

The “How” of Enforcing the Fourteenth Amendment: Why the Rehnquist Court’s Treatment of Implementation, not Interpretation, is the True Post-*Boerne* Failing

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I. INTRODUCTION

One of the most striking legacies of the Rehnquist Court has been the severe curtailing of Congress’s power to enact civil rights legislation under Section Five of the Fourteenth Amendment (14 § 5).¹ Many scholars have attributed this shift to what they see as a lack of judicial deference to Congress’s interpretation of the Constitution²—a trend that they trace to *City of Boerne v. Flores*.³ This article will argue that *Boerne* did not represent a major shift in this regard, and that Congress’s loss of 14 § 5 power during the Rehnquist Era can instead be traced to the Court’s treatment of congressional implementation⁴ of the Constitution in the cases that followed *Boerne*.

This article articulates a set of principles and a doctrinal framework, based on *Boerne* and its predecessors, which can be used to establish whether Congress has the power to pass a given law under 14 § 5. *Interpretation* of the Fourteenth Amendment is clearly an important part of that process, but analyzing Congress’s attempts to *implement* that meaning is also important. Thus, the framework will highlight the moment when Congress’s power—or lack thereof—to interpret the

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1. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV § 5 (14 § 5).

2. See *infra* Section II.

3. 521 U.S. 507 (1997).

4. The difference between interpreting and implementing the Constitution is discussed most thoroughly in Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997). Fallon’s focus, however, is on the ways in which the Court implements the Constitution, not on Congress’s role. *Id.*

Fourteenth Amendment must be addressed, but it will also then bracket that moment to demonstrate the impact that the implementation issue has by itself. In dealing with these two issues separately, the article departs from most of the recent 14 § 5 literature;⁵ however, it follows the lead of the Court itself. Although the Court has been neither consistent nor coherent in its recent 14 § 5 jurisprudence, the basic structure of its cases has implicitly separated the question of constitutional interpretation from the question of constitutional implementation.

In advancing a nuanced yet workable approach to dealing with this distinction, this article seeks to provide doctrinal guidance at what is a critical moment in history for the Fourteenth Amendment. The two Justices who did the most to shape the Rehnquist Court's 14 § 5 jurisprudence—Justice O'Connor and Chief Justice Rehnquist himself—have left the Court, leaving an unsettled doctrine in their wake. The approach that the Roberts Court takes on these issues will have an immediate and far-reaching effect. Important legislation—most notably, the re-authorized Voting Rights Act (VRA)⁶—is currently being challenged in the lower courts on the grounds that Congress exceeded its 14 § 5 power when enacting it.⁷

The core argument that animates the analytical framework presented in this article states that even if the Court continues to follow its current practice of not deferring to Congress's constitutional interpretations, it should nonetheless defer to Congress's theories and findings regarding implementation, as was recognized by *Boerne* and its predecessors. Both the cases and the scholarship that have come in the wake of *Boerne* treat congressional findings as one unit, either to be afforded deference or not. Rarely have attempts been made to disentangle the different types of judgments that Congress makes. Engaging in this type of analysis is difficult because of the often-blurred line between constitutional interpretation and implementation. It is important, however, because the institutional relationship between Congress and the Court cannot be properly assessed so long as this line remains blurred.

The framework presented in this article seeks to separate the interpretive from the implemental and to grapple with the issues thus raised, while attempting to achieve three goals: (1) to shift the discussion of Congress's 14 § 5 power away from its current focus on constitutional interpretation, and back toward a more implementation-oriented approach that 14 § 5 scholars such as Archibald Cox took before *Boerne*

5. Considerable scholarship has identified and discussed the interpretation/implementation divide. See Fallon, *supra* note 4; Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (providing an overview of the scholarship in this field). However, most critiques of *Boerne* and its progeny have largely ignored the interpretation/implementation issue.

6. 42 U.S.C. § 1973 (2000).

7. See Complaint at 1, Northwest Austin Municipal Utility District No. One v. Gonzales, No. 1:06-cv-01384 (D.D.C., complaint filed Aug. 4, 2006).

was decided; (2) to expose the flaws and inconsistencies in the Court's own interpretation of *Boerne* while demonstrating how these failings relate to the implementation issue, rather than the interpretation issue; and (3) to offer a clearer approach to 14 § 5 doctrine. This clearer approach—the proposed framework—is grounded in *Boerne* and its predecessors, and it accepts the view of judicial primacy in constitutional interpretation that is prevalent in those cases. Through its focus on distinguishing interpretation from implementation, however, this approach provides an antidote to the most fundamental flaws that have emerged in the Court's post-*Boerne* cases.

Section II of this article will analyze the relevant 14 § 5 scholarship, from both the Rehnquist Era and earlier eras. Section III will provide a brief outline of the key cases in the Court's 14 § 5 jurisprudence, and the ways in which the Court's doctrine shifted dramatically during the Rehnquist years. Section IV will introduce the proposed analytical framework for approaching 14 § 5 cases. Section V will apply the doctrinal tools introduced in section IV to a series of cases. The goal of this section is to show how the new doctrinal framework can help make sense of—or at least define the inconsistencies of—key Rehnquist Court cases, as well as the precedents on which those cases relied. This section will also reflect on the limits that the framework imposes on Congress, as illustrated both by the cases analyzed and by hypothetical future cases. Section VI will conclude.

II. A TOPIC BOTH OLD AND NEW—JUDICIAL REVIEW OF CONGRESSIONAL FINDINGS

From an historical perspective, the invalidation of civil rights laws is not a new concept. On the contrary, the birth of the Fourteenth Amendment was greeted almost immediately by judicial attempts to stifle 14 § 5 legislation. Most enduringly, this took the form of the state action doctrine, which the Court used,⁸ and continues to use,⁹ to strike down laws that address discrimination, no matter how vile and widespread, by non-state actors.¹⁰ It is important to note that judicial creation of the state action doctrine relied on a legal analysis of two questions: what type of discrimination the Fourteenth Amendment forbids, and whether Congress is permitted to legislate beyond those parameters. These two questions remain every bit as vital today as they were

8. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3 (1883).

9. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000).

10. Many scholars and even judges continue to advocate for the removal or scaling-back of the state action doctrine. *See, e.g.*, Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and The Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481 (2006); Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681 (2006); *United States v. Morrison*, 529 U.S. 598, 664-66 (2000) (Breyer, J., dissenting).

during Reconstruction, and are the primary focus of a majority of the scholarship addressing the Rehnquist Court's 14 § 5 jurisprudence. It is important to note, however, that the Reconstruction-Era Court, by creating the state action doctrine, was not addressing the question of *how* Congress could carry out the dictates of the Fourteenth Amendment; instead, it was defining the bounds of what those dictates were. The question was, therefore, one of interpretation, not implementation.¹¹

The Reconstruction Era was followed by a long period of inaction under 14 § 5. Simply put, Jim Crow Congresses saw no need to pass civil rights legislation, and the courts, therefore, had no need to address it. A different type of Fourteenth Amendment argument did arise during this time period, however, and it merits a brief examination because of its ties to the issues of legislative fact-finding and constitutional implementation. During the so-called *Lochner* Era,¹² the Court used the concept of substantive due process to strike down scores of progressive laws.¹³ What is relevant here is the way in which the *Lochner* Court, much like the Rehnquist Court,¹⁴ engaged in close scrutiny of the factual findings that legislatures had made—for example, the finding that limiting the hours of bakery workers would have an effect on public health.¹⁵ The *Lochner* Court's treatment of legislative findings raised questions about whether the Court was exceeding its role and wading into topics best addressed by legislatures—the issue becomes one of moving beyond interpretation and into implementation.¹⁶ The degree of scrutiny and non-deference stood out as exceptional at the time; the Court's approach was decried by contemporary scholars, who expressed a concern that judges had no special competence for addressing such questions, and that the judicial process might therefore lose its legitimacy in the

11. This is not to say that any use of the state action doctrine is necessarily a question of interpretation rather than implementation. *Cf. Morrison*, 529 U.S. 598.

12. The *Lochner* Era is generally thought to span from roughly 1890 to 1937, when *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overturned *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

13. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York state law that limited the working hours of bakers); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a federal law that banned interstate sale of items produced using child labor); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down a federal minimum wage for women).

14. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 143 (2001) (describing how the Rehnquist Court at times seemed to be “resurrecting a practice of judicial second-guessing of legislative fact-finding not seen since the darkest days of the *Lochner* Era”).

15. *Lochner*, 198 U.S. at 64.

16. Not all legislative fact-finding relates to implementation, as Sections IV and V will discuss. This subtlety was not lost on Justice Holmes, who drew a distinction in *Block v. Hirsh*, 256 U.S. 135 (1921), between “legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one,” as opposed to “a declaration by a legislature concerning public conditions that by necessity and duty it must know,” the latter of which Holmes felt deserved more deference from the Court. *Id.* at 154. This type of nuanced approach to the question of judicial deference to legislative fact-finding is nowhere to be found in the Rehnquist Court's 14 § 5 jurisprudence.

eyes of laymen.¹⁷ The legitimacy issue was particularly pressing given the importance and popularity of the legislation in question.¹⁸

During the Warren Court Era, the Court once again found itself, or perhaps placed itself, in the middle of many important national dialogues.¹⁹ The Warren Court evaluated many statutes, both state and federal. Typically, it was federal legislation, such as the VRA, that was upheld,²⁰ while state legislation, such as redistricting schemes that violated the principle of “one person, one vote,” was struck down.²¹ Writing in 1965, Archibald Cox examined this element of the Court’s role in promoting civil rights.²² Cox fretted over the striking down of state laws, noting that, on one hand, courts are not really equipped to deal with the type of in-depth fact-finding that many of these cases required, but observing that, on the other hand, to defer to state legislatures in many of the situations would be to put the imprimatur of the Court on an unjust system.²³ He was much more comfortable with the Court’s decisions that upheld congressional legislation as being within the scope of Congress’s 14 § 5 powers. Having seen the Court take the lead on issues of social change—*Brown v. Board of Education*²⁴ was mentioned repeatedly²⁵—Cox expressed hope that *Katzenbach v. Morgan*,²⁶ which had just come down, upholding a portion of the VRA, would embolden Congress to start taking more of a lead and thus take pressure off of the courts.²⁷ He envisioned a “buffer zone” of scenarios that the courts themselves would not rule unconstitutional, but that Congress could outlaw.²⁸ Thus, while Cox was uneasy with the idea of the Court using the concept of equal protection to strike down a state law that required all voters to be literate in English,²⁹ he was clearly comfortable with the

17. See Henry Biklé, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 6-7 (1924).

18. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 43 (2006).

19. *But see id.* at 9, 36-38 (arguing that civil rights and other Warren Court topics were not at the top of the nation’s agenda).

20. See *infra* Section III.

21. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

22. Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1965).

23. *Id.* at 97-98.

24. 347 U.S. 483 (1954).

25. Cox, *supra* note 22, at 91-94. Cox writes of the case with deep respect, but also with a touch of doctrinal malaise: “It detracts nothing from the magnificent accomplishments of the Warren Court to say that the period of great growth has also created extraordinary constitutional stresses.” *Id.* at 94.

26. 384 U.S. 641 (1966).

27. Cox, *supra* note 22, at 122. Cox seems to assume—as many did, given the political context of the times—that it must be the duty of some branch of the federal government to prevent discriminatory action by the states; the question for him was which branch was going to do it. *Id.*

28. *Id.* at 121.

29. *Cardona v. Power*, 384 U.S. 672 (1966), the companion case to *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved a direct challenge, brought by a Puerto Rican-born plaintiff, to the constitutionality of a New York law that required that all voters be literate in English. *Id.* at 674. *Cardona* was remanded to be re-evaluated in light of *Morgan*; the plaintiff’s education status was unknown, so it is possible that the Voting Rights Act’s (VRA) section 4(e), see *infra* note 30, rendered her case

Court in *Morgan* upholding a federal law that, in the name of equal protection, forced states to permit certain Spanish speakers to vote regardless of their literacy in English.³⁰ What is crucial to our analysis here is that Cox did not view this buffer zone as a usurpation by Congress of the Court's *Marbury*-given right³¹ to define what the law is; he simply saw it as a reflection of Congress's superior fact-finding capabilities, combined with the doctrine of judicial deference to legislatures.³²

Cox's view can perhaps be summarized by saying that the Constitution allows Congress to do a lot more than it requires the courts to do. Lawrence Sager took this viewpoint one step further, by asserting that the Constitution in fact *requires* Congress to do many things that the courts cannot—for example, to create an affirmative right to a minimum level of welfare.³³ What both Cox and Sager agree on is that the courts are often correctly reluctant to wade into difficult areas of constitutional implementation—figuring out how best to bring to life constitutional guarantees such as equal protection. This reluctance should not be taken as a sign, however, that the Constitution does not allow—or even

moot. See *Cardona*, 384 U.S. at 674. Although Justices Douglas and Fortas argued that the New York law was unconstitutional, Cox was clearly uneasy with the idea of a court overturning a legislature on what he saw as the very fact-intensive questions raised by *Cardona*. See Cox, *supra* note 22, at 96-97.

30. These are the facts of *Morgan*, in which the Court upheld section 4(e) of the VRA, which in turn overrode the New York state law that was at issue in *Cardona*. See *Cardona*, 384 U.S. at 674. Section 4(e), which was passed pursuant to Congress's 14 § 5 power, provided that states must allow Spanish speakers who had received at least a sixth-grade education in Puerto Rico to vote, even if they did not speak English. 79 Stat. 439, 42 U.S.C. § 1973b(e) (1964 ed., Supp. I); see *Morgan*, 384 U.S. at 646. The *Morgan* Court therefore permitted Congress to essentially strike down New York's English-language literacy test in the name of the Fourteenth Amendment, even while the Court on the same day in *Cardona* was unwilling to declare New York's law unconstitutional. For the Court's explanation of this approach, see *Morgan*, 384 U.S. at 648-50.

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But note that *Marbury* itself does not necessarily imply that Congress's view of the meaning of the Constitution should always be subordinated to the Court's view. See Fallon, *supra* note 4, at 130 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 349 (2d ed. 1988)).

