

THE “HOW” OF ENFORCING THE FOURTEENTH  
AMENDMENT: HOW THE REHNQUIST COURT’S  
TREATMENT OF IMPLEMENTATION, NOT  
INTERPRETATION, IS THE TRUE POST-*BOERNE* FAILING

*Rebecca Goldberg\**

Section I: Introduction

One of the most striking legacies of the Rehnquist Court is a severe curtailing of Congress’ power to enact civil rights legislation under Section Five of the Fourteenth Amendment (14§ 5). In the landmark cases that form this trend,<sup>1</sup> the Court engaged in close scrutiny of the congressional record, with the goal of determining whether or not Congress had amassed sufficient evidence to justify the passing of the legislation in question. This scrutiny of congressional findings was often done in a haphazard fashion; the Court presented no consistent guidelines to show what type or degree of findings would be considered sufficient. While many scholars have noted (and often decried) the manner in which the Rehnquist Court used findings in these cases, most of these scholars have viewed this as a subset of a larger and, they feel, more important question raised by the 14§ 5 cases—the question of which branch of government is the final authority in interpreting the meaning of the Constitution.<sup>2</sup> But as this Article will argue, the one question is not in fact a subset of the other. On the contrary, even if one concedes absolute power to the Court when it comes to interpreting the Constitution, several questions remain about the Court’s use of findings in its 14§ 5 jurisprudence. The cases that followed *Boerne* are vulnerable to important critiques that do not touch on the issue of Constitutional interpretation, but hinge instead on Congress’ attempts at Constitutional implementation.<sup>3</sup> Many congressional findings serve the goal of

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<sup>1</sup> See *infra*, Section IV.

<sup>2</sup> See *infra*, Section II.

<sup>3</sup> The difference between interpreting and implementing the Constitution is discussed in Richard H. Fallon, Jr., *Forward: 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’ role. But

figuring out how to implement an already-established interpretation of the Constitution—these findings will be referred to as “implementation” findings. It is the Court’s treatment of these findings that are the most troubling legacy of *Boerne*.

This Article proposes a set of principles and a doctrinal framework that can be used to establish whether or not Congress has the power to pass a given law under 14§ 5. Interpreting the meaning of the Fourteenth Amendment is clearly an important part of that process; but analyzing Congress’ attempts to implement that meaning is a separate, but also important, part. The framework will therefore highlight the moment when the issue of Congress’ power (or lack thereof) to interpret the Amendment must be addressed, but it will then bracket that question, so as to demonstrate the reach 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; however, it follows the lead of the Court itself. Though the Court has been neither consistent nor coherent on the issue of how and when findings should be used, the Justices’ basic line of reasoning in 14§ 5 cases has implicitly separated the question of Constitutional interpretation from questions about factual findings (which, I will show, typically relate to implementation). The framework proposed in this Article therefore comes much closer to the Court’s own doctrine than most scholarly proposals have done; however, the implementation portion of the framework differs from the Court’s doctrine in its level of detail, in the values it reflects, and in the clarity with which it provides a roadmap for both legislatures and the courts.

The core argument that animates the analytical framework presented in this Article is that, even if the Court continues its current stance of not deferring to Congress’ findings regarding the meaning of the Constitution, it should nonetheless defer to Congress’ implementation findings. Both the cases and the scholarship that have come in the wake of *Boerne* have treated congressional findings as one unit, either to be deferred to or not; rarely have attempts been made to disentangle the types of findings that Congress makes, or to ponder the implications of having different types of findings. Engaging in this type of analysis is difficult, due to the often-blurred line between Constitutional interpretation and implementation. But it is important, 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. In

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Prof. Fallon’s title, via a suggestion from Prof. Barron, is the source of the phrase “implementation findings” that is used in this Article. (Earlier drafts of the Article used the phrase “instrumental findings.”)

doing so, the Article will strive to achieve three goals: 1) To shift the discussion of Congress' 14§ 5 power away from its current focus on Constitutional interpretation, and back towards a more implementation-oriented approach that 14§ 5 scholars such as Archibald Cox and Lawrence Sager took before *Boerne* was decided; 2) To expose the flaws and inconsistencies in the Court's own interpretation of *Boerne*, and to demonstrate how these failings relate to the implementation issue, rather than the interpretation issue; and 3) To offer a new approach to 14§ 5 doctrine. This new approach is grounded in *Boerne* and its predecessors, and it accepts the view of judicial primacy in Constitutional interpretation that is prevalent in those cases. But through its focus on the issue of Constitutional implementation, this approach provides an antidote to the most fundamental flaws that have emerged in the Court's post-*Boerne* cases. The future need for a coherent approach to 14§ 5 doctrine is not in any way hypothetical. The battle between Congress and the Court shows no signs of abating, and important legislation—most notably, the re-authorized Voting Rights Act (VRA)<sup>4</sup>—is currently being challenged in the lower courts.

The Article will proceed in five sections. Section II will analyze the relevant 14§ 5 scholarship, from both the Rehnquist era and earlier eras. Along the way, this Section will also provide a basic outline of the key cases and the ways in which the Court's doctrine shifted dramatically during the Rehnquist years. Section III will introduce the proposed analytical framework for approaching 14§ 5 cases. Section IV will apply the doctrinal tools introduced in Section III 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 V will conclude.

## Section II: A Topic Both Old and New—Judicial Review of Congressional Findings

From an historical perspective, it is not a new thing for civil rights laws to be invalidated; 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<sup>5</sup> and continues to use<sup>6</sup> to strike down laws

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<sup>4</sup> See *Northwest Austin Municipal Utility District Number One v. Gonzales*, No. Civ.A. 1:06-cv-01384 (D.D.C., complaint filed Aug. 4, 2006).

<sup>5</sup> See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>6</sup> See, e.g., *U.S. v. Morrison*, 529 U.S. 598 (2000).

that address discrimination, no matter how vile, by non-state actors.<sup>7</sup> From the perspective of this paper, it is important to note that judicial creation of the state-action doctrine relies on a legal analysis of two questions: what type of discrimination the Fourteenth Amendment forbids, and whether or not Congress is permitted to legislate beyond those parameters. These two questions remain every bit as vital today as they were during Reconstruction, and the vast majority of scholarship addressing the Rehnquist Court's 14§ 5 jurisprudence has focused on them, as we will see below. But it is important to note what the Reconstruction-era Court and its enduring state-action doctrine do not consider: the issue of empirical evidence. Laws prohibiting private discrimination are not evaluated under the rubric of whether or not they address a widespread problem. On the contrary, the laws that have been struck down under the state action doctrine have often addressed extraordinarily common and pressing types of discrimination. This was the case during Reconstruction, when overt racial discrimination abounded, and it remained the case during the Rehnquist era, when portions of the Violence Against Women Act were struck down because of the state action doctrine.<sup>8</sup> Indeed, if one had only these cases to examine, one might imagine that the Court's 14§ 5 doctrine was primarily aimed at cabin-ing the scope of the Amendment, out of an unwillingness to wade into areas with high levels of ongoing and deep-seated discrimination. This stands in contrast to the Rehnquist Court's new restrictions on 14§ 5, which at times have required that Congress *only* "wade in"—that is, pass legislation—if a problem is sufficiently widespread.

But historically, we are getting ahead of ourselves. 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. But a different type of Fourteenth Amendment argument did arise during this time period, and it merits a brief examination because of its ties to the issues of empirical evidence and Constitutional implementation. During the so-called "Lochner Era,"<sup>9</sup> the Court used the concept of substantive due process to strike down laws that had been enacted by progressive state legislatures.<sup>10</sup> What

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<sup>7</sup> Many scholars and even judges continue to agitate 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. 1680 (2006); *U.S. v. Morrison*, 529 U.S. 598, 664–66 (2000) (Breyer, J., dissenting).

<sup>8</sup> See *U.S. v. Morrison*, 529 U.S. 598 (2000). The result in *Morrison* was unaffected by the evidence of widespread violence against women, see *Morrison* at 631 (Souter, J., dissenting), quoting H.R. Rep. No. 103–395, p. 25 (1993) (citing U.S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed.1988)).

<sup>9</sup> The *Lochner* era is generally thought to span from *Lochner v. New York*, 198 U.S. 45 (1905), to *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>10</sup> It is worth noting the dual role that the Fourteenth Amendment has had in the federalism debates—as a tool both to suppress the states and to protect them.

is relevant here is the way in which cases like *Lochner* prompted scholars to examine the issue of judicial power in general, and judicial assessment of facts in particular.

Writing in 1924, Henry Biklé expressed his concern that if judges reasoned based on their own general knowledge regarding non-legal subjects, as he felt the majority judges had done in *Lochner*, the layman would lose respect for the process, since the layman himself is equally able to engage in such reasoning, and might use it to come to a different conclusion than the Court.<sup>11</sup> Biklé categorized six different approaches that the Court had used when their evaluation of the constitutionality of a statute depended on factual assertions.<sup>12</sup> Two of these are particularly relevant here: legislative declarations of fact,<sup>13</sup> and committee reports from the legislature.<sup>14</sup> Biklé thought the latter to be a good and proper way for legislators to “strengthen their position in the courts;” however, on the issue of legislative declarations of fact, Biklé was skeptical. Surely, he reasoned, legislatures cannot circumvent judicial review simply by declaring the relevant facts to be in their favor.<sup>15</sup> Such declarations are subject to deference, but perhaps it is simply the same deference that is due to legislatures in general, and which creates the presumption of constitutionality in the first place.<sup>16</sup> He traced the issue through a pair of Supreme Court decisions,<sup>17</sup> and arrived at a passage in which Justice Holmes made an interesting distinction between “legislative declaration of facts that are material only as a ground for enacting a 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.”<sup>18</sup> Unsurprisingly, Justice Holmes felt that the latter type of declaration should be subject to greater deference by the Court.<sup>19</sup> Biklé does not pursue the distinction raised by Justice Holmes—his article goes on to explore the idea of administrative agencies playing a role in evaluating issues of fact.<sup>20</sup> But we see from his

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<sup>11</sup> Henry Biklé, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924), at 6–7.

<sup>12</sup> *Id.* Biklé’s six categories were: 1) treating the issue as a legal question, and therefore using reason and precedent; 2) relying on briefs presented by advocates; 3) relying on data from the trial court; 4) deferring to a legislative declaration of fact; 5) reading committee reports from the legislature; and 6) deferring to the findings of the courts of final resort in the states.

<sup>13</sup> *Id.* at 18–19.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 18.

<sup>17</sup> *Id.* Biklé notes that the Court in *The Chastleton Corporation v. Sinclair*, 264 U.S. 543, 547–48 (1924) asserted that legislative assertions of fact are to be given great deference, but that their support for that contention was a passage from *Block v. Hirsh*, 256 U.S. 135, 154 (1921), discussed *supra*.

<sup>18</sup> *Id.*, citing *Block v. Hirsh*, 256 U.S. 135, 154 (1921).

<sup>19</sup> For more on *Lochner*, Justice Holmes, and the Court’s use of facts, see David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 559–64 (1991).

<sup>20</sup> *Id.* at 24–26.

article that both scholars and judges<sup>21</sup> during the *Lochner* era were engaging with the question of judicial deference to legislative fact-finding. (While Bilké and Holmes did not discuss the difference between legal findings and implementation findings, it seems clear from the context that they were focused on implementation findings.) However, neither Bilké nor Holmes seems to have felt that legislative findings were ever necessary—they were simply one possible way in which defenders of a statute might seek to bolster their claim.

It was not until the Second Reconstruction that the issues of 14§ 5 power and of the use of congressional fact-finding came together. If the *Lochner* era was marked by the striking down of state statutes, and the Rehnquist era was marked by the striking down of federal statutes, the Warren Court can be defined by its treatment of both the state and the federal. Typically it was federal legislation (such as the VRA) that was upheld<sup>22</sup>, while state legislation (such as redistricting schemes that were deemed to violate the principle of “one person, one vote”) was struck down.<sup>23</sup> In both situations, questions were raised—much more directly than they had been during the *Lochner* era—about judicial deference to legislative fact-finding.

At the height of all this excitement, Archibald Cox examined the Court’s role.<sup>24</sup> Cox fretted over the striking down of state laws, noting that, on the 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 at hand would be to put the imprimatur of the Court on an unjust system.<sup>25</sup> He was much more comfortable with the Court’s decisions that upheld congressional legislation. Cox’s reasoning about these cases—he was specifically analyzing *Katzenbach v. Morgan*,<sup>26</sup> which had just come down (upholding a portion of the VRA), though he discussed many other cases—will prove useful as this Article continues. Notably, Cox seemed to anticipate and reject the Rehnquist Court’s application of *Morgan* and *South Carolina v. Katzenbach* (another VRA case)<sup>27</sup> when he wrote that, “the practice of relying upon the legislative record when it exists should not be taken to show that such a record is required.”<sup>28</sup> In contrast to Bilké, Cox was quite comfortable with the concept of deference to legislatures, at least

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<sup>21</sup> Justice Holmes, of course, was a dissenter in *Lochner*, famously noting that “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” 198 U.S. 45, at 75.

<sup>22</sup> See *infra*, Section IV.

