

# THE POWERS OF CONGRESS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AFTER *CITY OF BOERNE V. FLORES*

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## INTRODUCTION

If there is a recurrent theme in constitutional politics, it is this: The federal government, in the course of more than two centuries, has consistently sought to impose more control over the states.<sup>2</sup> In some cases, the exercise of this federal power is now well-recognized and, although its wisdom is subject to a great deal of debate, its exercise raises few constitutional objections under modern cases.

One useful tool that the federal government has is its spending power. Congress, in effect, bribes the states to take some action. For example, Congress orders the states to set up an unemployment fund that meets certain criteria, or Congress will impose various taxes on the state's citizens.<sup>3</sup> Or, if the states do not raise the legal drinking age for alcoholic beverages from eighteen to twenty-one years of age, Congress will withhold some federal funds used for highway construction.<sup>4</sup> Or, the states will receive certain monetary incentives *if* they provide for disposal of radioactive waste generated within their borders.<sup>5</sup>

The Spending Clause power is indeed useful, but it has its limits. Congress must have money to give the states in order for the "bribe" to work. If Congress is not supplying the money, there is nothing for Congress to withhold. Because the spending power requires the expenditure of federal funds, that power has a built-in, inner political check<sup>6</sup> that places some, albeit minor, limits on the reach of federal power.

Consequently, Congress has often turned to the Commerce Clause.<sup>7</sup> Congress, for example, may tell the states, "accept this highway money if you

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2. John C. Calhoun, well over a century ago, predicted that "Congress will inevitably be captured by a self-interested 'federal majority.'" William T. Mayton, "*The Fate of Lesser Voices*": *Calhoun v. Wechsler on Federalism*, 32 WAKE FOREST L. REV. 1083, 1083 (1997).

3. See *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

4. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

5. See *New York v. United States*, 505 U.S. 144 (1992).

6. Cf. Ronald D. Rotunda, *The Doctrine of the Inner Political Check, the Dormant Commerce Clause, and Federal Preemption*, 53 TRANSP. PRAC. J. 263, 266, 269 (1986) (commenting that courts interpret the dormant Commerce Clause to promote interstate commerce; when state rules affecting interstate commerce impose equal burdens on intra-state commerce, the court is more deferential to state power because of a political check by the voters within the state who directly bear the burdens).

7. U.S. CONST. art. I, § 8, cl. 3.

promise to pay your highway patrolmen at least the minimum wage.” However, it is much simpler—and there is no budgetary consequence—for Congress simply to require the state “to pay your highway patrolmen and other state employees the Federal minimum wage if these workers are in, or can affect, interstate commerce.”<sup>8</sup> Under an expansive concept of the doctrine—that interstate commerce includes intrastate commerce which “substantially affects”<sup>9</sup> interstate commerce<sup>10</sup>—virtually all state workers are likely to be in, or to affect, interstate commerce.

While the law in this area has shifted a bit in recent times, it is now clear that Congress can impose the minimum wage on many such state employees *as long as* Congress imposes the same requirements<sup>11</sup> on non-state employees who are

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8. Congress cannot simply deem or announce that a class of workers are in interstate commerce. The courts make the final determination if a class of workers are in, or affecting, interstate commerce. *See* *United States v. Lopez*, 514 U.S. 549, 559-60 (1995); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

9. *See Lopez*, 514 U.S. at 559; *see also* *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (stating that “Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”), *overruled on other grounds by* *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision). *National League of Cities* was itself overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2195 (1998).

10. *Cf. Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (stating that Congress’ Commerce Clause power “extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power”) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

11. Since 1938 Congress has regulated employment conditions of workers in or affecting interstate commerce. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201-219 (1994)). The original law specifically excluded states and their political subdivisions from its coverage. *Id.* § 3(d) (“‘Employer’ includes . . . but shall not include the United States or any state or political subdivision of a state”). In 1974, that statutory exclusion was repealed. Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58, § 6(a)(1) (codified as amended at 29 U.S.C. § 203 (1994)). This amendment changed the original § 3(d) to read,

“Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

*Id.* Two years later, *Wirtz*, 392 U.S. at 200, rejected any Tenth Amendment defense and held that it was constitutional for Congress to set the wages, hours, and working conditions of state employees. Only Justice Douglas, joined by Justice Stewart, dissented. Justice Douglas found the law to be a “serious invasion of state sovereignty protected by the Tenth Amendment” and “not consistent with our constitutional federalism.” *Id.* at 201. He objected that Congress, using the broad commerce power, could “virtually draw up each State’s budget to avoid ‘disruptive effect[s]’” on interstate commerce. *Id.* at 205. Congress could end up setting the wages of state

also in, or affecting, interstate commerce. In other words, Congress can regulate the states via the Commerce Clause if it imposes requirements on the states that are “generally applicable,” that is, if equal burdens are imposed on private employers.<sup>12</sup>

Congress, for example, could not impose a minimum wage on the state governor, state legislators, or state judges, because these state workers have no private counterparts; the law would not be “generally applicable.”<sup>13</sup> Even if certain state workers are in, or affecting, interstate commerce, Congress cannot impose on the states any restrictions that single out state employees because such laws would not be generally applicable. However, in general, Congress could impose a minimum wage on construction workers in, or affecting, interstate commerce even if some of those workers are state employees.

In short, there are important limits on the power of the federal government to commandeer the state legislature or state executive branch officials for federal

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governors. See generally Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver’s Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment*, 53 U. MIAMI L. REV. (forthcoming Oct. 1998) (article portends the result in *Condon v. Reno*, No. 97-2554, 1998 WL 559659, at \*1 (4th Cir. Sept. 3, 1998), which held that Congress violated the federalism values of the Tenth Amendment when it enacted the Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994 & Supp. II 1996)); Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289 (1984).

In 1976, in *National League of Cities*, 426 U.S. at 854-55, the Supreme Court overruled *Wirtz* and held that the Tenth Amendment forbade Congress from regulating the states in this way. In *Garcia*, 469 U.S. at 557, the Court (again, 5-4 decision) reconsidered *National League of Cities* and overruled it. See the thoughtful discussion by William W. Van Alstyne, *The Second Death of Federalism*, 85 MICH. L. REV. 1709 (1985).

There matters stood until *New York v. United States*, 505 U.S. 144, 178 (1992), which held that the Federal Government cannot authorize Congress to “command a state government to enact state regulation.” (emphasis added). Congress has the “power to regulate individuals, not States.” *Id.* at 165. Using the Commerce Clause, Congress may regulate interstate commerce directly; it may not “regulate state governments’ regulation of interstate commerce.” *Id.* at 166. The federal government may not “conscript state governments as its agents.” *Id.* at 177.

*New York* made some important distinctions. Federal courts may order state officials to comply with federal law because the Constitution provides that the judicial power extends to all cases arising under the Constitution. “No comparable constitutional provision authorizes Congress to command state legislatures to legislate.” *Id.* at 179. Many federal laws do affect state governments, but all “involve congressional regulation of individuals, not congressional requirements that States regulate.” *Id.* at 178. Finally, the Court clarified that it did not question “the authority of Congress to subject state governments to *generally applicable laws*.” *Id.* at 160 (emphasis added).

12. The *New York* decision “is not a case in which Congress has subjected a State to the same legislation applicable to private parties.” *New York*, 505 U.S. at 160.

13. There may also be other constitutional limitations on the power of Congress to directly regulate a state and its sovereign officers, but such arguments are outside the scope of this paper.

purposes. To a certain extent, the Constitution itself forbids Congress from imposing unfunded mandates on state officials.<sup>14</sup> Congress can “bribe” the states (that costs money), but Congress cannot simply order the states to take care of a problem.<sup>15</sup>

From the perspective of the President or Congress, the commerce power is preferable to the use of the spending power because commerce power does not require the use of federal funds. However, under the commerce power, Congress must impose similar restrictions on private individuals and entities, or otherwise the federal regulation is not “generally applicable.”<sup>16</sup> In addition, there is another problem with using the commerce power—it does not override the Eleventh Amendment. To that topic we now turn.

### I. THE ELEVENTH AMENDMENT

The Eleventh Amendment provides, “The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>17</sup> This provision—and the case law interpreting it—acts as a bar to suits brought against state governments in federal court, when anyone other than the federal government or another state brings suit.<sup>18</sup> This bar applies to all types of suits for damages or retroactive relief for past wrongs.

It is not unusual for the Supreme Court or commentators to refer to the Eleventh Amendment as a jurisdictional bar; however, this term is not strictly correct, because states can waive their Eleventh Amendment immunity.<sup>19</sup> A true

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14. See *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997) (finding the Necessary and Proper Clause itself a limitation on Congress’ power to commandeer state officials to carry out the laws of the United States).

15. See Erick M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power*: New York v. United States Revisited, 15 CONST. COMMENTARY 355 (1998). See also Ronald D. Rotunda, *Resurrecting Federalism Under the New Tenth and Fourteenth Amendments*, 29 TEX. TECH L. REV. 953 (1998).

16. See the thoughtful discussion in Thomas H. Odom, *The Tenth Amendment after Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657 (1987).

