefore, one could argue that the construction of the Act in *Kimel* saved its effectiveness for the overwhelming majority of older workers in the United States. Notwithstanding this reality, however, Justice Stevens' contention that *Seminole Tribe* forced the Court to reach an otherwise inconsequential constitutional inquiry is noteworthy, especially when coupled with his view that the Eleventh Amendment has no application to federal question cases. What is true, in any event, is the fact that the *Flores* standard, enunciated in the aftermath of *Seminole Tribe*, severely limited Congress's authority to enforce concededly valid federal legislation, as was the case with the Act at issue in *Kimel*. The Act, of course, was upheld in *EEOC*.[173] Had the Court adopted a construction of Section Five of the Fourteenth Amendment similar to that given to Section Two of the Thirteenth Amendment in *Jones* and *Runyon*, the plaintiffs in *Kimel* could have proceeded with their cases in federal court despite the holding in *Seminole Tribe*.

### C. *United States v. Morrison*

Later that year, the U.S. Supreme Court decided another case involving Congress's power to enforce the Fourteenth Amendment. Unlike *College Savings Bank*, *Florida Prepaid* and *Kimel*, *United States v. Morrison*[174] involved neither the Eleventh Amendment nor a concededly valid substantive statutory scheme. Instead, *Morrison* involved a constitutional challenge to the Violence Against Women Act, which provided a federal civil remedy to vindicate victims of gender-motivated violence.[175] The case began when a female student at Virginia Polytechnic Institute sued two members of the Institute's football team under the Act, accusing them of raping her. The Act defined a crime of violence "motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in

171 125 S. Ct. 1536, 1546 (2005).
172 125 S. Ct. 716, 726 (2005).
173 EEOC v. Wyoming, 460 U.S. 226 (1983).
174 529 U.S. 598 (2000).
175 42 U.S.C. § 13981 (2000).

part, to an animus based on the victim's gender."[176] Federal and state courts were given concurrent jurisdiction over complaints brought under the Act. Congress invoked its authority under both Article I, Section Eight and Section Five of the Fourteenth Amendment as its sources of constitutional power to enact the legislation.[177]

The United States, in defending the constitutionality of the Act, relied on both the Commerce Clause and Section Five of the Fourteenth Amendment.[178] Ultimately, the U.S. Supreme Court determined that the Act could not be sustained under either provision. Chief Justice Rehnquist, who delivered the opinion of the Court in *Morrison*, explained why the Act was in excess of Congress's legislative authority.

The Court began its analysis of the Commerce Clause issue by noting that the provision gives Congress the authority to "regulate the use of the channels of interstate commerce."[179] Moreover, Congress possesses the power to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[180] Finally, and most relevant to the situation in *Morrison*, Congress has the authority to "regulate those activities having a substantial relation to interstate commerce," or "those activities that substantially affect interstate commerce."[181] Having laid out the scope of federal legislative authority in this area, the Court proceeded to evaluate the Violence Against Women Act pursuant to the standard enunciated in *United States v. Lopez*.[182] In *Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm within close proximity to a school, as an excess of Congress's authority to regulate interstate commerce.[183]

The relevant inquiry considered four factors, all of which were initially identified in *Lopez*. It was necessary for this detailed examination to proceed because the Violence Against Women Act, like the Gun-Free School Zones Act invalidated in *Lopez*, could not be characterized as a regulation of either the channels or the instrumentalities of interstate commerce. The first factor discussed by the Court was the fact that "[g]ender-

176 42 U.S.C. § 13981(d)(1) (2000).
177 *Morrison*, 529 U.S. at 607.
178 *Id.* at 609.
179 *Id.*
180 *Id.*
181 *Id.*
182 514 U.S. 549 (1995).
183 18 U.S.C. § 922(q)(2)(A) (2000); *id.* at 567–68.

motivated crimes of violence are not, in any sense of the phrase, economic activity."[184] Second, it was noted that the Violence Against Women Act did not contain a jurisdictional element limiting its reach to a discrete class of cases substantially related to interstate commerce. Instead, Congress had chosen to cast the Act's remedy "over a wider, and more purely intrastate, body of violent crime."[185] The third *Lopez* factor involved an examination into whether Congress identified specific findings to demonstrate the regulated activity's effect on interstate commerce. Even though the Act was "supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families," the Court declared that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[186] Finally, the Court viewed the link between gender-motivated violence and interstate commerce as simply too attenuated to justify such an expansion of federal legislative jurisdiction under the guise of the Commerce Clause. Emphasizing this point, Chief Justice Rehnquist concluded the Commerce Clause analysis by stating that "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."[187]

Since the Violence Against Women Act was not deemed to be a valid exercise of federal legislative authority under Article I, the Court proceeded to address the question of whether the Act could be sustained on the alternative ground that it was a law designed to enforce the Fourteenth Amendment. The Act was passed, in large measure, to deal with the "pervasive bias in various state justice systems against victims of gender-motivated violence."[188] The Court noted Congress's conclusion that "discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crimes, 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."[189] For these reasons, the United States defended the Act as being necessary to remedy the states' biases and to deter further instances of gender-based discrimination in the state courts. It was argued that the inherent

184 *Morrison*, 529 U.S. at 613.
185 *Id.*
186 *Id.* at 614.
187 *Id.* at 615.
188 *Id.* at 619.
189 *Id.* at 620.

unfairness in the justice system itself operated as a denial of equal protection, opening the door for federal legislation pursuant to Section Five of the Fourteenth Amendment.

Nevertheless, the Court was unsympathetic to the arguments raised by the United States and the plaintiff. Relying on its prior decisions in *United States v. Harris*[190] and the *Civil Rights Cases*,[191] the Court declared that Enforcement Clause legislation cannot be "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers."[192] Emphasizing the point further, Chief Justice Rehnquist explained that the Act did nothing to hold any Virginia public official accountable for doing an inadequate job of investigating or prosecuting the alleged assault.[193] Instead, the Act was designed solely to provide a private remedy for the victim via the use of a direct suit against her alleged attackers. Finally, the Court found the Act to be excessive in that it applied uniformly throughout the United States and was not limited to those states in which discrimination against the victims of gender-motivated crimes could be identified. Therefore, the Act was not deemed to be akin to the federal statutes upheld in *Katzenbach v. Morgan*[194] and *South Carolina v. Katzenbach*.[195] Those enactments, of course, were directed solely to the particular states in which Congress found evidence of unconstitutional discrimination. For these reasons, the Violence Against Women Act was invalidated as an excess of the powers granted to Congress under both Article I, Section Eight and Section Five of the Fourteenth Amendment.

Justice Thomas authored a short concurring opinion in which he expressed the view that *Lopez*'s "substantial effects" test, though somewhat circumscribed, would encourage Congress to "persist in its view that the Commerce Clause has virtually no limits."[196] He urged the Court to replace the *Lopez* test with one more consistent with the "original understanding" of the Commerce Clause.[197] Justices Souter and Breyer both authored dissenting opinions.[198] Justice Souter focused primarily on Congress's findings, which included detailed evidence of the detrimental effect that gender-motivated violence has on inter-

190 106 U.S. 629 (1883).
191 109 U.S. 3 (1883).
192 *Morrison*, 529 U.S. at 621.
193 *Id.* at 626.
194 384 U.S. 641 (1966).
195 383 U.S. 301 (1966).
196 *Morrison,* 529 U.S. at 627 (Thomas, J., concurring).
197 *Id*.
198 *Id.* at 628, 655 (Souter & Breyer, JJ., dissenting).

state commerce. He contended that "[t]he business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact."[199] Citing evidence provided by Congress indicating that violent crime against women costs the country at least $3 billion each year, Justice Souter asserted that Congress had good reasons to assume that the Commerce Clause gave it the power to provide a civil remedy for the victims of gender-motivated violence.[200] Justices Stevens, Ginsburg and Breyer joined his dissenting opinion.[201]

Justice Breyer, in a separate dissent, declared that the language in the Constitution "says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause."[202] Relying on the Court's prior decision in *Heart of Atlanta Motel, Inc. v. United States*,[203] he insisted that "virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State."[204] He referred to the structural protections for the states that were discussed in Justice Stevens' dissent in *Kimel*, explaining that the Judicial Branch was overstepping its bounds by meticulously scrutinizing Congress's judgment. Justice Breyer stated that "within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."[205] Justices Stevens, Souter and Ginsburg joined this portion of Justice Breyer's dissenting opinion.[206]

In a later portion of his dissenting opinion, Justice Breyer stated that his conclusion that the Violence Against Women Act was a valid exercise of Congress's power to regulate interstate commerce made it unnecessary for him to reach a conclusion with regard to the Enforcement Clause issue.[207] Nevertheless, he questioned why the Court found Congress to lack the power to provide a remedy for victims of gender-motivated crimes against private actors. Even though the private actors who allegedly attacked the victim in question did not violate the Fourteenth Amendment, Justice Breyer viewed the Act as an exercise of Congress's power to enact remedial legislation that "prohibits

199 *Id.* at 629 (Souter, J., dissenting).
200 *Id.* at 635.
201 *Id.* at 628.
202 *Id.* at 657 (Breyer, J., dissenting).
203 379 U.S. 241 (1964).
204 *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting).
205 *Id.*
206 *Id.* at 655.
207 *Id.* at 666.

conduct which is not itself unconstitutional."[208] Since the Act did nothing more than provide a federal remedy for victims of conduct that was already criminalized by state law, he did not agree with the Court's characterization of the remedy as disproportionate. He added that there was no lack of "congruence and proportionality," for purposes of the *Flores* standard, because the Act dealt with nothing other than "the creation of a federal remedy to substitute for constitutionally inadequate state remedies."[209] Justice Stevens joined this portion of Justice Breyer's dissenting opinion, which consisted of skeptical observations about the Court's Enforcement Clause analysis without purporting to give a firm answer to the question presented.