<sup>23</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>24</sup> Archibald Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1965).

<sup>25</sup> *Id.* at 97–98.

<sup>26</sup> 384 U.S. 641 (1966).

<sup>27</sup> 383 U.S. 301 (1966).

<sup>28</sup> Cox, *supra* note 24, at 105.

so long as “preferred rights” were not being constrained;<sup>29</sup> for him, “the fundamental basis for legislative action is the knowledge, experience, and judgment of the people’s representatives,” which may have nothing to do with what is on the legislative record.<sup>30</sup> Having seen the Court take the lead on issues of social change—*Brown* is mentioned repeatedly<sup>31</sup>—Cox expressed hope that *Morgan* would embolden Congress to start taking more of a lead, and thus take pressure off of the courts.<sup>32</sup> He envisioned a “buffer zone” of situations that the courts themselves would not rule unconstitutional, but that Congress could outlaw.<sup>33</sup> 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 right to define what the law is; he simply saw it as a reflection of Congress’ superior fact-finding capabilities.<sup>34</sup> But he did not at all delve into the question that his theory begs: When is a fact just a fact, and when is it a change in substantive law?

*City of Boerne v. Flores*<sup>35</sup> brought Cox’s unasked question to the fore, though it certainly did not resolve it. In *Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA) on the grounds that Congress had exceeded its 14§ 5 power in enacting the law. The crucial backdrop for *Boerne* was *Employment Division v. Smith*,<sup>36</sup> in which the Court had adopted a narrow theory of the Free Exercise Clause; RFRA was Congress’ attempt to return to the Free Exercise standards articulated by earlier Courts, prior to *Smith*. Therefore, despite the efforts of counsel to prove

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<sup>29</sup> See *id.*, fn 84.

<sup>30</sup> *Id.* at 105.

<sup>31</sup> *Id.* at 91, 92, 93, and 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.

<sup>32</sup> *Id.* 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.

<sup>33</sup> *Id.* at 121. *Morgan* and its companion case, *Cardona v. Power*, 384 U.S. 672 (1966), are a perfect example of the buffer zone. In *Morgan*, the Court ruled that Congress was within its power when it insisted that states allow Spanish speakers who had received at least a sixth-grade education in Puerto Rico to vote, even if they did not speak English. This portion of the VRA—§ 4(e)—struck down an English language voting requirement in New York. In *Cardona*, which was argued the same day as *Morgan*, see 384 U.S. 672, 673, a Puerto Rican-born plaintiff directly challenged the constitutionality of the New York law, see 384 U.S. 672, 673. *Cardona* was remanded to be re-evaluated in light of *Morgan*; the plaintiff’s education status was unknown, so it is possible that the VRA’s § 4(e) rendered her case moot, see 384 U.S. 672, 674. But 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 at 97; it is clear that his views on judicial deference to legislative fact-finding would put this fact pattern squarely in the “buffer zone” he proposes, and would have led to the New York statute being upheld by the Court, had the VRA not rendered it moot.

<sup>34</sup> *Id.* at 106.

<sup>35</sup> 521 U.S. 507 (1997).

<sup>36</sup> 494 U.S. 872 (1990).

otherwise, it seemed clear that the legislature was making a legal declaration about what the meaning of the Free Exercise Clause should be.<sup>37</sup>

In evaluating *Boerne*, Michael McConnell expressed regret that the Court had viewed RFRA as a power grab, rather than as an “invitation to dialogue.”<sup>38</sup> Like Archibald Cox, McConnell seems to envision a buffer zone in which Congress may pass laws mandating behavior that the Court itself would never mandate. For McConnell, this zone consists of “legitimate differences of opinion” between the two branches as to the meaning of the Constitution.<sup>39</sup> If Congress’ interpretation is “within a reasonable range of plausible interpretations,” the statute should pass Constitutional muster.<sup>40</sup> It is important to note how completely McConnell’s theory is tied to the issue of Constitutional interpretation. Whereas Cox’s “buffer zone” existed in a space delineated by Congress’ fact-finding capabilities, to which the Court would defer, McConnell’s zone exists in a space occupied by contested Constitutional theories. Under McConnell’s approach, a Court that openly disagreed with Congress’ legal interpretation would nonetheless yield to that legal interpretation, so long as it were “reasonable.” It seems unlikely that the current Court would be open to this approach. This Article will therefore build on Cox’s model, while at the same time addressing the distinction (as Cox did not) between Congress’ legal findings and Congress’ implementation findings. This approach creates space for judicial deference that does not hinge on judicial acceptance of Congress’s interpretation of the Constitution.

McConnell’s theory does not focus on the ways in which Congress reaches its conclusions about the meaning of the Constitution, and the extent to which these conclusions may or may not be fact-dependent. But he does note in passing that the courts are more likely to defer to legislatures “when constitutional questions turn on empirical or predictive judgments”.<sup>41</sup> He also finds it “significant” that, prior to passing RFRA, “Congress took seriously its responsibility to engage in constitutional re-

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<sup>37</sup> See *infra*, Section IV.

<sup>38</sup> Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997), at 174.

<sup>39</sup> *Id.* at 184. 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 *Teague* approach, 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*, *infra* note 113, 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).

<sup>40</sup> *Id.* 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, RFRA merely liberated the enforcement of free exercise rights from constraints derived from judicial restraint.” *Id.* at 195.

<sup>41</sup> *Id.* at 186.

flection.”<sup>42</sup> This congressional reflection should have compelled the Court to exercise “special deference.”<sup>43</sup> It is unclear if McConnell views Congress’ Constitutional reflections as being the same or different from Congress’ reflections regarding implementation of the Constitution; if they are different, it is unclear if he thinks they deserve less deference, more deference, or the same amount.<sup>44</sup> But in arguing that Congress’ deliberative process should affect the Court’s level of deference, he again takes a different stance than that which Cox took.<sup>45</sup> Even as McConnell argues against *Boerne*, he seems to agree with the Rehnquist Court’s tenet (and with Biklé) that Congress must work to justify itself.

*Boerne* cited repeatedly to Warren-era cases such as *South Carolina v. Katzenbach*,<sup>46</sup> but Justice Kennedy’s majority opinion also articulated a new, stricter standard for 14§ 5 legislation: “congruence and proportionality.”<sup>47</sup> In *Kimel v. Florida Bd. of Regents*<sup>48</sup> and in *Board of Trustees of Univ. of Ala. v. Garrett*,<sup>49</sup> this new standard was applied in an Equal Protection context<sup>50</sup> for the first time, and in a way that can be described as non-obvious. Perhaps the most noteworthy aspect of *Kimel* and *Garrett*—and certainly the aspect most relevant to this Article—was the Court’s incredibly searching review of the congressional record. While much of both opinions focused on the legal question of whether the statutes at issue—the Age Discrimination and Employment Act (ADEA) and Title I of the Americans with Disabilities Act (ADA), respectively<sup>51</sup>—forbade behav-

<sup>42</sup> *Id.* McConnell contrasts this with the situation raised in *U.S. v. Lopez*, 514 U.S. 549 (1995), where the Court struck down the Gun Free School Zones Act on the grounds that Congress had not even made an effort to connect the Act to interstate commerce, though the Commerce Clause was the stated source of power.

<sup>43</sup> *Id.* at 186–87, citing *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) and *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

<sup>44</sup> McConnell’s contrasting of *Boerne* with *Lopez*, *see supra* note 42, suggests that he might view Congress’ findings about the meaning of the Constitution as being of the same nature as a congressional finding about economic impacts.

<sup>45</sup> *See supra*, note 30.

<sup>46</sup> 383 U.S. 301 (1966).

<sup>47</sup> 521 U.S. 507, 520 (1997).

<sup>48</sup> 528 U.S. 62 (2000).

<sup>49</sup> 531 U.S. 356 (2001).

<sup>50</sup> The *Boerne* standard was first applied in a due process case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), where it was used to strike down the Patent and Plant Variety Protection Remedy Clarification Act (“Patent Remedy Act”), which Congress had passed in 1992 to abrogate the states’ sovereign immunity from patent infringement claims.

<sup>51</sup> Both cases applied only to the portions of these laws that abrogated sovereign immunity so as to permit lawsuits against the states. The statutes were otherwise justified under the Commerce Clause, and so far the Court has not seen fit to deny Congress’ power to pass these laws under that Clause. But because of heightened Eleventh Amendment protections granted by the Court in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), it is not possible to use the Commerce Clause to abrogate sovereign immunity; it is necessary to appeal to a source of congressional power that arose after the passing of the Eleventh Amendment, such as the Fourteenth Amendment.

ior that was not itself Constitutional,<sup>52</sup> considerable space was also devoted to the question of whether discrimination based on age or disability status were “widespread,”<sup>53</sup> “[d]ifficult and intractable problems.”<sup>54</sup> Indeed, these two issues form a two-part test. As articulated in *Garrett*,<sup>55</sup> the Court must first “determine[] the metes and bounds of the constitutional right in question,”<sup>56</sup> and then “examine whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States.”<sup>57</sup> (Note how the Court separated the legal question from the factual question, but blurred the legal/implementational divide.) The issue of empirical evidence is therefore central to the inquiry. Indeed, the *Garrett* Court held that “Congress’ § 5 authority is appropriately exercised only in response to state transgressions.”<sup>58</sup> In *Kimel*, the assertion is slightly less bold<sup>59</sup>; but both cases hinge on the Court’s analysis of whether or not age and disability-status discrimination are in fact widespread problems.

It is worth pausing to note that this is exactly the type of issue that Biklé warned of in 1924—an issue where the average individual is probably as capable as the average Justice of deciding the truth for herself.<sup>60</sup> It is

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<sup>52</sup> The question of whether (and to what extent) Congress is permitted to prohibit behavior that is itself Constitutional is of course of tremendous importance, and it is the subject of lively debate, especially post-*Boerne*. Many scholars have essentially shared Archibald Cox’s notion of a buffer zone, in which Congress may forbid that which the Court would not strike down, see, e.g., Sager, *Justice in Plain Clothes* *infra* note 113. This is not necessarily because Congress disagrees with the Court as to what is unconstitutional, as McConnell envisions; it might simply be that Congress has the power to go beyond the Constitution, particularly so as to be protective of fundamental rights and freedoms. *Kimel* itself cites *Boerne* for the proposition that Congress may “prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text,” 528 U.S. at 81 (citing *Boerne* at 518).

<sup>53</sup> 528 U.S. at 90. And yet there are many points in *Kimel* and *Garrett* where the majority opinions seem to restrict Congress to only banning that which is unconstitutional. For example, the ADEA was quite narrowly-tailored so as to only prevent age discrimination that lacked a rational basis—employers were exempt from its requirements if age was a bona fide occupational qualification (BFOQ) for the job in question. See *id.* at 86 (quoting 29 U.S.C. s. 623(f)(1)). But the Court still felt that this rule did not hue closely enough to Constitutional doctrine, because the burden was placed on the employer to prove the existence of a BFOQ, see *id.* at 87. See *infra*, Section IV-C, for further discussion on this point.

<sup>54</sup> 528 U.S. at 88.

<sup>55</sup> The test, to the extent that there is one, is articulated differently at different points in the opinions. See *infra*, Section IV.

<sup>56</sup> 531 U.S. at 368.

<sup>57</sup> Comprehensive analysis of the Court’s post-*Boerne* decisions reveals that “congruence and proportionality” seems to form a third prong of the test, to be reached only if the first two prongs are satisfied, see *infra* Section IV.

<sup>58</sup> 531 U.S. at 368.

<sup>59</sup> Justice O’Connor’s majority opinion in *Kimel* suggests that evidence of a widespread problem is particularly (or perhaps only) important when Congress is legislating beyond the bounds of what the Constitution requires. See 528 U.S. at 88; see also *infra*, Section IV.

<sup>60</sup> See *supra*, note 11. But even this depends on the exact articulation of the question. A layperson can have an informed opinion about whether or not the disabled face discrimination in our society—a disabled layperson would have a particularly informed opinion on this point—but a layperson would not necessarily be able to analyze whether or not the disabled are routinely subjected to state government action that is unjustifiable even under the rational basis review standard.

also the sort of situation that McConnell mentions in passing—a Constitutional question that turns on empirical evidence.<sup>61</sup> McConnell observed that the courts have typically been especially deferential to Congress in these types of situations,<sup>62</sup> presumably because of a legislature's superior institutional capacity for fact-finding.

But the Court in both *Kimel* and *Garrett* was extremely non-deferential in its examination of the congressional record.<sup>63</sup> In passing both the ADEA and the ADA, Congress had engaged in extensive fact-finding regarding the necessity of the relevant statutes.<sup>64</sup> But the Court found much of Congress' evidence to be irrelevant to the purpose at hand. In *Kimel*, one Senator's testimony—which concluded that, "there is ample evidence that age discrimination is broadly practiced in government employment"—was dismissed because the Senator relied on newspaper articles and letters from his constituents.<sup>65</sup> All evidence relating to age discrimination in the private sector was disregarded as "beside the point."<sup>66</sup> And an entire report regarding governmental age discrimination in the state of California was deemed irrelevant because it did not establish that the discrimination was unconstitutional under rational basis review.<sup>67</sup> In *Garrett*, the Court rejected all evidence of discrimination against the disabled that was not car-

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<sup>61</sup> Notice that it is only because of the Court's formulation of the test that this becomes a Constitutional question that hinges on empirical evidence. Much of the rest of the Article will focus on a critique of that formulation.