17. U.S. CONST. amend. XI.

18. While the Amendment only purports to bar citizens of *other* states or foreign nationals from suing a state, the Supreme Court has held that, by implication, it also bars suits by citizens of the defendant state. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

19. E.g., *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (express waiver); *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184 (1964) (abrogated by legitimate act of Congress), *overruled on other grounds by Welch v. Texas Dep’t of Highways & Public Transp.* 483 U.S. 468, 478 (1987).

The complex law surrounding the Eleventh Amendment is discussed in 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.12 (West Pub. Co., 2d ed. 1992). In addition, there has been extensive academic commentary

jurisdictional limitation (such as the requirement of diversity of citizenship, the requirement that the amount in controversy exceed a certain figure, or a requirement that the case “arise under” the Constitution, laws, or treaties of the United States) is not waivable. But the bar of the Eleventh Amendment may be waived. Like the requirement of personal service of process, the Eleventh Amendment is designed to protect the states. States, then, may waive that protection.

The “state” for purposes of the Eleventh Amendment includes all agencies of the state, with the exception of its political subdivisions, such as cities and school boards.<sup>20</sup> Therefore, the Bar Examining Authority of each state, for example, should be treated as the state for purposes of the Eleventh Amendment. Since the Bar Examiners are instrumentalities of the state supreme court,<sup>21</sup> and the state supreme court is just as much a representative of the “state” as the executive and legislative branches, the Bar Examiners then should be under the protection of the Eleventh Amendment<sup>22</sup> unless there is some exception applicable.

If a valid federal law or the U.S. Constitution requires or forbids certain actions, the Eleventh Amendment does not authorize the states to violate the Constitution. This is because the Eleventh Amendment does not override the Supremacy Clause.<sup>23</sup> But if the suit to enforce those rights is brought against the state, it cannot be filed in federal court.

While this jurisdictional restriction is important, it is hardly a complete preclusion of a remedy. First, the state may consent to be sued in federal court. Second, and even more important, the Eleventh Amendment does not bar suits brought against state officials who are sued in their *personal capacity*.<sup>24</sup> Federal courts can enjoin these state officials sued in their personal capacities, or require that these officials personally pay damages. The state acts through its flesh and blood agents. The Eleventh Amendment grants them no immunity from damages

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in the wake of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), discussed below.

20. See *Maybanks v. Ingraham*, 378 F. Supp. 913 (E.D. Pa. 1974) (city); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (school board).

21. For example, many cases conclude that setting the qualifications for members of the bar, admitting applicants, and denying applicants, are all judicial acts, entitling the state officials to absolute judicial immunity. See *Sparks v. Character & Fitness Comm. of Ky.*, 859 F.2d 428, 431-32 (6th Cir. 1988) (finding bar admission responsibilities a judicial act); *Connecticut Bar Examining Comm. v. FOIC*, 550 A.2d 633, 635 (1988) (finding that bar admission is analogous to adjudication); *Anonymous v. Connecticut Bar Examining Comm.*, No. CV94-0534160-5, 1995 WL 506660, at \*4-5 (Conn. Super. Ct. Aug. 17, 1995) (finding state bar admission committee part of a judicial process).

22. Cf. *Thiel v. State Bar of Wis.*, 94 F.3d 399, 402 (7th Cir. 1996) (holding a state bar immune from suit under the Eleventh Amendment); *Crosetto v. State Bar of Wis.*, 12 F.3d 1396, 1402 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994) (holding a state bar immune from suit under the Eleventh Amendment).

23. U.S. CONST. art. VI, cl. 2.

24. See *Ex parte Young*, 209 U.S. 123, 148 (1908).

or injunctive relief in a federal action if they are sued in their personal capacities and are, therefore, asked to pay damages from their own funds (even if these state officers are acting under color of law). In the beginning of this century, the Court held that the Eleventh Amendment did not bar an action in federal court seeking to enjoin a state attorney general from enforcing a statute alleged to violate the Fourteenth Amendment.<sup>25</sup> When a state officer comes into conflict with Constitutional guarantees, “he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”<sup>26</sup>

Because of this metamorphosis, the offending state official is not treated as a representative of the state for Eleventh Amendment purposes when sued in his or her personal capacity. Any resulting judgment is against the official, not against the state.<sup>27</sup> Nevertheless, because he or she is acting *under color of law*, there is state action for purposes of the Fourteenth Amendment. In short, the state official’s actions are “state action” for purposes of the Fourteenth Amendment but the state official is not the “state” for purposes of the Eleventh Amendment.

Thus, the Eleventh Amendment does not bar a suit against the state official in his or her *personal* capacity, even though the state official is really sued for actions taken under color of law with the badge of state authority.<sup>28</sup> Moreover, private plaintiffs may sue to enjoin state officials to comply with valid federal law in the future, even though these officials will be required to spend state funds to so comply.<sup>29</sup>

However, if the plaintiff sues the state official in his or her *official* capacity, that really is another way of pleading an action against the state, and thus is within the Eleventh Amendment.<sup>30</sup> It is not necessary that the state be named as a party of record. For example, if a suit requests the courts to order the head of a state department of welfare to personally pay damages, that suit would be permissible; but if the suit seeks an order requiring him to pay past due amounts from the state treasury, that suit would be barred.<sup>31</sup>

The Eleventh Amendment thus places some loose limits on the power of the federal government to impose restrictions on the states. Congress cannot use its power under the Commerce Clause to remove a state’s Eleventh Amendment

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25. *Id.*; U.S. CONST. amend. XIV.

26. *Ex parte Young*, 200 U.S. at 159.

27. Because the judgment is not against the state treasury, the official is liable to pay from his or her own personal funds. However, even though the judgment is not against the state, the state may (if it wishes) reimburse the official. *See* 1 ROTUNDA & NOWAK, *supra* note 19, § 2.12, at 147-50. State officials sometimes purchase insurance to cover their liability under federal law. 3 *id.* § 19.23, at 605-06.

28. *See* *Hafer v. Melo*, 502 U.S. 21 (1991).

29. *See, e.g.,* *Edelman v. Jordan*, 415 U.S. 651, 676 (1974) (allowing prospective relief to persons discriminated against by public official refusing to follow federally mandated guidelines).

30. *See* *Kentucky v. Graham*, 473 U.S. 159 (1985).

31. *Edelman*, 415 U.S. at 651.

immunity.<sup>32</sup> The Commerce Clause, in short, cannot abrogate the Eleventh Amendment. This also makes sense, because it is reasonable to interpret the Eleventh Amendment as modifying the earlier enacted provisions of the Constitution and not the other way around.

However, another clause of the Constitution does not carry the minimal burdens that accompany federal exercise of power under the Commerce Clause or the Spending Clause.<sup>33</sup> This other clause—Section 5 of the Fourteenth Amendment—does operate to abrogate the protections of the Eleventh Amendment.<sup>34</sup> Section 5 authorizes Congress to impose requirements on the states even if those requirements are not generally applicable. Section 5 also does not require Congress to spend money to bribe the states. Additionally, Section 5 is not limited to activities within interstate commerce. Let us therefore turn to Section 5 of the Fourteenth Amendment.

## II. SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that “Congress shall have the power to enforce this article [of the Fourteenth Amendment] by appropriate legislation.”<sup>35</sup> Accordingly, Congress can enact legislation to protect individuals from state action that violates the Equal Protection Clause<sup>36</sup> or the Due Process Clause<sup>37</sup> of the Fourteenth Amendment.

In connection with this Section 5 power, Congress can create causes of action against the state and abrogate the protections of the Eleventh Amendment.<sup>38</sup> This unusual power is supported by history.<sup>39</sup> A major purpose of the Fourteenth Amendment was to give Congress the power to restrict state power, so the fact that the Fourteenth Amendment amends the earlier-enacted Eleventh Amendment is not surprising.

Congress considers powers exercised under Section 5 to be the preferable mode of regulating the states. First, unlike the exercise of power under the Commerce Clause, there is no requirement that the state activity affect interstate commerce.<sup>40</sup> Second, unlike the exercise of power under the Commerce Clause,

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32. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *overruling* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Idaho v. Coeur d’Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997).

33. U.S. CONST. art. I, § 8, cl. 1.

34. U.S. CONST. amend. XIV, § 5.

35. U.S. CONST. amend. XIV, § 5.

36. U.S. CONST. amend. XIV, § 1.

37. U.S. CONST. amend. XIV, § 1.

38. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

39. See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

40. In modern times it seems that almost everything is in, or affecting, interstate commerce, but the Commerce Clause power still has a few important limits. See *United States v. Lopez*, 514 U.S. 549 (1995); see also Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of*

Congress can abrogate the limitations under the Eleventh Amendment. Third, because Congress is exercising power under Section 5 of the Fourteenth Amendment (which, in turn, refers to Section 1 of the Fourteenth Amendment,<sup>41</sup> and Section 1 requires “state action”), there is no requirement that any regulation be “generally applicable.” And finally, Section 5 imposes no adverse budgetary consequences, because there is no need for Congress to spend money under Section 5. In contrast, this spending is a requirement when Congress uses its Spending Clause<sup>42</sup> power.

