Enforcing Civil Rights: Will the Supreme Court Strike Down the Voting Rights Act and Other Landmark Civil Rights Legislation?

The Constitution at a Crossroads

Introduction

> Do decisions that return the country to a pre-Civil War understanding of the nation establish a more perfect Union? Are decisions just that shield not only the states but lesser appendages of the state from paying for the wrongs they commit? Do decisions that leave the elderly and the disabled with inadequate remedies for unequal treatment establish justice? . . . .Do decisions that deny Congress the power to protect the free exercise of religion secure the blessings of liberty? Do decisions that leave women less protected than men achieve any of the Constitution's ends?
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> The[se] results . . . were reached largely . . . by means of doctrinal devices – state sovereign immunity, congruence and proportionality of legislation, and record of evils to be eradicated – that have no footing in the Constitution. Remove these obfuscations, it will be clear that the court's decisions do not survive the test for serving constitutional purposes.
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> JOHN T., NOONAN, JR.,NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 12 (2002).

Three years ago, an ideologically-divided Supreme Court appeared poised on the precipice of a ruling that would strike down a central provision of an iconic civil rights law – the preclearance provision of the Voting Rights Act of 1965 – as beyond Congress's constitutional authority. Then, the Court blinked, issuing instead an 8-1 ruling disposing of the challenge on narrow statutory grounds. Now with limits on state-imposed threats to voting rights front and center in the run-up to the fall 2012 elections, challenges to the Act are again racing through the court system, setting up a return engagement before the Court, possibly as soon as the October 2012 Term.

As the quote above from Judge John Noonan, a conservative appeals court judge appointed by President Ronald Reagan, makes clear, one of the most important and controversial developments in the Supreme Court's jurisprudence of the last 15 years is a new doctrine, minted by Justice Anthony Kennedy in the 1997 ruling in *Boerne v. City of Flores*, [1] limiting the power of Congress to protect the

[1] 521 U.S. 507 (1997).

constitutional guarantees of liberty and equality secured by the Fourteenth Amendment. Introduced with little notice or fanfare in *Boerne* – a case that divided the Court mainly over the meaning of the First Amendment's Free Exercise Clause – *Boerne's* "congruence and proportionality" test has subsequently become a lightening rod, as Justice Kennedy and other conservative Justices on the Court have applied this test with significant rigor in rulings that have narrowed the reach of landmark federal civil rights laws such as the American with Disabilities Act and the Age Discrimination in Employment Act. With a test to an important section of the Family and Medical Leave Act before the Court currently, and with a landmark challenge to the Voting Rights Act on its way to the Court, the constitutional authority of Congress to protect liberty, equality and civil rights is very much at a crossroads.

The Text and History of the Enforcement Power

The three Civil War Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments – establish the constitutional foundation for Congress to enact federal civil rights legislation, each giving to Congress the power to enforce the Constitution's new guarantees of liberty, equality, and the right to vote "by appropriate legislation."[2] In enlarging the constitutional powers of Congress, the Framers of the three Civil War Amendments gave Congress a critical role in ensuring that the new constitutional guarantees would be enjoyed by all Americans. For example, during the debates over the Fourteenth Amendment, the Framers of the Amendment explained that, to ensure that the Constitution's new guarantees "are to be effectuated and enforced, . . . additional power should be given to Congress . . . . This is to be done by the fifth section of the amendment . . . . Here is a direct affirmative delegation of power to carry out the principles of these guarantees, a power not found in the Constitution."[3] Thus, the Framers of the Fourteenth Amendment explained that the Enforcement Clause "casts upon Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property."[4]

The language that the Framers used to define the scope of Congress' authority under the Civil War Amendments – "appropriate legislation" – reflects a decision to give Congress wide discretion to enact whatever measures it deemed "appropriate" for achieving the purpose of the Amendments. In giving Congress the power to enact "appropriate legislation" to secure the new constitutional guarantees of liberty, equality, and the right to vote, the Framers of the three Civil War Amendments granted Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the Supreme Court in *McCulloch v. Maryland*,[5] a seminal case well known to the Framers of those Amendments.[6] In adopting a broad understanding of the scope of the enforcement power, the Framers

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[2] U.S. Const., Amdt. XIII, §2; Amdt. XIV, § 5; Amdt. XV, §2.
[3] Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).
[4] *Id.* at 2768.
[5] 17 U.S. (4 Wheat.) 316 (1819).
[6] *See, e.g.*, JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 28-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev 1801, 1810-11 (2010); Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation*, 111 HARV. L. REV. 153, 178 n.153 (1997). For an extensive discussion of the text and history of the Enforcement Clauses

stressed the importance of a broad legislative power to protect constitutional rights – with corresponding deference from the courts to respect this new authority.

