New Dimensions of the Section 5 Enforcement Power

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I. INTRODUCTION

This article provides commentary on the recent United States Supreme Court decision, Board of Trustees of the University of Alabama v. Garrett. The Garrett decision is related to a recent blitzkrieg of decisions by the Rehnquist Court interpreting and significantly narrowing the scope of the congressional

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1. 531 U.S. 356 (2001), reversing 193 F.3d 1214 (11th Cir. 1999) (applying the rational basis standard).
power under Section Five of the Fourteenth Amendment. Garrett provides some clarity as to the new dimensions of the interpretation of the Section Five power, but that clarity is of small comfort to the advocates of congressional power. Garrett confirms that the Court will set high and rigorous standards for the exercise of the Section Five power by Congress, even in the area of "civil rights" litigation.

With Garrett and the earlier Section Five decisions, the Rehnquist Court signaled, at a minimum, that it will not permit Congress to substitute its judgment for the Court's interpretation of constitutional guarantees. Under the circumstances, it is unlikely that Congress could utilize the Section Five power outside of some relatively narrow parameters. Moreover, as other commentators have argued, the Rehnquist Court's interpretation of the Section Five power may lead to reconsideration of the earlier Section Five decisions in the civil rights field—famous decisions which upheld the Nation's basic civil rights legislation.

II. THE BACKGROUND OF SECTION 5 LAW

The Thirteenth, Fourteenth and Fifteenth Amendments are commonly referred to as the "Enforcement Amendments." Historically, this title derived from the efforts of Congress, following the Civil War to develop constitutional mechanisms for enforcing the victory won on the battlefield. It is commonplace to understand that the Thirteenth Amendment was directed at abolishing slavery. When the Thirteenth Amendment proved to be inadequate to address all the post-war problems, the Reconstruction Congress passed the Fourteenth Amendment, including Section Five. When questions arose regarding the scope of the Fourteenth Amendment, Congress passed the Fifteenth Amendment basically

2. See Tracy Thomas, Congress' Section Five Power and Remedial Rights, 34 U.C. DAVIS L. REV. 673, 705 (2001). Adopted in 1868, Section Five of the Fourteenth Amendment is generally considered to be a "plenary" power. Section Five states "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Although the Fourteenth Amendment has four substantive provisions, only Section One has any present relevance. Section One states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. For present purposes, Section Five gives Congress the power to protect individuals from state action that violates the Equal Protection Clause or the Due Process Clause. See Ronald D. Rotunda, The Powers of Congress Under Section Five of the Fourteenth Amendment After City of Boerne v. Flores, 32 IND. L. REV. 163, 169 (1998).

3. The objective of this article is to describe the evolution of the Court's judicial review standard—from rational basis review to the searching review standard in Garrett. Although this tracing exercise necessarily involves some effort to explain the nature of the changes in the standard, I am not seeking to develop, at this point, a comprehensive evaluation of the Court's recent decisions.


6. See, e.g., KATHLEEN M. SULLIVAN AND GERALD GUNTHER, CONSTITUTIONAL LAW 925 (14th ed. 2001). In the secondary literature, the Enforcement Amendments are sometimes called the "Civil War Amendments" or the "Reconstruction Amendments." I consider these terms to be synonymy for the term Enforcement Amendments and, for present purposes, interchangeable.
outlawing racial discrimination in voting. Each Amendment contains a section conferring enforcement powers on Congress. Presumably, the Framers of each of the Enforcement Amendments utilized language so that Congress would have the necessary power to effectuate the goals of the Amendment. With respect to all three Amendments, the term selected by the Framers to describe the scope of the power conferred by the Amendment was "appropriate." 8

Although the Enforcement Amendments share terminology, congressional use of the Section Five power is considerably more controversial than that of the Section Two power of the Fifteenth Amendment because the scope of Section One of the Fourteenth Amendment is much broader and more general than the scope of Section One of the Fifteenth Amendment. 9 Because of this general Fourteenth Amendment scope, congressional exercise of the Section Five enforcement power invites both congressional "remedies" and "congressional definitions of the very rights themselves." 10

There is common recognition that the traditional rational basis standard was the test for the Section Five power. 11 The Court formerly established that the test for Section Two of the Fifteenth Amendment is the "traditional rationality test." 12 The history of the Section Five power is more complicated because of the greater breadth of the Fourteenth Amendment as discussed below.

A. THE MORGAN DECISION: THE "RATIONAL BASIS" STANDARD

The Katzenbach v. Morgan 13 decision is the benchmark in the background of the Section Five power. Much has been written about Morgan. Partly, this is a consequence of what Professor Stephen Carter called the "ethereal substance" of the Morgan decision. 14 This discussion focuses on the Morgan decision's determination that the Section Five power is reviewable with the rational basis standard.

An understanding of Morgan starts with the recognition that, in Lassiter v. Northampton Election Board, 15 the Supreme Court held that English literacy

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8. See Section 5, supra note 2. Ex. parte Virginia, 100 U.S. 339, 345-46 (1880). The scope of the power granted in Section Five is that the exercise of congressional power be "appropriate." The term "appropriate" is easily traced to the Supreme Court's seminal plenary powers decision in McCulloch v. Maryland, 4 Wheat. 316, 421 (1819). See Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). ("Thus the McCulloch v. Maryland standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment"). See also id. at 650. The powers of Congress have traditionally (since McCulloch) been considered to be "plenary" in nature. See Judith Olans Brown and Peter D. Enrich, Nostalgic Federalism, 28 HASTINGS CONST. L.Q. 1, 5 (2000).
10. Id.
11. Morgan, 384 U.S. at 651. See Tribe, supra note 9, at 937.
requirements for voting in state elections did not automatically violate the Fourteenth or Fifteenth Amendments. In spite of the 1959 Lassiter decision, the Congress had included Section Four (e) in the Voting Rights Act of 1965. Section Four (e) provided that no person who had successfully completed the sixth grade in an accredited school in Puerto Rico could be denied the right to vote because of illiteracy in English. The State of New York had a large Puerto Rican population, and New York had an English literacy requirement for voting. The effect of the New York English literacy requirement disenfranchised residents who were literate in Spanish.