The holding in *Morrison* regarding the Fourteenth Amendment issue was consistent with the Court's prior decision in *DeShaney v. Winnebago County Department of Social Services*,[210] which made it clear that the Constitution does not impose an affirmative duty on the states to protect individuals from violent criminals. This principle was further illustrated by the Court's recent decision in *Town of Castle Rock v. Gonzales*.[211] Justice Scalia, who delivered the opinion of the Court in *Gonzales*, explained that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."[212] Nevertheless, Congress's judgment that victims of gender-motivated violence were being effectively denied the equal protection of the laws was entitled to more deference than that shown by the U.S. Supreme Court. The Violence Against Women Act was designed to counter the apparent inadequacies found in the justice systems of the several states. Such inadequacies, in many instances, could lead to violations of the Equal Protection Clause. While it is true that the Act was directed at private conduct rather than state action, Section Five of the Fourteenth Amendment delegates the enforcement power to Congress. Congress believed that the Act was "appropriate legislation"[213] to deal with the problem of de facto gender discrimination in the criminal justice system, and the means chosen to address the perceived constitutional deficiencies should have been accorded the respect owed to the people's elected representatives. The Court again made no attempt to distinguish the narrow construction given to Section Five of

208 *Id.* at 665.
209 *Id.*
210 489 U.S. 189 (1989).
211 125 S. Ct. 2796 (2005).
212 *Id.* at 2810.
213 U.S. CONST. amend. XIV, § 5.

the Fourteenth Amendment in *Morrison* from the broad construction given to Section Two of the Thirteenth Amendment in *Jones* and *Runyon*. While it is true that the Thirteenth Amendment itself applies to private conduct, it is also true that the sweeping legislative enactments upheld in those two cases went far beyond the prohibitions contained in the underlying constitutional provision. The Court has not explained why the Enforcement Clause of the Fourteenth Amendment should be read more narrowly than its almost identical counterpart.

D. *Board of Trustees of the University of Alabama v. Garrett*

The following year, the Court decided another case involving the interaction between the standards enunciated in *Seminole Tribe* and *Flores*. *Board of Trustees of the University of Alabama v. Garrett*[214] posed the question of whether Title I of the Americans with Disabilities Act of 1990[215] constituted a valid abrogation of the states' Eleventh Amendment immunity. The Act's substantive provisions were not challenged as an excess of Congress's legislative authority under Article I, but the holding in *Seminole Tribe* prevented the concededly valid statutory requirements from justifying an abrogation of the states' sovereign immunity. Therefore, the plaintiffs were required to demonstrate that the Act was a valid exercise of Section Five of the Fourteenth Amendment before they could pursue their case. Like the plaintiffs in *College Savings Bank*, *Florida Prepaid* and *Kimel*, they were unsuccessful.[216]

The Act prohibits covered employers, including the states, from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[217] To facilitate the Act's objectives, employers covered by its provisions are required to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business."[218] Congress clearly expressed its intent to subject the states to suits brought by private individuals for violations of the

214 531 U.S. 356 (2001).
215 42 U.S.C. §§ 12111–12117 (2000).
216 *Garrett*, 531 U.S. at 374.
217 42 U.S.C. § 12112(a) (2000).
218 42 U.S.C. § 12112(b)(5)(A) (2000).

Act, making it unnecessary for the Court to engage in an extensive analysis of how to interpret the statute.[219]

The Court began the inquiry required under *Flores* by looking to its prior decisions interpreting the Equal Protection Clause of the Fourteenth Amendment. *City of Cleburne v. Cleburne Living Center, Inc.*[220] made it clear that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."[221] The Court explained that classifications based on disability, like the age classifications discussed in *Kimel*, "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[222] Therefore, it was apparent to the Court that the requirements of the Americans with Disabilities Act extended far beyond the mandates of the Equal Protection Clause. After all, not all violations of the Act resulted from irrational discrimination, given that an employer may reasonably conclude that it is less costly to hire healthy employees than it is to make special accommodations for disabled workers.

Chief Justice Rehnquist, who delivered the Court's opinion in *Garrett*, went on to "examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."[223] Examples of discrimination by local governments were deemed irrelevant to the inquiry. Even though the actions of local governments constitute state action for purposes of the Fourteenth Amendment, the Court's determination in *Lincoln County v. Luning*[224] that local governments do not enjoy Eleventh Amendment immunity precluded congressional reliance on misconduct by local governmental entities for purposes of establishing the needed pattern of state misconduct.[225]

Although the record provided evidence of unwillingness on the part of some state officials to make the sort of accommodations for the disabled required by the Act, the Equal Protection Clause did not mandate such accommodations. The Act did contain an exception for employers able to demonstrate that the accommodation requirement would impose an "undue hardship on the operation of the business"[226] involved. The Court insisted

219 42 U.S.C. § 12202 (2000).
220 473 U.S. 432 (1985).
221 *Garrett,* 531 U.S. at 367.
222 *Id*. at 367 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).
223 *Garrett,* 531 U.S. at 368.
224 133 U.S. 529, 530 (1890).
225 *Garrett*, 531 U.S. at 369.
226 42 U.S.C. § 12112(b)(5)(4) (2000).

that the accommodation duty imposed by the Act still far exceeded the requirements of the Fourteenth Amendment in that it made unlawful "a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."[227] It was also noted that the Act placed the burden on the employer to prove that it would suffer such a hardship, while the complaining party had to "negate reasonable bases for the employer's decision" to establish a violation of the Equal Protection Clause.[228] Finally, the Court found the Act's prohibition against the use of "standards, criteria, or methods of administration" that had a disparate impact on the disabled to be out of proportion with the Equal Protection Clause jurisprudence. In *Washington v. Davis*, the Court had found evidence of a disparate impact on racial minorities, standing alone, to be insufficient to establish a violation of the equal protection component of the Fifth Amendment's Due Process Clause.[229]

Chief Justice Rehnquist concluded the opinion of the Court by contrasting the Americans with Disabilities Act with the Voting Rights Act upheld in *South Carolina v. Katzenbach*.[230] After stating that "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment,"[231] he described the Voting Rights Act as "a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."[232] He declared that "in order to authorize private individuals to recover money damages against the States, 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."[233] Consequently, Title I of the Americans with Disabilities Act was found to be in excess of Congress's power to enforce the substantive guarantees of the Fourteenth Amendment. In a footnote, the Court noted that Title I's provisions still applied to the states and could be "enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*."[234]

Justice Kennedy authored a concurring opinion, joined by

227 *Garrett,* 531 U.S. at 372.
228 *Id.*
229 426 U.S. 229, 239 (1976).
230 383 U.S. 301, 337 (1966).
231 *Garrett,* 531 U.S. at 373 n.8.
232 *Id.* at 373.
233 *Id.* at 374.
234 *Id.* at 374 n.9 (citation omitted).

Justice O'Connor.[235] He expressed his agreement with the Court by declaring that "[t]he predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity."[236] Since no pattern of unconstitutional discrimination by the states had been identified, Justice Kennedy believed that the Act was in excess of Congress's power to enforce the Fourteenth Amendment.

*Garrett* was a five to four decision, with Justice Breyer authoring a dissenting opinion joined by Justices Stevens, Souter and Ginsburg.[237] Justice Breyer insisted that the Court had not "traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."[238] As he saw it, the inquiry in cases like *Katzenbach v. Morgan*[239] had been "whether Congress's likely conclusions were reasonable."[240] He saw no need for the Court to focus on whether there was "adequate evidentiary support in the record."[241] Lamenting the lack of deference shown to the Legislative Branch, he noted that "[t]he Court's failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly in respect to lack of justification."[242]

Justice Breyer went on to decry the Court's misapprehension of its role in the case. He stated that "neither the 'burden of proof' that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power."[243] He contended that "Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification."[244] Although he acknowledged that "what is 'reasonable' in the statutory sense and what is 'unreasonable' in the constitutional sense might differ,"[245] Justice Breyer emphasized that the framers of the Enforcement Clause "sought to grant to Congress, by a specific provision applicable to

235 *Id.* at 374 (Kennedy, J., concurring).
236 *Id.* at 376.
237 *Id.* at 376 (Breyer, J., dissenting).
238 *Id.* at 380.
239 384 U.S. 641 (1966).
240 *Garrett,* 531 U.S. at 380 (Breyer, J., dissenting).
241 *Id.*
242 *Id.* at 382.
243 *Id.* at 383.
244 *Id.* at 384.
245 *Id.* at 385.

the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."[246] Quoting *South Carolina v. Katzenbach*, which involved the Enforcement Clause of the Fifteenth Amendment, he declared that Congress had the prerogative to use "any rational means to effectuate the constitutional prohibition."[247] It was clear to Justice Breyer that the Americans with Disabilities Act was unquestionably a valid exercise of Congress's authority to enforce the Equal Protection Clause. Therefore, he would have upheld Congress's purported abrogation of the states' Eleventh Amendment immunity.

The U.S. Supreme Court's decision in *Garrett* serves as further evidence of the lack of deference shown to Congress in recent years. *Garrett* also contained another flaw. The Court's language about the pattern requirement was so unclear that it has led some to conclude that such documentation is required whenever Congress chooses to abrogate the states' Eleventh Amendment immunity.[248] Such an interpretation of the Court's opinion would explain why the Court discounted examples of discrimination by local governments. Nevertheless, this interpretation makes no sense when taking into consideration the context of the Court's language. In *South Carolina v. Katzenbach*, the Court upheld the Voting Rights Act of 1965, which prohibited a broader swath of conduct than that directly forbidden by the Fifteenth Amendment.[249] The Act's substantive provisions were deemed valid enforcement measures because the prohibited state conduct, though not itself unconstitutional, had resulted in constitutional violations in various instances. Consequently, it would seem that the documentation of a pattern of unconstitutional behavior by the states is required when Congress enacts prophylactic legislation that raises the substantive bar above the constitutional mandate. Congress need not, however, provide such documentation when it merely provides a remedy for actual violations of the Constitution. This line of reasoning leads to the conclusion that Congress is always free to abrogate the states' Eleventh Amendment immunity, even without a pattern of unconstitutional behavior by the states, as long as the substantive requirements of the underlying statute do not prohibit conduct that is not proscribed by the Fourteenth Amendment itself.

The Court's opinion in *Garrett*, however, was very unclear.

246 *Id.* at 386 (quoting Katzenbach v. Morgan, 384 U.S. 641, 650 (1966)).

