

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–1667

TENNESSEE, PETITIONER *v.* GEORGE LANE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May 17, 2004]

JUSTICE SCALIA, dissenting.

Section 5 of the Fourteenth Amendment provides that Congress “shall have power to enforce, by appropriate legislation, the provisions” of that Amendment—including, of course, the Amendment’s Equal Protection and Due Process Clauses. In *Katzenbach v. Morgan*, 384 U. S. 641 (1966), we decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those tests were not themselves in violation of the Fourteenth Amendment, we held that §5 authorizes prophylactic legislation—that is, “legislation that proscribes facially constitutional conduct,” *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 728 (2003), when Congress determines such proscription is desirable “to make the amendments fully effective,” *Morgan, supra*, at 648 (quoting *Ex parte Virginia*, 100 U. S. 339, 345 (1880)). We said that “the measure of what constitutes ‘appropriate legislation’ under §5 of the Fourteenth Amendment” is the flexible “necessary and proper” standard of *McCulloch v. Maryland*, 4 Wheat. 316, 342, 421 (1819). *Morgan*, 384 U. S., at 651. We described §5 as “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” *Ibid.*

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The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach*, 383 U. S. 301 (1966), which had upheld prophylactic application of the similarly worded “enforce” provision of the Fifteenth Amendment (§2) to challenged provisions of the Voting Rights Act of 1965. But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race. In *City of Boerne v. Flores*, 521 U. S. 507 (1997), we confronted Congress’s inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination.¹ There Congress had sought, in the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*, to impose upon the States an interpretation of the First Amendment’s Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of §5, we formulated the “congruence and proportionality” test for determining what legislation is “appropriate.” When Congress enacts prophylactic legislation, we said, there must be “proportionality or congruence between the means adopted and the legitimate end to be achieved.” 521 U. S., at 533.

I joined the Court’s opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as “proportionality,” because they have a way of turning into vehicles for the implementation of individual judges’ policy preferences. See, *e.g.*, *Ewing v. California*, 538 U. S. 11, 31–32 (2003) (SCALIA, J., concur-

¹ Congress had previously attempted such an extension in the Voting Rights Act Amendments of 1970, 84 Stat. 318, which sought to lower the voting age in state elections from 21 to 18. This extension was rejected, but in three separate opinions, none of which commanded a majority of the Court. See *infra*, at 10.

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ring in judgment) (declining to apply a “proportionality” test to the Eighth Amendment’s ban on cruel and unusual punishment); *Stenberg v. Carhart*, 530 U. S. 914, 954–956 (2000) (SCALIA, J., dissenting) (declining to apply the “undue burden” standard of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992)); *BMW of North America, Inc. v. Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., dissenting) (declining to apply a “reasonableness” test to punitive damages under the Due Process Clause). Even so, I signed on to the “congruence and proportionality” test in *Boerne*, and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999), where we held that the provisions of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U. S. C. §§271(h), 296(a), were “so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,” 527 U. S., at 646 (quoting *Boerne*, *supra*, at 532); *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000), where we held that the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. III), imposed on state and local governments requirements “disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act,” 528 U. S., at 83; *United States v. Morrison*, 529 U. S. 598 (2000), where we held that a provision of the Violence Against Women Act, 42 U. S. C. §13981, lacked congruence and proportionality because it was “not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe,” 529 U. S., at 626; and *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356 (2001), where we said that Title I of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 330, 42 U. S. C. §§12111–12117, raised “the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*,” 531 U. S., at 372.

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But these cases were soon followed by *Nevada Dept. of Human Resources v. Hibbs*, in which the Court held that the Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U. S. C. §2612 *et seq.*, which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was “congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior.” 538 U. S., at 740 (internal quotation marks omitted). I joined JUSTICE KENNEDY’s dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today’s decision, holding that Title II of the ADA is congruent and proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by THE CHIEF JUSTICE’s dissent.

I yield to the lessons of experience. The “congruence and proportionality” standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress’s taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test (“congruence and proportionality”) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, “low walls and vague distinctions will not be judicially defensible

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in the heat of interbranch conflict.” *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211, 239 (1995).

I would replace “congruence and proportionality” with another test—one that provides a clear, enforceable limitation supported by the text of §5. Section 5 grants Congress the power “to *enforce*, by appropriate legislation,” the other provisions of the Fourteenth Amendment. U. S. Const., Amdt. 14 (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, “enforce” a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, “enforce” a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not “enforce” the right of access to the courts at issue in this case, see *ante*, at 19, by requiring that disabled persons be provided access to *all* of the “services, programs, or activities” furnished or conducted by the State, 42 U. S. C. §12132. That is simply not what the power to enforce means—or ever meant. The 1860 edition of Noah Webster’s American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined “enforce” as: “To put in execution; to cause to take effect; as, to *enforce* the laws.” *Id.*, at 396. See also J. Worcester, Dictionary of the English Language 484 (1860) (“To put in force; to cause to be applied or executed; as, ‘To *enforce* a law’”). Nothing in §5 allows 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.

Morgan asserted that this commonsense interpretation “would confine the legislative power . . . to the insignifi-

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cant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the ‘majestic generalities’ of §1 of the Amendment.” 384 U. S., at 648–649. That is not so. One must remember “that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution.” R. Berger, *Government By Judiciary* 147 (2d ed. 1997). If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress’s §5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled “*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*” Section 1 of that Act, later codified as Rev. Stat. §1979, 42 U. S. C. §1983, authorized a cause of action against “any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States.” 17 Stat. 13. Section 5 would also authorize measures that do not restrict the States’ substantive scope of action but impose requirements directly related to the *facilitation* of “enforcement”—for example, reporting requirements that would enable violations of the Four-

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teenth Amendment to be identified.² But what §5 does *not* authorize is so-called “prophylactic” measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

The major impediment to the approach I have suggested is *stare decisis*. A lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina*. As Prof. Archibald Cox put it in his Supreme Court Foreword: “The etymological meaning of section 5 may favor the narrower reading. Literally, ‘to enforce’ means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state’s constitutional duty.” Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 110–111 (1966).

