FEAR AND DEGRADATION IN ALABAMA:
THE EMOTIONAL SUBTEXT OF UNIVERSITY OF ALABAMA V. GARRETT

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Scholars speak of University of Alabama v. Garrett\(^1\) as a case about diminishing access to courts for the disabled,\(^2\) ever-expanding sovereign immunity doctrine,\(^3\) the tightening of restrictions on the power of Congress,\(^4\) the aggrandizement of judicial power,\(^5\) the New Federalism,\(^6\) and it is about all these things—it is an important opinion in the Court’s emerging Boerne/Section 5/sovereign immunity jurisprudence. But it becomes increasingly obvious that our familiar doctrinal tools—text, history, precedent, public policy—will take us only so far in deciphering the Supreme Court majority’s protective, even reverential attitude toward the states’ sovereign immunity. This article suggests that the increasingly emotive cast of the majority’s language about the states is itself worthy of attention, as are the numerous signals in the federalism opinions about its emotional commitments and blind spots: toward Congress, toward civil rights plaintiffs and civil rights statutes, and toward its own prerogatives.

A brief description of the Garrett case may be helpful. The petitioner Patricia Garrett was a state employee who contracted breast cancer, was subjected to repeated negative comments about her ill-

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\(^1\) 531 U.S. 356 (2001).


ness, and was then demoted from the job she had performed for seventeen years, though she could still do the work. The respondent was the state entity, the University of Alabama, which was assumed, for purposes of the suit, to have violated the Americans with Disabilities Act ("ADA") in its treatment of Patricia Garrett.8

Title I of the ADA permits suits by private citizens against states for money damages, suits that would ordinarily be barred unless they fall within Congress' power to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment. The Court held that disparate treatment toward the disabled need only satisfy the rational basis test to pass constitutional muster.9 In light of City of Boerne v. Flores,10 since Congress sought to afford greater protection than was constitutionally required, its efforts to remedy discrimination against this group were required to be congruent and proportional to the injury to be prevented.11 Thus, much turned on the Court's view of the scope of the injury—what patterns of conduct it identified and found commensurate with the legislative response.

If one reads Garrett for emotional content, it is not hard to find. The opinion contains a veritable soap opera's worth of judicial emotion, including mistrust of Congress, indifference or hostility to the underlying rights at stake, empathy for the states, the desire to protect the states from domination and degradation, arrogance about the scope of the Court's own powers, and perhaps most noticeably, extreme sensitivity toward assaults on its own dignity. Reading for emotional content requires noticing the emotions that are lacking as well, in this case the lack of concern toward the privations of individual plaintiffs or entire classes of plaintiffs.

But why read an opinion, like Garrett, or a set of opinions like those constituting the Court's emerging sovereign immunity doctrine, for emotional content? I suggest that the values expressed in—or implicit in—those opinions are both a product of and an expression of certain emotional assumptions and commitments. These cases, as they redraw the boundaries between the Court and Congress, between federal and state government, are animated by empathy for some actors and lack of empathy toward others, by assumptions about who is worthy of trust, who is likely to act in bad faith, and whose dignity needs protecting. The motivations the Court assumes or demands, the empathetic connections it is willing to make, the

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8 The case was consolidated on appeal with the case of another state employee, Milton Ash, against the Alabama Department of Youth Services.
11 Garrett, 531 U.S. at 372.
causal links it sees, and the resulting patterns it recognizes or declines to recognize all are crucial to the creation of doctrine, yet cannot be explained solely by reference to doctrinal factors.

Two points of clarification are in order. First, I am not arguing that the Court (or any of its voting blocs) possesses the ability to express meaning or values, apart from the meaning or values embodied in its opinions. My concern is with the meaning and values transmitted by the Court, as an entity, in its decisions. As I hope to show, in the federalism context these values are not merely expressive, if that term is intended to describe attributes of form rather than consequence. The federalism decisions may well convey concerns about form. For example, they may focus on the form of suits against the state, and on whether that form connotes the proper respect for the state’s dignity. But if so, form cannot be easily separated from substance: the attitudes these decisions convey and embody have serious substantive consequences for the parties, for the shape of doctrines like sovereign immunity, and for the balance of federal/state relations in general.

Second, I do not mean to suggest criticism of the fact that the Court’s opinions do express particular values or emotional commitments. On the contrary I assume, as I have argued before, that emotional variables are an inevitable component of legal reasoning, and one that may even be beneficial. The problem is that the emotional content of legal opinions tends to remain unexpressed, and thus insulated from debate. My purpose here is to suggest that these underlying emotional commitments have considerable explanatory power.