32. *Id.* at 106.

Whether a state law denies equal protection depends to a large extent upon finding and appraisal of the practical importance of relevant facts—in the case of the English literacy requirement, upon such considerations as the extent to which the requirement served as an incentive to learn English and ease the process of assimilation, the availability of Spanish-language newspapers and their sufficiency to enable non-English-speaking voters to exercise the franchise intelligently, the importance of the franchise, and the relative effectiveness of other inducements to learn English. There is often room for differences of opinion in interpreting the available data. A fortiori men may differ upon the values of competing desiderata. The accepted principle upon constitutional review is that the Court should assume that there are facts which furnish a constitutional foundation for the state legislation unless that conclusion is rationally impossible.

Id. See also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 866 (1999) (citing TRIBE, *supra* note 31, at 346) (citing the proposition that Cox felt that the enforcement power “does not threaten *Marbury v. Madison* since congressional action involves less the interpretation of law than the finding of fact”). As the rational basis test developed further, other scholars would also describe the test as stemming, at least in part, from an appreciation of Congress's superior institutional capacity for fact finding. See, e.g., David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 205-06 (1988).

33. See Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1992, 1994-95 (2001); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 415 (1993).

mandate, as Sager would argue—legislative action to bring about reform of the type that courts are reluctant to impose. Under this view, the gap between what the courts will mandate and what they will allow legislatures to mandate has nothing to do with permitting alternate interpretations of the Constitution. Instead, the idea is that even if both branches agree on a single interpretation, there will still be a myriad of possible ways to carry out their shared vision of the Constitution, and the legislature is better equipped to make the policy decisions that surround this implementation process. Moreover, while the Court's institutional posture has led it to develop deferential doctrines—such as the presumption of constitutionality, which can lead it to uphold laws that are constitutionally questionable, such as New York's law in *Cardona v. Power*³⁴—Congress's lack of similar institutional fetters allows for more direct implementation of constitutional norms.³⁵ While both Cox's and Sager's theories perhaps do not adequately address the difficulties involved in drawing the line between interpretation and implementation,³⁶ they establish a framework of Fourteenth Amendment jurisprudence under which the Court defers to Congress's efforts to implement the Amendment, while still retaining the ultimate authority to interpret that Amendment.

The first modern offshoot of an alternate theory, under which the Court might defer to Congress's interpretation of the Fourteenth Amendment, emerged in *Morgan*, the very case Cox most closely analyzed. As is discussed above, *Morgan* upheld a federal law that in turn struck down a state's English-only voting requirement.³⁷ Although the Court in *Morgan*, and in its companion case *Cardona*, expressly declined to decide the question of whether New York's law was unconstitutional, an alternate rationale produced in *Morgan* was that Congress might have itself decided that the state law was unconstitutional, and that the Court should defer to that decision so long as it was not irrational.³⁸ It is important to note the limits of this approach to congressional power to

34. 384 U.S. 672 (1966). This relates to the issue of how courts implement the Constitution. See Fallon, *supra* note 4. The overlap between the questions of judicial implementation and congressional implementation will be explored in Sections III and IV.

35. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Sager, *Justice in Plain Clothes*, *supra* note 33; Strauss, *supra* note 32; Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 469 (2000); Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 8 (2003). In a related manner, the Executive Branch is able to implement the Constitution in ways that courts are institutionally unable to do. See David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (2000).

36. Some scholars have argued that the interpretation /implementation dichotomy is in fact a false one. See Levinson, *supra* note 28. For an overview of scholarship addressing the interpretation / implementation divide—or lack thereof—see Berman, *supra* note 5.

37. Katzenbach v. Morgan, 384 U.S. 641, 654-56 (1966).

38. See *id.*

interpret the Fourteenth Amendment. The power arose only in the context of judicial silence—Congress was legislating in a space that the Court had not yet occupied, and that it seemed happy enough to avoid. Moreover, Congress's power had a "ratchet"³⁹ component to it—it could not be used to dilute the protections of the Amendment.⁴⁰ Also, of course, the Court still retained the ultimate decision-making authority, albeit under a permissive standard of review. In spite of all this, *Morgan's* alternate holding excited considerable controversy.⁴¹ Given the important role that the Warren Court had played in upholding the rights of minority groups, even a modest shift of power to Congress seemed potentially dangerous.

In recent years, however, some scholars have embraced an understanding of *Morgan* that emphasizes Congress's power to interpret the Fourteenth Amendment. This shift seems to have come about at least in part as a response to *Boerne* and its progeny, which most scholars have read to constitute a restriction on Congress's power to interpret the Fourteenth Amendment.⁴² In expressing their disagreement with the Rehnquist Court's post-*Boerne* decisions, Robert Post and Reva Siegel have characterized these decisions as breaking with history—a history in which they see a pattern of the Court sharing the power to interpret the Constitution with Congress.⁴³ Yet the history they describe does not in fact exhibit this pattern. Post and Siegel applaud the way the *Morgan* Court deliberately created ambiguity, so as to encourage Congress to experiment broadly with 14 § 5 legislation;⁴⁴ they also praise the Warren Court's willingness to listen and be swayed by Congress's views regarding the suspect nature of gender-based classifications.⁴⁵ While both of these examples create a clear contrast with the Rehnquist Court's approach,⁴⁶ neither of them can precisely be described as the

39. This term originated in William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975). See Post and Siegel, *Protecting the Constitution*, *supra* note 35, at 39.

40. See *Morgan*, 384 U.S. at 651 n.10. While Justice Brennan's language in this footnote has long been read to create the "ratchet" structure that Cohen describes, Brennan's actual statement—that "Congress[s] power under [14] § 5 is limited to adopting measures to enforce the guarantees of the Amendment; [14] § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees"—does not in fact seem to grant Congress permission to expand the meaning of the Fourteenth Amendment. *Id.* Instead, Justice Brennan's use of the word "enforce" seems to envision that Congress's power is limited to implementing the Amendment rather than expanding it. However, since the Court in this case explicitly refrained from reaching the question of what the Fourteenth Amendment dictates as regards the legality of the New York law, Justice Brennan's second rationale does require that Congress perform its own interpretation of the Amendment in order to decide how it should be implemented. *Id.*

41. See Cohen, *supra* note 39, at 605.

42. In fact, *Boerne* does not significantly change the balance of power between Congress and the courts when it comes to constitutional interpretation, and the post-*Boerne* cases are noteworthy for their treatment of implementation, not interpretation. See *infra* Sections III, IV, and V.

43. See Post & Siegel *Protecting the Constitution*, *supra* note 35, at 1.

44. See *id.* at 36-39.

45. See *id.* at 31-33.

46. See *infra* Sections III and V.

Court ceding interpretative authority to Congress.⁴⁷ Post and Siegel speak in the language of interpretation, but many of the issues they discuss in fact relate to Congress's power to implement the Fourteenth Amendment.⁴⁸ Though they consistently call on the Court to give Congress a greater role in constitutional interpretation,⁴⁹ it is unclear if they believe that the Court should allow Congress to enunciate an interpretation of the Constitution that directly conflicts, even slightly, with the Court's own articulated view.⁵⁰

Other modern scholars, however, have made clear that they do support this type of expanded congressional role in constitutional interpretation. Larry Kramer, whose theory of "popular constitutionalism"⁵¹ shares Post's and Siegel's emphasis on preserving the people's voice in constitutional interpretation,⁵² has stated unequivocally that when a question of constitutional interpretation is "open to reasonable disagreement," as was the First Amendment question in *Boerne*, the Court may simply allow Congress to express, and implement, a view that differs from the stated view of the Court.⁵³ Michael McConnell had the same reaction to *Boerne*, arguing that there can be "legitimate differences of opinion" between the two branches as to the meaning of the Constitution,⁵⁴ but that so long as Congress's interpretation is reasonable, the statute should pass constitutional muster.⁵⁵ Like Cox and Sager, Kramer and McConnell seemed to envision a buffer zone in

47. Post and Siegel repeatedly acknowledge, with apparent approval, the fact that the Court in *Morgan* reserved to itself the ultimate authority to determine the meaning of the Fourteenth Amendment. See Post & Siegel, *Protecting the Constitution*, *supra* note 35, at 36-39.

48. Most notably, Post and Siegel spend considerable time criticizing the Rehnquist Court's treatment of legislative fact-finding, which, as Sections III, IV, and V will discuss, had more to do with implementation than with interpretation. See *id.* at 10-17.

49. See *id.* at 1.

50. Post and Siegel's work seems to come closest to this argument when they favorably describe the Court's Thirteenth Amendment jurisprudence, which they see as giving broader interpretative power to Congress than to the courts. See Post & Siegel, *Equal Protection*, *supra* note 35, at 495-96. Most of their other analysis, however, seems to view the Court as the proper final arbitrator of constitutional meaning. Their quarrel is with the Rehnquist Court's unwillingness to listen to congressional input prior to making a final interpretive judgment. See, e.g., *id.* at 520-22.

51. See Kramer, *supra* note 14, at 16-73.

52. See Post & Siegel, *Protecting the Constitution*, *supra* note 35.

53. Kramer, *supra* note 14, at 145.

54. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 184 (1997); see also David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31 (comparing *Boerne* to the approach in *Teague v. Lane*, 489 U.S. 288 (1989), under which the Court defers to the "reasonable" constitutional interpretations of state judges, even when these interpretations were later rejected by the Court). But see Sager, *Justice in Plain Clothes*, *supra* note 33, at 413 (questioning, in the context of the rule of "clear mistake," the likelihood that a judge would relinquish her own constitutional vision in favor of a differing one proposed by the legislature).

55. See McConnell, *supra* note 54, at 184. At other points in the article, however, McConnell seems to be making a ratchet argument, i.e., that Congress can expand but not contract Constitutional rights. "Congress's decision to adopt a more robust, freedom-protective interpretation of the Free Exercise Clause did not 'alter' the Constitution or create 'new' rights. Rather, [the Religious Freedom Restoration Act of 1993 (RFRA)] merely liberated the enforcement of free exercise rights from constraints derived from judicial restraint." *Id.* at 195.

which Congress may pass laws mandating behavior that the Court itself would never mandate. But, whereas both Cox and Sager's buffer zone exists in a space delineated by Congress's superior institutional capacity for implementation, to which the Court should defer,⁵⁶ Kramer and McConnell's zone exists in a space occupied by contested theories of constitutional interpretation. The difference between the two approaches is therefore considerable⁵⁷—scholars like Kramer and McConnell are arguing for a level of deference to Congress's interpretation of the Fourteenth Amendment that goes far beyond even the portion of *Morgan* that was so controversial,⁵⁸ and instead hearkens back to James Bradley Thayer's famous rule of "clear mistake."⁵⁹ Thayer, however, was writing in 1893; in the modern era, we have long understood the Court to have a more central role, especially in the realm of defining and protecting individual rights.⁶⁰

For authors like Kramer, Post, and Siegel, the shift towards a greater role for Congress in interpreting the Fourteenth Amendment can be seen as part and parcel of a more general desire to incorporate democratic values and the voice of "the people" into the world of constitutional interpretation.⁶¹ Indeed, many scholars go further than these three in advocating that the Constitution should be taken out of the hands of the Court.⁶² In the particular context of 14 § 5 jurisprudence, however, it would be wrong to underemphasize the role that *Boerne* has played in causing so many scholars to re-examine the balance of power between Congress and the Court when it comes to interpreting the Fourteenth Amendment. McConnell, Kramer, Post, Siegel, and many others⁶³ reacted vehemently to *Boerne* and the cases that followed, particularly *Board of Trustees of the University of Alabama v. Garrett*⁶⁴ and *Kimel v. Florida Board of Regents*,⁶⁵ each of which struck down

56. See *supra* text accompanying notes 32-33.

57. This difference is highlighted by the fact that Sager explicitly rejected McConnell and Kramer's view of RFRA. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 443-44 (1994) ("where Congress insists that the Court adopt a legal test that the Court has repudiated, we have a recipe for constitutional disaster").

58. See *supra* sources accompanying notes 14, 54.

59. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Under Thayer's rule, a court might disagree with a legislature's understanding of the Constitution, but would nonetheless uphold the relevant statute unless the legislature's interpretation was completely irrational. See *id.* at 144.

60. Ever since the New Deal, the courts have been understood to exercise greater power over individual rights than they hold in other realms. See Kramer, *supra* note 14, at 122.

61. See *supra*, text accompanying notes 14, 35.

62. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); and RICHARD PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994). Some scholars, of course, have gone in the opposite direction. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

63. See *supra* sources accompanying notes 14, 35, 54.

64. 531 U.S. 356 (2001).

65. 528 U.S. 62 (2000).

provisions of long-standing civil rights statutes.⁶⁶ Because of *Boerne*'s focus on interpretation, the entire line of cases has been viewed in that light, and these scholars' critiques have therefore argued that Congress should be allowed a greater role in interpreting the Fourteenth Amendment.

This line of reasoning relies on a misreading of the Court's post-*Boerne* cases. While *Boerne* itself addressed the issue of Fourteenth Amendment interpretation—and did so in a fairly conventional way⁶⁷—the cases that followed involved an unprecedented intrusion by the Court into the realm of Fourteenth Amendment implementation.⁶⁸ By focusing solely on the issue of interpretation, critics of the Rehnquist Court's 14 § 5 jurisprudence have made two crucial mistakes. First, in their eagerness to take issue with the extraordinarily activist results in *Kimel* and *Garrett*, they have embraced a relinquishing of interpretive power to Congress that threatens the Court's role as the ultimate protector of individual rights. Second, in overlooking the role that implementation plays in the post-*Boerne* cases, they have failed to recognize the greatest dangers that are posed by these cases—dangers that relate not to the question of who gets to define what the Fourteenth Amendment means, but instead to the question of whether its protections, however defined, will be brought to life in the form of effective legislation.

III. THE CASES

To understand how drastically the post-*Boerne* cases have deviated from earlier 14 § 5 doctrine—a deviation that has largely taken the form of judicial control over questions of constitutional implementation—it is necessary to examine the doctrine as it has evolved. The cases discussed in this section will be re-examined in section V, where they will be subjected to the new analytical framework that section IV will announce.