<sup>62</sup> See *supra*, note 41.

<sup>63</sup> See 528 U.S. at 89–91 and 531 U.S. at 368–370. In *Florida Prepaid*, the Court's method of analysis was very similar to that of *Kimel* and *Garrett*; the Court engaged in a five-page analysis of Congress' factual findings, see 527 U.S. 640–45.

<sup>64</sup> It is not necessarily the case that Congress engaged in this fact-finding so as to justify its Constitutional power to pass the laws in question. Both the ADA and the ADEA were passed before *Boerne* and *Lopez*, in a time of greater permissiveness under both the Commerce Clause and 14§ 5. It is therefore possible that Congress felt that it clearly had the power to pass these statutes, and that the purpose of holding hearings was simply political. It is also worth noting that these statutes were passed prior to *Seminole Tribe*, see *supra* note 51. This has two implications: 1) Congress would have had even more reason to believe that the laws were clearly justified under the Commerce Clause, and 2) Congress would have had no reason to divide up its findings based on those that applied to state governments versus those that applied to all other actors. In the post-*Boerne* cases, the Court is therefore holding Congress to a standard that did not exist at the time when Congress passed the relevant laws. Furthermore, the Court made it clear in *Lopez* that it is not sufficient for Congress to present factual findings at a later date, after the law has been passed, see 514 U.S. 549, 563 (1995).

<sup>65</sup> See 528 U.S. at 89 (quoting 118 Cong. Rec. 24397, 7745 (1972)).

<sup>66</sup> See *id.* at 90–91.

<sup>67</sup> See *id.* at 90. For a critique of the *Garrett* Court's use of the tiers of scrutiny, see Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 8–10 (2003), hereinafter "Protecting the Constitution." But rational basis review was not the only thing preventing the use of this extensive study. Justice O'Connor declared: "Even if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time [1966], it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union. The report simply does not constitute 'evidence that [unconstitutional age discrimination] had become a problem of national import.'" *Id.* at 90 (quoting *Florida Prepaid* at 641).

ried out specifically by state employers—not local or federal government employers, not the state government in its role of providing public transportation (that employees take to work), just the state government as employer.<sup>68</sup> Again, as in *Kimel*, the evidence was rejected if Congress had not shown that the state government’s actions would fail even rational basis review.<sup>69</sup> Without stating their criteria in a clear format, the Justices joining these majority opinions<sup>70</sup> seemed to be putting several severe limitations on the evidence Congress could examine in deciding how best to implement the Fourteenth Amendment: limitations based on the source of the evidence, the subject matter of the evidence, the geographic comprehensiveness of the evidence, and the legal standard that the evidence supported. Portions of Section III and IV will engage in the task of trying to disentangle and analyze these different types of limitations on congressional evidence. For now, however, it is sufficient simply to note the extreme absence of deference to Congress as a fact-finding institution.

It would have been easy for the Court to essentially limit *Boerne* to its facts—that is, to tighten its hold on the meaning of the Fourteenth Amendment only in situations where Congress was attempting to use its 14§ 5 power to overturn a Supreme Court decision, as RFRA tried to overturn *Smith*. But instead, five Justices used *Boerne* as a launching pad for even more radical decisions in *Kimel* and *Garrett*.<sup>71</sup> The Congresses that passed the ADEA and the ADA were not acting in defiance of the Court’s doctrine; indeed, Lawrence Sager has noted that *Kimel*—he was speaking before *Garrett*—presented an “appealing instance[] of Congress acting as the Court’s partner,” not as an “adversary.”<sup>72</sup> For this reason, one might have expected the Court in *Kimel* (and *Garrett*, about which the same might be said) to engage in less harsh treatment of Congress. But in fact, the opposite occurred.

As the post-*Boerne* cases came down, many scholars took note of how the *Boerne* test was evolving. Much of the scholarship continued to focus on the twin questions of who gets to decide what the Constitution means (e.g., the extent to which the 14<sup>th</sup> Amendment protects the disabled) and whether or not Congress can confer an increased amount of protection than

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<sup>68</sup> See 531 U.S. at 368. For a critique of this element of *Garrett*, see *Protecting the Constitution* at 12–13. Post and Siegel muse that “[t]he Court’s mistake is so egregious as to require an explanation.”

<sup>69</sup> See *id.* Many scholars have criticized the Court’s use of tiers of scrutiny in this context, see, e.g., *Protecting the Constitution*, *supra*, note 67; Note, *The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146; and 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).

<sup>70</sup> Both *Kimel* and *Garrett* are 5–4 decisions, with Justices Thomas, Scalia, O’Connor, Kennedy, and Chief Justice Rehnquist in the majority.

<sup>71</sup> See *id.*

<sup>72</sup> Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1996 (2001).

that which the Constitution mandates.<sup>73</sup> These are the questions that *Boerne* itself had raised, and that scholars like Michael McConnell had already begun to explore.<sup>74</sup> Indeed, these are the same questions that 14§ 5 has inspired since its inception; and we can recall from the discussion *supra* of the state-action requirement that these questions do not necessarily relate at all to the issue of congressional findings.

But considerable scholarship did examine the way in which *Boerne* was interpreted in *Kimel* and *Garrett* to involve close scrutiny of the congressional record.<sup>75</sup> Robert Post and Reva Siegel focused their ire on the way in which the *Kimel* and *Garrett* Courts were treating Congress as if it were a trial court.<sup>76</sup> Their critique encompassed both the Court's use of tiers of scrutiny<sup>77</sup> and the Court's demanding standards as to what type of evidence would be accepted.<sup>78</sup> For Post and Siegel, these two critiques essentially map onto the two parts of the *Garrett* test: In part one of the test, where the constitutional right is identified, Post and Siegel feel the Court erred by applying rational review—a concept that was invented for the courts, as “a paradigm of judicial restraint”<sup>79</sup>—to Congress.<sup>80</sup> This error invades part two of the *Garrett* test, which calls on Congress to show evidence that the right identified in part one of the test has in fact been violated. For Post and Siegel, the application of part two was marred by the improper formulation of part one—because the right was identified in a “juricentric” manner, evidence of a trial-like type was demanded, “as if states subject to [Section 5] regulation were defendants in a lawsuit.”<sup>81</sup> Post and Siegel note in passing that *any* evidentiary requirement stands in contrast to the Court's position in *Boerne*, where the majority opined that

<sup>73</sup> See *supra*, note 69; see also, e.g., Sager, *Thin Constitutions and the Good Society*, *supra*, note 72.

<sup>74</sup> See *supra*, note 38; see also Cole, *supra*, note 39.

<sup>75</sup> See, e.g., Pamela Brandwein, *Constitutional Doctrine as Paring Tool: The Struggle for “Relevant” Evidence in University of Alabama v. Garrett*, 35 U. MICH. J.L. REFORM 37, 56–57 (2002) (detailing the ways in which Chief Justice Rehnquist's constitutional theories, as presented in *Garrett*, rendered moot almost all of the congressional evidence in the ADA's legislative record); Judith Olans Brown & Wendy E. Parmet, *The Imperial Sovereign: Sovereign Immunity and the ADA*, 35 U. MICH. J.L. REFORM 1, 12 (2003) (noting that Justice Breyer, dissenting in *Garrett*, found a huge amount of relevant evidence in the congressional record); David S. Day, *New Dimensions of the Section 5 Enforcement Power*, 47 S.D. L. Rev. 366, 380–82 (2002) (characterizing the *Garrett* Court's use of evidence as two-pronged, with the Court requiring both a certain quantity of evidence and a certain quality of evidence); Nicole E. Grodner, *Disparate Impact Legislation and Abrogation of the States' Sovereign Immunity After Nevada Department of Human Resources v. Hibbs and Tennessee v. Lane*, 83 Tex. L. Rev. 1173, 1215–16 (2005) (noting that *Boerne*, *Kimel*, and *Garrett* require specific examples from the legislative record of discrimination by the states, and attempting to reconcile these cases with *Hibbs* and *Lane*, discussed *infra*; the article notes that in *Lane*, the Court turned to its own past opinions (*Cleburne*) for concrete evidence of discrimination).

<sup>76</sup> See *Protecting the Constitution*, *supra* note 67.

<sup>77</sup> See *id.* at 8–10.

<sup>78</sup> See *id.* at 11–17.

<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.* at 8–10.

<sup>81</sup> *Id.* at 13.

the legislative record is not the basis for judicial deference to Congress.<sup>82</sup> But at other points in the article, Post and Siegel fall into the trap of assuming that the second step of *Garrett* is in fact reasonable, if only the first step were properly formulated. For example, they argue that, “In determining whether there are recurring social interactions that warrant legislation . . . Congress can consult evidence of a sort that could not support judicial findings.”<sup>83</sup> This framing accepts the notion that Congress may only forbid constitutional violations that are already widespread, or at least “recurring.” As the next Section will discuss, this should not, and indeed cannot, truly be the meaning of 14§ 5.

More broadly, to the extent that contemporary readers of *Kimel* and *Garrett* wrote about the Court’s use of evidence, their critiques focused primarily on what evidence the Court did and did not accept as relevant. Post and Siegel and many others<sup>84</sup> make clear that the Court should have considered a lot of the evidence that it in fact dismissed. But because these scholars viewed the issue of evidence as a subset of the interpretation question, their arguments do not distinguish between evidence that affects our interpretation of the Constitution and evidence that informs our implementation of the Constitution. Indeed, their critiques create the impression that the bulk of Congress’ 14§ 5 power lies in Congress’ ability to interpret the meaning of the Fourteenth Amendment, and that it is crucial for the Court to defer to Congress on this point. (Note, for example, the emphasis Post and Siegel put on step one of the *Garrett* test.<sup>85</sup>) But as this Article will show, this is not in fact the case. Yet this issue cannot even be reached unless one analyzes the distinctions between different types of congressional findings. None of the scholarship on the post-*Boerne* cases presents a developed theory addressing this point.

The closest thing to such a theory that can be found exists in the Commerce Clause literature. The Rehnquist Court’s penchant for scrutinizing congressional findings was not confined to 14§ 5 cases; it arose—indeed, it created something of a revolution—in Commerce Clause cases, as well, with the landmark rulings of *U.S. v. Lopez*<sup>86</sup> and *U.S. v. Morrison*<sup>87</sup>. The sea change in Commerce Clause doctrine created by these cases pro-

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<sup>82</sup> *Id.* at 11, quoting *Boerne*, 521 U.S. at 531–32 (citation omitted).

<sup>83</sup> *Id.* at 15. *See also id.* at 13 (“If Congress finds that prejudice is pervasively present in the treatment of the disabled by official institutions subject to Section 1 of the Fourteenth Amendment, Congress ought to be able to infer that prejudice is also pervasive in the treatment of the disabled by state institutions possessing Eleventh Amendment immunity”). *But see id.* at 16, which brackets the issue (“Even if a prerequisite of Section 5 power is a pattern of constitutional violations, the evidence necessary to establish such a pattern should not be the same as the evidence necessary to expose institutions to the serious threat of litigation” (emphasis added)).

<sup>84</sup> *See supra*, note 75.

<sup>85</sup> *See supra*, note 79. *See infra*, Part IV, for a discussion of how part I of the *Garrett* test is not in fact as problematic as it seems.

<sup>86</sup> 514 U.S. 549 (1995).

<sup>87</sup> 529 U.S. 598 (2000).

duced a wave of scholarship.<sup>88</sup> Though these articles also tended not to articulate a theory of how congressional evidence should be used, some of them provided important insight for that task.

Writing right after *Lopez*, Philip P. Frickey honed in on the important issue of congressional findings.<sup>89</sup> Frickey spoke of the “commerce-nexus element,” which was lacking in the Gun Free Zones Schools Act struck down by *Lopez*, meaning the statute lacked a discussion of how its provisions related to interstate commerce.<sup>90</sup> This article was written before *Boerne* had even been decided; yet Frickey realized the important role that congressional fact-finding could potentially play in both doctrines, and therefore analyzed 14§ 5 cases, as well. In discussing the issue of “nexus” in both doctrines, Frickey wrote: “The process can be broken down into its constituent parts: the articulation of a legal standard, and then the application of that standard to the available facts.”<sup>91</sup> The legal standard itself might define the level of factual evidence required—for example, the Court might interpret the Commerce Clause as requiring a direct nexus between the statute and interstate commerce, or only an indirect nexus.<sup>92</sup> In other words, the legal rule might confine the available theories of implementation, but the two concepts are nonetheless distinct. These points might seem relatively obvious, but as the discussion below will illustrate, the Rehnquist Court often muddled the distinction between these two steps in the 14§ 5 context (as it did in the Commerce Clause context). Frickey viewed with optimism the possibility that closer attention to Congressional fact-finding could help “curb[] legislative excess in noneconomic cases in general;”<sup>93</sup> he worried, however, that the Rehnquist Court would instead promote an “old-fashioned” and “selectively countermajoritarian” doctrine.<sup>94</sup>

The Rehnquist Court era is over, and we have considerably more evidence at hand than Frickey did to assess the impact of that era on the issue of congressional findings. But additional cases have only resulted in murkier waters. In *Nevada Dept. of Human Resources v. Hibbs*,<sup>95</sup> the Court was suddenly very deferential to congressional findings, and upheld

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<sup>88</sup> See, e.g., Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605 (2001); Jason Everett Goldberg, *Substantial Activity and Non-Economic Commerce: Toward a New Theory of the Commerce Clause*, 9 J.L. & POL'Y 563 (2001); Sam Saad, *Commerce Clause Jurisprudence: Has There Been a Change?* 23 J. LAND RESOURCES & ENVTL. L. 143 (2003).