It is becoming more common for Congress to enunciate that it is using its special Fourteenth Amendment powers to regulate the states. For example, when Congress enacted the provisions of the Americans with Disabilities Act (“ADA”) in 1990,<sup>43</sup> Congress used its powers under Section 5 of the Fourteenth Amendment,<sup>44</sup> and specifically abrogated any state protections under the Eleventh Amendment. The ADA specifically provides that—

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the Requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.<sup>45</sup>

It now becomes crucial to determine whether laws like the ADA are within Congress’ power to enforce the Fourteenth Amendment. If they are not, then the abrogation of the Eleventh Amendment immunity would be invalid. Congress could reenact these laws (like the ADA) that apply to the states by using its Commerce Clause power (assuming that Congress subjects the states to generally applicable laws),<sup>46</sup> but that power would not allow it to abrogate the Eleventh

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*Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997); Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

41. Section 5 of the Fourteenth Amendment grants Congress the “power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. *See also* U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law . . .; nor shall any state deprive any person . . .”).

42. U.S. CONST. art. I, § 8, cl. 1 (“to pay the Debts and provide for the common Defense and general Welfare of the United States”).

43. 42 U.S.C. §§ 12101-12213 (1994).

44. *See* *Armstrong v. Wilson*, 942 F. Supp. 1252, 1261, 1262-63 (N.D. Cal. 1996) (finding both the ADA and Rehabilitation Act, 29 U.S.C. §§ 701-767b (1994 & Supp. II 1996), were enacted pursuant to Congress’ authority under the Fourteenth Amendment).

45. 42 U.S.C. § 12202 (1994).

46. *See* *New York v. United States*, 505 U.S. 144 (1992).



Amendment.<sup>47</sup> Moreover, if Congress does not have Fourteenth Amendment power to apply laws like the ADA to the states, then those laws may not be justified by any Congressional power because Congress certainly did not use the Commerce Clause to justify abrogating the Eleventh Amendment. Congress, then, would have to reenact these laws under one of its other powers (the Spending Clause power or the Commerce Clause power, both of which are more limited powers), eliminate the purported abrogation of the Eleventh Amendment, and make sure that the states are governed by laws that are “generally applicable,” i.e., apply to private persons as well as the states.<sup>48</sup>

If Congress has authority under Section 5 of the Fourteenth Amendment, then it has a broad power. The Supreme Court has generously interpreted Congressional power under Section 5, *if* Congress has used that power to remedy discrimination based on race and ethnic background—categories that the Court calls “suspect classes.”<sup>49</sup>

Consider, first, *Katzenbach v. Morgan*.<sup>50</sup> In that case, the Supreme Court upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965.<sup>51</sup> The Voting Rights Act imposed various electoral reforms on the states. Section 4(e), in particular, provided that no person who had completed the sixth grade in any accredited public or private American-flag school (i.e., a school within the jurisdiction of the United States, such as any Puerto Rican school) in which the predominant classroom language was not English could be denied the right to vote in any election because of his or her inability to read or write English.<sup>52</sup> The

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47. See *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 788 (N.D. Ala. 1996) (finding that the Eleventh Amendment bars state employees from maintaining suit in federal court under the Age Discrimination in Employment Act, because that law was enacted pursuant to the Commerce Clause), *aff'd*, *Kimel v. State Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998).

48. Congress purported to use both its Fourteenth Amendment power and its Commerce Clause power in enacting the ADA. See 42 U.S.C. § 12101(b)(4) (1994). However, it is unfair to treat the entire law as being passed under both sections. First, the title that deals with private entities cannot be justified under Section 5 of the Fourteenth Amendment, because Section 5 requires that the federal law relate to state action (just as the Fourteenth Amendment requires state action). Second, the title that deals with states was not enacted pursuant to the Commerce Clause because Congress said specifically that it was abrogating the states’ Eleventh Amendment immunity and Congress cannot do that under the Commerce Clause.

49. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (addressing voting rights and invidious discrimination against Puerto Ricans). Later in *Oregon v. Mitchell*, 400 U.S. 112, 295-96 (1970), Justice Stewart, in a separate opinion, explained that the invalidated New York statute “was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans,” and “conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services.”

This issue is discussed in detail in 3 ROTUNDA & NOWAK, *supra* note 19, §§ 19.2-19.5. See also *id.* at §§ 19.6-19.10 (Congressional enforcement of the Thirteenth Amendment) and §§ 19.11-19.12 (Congressional enforcement of the Fifteenth Amendment).

50. 384 U.S. 641 (1966).

51. 42 U.S.C. §§ 1971, 1973 to 1973gg-8 (1994).

52. *Id.* § 1973b(e).

statute consequently prohibited New York from enforcing its state laws requiring an ability to read and write English as a condition of voting.<sup>53</sup>

The question in *Morgan* was whether the Congress could prohibit enforcement of the state law by legislating under Section 5 of the Fourteenth Amendment, even if the Court would find that the Equal Protection Clause<sup>54</sup> itself did *not* nullify New York's literacy requirement.<sup>55</sup> In fact, the Court had earlier ruled that the Equal Protection Clause does not, by its own force, prohibit literacy tests (unless they are administered in a racially discriminatory way).<sup>56</sup>

The Court appeared to utilize a two-part analysis to uphold the federal statute. The Court first construed Section 5 as granting Congress "by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."<sup>57</sup> Under this interpretation, the Court held that it was within the power of Congress to determine that the Puerto Rican minority needed the vote to gain nondiscriminatory treatment in public services, and that this need warranted federal intrusion upon the states.<sup>58</sup>

The Court reached the same result in what appears to be an additional part of its analysis. Because it "perceived a basis" upon which Congress might reasonably predicate its judgment that the New York literacy requirement was invidiously discriminatory, the Court said that it was also willing to uphold the federal legislation on that theory.<sup>59</sup> This second part of the analysis is quite significant. If the Court "perceived a basis" indicating that the federal law is not irrational, then the Court seemed to be saying that it would have to uphold the federal law.

If the Court in *Morgan* had limited its rationale to the first conclusion—that Congress may extend the vote to a class of persons injured by the racially discriminatory allocation of government services by a state—*Morgan* would offer no support for arguments that legislation could restrict the reach of the equal protection guarantee. A court still would retain authority to determine

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53. See *Morgan*, 384 U.S. at 643-44.

54. U.S. CONST. amend. XIV, § 1.

55. *Morgan*, 384 U.S. at 649.

56. In *Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45, 53-54 (1959), the Court refused to strike down state literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any showing of discriminatory use of the test. The *Morgan* Court acknowledged *Lassiter* and refused to disturb its earlier ruling. *Morgan*, 384 U.S. at 649-50.

57. *Morgan*, 384 U.S. at 650.

58. *Id.* at 652-53. See generally *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), judgment *reaff'd on reh'g* 461 F.2d 1171 (5th Cir. 1972); Daniel W. Fessler & Charles M. Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. C.R.-C.L. L. REV. 441 (1971).

59. *Morgan*, 384 U.S. at 653. Congress, in the statute upheld in *Morgan*, explicitly relied on Section 5, but years later the Court made it clear that when Congress legislates under Section 5, it need not do so explicitly. The Court must determine Congress' intent, but Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

whether discrimination exists, and whether the legislative remedy is reasonably related to the proper goal.

On the other hand, by suggesting that Congress can legislate to address specific violations of the Equal Protection Clause, the *Morgan* Court may have conferred on Congress the power to *define* the reach of equal protection, to determine what “equal protection” means.<sup>60</sup> Justice Harlan specifically attacked this portion of the majority’s opinion as allowing Congress to demarcate or define constitutional rights “so as in effect to *dilute* [the] equal protection and due process decisions of this Court.”<sup>61</sup> Justice Harlan’s fears bore fruit in the Religious Freedom Restoration Act of 1993 (“RFRA”)<sup>62</sup> discussed below. Adding fuel to his concern was the fact that in later cases, various justices of the Supreme Court explicitly acknowledged and relied on *Morgan* as the reason to respect congressional accommodations of conflicting constitutional rights and powers.<sup>63</sup>

In an influential discussion of congressional power under Section 5, Professor Archibald Cox analyzed *Morgan*, read it very broadly, and concluded that Congress does indeed have broad power to determine what constitutes a violation of equal protection.<sup>64</sup> Cox argued that Section 5 makes it irrelevant whether the relief for violations of the Fourteenth Amendment granted under a legislative enactment is greater or lesser than the courts would order. Cox

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60. See *Morgan*, 384 U.S. at 653; Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 133. According to Burt, “[*Morgan* allows] a restrained Court, intent perhaps on undoing the work of its active predecessors, [to] permit a graceful and selective retreat limited to those areas where the political branch gives an explicit and contrary judgment.” *Id.*

61. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting) (emphasis added). See Donald F. Donovan, Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982).

62. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). The seminal article on this issue is, William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996), cited, *inter alia*, in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997), which invalidated the RFRA.

63. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., with Blackmun & Powell, JJ., concurring) (finding white tenants had standing under Section 8(10)(a) of Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at scattered sections of 18 U.S.C., 25 U.S.C., 28 U.S.C. and 42 U.S.C.)), despite doubts of case or controversy under Article III of Constitution); *Welsh v. United States*, 398 U.S. 333, 371 (1970) (White, J., with Burger, C.J., & Stewart, J., dissenting) (making an argument for respecting congressional judgment accommodating the right to free exercise of religion within a statute for raising armies). See also *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (Burger, C.J., White & Powell, JJ., plurality opinion) (relying on Section 5 of the Fourteenth Amendment to justify a congressional decision to set aside 10% of federal work project funds for minority group members).

64. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199, 259 (1971) [hereinafter *The Role of Congress*]. See also Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

concluded that the *Morgan* rationale requires judicial deference to congressional judgments to limit rights as well as decisions to extend them.<sup>65</sup>

Those justices and commentators who rely on *Morgan* to support the position that Congress has the power to define the reach of equal protection or due process base their analysis on three questionable predicates: (1) that congressional power to override state law under the Fourteenth Amendment is as broad as an expansive reading of *Morgan* would suggest; (2) that *Morgan* authorizes Congress to override not only state actions, but also federal court constructions of the Fourteenth Amendment that are too restrictive in the view of Congress; and (3) that Section 5 permits Congress to interpret the various guarantees of the Fourteenth Amendment more broadly or more narrowly than the federal courts.

Congress can rely on a broad reading of *Morgan* to authorize Congress to define or change rights using its Section 5 power only if each of these premises is correct. The major cases elaborating on the reach of *Morgan*—*Oregon v. Mitchell* and, now, the *City of Boerne* decision—reject these assumptions.<sup>66</sup> *City of Boerne*, in particular, has driven a stake through the heart of this broad reading of *Morgan*.

The facts of *Morgan* dealt with a federal statute that sought to protect racial minorities from state-sanctioned racial discrimination in voting. For many years the Court has deferred to Congress when it has enacted laws that protect suspect classes against state-sanctioned discrimination. Once passing beyond this category of race (a suspect class), the Supreme Court has been much less deferential to Congress than Professor Cox or other commentators would have wished. The first leading case in this area is *Oregon v. Mitchell*.<sup>67</sup>

In *Mitchell* the Court considered challenges to various provisions of the Voting Rights Act Amendments of 1970.<sup>68</sup> Among other things, this law lowered the minimum voting age in state and local elections from twenty-one to eighteen years of age.<sup>69</sup> In purporting to enforce the Fourteenth Amendment, Congress found discrimination based on age, that a supposed “discrete and insular minority”<sup>70</sup> was created, and that it was necessary to remedy this denial of equal protection.<sup>71</sup> Congress did not invent the phrase, “discrete and insular minority,”

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65. *The Role of Congress*, *supra* note 64, at 259-60.

66. *Oregon v. Mitchell*, 400 U.S. 112 (1970), *superseded by* U.S. CONST. amend. XXVI; *City of Boerne v. Florida*, 117 S. Ct. 2157 (1977).

67. 400 U.S. 112 (1970).

68. Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. § 1973bb-1 (1994)).

69. *Id.* A majority of Justices, using different rationales, found that it was constitutional for Congress to abolish literacy tests (often used in a racist manner), to abolish state durational residency requirements in presidential elections (it affects the right to travel) and to enfranchise 18 year olds in federal (but not state) elections. *Mitchell*, 400 U.S. at 117-18.

70. *Mitchell*, 400 U.S. at 349 n.14 (Stewart, J. & Burger, C.J., Blackmun, J., concurring in part, dissenting in part) (those between 18 and 21 years of age).

71. *See id.* at 240 (Brennan, J., White & Marshall, JJ., dissenting) (noting that Congress

but lifted it from the famous footnote of *United States v. Caroline Products Co.*<sup>72</sup>

If Congress has the power to create new rights, the exercise of that power can be habit-forming. For example, in the ADA, Congress made similar “findings,” in particular that

individuals with disabilities are a *discrete and insular minority* who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>73</sup>

These findings are not difficult to make. Congress simply parrots whatever the case law provides that it should say. If the Court will treat these “findings” the way it often treats findings when reviewing Congressional power under the Commerce Clause, the Court will often defer to Congress because the Court upholds such factual findings if the conclusion is “rational.”<sup>74</sup>

If Section 5 of the Fourteenth Amendment really gives Congress *carte blanche* power to enact legislation to remedy what Congress regards as a denial of equal protection, the Court in *Mitchell* should simply have upheld the statute. Instead, the fragmented Court invalidated it.<sup>75</sup> While there was no opinion of the Court, a clear majority of the Justices agreed that Congress cannot interpret the substantive meaning of the Equal Protection Clause.<sup>76</sup> The Justices were unwilling to give up the power of judicial review—the power to ultimately say what the law is—first established in *Marbury v. Madison*.<sup>77</sup>

In *Mitchell*, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, concluded that Congress cannot usurp the role of the courts by determining the boundaries of equal protection.<sup>78</sup> Congress does not have “the power to determine what are and what are not ‘compelling state interests’ for equal protection purposes.”<sup>79</sup> Nor does Congress have the power to “determine as a matter of substantive constitutional law what situations fall within the ambit

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justified giving 18 year olds the right to vote “in order to enforce the Equal Protection Clause of the Fourteenth Amendment.”).

72. 304 U.S. 144, 152 n.4 (1938) (Stone, J., for the Court).

73. 42 U.S.C. § 12101(a)(7) (1994) (emphasis added).

74. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Perez v. United States*, 402 U.S. 146 (1971).

75. *Mitchell*, 400 U.S. at 261-62.

76. *Id.* at 135.

77. 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

78. *Mitchell*, 400 U.S. at 346 (Stewart, J. & Berger, C.J., Blackmun, J., concurring in part and dissenting in part).

79. *Id.* at 350.

of the clause and what state interests are ‘compelling.’”<sup>80</sup>

Justice Harlan agreed that Congress could not define the reach of equal protection. Justice Harlan concluded that Congress’ engagement in constitutional interpretation conflicts with the procedure for amending the Constitution.<sup>81</sup> Justice Black similarly agreed that Section 5 could not justify a federal law that set the voting ages in state and local elections.<sup>82</sup>

In short, Congress could not simply declare that people between eighteen and twenty-one years of age are a “discrete and insular minority” and were discriminated against in voting, and then use this declaration as the authority under Section 5 to force the states to allow these people to vote.<sup>83</sup> The Court has rejected the argument that discrimination based on age is discrimination that affects a suspect class.<sup>84</sup> Laws that discriminate on the basis of age are valid if they are rational.<sup>85</sup> Congress, therefore, cannot order the states to change their voting laws that make distinctions based on age because these voting requirements are rational.

Similarly, the courts have treated various forms of discrimination (disability, age discrimination) under the rational basis test and refused to create new categories of suspect classes under the Equal Protection Clause.<sup>86</sup> Therefore, one

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80. *Id.* at 296 (Harlan, J., concurring in part, dissenting in part).

81. *Id.* at 205.

82. *Id.* at 117-35 (Black, J., announcing judgment of the Court). Justice Black wrote: In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on *account of race*. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments’ ban on *racial discrimination*, I would hold that Congress has exceeded its powers.

*Id.* at 130 (emphasis added).

See also *EEOC v. Wyoming*, 460 U.S. 226, 262 (1982) (Burger, C.J. & Powell, Rehnquist, O’Connor, JJ., dissenting) (concluding that allowing “Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government.”). This case also involved age discrimination. The majority’s resolution of the case did not require reaching the issue discussed by the dissent. See *EEOC*, 460 U.S. at 243.

83. For the same reason, Congress could not simply declare that fetuses are a “discrete and insular minority,” and then claim that it could limit abortion rights.

84. See *EEOC*, 460 U.S. at 317-18.

85. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). Congress would have broader power to prohibit sex discrimination, because laws that discriminate on the basis of sex are judged by a stricter standard than the rational basis test. The Court uses what is called the “middle tier” analysis. See *Craig v. Boren*, 429 U.S. 190, 210 (1976); see also 3 ROTUNDA & NOWAK, *supra* note 19, §§ 18.20-18.24.

86. See *More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993) (finding that inmates limited to wheelchairs are not a suspect class); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (finding that a state’s distinction between mentally retarded and mentally ill is “rational”

should expect that other federal laws that simply announce new “suspect classes” cannot be justified as a proper exercise of Congress’ power under Section 5 of the Fourteenth Amendment, just as Congressional efforts to grant eighteen-year-olds the right to vote in state and local elections was held unconstitutional in *Oregon v. Mitchell*.<sup>87</sup>

Congress responded to *Mitchell* by proposing the Twenty-sixth Amendment, which the states then ratified. It guarantees that the votes of citizens eighteen years of age or older may not be abridged by the United States or any state on account of age.<sup>88</sup> The proper response to *Mitchell*, in short, was a constitutional amendment, which is the only way Congress can amend our Constitution.

Many lower courts have not even bothered considering the issue of Congress’ power to enact the ADA pursuant to its power under Section 5 of the Fourteenth Amendment and have often perfunctorily ruled that Congress does have the power to, in effect, create new suspect classes. In one case, the court conceded that handicapped status is not a suspect class, but then simply asserted that Congress can conclude the handicapped or other classes of people have been subjected to unequal treatment.<sup>89</sup> This, then, allows the exercise of broad Congressional powers under Section 5. However, the court never even mentioned, much less discussed, *Oregon v. Mitchell*.

In another decision, the U.S. Magistrate Judge similarly announced that Congress had the right to enact the ADA under the Fourteenth Amendment.<sup>90</sup> The judge also did not mention *Oregon v. Mitchell* and, in fact, relied on a law review article, the thesis of which the *Mitchell* Court had rejected.<sup>91</sup> State court opinions have casually asserted—without mentioning or analyzing *Oregon v.*

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and thus does not violate the Equal Protection Clause); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1420 (10th Cir. 1992) (finding that handicapped persons not a suspect class); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (finding that mental retardation is not a suspect or quasi-suspect class).