The Morgan Court recognized that Section Four (e) was passed "for the explicit purpose of dealing the disenfranchisement of large segments of the Puerto Rican population in New York." In Section Four (e), Congress gave the right to vote to New York residents literate in Spanish but not in English. Congress therefore, exercised its Section Five power to reach a result different from the result in Lassiter.

For present purposes, it is important to understand that the Morgan decision seemed to rest on two alternative rationales. First, the Morgan Court held that under the Section Five power, the Voting Rights Act was a permissible remedy for the discrimination regarding governmental services present in New York City. This will be considered here as the "Morgan remedy power." Alternatively, Justice Brennan's opinion in Morgan contained a rationale suggesting that Section Five gave Congress the power to define the substance of the rights contained in Section One of the Fourteenth Amendment. This article refers to this power as the "Morgan definitional power."

The Morgan Court concluded that for the remedy power, the standard of judicial review was the traditional rational basis test. The Court also decided that the standard for the definitional power was the rational basis test. In this

16. Id. at 51.
17. 384 U.S. at 643.
18. Id.
19. Id. at 644.
20. Id. at 645 n. 3.
23. Id. at 653-54. The Lassiter Court decided that an English literacy requirement did not constitute impermissible racial discrimination. 360 U.S. at 53. In Section 4(e), Congress determined in essence that New York's English literacy requirement was "invidious discrimination." Morgan, 384 U.S. at 654.
24. This more expansive rationale of Morgan had been widely discussed since 1966. See generally William Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603, 606 (1975); Jesse H. Choper, CONGRESSIONAL POWER TO EXPAND JUDICIAL DEFINITIONS OF THE SUBSTANTIVE TERMS OF THE CIVIL WAR AMENDMENTS, 67 MINN. L. REV. 299, 308 (1982); see also City of Rome v. United States, 446 U.S. 156, 177 (1980) (§ 2 of Fifteenth Amendment); Chemerinsky, supra note 7, at 219. Because of the post-Morgan caselaw, this article will not discuss the definitional holding in any detail here. Generally, the Rehnquist Court may have a concern that a broad remedy under Morgan may actually serve the same function as a congressional redefinition under Morgan. The narrowing of the remedy power, therefore, reduces the risk of congressional pretext.
25. 384 U.S. at 653.
26. Id. at 656. The definitional power holding received criticism even from scholars who approved the remedial power holding. See Alexander M. Bickel, The Voting Rights Cases, 1966 SUP. CT. REV. 79, 102.
regard, and others, the Morgan remedy power and the Morgan definitional power are interrelated. What is important for this discussion is the analytical independence of the Morgan definitional power from the Morgan remedial power.

The separate status of the Morgan remedial power is important because the Court’s subsequent case law “repudiated” the Morgan definitional power. The repudiation of the Morgan definitional power in Flores is probably best understood as recognizing that a simple majority of Congress cannot amend the Constitution. This would be inconsistent with the super majoritary amendment provisions of Article V of the Constitution. The Morgan definitional power, however, is not this article’s focus. Here we are focusing on the standard used when Congress acted under the Morgan remedy rationale.

For purposes of this background, the important starting point is Morgan’s conclusion that the test for the congressional exercise of its Section Five “remedial” power is the “rationality standard.” The traditional rational basis test is the benchmark in tracing the post-Morgan doctrinal developments. Leaving aside any considerations of the Morgan definitional power, the subsequent decisions altered the Section Five law that the rational basis test is the proper standard for judicial review of the exercise of the Section Five power.

B. THE FLORES DECISION: THE “CONGRUENCE AND PROPORTIONALITY” STANDARD

The turning point in the trajectory of Section Five from the judicial deference of the Morgan decision to the heightened scrutiny and judicial activism of Garrett, was City of Boerne v. Flores. There is much that could be said about the Flores decision, but the focus here will be on the Court’s analysis of the exercise of the remedial side of the Section Five power.

There is considerable irony in the doctrinal developments. As Professor Tribe noted, Flores created a “significant change indeed in Section Five law.” However, the Flores decision provided little in the way of analysis of the standards for the remedial power. There was, moreover, no dissent in Flores addressing the Section Five remedial power issues. The Flores Court focused on the scope of the “definitional” power and how that violated the Court’s standards.

27. TRIBE, supra note 9, at 937.
29. TRIBE, supra note 9, at 937.
30. See Morgan, 384 U.S. at 653.
31. Flores, 521 U.S. at 536. See Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section Five Powers, 53 STAN. L. REV. 1127, 1143 (2001). Between Morgan and Flores, there were decisions addressing the scope of the Section Five power. Most notable was Oregon v. Mitchell, 400 U.S. 112 (1970). By a 5-4 vote, the Court struck down the 1970 Voting Rights amendments where Congress required the states to permit 18 year olds to vote in state elections. Oregon was a highly fragmented decision. Moreover, the precedential value of Oregon has been superseded and is beyond our discussion here. Flores and its “searching scrutiny” dramatically changed the precedential landscape, and I shall treat Flores as the turning point in this analysis. See also Lopez v. Monterey County, 525 U.S. 266, 285-86 (1999).
32. TRIBE, supra note 9, at 957.
for separation of powers. Thus, it is only in some of the post-Flores decisions that the Court delineated the new dimensions of the Section Five remedial power.

The Flores decision derived from a highly controversial free exercise decision of the Rehnquist Court in Employment Division v. Smith. The Smith Court implicitly overruled, or at least radically limited, the then-existing free exercise doctrine from Sherbert v. Verner. In Smith, the Court held that although free exercise was a fundamental right, a free exercise claim would not receive the strict scrutiny level of judicial review unless the state's regulation was a purposeful burden on free exercise interests. Smith thus constituted a drastic limitation on the scope of free exercise claims.