247 *Id.* at 386 (quoting *Katzenbach*, 383 U.S. 301, 324 (1966)).

248 Joan Shinavski, *The Eleventh Amendment Bars Private Individuals from Suing State Employers for Money Damages Under Title I of the Americans with Disabilites Act: Board of Trustees of the University of Alabama v. Garrett*, 40 DUQUESNE LAW REVIEW 161–179 (2001).

249 *Katzenbach*, 383 U.S. at 337.

Since local governments are state actors for purposes of the Fourteenth Amendment, there was no reason for the Court to ignore evidence of discrimination by local governments. While it is true that local governments do not enjoy the immunity that the Eleventh Amendment gives to the states, the pattern of discrimination documented by Congress does not belong in the abrogation calculus. Instead, it is relevant only for demonstrating that the substantive requirements of the underlying prophylactic Act are necessary in order to prevent actual constitutional violations. As Justice Breyer pointed out in his dissenting opinion, "the substantive obligation that the Equal Protection Clause creates applies to state and local governmental entities alike."[250] The same is true of the substantive obligations that the Americans with Disabilities Act imposes on government employers. Since evidence of past discrimination by governmental entities was only relevant for establishing that the Act's prophylactic requirements were needed to deter actual violations of the Fourteenth Amendment, the Court was wrong to discount examples of discrimination by local governments.

The Court's reliance on *South Carolina v. Katzenbach* was anomalous for yet another reason. Chief Justice Rehnquist explained that the precedent was relevant because of the similarities in the wording of Section Two of the Fifteenth Amendment and Section Five of the Fourteenth Amendment.[251] Nonetheless, he never mentioned that the two constitutional provisions, though similar to each other, are almost identical to Section Two of the Thirteenth Amendment as well. The legislative enactments upheld in *Jones* and *Runyon* pursuant to Section Two of the Thirteenth Amendment were certainly not "congruent" and "proportional" for purposes of *Flores*. Those statutes swept far beyond the narrow requirements of the Thirteenth Amendment. The Court construed Congress's power to enforce the Thirteenth Amendment very broadly in *Jones* and *Runyon*, and it has not provided a principled reason for giving an overly narrow construction to Section Five of the Fourteenth Amendment in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett*.

## III. THE COURT'S RETREAT IN *HIBBS*, *LANE* AND *GOODMAN*

### A. *Nevada Department of Human Resources v. Hibbs*

After *Garrett* was decided, it appeared as if the rigorous judicial scrutiny applied to Enforcement Clause legislation would

250 *Garrett,* 531 U.S. at 378 (Breyer, J., dissenting).
251 *Id.* at 373 n.8.

continue to disrupt the enforcement of many other federal laws. The Americans with Disabilities Act, signed into law by President George H.W. Bush in 1990, was the sixth Act that the U.S. Supreme Court had found to be in excess of Congress's power to enforce the Fourteenth Amendment. *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett* were all decided within a five-year span. For proponents of prophylactic legislation, no end to the judicial overreaching seemed to be in sight. Nevertheless, that changed in 2003, when the Court issued its decision in *Nevada Department of Human Resources v. Hibbs*.[252] In *Hibbs*, the Court determined that the Family and Medical Leave Act was a legitimate exercise of Congress's Enforcement Clause authority.[253]

The Family and Medical Leave Act, which was signed into law by President Bill Clinton in 1993, entitles eligible employees to take up to twelve weeks of unpaid leave annually for any of a variety of reasons.[254] Aggrieved employees may seek both equitable relief and money damages against offending employers covered under the statute, including state employers. An employee of the State of Nevada sued his employer in federal court for an alleged violation of the Act, seeking money damages in addition to injunctive and declaratory relief. The Nevada Department of Human Resources contended that the Eleventh Amendment barred the suit because the Act, though a valid exercise of Congress's Article I power, was in excess of its authority to enforce the Fourteenth Amendment. Like the state defendants in *College Savings Bank*, *Florida Prepaid*, *Kimel* and *Garrett*, the Department believed that the rules of *Seminole Tribe* and *Flores* entitled it to the dismissal of the plaintiff's suit. Notwithstanding some apparent similarities, however, the Court's ruling in *Hibbs* went the other way.

In enacting the Family and Medical Leave Act, Congress relied on both the Commerce Clause and Section Five of the Fourteenth Amendment. *Seminole Tribe*, of course, prevented the plaintiff from relying on the Commerce Clause to sustain the Act's purported abrogation of the states' Eleventh Amendment immunity, so the inquiry quickly turned to the question of whether the Act was a valid exercise of Congress's Enforcement Clause power. Among the purposes listed in the Act was the promotion of "equal employment opportunity for women and men" in a manner consistent with the Equal Protection Clause.[255]

252 538 U.S. 721, 740 (2003).
253 *Id.*
254 29 U.S.C. § 2612 (2000).
255 29 U.S.C. § 2601(b)(5) (2000).

Ultimately, the U.S. Supreme Court determined that the Act was a valid exercise of Congress's power to enforce the Equal Protection Clause, thereby enabling the plaintiff to proceed with his suit in federal court pursuant to the rule of *Fitzpatrick*.

Chief Justice Rehnquist, who delivered the opinion of the Court in *Hibbs*, noted at the outset that Section Five of the Fourteenth Amendment enables Congress to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[256] Explaining that the Act aimed "to protect the right to be free from gender-based discrimination in the workplace,"[257] he went on to say that heightened scrutiny applied to gender-based discrimination challenged on Equal Protection Clause grounds. In order for a gender-based classification to withstand such scrutiny in court, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."[258] The Constitution does not permit the states to "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[259] Chief Justice Rehnquist stated that Congress had documented evidence of gender discrimination in the family-leave context. He pointed out that many states had provided women with maternity leave that exceeded the "period of physical disability due to pregnancy and childbirth" without offering a similar benefit to fathers.[260] He declared that these "differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[261]

The Court went on to assert that the discretionary nature of some family-leave programs had resulted in de facto gender discrimination, providing a reasonable basis for Congress to conclude that "such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees."[262] There had also been instances of overt discrimination, as "seven States had childcare leave provisions that applied to women only" and "Massachusetts required that notice of its leave provisions be posted only in 'establishments in which females are employed.'"[263] These cases of gender-based discrimi-

256 *Hibbs,* 538 U.S. at 727–28.
257 *Id.* at 728.
258 *Id*. (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
259 *Id.* at 729 (quoting *Virginia*, 518 U.S. at 533).
260 *Id.* at 731.
261 *Id*.
262 *Id.* at 734.
263 *Id*. at 733 (quoting MASS. GEN. LAWS ANN. ch. 149, § 105D (West 2004)).

nation convinced the Court that Congress was justified in relying on its Enforcement Clause power to pass the Family and Medical Leave Act, which provided men and women with an equal statutory right to unpaid leave. The Court distinguished *Kimel* and *Garrett* by emphasizing the difference between the rational basis test that applies to age and disability classifications and the heightened scrutiny that applies to gender classifications.[264] Since the standard for demonstrating the constitutionality of gender-based classifications is more difficult for the states to meet than the rationality standard applicable to classifications based on age and disability, it was easier for Congress to establish a pattern of unconstitutional gender discrimination by the states.

It was also determined that the Family and Medical Leave Act was "congruent and proportional to the targeted violation."[265] The Court reasoned that Congress had the authority to create "an across-the-board, routine employment benefit for all eligible employees" in order to "ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men."[266] Therefore, the Act was deemed a valid exercise of Congress's power to enforce the Equal Protection Clause, permitting the plaintiff in *Hibbs* to proceed with his suit against the State of Nevada. Since the underlying federal Act passed the "congruence and proportionality" test enunciated in *Flores*, the case was governed by *Fitzpatrick*, and the Eleventh Amendment did not preclude federal adjudicatory jurisdiction.

The opinion of the Court, delivered by Chief Justice Rehnquist, was joined by Justices O'Connor, Souter, Ginsburg and Breyer. In a short concurring opinion, Justice Souter noted that he joined the opinion of the Court without abandoning the dissenting positions expressed in *Seminole Tribe*, *Florida Prepaid*, *Kimel* and *Garrett*.[267] He was joined by Justices Ginsburg and Breyer. Justice Stevens, who concurred in the judgment, did not join the opinion of the Court because he was uncertain whether the Family and Medical Leave Act was "truly 'needed to secure the guarantees of the Fourteenth Amendment'" and had "never been convinced that an Act of Congress can amend the

264 *Id.* at 735.

265 *Id.* at 737 (quoting Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001)).

266 *Id.*

267 *Id.* at 740 (Souter, J., concurring).

Constitution."[268] He concurred in the judgment only because he viewed Nevada's sovereign immunity defense as one based on judge-made common law, which Congress could abrogate pursuant to its Commerce Clause authority. He insisted that the Eleventh Amendment posed no barrier to the adjudication at issue in *Hibbs* because the plaintiff was a citizen of Nevada. The Eleventh Amendment, of course, only states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[269] Justice Stevens construed the Eleventh Amendment to be nothing more than a limit on the diversity jurisdiction of the federal courts.