12 It is not necessary to enter the debate about whether a collective entity can express attitudes. Compare Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1520-27 (2000) (arguing that collective entities like “the state” are capable of expressing attitudes, beliefs, purposes and mental states) with Matthew D. Adler, Expressive Theories of Law: A Skeptical Overview, 148 U. Pa. L. Rev. 1363, 1389 (2000) (arguing that institutions do not possess mental states apart from those of the individuals that comprise them and cannot express meaning apart from that expressed by their actions). My focus here is on the values that underlie the opinions of the Court, not the expressive intent of either the Court as an entity (a concept that is obviously problematic) or any of its members, to the extent that intent is not embodied in the opinion itself.

13 Anderson and Pildes argue that “the entire architecture of sovereign immunity and its qualifications . . . appears preeminently concerned with the form and means by which States are held accountable to federal law.” Anderson & Pildes, supra note 12, at 1563.

14 Thanks to Eric Posner for pressing me to clarify this issue.


16 See id. at 366-67 (stating that “this core insight [about the interrelationship between cognition and emotion] has met with continual resistance in the legal world, which generally subscribes to the formalistic belief that reason can be neatly separated from emotion”); see also Bandes, supra note 6, at 856-57 (discussing pressures on judges to portray “the evolution of doctrine as the linear result of doctrinal logic”).
If so, it is crucial to try to identify those influences most salient in Garrett and other federalism decisions, and to begin a conversation about the particular emotional commitments at play here, what vision of constitutional federalism they engender, and ultimately, whether they are likely to lead to just results.

My remarks will turn, first, to the emotive cast of the Court’s attitude toward the states. I will suggest that we should pay attention to this emotive cast because it has explanatory power, and because it has consequences. Second, I will discuss the intersection between the Court’s reverence toward the states and its attitudes toward the other actors in Garrett and related federalism decisions—specifically its attitudes toward Congress, civil rights plaintiffs, and the Court itself.

The theme of the Supreme Court’s recent sovereign immunity jurisprudence might be summarized, to borrow Suzanna Sherry’s phrase, as “states are people too.” The states are becoming increasingly anthropomorphized, and the transformation has consequences. The states are portrayed as people with needs and feelings—dignity and esteem that must be respected, and rights that must be honored. It is becoming increasingly obvious that ensuring the proper respect for the states’ dignity is the central concern underlying the rapidly expanding doctrine of sovereign immunity, eclipsing virtu-

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17 The primary focus will be on the Court’s recent sovereign immunity decisions, particularly University of Alabama v. Garrett, 531 U.S. 356 (2001), but with reference to Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), and Alden v. Maine, 527 U.S. 715 (1999), as well. Other doctrinal areas related to federalism, such as the Tenth Amendment commandeering decisions, will be briefly mentioned for illustrative purposes.

18 Suzanna Sherry, States Are People Too, 75 NOTRE DAME L. REV. 1121 (2000); see also Alden, 527 U.S. at 801-03 (1999) (Souter, J., dissenting) (critiquing the fallacy of assuming that dignity “is a quality easily translated from the person of the King to the participatory abstraction of a republican State”).

19 Sherry gives several examples, drawn from College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board and Alden v. Maine, of the Court’s dubious analogies between the “individual rights” of states and those of citizens, leading to its troubling solicitude for the states’ “rights.” Sherry, supra note 18, at 1125-26.

20 See, e.g., Seminole Tribe of Fl. v. Florida, 517 U.S. 44 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), and holding that Congress may not override state sovereign immunity pursuant to the Commerce Clause); Fl. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding patent law was passed pursuant to the Commerce Clause and was unenforceable as against a state); Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding trademark law was not appropriate legislation under Section 5 of the Fourteenth Amendment and was unenforceable as against a state); Alden v. Maine, 527 U.S. 706 (1999) (extending principle of sovereign immunity to bar suits brought in state court); Kimel v. Fl. Bd. of Regents, 528 U.S. 62 (2000) (holding that the federal Age Discrimination in Employment Act is not appropriate legislation under Section 5 of the Fourteenth Amendment and is not enforceable as against a state); Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding the federal Americans with Disabilities Act is not appropriate legislation under the Fourteenth Amendment and is not enforceable as against a state); Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 745 (2002) (extending principle of sovereign immunity to bar suits against state entities before federal administrative agencies).
ally all countervailing considerations. Scholars have frequently noted, as I discuss elsewhere, the Court’s “reverential” attitude toward a concept that, in its current incarnation, is largely unmoored from constitutional text, dependent on highly contested and “intuitive” historical readings, and, ultimately, “intellectually unfounded and unjust.” In the most recent sovereign immunity case, Federal Maritime Commission v. South Carolina State Ports Authority, Justice Thomas, writing for the majority, not only acknowledges the “barren historical record” relevant to the question presented (whether states can be sued before federal administrative agencies), but accuses Justice Breyer, who argues from the historical record, of using “discredited . . . ahistorical literalism.” Justice Thomas not only acknowledges the irrelevance of the text of the Eleventh Amendment to the question at hand, but derides Justice Breyer for referring to the text in his dissent. Justice Thomas further derides the dissent’s reference to one purported purpose of the Eleventh Amendment—the protection of the states’ financial integrity—despite the fact that as recently as 1999, in Alden v. Maine, the Court found this to be a “consideration[] of great substance.” Justice Thomas states that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.” He is undeterred by the fact that the “Framers likely did not envision the intrusion on state sovereignty at issue,” declaring the Court “confident that it is contrary to their constitutional design.” When dignity and respect become the overriding elements of constitutional interpretation, it is time to pay them attention in their own right.