Congress reacted to Smith directly and transparently by passing the Religious Freedom Restoration Act of 1991 (RFRA). RFRA explicitly rejected the Court's holding in Smith. For present purposes, it is important that RFRA mandated that most free exercise claims should be judicially reviewed using the strict scrutiny standard.

At the risk of some simplification, there are two "aspects" to the Flores decision: the "federalism" aspect and a "separation of powers" aspect. The separation of powers aspect of Flores derives from the rather transparent attempt to overrule Smith merely by means of a statute. The federalism aspect of Flores was based on the congressional use of its Section Five power to pass RFRA as a remedy for state discrimination against free exercise interests. In this aspect of RFRA, the Congress directed that a state must make exceptions for free exercise interests from otherwise neutral, generally applicable regulations. Congress claimed, in essence, that its Section Five power permitted it to impose a standard of state conduct.

The Flores Court plainly rejected the Section Five definitional power. The Flores Court bluntly asserted that the Judiciary was supreme in such matters. The impact of the Flores decision on the Section Five remedial power was less clear, in part because the Court seemed to refer to that part of the Morgan decision approvingly.

Despite the seeming affirmation of the Morgan remedial power, the Flores Court overturned RFRA by changing the standard of judicial review used for Section Five. As noted above, the standard in Morgan was the deferential

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35. See 494 U.S. at 886, n. 3. This understanding of Smith was confirmed in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
36. Flores, 521 U.S. at 512.
37. Id. at 515.
38. Id.
39. See id. at 524.
40. See id. at 535-36.
41. See id. at 532.
42. See Nagel, supra note 4, at 862. See also Flores, 521 U.S. at 529; id. 521 U.S. at 545 (O'Connor, J., dissenting) ("In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute").
43. See Flores, 521 U.S. at 528.
rational basis test. RFRA would have survived rational basis. But, in *Flores*, the Court instead chose to use a test requiring that Section Five remedial legislation must exhibit “congruence and proportionality between the injustice to be prevented or remedied and the means adopted to that end.”44 In *Flores*, the congressional action under Section Five was deemed lacking congruence and proportionality because RFRA was an overbroad means to address the potential problem.

As of *Flores*, it was unclear whether the Morgan rational basis standard remained (and *Flores* was merely distinguishable), or whether *Flores* adopted some standard other than the rational basis test for the Section Five power.45 Within a few years, the verdict would come in. The “congruence and proportionality” standard was not just a synonym for rational basis. Rather, we now know that the *Flores* Court set a stricter standard than rational basis for the exercise of congressional power under Section Five.46

After the *Flores* decision, the Rehnquist Court developed and expanded the “congruence and proportionality” test. The standards for the Section Five power grew higher with the consequence that the states were more likely to win. The Court tightened the standards and thereby made it more difficult for Congress to engage in “remedial” legislation under Section Five.47

C. THE COLLEGE SAVINGS BANK DECISION: THE DUTY TO IDENTIFY

After *Flores*, the Court next addressed Section Five in the *College Savings Bank* decision. In *College Savings Bank*, Congress earlier passed the Patent Remedy Act, acting pursuant to the Section Five power. In *College Savings Bank*, the question was whether the Section Five power provided Congress with the power to correct an apparently perceived problem in state infringement on patents. Applying a post-*Flores* test to the Patent Remedy Act, the Court, per Chief Justice Rehnquist, decided that Congress did not satisfy the Section Five standard.49

In *College Savings Bank*, the Court not only applied the congruence and proportionality test from *Flores*, but it also restated it. The restatement was more than mere semantics as *College Savings Bank* recast the Section Five remedial standard in ways which would prove significant. The Court restated the *Flores* standard as follows: “[f]or Congress to invoke Section Five, it must

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44. *Id.* at 520.

45. Nagel, *supra* note 4, at 862. The *Flores* Court concluded that RFRA violated both “separation of powers and the federal balance.” 521 U.S. at 536. Thus, because *Flores* turned in part on the separation of powers rationale, it was not clear how a Section Five issue would be analyzed. The first “pure” Section Five case was *College Savings Bank*.

46. *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368-69 (2001). In *Flores*, the Court stated, in its historical analysis that “Congress’ power was no longer plenary but remedial.” 521 U. S. at 522. The Court did not explain this statement, but it may have presaged the subsequent decisions.

47. Then, the Court decided *Kimel* in 2000. The next landmark is the *Morrison* decision in 2000. Finally, the Court’s trajectory culminates for now with the *Garrett* decision in 2001.


49. *Id.* at 647.
identify the conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remediying or preventing such conduct . . . . ^50 The Flores language of “congruence and proportionality” was transformed into a two-pronged inquiry: (1) the “identification” requirement and (2) the “tailoring” requirement.

Applying this recast standard for Section Five, the Court determined that the legislative history did not indicate that Congress had found a record of patent infringements by the states. ^51 The Court noted that “Congress came up with little evidence of infringing conduct on the part of the States.” ^52 Because the evidentiary record did not satisfy some undefined quantum of conduct by the states, the Court held that Congress had failed the “identification” prong.

The College Savings Bank Court also determined that Congress failed the “tailoring” prong in the restated standard. The Court concluded that “Congress made all States immediately amenable to suit in federal court for all kinds of patent infringement and for an indefinite duration.” ^53 The Court also concluded that, for purposes of the tailoring prong, Congress had ignored the existence of state law remedies. ^54 Under these circumstances, the Court held that Congress improperly tailored the remedies of Patent Remedy Act to the alleged problem. ^55

The significance of College Savings Bank may seem, at first glance, small. Doctrinally, however, College Savings Bank was the Rehnquist Court’s initial effort to recast the Section Five standard. It is likely that the “congruence” criteria from Flores became the “identification” prong in the College Savings Bank test. The “proportionality” criterion from Flores was recast as the “tailoring” prong in College Savings Bank. Thus, College Savings Bank both renamed and redefined the dimensions of the new Section Five standard.