In the years after Reconstruction, the Supreme Court held that the Enforcement Clause of the Fourteenth Amendment gave Congress broad authority to secure the guarantees of the Fourteenth Amendment from state invasion, echoing the reasoning of *McCulloch*. "Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, whatever tends . . . to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial and invasion . . . is brought within the domain of congressional power."[7] Using the enforcement power, Congress has enacted a long list of iconic civil rights legislation vindicating the promises of the Civil War Amendments, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and, more recently, the Americans with Disabilities Act and the Family and Medical Leave Act.

Boerne and the Congruence and Proportionality Test

In 1997, in its landmark opinion in *Boerne*, the Supreme Court changed course. *Boerne* held that the Religious Freedom Restoration Act ("RFRA") exceeded Congress' power to enforce the Fourteenth Amendment and, more important, demanded that federal enforcement legislation satisfy a new, searching standard of review, called congruence and proportionality. In fashioning the congruence and proportionality standard in *Boerne*, Justice Kennedy emphasized that the text of Section 5 limits Congress to the power to "enforce" the guarantees of the Fourteenth Amendment. "Legislation which alters the meaning of the [Fourteenth Amendment] cannot be said to be enforcing [it]. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[8] In choosing to give Congress a power to enforce, Justice Kennedy reasoned, the drafters of the Amendment gave Congress remedial authority to redress actual constitutional violations by state and local governments, not the substantive power to elucidate the Constitution's meaning.[9] Thus, in Justice Kennedy's view, Congress was required to hew to the Court's precedents in legislating under the Enforcement Clause. Any other result, the Court reasoned, would allow Congress to change the Constitution's meaning and overhaul the balance of powers between the states and the federal government. "If Congress could define its own powers by

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of the Civil War Amendments, see DAVID H. GANS & DOUGLAS T. KENDALL, THE SHIELD OF NATIONAL PROTECTION: THE TEXT AND HISTORY OF SECTION 5 OF THE FOURTEENTH AMENDMENT (2009).

[7] *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) ("The basic test to be applied . . . is the same in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fourteenth Amendment was ratified. . . . The Court has subsequently echoed his language in describing each of the Civil War Amendments."); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("[T]he McCulloch v. Maryland standard is the measure of what constitutes ' appropriate legislation' under § 5 of the Fourteenth Amendment.").

[8] *Boerne*, 521 U.S. at 519.

[9] *Id.* at 520 (arguing that "the Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause").

altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[10]

Boerne drew a distinction "between measures that remedy and prevent unconstitutional actions and measures that make a substantive change in the governing law,"[11] reaffirming that when Congress enforces recognized fundamental constitutional rights rather than inventing new ones, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[12] While the line between remedial and substantive measures "is not easy to discern, and Congress must have wide latitude in determining where it lies," Justice Kennedy explained that "the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[13]

Applying this new test, the Court concluded that RFRA, which provided that government action that substantially burdened the free exercise of religion must meet the test of strict scrutiny, could not be justified as legislation enforcing the Fourteenth Amendment. The Act's sweeping coverage, Justice Kennedy wrote, "is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[14] Rather, as the legislative record clearly reflected, RFRA was an attempt to overturn legislatively the Supreme Court's prior decision in *Employment Division, Dep't of Human Resources v. Smith,*[15] which had narrowed the meaning of the First Amendment, and "attempt a substantive change in constitutional protections."[16]