<sup>89</sup> Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996).

<sup>90</sup> *Id.* at 703.

<sup>91</sup> *Id.* at 715. It is interesting to note how similar this articulation seems to be to the *Garrett* Court's test. However, as Section IV will discuss, the two are actually quite different.

<sup>92</sup> *Id.* at 715.

<sup>93</sup> *Id.* at 728–29.

<sup>94</sup> *Id.*

<sup>95</sup> 538 U.S. 721 (2003).

the Family and Medical Leave Act. The fact that gender discrimination receives heightened scrutiny seemed to play a key role in that case,<sup>96</sup> though one might have predicted that it would have been offset by the gender-neutral language of the statute. Robert C. Post attempted to reconcile *Hibbs* with *Kimel* and *Garrett* on the theory that the Court was influenced by “constitutional culture,”<sup>97</sup> which essentially means “the beliefs and values of nonjudicial actors.”<sup>98</sup> Similarly, rumor has speculated that Chief Justice Rehnquist, the key swing vote in *Hibbs*, was influenced by his daughter’s struggles as a working single mother. Perhaps “constitutional culture” can simply be used as shorthand for the idea that, at a given moment in time, the Justices are more ready and able to recognize some forms of discrimination than others.

But constitutional culture does not seem to explain the similar result in *Tennessee v. Lane*, where Title II<sup>99</sup> of the ADA was upheld—after all, *Garrett* struck down a separate portion of the ADA, and it seems unlikely that cultural views of the disabled changed significantly between 2001 and 2004. *Lane* is an even greater cause for surprise when we consider that Title II of the ADA, which requires the (often expensive) creation of reasonable accommodations for the disabled, seems if anything to be a greater imposition on the states than Title I, which seeks to curb employment discrimination on the basis of disability. If we focus on the question of Constitutional interpretation, as so many *Boerne* scholars have done, one would expect the difference between *Garrett* and *Lane* to hinge on a Constitutional difference between the right to access buildings and the right to avoid discrimination. The cases do have this dynamic—the *Lane* Court stressed the due process element of accessing courthouses. But the cases also demonstrate the importance of fact-finding—while it was difficult to prove a widespread pattern of irrational employment discrimination to the Court’s satisfaction, it is easier to prove a lack of ramps and elevators. In the end, Congress’ ability to convince the Court of the need for its approach to implementation seems to have been at least as important as the interpretive issues surrounding these cases.

The Rehnquist Court left us with more questions than answers as regards the role of congressional evidence in Constitutional law, and the scholarship thus far has failed to adequately fill the void. Specifically, scholars have not examined the possibility that implementation findings should be addressed differently than legal findings, and that this doctrinal change alone could alter the result in at least some of the post-*Boerne*

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<sup>96</sup> But heightened scrutiny alone does not seem to fully explain the case. See Post, *infra* note 97, 16–17.

<sup>97</sup> Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

<sup>98</sup> *Id.* at 8.

<sup>99</sup> 541 U.S. 509 (2004).

cases. The remainder of this Article will attempt to prove this point, through the development and application of a new analytical framework.

### Section III: A New Framework

This Section will create a new analytical framework that can be used to evaluate whether or not Congress has the power, under 14§ 5, to pass a given law. The framework will include a series of questions that courts should ask in addressing that question. 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 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." Section Five adds, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." At times, the Rehnquist Court seemed to understand this enforcement clause as meaning that Congress could only legislate so as to punish states that had already shown a propensity towards denying equal protection to their citizens. In *Garrett*, the majority stated that, "Congress' § 5 authority is appropriately exercised only in response to state transgressions."<sup>100</sup> But it seems clear that this cannot be the true meaning of the clause. For one thing, it is not the meaning that any Court has ever consistently applied. The Rehnquist Court itself went on to uphold the FMLA, in spite of the fact that, at the time when the statute was passed, many states already had laws aimed at promoting equitable leave policies in the workplace.<sup>101</sup> Furthermore, as Robert Post and Reva Siegel have pointed out, this posture of considering the states as if they were defendants before Congress is inconsistent with our Constitutional structure.<sup>102</sup> The Court's assertion in *Garrett* seems to imply that, without an adequate (and extensive) record of discrimination, Congress is forbidden even from passing a law that simply reads: "No State shall deny to any person within its jurisdiction the equal protection of the laws." 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, this would essentially turn the Constitution into our only source of federal civil rights law, and would change Congress' role 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 it formulated

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<sup>100</sup> 531 U.S. 356, 368.

<sup>101</sup> See *Hibbs* at 732-33.

<sup>102</sup> See *supra*, note 67.

the relevant rule in slightly different ways,<sup>103</sup> but with the exception of *Garrett*, they all sought to address the question of when and how Congress can legislate *beyond* what is required by the Constitution. The understanding seems to be that few or no questions are raised when Congress simply outlaws (or creates penalties for) that which the Constitution itself forbids<sup>104</sup>—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.<sup>105</sup> It seems right that Congress should be allowed 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 to justify a law that simply follows the dictates of the Constitution (here, 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’ power to enact, and it need not be justified in any other way.<sup>106</sup> However, as we will see below, both legal and factual justifications might be necessary in order 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 hypothesized two paragraphs above, it is clear that the text of the Constitution is being followed. But the issue is easily obscured. For example, some might argue that “equal protection” means equal access for all individuals, and that the Fourteenth Amendment itself therefore requires government buildings to be wheelchair accessible. The path to an answer of “yes” can therefore be strewn with questions of law. And here we might indeed encounter the issue of congressional findings. Not all congressional findings relate to implementation—Congress at times makes legal findings, including findings specifically about what the Constitution does and does not mean.<sup>107</sup> These interpretive findings might be adduced from

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<sup>103</sup> See *infra* Part IV.

<sup>104</sup> See Evan H. Caminker, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1127, 1156–57 (2001).

<sup>105</sup> Such a law would in fact probably be passed under the 15<sup>th</sup> Amendment. However, 15§ 2, that Amendment’s enforcement clause, has been read by the Court to follow the same jurisprudence as 14§ 5, see *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966).

<sup>106</sup> 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.

<sup>107</sup> See, e.g., *Boerne* at 515 (“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

the testimony of academics, from the knowledge of Senators themselves (who are often lawyers), from a committee's interpretation of the relevant case law, and so on. A question therefore arises as to how courts should treat these findings.

Here we find ourselves in territory that has been canvassed by many 14§ 5 scholars. Some, like Michael McConnell,<sup>108</sup> have argued that, since Congress and the Court represent co-equal branches of government, they should see themselves as engaging in a dialogue on the meaning of the Constitution. Others argue for a stronger judicial role<sup>109</sup>; still others, for almost complete deference to the legislature.<sup>110</sup> As promised, this Article will bracket this question, and proceed as if McConnell, Cole, and Post and Siegel have lost their battle, and the Court has seized complete control over the issue of Constitutional interpretation. Proceeding in this manner will best highlight the power that the implementation issue has on its own.

So far we have established that, in order to answer yes to Question One—in other words, in order to establish that the law at hand simply follows the dictates of the Fourteenth Amendment—one must first make a legal determination about what those dictates are. But there are also factual issues that can arise on the path to an answer of “yes” to this question. One can imagine, for example, a hypothetical Supreme Court coming to the legal conclusion that the Fourteenth Amendment mandates equal treatment for all, regardless of disability status. But a question might remain as to whether or not a given law—for example, a law requiring all buildings to have ramps—was a carrying out of that Constitutional mandate. At this point, the Court might turn to the congressional record; not to look at Congress' findings regarding the meaning of the Constitution, but instead to look at what may be termed “nexus findings”—findings that establish a nexus between the statute and the Fourteenth Amendment. Nexus findings are a subset of the category “implementation findings,” since they relate to Congress' role in deciding *how* the promises of the Constitution can best be realized. In our current example, nexus findings would serve to demonstrate 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 (e.g., enter a courthouse to receive due process, participate in a town meeting) and be treated equally by the government (e.g., apply for a government job, take advantage of government-provided services).

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Committee Relating to the Voting Rights Act of 1965,” S. Rep. No. 89-162, pt. 3, at 18 (1965) (analyzing the VRA's constitutionality in light of *Lassiter*, discussed *infra*, Section IV).

<sup>108</sup> See *supra*, note 38.

<sup>109</sup> Cf. Garrett Epps, *The Wrong Vampire*, 21 CARDOZO L. REV. 455 (1999) (offering at least qualified support for *Boerne*'s response to RFRA).

<sup>110</sup> See *Protecting the Constitution*, *supra* note 67.

As has already been noted, most of the literature, not to mention the case law,<sup>111</sup> fails to distinguish between legal findings and implementation findings.<sup>112</sup> But this is a mistake, because Congress' implementation findings—examples of which will be found throughout our framework—are deserving of a high level of deference, even by a Court that refuses to defer at all to Congress' legal findings. More so than legal findings, implementation findings play to the institutional strengths of the legislature. Conversely, as the discussion in Part IV will illustrate, appellate courts are out of their element when they struggle with these types of factual issues. Furthermore, implementation findings do not pose the same threat that one might perceive from legal findings. In the context of the Fourteenth Amendment, the Court might be loath to defer to a majoritarian body such as Congress on the legal question of *whom* the Constitution protects. But once that determination is made, it seems institutionally appropriate to allow Congress to decide *how* to best carry out the promise of equal protection. Lawrence Sager has written on the large gap between the reach of the Constitution and the reach of Constitutional adjudication.<sup>113</sup> In that gap, just as in Cox's "buffer zone," lies any number of policy measures that the Court would likely never demand,<sup>114</sup> but that Congress might well prescribe, in its role of deciding *how* to enforce the Constitution. Implementation findings are findings that Congress makes to inform its performance of this role of implementing, not interpreting, the Constitution. As such, they are distinct from legal findings, and are easily cognizable as deserving a higher level of deference.

Our framework now begins 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 dictates of the Fourteenth Amendment, and does this law simply follow them? Even if the Court takes a completely non-deferential stance on the first subquestion, it should show considerable deference to Congress' nexus findings, which address the second subquestion. If the Court ultimately decides that the law does in fact simply follow the dictates of the 14<sup>th</sup> Amendment, no other questions are necessary.

However, it will often arise that the Court decides on an answer of "no" to Question One. One need look no further than the above example—

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<sup>111</sup> For a pre-*Boerne* analysis of this phenomenon, see David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541, 544 (1991) ("The Court fails to distinguish between normative principles and empirical propositions, analyzing empirical research as it might arguments about the text or precedent"). Faigman, however, was not discussing the Court's interaction with Congress.

<sup>112</sup> Frickey is an exception, though he does not use the term "implementation findings," and the focus of his analysis is different than the focus of this Article, see *supra* notes 89–94.

<sup>113</sup> See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993).

<sup>114</sup> *But see* Fallon, *supra* note 3.

it is very likely that the Court would not in fact make the legal judgment that the Fourteenth Amendment is meant to promote equality for the disabled, and would instead rule, for example, that the Amendment only serves to protect the disabled against animus-based discrimination. If this were the Court's legal finding, and if Congress (as is likely) failed to produce nexus findings to show that the lack of ramps in government buildings is the result of animus against the disabled, then the Court's answer to the first question would be "no."

At this point, the ball is in the Justices' court, so to speak. The Court could conceivably rule that Congress is forbidden to legislate beyond the scope of what the 14<sup>th</sup> Amendment requires. Within the scope of this Article, where we are assuming a world in which the Court has total power over the interpretation of Constitutional law, this would be permissible. But this is not the course that the Rehnquist Court (or any Court before it) took. The post-*Boerne* rule, as articulated in *Kimel*, holds:

Congress' Section five power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.<sup>115</sup>

The test of whether Congress has gone too far is *Boerne*'s congruence and proportionality test<sup>116</sup>: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>117</sup> Therefore, a "no" answer to our first question is not the end of the inquiry—one must next ask a *Boerne* series of questions. While the Court has not always applied the *Boerne* test in a consistent manner,<sup>118</sup> the above quotations have generally been used as the touchstones for the test, and they will therefore be used to delineate the next set of questions for our framework. The structure thus devised also has the benefit of being fairly consistent with the earlier Supreme Court cases on which *Boerne* is based.<sup>119</sup>

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, this question can be rephrased to read: "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 in-

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<sup>115</sup> 528 U.S. at 81 (citing *Boerne* at 518).