It is instructive to compare the identification and tailoring prongs with the prongs of the rational basis standard. ^56 First, in the rational basis test, all the government needs is a conceivable legitimate interest. ^57 There is no responsibility for the Congress to identify, or actually present evidence of its legitimate interest. In College Savings Bank, however, the state was required to identify its actual interests. Second, in rational basis, it is the conventional wisdom that any means that Congress might conceivably think would advance the legitimate interest will be upheld. ^58 In contrast, the “tailoring” prong of the College Savings Bank decision is clearly more stringent than the rationally

^50. Id. at 639.
^51. Id. at 640.
^52. Id.
^53. Id. at 647.
^54. Id. at 643.
^55. Id. at 647. The Court described the problem as the Act’s “indiscriminate scope.” Id. The Court ultimately concluded the “statute’s apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime.” Id. at 647-48. Through the rigorous means scrutiny of the new tailoring test, the Court thus exposed this “pretext” on the part of Congress.
^56. The rational basis standard was used for Section Five in Morgan. See supra notes 25-29.
related means test. As the *College Savings Bank* Court explained, the tailoring prong prohibits the use of overbroad means.\(^{59}\) As of *College Savings Bank*, therefore, the Section Five remedial power standard became less deferential on both prongs of the test.\(^{60}\)

Doctrinally, *College Savings Bank* may have its greatest significance as a rejection in the use of judicial deference for the means prong of the Section Five standard. Under the traditional rational basis test, any means—as long as they are not irrational—are constitutional. The *College Savings Bank* “means” test, as Professor Tribe notes, is remarkable in that it is a repudiation of this traditional degree of judicial deference to the choice of means by Congress.\(^{61}\)

Professor Tribe also suggests that after *College Savings Bank*, congressional efforts to legislate pursuant the Section Five remedial power were “saddled with something between intermediate and strict scrutiny . . .”.\(^{62}\) Without agreeing that *College Savings Bank* adopted one of these high standards, it is quite clear that the Court moved away from the traditional rational basis test and away from the deference that it embodied.\(^{63}\) With *College Savings Bank*, the Rehnquist Court also moved away from the ambiguous congruence and proportionality standard of *Flores* and strongly moved toward the application of rigorous scrutiny. The harsh nature of that new standard would evolve in the following term.

**D. THE KIMEL DECISION: THE DUTY TO IDENTIFY A PATTERN**

After *College Savings Bank*, the next decision regarding the Section Five power was *Kimel v. Florida Board of Regents*.\(^{64}\) *Kimel* involved the 1967 congressional Age Discrimination in Employment Act (ADEA). The ADEA made it unlawful for employers, including state employers, to discriminate in employment against individuals who are older than 40.\(^{65}\) The ADEA was “civil rights” protection in employment for certain older people. In *Kimel*, the Court struck down the ADEA’s applicability to the states.\(^{66}\)

Like *College Savings Bank*, and other decisions, the question about the scope of congressional power under Section Five arose in the context of an Eleventh Amendment challenge to certain state employment practices. In *Kimel*, the plaintiff claimed that state employers discriminated against him based on

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\(^{59}\) *College Saving Bank*, 527 U.S. at 647.

\(^{60}\) The *College Savings Bank* Court’s terminology also suggested, without explicitly holding, that the burden of persuasion in the new Section 5 standard rested on Congress: “. . . for Congress to invoke Section 5, it must identify . . . “ 527 U.S. at 639 (emphasis added). This allocation of the burden of persuasion is inconsistent with the rational basis standard, and this would appear to be a further indication that the new Section 5 standard is more rigorous than the traditional rational basis standard.

\(^{61}\) TRIBE, *supra* note 9, at 959.

\(^{62}\) *Id*.

\(^{63}\) This paper addresses the subsequent decisions. It is arguable that *College Savings Bank* did not go quite to the level of “intermediate scrutiny” and certainly did not approach “strict scrutiny.”

\(^{64}\) 528 U.S. 62 (2000).

\(^{65}\) See *id*. at 67-69.

\(^{66}\) *Id*. at 92.
age, and the plaintiff sought money damages. The Court, in an opinion by Justice O'Connor, held that Congress had not abrogated the State's Eleventh Amendment immunities. The Court determined that Congress did not have the authority to abrogate the State's Eleventh Amendment immunities under Section Five because the congressional action adopting the ADEA did not comport with the post-Flores standards for evaluating Section Five legislation.

The Kimel decision utilizes the "identification" and "tailoring" prongs from the College Savings Bank decision. Given that the ADEA was passed in 1967, long before College Savings Bank, it probably was no surprise that Congress thought it only needed a rational basis to pass the ADEA. After all, in 1967, Morgan was not just good law, but it had recently reaffirmed the use of the rational basis test. In 1999, however, the Rehnquist Court did not let this historical context stand in the way of imposing the "new federalism" on congressional decision-making.

The Kimel Court insisted that the congressional action under Section Five must be based on an appropriate identification of a problem and that the means selected should be appropriately tailored to correct that problem. The Kimel Court concluded, as in College Savings Bank, that both prongs of the test failed. In doctrinal contrast to College Savings Bank, however, the Kimel Court discussed the prongs in reverse order: the tailoring prong and then the identification prong. As for the tailoring prong, the Kimel Court initially concluded that the ADEA was too "broad." Justice O'Connor then reasoned that the obligations imposed by the ADEA on the state and local governments were "disproportionate" and, thereby, not appropriately tailored. The Court finally concluded that the ADEA should be rejected because it was an attempt to ratchet up the applicable standard of state conduct regarding its employees into "heightened scrutiny."