It is impossible to understand 14 § 5 without examining two landmark cases that upheld the VRA⁶⁹: *South Carolina v. Katzenbach*⁷⁰ and

66. See *infra* Section III.

67. See *infra* Section V.

68. This is true not just of *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), and *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (and *Fla. Prepaid Secondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999), see *infra* note 95), all of which struck down a portion of legislation, but also of *Neb. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), which ultimately upheld the laws in question, see *infra* Section III.

69. The VRA has faced other challenges, as well. See *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970) (upholding two of the 1970 amendments to the statute in full, and also upholding the lowering of the voting age to eighteen for all federal elections, but striking down the age change for state elections); *City of Rome v. United States*, 446 U.S. 156, 187 (1980) (upholding the VRA's continuing validity after the 1975 amendments). For a further discussion of the Court's deference to Congress in *City of Rome*, see Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 716-18, 720 (1996).

70. 383 U.S. 301 (1966).

Katzenbach v. Morgan. The Court has consistently cited these cases in its 14 § 5 jurisprudence, even as that jurisprudence has changed over the years.⁷¹ Both *Katzenbach* and *Morgan* applied the *McCulloch* test to determine the constitutionality of a federal statute.⁷² “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁷³ As applied by the Warren Court, this test easily breaks down into questions of interpretation (determining legitimate ends), and questions of implementation (determining appropriate means). As discussed above, the Court in *Morgan* showed some willingness to defer to Congress on questions of constitutional interpretation;⁷⁴ the *Katzenbach* opinion did not take this stance, but both cases emphasized the importance of deferring to Congress on questions of implementation, and allowing Congress to pass prophylactic legislation.⁷⁵

The Court’s approach in *Katzenbach* to the issue of literacy tests is a perfect example of how the Warren Court disentangled the issues of interpretation and implementation. In *Lassiter v. Northampton County Board of Elections*,⁷⁶ the Court found that literacy tests were not, *per se*, unconstitutional, though they could be used to perpetuate unconstitutional discrimination.⁷⁷ Congress, however, chose to ban all literacy tests as part of the VRA.⁷⁸ Instead of viewing this as a congressional repudiation of *Lassiter*, the Court in *Katzenbach* examined Congress’s reasoning. Congress observed that many illiterate whites had been given the franchise even in states with literacy tests, and thus concluded that the states could not claim future harm from adding illiterate black

71. The Court’s loyalty to *Morgan* has been less reliable. Although *Boerne* contains numerous favorable cites to *Morgan*, it also explicitly rejects one interpretation of that case—the so-called “ratchet theory,” under which Congress may expand but not constrict constitutional rights. See *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1997). The fact that *Boerne* takes away Congress’s power to expand constitutional rights is of vital importance, but not to this article, since our framework here works under the assumption that it is for the Court alone to decide the scope of constitutional rights.

72. *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

73. *McCulloch v. Maryland*, 14 U.S. (4 Wheat.) 316, 421 (1819). *McCulloch*, which predates the Civil War Amendments, established a general test for congressional power as against the reserved powers of the states. *Ex parte Virginia*, 100 U.S. 339 (1879), extended the *McCulloch* test to apply to those Amendments. *Id.* at 345-46. Some scholars believe that the enforcement clauses of the Fourteenth and Fifteenth Amendments were explicitly designed to echo the language of *McCulloch*, thus giving these clauses the same meaning as the Necessary and Proper Clause. See Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747, 823-24 (1999); Steven A. Engel, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 119-20 (1999).

74. See *supra* notes 37-41 and accompanying text.

75. See *Morgan*, 384 U.S. at 648-50.

76. 360 U.S. 45 (1959).

77. *Id.* at 53.

78. 79 Stat. 439, 42 U.S.C. § 1973b(e) (1964 ed., Supp. I).

voters to their rolls.⁷⁹ The harm to the states was therefore negligible, while the positive effect of the ban was large, since it would put a stop to the common problem of discriminatory application of literacy tests. By relying on Congress's factual findings and justifications for the law, the Court reached a decision that the ban on literacy tests was appropriate. Importantly, the Court reached this decision without overturning or even questioning *Lassiter*, which remained the definitive statement of the meaning of the Fourteenth Amendment as applied to literacy tests.

Boerne presented a situation in which Congress had clearly imposed its own interpretation of the Constitution. In an earlier case, *Department of Human Resources of Oregon v. Smith*,⁸⁰ the Court had declined to apply the *Sherbert v. Verner*⁸¹ test to a certain class of cases involving free exercise of religion.⁸² Out of outrage over *Smith*, Congress had used its 14 § 5 power⁸³ to pass the Religious Freedom Restoration Act of 1993 (RFRA).⁸⁴ The text of RFRA criticized *Smith*⁸⁵ and explicitly sought to reinstate the *Sherbert* test.⁸⁶ The Court in *Boerne* struck down RFRA as an unconstitutional attempt by Congress to make a substantive change in the meaning of the Fourteenth Amendment⁸⁷—in other words, the *Boerne* Court clarified that Congress could not usurp the Court's role as ultimate interpreter of the Constitution. In making this point, the Court relied heavily on *Katzenbach* and *Morgan*, yet failed to apply the *McCulloch* rule employed by these cases,⁸⁸ and instead enunciated "congruence and proportionality" as the relevant test.⁸⁹ Thus, while prophylactic legislation is at times appropriate, the law must be "adapted to the mischief and wrong" that the Amendment is aimed at preventing.⁹⁰ This structure allowed the Court to strike down RFRA without engaging in the messy business of assessing congressional intent. Instead, the Court was able to say that while RFRA

79. See *Katzenbach v. Morgan*, 383 U.S. 301, 334 (1966) (citing House Report 15 and Senate Report 15-16).

80. 494 U.S. 872 (1990).

81. 374 U.S. 398 (1963). The *Sherbert* test involves an evaluation of whether a law "substantially burden[s] a religious practice," and, if so, if there is a compelling government interest that justifies the burden. *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997).

82. *Id.* at 512-14.

83. The Fourteenth Amendment has been interpreted to give Congress the power to enforce the Free Exercise Clause of the First Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

84. 42 U.S.C. § 2000bb (1993).

85. *Boerne*, 521 U.S. at 515 (quoting 42 U.S.C. § 2000bb(a)(4)).

86. *Id.* (quoting 42 U.S.C. § 2000bb(b)(1)).

87. *Id.* at 534-35.

88. Many scholars have argued that the *Boerne* Court erred in not applying the *McCulloch* test. See, e.g., Amar, *supra* note 73; Engel, *supra* note 73; Evan H. Caminker, *Appropriate Means—Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1127 (2001) ("This article argues that the means—ends test for Section Five legislation should be the same as the conventional 'rational relationship' test established by *McCulloch v. Maryland*, not the 'congruence and proportionality' test that the Court has recently adopted.").

89. *Boerne*, 521 U.S. at 520.

90. *Id.* at 534 (quoting *The Civil Rights Cases*, 109 U.S. 3, 13).

was technically a prophylactic law in the sense that some of the things it forbade were things that the Constitution itself forbids, it swept too far and therefore failed the test of congruence and proportionality. The exact doctrinal structure of the *Boerne* opinion is at times unclear,⁹¹ but the basic framing seems to have three parts: (1) Congress may pass laws that simply follow the dictates of the Constitution, as enunciated by the Court; (2) Congress may pass prophylactic laws, however, (3) such laws must be congruent and proportional to the harm—in the form of constitutional violations—that they attempt to eradicate. These three points form the backbone of the analytical framework discussed in section IV.⁹² In deciding whether a prophylactic rule sweeps too far, the *Boerne* Court indicated a willingness to defer to congressional findings about the need for certain types of legislation;⁹³ in other words, the *Boerne* Court was emphatic about judicial primacy when it comes to interpretation, but willing to be deferential on the subject of implementation.⁹⁴

Kimel and *Garrett* represented a significant shift⁹⁵ from both the *Boerne* and *Katzenbach* approach, which, though they used different tests, were in fact quite similar.⁹⁶ In *Kimel* and *Garrett*, the Court struck down elements⁹⁷ of two landmark statutes, the Age Discrimination in Employment Act of 1967 (ADEA)⁹⁸ and Title I of the Americans with Disabilities Act of 1990 (ADA),⁹⁹ respectively. In so doing, a bare majority of the Court altered the test that had been unanimously accepted by the *Boerne* Court. First, the Court added a new requirement—prior to passing prophylactic legislation, Congress must show

91. See *infra* section V.

92. In addition, these three points mirror the structure of *South Carolina v. Katzenbach*, as section V will discuss.

93. The *Boerne* Court held that while “[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles,” a strong legislative record that explains the types of constitutional violations that the law seeks to avoid is a sign of legislative restraint, and can thus be used to justify a prophylactic law that forbids a considerable amount of constitutional behavior by the states. *Boerne*, 521 U.S. at 531, 533.

94. The *Boerne* Court, however, was not called upon to demonstrate this deference, since RFRA’s legislative history did not reveal a felt need for strong prophylactic legislation, but instead revealed a congressional desire to overturn *Smith*. See *supra* notes 85-87 and accompanying text.

95. The shift actually began in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), a patent infringement case. *Kimel* and *Garrett* represented the Court’s first application of *Boerne* in an Equal Protection Clause context.

96. See *infra* section V. In particular, *Katzenbach* and *Boerne* followed almost identical frameworks.

97. Much of the Americans with Disabilities Act of 1990 (ADA) and the Age Discrimination in Employment Act of 1967 (ADEA) had been passed under Congress’s Commerce Clause power; these portions of the statutes were not challenged in *Kimel* and *Garrett*. The only parts of the statutes that were challenged in these cases were those that created a cause of action against the states. In the wake of heightened Eleventh Amendment protections granted by the Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), it is not possible to use the Commerce Clause to abrogate sovereign immunity; it is possible, however, to use the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59.

98. Pub. L. No. 90-202, 81 Stat. 602 (as amended 29 U.S.C. § 621 (2000)).

99. 42 U.S.C. §§ 12111-17 (2000).

that it is responding to a “[d]ifficult and intractable problem[],”¹⁰⁰ as evidenced by a “history and pattern of unconstitutional . . . discrimination.”¹⁰¹ This requirement conflicts with *Boerne*, which stated that 14 § 5 legislation does not require “egregious predicates”¹⁰²—indeed, the very idea of congruence and proportionality seems to suggest that laws can target small problems, so long as the scope of the remedy is correspondingly small.¹⁰³ Even more notable than the fact of this new requirement, however, is the way in which it was applied. In assessing whether Congress had amassed sufficient evidence of a widespread pattern of discrimination, the *Garrett* and *Kimel* majorities dismissed the bulk of the evidence that Congress had gathered—everything from a Senator’s testimony based on the experiences of his constituents,¹⁰⁴ to a full-scale report documenting age discrimination by the state government of California.¹⁰⁵ Indeed, the Court refused to accept any evidence that fell short of the standards that a court of law would demand.¹⁰⁶

This aspect of *Kimel* and *Garrett* represents an unacknowledged shift in the Court’s focus from issues of interpretation to issues of implementation. It is possible that the Justices thought they were merely strengthening their hold on constitutional interpretation—a clear concern for the majority was that both the ADEA and the ADA would turn age and disability status into suspect classifications, rather than classifications to be reviewed under a rational basis analysis.¹⁰⁷ But even if one accepts the idea that Congress may only pass laws that have the goal of preventing irrational age and disability discrimination, this tenet does not justify the Court’s insistence that Congress must use a judicial style of proof to determine that a law will have that effect. In so requiring, the Court imposed the court-specific rules regarding judicial

100. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000).

101. *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

102. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

103. *Id.* at 502, 508, 545.

104. *See Kimel*, 528 U.S. at 89 (quoting 118 CONG. REC. 24397, 7745 (1972)).

105. *See id.* at 90.

106. This element of *Kimel* and *Garrett* has been decried by numerous scholars. *See Post & Siegel, Protecting the Constitution*, *supra* note 35; Note, *The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146 (2001); Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court’s “Strict Scrutiny” of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091 (2001).

107. To the extent that these statutes sought to influence judicial rules of decision, this concern relates to the question of Congress’s power to affect judicial implementation, a topic that this paper will not dwell on except to notice that it is distinct from the question of Congress’s power over pure constitutional interpretation. *See Fallon, supra* note 4. I will briefly note, however, that Congress typically has had this power. *See Washington v. Davis*, 426 U.S. 229 (1976), in which the Court refused to change its own approach to implementation of the Fourteenth Amendment to the proposed standard by which a disparate impact on racial minorities might be seen as reason to invalidate a practice even if discriminatory intent had not been shown. In this case, the Court specifically stated that Congress did have the power to impose this approach on the courts. *See id.* at 248 (“extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription”).

implementation on Congress, thus conflating judicial implementation with congressional implementation. This result severely limited Congress's ability to use institutionally appropriate means to gather facts and make decisions. This is the "how" of law making; it was Congress's power to implement the Fourteenth Amendment, not to interpret it, which suffered a serious eclipse in *Kimel* and *Garrett*.

Although the Rehnquist Court's final two 14 § 5 cases, *Nevada Department of Human Resources v. Hibbs*¹⁰⁸ and *Tennessee v. Lane*,¹⁰⁹ both resulted in the Court upholding the laws in question,¹¹⁰ these cases nonetheless continued the trend of judicial scrutiny of congressional implementation. These cases deviate from *Kimel* and *Garrett* in the sense that the Court willingly accepted Congress's assertion that prophylactic legislation was necessary to prevent a widespread pattern of unconstitutional discrimination. In so doing, the *Hibbs* Court was particularly willing to accept a variety of different congressional approaches to fact-finding—a notable difference from *Kimel* and *Garrett* that Chief Justice Rehnquist's majority opinion does not explain. The key doctrinal changes made in both *Kimel* and *Garrett*, however, remain intact. In *Hibbs* and *Lane*, as well as in *Kimel* and *Garrett*, the Court's approach requires that Congress make a finding of widespread discrimination prior to legislating under 14 § 5. Moreover, the facts underlying that finding are considered fair game for a high level of judicial scrutiny. These cases, therefore, continue the Court's trend of deep involvement in resolving questions regarding how Congress goes about implementing the dictates of the Fourteenth Amendment.