The Supreme Court has shown itself to be highly empathetic toward the states’ needs and feelings, and not particularly empathetic

21 Bandes, supra note 6, at 877.
23 James E. Pfander, Once More Unto the Breach: Eleventh Amendment Scholarship and the Court, 75 NOTRE DAME L. REV. 817, 832 (2000).
26 Id. at 974.
27 Id. at 974 n.8.
28 The text of the amendment, Justice Breyer notes, refers only to the “judicial power.” Id. at 988 (Breyer, J., dissenting).
29 Id. at 974 n.8 (finding the textual approach “ironic” in light of the lack of textual basis for the federal agencies).
30 Id. at 981 (commenting that the government’s reference to the threat to financial integrity “reflects a fundamental misunderstanding of the purposes of sovereign immunity”).
33 Id. at 983.
toward the effects of the states’ wrongful conduct on individuals. Consider the ways in which the state is portrayed in recent Supreme Court opinions. Here is Justice Kennedy, in his Garrett concurrence, describing the situation the state would be in if Garrett’s suit for damages were permitted to proceed. After recognizing that prejudice may arise from insensitivity or lack of reflection as well as malice or hostile animus, and that government (through legislation, at any rate) can model more decent perspectives on persons with disabilities, he declaims:

It is a question of quite a different order, however, to say that... the States as governmental entities must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on failure to act or the omission to remedy. States can, and do, stand apart from the citizenry.34

Now compare this to the language the Court uses to describe the situation of the plaintiff in the suit, Patricia Garrett:

Respondent Patricia Garrett, a registered nurse, was employed as the Director of Nursing... for the University of Alabama in Birmingham Hospital. In 1994, Garrett was diagnosed with breast cancer and subsequently underwent a lumpectomy, radiation treatment, and chemotherapy. Garrett’s treatments required her to take substantial leave from work. Upon returning to work in July 1995, Garrett’s supervisor informed Garrett that she would have to give up her Director position. Garrett then applied for and received a transfer to another, lower paying position as a nurse manager.35

There are a number of comparisons one might make between these descriptions. As a purely quantitative matter, the state and the indignities it would suffer if sued receive substantially more ink throughout the opinion than do Patricia Garrett and the hardships she suffered. Garrett herself gets only the above mention, whereas the state is the center of attention throughout. As Tony Amsterdam and Jerome Bruner said in another context, “the principle players are

not individuals or groups of human beings but governmental entities . . . . People do not figure prominently in [this] plot."

A comparison of linguistic structure is also instructive. The language about Garrett tends to portray her as an agent acting to bring on her fate, rather than being acted upon—she undergoes various treatments, she takes substantial time off from work, she applies for (and therefore receives) a transfer to another position. She is portrayed as acting to move to another position, rather than as being forced to do so. This is all told quite matter-of-factly, although the factual relevance of her “substantial” time off from work is not explained; the implication that she is somehow at fault here is left unstated, as it must be given that the opinion nowhere contests the assumption that Garrett’s treatment violated the ADA. The reader searching for judicial sympathy or outrage over victimization must look instead to Justice Kennedy’s concurrence. However, the sympathy and outrage in this opinion are not for Patricia Garrett, but for the state. Justice Kennedy portrays the state, in language that seems overheated rather than matter of fact, as an innocent victim, unjustly accused of the serious charge of maliciousness. Here the party is portrayed as passively acted upon. A state is an entity, fulfilling a capacity; it is neutral, it stands apart from its citizens, it takes instruction, it does not act, but fails to act, fails to revise laws, omits to remedy, fails to act purposefully, does only what the citizens demand. The active voice is utilized comparatively to demonstrate the absurdity and unfairness of the charge. How could such an entity act with hostility, embody misconceived or malicious perceptions, or engage in a pattern or practice designed to deny equal protection? Hostility and malice are thus subtly imported into the analysis; it is easy to miss the fact that only recently, in the aftermath of Boerne, has Congress had to prove the existence of these states of mind in order to legislate.

I will return later to the discussion of Patricia Garrett and other civil rights plaintiffs. My focus here is on the depiction of the states. Similar comparisons are easily found in the majority opinion in Alden v. Maine, which is shot through with awed references to the dignity, esteem and good faith of the sovereign, and which speaks in

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This analysis is heavily indebted to Amsterdam and Bruner’s work in MINDING THE LAW, supra note 36. See in particular the authors’ discussion of Justice Scalia’s opinion in Michael H. v. Gerald D., id. at 81-102.