However, *South Carolina* and *Morgan*, all of our later cases except *Hibbs* that give an expansive meaning to “enforce” in §5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*. See

²Professor Tribe’s treatise gives some examples of such measures that facilitate enforcement in the context of the Fifteenth Amendment:

“The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds. The Civil Rights Act of 1960, 74 Stat. 86, permitted joinder of states as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systemic discrimination. The Civil Rights Act of 1964, 78 Stat. 241, expedited the hearing of voting cases before three-judge courts . . .” L. Tribe, *American Constitutional Law* 931, n. 5 (3d ed. 2000).

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Oregon v. Mitchell, 400 U. S. 112 (1970) (see discussion *infra*); *Ex parte Virginia*, 100 U. S. 339 (1880) (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder v. West Virginia*, 100 U. S. 303, 311–312 (1880) (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia v. Rives*, 100 U. S. 313, 318 (1880) (dictum in a racial discrimination case involving the same statute). See also *City of Rome v. United States*, 446 U. S. 156, 173–178 (1980) (upholding as valid legislation under §2 of the Fifteenth Amendment the most sweeping provisions of the Voting Rights Act of 1965); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 439–441 (1968) (upholding a law, 42 U. S. C. §1982, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under §2 of the Thirteenth Amendment).

Giving §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 a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter-House Cases*, 16 Wall. 36, 81 (1873), the Court's first confrontation with the Fourteenth Amendment, we said the following with respect to the Equal Protection Clause:

“We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.”

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Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of §5. See 384 U. S., at 648 (citing *Ex parte Virginia*); 384 U. S., at 651 (citing *Strauder v. West Virginia*, and *Virginia v. Rives*).³ In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights, see *Duncan v. Louisiana*, 391 U. S. 145, 147–148 (1968)) and the doctrine of so-called “substantive due process” (which holds that the Fourteenth Amendment’s Due Process Clause protects unenumerated liberties, see generally *Lawrence v. Texas*, 539 U. S. 558 (2003); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992)). Thus, the Fourteenth Amendment did not include the many guarantees that it

³A later case cited in *Morgan*, *James Everard’s Breweries v. Day*, 265 U. S. 545, 558–563 (1924), applied the more flexible standard of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), to the Eighteenth Amendment, which, in §1, forbade the “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes” and provided, in §2, that “Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” Congress had provided, in the Supplemental Prohibition Act of 1921, §2, 42 Stat. 222, that “only spirituous and vinous liquor may be prescribed for medicinal purposes.” That was challenged as unconstitutional because it went beyond the regulation of intoxicating liquors for beverage purposes, and hence beyond “enforcement.” In an opinion citing none of the Thirteenth, Fourteenth, and Fifteenth Amendment cases discussed in text, the Court held that the *McCulloch v. Maryland* test applied. Unlike what is at issue here, that case did not involve a power to control the States in respects not otherwise permitted by the Constitution. The only consequence of the Federal Government’s going beyond “enforcement” narrowly defined was its arguable incursion upon powers left to the States—which is essentially the same issue that *McCulloch* addressed.

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now provides. In such a seemingly limited context, it did not appear to be a massive expansion of congressional power to interpret §5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan*.

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to §5. In *Oregon v. Mitchell*, 400 U. S. 112 (1970), the Court upheld, under §2 of the Fifteenth Amendment, that provision of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which barred literacy tests and similar voter-eligibility requirements—classic tools of the racial discrimination in voting that the Fifteenth Amendment forbids; but found to be *beyond* the §5 power of the Fourteenth Amendment the provision that lowered the voting age from 21 to 18 in state elections. See 400 U. S., at 124–130 (opinion of Black, J.); *id.*, at 153–154 (Harlan, J., concurring in part and dissenting in part); *id.*, at 293–296 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld—but only a minority of the Justices believed that §5 was adequate authority. Justice Black’s opinion in that case described exactly the line I am drawing here, suggesting that Congress’s enforcement power is broadest when directed “to the goal of eliminating discrimination on account of race.” *Id.*, at 130. And of course the *results* reached in *Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional regulation that does not protect against or prevent racial discrimination.

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Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic §5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See *Hibbs*, 538 U. S., at 741–743 (SCALIA, J., dissenting); *Morrison*, 529 U. S., at 626–627; *Morgan*, 384 U. S., at 666–667, 669, 670–671 (Harlan, J., dissenting).⁴ I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See *Morrison*, *supra*, at 625–626. And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under §5 to prevent or remedy racial discrimination by the States.

⁴Dicta in one of our earlier cases seemed to suggest that even *non-prophylactic* provisions could not be adopted under §5 except in response to a State’s constitutional violations:

“When the State has been guilty of no violation of [the Fourteenth Amendment’s] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.” *United States v. Harris*, 106 U. S. 629, 639 (1883).

I do not see the textual basis for this interpretation.

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I shall also not subject to “congruence and proportionality” analysis congressional action under §5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of “enforcement” of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it *ultra vires*. The present legislation is plainly of the latter sort.

* * *

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of “enforcing” the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. “The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth ‘logical’ extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the ‘line drawing’ familiar in the judicial, as in the legislative process: ‘thus far but not beyond.’” *United States v. 12 200-ft. Reels of Super 8MM. Film*, 413 U. S. 123, 127 (1973) (Burger, C. J., for the Court) (footnote omitted). It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.