IV. A CLEARER FRAMEWORK

This section will enunciate an analytical framework that can be used to evaluate whether Congress has the power, under 14 § 5, to pass a given law. This framework uses the language and basic approach of *Boerne*, while also looking to the *Katzenbach* and *Morgan* cases—on which *Boerne* relied heavily—to address the issues of implementation that were not raised by the facts of *Boerne*. The framework will include a series of questions that courts should ask in assessing a law under 14 § 5. Congress could also ask itself these questions before passing a law, and attempt to answer these questions on the legislative record. The questions are framed from a court's point of view primarily to make it easier to compare them with the ways in which the Court has thus far

108. 538 U.S. 731 (2003).

109. 541 U.S. 509 (2004).

110. *Hibbs* upheld the portion of the Family and Medical Leave Act of 1993 (FMLA) that created a cause of action against the states. 29 U.S.C. §§ 2601, 2611-19, 2631-36, 2651-54 (2000); 5 U.S.C. §§ 6381-87 (2000). *Lane* upheld a similar abrogation of state sovereign immunity in Title II of the ADA. 42 U.S.C. §§ 12131-65 (2000).

addressed this issue.

Section One of the Fourteenth Amendment reads in part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹¹ Section Five adds, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”¹¹² At times, the Rehnquist Court seemed to understand this enforcement clause as meaning that Congress could only legislate to punish states that had already shown a propensity towards denying equal protection to their citizens. In *Garrett*, the majority stated that, “Congress’[s] § 5 authority is appropriately exercised only in response to state transgressions.”¹¹³ It seems clear, however, that this cannot be the true meaning of the clause, and indeed the Court has never consistently applied this meaning. The Rehnquist Court upheld the Family and Medical Leave Act of 1993 (FMLA) in spite of the fact that, at the time the statute was passed, many states already had laws aimed at promoting equitable leave policies in the workplace.¹¹⁴ Furthermore, as Post and Siegel have pointed out, it is inconsistent with our constitutional structure to view states as defendants before Congress.¹¹⁵ The Court’s assertion in *Garrett* seems to imply that without an adequate—and extensive—record of discrimination, Congress is forbidden from even passing a law that simply reads: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁶ The legislative body would thus be put in a purely reactionary state, able to act if and only if legal violations had already occurred. In other words, the Constitution would essentially become our only source of federal civil rights law, and Congress’s role would change into that of a court, judging the states’ compliance.

Luckily, it seems that the Rehnquist Court did not really mean what it said in *Garrett*. *Boerne*, and each of the cases that followed, formulated the relevant rule in slightly different ways;¹¹⁷ but, with the exception of *Garrett*, each case sought to address the question of when and how Congress can legislate *beyond* what is required by the Constitution. An understanding emerges that few or no questions are raised when Congress simply outlaws—or creates penalties for—that which the Constitution itself forbids.¹¹⁸ It seems right that Congress should be al-

111. U.S. CONST. amend. XIV § 1.

112. *Id.* at § 5.

113. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

114. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 732-33 (2003).

115. See Post and Siegel, *Protecting the Constitution*, *supra* note 35, at 7-17.

116. U.S. CONST. amend. XIV § 1.

117. See *infra* section IV.

118. See Caminker, *supra* note 88. Again, imagine a law that says, “No State shall deny to any person within its jurisdiction the equal protection of the laws” or that forbids poll workers from only letting white people vote. Such a law would in fact probably be passed under the Fifteenth Amendment; but Section 2, that Amendment’s enforcement clause, has been read by the Court to follow the

lowed to pass such laws, and that no consideration, including a lack of evidence showing that states are currently denying equal protection, should lead the courts to strike these laws down.

This axiom—that Congress does not need any empirical data or other justification to pass a law that simply follows the dictates of the Fourteenth Amendment—forms the basis for the beginning of the analytical framework. “Question One” of the framework therefore becomes: Does this law simply forbid that which the Fourteenth Amendment itself forbids, and/or require that which the Fourteenth Amendment requires? If the answer is yes, then the law is ipso facto within Congress’s power to enact, and it need not be justified in any other way.¹¹⁹ However, as we will see below, both legal and factual justifications might be necessary to convince the Court to arrive at an answer of yes to Question One.

The first level of complexity that arises on the path to an answer of yes relates to legal determinations. In the case of some laws, such as those previously hypothesized, it is clear that the law follows the text of the Constitution. The issue, however, is easily obscured. For example, some might argue that equal protection requires treating all citizens exactly the same, while others might argue that equal protection means taking affirmative steps to place different groups on an equal footing. Thus, if a federal law required state employers to engage in color-blind, gender-blind, and/or class-blind hiring practices, a legal question would arise as to whether this was simply a required function of equal protection. The path to an answer of yes is thus potentially littered with questions of law—questions that Congress might well address.¹²⁰ In answering these legal questions, our framework follows the lead of *Boerne* and earlier 14 § 5 cases by giving the Court the ultimate authority to decide these interpretive issues.¹²¹ The Court is of course free to be swayed by Congress’s arguments,¹²² but it is under no obligation to defer to them.

In addition to the interpretive questions that must be answered in

same jurisprudence as 14 § 5. See *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

119. The law could of course be challenged on the grounds that it violated another portion of the Constitution, but that sort of challenge is beyond the scope of this article.

120. Congress often makes findings regarding the meaning of the Constitution. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997) (“These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates.”); see also JOINT VIEWS OF 12 MEMBERS OF THE JUDICIARY COMMITTEE RELATING TO THE VOTING RIGHTS ACT OF 1965, S. REP. NO. 89-162, pt. 2, at 18 (1965) (analyzing the VRA’s constitutionality in light of *Lassiter*, discussed *infra* section III).

121. Recently, some scholars have argued against this approach. See *supra* note 62 and accompanying text. However, it is my position that it makes sense for the Court, as a counter-majoritarian body, to maintain its role as ultimate arbitrator of the meaning of the Fourteenth Amendment. More practically, this is an issue that commanded a unanimous holding in *Boerne*; a framework that hinged on the Court ceding interpretive authority to Congress would quite certainly not be considered by the current Court.

122. Robert Post and Reva Siegel have applauded historical instances of the Court being swayed in this manner. See Post & Siegel, *Equal Protection*, *supra* note 35, at 520-22.

order to resolve Question One, questions of implementation might also arise. One can imagine, for example, a hypothetical Supreme Court coming to the legal conclusion that the Fourteenth Amendment mandates that every individual be able to exercise her legal rights, regardless of disability status. A question may remain, however, as to whether a given law—for example, a law requiring all government buildings to have ramps—was a carrying out of that constitutional mandate. On this issue, the Court should defer to Congress's findings and theories regarding constitutional implementation. For example, the congressional record might address the connection between wheelchair access and equal protection by illuminating the many ways in which lack of physical access to buildings or other spaces can affect one's ability to exercise legal rights and be treated equally by the government.¹²³ If Congress therefore determines that wheelchair access is necessary to fulfill the agreed-upon mandate of the Fourteenth Amendment, the Court should defer to this determination. The Court in *Boerne*, *Katzenbach*, and *Morgan* followed this structure of deferring to Congress on issues of implementation while not deferring to Congress on issues of interpretation;¹²⁴ post-*Boerne*, however, the structure has been lost, and replaced with a policy of non-deference on both types of questions.

It is important to note the way this framework envisions the Court discussing the meaning of the Fourteenth Amendment. In many types of cases, such as for claims brought under 42 U.S.C. § 1983, courts are called upon to engage in judicial implementation of the Constitution, in the sense that they must look at a given set of facts and determine whether a constitutional violation has occurred.¹²⁵ Because of the nature of the judicial process, this inquiry must necessarily involve the use of judicial rules of decision, for example regarding which party carries the burden of persuasion. Moreover, when the courts evaluate laws—often state laws—to determine if the laws themselves create a denial of the equal protection guarantees of Section One of the Fourteenth Amendment (14 § 1),¹²⁶ courts typically adopt a posture of deference to the legislature, and are thus prone to upholding laws even if they are constitutionally questionable.¹²⁷ All of these judicial strategies create a

123. Physical access to a building can be a necessary prerequisite to exercising one's legal rights, for example if one wishes to participate in a court proceeding or in a town meeting. Physical access might also be necessary if one wishes to be considered for a government job or to take advantage of government-provided services. There are thus many ways in which a lack of access might be seen as resulting in a lack of equal protection, as well as perhaps a lack of due process.

124. See Levinson, *supra* note 32. A limited exception is perhaps found in *Katzenbach v. Morgan*, 384 U.S.641, 654-56 (1966).

125. The concept of judicial implementation can be used to apply to a broader range of situations than this. See Fallon, *supra* note 4.

126. This is different than the question that this article addresses, which deals with an evaluation of whether a federal law falls within Congress's 14 § 5 power.

127. See *supra* notes 29-30 and accompanying text.

situation where the Court often decides cases without actually stating the underlying meaning of the Fourteenth Amendment.¹²⁸ A 14 § 5 case, however, presents a situation where the Court can—and, I would argue, should—articulate a “pure” statement of constitutional interpretation regarding the meaning of 14 § 1.¹²⁹ This statement might appear to conflict with other judicial statements arising in contexts where the Court implements the law. Thus, while the “pure” meaning of the Fourteenth Amendment might be that government employers are not allowed to fire employees based on their sexual orientation,¹³⁰ a case in which the court itself implements this rule might find no constitutional violation unless the employer is incapable of articulating a plausible, permissible rationale for the firing. This would not mean, however, that the Constitution only forbids firings for which no plausible permissible rationale can be offered; therefore Congress, in engaging in its own, uniquely legislative form of constitutional implementation, might find other ways to prevent firings based on sexual orientation—ways that do not hinge on an employer’s articulation of a plausible rationale. The Court’s post-*Boerne* doctrine has failed to make this distinction; as section V will show, this failure has had an important impact on the results of several cases.

With this distinction in mind, we return to the framework, which is beginning to take shape. The Court first asks itself, “Does this law simply follow the dictates of the Fourteenth Amendment?” This question divides into two parts: What are the “pure” dictates of the Fourteenth Amendment, and does this law simply implement them? Even if the Court takes a completely non-deferential stance on the first subquestion, it should show considerable deference to Congress’s views on the second subquestion. If the Court ultimately decides that the law simply follows the dictates of the Fourteenth Amendment, no other questions are necessary.

Often, the Court will answer no to Question One. But, it is clear both from *Boerne*, and even from the cases that followed, that this is not an end to the inquiry. The post-*Boerne* rule, as articulated in *Kimel*, holds:

Congress’[s] § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress’[s] power “to enforce” the Amendment includes the authority both to remedy and to deter violation[s] of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, includ-

128. See *supra* note 35, at 68-70.

129. The relevant provision of the Constitution might not be 14 § 1; for example, *Boerne* dealt with Congress’s 14 § 5 power to implement the First Amendment. The analysis here applies with equal force to such situations.

130. Of course, this might not be the pure meaning of the Fourteenth Amendment, in the eyes of the Court. Under this framework, this interpretive decision is ultimately the Court’s to make.

ing that which is not itself forbidden by the Amendment's text.¹³¹

The test of whether Congress has gone too far is *Boerne's* congruence and proportionality test:¹³² "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹³³ Therefore, an answer of no to our first question is not the end of the inquiry—one must next ask a *Boerne* series of questions.

If the Court finds that a law goes beyond the scope of the Fourteenth Amendment, it must next ask "Question Two": "Will the law remedy and/or deter violations of the Fourteenth Amendment?" As we will see below, this question can be rephrased as: "Is this a prophylactic law?" If the answer is no, it seems that, under *Boerne*, the law is not constitutional. If the answer is yes, the final question, "Question Three," becomes: "Is the injury to be prevented or remedied congruent and proportional to the means adopted?" If the answer to this question is also yes, the Court considers the law constitutional.

It is important to note that the answers to these questions hinge on the answer that the Court gave to the first question—particularly, to the first subquestion, which addresses the meaning of the Fourteenth Amendment itself. To return to the issue of wheelchair accessibility, one can imagine two possible answers to the subquestion regarding the dictates of the Fourteenth Amendment. The Court might rule that the Fourteenth Amendment forbids animus-based discrimination against the disabled, or the Court might rule that the Fourteenth Amendment forbids irrational discrimination against the disabled.¹³⁴ Under either formulation, a law that mandates wheelchair accessibility would probably not be seen as merely following the dictates of the Amendment—after all, our buildings do not lack ramps because of animus, and there are rational, mainly monetary, reasons not to build them—so the answer to Question One would be no. We must keep Congress's formulation of the law in mind, however, as we proceed to the *Boerne* questions. For example, if Congress's findings primarily focused on showing how ramps could help to reduce animus against the disabled—and, thus, animus-based discrimination against the disabled—they are only persuasive if animus has been articulated as the relevant legal standard.¹³⁵

Question Two—"will the law remedy and/or deter violations of the Fourteenth Amendment?"—proves tricky in its application. This ques-

131. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (citing *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)).

132. *See id.* (citing *Boerne*, 521 U.S. at 519).

133. *Boerne*, 521 U.S. at 520.