37 531 U.S. at 362.

38 531 U.S. at 375 (Kennedy, J., concurring).

39 Id.

40 See Alden, 527 U.S. at 714 (“The federal system . . . reserves to . . . [the States] a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes
shocked tones (evoking the impressments of sailors or the excesses of the Star Chamber) of the denigration inherent in the “power to press a State’s own courts into federal service to coerce other branches of the States” which is a power “to turn the state against itself and . . . commandeer the entire political machinery of the state against its will . . . .”42 The fact that the state had essentially defrauded its probation officers of compensation to which they were entitled is nearly impossible to discern from the opinion.43

Moreover, the Court treats the states like people who, like other humans, ought not be held accountable for unlawful discrimination unless they acted with purpose and malice. This is problematic, first, because the intent requirement fits poorly with the ways in which governmental entities cause harm. But in addition, even as the Court seeks to treat the states as people capable of forming intent, it makes clear that they are not to be treated entirely like other people. In fact, they stand apart from other people, and would not stoop to harboring malice. To accuse them of doing so is offensive to their dignity, insulting to their good faith, and damaging to the esteem in which they deserve to be held.

The doctrine of discriminatory purpose insulates governmental actions with discriminatory effect from the judicial reach unless they can be shown to be purposeful. (And now, it will largely insulate them from the legislative reach as well, at least to the extent that individual plaintiffs will not be able to enforce a ban on such actions through money damages).44 Discriminatory purpose is more than just

\[\text{inhering in that status.}^{*}\]; id. at 715 ("States retain the dignity, though not the full authority, of sovereignty."); id. ("[T]he Framers considered immunity from private suits central to sovereign dignity."); id. at 749-49 ("The principle of sovereign immunity . . . accords the States the respect owed them as members of the federation."); id. at 749 (citing Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. at 268, for its recognition of "the dignity and respect afforded a State, which the immunity is designed to protect").

42 Alden v. Maine, 527 U.S. 706, 749 (1999). See also Anderson & Pildes, supra note 12, at 1559 ("The very word ‘commandeering’ conjures up militaristic images, an extreme exercise of subordination and invasion justified, if ever, only by the most exigent necessities.").
43 The opinion says merely that the petitioners “alleged the State had violated the overtime provisions of the Fair Labor Standards Act.” Alden, 527 U.S. at 711.
44 This is despite the fact that the purpose requirement was billed in Washington v. Davis, 426 U.S. 229, 247-48 (1976), as necessitated by the Court’s institutional limitations. See David Cole, The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights, 1997 SUP. CT. REV. 31, 60 ("Where the federal courts fail to enforce a constitutional norm fully for institutional reasons, Congress should be free to enforce it to that limit."); Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441, 467 (2000) (arguing that for this reason the Washington v. Davis test should not constrain Congress); see also Mark A. Johnson, Board of Trustees of the University of Alabama v. Garrett: A Flawed Standard Yields a Predictable Result, 60 Md. L. REV. 393, 403 (2001) (observing that the purpose requirement as applied in Cleburne was meant to constrain the courts rather than Congress); Note, The Irrational Application of Rational Basis Kimel, Garrett, and Congressional Power To Abrogate State Sovereign Immunity, 114 HARV. L. REV. 2146
awareness of possible consequences; it involves selecting a particular course of action at least in part because of its adverse affects on an identifiable group. It is essentially a malice requirement. It inextricably links harm to the intent to commit it, discounting harm that cannot be traced to particular wrongdoers who have chosen to inflict it. To the extent the doctrine means to describe the workings of prejudice, it does so poorly. Prejudice, as Justice Kennedy recognized in his Garrett concurrence, often arises from indifference or insecurity. It is often unconscious, or so deeply imbedded in the social fabric as to be almost invisible. As Alan Freeman insightfully observed 25 years ago, modern antidiscrimination law "views discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors... The task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm." To the extent victims cannot meet their burden of isolating the particular conditions that caused their harm, and cannot link them to identified blameworthy perpetrators, the harm they suffered will be regarded as a mere accident, about which nothing can now be done, "caused,' if at all, by the behavior of ancestral demons." Thus the law requires proof of racial animus of a sort that is demonized in our society and, as often as not, recoils from such proof when it is offered.