<sup>116</sup> See 528 U.S. at 81 (citing *Boerne* at 519).

<sup>117</sup> 521 U.S. at 520.

<sup>118</sup> See *infra*, Section IV.

<sup>119</sup> See *infra*, Section IV-A.

jury to be prevented or remedied congruent and proportional to the means adopted?” If the answer to this question is also yes, the law will be found Constitutional.

It is important to note that the answers to these questions will hinge on the answer that the Court gave to the first question—particularly, to the first subquestion, regarding the meaning of the Fourteenth Amendment itself. To return to the issue of wheelchair accessibility, one can imagine two possible answers to the subquestion “What are 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.<sup>120</sup> Under either formulation, a law that mandated wheelchair accessibility would probably not be seen as simply 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 an answer of “no” to Question One would be given. But the formulation of the law must be kept in mind as we proceed to the *Boerne* questions. For example, if Congress’ findings were all focused on showing that ramps could help reduce animus against the disabled (and, thus, animus-based discrimination against the disabled), this would only be persuasive if animus had been articulated as the relevant legal standard.<sup>121</sup>

Question Two—“Will the law remedy and/or deter violations of the 14<sup>th</sup> Amendment?”—has proven tricky to apply. In important ways, this question is similar to Question One—the Court must be convinced that there are violations of the Amendment itself that will be stopped. Yet the “broader swath of conduct” language makes it clear that these two steps must not collapse into one. 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 allow both too much and too little. Under this rule, Congress could render any law Constitutional simply by including a provision that forbade clearly unconstitutional conduct. On the other hand, this rule would leave no room for laws that do not forbid or mandate anything that the Fourteenth Amendment does, 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.

A prophylactic law might take the form of a law that forbids some unconstitutional behavior and some constitutionally permitted behavior, but

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<sup>120</sup> Obviously, there is an infinite number of other ways in which the Court might formulate the law.

<sup>121</sup> See *infra*, Section IV, Part E, for a discussion of how a law can fail based on the overlap between Question One and Questions Two and Three.

that structure alone does not entitle a law to the prophylactic label. This is because, in order to be deemed prophylactic, the entirety of the law must be aimed at rooting out unconstitutional discrimination. In so doing, the law might not even take the step of directly forbidding that which the Constitution forbids; this step might be unnecessary, if a law already exists that forbids the specific type of unconstitutional behavior being addressed. Indeed, prophylactic laws often arise because other, more direct laws already exist, but have proven ineffective to eradicate constitutional violations.<sup>122</sup> The Supreme Court itself often turns to prophylactic rulemaking in its efforts to combat constitutional violations<sup>123</sup>; it is therefore unsurprising that Congress, which is tasked more directly with a forward-looking policy role, should do the same.<sup>124</sup>

When the Court spoke of laws that remedy and/or deter Fourteenth Amendment violations, it seems clear (as will be shown in Section IV, *infra*) that it was referring to prophylactic rules. Therefore, in order to answer Question Two, one must determine whether the law in question is in fact prophylactic. To do so requires Congress (or the advocate) to have described the type of Constitutional violation that the law will remedy or prevent. Just as was the case in a Question One analysis, the Court bears ultimate responsibility for the legal definition of what constitutes a violation—this is true whether the violation is directly addressed by the law or not. But 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. As with nexus findings, “prophylactic findings” are a type of implementation finding requiring factual analysis and a real-world understanding of the situation. The Court should therefore use the same high level of deference for prophylactic findings that it uses for nexus findings. To understand this process, consider the example of a law, similar to portions of the FMLA, that requires state employers to grant a certain amount of leave to all employees. No one would say that the 14<sup>th</sup> Amendment itself mandates X hours of leave for everyone. The law therefore fails under Question One, and must be shown to be prophylactic (as well as congruent and proportional, see *infra*) in order to be upheld. The first step, as always, is for the Court to enunciate the relevant mandates of the Fourteenth Amendment<sup>125</sup> — here, perhaps that it is unconstitutional sex discrimination when a state employer refuses to hire women out of fear that they

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<sup>122</sup> See *Hibbs* at 729–30 (discussing how Congress had attempted to eliminate gender discrimination by passing Title VII, but how discrimination continued; hence, the prophylactic measures taken in the FMLA).

<sup>123</sup> See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

<sup>124</sup> 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 3. Surely Congress, in its policy-making role, has at least the same degree of implementation power.

<sup>125</sup> Once again, I am proceeding under the assumption that the Court has complete control over this type of legal question.

might end up taking a lot of leave time.<sup>126</sup> Once this determination has been made, the Court would defer to Congress' findings that a law that required 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 in fact prevent (or remedy) some Constitutional violations, it is deemed prophylactic. But this does not mean 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, our framework differs somewhat from the approach taken by the Rehnquist Court. The Rehnquist Court's assessment of congruence and proportionality was generally focused on the quantitative—the Court would attempt to ascertain, based on the congressional record, how many Constitutional violations of the type that the law would prevent had occurred or were likely to occur, and to compare that measurement of the law's positive impact with the ways in which the law swept beyond the text of the Amendment (i.e., the extent to which Constitutionally-permitted actions would be stifled under the law). But this type of quantitative assessment, which looks for a widespread pattern of violations,<sup>127</sup> seems to cut against the countermajoritarian principles that the 14th 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. Though the phrase "congruent and proportional" seems to insist on some type of measuring, so as to compare one thing to another, it does not follow that the measuring must be done numerically.<sup>128</sup> For the purposes of this Article and this framework, therefore, the ends achieved by a given law will be measured in terms of the depth of the wrongness prevented.<sup>129</sup> The "means adopted" side of the equation will be looked at more holistically, taking into account the depth of any wrongs caused by

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<sup>126</sup> 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 (of having caretaking stereotypes perpetuated) that seemed to worry the Justices. See *infra*, Section IV-D.

<sup>127</sup> See *infra*, Section IV.

<sup>128</sup> Moreover, the Rehnquist Court's approach was not purely numerical; though 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 IV. Therefore, the Rehnquist Court's approach, though quantitative in part, was in the end just as mushy in its application as any balancing test.

<sup>129</sup> At times the Rehnquist Court has hinted at this more qualitative approach to determining congruence and proportionality, though it has never been carried out, see discussion of *Lane*, *infra*, Section IV-D. But see Caminker, *supra* note 104, at 1154 (discussing how "the Court's consideration of the magnitude of a remedial measure reflects both quantitative and qualitative concerns").

the prophylactic measure, but also issues such as cost and inconvenience to the government. But unlike the Rehnquist Court's approach, this framework will not count the mere fact of a federal law being directed at the states as an automatic negative associated with the law<sup>130</sup>; such a position seems contrary to the history of the Civil War Amendments. Finally, since Congress' findings on how best to construct a prophylactic law are a clear example of implementation findings, this framework applies a high level of deference to those findings—another deviation from the Rehnquist Court's approach. In differing from the Rehnquist Court in these ways, the framework adheres to the Warren Court precedents on which *Boerne* and its progeny are based.<sup>131</sup>

An analysis of congruence and proportionality that is based on these precepts might proceed as follows. Assume that the Court has made the legal judgment that the Fourteenth Amendment protects the disabled from firings based on animus, but the 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 (if we assume that animus-based firings are irrational) the law will indeed serve to prevent or remedy (via a cause of action) 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. The degree of injury still might vary, however. For example, while any mistreatment by the government that is grounded in animus towards the disabled might be seen as unconstitutional, one can imagine a Constitutional distinction between mistreatment that causes a minor inconvenience and mistreatment that results in one's imprisonment. Losing one's job is fairly severe on this spectrum. The injury that the law prevents is therefore quite large.

One must next measure the "means adopted." The fact that, under this law, employers cannot fire the disabled because of animus cannot be seen as a negative (even if the employers see it that way); on the contrary, that is the purpose of the law. The "negative," therefore, is the inability to

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<sup>130</sup> See *infra*, Section IV-D, for a discussion of how the Rehnquist Court seemed implicitly to make this judgment.

<sup>131</sup> See *infra*, Section IV-A.

make irrational but not animus-based firings—in other words, that the employment-at-will structure suffers. Also, if the law includes a burden-shifting provision, employers might be forced to prove the rationality of their firings of 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 one 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. Underlying this analysis is deference to Congress' implementation findings. For example, Congress might have ascertained that animus-based firings can 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-and-oranges comparison between individual rights and government inconvenience. But judges are often called upon to balance factors in this manner. Furthermore, the quantitative approach was not only inadequate for the reasons discussed above; it was also at least equally difficult to apply, as Section IV will show.<sup>132</sup>

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,<sup>133</sup> result in laws passed under 14§ 5 being upheld. That this should be so even under a *Boerne*-inspired doctrine will become more obvious when *Boerne* is discussed in-depth, below. Put simply, the decision in that case 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.

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<sup>132</sup> See also *supra*, note 128.

<sup>133</sup> For a discussion of the limits that this framework puts on Congress, see *infra* Section IV-E.

One might wonder if such an intricate framework is necessary to arrive at such a basic point. But, as we will see in Section III, 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. Last of all, 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 nine essentially agreed that Congress had overstepped its bounds,<sup>134</sup> 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 and nitpicky when developed in this Section are in fact capable of swinging an entire opinion.

#### Section IV: Using the Framework to Analyze the Supreme Court's 14§ 5 Jurisprudence

##### Part A: The VRA Cases

It is impossible to understand 14§ 5 without examining two landmark cases that upheld the VRA<sup>135</sup>: *South Carolina v. Katzenbach*<sup>136</sup> and *Katzenbach v. Morgan*.<sup>137</sup> The Court has consistently cited these cases in its 14§ 5 jurisprudence, even as that jurisprudence has changed over the years.<sup>138</sup> Furthermore, both cases provide ample examples of judicial use of Congress' implementation findings.

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<sup>134</sup> 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," 521 U.S. at 566.

<sup>135</sup> The VRA has faced other challenges, as well. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding two of the 1970 amendments to the statute in full, and also upholding the lowering of the voting age to 18 for all federal elections, but striking down the age change for state elections) and *City of Rome*, 446 U.S. 156 (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 Frickey, *supra* note 89, at 716–18, 720.

<sup>136</sup> 383 U.S. 301 (1966).

<sup>137</sup> 384 U.S. 641 (1966).

<sup>138</sup> The Court's loyalty to *Morgan* has been less reliable. Though *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 521 U.S. at 527–28. The fact that *Boerne* takes away Congress' 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.

In the two *Katzenbach* cases, the Court upheld many of the central provisions of the VRA.<sup>139</sup> In so doing, the Court focused on the issue of “appropriateness.” The word “appropriate” can be found in the enforcement clauses of the Fourteenth and Fifteenth Amendments<sup>140</sup> themselves, but it actually has an even earlier source in *McCulloch v. Maryland*,<sup>141</sup> which established a general test for congressional power as against the reserved powers of the states. The *McCulloch* test, which *Ex parte Com. of Virginia*<sup>142</sup> extended to the Civil War Amendments,<sup>143</sup> and which both *Katzenbach* Courts therefore applied,<sup>144</sup> is focused on legitimate ends, appropriate means, and consistency with the “letter and spirit” of the Constitution<sup>145</sup>; in modern civil rights cases, it has been interpreted to allow Congress to use “any rational means” to combat racial discrimination.<sup>146</sup> In *Boerne* and its progeny, the Court did not use the *McCulloch* test; many commentators have argued that this is not as it should be, and that the Court should return to *McCulloch*.<sup>147</sup> I would contend, however, that the *Boerne* Court’s heavy reliance on *South Carolina* and *Morgan* indicates that the Court did not mean to depart from the rules used in those cases, except in the instance of the “ratchet rule” that was arguably articulated in *Morgan*.<sup>148</sup> The rules that we will see applied in *Boerne* and beyond clearly have their roots in *McCulloch*’s concept of legitimate ends and appropriate means; it therefore makes sense to look at how the Warren Court applied those concepts, and to view their use through the lens of our proposed framework.

It is striking to see how easily our framework, which was developed with reference to the Rehnquist Court’s articulation of 14§ 5 doctrine,

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<sup>139</sup> In *Morgan*, the relevant provision (4(e), which dealt with the rights of Puerto Rican-educated Americans to vote, even if they did not speak English) was upheld under the Fourteenth Amendment; in *South Carolina*, the provisions were upheld under the Fifteenth Amendment. However, the Court’s jurisprudence for the two Amendments is the same, *see* 384 U.S. at 650–51, as is demonstrated by the similar approach that the Court took in these two cases.

<sup>140</sup> 15§ 2 is the enforcement clause of the Fifteenth Amendment.

<sup>141</sup> 4 Wheat. 316 (1819).

<sup>142</sup> 100 U.S. 339, 345–46 (1880).

<sup>143</sup> *See* 384 U.S. at 650.

<sup>144</sup> *See* 383 U.S. at 326–27, and 384 U.S. at 650–51.

<sup>145</sup> *See* 4 Wheat. at 421.

<sup>146</sup> *See* 383 U.S. at 324 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258–259, and *Katzenbach v. McClung*, 379 U.S. 294, 303–304).