134. Obviously, there are an infinite number of other ways in which the Court might formulate the law.

135. *See infra* section V.E, for a discussion of how a law can fail based on the overlap between Question One, Question Two, and Question Three.

tion is significantly similar to Question One—the Court must be convinced that there are violations of the Amendment that will be prevented. Yet the “broader swath of conduct” language from *Kimel* makes it clear that these two steps must not collapse into one.¹³⁶ At first blush, it might seem that this language simply means that Congress may pass a law that forbids some things that are not themselves unconstitutional, so long as the law also forbids some things that are unconstitutional. But such a rule would be both under- and over-inclusive. Under this rule, Congress could render any law constitutional simply by including a provision forbidding clearly unconstitutional conduct. On the other hand, this rule would exclude laws that fail to mandate anything that the Fourteenth Amendment requires, but that nonetheless serve to catch or prevent constitutional violations. This brings us to the topic of prophylactic legislation, which both logic and the Court’s own rulings seem to point to as the actual type of law that the “broader swath of conduct” language is meant to permit.¹³⁷

A prophylactic law might take the form of a law that forbids some unconstitutional behavior and some constitutionally permitted behavior. That structure alone, however, does not entitle a law to the prophylactic label. In order to be deemed prophylactic, the entirety of the law must be aimed at rooting out unconstitutional discrimination. In so doing, it might not be necessary to expressly forbid that which the Constitution forbids, especially if such a law already exists. Indeed, prophylactic laws often arise because other, more direct laws already exist but have proven ineffective to eradicate constitutional violations.¹³⁸ The Supreme Court often combats such violations by turning to prophylactic rulemaking.¹³⁹ It is therefore not surprising that Congress, given its focus on policy, should do the same.¹⁴⁰

Answering Question Two requires that Congress, or the advocate, describe the type of constitutional violation that the law will remedy or prevent. As with a Question One analysis, the Court bears ultimate responsibility for providing the legal definition of what constitutes a violation—this is true whether the violation is directly addressed by the law or not. However, the second part of the analysis—proving that the law will remedy or prevent that type of violation—plays to the institutional strengths of the legislature, since it requires a factual analysis and a real-

136. *Kimel*, 528 U.S. at 81 (2000) (citing *Boerne*, 521 U.S. at 518).

137. *Id.* (citing *Boerne*, 521 U.S. at 518).

138. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003) (discussing how Congress attempted to eliminate gender discrimination by passing Title VII, but how discrimination continued, which led to the prophylactic measures taken in the FMLA).

139. *See Strauss*, *supra* note 32.

140. Via a similar argument, one notes that the Court tends more generally not only to interpret the Constitution, but also to implement it. *See Fallon*, *supra* note 4. Surely Congress, in its policy-making role, has at least the same degree of implementation power.

world understanding of the situation. The Court should, therefore, defer to Congress's conclusions regarding the effectiveness of a prophylactic rule, so long as those conclusions are not clearly erroneous. To understand this process, consider the example of a law that requires state employers to grant a certain amount of leave to all employees. No one would suggest that the Fourteenth Amendment actually mandates a specific number of hours of leave for everyone. The law therefore fails under Question One, and must be proven prophylactic—as well as congruent and proportional—in order to be upheld. The first step requires that the Court enunciate the relevant mandates of the Fourteenth Amendment¹⁴¹—here, perhaps, that it is unconstitutional sex discrimination when a state employer refuses to hire women out of fear that they might end up taking a lot of leave time to care for their families.¹⁴² But, the Court would then defer to a congressional finding that a law requiring state employers to give family-related leave to both male and female employees would help prevent this type of unconstitutional hiring decision. So long as the law would prevent—or remedy—some constitutional violations, it is deemed prophylactic. This does not mean, however, that the law will necessarily be upheld; in order to make that determination, the analysis proceeds to the final question.

“Question Three” asks: “Is the injury to be prevented or remedied congruent and proportional to the means adopted?” In answering this question, the framework differs somewhat from the approach taken by the Rehnquist Court, which was generally focused on the quantitative. The Rehnquist Court would attempt to ascertain, based on the congressional record, how many constitutional violations of the type targeted for prevention had occurred, or were likely to occur. The Court would then compare that measurement of the law's positive impact with the ways in which the law swept beyond the text of the Amendment—for example, the extent to which constitutionally-permitted actions would be stifled under the law. This type of quantitative assessment, which looks for a widespread pattern of violations,¹⁴³ seems to cut against the counter-majoritarian principles that the Fourteenth Amendment embodies. Predicating the protections of the Fourteenth Amendment on the number of potential violations seems to place less numerous minority groups at a disadvantage in a way that is antithetical to the text and history of the Amendment. Although the phrase “congruent and proportional” seems to insist on some type of measurement, it does not fol-

141. Once again, I am proceeding under the assumption that the Court has complete control over this type of legal question.

142. Note that in *Hibbs*, the Court seemed more focused on discrimination that took the form of maternity leave being longer than paternity leave; however, at the same time, it was the negative impact on women (from having caretaking stereotypes perpetuated) that seemed to worry the Justices. See *infra* section V.

143. See *supra* section III.

low that the measurement must be made numerically.¹⁴⁴ For the purposes of this article and this framework, the ends achieved by a given law are measured in terms of the depth of the wrongs prevented.¹⁴⁵ The “means adopted” side of the equation will be looked at more holistically, taking into account the depth of any wrongs caused by the prophylactic measure, but also considering issues such as cost and inconvenience to the government. Unlike the Rehnquist Court’s approach, however, this framework does not automatically consider a federal law directed at the states as negative;¹⁴⁶ such a position seems contrary to the history of the Civil War Amendments.¹⁴⁷ In this way, the framework differs from the Rehnquist Court’s approach and, instead, adheres to the Warren Court precedents on which *Boerne* and its progeny are based.¹⁴⁸

An analysis of congruence and proportionality based on these precepts might proceed as follows. Assume the Court has made the legal judgment that the Fourteenth Amendment protects the disabled from firings based on animus, but the federal law before them forbids any irrational firing of the disabled. The Court has accepted the contention that this is a form of prophylactic legislation, since the law will indeed serve to prevent or remedy animus-based firings. We proceed, therefore, to the question of congruence and proportionality. Under *Boerne*, it seems clear that the “injury to be prevented” is only the constitutional violations themselves—the animus-based firings. The means adopted is the law itself. In comparing the two, one must first measure the injury to be prevented. This measurement should be assessed based on the extent to which the injury violates our constitutional values. By definition, all constitutional violations violate our constitutional values; therefore, the injury will always be seen as large. This is as it should be—since any law that makes it to Question Three will have already been shown to remedy or prevent constitutional violations, this will obviously be a point in its favor. But the degree of injury still may vary. For example, while any mistreatment by the government that is grounded in animus toward the disabled might be seen as unconstitutional, one can imagine

144. Moreover, the Rehnquist Court’s approach was not purely numerical; although the Court combed the congressional record and attempted to count up the number of constitutional violations committed by state actors, there was no easily-applied rule about what the number should be, or how it should compare to some other number that would represent the “means adopted” side of the equation. See both *supra* section II, and *infra*, section V. Therefore, the Rehnquist Court’s approach, though quantitative in part, was in the end just as subjective in its application as any balancing test.

145. At times the Rehnquist Court has hinted at this more qualitative approach to determining congruence and proportionality, although it has never been carried out. See discussion of *Lane*, *infra* section V. But see Caminker, *supra* note 88, at 1154 (discussing how “the Court’s consideration of the magnitude of a remedial measure reflects both quantitative and qualitative concerns”).

146. See *infra* section V (discussing how the Rehnquist Court seemed implicitly to make this judgment).

147. See *infra* section V.

148. See *infra* section V.

a constitutional distinction between mistreatment that causes a minor inconvenience and mistreatment that results in one's imprisonment; on this spectrum, losing one's job would be a fairly large injury. Because this type of constitutional distinction sounds in interpretation, the Court can take the lead.

One must next measure the "means adopted." Under this law, employers are unable to fire the disabled out of animus. This cannot be viewed as a negative, even though employers might see it that way. On the contrary, animus-based firings are the very constitutional wrong that the law aims to prevent. The negative, therefore, is the employer's inability to make irrational, but not animus-based, firings—in other words, the employment-at-will structure suffers. Also, if the law includes a burden-shifting provision, employers may be forced to prove the rationality behind firing disabled employees, which creates another negative in the form of cost and inconvenience to the government.

Having measured the harm on each side of the equation, one proceeds to assess the congruence and proportionality of each to the other. The question becomes whether the harm to the employment-at-will structure and the costs to the government caused by the burden-shifting provision are justified by the prevention of livelihood-ending constitutional violations. While the ultimate decision is the Court's, deference to Congress's conclusions regarding implementation should underlie the analysis. For example, Congress might have ascertained that animus-based firings can easily go unpunished, because of the difficulty of proving an employer's motive, and that a test based on rationality would be an effective way to address this problem. Such findings would strengthen the "harm to be prevented" side of the equation. Similarly, if Congress had observed that the employment-at-will structure had already been abandoned in many contexts, and/or that the litigation costs to the government would not be large, these findings would affect the other side of the equation. Having taken all of this into account, the Court would proceed to balance the two sides and decide if the means justified the ends.

It is true that a non-quantitative congruence and proportionality analysis is somewhat difficult to apply at the borders. It relies on judges making subjective evaluations of intangible concepts such as "injury"; it also relies on an apples-to-oranges comparison between individual rights and government inconvenience. Judges, however, are often called upon to balance factors in this manner. Furthermore, the quantitative approach taken by the Rehnquist Court was not only inadequate for the reasons discussed above; it was also at least equally difficult to apply, as

section V will show.¹⁴⁹

Between the deference to legislators that many portions of this framework call for, and the fact that a violation of constitutional rights will almost always weigh in as a large injury, it seems likely that the framework will often, though not always,¹⁵⁰ result in upholding laws passed under 14 § 5. It is unsurprising that this should be the case under a *Boerne*-inspired framework; the reasons for this will become more obvious when *Boerne* is discussed in-depth, below. Put simply, *Boerne* gave Congress leeway to make an honest attempt to remedy and prevent the type of discrimination that the Fourteenth Amendment forbids. So long as Congress legislates within those bounds, and does not use 14 § 5 as a tool to directly attack or bypass the Court, one would expect most laws to be upheld.

One might wonder if such an intricate framework is necessary to arrive at such a basic point. However, as we will see in section V, it is easy to create chaos out of the few concrete dictates that the *Boerne* doctrine has introduced. It is helpful to work through the concepts in the abstract and develop an appropriate guide based on that analysis, rather than beginning with a particular set of facts. It is also very important to separate out the different steps of the process, since different levels of deference are called for at different points. Lastly, this framework is an important tool with which to approach not only the future, but also the past. It can be difficult to understand how the same nine Justices went from *Boerne*, where all essentially agreed that Congress had overstepped its bounds,¹⁵¹ to *Garrett* and *Kimel*, where a bitterly divided Court lashed out with almost unprecedented activism, to *Hibbs* and *Lane*, where unexpected alliances shocked commentators on all sides. The next section will use the framework developed here to break down each of these cases and show how the distinctions that perhaps seemed overly subtle when developed in this section are in fact capable of swinging an entire opinion.

V. USING THE FRAMEWORK TO ANALYZE THE SUPREME COURT'S 14 § 5 JURISPRUDENCE

This section will use the framework developed in section IV to analyze the cases described in section III. Some of the cases will be found to follow the structure of the framework almost exactly, while others will deviate from it considerably. In the latter situation, the framework

149. See Caminker, *supra* note 88, at 1154.

150. For a discussion of the limits that this framework puts on Congress, see *infra* section V.

151. Justice Breyer withheld judgment on the 14 § 5 question, but noted that he “agree[d] with some of the views expressed, [but] not necessarily . . . with all of them.” *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

will serve as a useful foil to shed light on the underlying structure of the Court's opinions.

A. *The VRA Cases*

It is striking to see how easily the framework, which was developed with reference to the Rehnquist Court's articulation of 14 § 5 doctrine, maps onto the Court's decision in *Katzenbach*.¹⁵² In that case, the Court held, "We . . . reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms."¹⁵³ In other words, although the VRA merits an answer of no to Question One, it still might be within Congress's power to enact. Next, the Court noted the prophylactic nature of the VRA,¹⁵⁴ and commented on why Congress felt the need to take a proactive stance, rather than relying on after-the-fact adjudication.¹⁵⁵ Question Two, therefore, receives a resounding "yes." But, this still leaves Questions Three; as the Court put it, "The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combating the evil."¹⁵⁶ The Court therefore proceeded to examine each challenged provision of the law.

The example of literacy tests, which the VRA banned in the covered jurisdictions, provides a perfect example of how the Warren Court judged appropriateness. South Carolina focused on literacy tests because the Court had upheld such tests as constitutional in *Lassiter*.¹⁵⁷ The VRA's ban could, therefore, be seen as a repudiation of that case. On the other hand, *Lassiter* held that "a literacy test, fair on its face, may be employed to perpetuate . . . [unconstitutional] discrimination."¹⁵⁸ These two observations together represent an articulation of the relevant law—the Constitution permits literacy tests, but forbids the discriminatory application of such tests—and an answer of no to Question One. Furthermore, it is clear that the ban will serve a prophylactic purpose, since the elimination of all literacy tests will surely lead to the elimination of the unfair application of literacy tests. Consequently, the answer to Question Two is yes, which brings us to Question Three. To decide if a prophylactic ban was legitimate, Chief Justice Warren ana-

152. On the other hand, perhaps it is not surprising, since *Boerne* cited heavily to *Katzenbach*. Most scholars view *Boerne*, however, as a departure from the Court's earlier doctrine. This reveals that *Boerne* did not in fact represent as dramatic a departure as is generally believed.

153. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

154. *See id.* at 327-28 ("The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication.").

155. *See id.* at 328.

156. *Id.*

157. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, (1959). *Lassiter* upheld a facially neutral literacy test that was being challenged as per se unconstitutional. *See id.* at 53-54.