Justice Scalia authored a dissenting opinion in which he decried the nationwide reach of the remedy. He declared that the inquiry should focus on "whether the State has itself engaged in discrimination sufficient to support the exercise of Congress's prophylactic power."[270] In his view, Congress was only empowered to apply prophylactic legislation to those particular states that had engaged in unconstitutional behavior. Therefore, he would have dismissed the plaintiff's suit in the absence of a congressional determination that Nevada, as opposed to some states, had engaged in unconstitutional gender discrimination in the area of family and medical leave.[271]

Justice Kennedy authored a separate dissenting opinion, joined by Justices Scalia and Thomas. He asserted that Section Five of the Fourteenth Amendment did not give Congress the power to create an "entitlement program of its own design."[272] While expressing the view that "[t]he Commerce Clause likely would permit the National Government to enact an entitlement program" such as the one created by the Family and Medical Leave Act, he insisted that the Act could not be sustained as a valid exercise of Congress's Enforcement Clause authority.[273] It was clear that he did not view the stereotypes described by the Court as evidence of unconstitutional discrimination by the states. Justice Kennedy declared:

> Given the insufficiency of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem

268 *Id.* at 740–41 (Stevens, J., concurring).
269 U.S. CONST. amend. XI.
270 *Hibbs,* 538 U.S. at 743 (Scalia, J., dissenting).
271 *Id.*
272 *Id.* at 744 (Kennedy, J., dissenting).
273 *Id.*

> would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws.[274]

He contended that the states' sovereign immunity "cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and proportional remedy."[275]

Justice Kennedy's dissenting opinion in *Hibbs*, like the opinion of the Court in *Garrett*, did not clarify when the documentation requirement applies. Although his language implies that Congress cannot abrogate the states' Eleventh Amendment immunity in any instance without documenting a pattern of unconstitutional activity, the context of that language indicates that the documentation requirement applies only when the underlying federal statute imposes a higher standard on the states than that set by the Fourteenth Amendment itself. The Family and Medical Leave Act undoubtedly does that. Justice Kennedy did not address a situation in which Congress, seeking to deter violations of the Fourteenth Amendment, acts to abrogate the states' Eleventh Amendment immunity in cases where the plaintiffs' complaints allege unconstitutional conduct rather than conduct that merely violates a federal prophylactic statute. If Congress were to abrogate the states' Eleventh Amendment immunity in cases involving suits against the states for actual violations of the Fourteenth Amendment, it is unlikely that the documentation requirement would apply. It would make no sense for the Court to say that Congress must wait for a pattern of unconstitutional activity to develop before allowing private lawsuits to redress the relevant violations. The documentation requirement, therefore, appears to be applicable only when Congress attempts to demonstrate that prophylactic legislation, which raises the bar above the requirements of the Constitution, is needed to deter actual violations of the Fourteenth Amendment. The alternative understanding would be even more troubling than the status quo, as it would be utterly ridiculous to require that Congress allow some unconstitutional conduct to go unaddressed before permitting aggrieved individuals to sue their respective states.

In any event, the Court clearly appears to be showing more deference to Congress's judgment when the challenged prophylactic legislation is designed to deter discrimination based on race or gender. *Hibbs* was an important victory for equality in the workplace, and it remains to be seen whether the principles

274 *Id.* at 754.
275 *Id.* at 759.

underlying that decision will be sufficient to sustain other prophylactic statutes. While it is unfortunate that a similar respect for legislative judgment was not shown in *Morrison*, it is generally true that the Violence Against Women Act was directed at private conduct rather than state action. For this reason, the constitutional prospects for prophylactic legislation designed to combat state-sanctioned gender discrimination appear to be good.

### B. *Tennessee v. Lane*

A year after the *Hibbs* decision, the U.S. Supreme Court was called upon to decide whether Title II of the Americans with Disabilities Act constituted a valid exercise of Congress's power to enforce the Fourteenth Amendment.[276] Title II provides that "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."[277] In *Tennessee v. Lane*, the Court found Title II to be a valid exercise of Congress's prophylactic power as applied to "the class of cases implicating the fundamental right of access to the courts."[278]

Two paraplegics sued the State of Tennessee and several Tennessee counties, alleging that they had been denied access to the state judicial system due to their disabilities. George Lane alleged that he was required to appear on the second floor of a courthouse that lacked an elevator in order to answer a set of criminal charges.[279] Apparently, he got to the courtroom only after crawling up two flights of stairs. When he returned to the courthouse for another hearing, he was arrested and jailed for failure to appear after refusing to crawl again or to be carried to the courtroom by police officers.[280] Beverly Jones, who was a certified court reporter, claimed that she was denied both work opportunities and chances to participate in the judicial process because of inadequate accommodations at various county courthouses.[281] The State of Tennessee contended that the Eleventh Amendment barred the suit, relying heavily on the Court's prior decision in *Garrett*.

Justice Stevens, who delivered the opinion of the Court in *Lane*, explained that the Court's opinion in *Garrett* had noted that most of the instances of state-sponsored discrimination

276 Tennessee v. Lane, 124 S. Ct. 1978, 1982 (2004).
277 42 U.S.C. § 12132 (2000).
278 *Lane,* 124 S. Ct. at 1994.
279 *Id.* at 1982.
280 *Id.* at 1983.
281 *Id.*

against the disabled documented by Congress "related to 'the provision of public services and public accommodations, which areas are addressed in Titles II and III,' rather than Title I."[282] That was among the reasons why *Garrett* held that "Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment."[283] Nevertheless, because of the differences between the substantive provisions of Titles I and II, *Garrett* left open the possibility that Title II was a valid exercise of Congress's power under Section Five of the Fourteenth Amendment.

The Court likewise emphasized that Title II was enacted to enforce constitutional guarantees other than the Equal Protection Clause. Although governmental discrimination against the disabled only triggers a rationality analysis for purposes of the Equal Protection Clause, the Court declared that Title II sought to "enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."[284] For instance, the Due Process Clause guarantees to a criminal defendant the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."[285] That right is also secured by the Confrontation Clause of the Sixth Amendment, which is incorporated within the Due Process Clause of the Fourteenth Amendment. The Due Process Clause also requires the states to provide certain civil litigants with a "'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings."[286] The Jury Trial Clause of the Sixth Amendment, applicable to the states by virtue of the Due Process Clause, guarantees to criminal defendants the right to "trial by a jury composed of a fair cross section of the community."[287] Disabled persons are, of course, a part of that community. The First Amendment, which is also incorporated within the Due Process Clause, secures to members of the public "a right of access to criminal proceedings."[288] Consequently, the rationale that controlled in *Garrett* was inapplicable in *Lane*.

Proceeding to the documentation analysis, the Court noted that "[a] report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even tak-

282 *Id.* at 1987 (quoting Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. at 371 n.7).
283 *Id.* (summarizing the holding in *Garrett*).
284 *Id.* at 1988.
285 *Id.* (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)).
286 *Id.* (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).
287 *Id.*
288 *Id.*

ing into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings."[289] The Court stated:

> [Congress's] appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.[290]

These findings were clearly sufficient to satisfy the need for evidence of unconstitutional discrimination by the states.

Comparing the circumstances in *Lane* to those that had been present in *Hibbs*, the Court asserted that Title II was aimed at the enforcement of a variety of constitutional rights "that 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."[291] The Court also made it clear that it did not have to "consider Title II, with its wide variety of applications, as an undifferentiated whole."[292] Instead, the inquiry was limited to the question of whether the Enforcement Clause provided Congress with the authority to subject unconsenting states to suits for money damages for failing to give the disabled access to the courts. Since the Court found Title II to be valid Enforcement Clause legislation as applied to "the class of cases implicating the accessibility of judicial services," other applications of the statute were deemed immaterial to the outcome of the case.[293] It was likewise noted that *Garrett*, which had severed Title I from Title II for purposes of the Enforcement Clause inquiry, demonstrated that courts were not required to "examine the full breadth of the statute all at once."[294]

Title II was viewed as "congruent and proportional to its object of enforcing the right of access to the courts" because it "require[d] only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification [was] otherwise eligible for the service."[295] Since the case at issue in *Lane* implicated additional constitutional rights secured by the Fourteenth Amend-

289 *Id.* at 1990–91.
290 *Id.* at 1991.
291 *Id.* at 1992.
292 *Id.*
293 *Id.* at 1993.
294 *Id.* (internal quotation marks omitted).
295 *Id.* (quoting 42 U.S.C. § 12131(2) (2000)).

ment, the Court saw no need to decide whether Title II's duty to accommodate was in excess of Congress's Section Five authority as applied to the class of cases implicating only the Equal Protection Clause's prohibition of irrational discrimination against disabled persons.[296] Congress clearly stated its intention to abrogate the states' Eleventh Amendment immunity when it enacted the Americans with Disabilities Act.[297] Therefore, pursuant to the Court's prior decisions in *Fitzpatrick* and *Hibbs*, the plaintiffs in *Lane* were able to proceed with their Title II actions in federal court.

The opinion of the Court, delivered by Justice Stevens, was joined by Justices O'Connor, Souter, Ginsburg and Breyer. In a concurring opinion joined by Justice Ginsburg, Justice Souter decried the Court's prior decision in *Buck v. Bell*,[298] which sustained the constitutionality of the "once-pervasive practice of involuntarily sterilizing those with mental disabilities."[299] He declared that "the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5."[300] Justice Ginsburg, who was joined by Justices Souter and Breyer, authored a concurring opinion in which she insisted that it was "not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities."[301] She went on to state that there was no need to "disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom."[302] Justice Ginsburg concluded her concurrence by expressing her approval of the Court's decision to defer to Congress's judgment in cases implicating the right of access to judicial proceedings.

Chief Justice Rehnquist authored a dissenting opinion, joined by Justices Kennedy and Thomas. In his view, the Court's decision in *Lane* could not be reconciled with *Garrett*. Relying on *Garrett*, he stated that the first step of *Flores*' "congruence and proportionality" analysis was to "identify with some precision the scope of the constitutional right at issue."[303] The second step, according to Chief Justice Rehnquist, was to "examine whether

296 *Id.* at 1994 n.20.
297 42 U.S.C. § 12202 (2000).
298 274 U.S. 200 (1927).
299 *Lane,* 124 S. Ct. at 1995 (Souter, J., concurring).
300 *Id.*
301 *Id.* at 1996 (Ginsburg, J., concurring).
302 *Id.* at 1997.
303 *Id.* at 1998 (Rehnquist, C.J., dissenting) (quoting Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001)).

Congress identified a history and pattern of violations" of the constitutional right being enforced.[304] Finally, he contended that the last step of the *Flores* inquiry required the Court to determine "whether the rights and remedies created by Title II [were] congruent and proportional to the constitutional rights it purport[ed] to enforce and the record of constitutional violations adduced by Congress."[305] Chief Justice Rehnquist was clearly convinced that *Garrett* required the dismissal of the plaintiffs' suits against the State of Tennessee.