87. 400 U.S. 112 (1970).

88. U.S. CONST. amend. XXVI.

89. *Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1479 (D. Minn. 1996). This court readily concluded that the University of Minnesota is an instrumentality of the state for purposes of the Eleventh Amendment. *Id.* at 1476. *See also* *Williams v. Ohio Dept. of Mental Health*, 960 F. Supp. 1276 (S.D. Ohio 1997). *Cf.* *Lake v. Arnold*, 112 F.3d 682, 686 (3d Cir. 1997) (holding that retarded individuals constitute a class eligible to sue under 42 U.S.C. § 1985(3) (1994)). *But cf.*, *Pierce v. King*, 918 F. Supp. 932, 940 (E.D.N.C. 1996) (appearing to reject the Fourteenth Amendment justification for the ADA), *aff’d*, 131 F.3d 136 (4th Cir. 1997).

90. *Niece v. Fitzner*, 941 F. Supp. 1497, 1503-04 (E.D. Mich. 1996) (holding that the ADA applies to state prisons, and Congress abrogated the states’ Eleventh Amendment immunity).

91. The article that the district court relied on was Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). Cox’s article argued for deference to Congress in creating new rights under the Equal Protection Clause. *Oregon v. Mitchell*, 400 U.S. 112, 127-28 (1970), rejected that premise. *See* Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 857-61 (1976).

*Mitchell*—that the ADA properly abrogates the state’s Eleventh Amendment rights because the Fourteenth Amendment should be read broadly.<sup>92</sup> Then came *City of Boerne v. Flores*.<sup>93</sup>

### III. CITY OF BOERNE V. FLORES

Perhaps the significance of *Oregon v. Mitchell* was unclear to many lower courts because the opinion was fragmented. That defect was cured when the Court expanded on what *Oregon v. Mitchell* had portended in *City of Boerne v. Flores*.<sup>94</sup> This time there was an opinion of the Court, and it ruled that Congress exceeded its powers under Section 5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act (“RFRA”).<sup>95</sup> Congress enacted the RFRA to overturn *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>96</sup>

In *Smith*, the Court had allowed the state to enforce generally applicable neutral laws (in that case, a law banning the use of peyote, an illegal drug) even if the law was applied to deny unemployment benefits to individuals who lost their job because of the illegal peyote use. In this case the users were members of a Native American Church who claimed that they used peyote as a sacrament.<sup>97</sup> Thus, they argued, the law interfered with their free exercise of religion.<sup>98</sup>

Congress reacted to *Smith* by enacting the RFRA.<sup>99</sup> In contrast to *Smith*, the federal statute provided that both the States and the Federal Government cannot

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92. Anonymous v. Connecticut Bar Examining Comm., No. CV94-0534160-S, 1995 WL 506660 at \*6 (Super. Ct. Conn. Aug. 17, 1995). On other issues, this state court opinion was quite favorable to bar authorities and concluded that absolute judicial immunity protected bar examiners in an ADA suit from claims for damages, attorney’s fees and punitive damages. *Id.* at \*5. See Ronald D. Rotunda, *The Americans with Disabilities Act, Bar Examinations, and the Constitution: A Balancing Act*, 66 B. EXAMINER 6 (No. 3, August, 1997).

93. 117 S. Ct. 2157 (1997).

94. *Id.* Justice Stevens filed a concurring opinion. Justice Scalia filed an opinion concurring in part, in which Justice Stevens joined. Justice O’Connor filed a dissenting opinion, in which Justice Breyer joined in part. Justices Souter and Breyer each filed dissenting opinions. One of the few commentators to correctly predict the outcome in *City of Boerne* was Professor William Van Alstyne. See Van Alstyne, *supra* note 62, at 291.

95. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

96. 494 U.S. 872 (1990). See Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 633 (1998).

97. *Id.* at 903.

98. See *id.* at 873-90.

99. As President Clinton said when signing the RFRA, “[T]his act reverses the Supreme Court’s decision in *Employment Division against Smith* . . .” 2 Pub. Papers 2000 (Nov. 16, 1993), quoted in Van Alstyne, *supra* note 62, at 291 & n.3.



“substantially burden”<sup>100</sup> a person’s exercise of religion, even under a rule of general applicability, unless the government demonstrates that the burden (1) furthers a “compelling governmental interest;” and, (2) is the “least restrictive means of furthering” that interest.<sup>101</sup> The purpose of the RFRA was to overturn *Smith* where the U.S. Supreme Court interpreted the meaning and reach of the Free Exercise Clause.<sup>102</sup>

*City of Boerne v. Flores*<sup>103</sup> also involved an application of the RFRA. Archbishop Flores applied for a permit to enlarge a church building to accommodate its congregation. The historical Landmark Commission denied the permit because the enlargement conflicted with an historical preservation plan. Archbishop Flores then sued under the RFRA.<sup>104</sup> When the case got to the Supreme Court, Justice Kennedy held that the RFRA was unconstitutional and not justified by Section 5 of the Fourteenth Amendment.<sup>105</sup>

While Congress has Section 5 power to enforce the Free Exercise Clause, that power is only the power to “enforce,” not the power to create, or to redefine. It is a preventive power or a remedial power, not a power to delineate.<sup>106</sup> Relying on *Oregon v. Mitchell*, the Court said that this Section does not give Congress the right to decree the substance of what the First Amendment means: “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”<sup>107</sup>

The line between remedial legislation and legislation that makes a substantive change in the law may not always be clear. The Court will give Congress “wide latitude” in deciding where to draw the line, but there “must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>108</sup> The Court will make the final decision as to whether the federal remedy is proportional to the alleged wrong.

For example, the *City of Boerne* Court noted that when Congress enacted the Voting Rights Act of 1965—and the Supreme Court in *Morgan* later affirmed the constitutionality of various provisions<sup>109</sup>—there was a long and widespread record before Congress and in the case law documenting state-sponsored racial discrimination in voting.<sup>110</sup> The factual record before the *Morgan* Court reflected pervasive discriminatory and unconstitutional use of literacy tests.<sup>111</sup> But when one turns to the RFRA, one finds no evidence of any pattern of state laws being

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100. 42 U.S.C. § 2000bb(a)(3) (1994).

101. *Id.* § 2000bb.

102. *See id.* § 2000bb(a)(4).

103. 117 S. Ct. 2157 (1997).

104. *Id.* at 2160.

105. *Id.* at 2168-72.

106. *See id.* at 2170-72.

107. *Id.* at 2164.

108. *Id.*

109. *Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966).

110. *City of Boerne*, 117 S. Ct. at 2167.

111. *See id.* (citing *Morgan*, 384 U.S. at 656).

enacted because of religious bigotry in the last forty years. There is only evidence that some generally applicable laws placed incidental burdens on religion, but these laws were not enacted or enforced because of animus or hostility to religion, nor did they indicate that there was any widespread pattern of religious discrimination in this country.<sup>112</sup> Certainly some *individuals* engage in religious bigotry, but the states were not the guilty parties and the Fourteenth Amendment is limited to state action.

The *City of Boerne* Court emphasized that, given the paucity in the factual record, the power of Congress under Section 5 must be correspondingly limited:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.<sup>113</sup>

The RFRA, in short, was a major federal intrusion “into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>114</sup> It is not an answer to say that Congress is merely trying to “over enforce” the guarantees of free exercise. If a highway patrolman arrests you for traveling fifty-five miles per hour in a sixty-five mile per hour zone, you would not be satisfied by the patrolman’s response that he was merely “over enforcing” the traffic laws. You would object to being subjected to phantom restrictions. So also some states were upset with the phantom restrictions imposed by the RFRA.<sup>115</sup>

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112. *See id.* at 2169.

113. *Id.* (citations omitted).

114. *Id.* at 2171. One of the interesting lower court cases applying the RFRA to invalidate a state policy was *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995). The Ninth Circuit ruled that the RFRA required a state elementary school to make exceptions to its “no weapons” policy, so that all Sikh children (seven years old and older) could carry knives to school. *Id.* at 885-86. This knife (or “kirpan”) has a three and a half-inch blade. The knives were, however, made immovable by being tightly sewn to the sheaths. *Id.* at 886.

115. The RFRA applies both to federal laws and to state laws that indirectly burden the free exercise of religion. To the extent that the RFRA applies to federal laws, there is no issue under Section 5 of the Fourteenth Amendment. Congress is simply telling federal courts, in interpreting federal law, to read the law in a way described in the RFRA to protect free exercise rights. However, the RFRA would still raise a question of whether this free exercise exemption from the normal requirements of neutrally applicable federal law violates the Establishment Clause. That issue was not before the Court in *City of Boerne* and is not the subject of this paper. *See Van Alstyne, supra* note 62, at 294 & n.12.