158. *Katzenbach*, 383 U.S. at 333 (quoting *Lassiter*, 360 U.S. at 53).

lyzed the harm that the ban would cause the state and compared it to the law's benefits, just as one would do under the third step of the framework. At this point, as was often the case throughout the opinion, the Court deferred to Congress's analysis of the facts. Congress observed that many illiterate whites had been given the franchise even in states with literacy tests, and concluded that the states therefore could not claim an injury from the addition of illiterate black voters to their rolls.¹⁵⁹ The harm to the states was therefore negligible, while the positive effect of the ban was substantial. Even if states could be trusted to stop applying their tests in a discriminatory way, keeping a fair version of the tests would "freeze the effect of past discrimination in favor of unqualified white registrants," since the whites who had gained the franchise under a discriminatory application—or non-application—of the literacy tests would still be able to vote.¹⁶⁰ In this manner—by relying on the conclusions regarding implementation that Congress made to justify the law, which were based on a comparison of the law's pros and cons—the Court held that the ban on literacy tests was appropriate. Importantly, the Court reached this decision without overturning or even questioning *Lassiter*, on the contrary, that case's articulation of the law was the touchstone for Chief Justice Warren's analysis. Though the opinion cited heavily to the congressional record, it did not rely on a congressional interpretation of what the Fourteenth Amendment means. Instead, the Court relied on Congress's expertise to decide *how* the Court-articulated promise of that Amendment could best be actualized.¹⁶¹

The Court's opinion in *Morgan* does not map nearly so neatly onto our framework; however, it is useful to follow the path of the framework to see the differences that emerge. The Court in *Morgan* was evaluating a provision of the VRA¹⁶² that had forced New York to stop applying a state law restricting the franchise to those who could read and write English.¹⁶³ Much as the state of South Carolina had tried to do, New York argued that Congress could only forbid a state law if the law itself was unconstitutional.¹⁶⁴ The Court forcibly disagreed,¹⁶⁵ thus conform-

159. *See id.* at 334.

160. *See id.*

161. *Katzenbach* goes on to analyze other portions of the VRA: the pre-clearance requirement, the venue and burden shifting provisions, and the appointment of federal examiners to be sent to jurisdictions chosen by the Attorney General. *Id.* at 331-37. In justifying each of these prophylactic measures, the Court cites to the congressional record.

162. Section 4(e) stated that Puerto Rico-educated Americans be permitted to vote even if they did not speak English. *See Katzenbach v. Morgan*, 384 U.S. 641, 643 (1966).

163. *See id.* at 643-44 (citing N.Y. CONST. art. II, § 1). Note that, because New York was not a covered jurisdiction under section 5 of the VRA, the general ban on literacy tests did not apply. *Id.* at 647. The ban on literacy tests was extended to the entire country when the VRA was amended in 1970, and the Court upheld the nationwide ban in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

164. *See Morgan*, 384 U.S. at 648.

165. *See id.* at 648-50.

ing with the framework's axiom that a no answer to Question One does not automatically render a law unconstitutional. The next move the framework would predict would be an articulation of the relevant constitutional rule, to decide whether the statute in question merits an answer of no (or yes) to Question One. The Court, however, refused to play along.¹⁶⁶ At no point does Justice Brennan's opinion decide the question of whether New York's law was unconstitutional.¹⁶⁷ Analytically, it seems that the question was irrelevant to him, because the law was in any case a legitimate prophylactic measure—a conclusion he reached by giving considerable deference to Congress's legislative role.¹⁶⁸ In a sense, *Morgan* could be seen as working within our framework, but simply skipping Question One, because the law was obviously permitted under Question Two and Question Three. This analysis, however, fails to take into account the extent to which the *Morgan* Court seemed ready to defer to Congress on the issue of constitutional interpretation,¹⁶⁹ as well as on the issue of implementation. It is important to note that this does not place *Morgan* in opposition to our framework; the framework itself does not preclude a collaborative effort between Congress and the Court in interpreting the meaning of the Fourteenth Amendment. However, since this article strives to show how the framework operates when the Court is not open to such collaboration, *Morgan* is not as vital as it would otherwise be.

In reflecting on these two VRA cases, it is important to remember the historical context in which they took place. The Warren Court often fought a lonely battle for civil rights against state legislatures and state courts; it is therefore unsurprising that the Court welcomed Congress's assistance in this battle.¹⁷⁰ This partnership is reflected in the Court's reliance on congressional findings¹⁷¹ and in its general deference to

166. See *id.* at 649 (“[O]ur task in this case is not to determine whether the New York English literacy requirement . . . violates the Equal Protection Clause.”).

167. In *Cardona*, a companion case to *Morgan*, the constitutionality of New York's law was challenged directly. See *Cardona v. Power*, 384 U.S. 672, 673 (1966). As in *Morgan*, the Court in *Cardona* refrained from answering the question of the statute's constitutionality. See *id.* at 674. It is not that Justice Brennan seemed to consider overturning *Lassiter*; however, he left open the possibility that New York's literacy test might have been unconstitutional under that standard. See *Morgan*, 384 U.S. at 654.

Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these [goals of giving immigrants an incentive to learn English and assuring intelligent exercise of the franchise] were actually the interests being served.

Id.

168. See, e.g., *id.* at 653 (“It was for Congress . . . to assess and weigh the various conflicting considerations It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”); *id.* at 654 (“Congress might well have concluded”); *id.* (“some evidence suggest[ed]”); *id.* at 656 (“[Congress] brought a specially informed legislative competence”).

169. See, e.g., *id.* at 652 (stating that § 4(e) must be an enforcement of the Fourteenth Amendment since Congress stated that it was).

170. See Cox, *supra* note 22 at 93-94.

171. Like the *Katzenbach* Court, the Court in *Morgan* cited frequently to legislative history. See,

Congress's judgment about how best to enforce the provisions of the Civil War Amendments.

B. Boerne

Although our framework derives from the language of *Boerne*, the Court's application of its own test in that case was sufficiently confused to render further analysis necessary. It is abundantly clear that, in the eyes of the *Boerne* Court, RFRA merited an answer of no to Question One. What is less clear is whether the law was ultimately stymied under Question Two or Question Three. At times, the Court seemed to state quite clearly that RFRA was simply not a prophylactic law: "RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. . . . It appears, instead, to attempt a substantive change in constitutional protections."¹⁷² If this statement is to be taken at face value, then the Court's holding was that RFRA was not a prophylactic law, and was thus unconstitutional under Question Two. Logically, however, it seems more likely that the Court was collapsing Question Two and Question Three into one step. The Court did not assert that no violations of *Smith* existed that would be prohibited under RFRA. Instead, it argued that the law would unnecessarily strike down a large amount of constitutional behavior. Therefore, strictly speaking, the law was indeed prophylactic; where it failed was under the congruent and proportional analysis and thus under Question Three.¹⁷³

Indeed, this is the case where "congruence and proportionality" was born.¹⁷⁴ As in our framework, an analysis of congruence and proportionality was done to decide if a prophylactic law was permissible. A law passed under 14 § 5 must be "adapted to the mischief and wrong"¹⁷⁵ that the Amendment¹⁷⁶ is aimed at preventing. "RFRA is not so confined."¹⁷⁷ The Court went on to describe the many ways in which

e.g., *Morgan*, 384 U.S. at 653 n.12, 654 n.14, 656 n.17.

172. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). *See also id.* at 534-35 ("Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.")

173. The Court can of course be forgiven for not speaking in the language of this article's framework. On the other hand, it does seem to be a logical shortcoming of the opinion that it does not distinguish between the remedial/preventive concept and the congruent/proportional concept.

174. *See Boerne*, 521 U.S. at 508.

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Id.

175. *Boerne*, 521 U.S. at 532 (quoting *The Civil Rights Cases*, 109 U.S. 3, 13 (1883)).

176. Here, the Amendment in question is the First Amendment, which Congress can enforce via the Fourteenth Amendment through appropriate legislation. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

177. *Boerne*, 521 U.S. at 532 (quoting *The Civil Rights Cases*, 109 U.S. at 13).

RFRA's "sweeping coverage" was far less tailored to its purported aims than was the VRA.¹⁷⁸ From these passages, it is difficult to say if the Court was arguing that a law so misaligned with its alleged goals simply could not be called remedial or prophylactic, or whether the Court was saying that such a law may, indeed, be preventive, but is nonetheless invalid, because of a lack of congruence and proportionality. Either way, the law failed. It is interesting that the Court even chose to entertain the notion that RFRA might be an attempt to effectuate the dictates of *Smith*, given that the text of the law made it clear that effectuating *Smith* was the opposite of Congress's intent. Perhaps out of a wariness of adjudicating issues of motive, the Justices nonetheless considered the possibility. Yet in the end, they decided that the law was not an enforcement of the First Amendment as defined by *Smith*, but instead constituted a substantive change in the meaning of that Amendment.¹⁷⁹

We turn next to the question of what *Boerne* says regarding the Court's deference to the legislature on issues of implementation. Although the *Boerne* Court disapproved of Congress's attempts at constitutional interpretation, it seemed quite supportive of Congress playing an active role in showing that a law was both prophylactic and "congruent and proportional" to the constitutional violations the law aimed to prevent. The Court often referred to the congressional record, to show both how Congress had tried to trumpet its own interpretation of the First Amendment over that of the Court,¹⁸⁰ and also how Congress had not adequately shown a relation between RFRA and any violations of *Smith*'s vision of the First Amendment that it was allegedly meant to prevent.¹⁸¹ Such a record, it seems, would have helped RFRA's cause. While "judicial deference, in most cases, is based not on the state of the legislative record Congress compiles,"¹⁸² the Court opined that a strong legislative record, which explains the types of constitutional violations the law seeks to avoid, is a sign of legislative restraint. Consequently, the legislative record can be used to justify a prophylactic law that forbids a considerable amount of constitutional behavior by the states.¹⁸³ The *Boerne* Court thus seemed ready and willing to accept and even defer to Congress's view that the intent of the law was to uphold the aims of *Smith*—in other words, the Court was ready to defer to Congress's views on implementation. RFRA, however, was not a law aimed to uphold *Smith*, as its findings made abundantly clear; it was a law whose aim was to reinterpret the First Amendment. Accordingly, the law was

178. *Id.* at 532-33.

179. *See id.* at 534-35.

180. *See id.* at 515.

181. *See id.* at 530.

182. *Id.* at 531.

183. *Id.* at 533.

struck down.

As this analysis illustrates, *Boerne* did not represent a dramatic departure from the Court's 14 § 5 precedent. Of the three cases discussed thus far, all three agreed that the Court should show deference to Congress on issues of implementation. *Boerne* marks a point of departure not so much for what it says,¹⁸⁴ but rather for how it was later applied by the Court. It is my contention that much of the recent scholarship on 14 § 5 has mistakenly taken aim at *Boerne*, rather than at the cases that followed it. It is true that *Boerne* tightened the reins on Congress's power to interpret the scope of the Fourteenth Amendment, especially when compared to *Morgan*. *Boerne*, however, left open the door for Congress to play a far-reaching role, as it had historically done, in determining *how* that Amendment should be enforced. As the following cases will reveal, this role is a vital one.

C. *Kimel and Garrett*

Kimel and *Garrett* represented a significant departure from both the VRA cases and from *Boerne*. Where the *Boerne* Court made a clear, albeit implied, distinction between Congress's views on interpretation—to which it did not defer—and Congress's views on implementation—to which it was ready to defer, had they shown the legitimate and prophylactic nature of the law—this distinction was completely lost in *Kimel* and *Garrett*. Moreover, the Court in *Kimel* and *Garrett* introduced a new step in its 14 § 5 analysis—the requirement of a widespread pattern of violations, which limited Congress's ability to decide when it should take steps to implement even those constitutional protections that the Court recognizes.

Kimel was the Court's first application of the *Boerne* test in an Equal Protection context.¹⁸⁵ The case involved a challenge to the portion of the Age Discrimination in Employment Act (ADEA)¹⁸⁶ that authorized private lawsuits against the states.¹⁸⁷ Justice O'Connor, writing for the majority, explained the relevant scope of the law, in what essentially seems to be an attempt to answer what I have called Question

184. However, it is noteworthy that the Court did not directly apply the *McCulloch* test, and instead chose to use the actual text of 14 § 5 as its only doctrinal touchstone. *See id.* at 519. Perhaps it is for this reason that the doctrine developed in *Boerne* seems completely new, rather than seeming like a natural outgrowth of cases like *Katzenbach*.

185. The Court had previously applied the test in the context of a law that abrogated the states' sovereign immunity from patent infringement claims. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999). Many of the issues that arose in *Kimel* and *Garrett*—most notably, the Court's lack of deference to Congress's implementation findings—also arose in *Florida Prepaid*.

186. Pub. L. No. 90-202, 81 Stat. 602 (as amended 29 U.S.C. § 621 (2000)).

187. The ADEA was otherwise justified under the Commerce Clause; it was necessary to appeal to the Fourteenth Amendment, however, to support the abrogation of state sovereign immunity. *See supra* text accompanying note 97.

One. In what many have seen as the case's central blunder,¹⁸⁸ Justice O'Connor identified the Fourteenth Amendment's protections against age discrimination in terms of tiers of scrutiny. Because "age is not a suspect classification under the Equal Protection Clause," it is entitled only to rational basis review;¹⁸⁹ therefore, the Fourteenth Amendment only forbids completely irrational age-based discrimination. This is, of course, not necessarily the case.¹⁹⁰ But, be that as it may, this is the manner in which the Court articulated the relevant legal rule under the Fourteenth Amendment.

The opinion moved on to analyze the petitioners' argument that, because employers were allowed under the ADEA to look at age when it was a "bona fide occupational qualification" (BFOQ), the statute was narrowly-tailored so as only to forbid the irrational use of age.¹⁹¹ But the Court disagreed, noting that the Act nonetheless shifted the burden to the employer to prove the existence of a BFOQ, and that the BFOQ defense was to be "narrowly construed."¹⁹² Therefore, even with the BFOQ exception, the statute nonetheless "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional" under rational basis review.¹⁹³ At this point in the opinion, it seems that all the Court had managed to do was provide, with some difficulty, an answer of no to Question One. Yet at the same time, the Court had already deemed the law to be wildly out of proportion to any legitimate constitutional aim.¹⁹⁴

Justice O'Connor's next move is worth analyzing in some detail:

That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our [14] § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that [14] § 5 precludes Congress from enacting reasonably prophylactic legislation.¹⁹⁵

First, it is worth noting the majority's juricentric framing—the issue is not prohibiting unconstitutional conduct, but instead prohibiting conduct "likely to be held unconstitutional" in a court of law. Here again

188. *See supra* text accompanying note 106.

189. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

190. *See Post & Siegel, supra* note 35, at 68-70.

191. *Kimel*, 528 U.S. at 86 (quoting 29 U.S.C. § 623(f)(1) (2000)).

192. *See id.* at 87 (quoting 29 C.F.R. §. 1625.6(a) (1998)).

193. *Id.* at 86.