<sup>147</sup> *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (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; and Caminker, *supra* note X (“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”).

<sup>148</sup> *See supra*, note 138.

maps on to the Court's decision in *South Carolina*.<sup>149</sup> 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."<sup>150</sup> In other words, though the VRA merits an answer of "no" to Question One, it still might be within Congress' power to enact. Next, the Court noted the prophylactic nature of the law,<sup>151</sup> and commented on why Congress felt the need to take a proactive stance, rather than relying on after-the-fact adjudication.<sup>152</sup> Question Two therefore receives a resounding "yes." But "the question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combating the evil."<sup>153</sup> The Court therefore proceeded to examine each challenged provision of the law in turn.

The remedies in question applied to some states but not others. It is worth noting that the Rehnquist Court at times commented favorably on this aspect of the VRA<sup>154</sup>; at the time, however, it seems to have been a potential strike against the law.<sup>155</sup> The *South Carolina* Court discussed at some length the issue of whether or not the VRA's mechanism for choosing which states to cover was fair, and accurately approximated the areas of the country with the most discrimination.<sup>156</sup> This portion of the case could be misread to imply that a law is only permissible if every portion of the country that it affects has been shown to have a history of discrimination.<sup>157</sup> To read the case this way would be to misunderstand its historical context; rather than embracing the VRA's selective application, Chief Justice Warren was instead applying additional scrutiny because of the way in which the law singled out certain states.

In order to see how the *South Carolina* Court carried out its inquiry into the appropriateness of the VRA, it is therefore easier to look not at the

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<sup>149</sup> On the other hand, perhaps it is not surprising, since *Boerne* cited heavily to *South Carolina*. But most scholars view *Boerne* as a departure from the Court's earlier doctrine. What this reveals, as is discussed *supra* in the context of *McCulloch*, is that *Boerne* did not in fact represent as dramatic of a departure as is generally believed.

<sup>150</sup> 383 U.S. at 327.

<sup>151</sup> See *id.* at 327–28 ("The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication").

<sup>152</sup> See *id.* at 328.

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., *Boerne* at 532–33.

<sup>155</sup> See 383 U.S. at 328–29 (discussing how South Carolina had tried to invoke "the doctrine of the equality of States").

<sup>156</sup> See *id.* at 328–33.

<sup>157</sup> At times, the Rehnquist Court seemed to take this stance, see *Kimel* at 90 (calling a report on age discrimination in the state of California "insufficient to support Congress' 1974 extension of the ADEA to every State of the Union" because it "does not constitute 'evidence that [unconstitutional age discrimination] had become a problem of national import"). But at other times, the Court did not take this approach, see *Hibbs* at 750–51 (Kennedy, J. dissenting) (noting that many states already had policies aimed at preventing discriminatory leave policies prior to the passage of the FMLA); see *Hibbs* at 732–33 for the majority's response to this portion of the dissent.

Court's evaluation of the Act's trigger provision, but rather at its evaluation of the substance of the rules that were imposed on the selected states. 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 had focused on literacy tests because the Court itself had upheld such tests as Constitutional in *Lassiter*<sup>158</sup>; the Act'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."<sup>159</sup> These two observations together represent an articulation of the relevant law—the Constitution permits literacy tests that are fair, but forbids the discriminatory application of such tests—and an answer to Question One ("no"). Furthermore, it is clear from this discussion 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. We therefore have an answer of "yes" to Question Two, which brings us to Question Three. To decide if a prophylactic ban was legitimate, Chief Justice Warren analyzed the harm that it would cause the state and compared it to the good that the law would bring about, just as one would do under a "congruent and proportionate" analysis. At this point, as was often the case throughout the opinion, the Court deferred to Congress' analysis of the facts. Congress had observed that many illiterate whites had been given the franchise even in states with literacy tests; it therefore concluded that the states could not claim that they would be harmed by the addition of illiterate black voters to their rolls.<sup>160</sup> The harm to the states was therefore negligible, while the positive effect of the ban was large. 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.<sup>161</sup> In this manner—by relying on the implementation findings that Congress made to justify the law, which were based on a comparison of the real-life positives and negatives that the law would bring about—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*. 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.

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<sup>158</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

<sup>159</sup> 383 U.S. at 333, quoting *Lassiter* at 53.

<sup>160</sup> See *id.* at 334 (citing House Report 15 and Senate Report 15--16).

<sup>161</sup> See *id.* at 334 (citing House Report 15 and Senate Report 16).

Instead, the Court relied on Congress' expertise to decide *how* the (Court-articulated) promise of that Amendment could best be actualized.<sup>162</sup>

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 how this is so. The Court in *Morgan* was evaluating a provision of the VRA<sup>163</sup> that had forced New York to stop applying one of its state laws (a law restricting the franchise to those who could read and write English).<sup>164</sup> 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.<sup>165</sup> The Court forcibly disagreed,<sup>166</sup> thus conforming with our framework's axiom that a "no" answer to Question One does not automatically render a law unconstitutional. The next move that our framework would predict would be an articulation of the relevant Constitutional rule, so as to decide if the statute in question does in fact merit an answer of "no" (or "yes") to Question One. The Court, however, refused to play along.<sup>167</sup> At no point does Justice Brennan's opinion decide the question of whether or not New York's law was unconstitutional.<sup>168</sup><sup>169</sup> Analytically, it seems that the question was irrelevant to him, because the law was in any case a clearly legitimate prophylactic measure—a conclusion he reached though a truly stunning amount of deferential language regarding Congress' legislative role.<sup>170</sup> In a sense, therefore, *Morgan* could be seen as

<sup>162</sup> *South Carolina* goes on to analyze other portions of the VRA: the pre-clearance requirement, 383 U.S. at 334–35; the venue and burden shifting provisions, *id.* at 331–32, 335; and the appointment of federal examiners, to be sent to jurisdictions chosen by the Attorney General *id.* at 335–37. In justifying each of these prophylactic measures, the Court cites to the congressional record.

<sup>163</sup> 4(e), which stated that Puerto Rico-educated Americans be permitted to vote even if they did not speak English, *see* 384 U.S. at 643.

<sup>164</sup> *See* 384 U.S. at 643–44, citing Article II, s 1, of the New York Constitution. Note that, because New York was not a covered jurisdiction under the VRA, the general ban on literacy tests did not apply. 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).

<sup>165</sup> *See* 384 U.S. at 648.

<sup>166</sup> *See id.* at 648–50.

<sup>167</sup> *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”).

<sup>168</sup> In a companion case to *Morgan*, *Cardona*, the Constitutionality of New York's law was challenged directly, *see supra*, note 33. As in *Morgan*, the Court in *Cardona* refrained from answering the question of the statute's Constitutionality.

<sup>169</sup> 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* 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 [giving immigrants an incentive to learn English and assuring intelligent exercise of the franchise] were actually the interests being served”).

<sup>170</sup> *See, e.g.*, 384 U.S. 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”). *See also, id.*, at 654 (“Congress might well have concluded”; “some evidence suggest[ed],”); *id.* at 656 (“[Congress] brought a specially informed legislative competence,”), and many, many more.

working within our framework, but simply skipping Question One because the law was clearly permitted under Questions Two and 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,<sup>171</sup> 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. But it is discussed here both because of its importance as a landmark 14§ 5 case and because it will be important to our understanding of *Boerne*, which cited *Morgan* repeatedly.

In reflecting on these two VRA cases, it is important to remember the work of Archibald Cox.<sup>172</sup> Given the historical context, in which the Warren Court had often fought a lonely battle for civil rights against state legislatures and state courts, Cox looked with relief on cases like *Morgan* and *South Carolina*. Here, at least, the Court had Congress as a partner in waging battle against state-level discrimination. This feeling of partnership is reflected in the Court's reliance on congressional findings,<sup>173</sup> and in its general deference to Congress' judgment about how best to enforce the provisions of the Civil War Amendments.

#### Part B: *City of Boerne*

*City of Boerne v. Flores*<sup>174</sup> presented a situation in which Congress had clearly imposed its own interpretation of the Constitution. In an earlier case, *Employment Div., Dept. of Human Resources of Oregon v. Smith*,<sup>175</sup> the Court had declined to apply the *Sherbert*<sup>176</sup> test to a certain class of cases involving free exercise of religion.<sup>177</sup> Out of outrage over *Smith*, Congress had used its 14§ 5 power<sup>178</sup> to pass the Religious Freedom Restoration Act of 1993 (RFRA).<sup>179</sup> The text of RFRA itself criti-

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<sup>171</sup> See, e.g., 384 at 652 (stating that 4(e) must be an enforcement of the Fourteenth Amendment, since Congress stated that it was).

<sup>172</sup> See *infra*, Section II.

<sup>173</sup> Like the *South Carolina* Court, the Court in *Morgan* cited frequently to legislative history, see, e.g., 384 U.S. at 653 (fn 12), 654 (fn 14), 656 (fn 17).

<sup>174</sup> 521 U.S. 507 (1997).

<sup>175</sup> 494 U.S. 872 (1990).

<sup>176</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Sherbert* test involves an evaluation of if a law substantially burdens a religious practice, and, if so, if there is a compelling government interest that justifies the burden, see 521 U.S. at 513.

<sup>177</sup> See 521 U.S. at 512–14.

<sup>178</sup> 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 (1940).

<sup>179</sup> 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*

cized *Smith*<sup>180</sup> and explicitly sought to reinstate the *Sherbert* test.<sup>181</sup> Therefore, though the respondents' attorneys in *Boerne* had attempted to argue that RFRA was "a reasonable means of protecting the free exercise of religion as defined by *Smith*,"<sup>182</sup> it is clear that this was, at best, an after-the-fact justification.

What is perhaps most remarkable about the case is that, in light of these facts, the majority nonetheless worked quite hard to justify its decision. It almost seems as if the Justices might have simply cited *Marbury*<sup>183</sup> and gone home. Alternatively, they could have granted Congress' right to provide additional protections to the free exercise of religion beyond those provided by the text of the Constitution, as the *Morgan* Court might have done; or, they could have accepted Congress' invitation to dialogue, and perhaps adjusted their interpretation of the First Amendment in light of Congress' legal findings, as scholars like McConnell would have had them do.<sup>184</sup> But instead, they proceeded along an analytical path that is somewhat convoluted, but which our framework will help dissect.

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 have any meaning . . . . It appears, instead, to attempt a substantive change in constitutional protections."<sup>185</sup> 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. But logically, it seems more likely that the Court was collapsing Questions Two and Three into one step. The Court did not seem to be asserting that no violations of *Smith* existed that would be prohibited under RFRA; its issue was rather with the large amount of constitutional behavior that would unnecessarily be struck down by the law. Therefore, strictly speaking, the law was indeed prophylactic; it failed under the congruent and proportional analysis, done under Question Three.<sup>186</sup>

<sup>180</sup> See 521 U.S. at 515, quoting 42 U.S.C. § 2000bb(a)(4).

<sup>181</sup> See *id.*, quoting 42 U.S.C. § 2000bb(b)(1).

<sup>182</sup> *Id.* at 529.

<sup>183</sup> *Marbury v. Madison*, 1 Cranch 137 (1803).

<sup>184</sup> Indeed, Justices O'Connor, Breyer, and Souter, all argued that *Smith* should be reconsidered, see 521 U.S. at 544–65 (O'Connor, J., dissenting) (arguing that *Smith* was wrongly decided), *id.* at 565–66 (Souter, J., dissenting) (arguing that *Smith* should be reargued), and *id.* at 566 (Breyer, J., dissenting) (agreeing with Justice O'Connor as to the merits of *Smith*).

<sup>185</sup> 521 U.S. at 532. 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").

<sup>186</sup> 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.

Indeed, this is the case where “congruence and proportionality” was born.<sup>187</sup> As in our framework, an analysis of congruence and proportionality was done so as to decide if a prophylactic law was permissible. Specifically, “Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”<sup>188</sup> The law must be “‘adapted to the mischief and wrong’” that the Amendment is aimed at preventing.<sup>189</sup> “RFRA is not so confined.”<sup>190</sup> The Court went on to describe the many ways in which RFRA’s “sweeping coverage” was far less tailored to its purported aims than was the VRA.<sup>191</sup> In looking at all of these passages, it is difficult to say if the Court was arguing that a law that was so misaligned with its alleged goals simply could not be called remedial or preventive (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.

Once again, 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’ intent. But, perhaps out of a wariness of adjudicating issues of motive, the Justices nonetheless considered the possibility, though in the end they decided that the law could not be seen as an enforcement of the First Amendment as defined by *Smith*, but instead constituted a substantive change in the meaning of that Amendment.<sup>192</sup>

We turn next to the question of what *Boerne* says about the Court’s deference to the legislature’s implementation findings. Though the *Boerne* Court disapproved of Congress’ attempts at legal findings, it seemed quite supportive of Congress playing an active role in showing that a law was prophylactic and congruent and proportional to the Constitutional violations it aimed to prevent. The Court referred fairly often to the congressional record, both to show how Congress had tried to trumpet its own Constitutional interpretation over that of the Court,<sup>193</sup> but also to show how Congress had not adequately shown a relation between the RFRA and any violations of *Smith*’s vision of the First Amendment that it was alleg-

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<sup>187</sup> See 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”).