Boerne's new interpretation of the scope of Congress' power to enforce the guarantees of the Fourteenth Amendment went unchallenged on the Court. Instead, the dissenters – Justices Sandra Day O'Connor, Stephen Breyer, and David Souter – took on the Court's prior interpretation of the Free Exercise Clause in *Smith*, arguing that, as a matter of First Amendment history, *Smith* was wrong (or there were serious doubts about its correctness) and should be re-considered or overruled.[17] As Justice O'Connor explained, "[i]f the Court were to correct the misinterpretation of the Free Exercise Clause in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty."[18]

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[10] *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
[11] *Id.* at 519.
[12] *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).
[13] *Id.* at 519, 520.
[14] *Id.* at 532.
[15] 494 U.S. 872 (1990).
[16] *Boerne*, 521 U.S. at 532.
[17] *Id.* at 544-45 (O'Connor, J., dissenting); *see also id.* at 565-66 (Souter, J., dissenting) (calling for re-argument on the question whether *Smith* was correctly decided); *id.* at 566 (Breyer, J., dissenting) (same).
[18] *Id.* at 545 (O'Connor, J., dissenting).

The Rehnquist Court's Federalism Revolution: An Ideological Divide Emerges on Congruence and Proportionality

Boerne might have been viewed as an outlier case involving a unique set of circumstances – after all, in enacting RFRA, Congress had by statute attempted to displace the Supreme Court's interpretation of the Free Exercise Clause and mandate a constitutional standard of review for all future cases – but a majority of the Court did not treat it in this fashion. Rather, in a series of cases deciding between 1999 and 2001, at the height of the Rehnquist Court's Federalism Revolution, the Court applied *Boerne*'s newly-minted congruence and proportionality standard with rigor to hold unconstitutional in part a number of federal statutes, including two of the most important modern federal anti-discrimination laws. In these cases, the Court's liberal Justices recognized the dangers posed by the congruence and proportionality test and issued strongly-worded dissents.

In *Kimel v. Florida Bd. of Regents*,[19] decided in 2000, and *Board of Trustees of Univ. of Alabama v. Garrett*,[20] decided in 2001, 5-4 conservative majorities held that the Age Discrimination in Employment Act and the employment discrimination provisions of the Americans With Disabilities Act were not valid exercises of congressional power to enforce the Fourteenth Amendment, and were unconstitutional to the extent they allowed individuals to sue state governments for monetary damages.[21] In these cases, the Court, in opinions authored, respectively, by Justice O'Connor and Chief Justice William Rehnquist, reasoned that, because the Court had interpreted the Fourteenth Amendment to permit age discrimination and disability discrimination, so long as it is rationally related to a legitimate government interest, the ADEA's and ADA's prohibitions on such discrimination "attempt[ed] to redefine the States' legal obligations"[22] and "rewrite Fourteenth Amendment law laid down by this Court . . . . Section 5 does not so broadly enlarge congressional authority."[23] Conducting an extensive, searching review of the congressional record, the majority in both cases concluded that Congress had no basis for concluding that legislation was needed to correct a pattern of unconstitutional discrimination by the states.

Four Justices issued strongly worded dissents in each case. Most significantly, in *Garrett*, the Court's liberal wing took on the Court's sweeping use of *Boerne* to limit landmark antidiscrimination laws. Recognizing the broad sweep of the Fourteenth Amendment's guarantee of the equal protection of the laws and the broad discretion entrusted to Congress under the Enforcement Clause, Justice Breyer's dissent argued that "Congress could have reasonably concluded that the [ADA's] remedy . . .

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[19] 528 U.S. 62 (2000).
[20] 531 U.S. 356 (2001).
[21] In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that Congress could not subject states to suit for money damages for violating federal statutes enacted pursuant to Congress' Article I powers. To overcome this principle of state sovereign immunity, Congress needed to point to a grant of authority to Congress at the expense of the states, such as the power granted to Congress in each of the Civil War Amendments. Thus, *Seminole Tribe* made the scope of Section 5 critical to providing federal damage remedies against state governments.
[22] *Kimel*, 528 U.S. at 88.
[23] *Garrett*, 531 U.S. at 374.