194. Prior to the discussion of the bona fide occupational qualification (BFOQ), Justice O'Connor noted that it is very difficult to prove a claim of unconstitutional age discrimination under rational basis review, and that indeed all three claims of unconstitutional age discrimination that the Court had ever heard had failed. *See id.* at 83 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *Vance v. Bradley*, 440 U.S. 93 (1979), and *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam)). At this point in the opinion, Justice O'Connor seemed to jump ahead to her ultimate conclusion: "Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to . . . unconstitutional behavior.'" *Id.* at 86 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

195. *Kimel*, 528 U.S. at 88.

we see the insistence that legislative implementation must take the same form as judicial implementation. The next sentence of this quotation is worth studying on its own. On the one hand, it seems to agree with the framework in that, having found that the law exceeds the scope of what the Constitution mandates, the Court moved on to evaluate if it was nonetheless a permissible prophylactic measure. However, the sentence also seems to equate “prophylactic legislation” with “powerful remedies.” This seems to contrast with the *Boerne* Court’s contention that a prophylactic law can be narrowly targeted and show considerable legislative restraint.¹⁹⁶ Furthermore, the sentence seems to imply that prophylactic legislation is only permissible when the problem it targets is “difficult and intractable.” This is a clear repudiation of the *Boerne* Court’s position that 14 § 5 legislation does not require “egregious predicates.”¹⁹⁷

From this point onward, the opinion focused on the new “difficult and intractable” inquiry—the concept of “congruence and proportionality” never resurfaced. Indeed, if one were to look only at this case, the entire 14 § 5 issue would seem to collapse into a rule that a law may only go beyond the bounds of what the Constitution mandates if it does so to eradicate a “difficult and intractable” problem. As we will see in our analysis of *Garrett*, however, the Court’s test actually became more limited than that—even if the ADEA had survived the “difficult and intractable” analysis, it would still have been subjected to a congruence and proportionality inquiry.

In any case, the “difficult and intractable” issue seems to be the exact sort of thing that Congress is best qualified to assess; one would therefore expect to see a high level of deference to Congress’s findings on this point. The opposite, however, occurred—Justice O’Connor dismissed as irrelevant almost the entire body of evidence that Congress had assembled to indicate the necessity of passing the ADEA, often on the grounds that Congress had not presented trial-like proof to establish that these instances of discrimination would have been found unconstitutional by a court.¹⁹⁸ This aspect of *Kimel* has been discussed by many scholars, and often conflated with the Court’s initial articulation of the relevant law—that the Constitution only forbids irrational age discrimination.¹⁹⁹ It is dangerous, however, to conflate the two points. The Court’s interpretation of the Fourteenth Amendment is not necessarily the reason that *Kimel* came out the way it did. The Court could have maintained its constitutional interpretation, but deferred to Congress’s

196. *Boerne*, 521 U.S. at 532-33.

197. *Id.* at 533.

198. *See supra* notes 104-105 and accompanying text.

199. *See supra* text accompanying note 106.

findings on the issue of implementation. These findings showed, at least in the eyes of Congress, that prophylactic legislation was necessary in order to implement the Constitution's ban on irrational age-based firings. Deference on this point would have obviated the need to contest the interpretive point. This approach will be illustrated as we now turn to an analysis of how *Kimel* would have been decided under this article's framework.

Assume for the sake of argument that the Court was correct both in framing the relevant law as forbidding only irrational age discrimination and in judging the ADEA to forbid more than simply irrational age discrimination. The law therefore receives a no for Question One, and we proceed to the *Boerne* questions. Certainly the law is prophylactic—it forbids irrational age discrimination, even if it sweeps in other things as well. Question Two is thus a yes, and we move to Question Three, which requires a comparison between the constitutional wrong that the law prevents and any negative outcomes associated with the law. “[A]vail[ing] itself of information from any probative source”²⁰⁰—in other words, using its own institutionally-appropriate methods of fact-finding, which admittedly differ from judicial methods—Congress had determined that government²⁰¹ employees often suffered irrational age discrimination that our pre-ADEA legal regime was unable adequately to address, though the discrimination was unconstitutional by the Court's own definition. The law served to prevent the serious harm of a constitutional injury at the cost of not letting state employers use age as a proxy for other characteristics unless there was a BFOQ that necessitated the use of such a proxy. Especially given the presence of the BFOQ limitation, this cost seems quite low. It appears likely then, under both our framework and a reasonable interpretation of *Boerne*, that the law would have been upheld, even if one concedes the initial legal determinations made by the Court. It is important to note that, unlike RFRA, the ADEA makes no legal claims about the inaccuracy of Supreme Court precedent, and it does make factual claims about the need for prophylactic legislation to address the problem of unconstitutional age discrimination.

Garrett was in many ways a similar case to *Kimel*; however, *Garrett* had a more clearly structured doctrine. In lockstep with Question One of our framework, Chief Justice Rehnquist's majority opinion took as its starting point the identification of “the scope of the constitutional right

200. *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966) (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964)).

201. In the eyes of the majority, the only relevant set of employees was state employees, since the question at hand was whether Congress was justified in using 14 § 5 to overcome state sovereign immunity.

at issue.”²⁰² The statute in question—Title I of the ADA—dealt with disability-based employment discrimination. The Court reasoned that, because classifications based on disability, like those based on age, are only subject to rational basis review,²⁰³ disabled individuals only have the right to be treated rationally by the state.²⁰⁴ Under our framework, the next step would be to ask whether the statute was prophylactic; the answer would clearly be yes, so we would move to an inquiry of congruence and proportionality. The *Garrett* Court, however, had a different second step in mind: to “examine whether Congress identified a history and pattern of unconstitutional . . . discrimination.”²⁰⁵ If such a pattern is established—the majority in *Garrett* thought that it was not, but discussed the possibility nonetheless—the final step would be an analysis of congruence and proportionality.²⁰⁶ So while the *Garrett* Court agreed with our framework as to Questions One and Three, its middle step was quite different. *Garrett’s* middle step is quite similar to *Kimel’s* “difficult and intractable” requirement, on which it seems to be based.²⁰⁷ This new element of the Court’s 14 § 5 jurisprudence goes far beyond anything that *Boerne* required. In *Boerne*, the Court took note of the paucity of the congressional record, which failed to reveal any religiously-bigoted laws passed in the previous forty years.²⁰⁸ However, this lack of evidence was not seen as dispositive,²⁰⁹ and the Court still engaged in a full analysis of congruence and proportionality, ultimately striking down RFRA on the grounds that its “sweeping coverage” was so disproportionate to the alleged aim of the law to convince the Court that RFRA was not a remedial effort to enforce *Smith*, but instead represented a substantive change in the law.²¹⁰ The *Boerne* Court made clear, however, that Congress could pass narrowly-tailored laws to address constitutional problems that were narrow in scope,²¹¹ *Kimel* and *Garrett’s* new second step repudiated this point.

Moreover, the new second step constituted a crystal-clear intrusion by the Court into Congress’s ability to implement the Constitution; the entire point of the step was to limit the circumstances in which Congress

202. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001).

203. *Id.* at 366.

204. *Id.* at 367. For a discussion of how this can be seen as an incorrect way of formulating the law see *Garrett*, 531 U.S. at 383 (Breyer, J., dissenting) (“Rational-basis review—with its presumptions favoring constitutionality—is ‘a paradigm of *judicial* restraint.’ And the Congress of the United States is not a lower court.” (citation omitted)).

205. *Id.* at 368.

206. *Id.* at 372.

207. *See id.* at 368 (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000)).

208. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

209. *Id.* at 531-32. *See also id.* at 533 (“This is not to say, of course, that § 5 legislation requires . . . egregious predicates.”).

210. *Id.* at 532-33.

211. *See id.* at 533.

may enact legislation that is specifically aimed at remedying or preventing constitutional violations. Finally, in carrying out its search for a history and pattern of unconstitutional discrimination against the disabled, the *Garrett* Court employed the same notable lack of deference to Congress that was seen in *Kimel*, demanding congressional evidence that proved to a legal certainty a history of irrational discrimination by state actors.²¹² The flaws of this approach have already been discussed.

Kimel and *Garrett* thus represent two major changes in the Court's 14 § 5 doctrine. The first change is that a "history and pattern" of unconstitutional discrimination—perhaps "difficult and intractable" discrimination—became a necessary condition to uphold any law that went beyond the mandates of the Fourteenth Amendment. The second change is that the Court insisted on trial-like evidence to establish the required history and pattern, thus limiting Congress to judicial methods of constitutional implementation, rather than recognizing that legislative implementation will often take a different form. It was these changes that resulted in the Court's insistence on a sufficiently high number of violations,²¹³ and on the Court's willingness to "count" only those violations that pertain to state government,²¹⁴ those violations that constitute irrational discrimination with legal certainty,²¹⁵ and so on.²¹⁶ Thus, the Court essentially took away Congress's power to decide both when and how to protect the constitutional rights defined by the Court.

D. *Hibbs and Lane*

Hibbs and *Lane* stand in contrast to *Kimel* and *Garrett* most obviously because the laws in *Hibbs* and *Lane* were both upheld. In *Hibbs*, the key swing voters were Chief Justice Rehnquist and Justice O'Connor, who joined with Justices Ginsburg, Souter, and Breyer to form a majority—Justice Stevens concurred.²¹⁷ In *Lane*, the only switch from *Garrett* and *Kimel* was Justice O'Connor, who joined with Justices Ginsburg, Souter, Breyer and Stevens to form a majority. The voting patterns of Justice O'Connor and Chief Justice Rehnquist are particu-

212. *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369-74 (2001).

213. *See id.* at 370.

214. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88-91 (2000); *Garrett*, 531 U.S. at 368-69.

215. *See Kimel*, 528 U.S. at 88-91; *Garrett*, 531 U.S. at 368.

216. Other requirements include *Kimel's* apparent insistence on proof of nationwide discrimination, *see Kimel*, 528 U.S. at 90, and the Court's apparent requirement of previous judicial determinations. *See id.* at 83.

217. It is worth noting that, while Justice Stevens's concurrence focused primarily on the Eleventh Amendment issue, he also stated, "I am uncertain whether the congressional enactment before us was truly needed to secure the guarantees of the Fourteenth Amendment." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740-41 (2003) (Stevens, J. concurring) (internal quotations omitted). He did not explain his reservations; however, this statement seems to indicate that, for at least one Justice, the FMLA was actually less constitutionally defensible than the ADA and the ADEA, both of which Justice Stevens voted to uphold in *Garrett* and *Kimel*, respectively.

larly interesting to observe, since theirs are the only two seats to have changed hands since *Lane*. The need to understand and analyze the Rehnquist Court's legacy with respect to 14 § 5 is especially pressing when we consider that the two Justices who held the fate of the doctrine in their hands have now been replaced.

The statute at issue in *Hibbs* was the FMLA,²¹⁸ which requires employers²¹⁹ to provide employees²²⁰ with up to twelve weeks of unpaid leave per year for various health- and family-related reasons.²²¹ Chief Justice Rehnquist began his majority opinion by stating that the relevant constitutional right is "to be free from gender-based discrimination in the workplace."²²² This is the first case we have encountered where the Court relied on Congress in the answering of Question One—Chief Justice Rehnquist quoted Congress's explanation as to how this law related to the issue of gender discrimination.²²³ This is an example of how the Court can maintain its hold on the meaning of the Constitution while still expressing deference to Congress's views on what types of realities create constitutional violations.

The majority's next step was to detail the evidence before Congress—centrally, that paternity leave is less common than maternity leave, and that men receive "notoriously discriminatory treatment in their requests for such leave."²²⁴ The doctrinal purpose of summarizing this evidence was revealed when the Court declared, "[i]n sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic [14] § 5 legislation."²²⁵ This statement lends a further clue as to the Court's post-*Boerne* doctrinal framework. Chief Justice Rehnquist appeared to be following the formula announced in *Garrett*, in which, once the constitutional right is announced, the next step is to identify a history and pattern of unconstitutional discrimination by the states—the problems with this approach have already been discussed. What the quotation from *Hibbs* reveals is that the purpose of this step is to determine if prophy-

218. 29 U.S.C. § 2611 (2000); 5 U.S.C. §§ 6381-87 (2000).

219. This includes the state government as an employer, which is the only part of the statute at issue in this case. All government offices are covered by the FMLA, while its application to private-sector employers is limited to those with fifty or more employees. See 29 U.S.C. § 2611.

220. Not all employees are covered under the FMLA. See 29 U.S.C. § 2611; *Hibbs*, 538 U.S. at 739.

221. *Hibbs*, 538 U.S. at 724.

222. *Id.* at 728.

223. See *id.* at 728 n.2 ("Congress found that, 'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'" The Act, therefore, "minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available . . . *on a gender-neutral basis* . . ." (quoting 29 U.S.C. §§ 2601(b)(4), (5) (2000))).

224. See *id.* at 731.

225. *Id.* at 735.

lactic legislation is justified. If it is, one moves to a congruence and proportionality analysis to decide if the prophylactic legislation enacted was legitimate.

In keeping with *Kimel* and *Garrett*, the “history and pattern” step seems to require no mere nod to a problem or potential problem, but rather a demonstration of widespread wrongs. Also, the states’ wrongs must be of the unconstitutional variety, Chief Justice Rehnquist’s “in sum” statement avers. We come here, however, to the unstated point of departure between *Kimel-Garrett* and *Hibbs*. The majority’s recitation of leave inequalities includes little explanation of why such inequalities comprise a constitutional violation. The idea seems to be that any medical leave that women receive that exceeds the “medically recommended pregnancy disability leave period of six weeks” must not be based on “any different physical needs of men and women, but rather . . . the invalid stereotypes that Congress sought to counter through the FMLA.”²²⁶ This is one possibility, but it is certainly not the only one. Another possibility is that the discrepancy could relate, not to the physical needs of childbirth recovery, but to the physical needs of breastfeeding. More generally, the Court never explains why an unequal leave policy, even if it is based on societal assumptions about women’s role as caretakers, is necessarily unconstitutional.²²⁷ Contrast this with *Garrett*, where Chief Justice Rehnquist’s majority opinion refused to concede that an unconstitutional instance of irrational, disability-based discrimination had taken place even when a person with a concealed disability was told “that she should not disclose it if she wished to obtain employment,” or when the dean of a state university refused to let a student practice teach, because the dean “was convinced that blind people could not teach in public schools.”²²⁸ I make this point not to argue that *Hibbs* was wrongly decided, but instead to highlight the ways in which the *Hibbs* Court deferred to Congress’s assessment of the extent to which the threat of constitutional violations loomed,²²⁹ and

226. *Id.* at 733 n.6.