Intent requirements are particularly problematic when government wrongdoing is at issue, because they cannot capture the ways in which government entities cause systemic harm. Such harm usually results, as the Court long ago observed in Owen v. City of Independence, "not so much from the conduct of any single individual, but from the interactive behavior of several governmental individuals, each of whom may be acting in good faith." Complex entities tend not to have motives, and "much of their misconduct is inaction, or a web of interlocking actions and inactions, which do not fit comfortably..."
within the paradigm of malevolent individuals causing harm by singling out innocent victims.\(^{50}\)

Discriminatory purpose requirements, coupled with *Kimel* and *Garrett*'s demand that the plaintiff prove a pattern of discrimination by the states themselves, put Congress in a particularly tight bind when it seeks to abrogate sovereign immunity.\(^{51}\) In essence, the Court's approach requires that for Section 5 to be used to override sovereign immunity, the state be shown to be blameworthy, the possessor of "malicious perceptions." The state itself must be shown to have selected a course because of its adverse consequences on a particular protected group. The usual problems of proving discriminatory intent are thus exacerbated by running headlong into the aura of dignity and esteem surrounding the state. As Alan Freeman explained about the purpose requirement, "it creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment [at the apparently unjustified stigmatization that occurs] when [they are] called upon to bear any burdens in connection with remedying violations."\(^{52}\) This sense of resentment at unjust stigmatization, and unjust stigmatization of the state, no less, seems to capture Justice Kennedy's high dudgeon in the passage I quoted earlier. The states stand apart from the citizenry, he tells us. Congress should not presume to accuse them of harboring the very malice the Court has just announced it will henceforth require it to demonstrate.

The Court ups the ante even further. The *Boerne* congruence and proportionality test requires that, at least when addressing harms that the Court is not prepared to hold unconstitutional, Congress must provide for a remedy that is congruent and proportional to the harm the statute seeks to prevent. That is, if Congress wishes to offer a nationwide remedy, it must prove the existence of a nationwide pattern.\(^{53}\) Much hinges, in this formulation, on what sort of pattern the Court demands—what sorts of incidents may be included, and what sorts of causal links the Court is willing to recognize among those incidents. In *Garrett*, the Court, having demanded a pattern of misconduct, proceeds relentlessly to disaggregate the conduct that might have demonstrated such a pattern, until what Justice Breyer called "a vast legislative record documenting massive, society-wide discrimination"\(^{54}\) has dwindled to what the majority calls several "unexamined,

\(^{50}\) Bandes, *Patterns of Injustice*, supra note 48, at 1328.

\(^{51}\) For trenchant criticism of this requirement, see Caminker, *supra* note 4, at 1152-54.

\(^{52}\) Freeman, *supra* note 46, at 1055.

\(^{53}\) Post & Siegel, *supra* note 44, at 478.

For example, it disaggregates the defendants: separating state from local wrongdoing, employment discrimination from discrimination in public services and accommodations. And it disaggregates Congress, considering only those accounts submitted to Congress directly, but not those submitted to its task force. Such decisions are not merely mechanical—they are influenced by non-doctrinal factors, including the emotional factors I have discussed here.

Consider the Court’s insistence that Congress demonstrate a pattern of state misconduct, which fails to take local governmental or private conduct into account. This insistence is not easily explicable on doctrinal grounds. Congress issued voluminous findings recognizing a systemic and pervasive pattern of society-wide invidious discrimination, in general and by both state and local government. In any case, the people who work in state government, as Justice Breyer observed in dissent, come from the same society as the rest of us, and it is therefore reasonable to interpret their actions in light of society-wide patterns. In addition, Congress determined that the most effective way to deter the discrimination at hand is to attack its cause: “prejudice arising from [the] isolation of the disabled.” It found that this was best accomplished by attacking each component of the overall pattern of discrimination in the delivery of public services, in order to try for as complete an integration of the disabled into society as possible. But Justice Kennedy’s concurrence calls it “a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws.” The Court sees the state as standing apart from and indeed above the citizenry, rather than as part of the society at large, subject to the same ignorance and prejudice that afflicts us all. It accords special treatment to states which violate laws that are meant to constrain equally all those to whom they apply.

The congruence and proportionality requirement raises the possibility that Congress will need to show, not only that the remedy is directed toward a nationwide problem, but that every state, or at least

55 Id. at 370.
56 Id.
57 Id. For an excellent discussion of the Court’s conception of a legislative record, see generally Buzbee & Schapiro, supra note 4, at 152 (arguing, inter alia, that the Court is coming close to adopting a “participation requirement” that all support for legislation must be recorded in written form during the legislative process).
58 Garrett, 531 U.S. at 378 (Breyer, J., dissenting). See also Kramer, supra note 5, at 150 (noting that the people who work for the state governments come from the same society as the rest of us, and that it is reasonable to interpret their actions in light of society-wide patterns).
59 Hartley, supra note 2, at 56.
60 Id.
61 531 U.S. at 375 (Kennedy, J., concurring).
a majority of states, contributed to that problem, a standard that no current Section 5 legislation is likely to meet. Alternatively, it may require Congress to target its remedy only toward those states that have demonstrated a need for correction. In other words, Congress would need to single out individual states and make a record stating that they purposefully discriminated against some (or indeed, many) of their citizens. The consequences of such a requirement, which would deny Congress the benefits of nationwide application, are not hard to predict. Nationwide application reduces the opportunities for discriminatory line drawing, the imposition of exceptional burdens on particular states, and the danger that federal intervention will be perceived as unreasonable discrimination against particular states or regions. To amass a record establishing the blameworthiness of particular states would require the expenditure of tremendous political capital, would be highly divisive, and, in light of the Court’s protective stance toward the states, is likely doomed to failure in any event.