constitutes an 'appropriate' way to enforce th[e Constitution's] basic equal protection requirement." [24] The rational basis test, he explained, was designed to restrain judges, and should not be invoked to prevent Congress from ensuring that the Fourteenth Amendment's guarantee of the equal protection of the laws is actually enjoyed by all persons, regardless of disabilities. The four liberal dissenters took the majority to task for ignoring that Section 5 of the Fourteenth Amendment gave Congress "'the same broad powers expressed in the Necessary and Proper Clause'" to do "whatever 'tends to enforce submission to [the Amendment's] prohibitions' and 'to secure to all persons . . . the equal protection of the laws.'"[25] There was no basis in law, Justice Breyer argued, for refusing to "follow the longstanding principle of deference to Congress," and setting aside Congress' considered, well-supported judgment that the ADA was necessary to prevent "substantial unjustified discrimination against persons with disabilities," often motivated by "'stereotypic assumptions' or purposeful unequal treatment'" in violation of the Fourteenth Amendment's guarantee of equality.[26]

Toward the end of Chief Justice Rehnquist's tenure, the conservative ideological bloc that produced the federalism revolution began to break down, producing narrow majorities on the Court that have limited *Boerne*'s reach and have held that Congress has significantly more leeway to enact statutes that prevent or deter constitutionally-suspect discrimination or safeguard substantive fundamental rights secured by the Fourteenth Amendment. In 2003, in *Nevada Dep't of Human Resources v. Hibbs*,[27] in a 6-3 ruling authored by Chief Justice Rehnquist himself, the Court held that the Family and Medical Leave Act's family care provision, granting employees 12 weeks of unpaid leave to care for a family member, was appropriate legislation to prevent and deter gender discrimination by the states in the administration of leave benefits. By granting all persons the right to take leave, the Chief Justice explained, "the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."[28] While *Boerne*'s congruence and proportionality standard still applied, Chief Justice Rehnquist explained that "it was easier for Congress to show a pattern of state constitutional violations" because of the Fourteenth Amendment's heightened protection against gender discrimination.[29]

In 2004, in *Tennessee v. Lane*,[30] the Court held, by a 5-4 vote, that the ADA's prohibition on disability discrimination in the administration of public services was valid legislation enforcing the Fourteenth Amendment, as applied to barriers on access to state courthouses. In an opinion by Justice Stevens, the Court held that because the ADA prohibited discrimination in the exercise of fundamental rights, such as the right of access to the courts, that are "subject to more searching judicial review,"[31] Congress was justified in using prophylactic legislation to respond to a widespread pattern of

[24] *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting).
[25] *Id.* at 386 (Breyer, J., dissenting) (citations omitted).
[26] *Id.* at 386, 380, 381 (Breyer, J., dissenting) (citations omitted).
[27] 538 U.S. 721 (2003).
[28] *Id.* at 737.
[29] *Id.* at 736.
[30] 541 U.S. 509 (2004).
[31] *Id.* at 522-23.

discrimination. "When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation prohibiting practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."[32]

Hibbs and *Lane* provoked strongly worded dissents objecting that the Court had watered down *Boerne*'s congruence and proportionality test beyond recognition. In *Hibbs*, Justice Kennedy's dissent, joined by Justices Antonin Scalia and Clarence Thomas, argued that the Court had failed to adhere to *Boerne*'s strictures. "Simply noting the problem is not a substitute for evidence which identifies some real discrimination that the family leave rules are designed to prevent."[33] In Justice Kennedy's view, "[t]he paucity of evidence to support the case . . . demonstrates that Congress was not trying to responds with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own."[34] In *Lane*, Chief Justice Rehnquist's dissent, joined by Justice Kennedy and Justice Thomas, argued that the majority should have followed the Court's three-year-old ruling in *Garrett.* "The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett* . . . . Title II can only be understood as a congressional attempt to 'rewrite the Fourteenth Amendment law laid down by this Court,' rather than a legitimate effort to remedy or prevent state violations of that Amendment."[35] The *Lane* dissenters rejected the majority's as-applied analysis, viewing it as an attempt "to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right."[36]