Beginning with the first step of the analysis, Chief Justice Rehnquist acknowledged that "the task of identifying the scope of the relevant constitutional protection" in *Lane* was difficult because Title II purported to "enforce a panoply of constitutional rights of disabled persons."[306] Since the Court upheld Title II as applied to "the class of cases implicating the fundamental right of access to the courts," he viewed the proper inquiry as being limited to the scope of those due process rights specifically related to access to judicial proceedings.[307] Moving on to the second step, he criticized the majority for setting out on "a wide-ranging account of societal discrimination against the disabled" instead of limiting its examination of constitutional violations to the specific due process right on which it relied to uphold Title II.[308] He indicated that such a broad examination of the documentation was especially inappropriate in light of the Court's decision to evaluate Title II only as applied to the circumstances in *Lane*. Expressing doubt that the statute was designed to deter actual constitutional violations, he declared that no person "has a *constitutional* right to make his way into a courtroom without any external assistance" and that "[a] violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding."[309]

Chief Justice Rehnquist went on to the third step of the *Flores* analysis and insisted that Title II was out of proportion with Congress's objective of enforcing the Fourteenth Amendment's substantive provisions. He stated that the Court was obligated to measure the full breadth of Title II's coverage against the scope of the specific constitutional rights that it purported to enforce. In his view, the Court's "as applied" approach was inappropriate in the Enforcement Clause context because it converted

304 *Id.* at 1999 (internal quotation marks omitted).
305 *Id.* at 2003.
306 *Id.* at 1998.
307 *Id.*
308 *Id.* at 1999.
309 *Id.* at 2002.

the *Flores* inquiry into a test of whether the Court could "conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation."[310] He contended that the majority's analysis would allow Congress to "simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States."[311] This, he said, would eliminate any incentive for Congress to draft Enforcement Clause legislation narrowly "for the purpose of remedying or deterring actual constitutional violations."[312]

Justice Scalia also authored a dissenting opinion.[313] He abandoned his support for *Flores*' "congruence and proportionality" standard, calling it "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."[314] Instead, he proposed a test even more restrictive of Congress's authority to enforce the substantive provisions of the Fourteenth Amendment. He asserted that "[n]othing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment."[315] In his view, Section Five only "authorizes Congress to create a cause of action through which the citizen may vindicate his [or her] Fourteenth Amendment rights."[316] Addressing the principle of stare decisis, he noted that most of the pre-*Hibbs* decisions sustaining prophylactic legislation under the Civil War Amendments had "involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*."[317] *Jones* was among the cases cited by Justice Scalia to illustrate this point. He contended that when many of those earlier cases were decided, "the Fourteenth Amendment did not include the many guarantees that it now provides," creating a situation in which "it did not appear to be a massive expansion of congressional power to interpret § 5 broadly."[318]

Consequently, Justice Scalia declared that he would only apply a permissive Enforcement Clause standard to "congressional measures designed to remedy racial discrimination by the

310 *Id*. at 2005.
311 *Id*.
312 *Id.*
313 *Id.* at 2007 (Scalia, J., dissenting).
314 *Id.* at 2008–09.
315 *Id.* at 2009.
316 *Id*. at 2009–10.
317 *Id*. at 2010.
318 *Id*. at 2011–12.

States."[319] Referring to his prior dissent in *Hibbs*, he made it clear that he was not abandoning "the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."[320] Citing *Morrison*, he stated his intention to "adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large."[321] Assuming that those requirements were met and that no other constitutional provision was violated, Justice Scalia asserted that he would "leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States."[322] Nonetheless, he emphasized that he would not show Congress such extensive deference in other Enforcement Clause contexts and that it was "past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion."[323] Justice Thomas, who joined Chief Justice Rehnquist's dissent but not that of Justice Scalia, authored a short dissenting opinion in which he expressed the view that *Hibbs* had been wrongly decided and made it clear that he was not relying on that precedent to reach his conclusion in *Lane*.[324]

### C. *United States v. Georgia*

In 2006, the Court decided its first case involving the Enforcement Clause under newly confirmed Chief Justice John G. Roberts, Jr., who was chosen by President George W. Bush to replace Chief Justice Rehnquist. Surprisingly, *United States v. Georgia (*hereinafter referred to as "*Goodman*"*)* was a unanimous decision.[325] Justice Scalia, who delivered the opinion of the Court, explained that the question for consideration was "whether a disabled inmate in a state prison may sue the State for money damages under Title II of the Americans with Disabilities Act of 1990."[326] Title II states that "no qualified individual . . . shall, by reason of such disability, be excluded from par-

319 *Id*. at 2012.
320 *Id.*
321 *Id.*
322 *Id*. at 2013.
323 *Id.*
324 *Id.* at 2013 (Thomas, J., dissenting).
325 United States v. Georgia (*Goodman*), 126 S. Ct. 877 (2006). Tony Goodman was the petitioner in No. 04-1236. The United States, the petitioner in No. 04-1203, "intervened to defend the constitutionality of Title II's abrogation of state sovereign immunity." *Id.* at 880.
326 *Id*. at 878; 42 U.S.C. §§ 12131–12165 (2000).

ticipation 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."[327] Relying on the Court's prior decision in *Pennsylvania Department of Corrections v. Yeskey*,[328] Justice Scalia noted that it was clear that the term "public entity" was broad enough to include state prisons.[329] Congress's intent to abrogate the states' Eleventh Amendment immunity was, of course, clearly expressed in the Act.[330]

Tony Goodman, a paraplegic inmate in a Georgia prison, sued the State of Georgia and the Georgia Department of Corrections, in addition to several individual prison officials, under both Title II and 42 U.S.C. § 1983.[331] He sought "both injunctive relief and money damages against all defendants."[332] He alleged that "he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own and [that], on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste."[333] In addition, Goodman claimed that he had been denied access to physical therapy, medical treatment and other services on account of his disability.

It was noted at the outset that "Goodman's claims for money damages against the State under Title II were evidently based, at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment."[334] This was due to the Eighth Amendment's proscription of cruel and unusual punishment, which was incorporated within the Due Process Clause of the Fourteenth Amendment.[335] Georgia did not dispute Goodman's assertion that the same alleged conduct that violated the Eighth Amendment also violated Title II of the Americans with Disabilities Act.[336]

Writing for the Court in *Goodman* and relying on his own prior dissent in *Lane*, Justice Scalia explained that no member of the Court doubted Congress's Section Five authority to create "private remedies against the States for *actual* violations" of the Fourteenth Amendment.[337] The Court went on to state that, "in-

327 42 U.S.C. § 12132 (2000).
328 524 U.S. 206, 210 (1998).
329 *Goodman,* 126 S. Ct. at 879.
330 42 U.S.C. § 12202 (2000).
331 42 U.S.C. §§ 12131–12165, 1983.
332 *Goodman,* 126 S. Ct. at 879.
333 *Id.*
334 *Id.* at 881.
335 Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).
336 *Goodman,* 126 S. Ct. at 881–82.
337 *Id.* at 881.

sofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."[338] Consequently, it was determined that the U.S. Court of Appeals for the Eleventh Circuit had "erred in dismissing those of Goodman's Title II claims that were based on such unconstitutional conduct."[339] The Supreme Court declined to address the question of whether Congress's purported abrogation of sovereign immunity was valid as to the class of alleged conduct that "violated Title II but did not violate the Fourteenth Amendment," leaving it to the applicable inferior federal courts to conduct the "congruence and proportionality" inquiry in the first instance.[340]

Justice Stevens, in a concurring opinion joined by Justice Ginsburg, emphasized that the Court's focus on Goodman's Eighth Amendment claims arose "simply from the fact that those [were] the only constitutional violations [that] the Eleventh Circuit [had] found him to have alleged properly."[341] He asserted that "the history of mistreatment leading to Congress' decision to extend Title II's protections to prison inmates was not limited to violations of the Eighth Amendment,"[342] and that courts had "reviewed myriad other types of claims by disabled prisoners, such as allegations of the abridgment of religious liberties, undue censorship, interference with access to the judicial process, and procedural due process violations."[343] Justice Stevens concluded his concurring opinion by explaining that the District Court and the Court of Appeals would, on remand, have an opportunity to consider all of the potential Fourteenth Amendment violations for purposes of both Goodman's complaint and the *Flores* inquiry.[344]

*Goodman* cleared up much of the confusion created by the Court's poorly written opinion in *Garrett*. First of all, it now seems obvious that the documentation requirement applies only when Congress prohibits conduct which does not itself violate the Fourteenth Amendment, and that Congress clearly has the power to abrogate the states' Eleventh Amendment immunity in order to redress Fourteenth Amendment violations. Secondly, in light of *Lane* and *Goodman*, litigants who allege conduct that actually violates the Fourteenth Amendment are likely to circumvent the Eleventh Amendment hurdle, assuming that Congress's

338 *Id*. at 882.
339 *Id.*
340 *Id*.
341 *Id.* at 883 (Stevens, J., concurring).
342 *Id*.
343 *Id*. at 884.
344 *Id.*

intent to abrogate sovereign immunity is clear, even if the underlying statutes do not satisfy the "congruence and proportionality" standard as applied to the broader class of cases which do not involve constitutional violations.

These principles are consistent with Justice Scalia's dissent in *Lane*, in which he conceded that Congress has the power to abrogate the states' Eleventh Amendment immunity in order to redress actual Fourteenth Amendment violations. It is worthy of note that Justice Scalia did not join Chief Justice Rehnquist's dissenting opinion in *Lane*, where the Chief Justice contended that the Court's "as applied" approach to the case was erroneous. The Chief Justice found that it would permit Congress to "simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States."[345] Justice Scalia authored his own dissent in *Lane*, expressing the view that Congress's ability to prohibit more than the Fourteenth Amendment itself prohibits should be limited to cases involving racial discrimination.

While it is true that most of the Court's early decisions upholding sweeping Enforcement Clause legislation involved congressional efforts to deter racial discrimination, Justice Scalia provided no principled reason for subjecting prophylactic legislation involving other Fourteenth Amendment rights to a greater degree of judicial scrutiny. When viewed in the context of *Jones* and *Runyon*, the "congruence and proportionality" standard enunciated in *Flores* is virtually inexplicable. Therefore, neither the restrictive test advocated by Justice Scalia, nor the slightly less rigorous test currently used by the Court to assess the constitutionality of Enforcement Clause legislation, is consistent with the Court's pre-*Flores* precedents.