Thus far I have focused on the Court’s protective and reverential attitude toward the states. However, there are other strong attitudes at work in Garrett that help explain why the Court anecdotalizes the conduct at issue and why it ultimately refuses to allow damage suits against the states. I will speak briefly about the Court’s attitudes toward Congress, toward civil rights plaintiffs and the rights they assert, and toward its own prerogatives.

I first turn to Congress. In the Boerne case, the Court asserts its authority to overrule Congress, which has attempted to assert its own authority to override the Court’s interpretation of the free exercise clause. I agree with those who discern a certain emotional subtext to Boerne: it suggests judicial pique at the temerity of Congress. As Barry Friedman and Michael Doff put it: Congress slapped the Court, and the Court slapped back. And indeed, it was a public ritual of

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62 See Post & Siegel, supra note 44, at 478 (pointing out that, contrary to the Court’s assertion in Garrett, in Oregon v. Mitchell, 400 U.S. 112 (1970), the Court upheld a nationwide prohibition on literacy tests despite the absence of state by state findings); see also Samuel Estreicher & Margaret H. Lemos, The Section 5 Mystique, Morrison, and the Future of Federal Anti-Discrimination Law, 2000 Sup. Ct. Rev. 109, 151 (same).
63 Post & Siegel, supra note 44, at 478.
64 See generally Colker & Brudney, supra note 4, at 126-27 (discussing the difficulties in amassing a legislative record concerning age discrimination committed by the states).
65 See, e.g., Post & Siegel, supra note 44, at 461 (asserting that the Court was plainly provoked by RFRA).
sorts: Congress contradicted (or disrespected) the Court quite publicly, and the Court, quite publicly, put it in its place.\(^{67}\)

In *Boerne*, Congress was straightforward about its motive, which was to override current Supreme Court precedent in favor of prior understandings. Later cases colliding with *Boerne*, such as *Kimel* and *Garrett*, involved legislation that made no such attempt to override or contradict the Court. If *Boerne* was a punishment for RFRA, the *Boerne* progeny show that the punishment exceeds any crime RFRA may have committed.\(^{68}\) Although each of these decisions contains the requisite language about the latitude given to Congress to remedy wrongs,\(^{69}\) and the deference to which Congress is entitled,\(^{70}\) the sense of judicial mistrust for the motives and competence of Congress pervading *Boerne* can be found in these opinions as well.

*Kimel* expresses a deep skepticism about what Congress sought to achieve, referring to that body’s “unwarranted response to a perhaps inconsequential problem.”\(^{71}\) In *Garrett*, the Court seems to question the sincerity of Congress. It suggests that Congress, rather than acting within its constitutionally defined enforcement powers, was attempting to rewrite Fourteenth Amendment law to advance its own vision of desirable public policy.\(^{72}\) It also questions the veracity of Congress. The Court observes that “had Congress truly understood this information [that it claimed supported the need for the legislation] as reflecting a pattern of unconstitutional behavior by the states...” it would have said so in its legislative findings.\(^{73}\) The Court’s effort to allay its mistrust has arguably led to its newly-minted substantive/remedial distinction and its concomitant requirement that legislative remedies exhibit congruence and proportionality, both of

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\(^{67}\) Neal Devins argues that Congress may have been, and may still be "spurring the Court into action by signaling its indifference to the constitutional fate of its handiwork." Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court’s Anti-Congress Crusade*, 50 DUKE L.J. 435, 436 (2001).

\(^{68}\) Commentators suggest that the Court could have struck *Boerne* down on the ground that it “violated *Marbury* by attempting to dictate the meaning of the Constitution,” Colker & Brudney, supra note 4, at 103; see also Estreicher & Lemos, supra note 62, at 130 (arguing that RFRA could have been struck down as a violation of *United States v. Klein*, 80 U.S. 128 (1872)); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 918 (1999) (arguing that the problem with RFRA was that it made too great a change in free exercise law); a problem that would not have extended to the *Boerne* progeny.


\(^{71}\) *Kimel*, 528 U.S. at 89. See Colker & Brudney, supra note 4, at 108 (discussing the Court’s “deeply skeptical tone” toward the legislative history in *Kimel*).

\(^{72}\) *Garrett*, 531 U.S. at 374.

