

Congress's Broad Powers Under Section 5 of the Fourteenth Amendment



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Section Five of the Fourteenth Amendment should be interpreted broadly to authorize Congress to advance the protections of due process, equal protection, and the privileges and immunities of citizenship. The drafters of the Fourteenth Amendment intentionally chose not to leave the enforcement of its provisions solely to the courts, but instead gave Congress authority to enact laws to enforce its requirements.

The history of the Fourteenth Amendment shows that its framers intended Congress to have expansive power under this provision. In the first case to interpret this authority after the ratification of the Fourteenth Amendment, the Court spoke of Section Five giving to Congress the power to “secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion” and that any act “if not prohibited, is brought within the domain of congressional power.” *Ex parte Virginia* (1879).

According Congress such power is a desirable and necessary way of fulfilling the crucial goals of the Fourteenth Amendment: protecting people from infringement of their rights or a denial of equality. The Constitution is the floor, not the ceiling, of individual rights. Congress should have the ability to expand liberty and enhance equality, and Section Five should be interpreted to allow this.

Private Action

Unfortunately, the Supreme Court repeatedly has adopted unduly narrow interpretations of Congress's power under Section Five. First, the Court wrongly held that Section Five does not empower Congress to regulate private conduct, but only state and local government actions. This was initially the holding in *The Civil Rights Cases* (1882), and reaffirmed in *United States v. Morrison* (2000), which held that Section Five did not give Congress power to pass a law prohibiting private gender-motivated violence. The Court reasoned that because Section One of the Fourteenth Amendment, which prohibits states from denying citizens privileges and immunities of citizenship, due process, or equal protection of the laws, applies only to state and local governments, Congress's power to enforce the Fourteenth Amendment is similarly limited.

But that conclusion does not follow. As Justice Stephen Breyer expressed in his dissent in *Morrison*, “But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial ‘[l]egislation ... [that] prohibits conduct which is not itself unconstitutional.’” Moreover, violations of rights by private actors occur precisely because state and local governments

have failed to prevent them. Congress, in preventing discrimination or violation of rights by private entities, is remedying the failures of state and local governments. This is exactly what the power under Section Five exists to accomplish.

Expanding the Application of Rights

Second, the Court has unduly limited Congress's power to protect liberty and advance equality under Section Five of the Fourteenth Amendment. In [*City of Boerne v. Flores*](#) (1997), the Court ruled that Section Five does not empower Congress to create new rights or expand the scope of rights; rather Congress is limited to laws that prevent or remedy violations of rights recognized by the Supreme Court, and these must be narrowly tailored — “proportionate” and “congruent” — to the constitutional violation. This significantly and unjustifiably limits congressional power. Applying this test, courts have declared unconstitutional federal laws expanding protection for religious freedom, making state governments liable for age and disability discrimination in employment, and allowing state governments to be sued for patent infringement.

The better view of Congress's Section Five power was articulated in [*Katzenbach v. Morgan*](#) (1966). The Court concluded that Congress has the power to expand, but not limit the rights that would otherwise be protected by section one of the Fourteenth Amendment. This approach accorded to Congress the power to expand the protections of liberty and equality, as well as to prevent and remedy violations of rights recognized by the courts.

Discrimination in Voting

Third, the Court has wrongly restricted the Congress's authority to impose remedies on states with a history of race discrimination in voting. In [*Shelby County, Alabama v. Holder*](#) (2013), the Court held that a section of the Voting Rights Act of 1965 that subjected certain states and counties to heightened antidiscrimination measures is unconstitutional, as it exceeds the scope of Congress's powers and is an impermissible intrusion on state sovereignty.

The Voting Rights Act of 1965 is a landmark civil rights law. The law prohibits state and local governments from having election practices which discriminate, or have a discriminatory impact, against minority voters. It authorizes lawsuits to enforce this prohibition. Congress, though, was concerned that this was not sufficient. Litigation is expensive and time consuming. Also, Congress was aware that many jurisdictions, especially in the South, were repeatedly changing their election practices to discriminate against minority voters.