In *Jones*, the Court sustained a broad civil rights statute under Section Two of the Thirteenth Amendment on the ground that "the Enabling Clause of that Amendment empowered Congress to do much more" than the self-executing Section One accomplished in the absence of additional federal legislation.[346] In *Runyon*, the Court reaffirmed Congress's authority to enact such legislation.[347] There was no indication that Section Two legislation had to be limited to the purpose of remedying or deterring actual Thirteenth Amendment violations.

In *Katzenbach v. Morgan*, the Court declared that "the *McCulloch v. Maryland* standard is the measure of what consti-

345 Tennessee v. Lane, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting).
346 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).
347 Runyon v. McCrary, 427 U.S. 160, 179 (1976).

tutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."[348] *McCulloch* construed the Necessary and Proper Clause as an extensive grant of legislative authority and rejected an argument for a narrow reading of that provision.[349] Likening the Enforcement Clause of the Fourteenth Amendment to the Necessary and Proper Clause as construed in *McCulloch*, the Court explained in *Morgan* that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[350] The construction given to the Enforcement Clause was clearly one that showed a substantial degree of deference to the judgments made by Congress.

The Court likewise adopted a broad construction of Section Two of the Fifteenth Amendment in *South Carolina v. Katzenbach*. In that case, the Court stated that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."[351] This was, of course, a direct reference to Chief Justice Marshall's language in *McCulloch*. It was further noted that the Court had "echoed his language in describing each of the Civil War Amendments."[352]

Unfortunately, the Court has not seen fit to echo the language of Chief Justice Marshall in recent times, particularly with regard to Section Five of the Fourteenth Amendment. The utter lack of deference shown to Congress in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett* is a far cry from the rationale underlying the Court's decision in *McCulloch*. Furthermore, the Court has made no attempt to distinguish its recent Enforcement Clause holdings from *Jones* and *Runyon*. Since the Thirteenth Amendment itself restricts private entities, it is easy to understand why *Jones* and *Runyon* did not call for a different result in *Morrison*. The Fourteenth Amendment, of course, only limits state action, providing the Court with a logical reason to view the Violence Against Women Act as an excess of Congress's Enforcement Clause authority. That Act was concededly directed against private actors. This is true despite the fact that it was designed, at least in part, to address the problem of gender discrimination in the criminal justice system. That is not to say that *Morrison* was correctly decided, but it does illustrate

348 384 U.S. 641, 651 (1966).
349 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323–25 (1819).
350 384 U.S. at 651.
351 South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).
352 *Id*. at 327.

why the Court's Thirteenth Amendment precedents were never used to inform the Court's Enforcement Clause inquiry. Nevertheless, that line of reasoning was wholly inapplicable in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel* and *Garrett*.

In *Garrett*, the Court noted that "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."[353] Chief Justice Rehnquist, who delivered the opinion of the Court in *Garrett*, described Title I of the Americans with Disabilities Act as an excess of Congress's power to enforce the Fourteenth Amendment. He viewed the Voting Rights Act upheld in *South Carolina v. Katzenbach* as a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment."[354] Contending that Title I was not a "limited remedial scheme" akin to the Voting Rights Act, he purported to rely on *South Carolina v. Katzenbach* to justify the invalidation of Title I for Enforcement Clause purposes.[355] That precedent, however, exhibited a large measure of deference to Congress, making the Court's reliance on it in *Garrett* all the more ironic.

Since the Court relied on a precedent involving the Fifteenth Amendment to justify a narrow construction of the Fourteenth Amendment's Enforcement Clause, there is no reason why the Court should not also use the relevant Thirteenth Amendment precedents to inform the Fourteenth Amendment inquiry. The Fourteenth and Fifteenth Amendments restrict only governmental entities, while the Thirteenth Amendment is directed at private action. Nonetheless, the Enforcement Clauses of the three Civil War Amendments are virtually identical. The self-executing provisions of the Thirteenth and Fifteenth Amendments are much narrower than the protections provided by Section One of the Fourteenth Amendment. If anything, Section Five of the Fourteenth Amendment should be given a broader construction than the Enforcement Clauses of the other two Civil War Amendments. The Court, however, has disregarded the deferential standard applied in *Jones* and *Runyon* when interpreting the Enforcement Clause of the Fourteenth Amendment.

Justice Scalia, dissenting in *Lane*, acknowledged the deference shown to Congress with regard to the deterrence of racial discrimination. Nevertheless, he insisted that he would give Congress such latitude in that limited context only because of stare decisis.[356] He never explained why Congress's authority to

353 Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001).
354 *Id.* at 373.
355 *Id.* at 373–74.
356 Tennessee v. Lane, 124 S. Ct. 1978, 2012 (2004) (Scalia, J., dissenting).

enforce other Fourteenth Amendment rights should be more circumscribed, aside from highlighting his own unwillingness to expand federal legislative jurisdiction.

Any objective observer must acknowledge that Congress's authority under Section Five of the Fourteenth Amendment is not unlimited. It is true that *Oregon v. Mitchell*[357] "found to be *beyond* the § 5 power [a federal statute] that lowered the voting age from twenty-one to eighteen in state elections."[358] *Mitchell*, of course, preceded the adoption of the Twenty-Sixth Amendment. Nevertheless, most of the pre-*Flores* precedents interpreting the Enforcement Clauses of the Civil War Amendments generally applied a standard consistent with that described in *McCulloch*, and the Court's recent departure from that trend is unfortunate. The Court certainly did not apply such a deferential standard in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett*. Perhaps *Hibbs*, *Lane* and *Goodman* represent the beginning of a larger retreat on the part of the Court. Since the Constitution grants the enforcement power to Congress rather than to the courts, one can only hope that the pendulum is beginning to swing back in the direction of those elected by the people of the United States.

## IV. THE COURT'S ASSERTION OF ITS OWN PROPHYLACTIC POWER

Section Five of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[359] Nothing in the Constitution says anything about entrusting a similar power to the federal courts. Notwithstanding this reality, however, the U.S. Supreme Court has sometimes prescribed prophylactic rules of its own.

Among the most famous prophylactic rules created by the Court is the one requiring that *Miranda* warnings be given to a criminal suspect prior to the commencement of custodial interrogation. Before custodial interrogation can begin, a suspect must be verbally warned that he or she "has the right to remain silent, that anything he [or she] says can be used against him [or her] in a court of law, that he [or she] has the right to the presence of an attorney, and that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires."[360] These warnings are required under the Court's 1966 decision in *Miranda v. Arizona*.[361] Confessions ob-

357 400 U.S. 112 (1970).
358 *Lane,* 124 S. Ct. at 2012 (Scalia, J., dissenting).
359 U.S. CONST. amend. XIV, § 5.
360 Miranda v. Arizona, 384 U.S. 436, 479 (1966).
361 *Id.*

tained in violation of *Miranda* cannot be admitted into evidence as a part of the prosecution's case-in-chief against the defendant.[362]

The warning requirement enunciated in *Miranda* is a prophylactic rule designed to enforce the Self-Incrimination Clause of the Fifth Amendment. The Due Process Clause of the Fourteenth Amendment, of course, incorporates the Self-Incrimination Clause and makes it applicable to the states.[363] Prior to *Miranda*, the Court evaluated the admissibility of a suspect's confession, for constitutional purposes, under a "voluntariness test."[364] There are two distinct bases for the requirement that confessions be voluntary in order to admit them into evidence. The first basis, recognized in *Bram v. United States*, is the Self-Incrimination Clause of the Fifth Amendment.[365] The second basis, discussed in *Brown v. Mississippi*, is the Due Process Clause of the Fourteenth Amendment.[366] It is worthy of note that the Fifth Amendment contains its own Due Process Clause, providing a similar voluntariness protection to federal defendants.[367] Nevertheless, the Court ultimately became convinced that new custodial interrogation techniques had begun to blur the line between voluntary and involuntary confessions, requiring more "concrete constitutional guidelines for law enforcement agencies and courts to follow."[368] Therefore, the Court created the prophylactic exclusionary rule of *Miranda*, barring the admission of confessions made during custodial interrogation before the giving of the warnings.

Two years after *Miranda* was decided, Congress enacted 18 U.S.C. § 3501.[369] The statute was designed to alter the rule of *Miranda* in criminal prosecutions brought by the United States or the District of Columbia. Under *Miranda*, the required warnings had to be given in order for a suspect's confession made during custodial interrogation to be introduced as evidence by the prosecution at trial. Section 3501(a) stated that, "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given."[370] Section

362 *Id.*
363 Malloy v. Hogan, 378 U.S. 1, 3 (1964).
364 Dickerson v. United States, 530 U.S. 428, 433 (2000).
365 168 U.S. 532 (1897).
366 297 U.S. 278 (1936).
367 U.S. CONST. amend. V.
368 Miranda v. Arizona, 384 U.S. 436, 442 (1966).
369 18 U.S.C. § 3501 (2000), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).
370 § 3501(a).