In a separate dissent in *Lane*, Justice Scalia argued that *Boerne's* congruence and proportionality standard should not be applied at all, calling the test "a standing invitation to judicial arbitrariness . . . that has no demonstrable basis in the text of the Constitution . . . ."[37] In Justice Scalia's view, all that Section 5 permits is legislation providing for access to courts to enforce the Amendment; it does not permit Congress "to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called 'prophylactic legislation' is reinforcement rather than enforcement."[38] Out of deference to the Court's long line of precedents interpreting Section 5 broadly to uphold federal laws aimed at racial discrimination, Justice Scalia announced that he would not apply his new rule in that context, observing that "[g]iving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment . . . ."[39]

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[32] *Id.* at 520.
[33] *Hibbs*, 538 U.S. at 746 (Kennedy, J., dissenting).
[34] *Id.* at 754 (Kennedy, J., dissenting).
[35] *Lane*, 541 U.S. at 547, 548 (Rehnquist, C.J., dissenting).
[36] *Id.* at 551 (Rehnquist, C.J., dissenting).
[37] *Id.* at 558 (Scalia, J., dissenting).
[38] *Id.* at 559 (Scalia, J., dissenting).
[39] *Id.* at 561 (Scalia, J., dissenting).

The Enforcement Power and the Roberts Court

As described above, the pendulum on the *Boerne's* congruence and proportionality test swung widely from the Court's demanding application in *Kimel* and *Garrett,* to the much more forgiving application in *Hibbs* and *Lane*, which reaffirmed that Congress has broad authority to create prophylactic rules to vindicate constitutional protections the Court has already recognized. But there is reason to believe that the Court's pendulum in this area may be poised to swing back. Chief Justice Rehnquist, who wrote the opinion in *Hibbs*, and Justice O'Connor, who joined the majority in *Hibbs* and cast the deciding vote in *Lane*, have been replaced by Chief Justice John Roberts and Justice Samuel Alito. If these Justices side with Justice Kennedy, who appears to be deeply committed to enforcing a strict version of the congruence and proportionality test he coined in *Boerne*, and Justices Scalia and Thomas, these cases are likely to be narrowed or overruled.

Indeed, in 2009, at oral argument in *NAMUDNO v. Holder*,[40] the Court's five conservative Justices seemed poised to strike down one of the most important provisions of the Voting Rights Act of 1965, the Act's preclearance requirement, which requires certain jurisdictions with a history of racial discrimination in voting to obtain federal permission before altering their voting laws or regulations. Such a ruling would be a dramatic development because the Court has upheld the constitutionality of the Act's preclearance provision four times[41] and *Boerne* and the cases that followed it have repeatedly cited the preclearance requirement of the Voting Rights Act as the archetype of valid enforcement legislation.[42] While the Court ultimately decided *NAMUDNO* on statutory grounds and avoided the constitutional question, the Court's opinion, written by Chief Justice Roberts, offers something of a road map for how the Court's conservatives might strike down the Act in the future. While the Chief Justice celebrated the Act's achievements, much of his opinion suggested that the Act's "current burdens" could no longer by justified by "current needs."[43] Viewing the preclearance requirement as an affront to federalism, the Chief Justice's opinion suggested that the Act may have run its course, citing "considerable evidence that it fails to account for current political conditions."[44] New challenges are now waiting in the wings.[45]

Possible Developments in the Future

The Court's present doctrine on the scope of congressional power to enforce the guarantees of the Civil War Amendments continues to be very controversial, and may change substantially in the Roberts Court. For the last fifteen years, the Supreme Court has been sharply divided between Justices

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[40] 129 S. Ct. 2504 (2009).

[41] *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

[42] *See Boerne*, 521 U.S. at 530-34; *Garrett*, 531 U.S. at 373-74; *Hibbs*, 538 U.S. at 756-57 (Kennedy, J., dissenting).

[43] *NAMUDNO*, 129 S. Ct. at 2513.

[44] *Id.* at 2512.