<sup>188</sup> *Id.* at 532, citing *City of Rome*, 446 U.S. at 177.

<sup>189</sup> *Id.*, quoting *Civil Rights Cases*, 109 U.S., at 13.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 532–33.

<sup>192</sup> See *id.* at 534–35.

<sup>193</sup> See *id.* at 515.

edly meant to prevent.<sup>194</sup> 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,"<sup>195</sup> the Court opined that a strong legislative record that explains the types of Constitutional violations that the law seeks to avoid is a sign of legislative restraint (similar to the sunset and bailout provisions of the VRA), and can thus be used to justify a prophylactic law that forbids a considerable amount of Constitutional behavior by the states.<sup>196</sup> In other words, the *Boerne* Court seemed ready and willing to accept and even defer to Congress' implementation findings about how the law was meant to uphold the aims of *Smith*. RFRA, however, was not a law aimed to uphold *Smith*, as its findings made abundantly clear. It was thus struck down.

As the above analysis illustrates, *Boerne* did not in fact 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' implementation findings. *Boerne* marks a point of departure not so much for what it says,<sup>197</sup> but rather for how it was later applied by the Court. It is my contention that scholars such as Robert Post and Reva Siegel, along with others, have mistakenly directed their ire at *Boerne*, rather than at the cases that followed it. It is true that *Boerne* tightened the reins on Congress' power to interpret the scope of the Fourteenth Amendment, especially when compared to *Morgan*. But *Boerne* 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. And, as this Article strives to contend, the power of that role is often underestimated.

#### Part C: *Kimel* and *Garrett*

*Kimel v. Florida Bd. of Regents*<sup>198</sup> and *Board of Trustees of Univ. of Ala. v. Garrett*<sup>199</sup> represented a significant departure from both the VRA cases and from *Boerne* itself. Where the *Boerne* Court made a clear (albeit implied) distinction between Congress' legal findings (to which it did not defer) and Congress' implementation findings (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*. In a concurrent, and perhaps related, development, the three steps of our framework, which

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<sup>194</sup> See *id.* at 530.

<sup>195</sup> *Id.* at 531.

<sup>196</sup> *Id.* at 533.

<sup>197</sup> 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 521 U.S. 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 *South Carolina*.

<sup>198</sup> 528 U.S. 62 (2000).

<sup>199</sup> 531 U.S. 356 (2001).

we were more or less able to tease out of the *Boerne* case, often collapsed in *Kimel* and *Garret*.

*Kimel* was the Court's first application of the *Boerne* test in an Equal Protection context.<sup>200</sup> The case involved a challenge to the portion of the Age Discrimination in Employment Act (ADEA)<sup>201</sup> that authorized private lawsuits against the states.<sup>202</sup> Justice O'Connor, writing for the majority, explained the relevant scope of the law. In what many have seen as the case's central blunder,<sup>203</sup> 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<sup>204</sup>; therefore, the Fourteenth Amendment only forbids irrational age-based discrimination. Many scholars have contended that it was improper for the Court to use the tiers of scrutiny in this way<sup>205</sup>; however, in keeping with this Article's practice of accepting whatever Constitutional meaning the Court chooses to dictate, we will not linger on this point.

The beginning of Justice O'Connor's analysis is striking: "Initially, the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." At this point in the opinion, the Court had not addressed the prevalence of age discrimination; Justice O'Connor seemed to be basing her assessment solely on the fact that, as she immediately went on to discuss at length, all three claims of unconstitutional age discrimination that the Court had ever heard had failed.<sup>206</sup> This is a startlingly juricentric view of the world—that, if no valid claims of unconstitutional age discrimination have reached the Supreme Court, they must not exist. In all fairness, Justice O'Connor seemed to be using the three Supreme Court cases to illustrate the difficulty of proving a claim of age discrimination in any court, given the demands of the rational basis review standard; but this explanation is no less juricentric. This portion of the opinion ended with the assertion that, "Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is 'so out of pro-

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<sup>200</sup> The Court had previously applied the test in the context of a law that abrogated the states' sovereign immunity from patent infringement claims, see *Florida Prepaid v. College Savings 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' implementation findings—also arose in *Florida Prepaid*.

<sup>201</sup> 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. and Supp. III).

<sup>202</sup> 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*, note 51.

<sup>203</sup> See *supra*, note 69.

<sup>204</sup> 528 U.S. at 83.

<sup>205</sup> See *supra*, note 69.

<sup>206</sup> 528 U.S. at 83, citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *Vance v. Bradley*, 440 U.S. 93 (1979), and *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam).

portion to a supposed remedial or preventive object that it cannot be understood as responsive to . . . unconstitutional behavior.”<sup>207</sup>

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 in fact narrowly-tailored so as only to forbid the irrational use of age.<sup>208</sup> 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.”<sup>209</sup> Therefore, even with the BFOQ exception,<sup>40</sup> the statute nonetheless “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional” under rational basis review.<sup>210</sup> At this point in the opinion, it seems that all the Court has managed to do is provide (with some difficulty) an answer of “no” to Question One; yet at the same time, the Court has already deemed the law to be wildly out of proportion to any legitimate Constitutional aim.<sup>211</sup>

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 Section 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that Section 5 precludes Congress from enacting reasonably prophylactic legislation.<sup>212</sup>

First of all, it is worth noting again the juricentric framing—the issue is not prohibiting unconstitutional conduct, but instead prohibiting conduct “likely to be held unconstitutional” in a court of law. In any case, the next sentence is worth studying on its own. On the one hand, it seems to agree with our 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.<sup>213</sup> Furthermore, the sentence seems to imply that prophylactic legislation is only permissible when the problem it targets is “difficult

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<sup>207</sup> *Id.* at 86, quoting *Boerne* at 532.

<sup>208</sup> *See id.* at 86 (quoting 29 U.S.C. s. 623(f)(1)).

<sup>209</sup> *See id.* at 87 (quoting 29 CFR s. 1625.6(a) (1998)).

<sup>210</sup> *Id.* at 86.

<sup>211</sup> *See supra*, note 207.

<sup>212</sup> 528 U.S. at 88.

<sup>213</sup> 521 U.S. at 532–33.

and intractable.” This is a clear repudiation of the *Boerne* Court’s position that 14§ 5 legislation does not require “egregious predicates.”<sup>214</sup>

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’ implementation findings on this point. The opposite, however, occurred. As was discussed in Section II, Justice O’Connor ignored a large body of evidence that Congress had assembled to indicate the necessity of passing the ADEA. This portion of the opinion has three major flaws. First, as was also discussed in Section II, the importance of a statute should be judged not by the number of people it affects, but by the extent to which the affected parties have been seriously Constitutionally wronged. To lose one’s job, fail to be hired, or face a reduction in salary as a result of impermissible age discrimination are all fairly serious harms, the depth of which the Court does not attempt to assess. The second flaw is in the utter lack of deference to Congress’ findings regarding the prevalence of age discrimination; as was already discussed, the Court dismissed out of hand everything from a Senator’s testimony based on the experiences of his constituents all the way to a full-scale report documenting age discrimination by the state government of California. Finally, and related to this lack of deference, is the fact that the Court insisted on congressional evidence of significant age discrimination that would have withstood the rational basis test in a court of law; in other words, the Court treated Congress as if it were a trial court. This flaw has been much discussed by scholars, and often conflated with the Court’s initial articulation of the relevant law (that the Constitution only forbids irrational age discrimination). But it is dangerous to thus conflate the two points, because even if one were to concede the Court’s phrasing of Question One, the statute would still probably have been upheld if only the Court had deferred to Congress’ implementation findings. This point will be illustrated as we now turn to an analysis of how *Kimel* would have been decided under this Article’s framework.

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<sup>214</sup> 521 U.S. at 533.

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. “Avail[ing] itself of information from any probative source,”<sup>215</sup> Congress made a judgment that unconstitutional age discrimination was a problem that needed to be addressed; this judgment regarding the need to implement the Constitution is one to which the Court should defer. It was in no way necessary for Congress either to rely on or recreate trial-like evidence to prove the prevalence of age discrimination. The law Congress passed 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 such a use of proxy. Congress felt that the means justified the end, since the harm of only being able to use age as a proxy in situations where it is necessary to do so is not very large compared to the harm of unconstitutional age discrimination that results in negative employment consequences. This congressional judgment regarding implementation is deserving of deference. 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 age discrimination. It seems clear that, under both our framework and a reasonable interpretation of *Boerne*, the law should have been upheld, even if one concedes the initial legal determinations made by the Court.

*Garrett*<sup>216</sup> was in many ways a similar case to *Kimel*; however, it had the distinction of being more clearly structured with respect to doctrine. In lockstep with Question One of our framework, Chief Justice Rehnquist’s majority opinion took its starting point to be “identify[ing] . . . the scope of the constitutional right at issue.”<sup>217</sup> 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,<sup>218</sup> disabled individuals only have the right to be treated rationally by the state.<sup>219</sup> Under our framework, the next step would be to ask whether the statute was prophylactic; the answer would clearly be yes, so we would

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<sup>215</sup> *South Carolina*, 383 U.S. 301, 330 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252–53 (1964)).

<sup>216</sup> 531 U.S. 356 (2001).

<sup>217</sup> *Id.* at 365.

<sup>218</sup> *Id.* at 366.

<sup>219</sup> *Id.* at 367.

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.”<sup>220</sup> If such a pattern were 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.<sup>221</sup> So while the *Garrett* Court agreed with our framework as to steps one and three, its middle step was quite different. It is worth analyzing the ramifications and possible origins of the *Garrett* requirement that a law that goes beyond what the Fourteenth Amendment mandates can only be upheld if it combats a “history and pattern” of unconstitutional discrimination.

The *Garrett* Court cited *Kimel* for the “history and pattern” element of its test.<sup>222</sup> As such, the step seems to have been a rephrasing of *Kimel*’s “difficult and intractable” inquiry. This reinforces the idea, discussed above, that the *Kimel* Court did not mean to drop “congruence and proportionality” from the 14§ 5 doctrine; it simply did not reach the issue, because the law failed under the “difficult and intractable” step. The rephrasing of “difficult and intractable” as “history and pattern,” seems logical enough—both *Kimel* and *Garrett* seemed to agree that the latter was necessary to prove the former. But however you phrase the concept, it is worth noting how far the test has now moved from 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 40 years.<sup>223</sup> However, this lack of evidence was not seen as dispositive,<sup>224</sup> and the Court still engaged in a full analysis of congruence and proportionality. RFRA’s “sweeping coverage” was decried because it called into question a vast number of state and local laws and regulations relating to every conceivable topic—indeed, any law in the country could be challenged under RFRA<sup>225</sup> — and ultimately the law failed because the disproportion between this sweeping coverage and the alleged aim of the law (to enforce *Smith*) was so great as to lead the Court to believe that the law was not indeed a remedial effort to enforce *Smith*, but instead represented a substantive change in the law. It therefore seems that making a history and pattern of unconstitutional discrimination a necessary step before even proceeding to a “congruence and proportionality” analysis is very much at odds with the Court’s approach in *Boerne*.

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<sup>220</sup> *Id.* at 368.

<sup>221</sup> *Id.* at 372.

<sup>222</sup> *See id.* at 368, citing *Florida Prepaid* at 640 and *Kimel* at 89.

<sup>223</sup> 521 U.S. at 530.

<sup>224</sup> *Id.* at 531–32. *See also id.* at 533 (“This is not to say, of course, that § 5 legislation requires . . . egregious predicates”).

<sup>225</sup> 521 U.S. at 532–33.

Be that as it may, the *Garrett* Court proceeded with its search for a history and pattern of unconstitutional discrimination against the disabled. Like the *Kimel* Court (when looking for “difficult and intractable”), it did so with a lack of deference to Congress that can only be described as brain-numbing. Scholars have already parsed the issue,<sup>226</sup> and Justice Breyer noted in dissent that Congress had assembled “a vast legislative record documenting ‘massive, society-wide discrimination’ against persons with disabilities,”<sup>227</sup> including “roughly 300 hundred examples of discrimination by state governments.”<sup>228</sup> But again, as in *Kimel*, the Court demanded congressional evidence that proved to a legal certainty a history of irrational discrimination by state actors. This requirement seems to be the Court’s attempt to follow *Boerne*’s prohibition against substantive changes in the law—since the Court defined the right in question as a right to be free from irrational discrimination, Congress’ duty became one of protecting only against irrational discrimination. So far so good, at least within the starting assumptions of this Article. But the Court then extended this theory to dismiss as irrelevant any evidence gathered by Congress that did not definitively represent irrational discrimination. As many scholars<sup>229</sup> and Justice Breyer<sup>230</sup> have pointed out, this was an institutionally inappropriate way to treat Congress. But the existing scholarship fails to adequately break down the source of the Court’s logical fallacy. The Court instituted this evidentiary requirement because five of the Justices conflated *Boerne*’s lack of deference to Congress’ legal findings—a lack of deference that at least eight Justices agreed with<sup>231</sup>—with a lack of deference to Congress’ implementation findings.