Having decided that the ADEA failed the tailoring prong, the Court then turned to a discussion of the sufficiency of the congressional "identification" of the problem. Having looked at the legislative history, the Court concluded that "our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the states was an unwarranted response to a perhaps

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67. See id. at 70.
68. Id. at 92.
69. See id. at 82-88.
70. Id. at 82.
71. Id. at 91.
72. Id.
73. See id. at 82-88. It is not clear why Justice O'Connor wrote the opinion in what seemed to be a "reverse" order. The majority's treatment does confirm that the new standard is a conjunctive test. The analysis of the prongs is interrelated.
74. Id. at 86. The Kimel Court characterized the ADEA's flaw as an "indiscriminate scope." Id. at 91.
75. Id. at 86. The Kimel opinion is notable for suggesting that there is no requirement of "razor-like precision" in the means prong. Id. at 83.
76. Id. at 88. Congressional efforts to change the level of judicial review were rejected in Flores, and Kimel fits that mold. In Flores, the concern was the separation of powers issue created by the transparent congressional effort to overturn the Smith decision merely by a statute. There is no reference to separation of powers as such in Kimel.
inconsequential problem." The *Kimel* Court found that Congress never identified any pattern of age discrimination by the states, much less any discrimination that arose to the level of constitutional violation. Perhaps not satisfied that its point about insufficiency of identification was made, the Court also issued a second conclusion: "A review of the ADEA’s legislative record *as a whole*, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."78

The Court continued its refinement of the identification prong: "Congress’ failure to discover any significant pattern of unconstitutional discrimination here, confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."79 In its restatement of the congressional failure to satisfy the identification prong, the Court concluded that the “failure” derived from the lack of “any significant pattern of constitutional discrimination.”80 The *Kimel* Court thus suggested that, in order to satisfy the identification prong, Congress must identify more than just various instances of a problem. *Kimel* seemed to suggest that the Congress must identify a “significant pattern of unconstitutional discrimination.”81

Obviously, on the facts of *Kimel*, Congress would not have identified such a “significant pattern.” In the era before *Flores*, Congress would not have understood that it had any such duty. In fact, the Congress probably did not have even as much evidence in the record as was the case with the *College Savings Bank*. But the *Kimel* Court suggested that the identification requirement now required a “significant pattern.”82 Although this terminology about a “pattern” was arguably dictum in *Kimel*, it seemed to provide a foundation for a further tightening of the Section Five standard. In *Garrett*, the dictum about significant “pattern” would become a holding.

**E. THE MORRISON DECISION: THE “TAILORED MEANS” PRONG**

Before *Garrett*, however, the Court addressed the Section Five standard in the now familiar *Morrison*83 decision. In another opinion authored by Chief Justice Rehnquist, the Court held that the private federal cause of action created by Section 13981 of the Violence Against Women Act84 (VAWA) was unconstitutional. The Court’s discussion of congressional power under the Interstate Commerce Clause has received considerable attention.85 The focus here, however, is on the alternative holding in *Morrison* regarding the Section

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77. *Kimel*, 528 U.S. at 89.
78. *Id.* at 91 (emphasis added).
79. *Id.*
80. *Id.*
81. *Id.*
82. *See id.*
Five remedial power.\(^86\)

Congress passed the VAWA, as an alternative basis, on the grounds of its Section Five remedial power.\(^87\) Since Section 13981 was aimed at private conduct, Congress faced a “state action” problem. To circumvent this issue, Congress concluded that, because of gender bias, at least some of the states were failing to enforce their existing laws in a manner sufficient to protect women against violence based on gender and that this neglect or refusal was harmful to women.\(^88\) The \textit{Morrison} Court held, in an opinion by Chief Justice Rehnquist, that the Section Five power of Congress was insufficient to sustain the provision of the VAWA.\(^89\)

The Court’s analysis of the Section Five issue was a typically terse Rehnquistian discussion. The majority applied the Section Five test from \textit{Flores} and \textit{College Savings Bank}.\(^90\) That is, the Court required that Congress should have “identified” a problem and then the Congress would use appropriately “tailored” means to remedy the evil that was identified.\(^91\)

In contrast to \textit{College Savings Bank}, the \textit{Morrison} majority concluded that Congress arguably satisfied the identification prong.\(^92\) While this point is somewhat obscured by the “state action” requirement for the applicability of the Section Five power, the \textit{Morrison} majority acknowledged that the four years of hearings by the Congress created a “voluminous record” and that this record provided a sufficient identification of the problems concerning gender-based violence.\(^93\) \textit{Morrison} confirmed, however, that the Section Five standard was a conjunctive two-part test. While the VAWA satisfied the identification prong, the record was insufficient to satisfy the tailoring prong.

In \textit{Morrison}, the Rehnquist Court concluded that the VAWA failed the means prong of the new Section Five standard because it was a disproportionate response to the problem identified.\(^94\) Even though the Court seemed to assume, for this part of its opinion, that the problem was biased or negligent enforcement of existing state laws, the Court faulted Congress because “Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe . . .”\(^95\) Then, even assuming that Congress might permissibly “aim” at private conduct, the \textit{Morrison} Court determined that

\begin{itemize}
  \item 86. \textit{Morrison}, 529 U.S. at 619-27. The Section Five power is discussed in Part III of the opinion. Unlike \textit{Kimel}, the Section Five analysis in \textit{Morrison} is free from any Eleventh Amendment discussion.
  \item 87. 529 U.S. at 619.
  \item 88. \textit{id.} at 620, 624-25.
  \item 89. \textit{id.} at 627.
  \item 90. \textit{id.} at 626.
  \item 91. \textit{See also} \textit{Kimel} v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000). Only Justice Breyer’s dissent in \textit{Morrison} addressed the Court’s Section Five analysis, and that discussion was brief. Justice Breyer did “flag” the change in the Section Five standard by questioning the majority’s new evidentiary standards. Again, the new evidentiary standards for Congress appeared adequate met in \textit{Morrison}, but the Court was setting a nearly impossible standard for the future.
  \item 92. 529 U.S. at 620 ("a voluminous congressional record").
  \item 93. \textit{id.} The Court recognized that Congress had concluded that the problem included “insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments . . .” \textit{id}.
  \item 94. \textit{id.} at 626.
  \item 95. \textit{id.}
the development of a federal statute with nation-wide applicability was an
overbroad response to the problem of inadequate state protection against bias-