227. The Court did present the possibility that, since individual supervisors have the power to arrange employee leave, the threat of “discretionary and possibly unequal treatment” looms. *Hibbs*, 538 U.S. at 732 (quoting H.R. REP. NO. 103-8, pt. 2, at 10-11 (1993)). This is perhaps the least convincing argument the Court made, however, since every discretionary human resources decision leaves open the possibility of gender-based discrimination, not to mention countless other forms of discrimination. Indeed, the majority in *Lane* read *Hibbs* as having “approved the family-care leave provision of the FMLA as valid [14] § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct.” *Tennessee v. Lane*, 541 U.S. 509, 528 (2004).

228. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001).

229. In this vein, note also that, while Chief Justice Rehnquist in *Garrett* was adamant in his insistence that Congress only consider evidence of state employers engaging in discrimination—not private employers, not federal employers, not local government employers, but only state employers—in *Hibbs* he cited repeatedly to evidence regarding discrimination by private employers. *Hibbs*, 538 U.S. at 730-32. He attempted to explain away this discrepancy in footnote 3, noting that a fifty-state survey showed that public sector employees had similar leave policies to private sector employ-

the best manner in which to combat those violations. It is just such deferential treatment that this article advocates.

According to the *Hibbs* majority, the reason for this difference in deference is that gender discrimination is judged under a heightened level of scrutiny, while age and disability discrimination are judged under rational basis review.²³⁰ “Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a ‘widespread pattern’ of irrational reliance on such criteria.”²³¹ This “thus” statement is startling. Based on the Court’s decisions in *Garrett* and *Kimel*, and even *Boerne*, one would expect tiers of scrutiny to make a difference to the Court’s articulation of the relevant constitutional standard—the first step of the Court’s doctrine, corresponding to the Question One. And, whether we like it or not, it is clear that the Court’s lack of deference to Congress led to a requirement in *Kimel* and *Garrett* that Congress prove the necessity of its legislation by a showing that a number of incidents had been proven to be true constitutional violations, as measured by the tiers of scrutiny. What the Court is saying here, however, is something different. The idea seems to be that the states themselves are essentially on trial by Congress to determine, as a true-or-false proposition, whether their treatment of a given class of persons is unconstitutional. Under rational basis review, Congress can prove the states “guilty” (or, rather, “liable”—the issue at hand in these cases is of course whether the states can be sued) only if a widespread pattern of discrimination is shown. Under heightened scrutiny, it is still necessary to “impugn” the states, but Congress need only show that violations have sometimes occurred in order to do so.

It would be an understatement to say that this is a far cry from *Boerne*’s assertion that “it is for Congress to determine the method by which it will reach a decision.”²³² More to the point, however, the issue no longer seems to be one of enforcing the Constitution via prophylactic legislation. It is here that we see the extent to which the addition of the “history and pattern” element—or its heightened scrutiny version, which seems to be the “existence” of classification-based state decisions—represents a fundamental departure from the structure of cases like *Katzenbach* and *Boerne*, which mapped quite easily onto our framework. The fact that this step is separated out from the congruent and proportional analysis is vitally important. In *Katzenbach*, the Court

ees. *Id.* at 730 n.3. Since the public sector includes all levels of government, it is not clear why this evidence was any more probative than the evidence presented in *Garrett*. Once again, it is my contention that *Hibbs* represents the preferable level of deference to Congress in its choice of what evidence to consider.

230. See *Hibbs*, 538 U.S. at 735 (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)).

231. *Id.* at 735.

232. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

considered the long, entrenched, and debilitating history of racial discrimination in voting; but it did so in comparing the wrong to the far-reaching scope of the remedy—what today would be considered a “congruence and proportionality” analysis.²³³ In making “history and pattern” a necessary condition in itself, preceding the “congruence and proportionality” inquiry, the Court has asserted that *no* prophylactic measure, no matter how reasonable, narrowly-tailored, or minimal in its impact it might be, can be upheld unless the states have been shown to be guilty, in some overall way, of unconstitutionality. Proving the states’ guilt is easier in the heightened scrutiny context, but the structure remains the same.

This brings us to “congruence and proportionality,” the Court’s final step in *Hibbs*. Here again, we see the Court’s newfound deference to Congress. The problem was “difficult and intractable,” which justifies a far-reaching response.²³⁴ An “across-the-board” requirement was Congress’ attempt to combat a “state-sanctioned stereotype”²³⁵—an unconstitutional one, we must assume, though the point is not argued. The majority viewed the FMLA as more narrowly tailored than the ADEA or the ADA, since those “applied broadly to every aspect of state employers’ operations,” while “the FMLA is narrowly targeted at the fault-line between work and family.”²³⁶ In short, since the statute can “be understood as responsive to, or designed to prevent, unconstitutional behavior,” it is upheld.²³⁷ This final quoting of *Boerne* brings home the discrepancies in the Court’s doctrine. For, while RFRA was surely not designed to prevent violations of *Smith*, can it be said that the ADEA and the ADA were not designed to prevent irrational discrimination against the elderly and the disabled? As the above analysis has shown, using our framework as a foil, the Court’s inquiry has in fact extended far beyond the *Boerne* formulation. *Hibbs* almost certainly would have had the same result if it had been analyzed under the *Boerne*-inspired framework, but it is important to note that the case nonetheless employs the more intrusive *Kimel-Garrett* test, albeit in a more deferential manner.

Lane bears some striking resemblances to *Hibbs*, but it also contains some striking differences. The case involved Title II of the ADA,²³⁸ which the Court upheld as it relates to physical access to courts. The issue of scrutiny, which was so paramount in *Hibbs*, arose

233. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (noting that the VRA’s preclearance requirement was perhaps “an uncommon exercise of congressional power, . . . [but] that exceptional conditions can justify legislative measures not otherwise appropriate”).

234. *Hibbs*, 538 U.S. at 737 (quoting *Kimel*, 528 U.S. at 88).

235. *Id.*

236. *Id.* at 738.

237. *Id.* at 740 (quoting *Boerne*, 521 U.S. at 532).

238. 42 U.S.C. §§ 12131-12165 (2000).

again in the first step of the Court's analysis, in which the Court tried to "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II."²³⁹ For reasons relating to due process, the Court held that the state may not deny an individual access to a court for any rational reason, such as "cost and convenience;"²⁴⁰ in other words, the right of access to a court is deserving of heightened scrutiny.²⁴¹

The majority's articulation of the next step seemed to differ from the "history and pattern" requirement that loomed so large in other post-*Boerne* cases. In *Lane*, Justice Stevens identified the second step as being an analysis of the "gravity of the harm" that the law addresses.²⁴² This seemed promisingly similar to our framework's treatment of congruence and proportionality. However, the step seems indistinguishable from the second step in *Hibbs* and even in *Garrett*. The Court combed the legislative record to determine if a "pattern of unconstitutional treatment" had been established.²⁴³ This was easy enough to prove,²⁴⁴ since the absence of ramps and elevators is more easily documented than irrational hiring and firing decisions—a point that the Court did not discuss. Furthermore, "it [is] easier for Congress to show a pattern of state constitutional violations" in a heightened scrutiny context than it is in a rational basis context.²⁴⁵ The statute therefore passes the second step with flying colors.

The congruence and proportionality analysis is similarly facile. Given a "long history" of a "difficult and intractable proble[m]" involving the basic right of access to the courts, as compared with a remedy that is nonetheless "limited," since the statute only requires "reasonable" accommodations,²⁴⁶ the statute is easily upheld. It is puzzling that this remedy is considered "limited" given the affirmative duty it places on states to engage in sometimes costly renovations. Title I of the ADA seemed quite limited, since it included an "undue burden" exception—which left the Court just as unmoved²⁴⁷ as the BFOQ limitation in the ADEA did—yet the relevant portion of Title I was struck down in *Garrett*.²⁴⁸ One wonders if the power of heightened scrutiny is affecting even the definition of a limited remedy.

Nevertheless, *Lane* represented a fairly straightforward application of the post-*Boerne* test as it has evolved. The main points of contro-

239. *Tennessee v. Lane*, 541 U.S. 509, 522 (2004).

240. *Id.* at 533.

241. *Id.* at 529.

242. *Id.* at 523.

243. *Id.* at 525.

244. *See id.* at 527.

245. *Id.* at 529 (quoting *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-37 (2003)).

246. *Id.* at 531 (quoting *Hibbs*, 538 U.S. at 737).

247. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001).

248. *See id.* at 374.

versy in the case related to its basic posture and to the initial understanding of what comprises a constitutional violation. On the posture side, Chief Justice Rehnquist's dissent took issue with the majority's consideration of courthouses in isolation from the other buildings to which the statute mandates access.²⁴⁹ On the constitutional side, the dissent argued that a constitutional violation does not occur until an individual is actually unable to attend a proceeding that she had a constitutional right to attend.²⁵⁰ The idea that ramps and elevators would prevent that from happening—thus demonstrating the very idea of a prophylactic measure—was apparently irrelevant to the dissenters. However, if one accepts the majority's contention that the lack of handicapped-accessible access to courtrooms comprises a constitutional violation, the rest of the case falls easily into place, whether under this article's framework or that of the Court.

E. Limits on Congress Under this Framework

The reader will perhaps have noticed that the above analysis appears to argue in favor of upholding every law addressed, with the exception of RFRA. Moreover, RFRA's fate under this article's framework was not fully explored. One might, therefore, wonder the extent to which this framework puts true limits on Congress's ability to legislate under 14 § 5. As was discussed in section IV, it is indeed the case that one would expect many laws to be upheld under this framework. However, limits do exist. While a statute cannot completely fail under Question One, both Question Two and Question Three represent possible moments for invalidation.

One way a law might fail is if the difference between Congress's and the Court's interpretations of the Constitution is large enough that the law cannot be seen as prophylactic, because it does not prevent any behavior that the Court views as unconstitutional. In this situation, the law fails under Question Two. As an example of this, one can imagine a law that mandates government grants and low-interest loans to all people ages eighteen to twenty-two, regardless of whether they are in college. If the Court believes that distinctions on the grounds of college enrollment are fundamentally rational, and thus cannot be seen to present a Fourteenth Amendment violation, then the law will have no possible prophylactic purpose, and will be struck down under Question Two. Under the theories of many other scholars,²⁵¹ which strive to expand Congress's power to interpret the Fourteenth Amendment, such a law might be upheld, especially since it can be seen as a ratcheting up of

249. See *Lane*, 541 U.S. at 550-52 (Rehnquist, C.J., dissenting).

250. See *id.* at 545-47.

251. See Kramer, *supra* note 14; McConnell, *supra* note 54; Cole, *supra* note 54.

rights.

Question Three presents a second way that a law might fail. Since the harm of a Fourteenth Amendment violation is always grave, and since Congress, as an elected body, will generally try to limit the harms it imposes on society at large, one would expect most laws not to fail under this question. Such failure, however, is nonetheless analytically possible. Imagine, for example, unconstitutional race discrimination that takes the form of white government employees receiving longer paid lunch periods than non-white government employees. If Congress responded to this inequity with a law stating that all government employees can only work half days, thus rendering lunch moot, the law would almost certainly be viewed as disproportionate to the injury, although it would serve to remedy the injustice. For people seeking full-time government employment and those who benefit from having a government that works full-time, the harm would simply be too great to justify.

In reality, the majority of laws that this framework would strike down would probably suffer from a combination of the above types of problems. RFRA is a good example of this phenomenon. Although the law was based on a different interpretation of free exercise than that of the Court, it was nonetheless technically a prophylactic law—among the many types of state laws it struck down, a handful were of the type that the Court would strike down under *Smith*. Because of the difference in constitutional interpretation, however, the Court-defined violations it prevented were a very small subset of the laws it affected. Furthermore, no findings or theories regarding constitutional implementation were given to describe the necessity of this gap, since Congress had not approached the question from that standpoint – the gap instead had its origins in the interpretation conflict. The law would therefore fail under Question Three of the framework, but the failure would be the cumulative result of all three steps in the process.

VI. CONCLUSION

The analytical framework that this paper proposes has served three purposes thus far. First, it has helped to dissect the Court's central 14 § 5 opinions, so as to better understand the ways in which the Court's doctrine has changed over time. What this process has revealed is that subtle changes in the Court's framing of the relevant test have resulted in wildly different requirements for Congress and in decisions that are often difficult to reconcile with one another. Furthermore, although most scholars have pointed to *Boerne* as the major point of departure for the Court's doctrine, analysis under our framework has shown that it is more accurate to locate the change within *Kimel* and *Garrett*. This is

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because *Boerne*'s views on Congress's power to interpret the Constitution have actually had less of an impact, and have represented less of a change from earlier cases, than have *Kimel* and *Garrett*'s views on the level of deference that is due to Congress's views on implementation. Nor has the change that began with *Kimel* disappeared with *Hibbs* and *Lane*, although those cases ultimately upheld the laws in question. All of this brings us to the second objective that analysis under our framework has hopefully achieved—it has shown that, even if the Court retains the strong hold on constitutional interpretation that it took in *Boerne*, there is still considerable space for Congress to maneuver, if only the Court can be convinced to defer to Congress's views on implementation. The power of the implementation issue should not be underestimated, although the issue of interpretation has captured the imagination of many scholars. The final contribution of this article is its presentation of a framework that embodies the 14 § 5 jurisprudence of both *Boerne* and its predecessors—a framework that, by explicitly focusing on the differences between implementation and interpretation, can hopefully help resolve the inconsistencies of the Rehnquist Era, and lead us to more reliable and predictable protection of the vital rights embodied in the Fourteenth Amendment.