\(^{73}\) Id. at 371.
which seem designed to police both the motives and the competence of Congress.\textsuperscript{74}

The often-criticized substantive/remedial distinction\textsuperscript{75} relegates Congress to the role of the Court’s handmaiden in effectuating judicially-articulated Fourteenth Amendment norms. The Court’s ungenerous reading of Section 5’s grant of power seems to bespeak a low opinion of Congress’ unique institutional competence. It essentially reads Congress out of the enterprise of charting and articulating constitutional meaning.\textsuperscript{76} This cramped role is particularly ironic given that Section 5 was itself at least partially animated by a mistrust of the judicial branch, and by the desire to give Congress an independent voice in realizing Fourteenth Amendment guarantees.\textsuperscript{77} Moreover, the Court’s conception of the remedial role is static, uncreative: a private-rights notion of remedial power. It is especially unfortunate for institutional reform cases, which require judicial/legislative partnership and a fluid, multi-faceted approach to complex problems.\textsuperscript{78} The Court’s new requirement that all Congressional fact-finding be reflected in formal legislative findings reflects a failure to appreciate the many ways, both formal and informal, in which Congress educates itself.\textsuperscript{79} The record requirement also looks much like a proof requirement—a means of policing Congress to ensure its legislative motives pass muster\textsuperscript{80} (specifically, as Larry Kramer

\begin{itemize}
\item \textsuperscript{74} See Buzbee & Schapiro, supra note 4, at 97, 136-139 (stating that the Court’s new heightened scrutiny requirements for legislative record review reflect distrust of the political branches and their motivations); Caminker, supra note 4, at 1166 (arguing the congruence and proportionality requirement is designed to flush out pretextual legislation by Congress); Colker & Brudney, supra note 4, at 6 (arguing that the Court’s new methodology, which displaces Congress’ fact-finding role by transforming factual into legal questions, grows from its increasing disrespect for Congress); Devins, supra note 4, at 1173 (arguing that the \textit{Boerne} right/remedy distinction enables the Court to declare a matter a question of law when it disapproves of Congressional fact-finding); Kramer, supra note 5, at 129-50 (noting the Court’s low opinion of Congress has led to unprecedented constraints on Congress’ ability to enforce the Constitution, including placing of institutional fetters intended for the Court onto Congress).

\item \textsuperscript{75} See, e.g., Cole, supra note 44, at 49 (arguing that the Court enunciates no persuasive reason for the distinction); Levinson, supra note 68, at 915 (arguing that the distinction is descriptively inaccurate).

\item \textsuperscript{76} See, e.g., Kramer, supra note 5, at 147 (stating that \textit{Garrett} largely dispossesses Congress of power to act under the Fourteenth Amendment except in cases of race or gender, which the Court has already declared suspect classifications; that is, it renders Sec. 5 superfluous); see also Post & Siegel, supra note 44, at 519-21 (noting that the Court’s view divorces the creation of constitutional meaning from political and social life).

\item \textsuperscript{77} See Akhil Reed Amar, \textit{Intratextualism}, 112 HARV. L. REV. 747, 826 (1999) (arguing that just as Congress sought to constrain future Congressional action with Section 1, it sought to provide a check on the judiciary through Section 5).

\item \textsuperscript{78} Levinson, supra note 68, at 879-80. See also Caminker, supra note 4, at 1171 (suggesting that the Court’s “stingy” approach to the Congressional role may undermine the Court’s own ability to implement its vision).

\item \textsuperscript{79} Colker & Brudney, supra note 4, at 117-19.

\item \textsuperscript{80} Buzbee & Schapiro, supra note 4, at 137; Devins, supra note 4, at 1173.
\end{itemize}
says, the kind of muster a court is capable of reviewing). Thus far, we have had no indication of how much proof will be adequate to dispel the assumption of improper legislative motives.

The requirement that the remedy be congruent and proportional also reflects a mixture of disdain for the independent role of Congress and mistrust of its motives. It seems an effort, albeit a clumsily-crafted one, both to ensure that the remedy really does address the evils Congress claims to want to address, and to ensure that those evils are sufficiently close to those the Court itself thinks should be addressed. Of course darker motives are also possible. Boerne and its progeny help inaugurate a shift in the balance of federal/state power. It is a shift that appears animated by hostility toward federal supervision of state conduct, and by suspicion of the existence of the Section 5 power itself. These are not motives the Court can own up to, without reading Section 5 out of the Constitution entirely.