IV. AFFIRMATIVE ACTION AFTER *CITY OF BOERNE*

*Oregon v. Mitchell*<sup>116</sup> and *City of Boerne*<sup>117</sup> should both cast a strong shadow over some types of what is often called affirmative action or reverse discrimination. In fact, *City of Boerne* stated explicitly that “[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”<sup>118</sup>

Nonetheless, some Justices have sought to rely on Section 5 of the Fourteenth Amendment to justify federal statutes that distribute benefits or burdens on the basis of race if the state acts for benign purposes. After a series of cases, it now appears that a majority of the Justices reject the notion that Congress can use Section 5 to justify action that would violate Section 1 of the Fourteenth Amendment if a state had engaged in the action. While the Court has come to that conclusion in several cases,<sup>119</sup> some commentators have been more reluctant to embrace that result.<sup>120</sup>

The framers of Section 5 of the Fourteenth Amendment apparently intended that provision to increase federal power at the expense of the states. However, neither the language nor the reasoning behind Section 5 supports the view that it increased federal *congressional* power over federal *judicial* power. A brief analysis of Justice Douglas’s almost-forgotten comments in *Katzenbach v. Morgan*<sup>121</sup> should make that clear.

Although Justice Douglas joined the opinion of the *Morgan* Court, he reserved judgment on whether the federal law<sup>122</sup> in question was constitutional in all respects. Justice Douglas would reserve “judgment until such time as [the issue] is presented by a member of the class against which that particular

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116. 400 U.S. 112 (1970).

117. *City of Boerne*, 117 S. Ct. at 2157.

118. *Id.* at 2167 (citing *Mitchell*, 400 U.S. at 112).

119. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (“Congress may not authorize the States to violate the Equal Protection Clause.”). The states argued that a federal statute allowed durational residency requirements in state welfare programs. The Court rejected that argument. See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 7332-33 (1982) (“Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”); *California v. Goldfarb*, 430 U.S. 199, 210 (1977) (finding in part that overbroad generalizations of gender-based needs violated rights guaranteed by the Fourteenth Amendment); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (holding “that no State can pass a law regulating elections that violates the Fourteenth Amendment’s” Equal Protection Clause).

120. See, e.g., Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 591-92 (1996) (arguing that Congress may grant more protection for constitutional liberties than the Court interprets).

121. 384 U.S. 641, 658 (1966) (Douglas, J., concurring with exceptions).

122. The federal law eliminated English literacy tests as a requirement for voting, as applied to anyone who successfully completed the sixth grade in a school accredited by Puerto Rico or other jurisdiction that was under the American flag. See *id.* at 643-44.

discrimination is directed.”<sup>123</sup> Should a person literate in English or in a language other than English (e.g., French) but not Spanish as taught in a Puerto Rican school (or Spanish, as taught in Mexico, or Spain) be able to challenge the law on equal protection or other constitutional grounds? No one but Justice Douglas thought that the answer to this question was difficult.

The majority of the *Morgan* Court did not bother discussing Douglas’ opinion, but the Justices might have reasoned as follows: If New York decided to drop its literacy requirement entirely, no court would look with favor on a challenge by an English-literate voter claiming that his vote was somehow “diluted.” States need not impose a literacy requirement as a prerequisite to voting. It would also be rational for New York to eliminate part of its English-language requirement in part, by relying on the educational system of other American-flag schools (*i.e.*, schools located within the jurisdiction of the United States). Because a state could constitutionally decide to eliminate its literacy requirement entirely (or to eliminate it as to people educated in an American-flag school), Congress, in turn, could similarly eliminate the literacy requirement.

In other words, if a state could eliminate its literacy requirement directly, Congress could also eliminate the literacy requirement by virtue of Section 5. If there were no equal protection or other constitutional restriction that would prevent a state from eliminating or modifying its English literacy requirement, then (if Congress has a source of federal power to regulate this area) Congress could equally eliminate or modify the English literacy requirement without worrying about violating due process or another constitutional restriction. On the other hand, if it would violate the Equal Protection Clause for a state to enact a particular law, Congress cannot reverse that result simply by enacting a federal law that says that the state law is all right.

In *Morgan*, a state voter could not successfully complain about vote dilution, because such a state voter would have no successful claim if the state itself had decided to eliminate or limit its literacy requirement.<sup>124</sup> The state also cannot complain that Section 5 expanded federal legislative power at the expense of the states, because that was the purpose of Section 5. However, that is all Section 5 did. It neither gave Congress the right to define the meaning of equal protection nor did it otherwise expand legislative power at the expense of the judiciary. Congress does not have the power to enforce Section 5 *as Congress interprets* Section 1 of the Fourteenth Amendment, because the Supreme Court, after *Marbury v. Madison*,<sup>125</sup> is the ultimate arbiter of what the Constitution means. The Court, not Congress, interprets Section 1. But Section 5 gives Congress the power to enforce Section 1 *as the Court interprets* that section.

The Voting Rights Act of 1965 at issue in *Morgan* was an attempt by Congress to expand the power of the federal government over the states and to extend protection to a group whose rights had often been denied in violation of the Fourteenth Amendment. Therefore, the statute in *Morgan* was upheld on the

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123. *Id.* at 658-59.

124. *Id.* at 656-57.

125. 5 U.S. (1 Cranch) 137 (1803).

rational relationship test.<sup>126</sup> The federal law did not pass out benefits or burdens on the basis of race. It simply eliminated the English literacy test for people who completed the sixth grade in an American-flag school.

If Congress were to limit federal *courts'* power to determine if a law discriminated on the basis of race, that is quite a different matter, and it would not involve the facts of *Morgan*. The federal law in *Morgan* simply removed a literacy test for people educated in an American-flag school. If a state had enacted a similar state law, it would not have involved passing out any benefits or burdens on the basis of race. But if the state law—or the federal law enacted pursuant to Section 5 of the Fourteenth Amendment—passed out benefits or burdens on the basis of color, a court should strictly scrutinize such a legislative scheme and uphold it only if supported by a compelling state interest.<sup>127</sup> The decision in *Morgan*, upholding the requirement of a more liberal voting eligibility standard than the judicially defined constitutional requirement, does not support the argument that Congress may restrict a court's power to interpret the requirements of the Fourteenth Amendment, or that Congress may define what "equal protection" or "due process" is, or that Congress may limit the available remedies for violations of those rights.<sup>128</sup>

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126. *Morgan*, 384 U.S. at 653-56.

127. *Cf.* *Hunter v. Erickson*, 393 U.S. 385 (1969). In *Hunter*, the Court held that a provision in a city charter prohibiting the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the city's voters was unconstitutional. *Id.* at 391. The Court found that although the statute did not discriminate on its face, its effect was to place a burden on the minority. *Id.* The Court asserted that a state may not make it more difficult to enact legislation for one group than for another. *Id.* at 392-93. *See also* *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967); Charles Black, *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69, 82 (1967). A congressional attempt to make it more difficult for the members of one group to enforce their constitutional rights to, for example, integrated public education, should be subject to this same equal protection strict scrutiny.

128. *See* *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (rejecting argument that congressional approval of one-year residence requirement for welfare recipients authorizes states to impose such requirements). *Accord*, *Graham v. Richardson*, 403 U.S. 365, 382 (1971). *But cf.* *Welsh v. United States*, 398 U.S. 333, 368 (1970) (White, J., with Burger, C.J. & Stewart, J., dissenting) (making an argument for respecting congressional judgment accommodating the right to free exercise of religion within a statute for raising an army).

Neither may Congress use its power to limit standing so as to affect substantive constitutional rights if it could not do so directly. The courts have often asserted that if a dispute is otherwise justiciable, the question whether a litigant is a proper party to request adjudication of an issue is within the power of Congress to determine. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 732 & n.3 (1972) (stating that in justiciable suits, Congress has the power to determine whether a party has standing to sue). Yet, where a restriction on standing may affect a constitutional right, such statements should not control. Rather, they should be limited to cases where Congress has created and expanded standing by statute.

The Court has indicated that Article III also limits the power to restrict or grant standing. *See*

In footnote ten, the *Morgan* Court issued a caveat that underscored the distinction between the power to enforce versus the power to define the reach of equal protection:

Section 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by section 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.<sup>129</sup>

However, while the Court understood the problem, merely making this statement does not make the problem go away. Simply stating that Congress can move in only one direction, like a ratchet, does not advance the analysis, because expanding one right may dilute another. If Congress enacts a law that expands freedom of choice in attending a public school, it may dilute efforts to achieve racially nondiscriminatory schools. If Congress expands the meaning of "life" or "person" in the Due Process Clause, it may restrict the abortion rights that the Court has created in its case law. In some cases, if the state expands one person's free exercise rights by granting a special exemption, it may violate the Establishment Clause.<sup>130</sup>

Although the Court in *Morgan* may not have carefully articulated why the power to enforce does not include the power to dilute, it did recognize what *City of Boerne* later confirmed: that a Section 5 power to dilute would conflict with a primary purpose of the Equal Protection Clause, to protect citizens' rights under the Fourteenth Amendment against a hostile legislature.<sup>131</sup> The command of the guarantees of Section 1 should control the Section 5 power: neither the states nor the Congress should have the power to violate the Equal Protection Clause or the Due Process Clause, as defined by the courts, if the guarantee is to be meaningful.<sup>132</sup> The Congressional power to enforce the Fourteenth

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Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) ("Apart from Article III jurisdictional questions, . . . Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise.")

Presumably, due process creates another limitation. See *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 301 (1943).

129. *Morgan*, 384 U.S. at 651-52 n.10 (citations omitted). See also *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (1970) (Black, J.), discussed below.

130. U.S. CONST. amend. I.

131. *Morgan*, 384 U.S. at 651-52 n.10. See also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997).

132. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), *opinion supplemented*, 349 U.S. 294 (1955).

Amendment is not the power to override the judicial interpretation of the clauses of that Amendment.<sup>133</sup>

As a logical matter, Section 5 of the Fourteenth Amendment should not be read to grant or to fortify any special congressional power to do something that the states could not constitutionally already do. Recall that in *Morgan* Congress used Section 5 to eliminate state obstacles, such as literacy tests, to exercising the franchise without regard to race.<sup>134</sup> The New York legislature itself could have enacted these reforms without raising any constitutional questions. Section 5 only allowed Congress to do that which New York could have already done: Section 5 simply allowed Congress to enact these reforms, without New York being able to raise successfully either a Tenth Amendment defense or any other federalism argument to invalidate what Congress did. Section 5 of the Fourteenth Amendment modifies the Tenth Amendment; it does not modify Section 1 of the Fourteenth Amendment or any other constitutional clause. Thus, if an affirmative action plan violates the Constitution, Section 5 of the Fourteenth Amendment should not give Congress any special power to engage in validating such a violation. Otherwise, the caveat in footnote ten to the *Morgan* opinion is wrong.<sup>135</sup>

While a court should not accept a subterfuge, it is not enough for the Court to announce, like an *ipse dixit*, that Section 5 does not authorize Congress to dilute constitutional rights, because legislation can be redrafted so that dilution of some rights is accompanied by expansion of other rights. While the *Morgan* Court was correct that Section 5 could not have been intended to authorize Congress to limit Fourteenth Amendment rights, the Court's opinion would not have suffered if it had offered more explanation. *City of Boerne* corrected this oversight when it held that Congress cannot define or alter the meaning of the Fourteenth Amendment by mere legislation.<sup>136</sup> The Constitution is not like ordinary legislation; it is the fundamental law, and shifting legislative majorities should not be able to change the judiciary's interpretation of that fundamental law.<sup>137</sup>

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133. In *Mississippi University for Women v. Hogan*, the Court quoted footnote 10 of *Katzenbach v. Morgan* and added: "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." 458 U.S. 718, 732-33 (1982) (quoting *Morgan*, 384 U.S. at 651-52 n.10). The *Hogan* Court held that the state, under the Fourteenth Amendment, could not have a female-only nursing school; no congressional statute could excuse the state from such gender discrimination. *Id.* at 731.

See also *Califano v. Goldfarb*, 430 U.S. 199, 210 (1977). Cf. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (stating that the powers granted by the Constitution to Congress or the states "are always subject to the limitation that they may not be exercised in a way that violated other specific provisions of the Constitution").

134. See *Morgan*, 384 U.S. at 645.

135. See *id.* at 651-52 n.10.

136. *City of Boerne*, 117 S. Ct. at 2168.

137. See *id.* (citing Van Alstyne, *supra* note 62, at 292-303 (1996)).

*A. Affirmative Action and Federal Set-Asides*

Let us apply this analysis to the Court's recent affirmative action cases. First, there is *Adarand Constructors, Inc. v. Peña*,<sup>138</sup> a case where federal law mandated that a certain percentage of federal contracts must be "set aside" to be awarded on the basis of race. The Court held that such federal affirmative action programs, like state programs, must comply with strict scrutiny.<sup>139</sup> That is, they must be narrowly tailored to further compelling government interests. The majority ruled that, to the extent that an earlier case had held federal racial classifications to a less rigorous standard, it is no longer controlling.<sup>140</sup>

*Adarand Constructors* appears to teach us that, if certain state affirmative action programs violate the Equal Protection Clause, then a similar federal affirmative action program will also violate the Constitution, because the Federal Government cannot use its powers under Section 5 of the Fourteenth Amendment to ratify a state violation of equal protection or to engage in action that would violate Section 1 of the Fourteenth Amendment if a state were the actor.<sup>141</sup> The Court explicitly did not decide the reach of Section 5 of the Fourteenth Amendment in *Adarand Constructors*,<sup>142</sup> but its later decisions, discussed below, that address racial gerrymandering do discuss the reach of Section 5 and the Court makes clear that Section 5 does not grant Congress the power to authorize states to violate Section 1 or to excuse states from complying with Section 1.

*B. Affirmative Action and Racial Gerrymandering*

In the racial gerrymandering cases, like the set-aside cases, the Court has

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138. 515 U.S. 200 (1995) (5-4 decision). The *Adarand Constructors* Court also overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which did not apply strict scrutiny to a federal affirmative action program. The new test requires "strict scrutiny." Cf. Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and The Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995) (concluding that RFRA is unconstitutional and violates the First Amendment); Lino A. Graglia, Podberesky, Hopwood, and *Adarand: Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287 (1996) (concluding that such race-based programs are unconstitutional).

139. *Adarand Constructors, Inc.*, 515 U.S. at 204.

140. *Id.*, overruling in part *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

141. The Fourteenth Amendment, by its own terms, only applies to states, not the Federal Government. But, in general, if an action violates the Equal Protection Clause, then it violates the equal protection component of the Due Process Clause of the Fifth Amendment, and the Fifth Amendment does apply to the Federal Government. See *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

142. *Adarand Constructors*, 515 U.S. at 230 (citations omitted):

It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. We need not, and do not, address these differences today.



backtracked from its earlier decisions and has now invalidated redistricting plans where the state has drawn district lines simply to favor a racial group. The Court is quite concerned that such racial gerrymandering will lead to more discrimination. The Court's rationale in these cases suggests that if the *state* unconstitutionally gerrymandered the voting district for racial reasons, the Court will not allow the *federal government* to engage in similar racial gerrymandering. If it is unconstitutional for a state to engage in such activities, then Congress should have no Section 5 power under the Fourteenth Amendment (or any similar power under Section 2 of the Fifteenth Amendment)<sup>143</sup> to change the result of this constitutional decision.

Consider the case of *Shaw v. Reno*.<sup>144</sup> White plaintiffs attacked racial gerrymandering designed to place more black voters in a district in the hope that the voters would more likely elect black candidates. The Court ruled that North Carolina's efforts to comply with the Voting Rights Act did not immunize the redistricting from constitutional attack.<sup>145</sup> If the redistricting was only as an

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143. U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

144. 509 U.S. 630 (1993) (5-4 decision), *on remand*, 861 F. Supp. 408 (E.D.N.C. 1994). The Court remanded for further proceedings. Justice White, joined by Justices Blackmun and Stevens, dissented. Justices Blackmun, Stevens, and Souter each filed dissenting opinions. North Carolina citizens challenged the constitutionality of North Carolina's congressional redistricting on the grounds that the state had engaged in unconstitutional racist gerrymandering by deliberate segregation of voters into separate districts on the basis of race. The plaintiffs did not allege that they were white, but the three judge district court took judicial notice that appellants were white. *Shaw*, 509 U.S. at 642. Plaintiffs complained that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." *Id.* at 641.

Justice O'Connor, writing for the Court, invalidated this state legislation (which had been enacted because of objections from the U.S. Attorney General) that was specifically designed to create majority black districts in North Carolina. *Id.* at 658. Plaintiffs complained that two Congressional districts, where a majority of black voters were concentrated arbitrarily, were created for racial purposes, without regard to any other considerations, such as compactness, contiguousness, geographic boundaries, or political subdivisions, in order to "assure the election of two black representatives in Congress." *Id.* at 630. One of the two majority-black districts looked like a "bug splattered on a windshield." *Id.* at 635 (citing WALL ST. J., Feb. 4, 1992, at A14). The other was approximately 160 miles long, and, for much of its length, no wider than a highway. If you drove down the street with both car doors open, "you'd kill most of the people in the district." *Id.* at 636 (citing WASH. POST, Apr. 20, 1993, at A4).

145. *Id.* at 655-57. The plaintiffs in *Shaw* alleged that the state legislature had created two congressional districts where a majority of black voters were concentrated "arbitrarily" for racial reasons. The Court held that plaintiffs stated a cause of action under the Equal Protection Clause when they claimed that the redistricting legislation "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purposes of voting, *without regard for traditional districting principles and without sufficient compelling justification.*" *Id.* at 642 (emphasis added). The Court majority rejected a notion that there is "benign" racial

effort to segregate the races for purposes of voting without regard for traditional districting principles, the Court ruled that there is a cause of action under the Equal Protection Clause.<sup>146</sup>

*Miller v. Johnson*<sup>147</sup> extended *Shaw* and invalidated a Georgia congressional

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gerrymandering. *Id.* at 653.

In the middle of the 1990s, a result of racial gerrymandering was that the Republican Party in the South was helped because black voters (who tend to vote Democratic) were put into districts that became overwhelmingly Democratic. Dozens of Republican Congressmen found themselves in safer districts or were placed in districts that were formerly safe Democratic districts but now were districts where the Republicans could mount serious challenges. Michael K. Frisby, *Florida Race Shows How Democrats Were Hurt By Efforts to Create Black-Dominated Districts*, WALL ST. J., Oct. 25, 1994, at A20 (Midwest ed.).

146. *Shaw*, 509 U.S. at 654. The Court emphasized that North Carolina's efforts to comply with the Voting Rights Act did not immunize the redistricting from constitutional attack: "The Voting Rights Act and our case law make clear that a reapportionment plan that satisfied § 5 [of the Voting Rights Act] still may be enjoined as unconstitutional." *Id.* Thus, the Court concluded that the Voting Rights Act does *not* "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Id.* "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Id.* "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 656-57.