Congress, therefore, included a preventative measure: Another section of the Act says that jurisdictions (states and counties) with a history of race discrimination in voting must get “preclearance” from the Attorney General or a three-judge court before significantly changing their election systems (for example, adopting a law that restricts early voting). The Act includes a formula defining which jurisdictions must get preclearance.

Congress repeatedly reauthorized the preclearance requirement, including for five years in 1970, for seven years in 1975, and for 25 years in 1982. In 2006, Congress voted overwhelmingly – 98-0 in the Senate and 390-33 in the House -- to extend it for another 25 years and President George W. Bush signed this into law.

In [*Shelby County, Alabama v. Holder*](#), the Supreme Court, in a 5-4 decision, held that the formula in the [*Voting Rights Act*](#) defining which states and counties have a history of discrimination in voting, and are therefore required to get approval before changing their election systems, is unconstitutional. This effectively nullified preclearance requirements under the Act. But it is unclear what constitutional

provision or principle the Court found was violated by the Voting Rights Act's formula for determining which states and counties have a history of racial discrimination, and are therefore subject to heightened antidiscrimination measures. The closest the Court came to indicating this was by saying that Congress violated the principle of equal state sovereignty, that it must treat all states alike. Nowhere, though, does the Constitution say that, and the framers of the Fourteenth Amendment obviously did not believe this since they also passed the Reconstruction Act and imposed military rule over Southern states.

This was the first time since the nineteenth century that a federal civil rights law dealing with race was declared unconstitutional. States immediately implemented voting laws that had been blocked by the Attorney General as discriminatory.

In all of these ways, the Supreme Court has improperly limited Congress and denied it the broad authority it should possess under Section Five of the Fourteenth Amendment.

Here ends Chemerinsky's thesis at the above link

My words: Maltz, same link, repeats Boerne's mangled argument from silence that because there was no criticism of the second draft of something like there was of the first, that meant the majority didn't want Congress to have as broad powers as the words say. My book goes into detail about who said what, concluding that Section 5 was never a concern. Anyway, we have the plain words.

Here is an uncritical review of SCOTUS on Section 5:

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<https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/703>

## COMMON INTERPRETATION

(Agreed to by both Maltz and Chemerinsky)

Section Five of the Fourteenth Amendment vests Congress with the authority to adopt "appropriate" legislation to enforce the other parts of the Amendment—most notably, the provisions of Section One. As Senator Jacob M. Howard explained, Section Five "enables Congress, in case the State shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment."

By adding to the authority of Congress, Section Five changed the balance of power between the state and federal governments that is the hallmark of the federal system. The scope of the power conferred by this provision has been a matter of considerable controversy. Initially, the Supreme Court gave a broad interpretation to Congress's authority under Section Five. In *Ex parte Virginia* (1879), the Court declared:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

However, subsequent decisions have at times construed the Section Five power more narrowly. These decisions have focused on two primary issues. First, who may Congress regulate? Second, what may Congress do? The debate over these issues that began in the late-nineteenth century continues to the present day.

## Who may Congress Regulate?

First, who may Congress regulate? In [\*The Civil Rights Cases\*](#) (1882), the Supreme Court struck down the provisions of the Civil Rights Act of 1875 that outlawed racial discrimination in a variety of private transactions, noting that Section One by its terms limits only the power of the states, and that therefore Section Five should not be read to provide Congress with the authority to regulate the activities of purely private parties. The Court declared: “It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the actions of State officers.”