There is another possible set of unacknowledged motives that may underlie cases like Kimel and Garrett—a hostility or at least skepticism toward the underlying rights at stake. This reading is based in part on what the cases do not say. Earlier I quoted an Amsterdam and Bruner phrase: “people do not figure prominently in these plots.” Their emotional intensity in these opinions is reserved for warding off harms to the dignity of the states, and, as I will suggest in a moment, to the dignity of the Court itself. Emotional intensity does not attach to Patricia Garrett, breast cancer victim, or any of the other plaintiffs. The language describing disability discrimination in Garrett or age discrimination in Kimel tends toward the skeptical, dismissive, sometimes even approving—references to the rationality, or inconsequentiality, of refusing to provide special accomodations for the disabled, or of taking age into account in hiring decisions. There is never a sense in these opinions of a Court engaged in

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81 Kramer, supra note 5, at 129-50.
82 Balkin & Levinson, supra note 6; Post & Siegel, supra note 44, at 506-07.
83 Caminker, supra note 4, at 1191.
84 See infra notes 36-37 and accompanying text.
85 See, e.g., Univ. of Ala. v. Garrett, 531 U.S. 356, 366-367 (2001) (discussing rationality of refusing to accommodate disabled and inadequacy of negative stereotyping as a grounds for challenge); Kimel v. Fl. Bd. of Regents, 528 U.S. 62, 86 (2000) (concluding that the Constitution permits states to draw lines based on age even if it is “probably not true” that those reasons are valid in the majority of cases). See also Colker & Brudney, supra note 4, at 125 (taking issue with Court’s broad notion of rational basis in Kimel); Johanna Pirko, The Erosion of Separation of Powers Under the “Congruence and Proportionality” Test: From Religious Freedom to the ADA, 53 Hastings L.J. 519, 530 (2002) (taking issue with Court’s narrow reading of Cleburne and broad notion of rational basis in Garrett); Post & Siegel, supra note 44, at 522 (arguing that the Court uses the Boerne test when it “is indifferent or hostile to the constitutional values at stake in particular instances of Section 5 legislation”).
figuring out how best to respond to disability or age discrimination; never a sense of regret at the inability to afford a remedy, or responsibility for the fate of those left remediless. Indeed, there is no attempt to offer any account of what the federal role in civil rights enforcement ought to be.

I suggested earlier that the emotional temperature of these opinions rises mainly when the state's dignity seems threatened. But another source of emotional intensity is discernible as well—the Court's reaction toward challenges to its own authority. One very noticeable theme tying together many of the past term's cases, including Garrett, Velazquez v. Legal Services Corporation, the INS cases, United States v. Dickerson, and Bush v. Gore, is their assertion of judicial supremacy. As Larry Kramer well described it, this is a supremacy that might better be described as "judicial sovereignty," an insistence that the Court is the sole arbiter of constitutional meaning. The emotional valence of Boerne and its progeny bespeaks an exquisite sensitivity to perceived assaults on the Court's dignity, or even the failure of Congress to pay its proper respects. This is easy to see in Boerne, as I mentioned earlier—the Court feels publicly disrespected, contradicted, "anxious to squelch any appearance that the views of other branches

\[86\] See United States v. Morrison, 529 U.S. 598, 627 (2000) ("If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."). The problem is that the Violence Against Women Act was passed in light of a "record of failure at the state level," in order to "provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence." Id. at 655 (Souter, J., dissenting). See also Post & Siegel, supra note 44, at 523 (discussing the majority's language, and noting that the Court never discusses whether a remedy is forthcoming from any source).

\[87\] Robert Post and Reva Siegel note that in Kimel, for the first time since the decision in Brown v. Board of Education, the Court has tried to disaggregate the Commerce Clause and Fourteenth Amendment aspects of the effort to protect civil rights, as if they were not part of the same project. Post & Siegel, supra note 44, at 518. If the civil rights of individuals fall between the cracks, the Court does not appear particularly concerned.

\[88\] 532 U.S. 903 (2001) (striking down certain restrictions on advocacy by the Legal Services Corporation as serious and fundamental restrictions on advocacy and on the functioning of the judiciary).


\[90\] United States v. Dickerson, 530 U.S. 428 (2000) (striking down statute designed to override the Court's decision in Miranda v. Arizona as a usurpation of the judicial role).

\[91\] Bush v. Gore, 531 U.S. 98 (2000) (halting recount ordered by Florida Supreme Court, and thereby effectively resolving the presidential election). See Kramer, supra note 5, at 153 (referring to Bush v. Gore as "surely the capstone of the Rehnquist Court's campaign to control all things constitutional").

\[92\] Kramer, supra note 5, at 13.
might affect its interpretation.\textsuperscript{93} Perhaps the most important emotional component of these opinions is trust—and lack of trust. They are pervaded by a strong sense that the Court ought to be the sole guardian of constitutional meaning, because the Court trusts its own good judgment most of all.\textsuperscript{94} And it is in its own good faith and judgment that the Court ultimately asks us to place our trust as well.

\textsuperscript{93} Id. at 130.

\textsuperscript{94} See, e.g., Amar, supra note 77, at 826 (calling the Court's "self-confident and self-aggrandizing attitude about [its] interpretive power under the Fourteenth Amendment" difficult to justify); Post & Siegel, supra note 44, at 521 (arguing that the Court assumes, at its peril, that its own equal protection doctrine is complete, settled, and immune to modification).