[45] *See Shelby County v. Holder*, No. 10-CV-651, 2011 WL 4375001 (D.D.C. Sept. 21, 2011), *appeal pending*, No. 11-5256 (D.C. Cir., argued Jan. 19, 2012); *LaRoque v. Holder*, No 10-CV-651, 2011 WL 6413850 (D.D.C. Dec. 22, 2011), *appeal pending*, No. 11-5349 (D.C. Cir.).

on the left, who have argued that the power of Congress under the Civil War Amendments is wide in scope, giving Congress broad authority to "advance equal-citizenship stature"[46] for all persons, and Justices on the right, who would sharply restrict the power of Congress, permitting Congress to legislate only after creating an exhaustive record showing that the legislation is a tailored response to a pattern of proven constitutional violations by the states. Justice O'Connor, and to a lesser extent Chief Justice Rehnquist, split the difference, giving Congress fairly broad power to add to the constitutional protections recognized by the Supreme Court, while sharply limiting the power of Congress in areas in which the Court had not established robust constitutional protections. With the changes in the Court's personnel, the Court's conservatives may choose to apply *Boerne*'s congruence and proportionality test expansively across the board, establishing new limits on the power to enforce the Civil War Amendments. If so, it would put at risk a broad swath of civil rights legislation, especially the three landmark statutes that have been the focus of so many of the Court's recent cases, the Voting Rights Act, the Family and Medical Leave Act, and the Americans With Disabilities Act.

First, as discussed above, the Roberts Court could strike down the preclearance provision of the Voting Rights Act on the ground that it has outlived its time.

Second, the Roberts Court could revisit *Hibbs* and *Lane*, either limiting those decisions or overruling them outright. This Term, the Justices are considering a successor to *Hibbs*, *Coleman v. Maryland Court of Appeals*,[47] which raises the question whether the self-care provision of the Family and Medical Leave Act is within Congress' power to enforce the guarantees of the Fourteenth Amendment. In *Coleman*, the Fourth Circuit distinguished *Hibbs*, holding that the self-care provision was not appropriate legislation enforcing the Fourteenth Amendment because its connection to preventing sex discrimination by the states was too tenuous to satisfy *Boerne*'s congruence and proportionality standard.[48] With the lower federal courts reading *Lane* broadly,[49] there are plenty of vehicles for the conservatives on the Roberts Court to either limit or overrule *Lane* as an aberration, inconsistent with *Garrett*.

Third, with the addition of another conservative Justice or two, the Roberts Court might even limit the power of Congress to enact laws that prohibit employment, voting and other practices that have a disparate impact on racial minorities or women on the theory that the Constitution only forbids purposeful discrimination, and nothing more.[50] While these measures have generally been upheld as a prophylactic to guard against purposeful discrimination,[51] the Roberts Court might view them as (1)

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[46] *See Lane*, 541 U.S. at 536 (Ginsburg, J., concurring).

[47] *See Coleman v. Maryland Court of Appeals,* No. 10-1016 (argued Jan. 11, 2012).

[48] *See Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 193-94 (4th Cir. 2010).

[49] For example, the federal courts of appeals have extended *Lane*'s holding to discrimination in access to education, even though education is not a fundamental right. *See Bowers v. NCAA*, 475 F.3d 524, 554-56 (3rd Cir. 2007); *Toledo v. Sanchez*, 454 F.3d 24, 34-40 (1st Cir. 2006); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 486-90 (4th Cir. 2005); *Association of Disabled Americans v. Florida Int'l Univ.*, 405 F.3d 954, 957-59 (11th Cir. 2005).

[50] *See, e.g. Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

[51] *See, e.g. United States v. Blaine County, Mont.*, 363 F.3d 897, 903-09 (9th Cir. 2004) (upholding results test in Section 2 of the Voting Rights as valid enforcement legislation); *In re Employment Discrimination Litigation Against*

once useful to prevent discrimination, but now out of date with advances in the nation; and (2) counterproductive to the goal of securing enforcement of the Fourteenth Amendment for all persons by encouraging the use of employment quotas and racial gerrymandering.[52] Having limited the scope of the disparate impact provision of Title VII and the result test of the Voting Rights Act,[53] the Roberts Court might deliver the knockout punch and declare important provisions these iconic statutes beyond the power of Congress.

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the State of Alabama, 198 F.3d 1305, 1318-24 (11th Cir. 1999) (upholding disparate impact provision of Title VII of the Civil Rights Act of 1964 as valid enforcement legislation).

[52] See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory."); *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) ("It is a sordid business, this divvying us up by race.").

[53] See, e.g. *Ricci*, supra; *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).