*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, at that—became a necessary condition to uphold any law that went at all beyond the mandates of the Fourteenth Amendment. While this change is important, it would probably not have a very big effect on the doctrine if it stood alone, since Congress is unlikely to legislate if it does not see a problem that it thinks needs to be addressed. The second change is more fundamental: The Court conflated legal findings with implementation findings, and therefore extended *Boerne*’s lack of deference to the former to become a lack of deference to the latter, as well. It was this conflation

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<sup>226</sup> See *supra*, note 75.

<sup>227</sup> 531 U.S. at 377.

<sup>228</sup> *Id.* at 379.

<sup>229</sup> See *supra*, note 75.

<sup>230</sup> See 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”) (emphasis in the original).

<sup>231</sup> See *supra*, note 134.

(and the resulting lack of deference) that resulted in the Court's insistence on a sufficiently high number of violations,<sup>232</sup> on those violations pertaining only to state government,<sup>233</sup> on those violations having been proven with legal certainty to constitute irrational discrimination,<sup>234</sup> and so on.<sup>235</sup> In conflating legal findings with implementation findings, the Court essentially took away Congress' power to decide how to protect the Constitutional rights that the Court had defined.

Part D: *Hibbs* and *Lane*

*Nevada Department of Human Resources v. Hibbs*<sup>236</sup> and *Tennessee v. Lane*<sup>237</sup> stand in contrast to *Kimel* and *Garrett* most obviously because in *Hibbs* and *Lane*, the laws in question were upheld. In *Hibbs*, the key swing voters were Chief Justice Rehnquist and Justice O'Connor (joining with Justices Ginsburg, Souter, and Breyer to form a majority; Justice Stevens concurred<sup>238</sup>); 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 particularly 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 new Justices are filling the places of the two Justices who held the fate of the doctrine in their hands.

The statute at issue in *Hibbs* was the Family and Medical Leave Act of 1993 (FMLA),<sup>239</sup> which requires employers<sup>240</sup> to provide employees<sup>241</sup>

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<sup>232</sup> See 531 U.S. at 370; see also *supra*, Part II, for a discussion of why head-counting is an illegitimate way to determine constitutionality under the Fourteenth Amendment's countermajoritarian principles.

<sup>233</sup> See *Kimel* at 88–91 and *Garrett* at 368–69.

<sup>234</sup> See *Kimel* at 88–91 and *Garrett* at 368.

<sup>235</sup> Other requirements include *Kimel's* apparent insistence on proof of nationwide discrimination, see *Kimel* at 90, see also *supra*, Part A, for a discussion of why this is not a proper reading of *Boerne*; also, the Court's apparent requirement of previous judicial determinations, see *Kimel* at 83 and discussion, *supra*, Part B.

<sup>236</sup> 538 U.S. 721 (2003).

<sup>237</sup> 541 U.S. 509 (2004).

<sup>238</sup> It is worth noting that, while Justice Stevens' 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." *Id.* at 740–41 (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.

<sup>239</sup> Pub. L. 103–3, 107 Stat. 6, 29 USC §§ 2601, 2611–19, 2631–36, 2651–54, 5 USC §§ 6381–87.

<sup>240</sup> 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 50 or more employees, see 29 USC § 2611.

with up to 12 weeks of unpaid leave per year for various health- and family-related reasons.<sup>242</sup> Chief Justice Rehnquist began his majority opinion by stating the relevant Constitutional right: “to be free from gender-based discrimination in the workplace.”<sup>243</sup> 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’ explanation as to how this law related to the issue of gender discrimination.<sup>244</sup> This is an example of how the Court can maintain its hold on the meaning of the Constitutional while still expressing deference to Congress’ nexus findings<sup>245</sup>—i.e., Congress’ 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 leave.”<sup>246</sup> The doctrinal purpose of summarizing this evidence was revealed when the Court declared, “In 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 legislation.”<sup>247</sup> 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. What the quotation from *Hibbs* reveals is that the purpose of this step is to determine if prophylactic legislation is justified. If it is, one moves to a congruence and proportionality analysis to decide if the prophylactic legislation enacted was legitimate.

This summary shows that, as was the case in *Kimel* and *Garrett*, the Court’s doctrine in *Hibbs* retained an additional requirement beyond that which *Boerne* or the VRA cases required or that which this Article’s framework suggests. 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 (though see the discussion, *infra*, of how the Court analyzed those wrongs). And the state’s wrongs must be of the unconstitutional variety, Chief Justice Rehnquist’s

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<sup>241</sup> Not all employees are covered under the FMLA, see 29 USC § 2611; see also *Hibbs* at 739.

<sup>242</sup> See 538 U.S. at 724.

<sup>243</sup> *Id.* at 728.

<sup>244</sup> See *id.* at 728, fn 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” (emphasis added by Chief Justice Rehnquist)).

<sup>245</sup> See *supra*, Section III.

<sup>246</sup> See *id.* at 730–32.

<sup>247</sup> *Id.* at 735.

“in sum” statement avers. But we come here to the unstated point of departure between *Kimell/Garrett* and *Hibbs*. The majority’s recitation of leave inequalities includes little explanation of why such inequalities constitute 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.”<sup>248</sup> 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.<sup>249,250</sup> 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.”<sup>251</sup> 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’ assessment of the extent to which the threat of Constitutional violations loomed,<sup>252</sup> and 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

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<sup>248</sup> *Id.* at 733, fn 6.

<sup>249</sup> 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, 538 U.S. at 732, quoting H. R. Rep. No. 103–8, pt. 2, pp 10–11 (1993). But this is perhaps the least convincing argument the Court made, since every discretionary human resources decision leaves open the possibility of gender-based discrimination, racial discrimination, etc. Does it follow that the Court may dictate all HR policies?

<sup>250</sup> Indeed, the majority in *Lane* read *Hibbs* as having “approved the family-care leave provision of the FMLA as valid Section 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct.” 541 U.S. 509, 528.

<sup>251</sup> *See* 531 U.S. at 369–70.

<sup>252</sup> 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, *see* 538 U.S. at 730–32. He attempted to explain away this discrepancy in fn 3, noting that a 50-state survey showed that “public sector employees” had similar leave policies to “private sector employees,” *id.* at 730. But 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.

of scrutiny, while age and disability discrimination are judged under rational basis review.<sup>253</sup> “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 practice’ of irrational reliance on such criteria.”<sup>254</sup> 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 our 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 in fact been proven to be true Constitutional violations, as measured by the tiers of scrutiny. But what the Court is saying here 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 “liable,” one might say—the issue at hand in these cases is of course whether or not 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.”<sup>255</sup> But more to the point, 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 “existence” of classification-based state decisions) represents a fundamental departure from the structure of cases like *South Carolina* and *Boerne* itself, 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 *South Carolina*, the Court 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.<sup>256</sup> In making “history and pattern” a necessary condition in it-

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<sup>253</sup> See 538 U.S. at 735.

<sup>254</sup> *Id.* at 735.

<sup>255</sup> 521 U.S. at 532.

<sup>256</sup> See, e.g., 383 U.S. at 334 (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”).

self, 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.

Which brings us to “congruence and proportionality,” which remains the Court’s final step. Here again, we see the Court’s newfound deference to Congress. The problem was “difficult and intractable,” which justifies a far-reaching response<sup>257</sup>; an “across-the-board” requirement was Congress’ attempt to combat a “state-sanctioned stereotype”<sup>258</sup>—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.”<sup>259</sup> In short, since the statute “can ‘be understood as responsive to, or designed to prevent, unconstitutional behavior,’” it is upheld.<sup>260</sup> 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 really 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.

*Tennessee v. Lane*<sup>261</sup> bears some striking resemblances to *Hibbs*, but also some striking differences. The case involved Title II of the ADA,<sup>262</sup> which the Court upheld as it relates to physical access to courts. The issue of scrutiny, which was so paramount in *Hibbs*, arose again in the first step of the Court’s analysis (“to identify the constitutional right or rights that Congress sought to enforce”).<sup>263</sup> For reasons relating to due process, the state may not deny an individual access to a court for any rational reason, such as “cost and convenience”<sup>264</sup>; in other words, the right of access to a court is deserving of heightened scrutiny.<sup>265</sup>

The majority’s articulation of the next step seemed to differ from the “history and pattern” requirement that caused so much trouble in other post-*Boerne* cases. In *Lane*, Justice Stevens identified the second step as

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<sup>257</sup> 538 U.S. at 737, quoting *Kimel* at 88.

<sup>258</sup> *Id.* at 737.

<sup>259</sup> *Id.* at 738.

<sup>260</sup> *Id.* at 740, quoting *Boerne* at 532.

<sup>261</sup> 541 U.S. 509 (2004).

<sup>262</sup> 104 Stat. 337, 42 U.S.C. §§ 12131–12165.

<sup>263</sup> 541 U.S. at 522.

<sup>264</sup> *Id.* at 533.

<sup>265</sup> *Id.* at 529.

being an analysis of the “gravity of the harm” that the law addresses.<sup>266</sup> This seemed promisingly similar to our framework’s treatment of congruence and proportionality. However, the step itself seems indistinguishable from the second step in *Hibbs* and even *Garrett*. The Court combed the legislative record to determine if a “pattern of unconstitutional treatment” had been established.<sup>267</sup> This was easy enough to prove,<sup>268</sup> 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.<sup>269</sup> 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” problem 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,<sup>270</sup> 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 included an “undue burden” exception, which left the Court just as unmoved<sup>271</sup> as the BFOQ limitation in the ADEA did.<sup>272</sup> One wonders if the power of heightened scrutiny is affecting even the definition of a limited remedy.

Be that as it may, *Lane* represented a fairly straightforward application of the post-*Boerne* test as it has evolved. The main points of controversy in the case related to its basic posture and to the initial understanding of what constitutes a Constitutional violation. On the posture side, Chief Justice Rehnquist’s dissent took issue with the majority’s consideration of courthouses in isolation of the other buildings to which the statute mandates access.<sup>273</sup> On the Constitutional side, the dissent argued that a Constitutional violation does not occur until an individual is in fact unable to attend a proceeding that s/he had a Constitutional right to attend.<sup>274</sup> The idea that ramps and elevators would prevent that from happening—thus demonstrating the very idea of a prophylactic measure—was apparently irrelevant. But in any case, if one accepts the majority’s contention that the lack of handicapped accessible access to courtrooms constitutes a Constitutional violation, the rest of the case falls easily into place, whether under the Court’s framework or this Article’s.

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<sup>266</sup> *Id.* at 523.

<sup>267</sup> *Id.* at 525.

<sup>268</sup> *See id.* at 527.

<sup>269</sup> *Id.* at 529, citing *Hibbs* at 735–37.

<sup>270</sup> *Id.* at 531–33, quoting *Hibbs* at 737.

<sup>271</sup> *See* 531 U.S. at 372.

<sup>272</sup> *See supra*, note 209.

<sup>273</sup> *See* 541 U.S. at 550–52 (Rehnquist, C.J., dissenting).

<sup>274</sup> *See id.* at 545, 47.

### Part E: Limits on Congress under this Framework

The reader will perhaps have noticed that the above analysis seems to argue in favor of upholding every law that is addressed, with the exception of RFRA. Moreover, RFRA's fate under the Article's framework was not fully explored. One might therefore wonder the extent to which this framework puts true limits on Congress' ability to legislate under 14§ 5. This Part will therefore address this question. As was discussed in Section III, 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 (being forced instead to undergo two more questions), Questions Two and Three each represent a possible moment for invalidation.

One way a law might fail is if the difference between Congress' and the Court's interpretations of the Constitution are large enough that the law cannot in fact 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 18-22, regardless of whether or not 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, which strive to expand Congress' power to interpret the Fourteenth Amendment, such a law might be upheld, especially since it can be seen as a ratcheting up of rights.

The second way that a law might fail, of course, is under Question Three. 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. But such failure is nonetheless analytically possible. Imagine, for example, unconstitutional race discrimination that takes the form of white employees being given longer paid lunches than non-white 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, though it would serve to remedy the injustice. The harm both to people seeking full-time government employment and to those who benefit from having a government that works full-time would simply be too large to justify.

In reality, the majority of laws that would be struck down under this framework would probably suffer from a combination of the above types of problems. RFRA is a good example of this phenomenon. Though 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*. But because of the difference in Constitutional interpretation, 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 had its origins in the interpretation conflict. The law would therefore fail under Question Three of our framework, but the failure would be the cumulative result of all three of the steps in the process.

#### Section V: 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, though 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 because *Boerne*'s views on Congress' power to interpret the Constitution have actually had less of an impact (and have represented less of a change from *South Carolina*, though still a change from *Morgan*) than have *Kimel* and *Garrett*'s views on the level of deference that is due to Congress' implementation findings. Nor has the change that began with *Kimel* disappeared with *Hibbs* and *Lane*, though those cases went in the opposite direction. All of this brings us to the second thing 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' implementation findings, as it did in *Hibbs*. The power of implementation findings should not be underestimated, though the issue of legal findings has captured the imagination of so many scholars. The final contribution of this Article is its presentation of a new way to view 14§ 5 doctrine—a way that, by focusing on implementation rather than 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.