By contrast, in [\*United States v. Guest\*](#) (1966), six Justices, although not in a single opinion, concluded that Section Five empowered Congress to outlaw private discrimination in some circumstances. However, in [\*United States v. Morrison\*](#) (2000), the Supreme Court held that Congress did not have the power under Section Five to enact a law called the Violence Against Women Act, which allowed victims of gender-motivated violence to sue the perpetrator in federal court. This decision expressly reaffirmed the *Civil Rights Cases* and disavowed the opinions to the contrary in *Guest*. The Court declared that it was reaffirming “the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”

## Expanding Rights

Second, what may Congress do? More specifically, does Section Five allow Congress to prohibit actions by the state governments that would not be outlawed by Section One itself? The Supreme Court has answered this question differently over time. At one point, the Justices expressed the view that Congress can use its power under Section Five to expand rights, as well as to provide remedies for violations. Thus, in [\*Katzenbach v. Morgan\*](#) (1966), the Court held that Congress could rely on its Section Five authority to outlaw the use of literacy tests as a qualification for voters who had been educated in Puerto Rico, notwithstanding the fact that only seven years earlier the Court had found that the use of literacy tests did not violate the Fourteenth Amendment. The majority opinion concluded that Congress has the power to expand, but not limit the rights that would otherwise be protected by Section One of the Fourteenth Amendment.

In subsequent cases, however, the Court has held that Congress cannot use its power under Section Five to expand rights, but rather only to provide remedies for rights recognized by the courts. In [\*Oregon v. Mitchell\*](#) (1970), a deeply-divided Court held that Congress could not constitutionally require the states to allow eighteen-year-old citizens to vote in state and local elections.

Most importantly, in [\*City of Boerne v. Flores\*](#) (1997), the Court held that Section Five does not empower Congress to create new rights or expand the scope of rights, and that even laws designed to prevent or remedy violations of rights recognized by the Supreme Court must be narrowly tailored —“proportionate” and “congruent”—to the scope of constitutional violations. *City of Boerne* involved the federal [\*Religious Freedom Restoration Act\*](#) (RFRA), a law adopted in 1993 in response to a Supreme Court decision that had narrowed the protections of the Free Exercise Clause of the First Amendment. In essence, RFRA subjected the actions of state and local governments to the same level of scrutiny that had been applied in earlier Supreme Court decisions interpreting the scope of the Clause. However, the *City of Boerne* majority concluded that this part of RFRA was unconstitutional because Section Five did not authorize Congress to either create new rights or expand the scope of the rights recognized by the Court itself.

Similarly, in [\*Shelby County, Alabama v. Holder\*](#) (2013), the Court declared a key provision of the [\*Voting Rights Act\*](#) of 1965 unconstitutional because it exceeded the scope of Congress’s powers under

Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment (which grants Congress power to enforce the Fifteenth Amendment). That provision of the Voting Rights Act requires that certain states and counties with a history of race discrimination in voting obtain approval (called “preclearance”) from the United States Attorney General or a federal court before changing their election system (for example, enacting a law that requires voters to show identification). The Act included a formula that determines which states and counties need to get preclearance to change their election practices. Only some states and counties are required to seek approval before changing election policies, based on their history of discrimination in voting. When the Voting Rights Act was passed in 1965, the preclearance provision was set to expire after five years. The life of the provision was extended by statute in 1970, 1975 and 1982, and then for an additional 25 years in 2006.

In *Shelby County*, the Court determined that the 2006 extension was unconstitutional because formula for determining which states and counties required to seek preclearance before changing their election practices was based on data about racial discrimination from the 1970s and had not been changed since 1982. Under these circumstances, the majority concluded that the selective imposition of the preclearance requirement ran afoul of what it described as “a fundamental principle of equal sovereignty’ among the States.”

Thus, under current law, there are two key limits on Congress’s power under Section Five of the Fourteenth Amendment, both of which are controversial. First, Section Five does not empower Congress to regulate private conduct, but only the actions of state and local governments. Second, Section Five does not provide Congress with the power to create new rights or expand existing rights, but rather only with the authority to prevent or remedy violations of rights already recognized by the courts. Moreover, the remedies provided by federal statutes must be “proportionate” and “congruent” to the scope of proven constitutional violations.