Compactness, contiguity, and respect for political boundaries are not constitutionally required, but if they exist, they "are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial grounds." *Id.* at 646. On the other hand, if people are widely separated by geographic and political boundaries but placed together because of the color of their skin, there is "an uncomfortable resemblance to political apartheid." *Id.* at 647. Therefore, if plaintiffs allege that legislation, which is race-neutral on its face, cannot rationally be understood as anything other than an effort to separate voters into different districts on the basis of race, and also, that the separation lacks "sufficient justification," then plaintiffs have stated a cause of action under the Equal Protection Clause. *Id.* at 649. *See also* James Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517 (1995).

147. 515 U.S. 900 (1995). On remand, the district court adopted a redistricting plan with only one black-majority district, and the U.S. Supreme Court affirmed the district court on appeal. *Abrams v. Johnson*, 117 S. Ct. 1925 (1997), *aff'g* *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995). The Court ruled, five to four, that the district court was not required to defer to unconstitutional plans previously adopted by the Georgia legislature and that the lower court acted within its discretion in concluding that it could not draw two black-majority districts without engaging in racial gerrymandering. *Id.* at 1928. The district court plan also did not result in dilution of black voting strength or retrogression in the position of racial minorities in violation of the Voting Rights Act and did not violate the Constitutional requirement of one person, one vote. *Id.* at 1927-28.

Compare *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194-95 (1997), which upheld a state redistricting plan by ruling that the district court's finding that the settlement agreement did

redistricting plan that involved racial gerrymandering that favored racial minorities. In *Miller*, the proof showed that race was the “predominate factor” in drawing the lines for the Eleventh District. The shape of the district was particularly bizarre on its face, and there was considerable evidence that the district was “unexplainable other than by race.”<sup>148</sup> Under the equal protection claim, the Court held that Georgia’s new Eleventh District was invalid under the principles announced in *Shaw*, and, that the District could not be sustained as narrowly tailored to serve a compelling governmental interest.<sup>149</sup>

The state argued that it had a compelling reason to draw the district the way that it was drawn, and that reason was the need to comply with preclearance mandates issued by the Department of Justice, but the Court rejected that justification as not “compelling.” The Court argued that Georgia’s earlier enacted plans did not violate Section 5 of the Voting Rights Act and hence Georgia’s redrawing of the Eleventh District was not necessary.<sup>150</sup>

The following term, in *Shaw v. Hunt*,<sup>151</sup> the Court further elaborated on the principle of *Miller*. First, the Court agreed with the unanimous lower court finding that the “serpentine” districting was deliberately drawn to produce one or more districts of a certain racial composition.<sup>152</sup> Then the Court turned to the second major issue: the trial court had also held that the redistricting plan was narrowly tailored to further the State’s compelling interests in complying with Sections 2 and 5 of the Voting Rights Act. On this issue, the Court reversed and held that the “bizarre-looking” majority-black district violated the Equal Protection Clause.<sup>153</sup> First, the Court found that the asserted state interest in eliminating the effects of past discrimination was not a compelling interest because that claimed interest did not actually precipitate the use of race in this redistricting plan.<sup>154</sup> Second, the Court ruled that creating an additional majority-black district was not required under a correct reading of Section 5.<sup>155</sup> Third, the Court concluded that racial gerrymandering was not a narrowly

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not subordinate traditional districting principles to race in violation of *Miller v. Johnson*, 515 U.S. 900 (1995), was not clearly erroneous.

148. *Miller*, 515 U.S. at 917.

149. *Id.* at 919-20.

150. *Id.* at 923.

151. 517 U.S. 899 (1996). Justice Stevens filed a dissenting opinion joined in part by Justices Ginsburg and Breyer. Justice Souter filed a dissenting opinion also joined in part by Justices Ginsburg and Breyer. See also *Bush v. Vera*, 517 U.S. 952 (1996). In *Bush*, a Texas redistricting plan created two black-majority districts and one Hispanic-majority district. The Department of Justice precleared the redistricting as compliant with the Voting Rights Act. Voters challenged the redistricting as racially gerrymandered in violation of the Fourteenth Amendment, a three-judge district court agreed, and the Supreme Court, with no majority opinion, affirmed. *Id.* at 986.

152. *Shaw*, 517 U.S. at 905-06.

153. *Id.* at 915.

154. *Id.* at 912.

155. *Id.* at 911. However, the Court did not reach the question whether compliance with the Voting Rights Act, Section 5, was, on its own, a compelling state interest.

tailored remedy to comply with Section 2 of the Act because the minority group was not geographically compact.<sup>156</sup>

#### CONCLUSION

Acts of Congress that purport to expand human rights, the right to vote, the right to practice one's religion, and so forth, may be enacted for the best of intentions. Obviously both state and private entities should not discriminate against otherwise qualified individuals. Nonetheless, a broad reading of congressional power to, in effect, reverse Supreme Court decisions interpreting the meaning of the Constitution, is bad constitutional law and bad policy. To read Section 5 of the Fourteenth Amendment to grant Congress the power to interpret the meaning of the Constitution is to read that Clause incorrectly.

Nonetheless, many courts below the U.S. Supreme Court have not considered with any care the limits to Congress' Section 5 power. *Oregon v. Mitchell*<sup>157</sup> and *City of Boerne v. Flores*<sup>158</sup> are proof that those limits exist, but after looking at many of the lower court cases, one would often never know that the Supreme Court ever decided either case. Many lower court cases upholding federal power under Section 5 of the Fourteenth Amendment never cite *Mitchell*—a lapse that should be surprising, because *Mitchell* led to the ratification of the Twenty-sixth Amendment. There are only twenty-seven amendments to our Constitution, and the Twenty-sixth Amendment is one of only a handful that actually reverse a Supreme Court decision. *Oregon v. Mitchell* is not an unknown decision lost in the sands of time, but many lower courts act as if it were so.<sup>159</sup>

156. *Id.* at 915.

157. 400 U.S. 112 (1970).

158. 117 S. Ct. 2167 (1997).

159. After *City of Boerne* the direction of the tide of cases is unclear. At least there is now case law recognizing the significance of Supreme Court decisions limiting congressional power under Section 5. Compare *Kimel v. State Bd. of Regents*, 139 F.3d 1426, 1448 (11th Cir. 1998) (Cox, J., dissenting in part) (stating that "[b]ecause the ADEA is not a valid exercise of Congress' § 5 authority, Congress could not have abrogated the states' Eleventh Amendment immunity to suit."). See also *Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997) (holding that the Driver's Privacy Protection Act was unconstitutional under the Tenth Amendment). The court noted that Congress had not invoked its spending power to justify the law. *Id.* at 982. Contrast *Coolbaugh v. Louisiana*, 136 F.3d 430, 432 (5th Cir. 1998) (Davis, J., joined by Duhe, J.) (holding that the ADA is within Congress' power under Section 5 of the Fourteenth Amendment, despite the *City of Boerne* case). Judge Smith dissented. *Id.* at 439. See also *Clark v. California*, 123 F.3d 1267, 1271-72 (9th Cir. 1997) (holding that the ADA and the Rehabilitation Act of 1973 are justified by Section 5 of the Fourteenth Amendment and both abrogate Eleventh Amendment immunity).

Also compare Kris W. Kobach, *Contingency Fees May Be Hazardous to Your Health: A Constitutional Analysis of Congressional Interference with Tobacco Litigation Contracts*, 49 S.C. L. REV. 215 (1998) (raising Tenth Amendment objections to Federal interference with state contracts), with Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Federalism*, 1997 SUP. CT. REV. 199, 248 (criticizing Printz v. United States, 117 S. Ct. 2365 (1997), for "its lack of constitutional grounding").

Some people are concerned that this interpretation of Section 5 of the Fourteenth Amendment means that Congress cannot expand human rights, civil rights, and political rights by using a broad power under Section 5.<sup>160</sup> The concept of “expanding” human rights, like motherhood, apple pie, and the flag, sounds great. But this power is like a knife that cuts both ways. Such a broad congressional power can be used to expand some rights by narrowing others.

Creative legislation should be able to recast a simple dilution of one right as an expansion of another right. A Congress bent on limiting desegregation, for example, would not simply enact a law authorizing states to establish racially segregated schools. Instead, the law might provide that—in an effort to expand freedom of choice—states should establish a variety of schools and allow people to transfer to their preferred schools, even if the result of such transfers meant that some schools became disproportionately white or black.

Although the Court in *Katzenbach v. Morgan*<sup>161</sup> found broad congressional power under Section 5 to determine that state practice interferes with Fourteenth Amendment rights, it also examined the federal statute for consistency with constitutional requirements.<sup>162</sup> The Court’s analysis confirms that federal courts will scrutinize congressional action under Section 5 to assure that it meets the equal protection requirements embodied in the Fifth Amendment.<sup>163</sup> If the legislation includes a suspect classification or affects a fundamental right, then under traditional equal protection analysis only a compelling state interest will support its constitutionality.

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160. See, e.g., Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199 (1971); John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997).

161. 384 U.S. 641 (1966).

162. *Id.*

163. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (racial discrimination so unjustifiable as to also be a denial of due process; racial segregation in District of Columbia schools such a denial under Fifth Amendment).