based violence. First, the Court concluded that not all states, or all areas,
actually had gender-bias law enforcement problems. The Court then
contrast ed the VAWA to the Voting Rights Act decision where, according to the
Morrison majority, Congress tailored the legislation to fit those geographic parts
of the country where particular problems existed. The Morrison decision thus
suggested that Congress could not impose the VAWA on those states whose own
laws apparently deal with the problem of gender-based violence in an adequate

fashion. The VAWA failed the tailoring prong both because it was not aimed
at state actors and because it was geographically overbroad.

Regarding the Section Five means test, Morrison certainly built on College
Savings Bank and Kimel in that it was another decision where the Court struck
down a federal statute because the congressional means chosen were
disproportionally overbroad. The Court even suggested that the national
uniformity of the VAWA was actually a constitutional problem for purposes of
Section Five. A remedy of national scope was an overbroad means when the
problem was not present in all parts of the nation. This would be a theme
revisited in later decisions.

Regarding the identification test, Morrison indicated that it would be
possible to satisfy it, but Morrison actually set a fairly rigorous standard in that
the VAWA was based on over four years worth of hearings and substantial
scientific research. If Morrison would represent the minimum expected of
Congress in identifying a problem, such a standard would constitute a significant
limitation on congressional action. For example, Congress will not always have
the time to assemble the “mountains of data” as it did in Morrison.

III. THE GARRETT DECISION AND THE SECTION 5 POWER

In American society, no group would have a closer parallel to the racial
minorities than Americans with disabilities, and Congress responded to this
similarity with the Americans With Disabilities Act (ADA), passed pursuant
to the Section Five power. At the time Congress passed the ADA, the Court had
already determined that the developmentally disabled were not a suspect or
 quasi-suspect class. Although the Court did not provide the disabled with

96. Id. at 627.
97. Id. at 626. In the Voting Rights Act of 1965 the preclearance provisions applied mainly to
certain Southern States and provision (4)(e) suspending New York’s English language proficiency
requirement applied effectively only in New York City. Both provisions were geographically limited.
This “geographic” limitation on congressional action was further developed in subsequent decisions.
98. Id. at 626-27. Justice Breyer’s dissent criticized this nation-wide requirement: “This Court has
not previously held that Congress must document the existence of a problem in every State prior to
proposing a national solution.” Id. at 666 (Breyer, J., dissenting). Unfortunately the dissent did not cite
any authority for this conclusion.
99. Id. at 627.
100. See id. at 620.
101. Id. at 628 (Souter, J., dissenting).
heightened judicial protection, Congress apparently decided, with the passage of
the ADA, that the disabled should receive some heightened legislative
protection. The Garreț decision addressed the apparent disparity between the
judicial and congressional approaches to protecting the disabled against
discriminatory state action.

A. THE ADA AND SECTION 5 REMEDIAL POWER

In Garreț, two plaintiffs sued state entities in Alabama. Garrett was a
nurse at a University of Alabama hospital; the other plaintiff was a security
guard at the Alabama Department of Youth Services. Both sued their state
employers under Title I of the Americans With Disabilities Act ("ADA"). In
both cases the claim was based upon a refusal of the state employer to make
certain requested “accommodations” for the disabilities; in both cases the
State of Alabama defended on the grounds of the Eleventh Amendment. Thus, at one level, the question presented in Garreț is whether Congress had,
under Section Five, the authority to abrogate the State’s Eleventh Amendment
immunity.

B. THE ELEVENTH AMENDMENT ANALYSIS IN GARRETT

Under Eleventh Amendment doctrine, the abrogation question in Garreț
presented the now-familiar two-part analysis: (1) whether Congress had intended
to abrogate; and (2) whether Congress had the authority to abrogate. In
Garreț, there was no real question that Congress intended to abrogate Eleventh
Amendment immunity with the ADA. The question in Garreț, for purposes
of the Eleventh Amendment, narrowed to whether Congress had the authority
under Section Five to abrogate the State’s Eleventh Amendment immunity for
the money damages claimed under the ADA.

In order to abrogate the Eleventh Amendment immunity, Congress relied
upon both its powers under the Interstate Commerce Clause and on Section Five.
Since the adoption of the ADA, the Supreme Court had decided in Seminole
Tribe v. Florida that none of Congress’ Article I powers included the power
to abrogate. By the time the Garreț decision reached the Court, the only
argument for abrogation was, therefore, Section Five of the Fourteenth

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106. Id.
107. Id. Title I of the ADA forbids discrimination in employment based on certain “disabilities.” In
addition to prohibiting discriminatory acts, the ADA imposes a duty on employers to make a “reasonable
accommodation” for an otherwise qualified employee so that the otherwise qualified employee can work
without undue hardship on the employer. Title I of the ADA applies to both public and private
employers. See id. at 360-61.
108. Id. at 362.
109. Id. at 363.
110. Id. at 364.
111. Id.
113. 531 U.S. at 364.
Amendment.