3501(e) defined the word "confession" as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."[371] The factors to be used by the trial judge to determine whether a given confession was voluntary were enumerated in § 3501(b). These factors included all relevant "circumstances surrounding the giving of the confession, including . . . the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment . . . ."[372] Inquiries were also mandated to determine

> whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, . . . whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, . . . whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and . . . whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.[373]

Finally, § 3501(b) made it clear that the presence or absence of any of the enumerated factors was not necessarily "conclusive on the issue of voluntariness of the confession."[374]

The U.S. Supreme Court was ultimately called upon to decide whether § 3501 was valid federal legislation in *Dickerson v. United States*.[375] Charles Thomas Dickerson was indicted for several offenses under Title 18 of the United States Code, including "bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence . . . ."[376] Prior to his trial, he moved for the suppression of a statement that he had made during a custodial interrogation session at a Federal Bureau of Investigation field office, contending that no one had given him *Miranda* warnings before the questioning commenced. Although the District Court granted his motion, the U.S. Court of Appeals for the Fourth Circuit reversed on interlocutory appeal by the Government, holding that the matter was governed by § 3501 rather than by *Miranda*.[377] The Court of Appeals reasoned that Congress had the authority to substitute § 3501's voluntariness test for the prophylactic warning rule be-

371 § 3501(e).
372 § 3501(b).
373 *Id.*
374 *Id.*
375 530 U.S. 428, 432 (2000).
376 *Id.* at 432.
377 United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *rev'd* 530 U.S. 428 (2000).

cause *Miranda* was not a constitutional holding. The U.S. Supreme Court granted certiorari, however, and ultimately reversed the decision of the Court of Appeals.[378]

Chief Justice Rehnquist, who delivered the opinion of the Court in *Dickerson*, explained that "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."[379] Citing *Flores*, he declared that Congress did not have the power to legislatively supersede the Court's decisions "interpreting and applying the Constitution."[380] The outcome of the case was left to turn on the question of "whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[381]

Moving on to address the critical issue, Chief Justice Rehnquist made it clear that *Miranda* had announced a constitutional rule that Congress could not alter. He explained that the *Miranda* Court had

> emphasized that it could not foresee "the potential alternatives for protecting the privilege which might be devised by Congress or the States," and [that] it [had] accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[382]

Nevertheless, it was likewise noted that the *Miranda* Court had "concluded that something more than the totality test was necessary" to enforce the Self-Incrimination Clause.[383] Since § 3501 reinstated the totality of the circumstances test without providing additional protection, it was found to be unconstitutional.

Another reason relied on by the Court to assert the constitutional status of *Miranda* was the fact that the warning requirement had been applied to state prosecutions. The U.S. Supreme Court, of course, does not have "a supervisory power over the courts of the several States," and its authority with respect to state criminal proceedings is "limited to enforcing the commands of the United States Constitution."[384] Consequently, *Miranda*'s direct application to the states meant that it was a constitutional

378 *Dickerson*, 530 U.S. 428, 432 (2000).
379 *Id.* at 437.
380 *Id.*
381 *Id.*
382 *Id.* at 440 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).
383 *Id.* at 442.
384 *Id.* at 438 (internal quotation marks omitted).

threshold to be applied uniformly to both the states and the federal government, not simply an exercise of the Court's supervisory authority over the federal courts.

Finally, the Court rejected the Government's contention that the exceptions carved into *Miranda*'s exclusionary rule had undermined its constitutional status. Such exceptions included the rule enunciated in *Oregon v. Hass*, which held that a confession obtained in violation of *Miranda* may be used to impeach the defendant's trial testimony if he or she takes the stand, assuming that the confession was otherwise voluntary.[385] Another exception relied on by the United States was the rule announced in *New York v. Quarles*, which permitted the admission of statements made by a detained suspect in response to police questioning that was deemed to be necessary to protect the public from immediate danger.[386] The Court declared that these exceptions to *Miranda*'s exclusionary rule did not destroy its status as a constitutional rule. Instead, the Court asserted that "no constitutional rule is immutable."[387] Because the Court found that *Miranda* was a constitutional precedent, it governed the result in *Dickerson*. Explaining that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," the Court declined the Government's invitation to overrule *Miranda*.[388] Therefore, Congress was without the constitutional authority to enact § 3501.

Justices Stevens, Souter, Ginsburg, Breyer, Kennedy and O'Connor joined Chief Justice Rehnquist's majority opinion.[389] Justice Scalia authored a dissenting opinion, joined by Justice Thomas.[390] Questioning the Court's authority to invalidate § 3501, Justice Scalia characterized the Court's decision in *Dickerson* as an assertion of "the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."[391] He insisted that, since *Miranda*, the Court had "interpreted that decision as having announced, not the circumstances in which custodial interrogation runs afoul of the Fifth or Fourteenth Amendment, but rather only 'prophylactic' rules that go beyond the right against compelled self-incrimination."[392] Relying on *Quarles*, he declared that the warnings prescribed by *Miranda*

385 420 U.S. 714, 723–24 (1975).
386 467 U.S. 649 (1984).
387 *Dickerson,* 530 U.S. at 441.
388 *Id.* at 443.
389 *Id.* at 430.
390 *Id.* at 444 (Scalia, J., dissenting).
391 *Id.* at 446.
392 *Id.* at 450.

were "not themselves rights protected by the Constitution."[393] Quoting the Court's prior decision in *Oregon v. Elstad*, Justice Scalia explained: "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[394]

Seeking to further illustrate his view that the decision in *Dickerson* was an excess of the Court's authority, Justice Scalia contended that "[w]here the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so."[395] That statement, of course, was a reference to Section Five of the Fourteenth Amendment. He went on to state that "[t]he power with which the Court would endow itself under a 'prophylactic' justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of that text."[396] Justice Scalia asserted that while congressional action under the Enforcement Clause could be used only to deter actual violations of the Constitution, the Court's "power to embellish" permitted it to prescribe prophylactic measures against "foolhardy" confessions as well as "constitutionally prohibited compelled confessions."[397] In so stating, he referred to the "congruence and proportionality" test established in *Flores*.

Notwithstanding the observations made by Justice Scalia in *Dickerson*, the prophylactic rule enunciated by the Court in *Miranda* would likely pass *Flores*' "congruence and proportionality" test if it were enacted by Congress pursuant to Section Five of the Fourteenth Amendment. The Court created *Miranda*'s exclusionary rule to deter actual violations of the Self-Incrimination Clause, which is incorporated within the Due Process Clause of the Fourteenth Amendment. Nevertheless, it was mandated by a judicial decision rather than by federal legislation. Even though the Enforcement Clause gives the prophylactic power to Congress, the Court has chosen to seize that power for itself. Since *Dickerson* was a federal case, the Fourteenth Amendment was not applicable and the Fifth Amendment's application was direct. Despite that fact, it is clear that the exclusionary rule's application in state cases influenced the Court's decision. In light of *Miranda* and *Dickerson*, it is apparent that the Court has confused its own duty to *give effect* to the substantive provisions of the Fourteenth Amendment in a spe-

393 *Id.* at 452 (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)).
394 *Id.* at 453 (quoting Oregon v. Elstad, 470 U.S. 298, 307 (1985)).
395 *Id.* at 460.
396 *Id.*
397 *Id.* at 461.

cific case with Congress's power to *enforce* those provisions by enacting prophylactic legislation.

## CONCLUSION

The Federal Judiciary's assault on Congress's power to enforce the Fourteenth Amendment threatens the rights of Americans all across the country. The U.S. Supreme Court's recent decisions limiting Congress's Enforcement Clause authority are particularly troubling in light of the Court's reaffirmation of its own prophylactic power in *Dickerson*. In spite of the decisions sustaining sweeping legislation under Section Two of the Thirteenth Amendment, the Court has inexplicably given Section Five of the Fourteenth Amendment a much more narrow construction. While it cannot be doubted that each of the Civil War Amendments provides a unique scope of substantive protection, the Court has never explained why these similarly worded enforcement provisions have been given such drastically different constructions.

Legislation to enforce one constitutional guarantee, of course, cannot itself conflict with another. For instance, Congress's authority to enforce the Fifteenth Amendment cannot be used to require the states to make race the "predominant factor" in redistricting decisions. Under *Miller v. Johnson*,[398] the Equal Protection Clause forbids the use of race as the "predominant factor" for purposes related to the composition of legislative districts.[399] Congress does not have the authority to authorize violations of the Fourteenth Amendment.[400] Legislative enactments designed to enforce the Civil War Amendments, like all other enactments, must not themselves violate the Constitution.

Notwithstanding the presence of some limitations, however, Congress's authority to enforce the Fourteenth Amendment should be viewed more broadly than the *Flores* standard permits. In *McCulloch*, the Court construed the words "necessary and proper"[401] in a manner which gave Congress wide latitude to enact federal legislation, rejecting the contention that the word "necessary" meant "absolutely or indispensably necessary."[402] The word "appropriate," as it appears in Section Five of the Fourteenth Amendment, cannot reasonably be construed to be more

398 515 U.S. 900 (1995).

399 Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?,* 4 U. PA. J. CONST. LAW, 735, 736 (2002) (discussing the "predominant factor" test).

400 Saenz v. Roe, 526 U.S. 489, 490 (1999).

401 U.S. CONST. art. 1, § 8.

402 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819).

restrictive of Congress's authority than the word "necessary" in the Necessary and Proper Clause. The propriety of legislation is a political judgment for Congress to make.

Justice Kennedy, who authored the opinion of the Court in *Flores* and introduced the "congruence and proportionality" test, took a contrary position during his confirmation hearings before the Senate Judiciary Committee. When questioned by Senator Arlen Specter about the U.S. Supreme Court's status as the final arbiter of the Constitution, then-Judge Kennedy stated that Congress would have the legislative authority to provide newspapers with heightened protection from libel suits if *New York Times v. Sullivan*[403] were overruled.[404] He believed that Congress had the authority to bring back the "actual malice" standard by statute if the Court were to reject it as a matter of constitutional law.[405] He made it clear that, in his view, Congress "could make that judgment as a constitutional matter."[406] Needless to say, the Religious Freedom Restoration Act, though governing a different subject, sought to accomplish an objective similar to that described in Judge Kennedy's hypothetical. While Congress lacks the power to overrule the Court's decisions interpreting the Constitution, its prophylactic power under Section Five of the Fourteenth Amendment should be viewed as broad enough to sustain a statute such as the Religious Freedom Restoration Act.