C. THE NEW SECTION 5 STANDARD FOR REVIEWING CONGRESSIONAL ACTION

Recall that the Court used a series of decisions to strike down four congressional statutes based upon the Section Five powers: The Religious Freedom Restoration Act,114 The Violence Against Women Act,115 The Patent Remedy Act,116 and The Age Discrimination In Employment Act.117 Since the Flores decision, the Court applied a two-pronged “identification” and “tailoring” standard in each case; moreover, the Court also ratcheted up the level of scrutiny in each decision. In Garrett, the Court continued this pattern. Taking the Section Five standard from the College Savings Bank decision, the Garrett Court found that the ADA’s damages remedy failed both prongs of the Section Five standard.118

1. Garrett and the “Identification” Prong

First, the Garrett Court applied the identification prong. The Court held that Congress insufficiently identified a pattern of disability discrimination arising out of the conduct of the States.119 In this regard and drawing on the Kimel decision, the Court insisted that Congress was required to have evidence of a “pattern” of state discrimination regarding disabilities.120 Evidence of “instances” or “examples” would be insufficient.

Then, extending beyond Kimel, the Court held that not just any evidence would be cognizable in establishing the pattern.121 The Garrett plaintiffs relied on evidence of past employment discrimination based on disabilities by counties or municipalities, and the plaintiffs sought to demonstrate, by analogy, that there was a serious problem of discrimination based on disabilities on the part of the States.122 The Garrett Court rejected this evidence because the counties and municipalities were not the State.123 In continuing to sift the evidence, the Court conceded that plaintiffs could identify half a dozen examples from the congressional record that did involve the States.124 The Garrett Court, however, flatly rejected the six examples as quantitatively insufficient to establish the “pattern” required by the Section Five standard.125

118. 531 U.S. at 372. See State Sovereignty, supra note 104, at 311.
119. 531 U.S. at 368.
120. Id. at 370. See State Sovereignty, supra note 104, at 309.
121. See 531 U.S. at 368-69.
122. See id. The counties and municipalities are not covered by the Eleventh Amendment, and they are subject to money damages claims through the ADA.
124. 531 U.S. at 369.
125. Id. at 370. The concurring opinion of Justice Kennedy (joined by Justice O'Connor) agreed
In addition to a quantification requirement, the Garrett Court also examined the evidence with a qualitative screening. First, the Court was critical of the ADA’s creation of an “accommodation duty,” and the ADA’s use of a “disparate impact” standard of liability. The Court rejected any evidence about state discrimination arising from these ADA provisions since the states would not be constitutionally required, under decisions such as Cleburne, to make such “accommodations.” The Court thus evaluated the evidence before Congress both quantitatively and qualitatively. With this rigorous evidentiary approach, the Garrett Court tightened the “identification” requirement of Section Five standard even beyond the narrow scope of Kimel.

2. Garrett and the “Tailored Means” Prong

The Garrett Court also considered the tailoring prong of the Section Five standard. The Court held that, because of the nation-wide scope of the ADA, the Act was not a proportionate response to this purported problem of disability discrimination by the states. The Court found that, as compared to the Voting Rights Act upheld in Morgan, the congressional program was overbroad.

Even before Garrett, the tailoring prong of the new Section Five standard had been scrutiny requiring a close fit between congressional goals and means. Congress failed the tailoring prong of the Section Five standard in Flores, Morrison, College Savings Bank and Kimel. Thus, Congress’s failure in Garrett was, perhaps, predictable. The Court’s explanation is Garrett is, however, highly suggestive. The Court pointed to the only congressional “response” which had satisfied the Section Five standard—Voting Rights Act of 1965. The Garrett Court described the Voting Rights Act approvingly as “a detailed but limited remedial scheme.” As such, the Garrett Court outlined the apparent requirements to satisfy the tailoring prong.

The Garrett decision is similar to the Morrison decision in several ways. In Morrison, Congress passed a private cause of action with respect to gender based violence, and this was applicable against the states. In Morrison, of course, there was no Eleventh Amendment issue, and the Section Five analysis in Morrison was not encumbered with any Eleventh Amendment analysis. The Morrison

with the Chief Justice’s majority opinion that the record for the ADA failed the identification prong of the Section Five standard. Justice Kennedy reasoned that: “one would have expected to find in the decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violation. This confirming judicial documentation does not exist.” 531 U.S. at 376 (Kennedy, J., concurring). While the Kennedy concurrence appeared to use a narrower grounds that the majority, this passage potentially provides a suggestion for future congressional action under Section Five: in identifying the requisite pattern of unconstitutional conduct, Congress should include a “confirming” record of judicial materials.

126. Id. at 372-73. See State Sovereignty, supra note 104, at 309.
127. 531 U.S. at 374.
128. Id. at 373. See South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966). The Garrett Court approvingly described the Voting Rights Act of 1965 as a “detailed but limited remedial scheme,” 531 U.S. at 373. Since the Voting Rights Act provisions were the only congressional actions to satisfy the Section Five means test, this may signal that the means test requires that a “remedial scheme” be “limited” in some fashion before it would satisfy constitutional muster. The term “detailed” may mean that the remedial scheme can be intricate or even complex—but it must observe some “limits.”
129. 531 U.S. at 373.
Court went directly to the question whether Section Five would permit the Congress to establish a private cause of action, and the Court decided Congress did not have the power under Section Five.

With *Morrison* as precedent, the *Garrett* decision was not surprising. The ADA provided a private cause of action like the VAWA in *Flores*. *Garrett* utilized the searching scrutiny standard much like the *Morrison* decision. While Congress apparently passed the identification prong in *Morrison*, it failed that test in *Garrett*. *Garrett* thereby confirmed the searching scrutiny of the new Section Five standard.\(^{130}\)

The *Garrett* decision applied the "proportionality" means test and found that Congress failed there, too. In sum, the *Garrett* Court demonstrated that both congressional goals and congressional means will receive a heightened scrutiny.\(^{131}\)

**IV. CONCLUSION: SEARCHING SCRUTINY UNDER SECTION FIVE**

It is a rather easy summation that, from *Morgan* to *Garrett*, much changed regarding the standard of judicial review of the exercise of Congress' Section Five power. In *Morgan*, the Warren Court established that the Section Five remedial power would be reviewed like any other plenary power—with the rational basis standard.\(^{132}\) Thirty years later, the Rehnquist Court began dismantling this deference to Congress.

The *Flores* decision was the first step as the Court substituted the "congruence and proportionality" standard for rational basis.\(^{133}\) The next step, in the *College Savings Bank* decision, involved the Rehnquist Court's recasting of the "congruence and proportionality" standard into a two part test: (1) the identification prong and (2) the tailored means prong.\(^{134}\) This decision strongly suggested that the Section Five standard was no longer deferential.

In the third step, the *Kimel* decision confirmed the non-deferential nature of the new standard when it refined the identification prong to require that Congress identify a *pattern* of unconsitutional conduct as a prerequisite for action under Section Five.\(^{135}\) Moreover, in *Morrison*, the Court confirmed that, although the identification prong might be satisfied, the tailored means prong required a tight fit.\(^{136}\) The Court's nondeferential trajectory then culminated in the *Garrett* decision's conclusion that, with the ADA, Congress failed both prongs of the new standard.\(^{137}\) With *Garrett*, the Court confirmed that it would...

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130. Chief Justice Rhenquist authored *Garrett*, *Morrison*, and *College Savings Bank*.
131. See *State Sovereignty*, supra note 104, at 311.
132. See text supra accompanying notes 13 to 30.
133. See text supra accompanying notes 39 to 47.
134. See text supra accompanying notes 48 to 63.
135. See text supra accompanying notes 64 to 82.
136. See text supra accompanying notes 83 to 101.
137. See text supra accompanying notes 102 to 130.
use a searching scrutiny of congressional action under Section Five.\textsuperscript{138}

The trajectory of the Section Five remedial power shows that the Section Five power of Congress was once treated with judicial deference,\textsuperscript{139} but now the power is tested against a rigorous level of judicial scrutiny. First, congressional goals are now closely scrutinized. Under \textit{Morgan}, all Congress had to have was some \textit{conceivable} basis to exercise its power. Today, after \textit{Garrett}, Congress must have “identified” the “problem” it seeks to address.\textsuperscript{140} Moreover, not just any problem will be sufficient. \textit{Garrett} made it clear that the identification requirement is that the challenger show that a significant “pattern” of state conduct exists.\textsuperscript{141} The \textit{Garrett} Court suggested that Congress must present “abundant evidence of States’ systematic denial . . .”\textsuperscript{142} Thus, the \textit{Garrett} Court’s identification requirement of a “systematic denial” is much more demanding than \textit{Morgan}’s requirement that the Congress have only some “conceivable” basis.

After \textit{Garrett}, not only are congressional goals suspect, but so are congressional means. In the decisions reviewed above, the Rehnquist Court narrowed the “means” prong of the Section Five standard until, as of \textit{Garrett}, the means must be tailored to the scope of the pattern of unconstitutional state conduct.\textsuperscript{143} The new Section Five standard does not permit congressional actions to use “overbroad” means.\textsuperscript{144} In particular, Congress may not use a nation-wide scheme to address a problem identified as limited to a particular state\textsuperscript{145} or region.\textsuperscript{146}

Thus, after \textit{Garrett}, Congress may use its national power under Section Five on a nation-wide basis only if it has first identified a nation-wide pattern of state conduct violating the provisions of Section One guarantees. The \textit{Garrett} standard for identifying even a “non-national” problem would make the identification requirement difficult for Congress to satisfy. Again, in only the \textit{Morrison} decision had Congress arguably satisfied the identification prong, and \textit{Morrison} involved four years of hearings and a “mountain of data.” If that quantum of data would turn out to be the minimum expected of Congress before it can exercise its Section Five powers, then Congress will simply not be able to use this power to address many problems in the post-industrial society. In a set of four decisions, the Rehnquist Court abruptly constricted the scope of the Section Five power. The consequence is that the Section Five remedial power is seriously diminished.

\textsuperscript{138} The term “searching scrutiny” is borrowed from the \textit{Flores} decision. \textit{See id.} 521 U.S. at 534.


\textsuperscript{140} \textit{See Bd. of Trustees of the Univ. of Ala. v. Garrett}, 531 U.S. 356, 368 (2001).

\textsuperscript{141} \textit{See id.} at 370. \textit{See also Kimel}, 528 U.S. at 91.

\textsuperscript{142} 531 U.S. at 370.

\textsuperscript{143} \textit{Id.} at 374.


\textsuperscript{145} \textit{See Katzenbach v. Morgan}, 384 U.S. 641, 652 (1966), for congressional “means” limited to one state.

In five short years (1997-2001), the Rehnquist Court recast the Section Five remedial power. The Court changed the standard: from the deferential rational basis test to the non-deferential, searching scrutiny standard. Under the Rehnquist Court, the Section Five power went from "plenary" status to a paltry condition. It simply is not much of a power any more.

In roughly the time it took the nation to subdue the Confederate States in the Civil War, the Rehnquist Court subordinated that national power derived from the Civil War's bloody victory to the purported interests of the states. While the states lost the Civil War, the victory of the federal government was ironically undercut by a searching judicial review of the exercise of the congressional powers under the Enforcement Amendments.

147. Again, the new standard includes the "identification" test and "tailored means" test.
148. See Brown and Enrich, supra note 8, at 20 (the Court's Section Five decisions are "parallel" to the Court's other plenary powers decisions). These "parallels" are the subject of another article on file with the author. See generally, John T. Noonan, Jr., Narrowing the Nation's Power 5 (2002).
149. See Balkin and Levinson, supra note 5, at 1053. To use the terms of Professors Balkin and Levinson, what the Rehnquist Court has done with Section Five has been quite a "revolution." The Court moved the applicable standard from rational basis to a "searching scrutiny" test. Cf., Dolan v. City of Tigard, 512 U.S. 374 (1994) (Taking Clause test is "rough proportionality").