The lack of deference shown to Congress's determinations about what is "appropriate legislation" to enforce the Fourteenth Amendment should meet an aggressive legislative response. Even without resorting to the constitutional amendment process established by Article V, Congress has several options available. Primarily, Congress should look for alternative sources of legislative jurisdiction to accomplish its objectives. For example, the Court concluded in *Oregon v. Mitchell* that Congress exceeded its authority under Section Five of the Fourteenth Amendment when it lowered the minimum voting age from twenty-one to eighteen in state elections.[407] *Mitchell*, of course, was decided before the adoption of the Twenty-Sixth Amendment. Section One of the Twenty-Sixth Amendment states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by

403 376 U.S. 254 (1964).
404 2 LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1395–96 (4th ed. 1995).
405 *Id.* at 1396.
406 *Id.*
407 400 U.S. 112 (1970).

any State on account of age."[408] The Twenty-Sixth Amendment itself accomplished what the statute sought to do, making further substantive legislation unnecessary. Section Two of the Twenty-Sixth Amendment states that "Congress shall have power to enforce this article by appropriate legislation."[409] It is very similar to Section Five of the Fourteenth Amendment, so it probably could be used to abrogate the states' Eleventh Amendment immunity under the rationale of *Fitzpatrick*. If a state were to discriminate against eighteen- to twenty-year-olds with respect to electoral matters, Congress could use Section Two of the Twenty-Sixth Amendment to subject that state to suits brought by private individuals in federal court to redress the alleged constitutional violations. The same principle would apply to the Enforcement Clauses of the Fifteenth, Nineteenth and Twenty-Fourth Amendments.

Congress has the power of the purse and, therefore, can use the Taxing and Spending Clause to accomplish many of its objectives. Under *South Dakota v. Dole*, Congress is empowered to condition the receipt of federal funds on the states' compliance with certain policy directives.[410] Perhaps Congress should use this power more aggressively in order to meet some of its broader objectives.

There are already signs that Congress is using this power, along with its powers under other constitutional provisions, to achieve objectives similar to those that prompted the enactment of the Religious Freedom Restoration Act. For instance, the Religious Land Use and Institutionalized Persons Act of 2000[411] attempts to mitigate the damage to religious freedom that was done by the *Smith* and *Flores* decisions. The Act states:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.[412]

This legislative mandate

> applies in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance; or . . . [in which] the substantial burden affects, or removal of that

408 U.S. CONST. amend. XXVI.
409 *Id.*
410 483 U.S. 203 (1987).
411 42 U.S.C. §§ 2000cc–2000dd-1 (2000).
412 42 U.S.C. § 2000cc-1(a) (2000).

> substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.[413]

It is clear from the language of the statute that Congress sought to use its powers under the Spending Clause, as well as its powers under the Foreign, Interstate and Indian Commerce Clauses, to compensate for the narrow construction given to the Fourteenth Amendment's Enforcement Clause in *Flores*. A similar provision of the Religious Land Use and Institutionalized Persons Act restricts governmental land use regulations that substantially burden the ability of people to freely exercise their religion.[414]

In *Cutter v. Wilkinson*, the U.S. Supreme Court unanimously held that the Religious Land Use and Institutionalized Persons Act did not violate the Establishment Clause of the First Amendment.[415] Justice Ginsburg, who delivered the opinion of the Court, noted that the Religious Freedom Restoration Act at issue in *Flores* had "lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds."[416] Nevertheless, she made it clear that the Court was not deciding whether the Religious Land Use and Institutionalized Persons Act was a valid exercise of the Commerce and Spending Clauses, thereby limiting the Court's holding in *Cutter* to the Establishment Clause issue.[417] The U.S. Court of Appeals for the Sixth Circuit had found the Act to be in violation of the Establishment Clause, making an inquiry into the bases for legislative jurisdiction unnecessary.[418] The U.S. Supreme Court, reversing the Court of Appeals, found the "institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."[419] Since the Court of Appeals never addressed the Spending and Commerce Clause issues, the U.S. Supreme Court did not address them either.

In any event, the Religious Land Use and Institutionalized Persons Act is undoubtedly valid under both constitutional provisions. Under *Dole*, Congress has wide latitude to condition the receipt of federal funds on the states' compliance with certain federal legislative mandates. In the alternative scenario, the Act contains a jurisdictional element that limits its application to a

413 42 U.S.C. § 2000cc-1(b) (2000).
414 42 U.S.C. § 2000cc(a)(1) (2000).
415 125 S. Ct. 2113, 2123 (2005).
416 *Id*. at 2118.
417 *Id*. at 2120 n.7.
418 Cutter v. Wilkinson, 349 F.3d 257, 268–69 (6th Cir. 2003), *rev'd* 125 S. Ct. 2113 (2005).
419 *Cutter,* 125 S. Ct. 2113, 2121 (2005).

discrete category of cases in which commerce is affected. Such a jurisdictional element was lacking in the Gun-Free School Zones Act at issue in *Lopez* and the Violence Against Women Act at issue in *Morrison*. The breadth of Congress's power under the Commerce Clause was illustrated by the Court's recent decision in *Gonzales v. Raich*, which held that the power vested in Congress by the Commerce Clause and the Necessary and Proper Clause "includes the power to prohibit the local cultivation and use of marijuana in compliance with [state] law."[420] In a concurring opinion, Justice Scalia noted that, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."[421]

The Supremacy Clause of Article VI states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[422]

As the Court noted in *Missouri v. Holland*: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."[423] Consequently, treaties can be used to expand federal legislative jurisdiction. In order to bring back the Violence Against Women Act that was invalidated in *Morrison*, President George W. Bush could sign a treaty with a foreign power that pledges each nation to take the steps necessary to protect women from gender-motivated violence. The Senate could proceed to give its advice and consent to the treaty pursuant to Article II. At that point, a new source of legislative jurisdiction would come into being. Such a treaty may not be self-executing for purposes of the standard discussed in *Foster & Elam v. Neilson*[424] and *United States v. Percheman*,[425] but the Necessary and Proper Clause would give Congress the power to enact legislation designed to implement the treaty. Congress could enact a statute identical to the one invalidated in *Morrison*, thereby creating a cause of action under federal law for victims of gender-motivated violence. It could be called the Violence Against Women Treaty Act, and it would be "necessary and

420 125 S. Ct. 2195, 2199 (2005).
421 *Id.* at 2216 (Scalia, J., concurring).
422 U.S. CONST. art. VI.
423 252 U.S. 416, 433 (1920).
424 27 U.S. (2 Pet.) 253, 314 (1829).
425 32 U.S. (7 Pet.) 51, 89, 94 (1833).

proper for carrying into Execution"[426] the President's powers under the Treaty Clause.

There are also more direct ways in which Congress could confront the federal courts. In *Nixon v. United States*, the U.S. Supreme Court held that challenges to the procedures used by the Senate to try impeachment cases present nonjusticiable political questions.[427] The same is likely true of challenges to the grounds for impeachment, particularly since Article I gives the House of Representatives "the sole Power of Impeachment" and the Senate "the sole Power to try all Impeachments."[428] Therefore, federal courts have no constitutional authority to review impeachment determinations made by the House and Senate.[429] If the House were to bring impeachment charges against a federal judge, the only recourse available to that judge would be an argument for acquittal in the Senate. If the Senate were to convict such a judge and effectuate his or her removal from office, such a determination would likely be final and incapable of review. Notwithstanding the overtly confrontational nature of the impeachment process and the political pressures that sometimes prevent its use, it remains an option available to Congress when judges evade their responsibilities or usurp legislative authority.

Congress also has the power to regulate the jurisdiction of the federal courts. Congress can use this power to keep the courts in check, as it did during the events leading up to *Ex parte McCardle*.[430] In that case, the U.S. Supreme Court was unable to reach the merits because Congress had repealed the underlying jurisdictional statute. As the Court explained, "[j]urisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[431] Congress can deal with judicial excesses by amending the jurisdictional statutes that give the federal courts their power to decide cases and order relief.

Finally, the option once proposed by President Franklin D. Roosevelt remains available to Congress at all times. 28 U.S.C. § 1 states that "[t]he Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."[432] Since the Constitution prescribes no number, Congress has the power to

426 U.S. CONST. art. I, § 8.

427 506 U.S. 224, 228, 238 (1993).

428 U.S. CONST. art. I, §§ 2–3.

429 Joseph R. Thysell, *Senate Rule XI and the Impeachment of Federal Judges*, 29 S.U. L. REV. 77, 82 (2001) (discussing judicial review of Senate impeachment proceedings).

430 74 U.S. (7 Wall.) 506 (1869).

431 *Id*. at 514.

432 28 U.S.C. § 1 (2000).

create more seats on the U.S. Supreme Court. Such a move would, of course, dilute the importance of the votes of the existing members of the Court. The fact that there are nine Justices is solely the result of a statutory mandate. There is no constitutional impediment to a federal law designed to pack the Court.

There is a political equilibrium in Washington that usually prevents Congress from taking these drastic steps. With two major political parties and countless other factions comprising a diverse Congress, it is unlikely that any significant legislative initiatives to curtail abuses by the federal courts will pass in the near future. Each party or faction is afraid that another will reap the benefits of a stronger Congress, and this dynamic prevents the body as a whole from acting to reassert its authority.

In any event, Congress must not remain impotent when its authority is undermined. For an entire decade, Congress has seen the Judiciary restrict Congress's powers in a relentless manner. Perhaps the U.S. Supreme Court's decisions in *Hibbs*, *Lane* and *Goodman* are a sign that the Court is finally starting to retreat. Time will ultimately tell if this is the case. Chief Justice John G. Roberts, Jr., and Justice Samuel A. Alito, Jr., have now replaced Chief Justice Rehnquist and Justice O'Connor, and the direction that the Court will take in the future remains uncertain. Perhaps the Court's two newest members will show more deference to Congress than Chief Justice Rehnquist and Justice O'Connor did, thereby decreasing tensions between America's legislators and jurists. If the Court continues to usurp Congress's authority, however, Congress will have no choice other than to act.

That is not to say that all judges deserve to be condemned. Most members of the Judiciary serve the American people with the highest level of respect for our constitutional tradition. Nevertheless, the same is true of those who serve as elected officials. The power that they exercise comes from the people who elect them, and our Constitution confirms that "We the People" are the ultimate authority in this country.[433] Congress simply cannot remain silent when unelected judges usurp the authority of the people. While judges are entitled to respect when they carry out their role in the constitutional design, they must learn to show a greater degree of respect for America's elected officials. The courts, after all, have no real power to enforce their decisions. They rely on the Executive Branch to enforce their judgments, and the Executive Branch has to rely on Congress to supply the needed resources. Under our Constitution, there are three co-

433 U.S. CONST. pmbl.

equal branches of government, none of which is superior to the others.