

2014

# After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism

William D. Araiza

*Brooklyn Law School*, [bill.araiza@brooklaw.edu](mailto:bill.araiza@brooklaw.edu)

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Constitutional Law Commons](#), and the [Legislation Commons](#)

---

## Recommended Citation

94 Boston University Law Review 367 (2014)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

# HEINONLINE

Citation: 94 B.U. L. Rev. 367 2014



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Mon May 11 15:06:46 2015

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0006-8047](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0006-8047)

---

**AFTER THE TIERS: *WINDSOR*, CONGRESSIONAL POWER  
TO ENFORCE EQUAL PROTECTION, AND THE  
CHALLENGE OF POINTILLIST CONSTITUTIONALISM**

WILLIAM D. ARAIZA\*

INTRODUCTION ..... 368

I. THE COMING DOCTRINAL COLLISION ..... 376

    A. *The Enforcement Clause, the Congruence and Proportionality Standard, and Suspect Classes* ..... 376

    B. *The Breakdown of the Suspect Class Doctrine*..... 385

II. THE ENFORCEMENT POWER AND THE PERILS OF CONSTITUTIONAL POINTILLISM..... 394

    A. *The Coming Conflict*..... 394

    B. *One Without the Other: The Enforcement Power in a World of Constitutional Pointillism*..... 395

III. A WAY FORWARD ..... 399

    A. *The Problem, Summarized*..... 399

    B. *The Way Forward*..... 400

    C. *Adapting the Enforcement Power to Pointillist Constitutional Jurisprudence* ..... 405

    D. *Application* ..... 409

CONCLUSION: THE CHALLENGE OF POINTILLIST CONSTITUTIONALISM..... 412

*The Supreme Court’s June 2013 opinion in United States v. Windsor is remarkable for its bypassing of standard equal protection doctrine. In striking down section 3 of the Defense of Marriage Act as unconstitutional discrimination against gays and lesbians, Windsor failed to broach the question whether sexual orientation constitutes a suspect class; indeed, it failed even to perform the “fit” analysis that doctrine demands. Instead, the Court examined the statute and accompanying legislative materials and concluded that section 3 violated the Equal Protection Clause’s core command that government action not be based on animus against a disfavored group.*

*Windsor’s unusually direct methodology conflicts with the Court’s jurisprudence governing Congress’s power to enforce the Equal Protection*

---

\* Professor of Law, Brooklyn Law School. Thanks to Joel Gora and Eric Berger for helpful comments on an earlier version of this Article, and to Emmanuel Fashakin and Michael Teitel for fine research assistance. The Author also wishes to acknowledge the financial support provided by the Brooklyn Law School Dean’s Summer Research Stipend Program.

*Clause. That jurisprudence, requiring that there be “congruence and proportionality” between enforcement legislation and the constitutional violation the law targets, has relied heavily on the suspect class status of the benefitted group. Until very recently, the results of the congruence and proportionality inquiry were predictable; legislation that enforced the equal protection rights of suspect or quasi-suspect classes would enjoy deferential judicial review, while legislation enforcing the rights of nonsuspect classes would receive a skeptical judicial reception. While recent cases potentially call this template into question, it remains for now a basic feature of the Court’s Enforcement Clause doctrine.*

*Windsor, by abjuring suspect class and even “fit” analysis, undermines the Court’s approach to the enforcement power. This Article examines the challenge Windsor poses to the Court’s Enforcement Clause doctrine. It argues that Windsor requires the Court to reconsider its approach to the congruence and proportionality standard. In particular, it argues that Windsor’s more particularized equal protection methodology requires the Court to consider how Congress may legitimately translate such judicial pointillism into enforcement legislation’s inevitably broader brushstrokes.*

*It is urgent that the Court consider a new approach to the enforcement power. Congress either has enacted or is poised to enact several significant pieces of enforcement legislation benefitting groups whose suspect class status has not been determined and likely never will. Unless the Court is prepared to exclude Congress from participating in the equality projects the Court itself has embarked on, the Court needs to consider how to harmonize its newfound interest in constitutional pointillism with enforcement legislation’s broader brushstrokes.*

*This Article suggests such an approach, one that recognizes Congress’s institutional competence and legitimacy to make broad judgments about the same sort of animus the Court found through its more precisely targeted inquiry in Windsor. This approach would not immunize enforcement legislation from judicial review. As explained in this Article, however, this approach does call for a change in the way the Court performs congruence and proportionality review. This Article closes by applying this new approach to a pending piece of enforcement legislation, the Employment Non-Discrimination Act, which would offer federal employment discrimination protections to gay and lesbian workers.*

#### INTRODUCTION

The Supreme Court’s decision in *United States v. Windsor*,<sup>1</sup> striking down section 3 of the Defense of Marriage Act (DOMA)<sup>2</sup> was remarkable in many

---

<sup>1</sup> 133 S. Ct. 2675 (2013).

<sup>2</sup> *Id.* at 2693 (finding that DOMA is motivated by an improper animus against homosexuals and thus violates due process and equal protection principles); *see also*

ways.<sup>3</sup> Yet it was also simply the latest example of the Court's decades-long trend of ignoring suspect class analysis in equal protection cases. The Court now has struck down two laws as violating the equal protection rights of gays and lesbians without even broaching the question whether sexual orientation constitutes a suspect class.<sup>4</sup> This avoidance of the suspect class issue is not an idiosyncratic feature of sexual orientation cases; the Court has not performed a serious suspect class analysis – or purported to – in nearly thirty years. To put that point in more personal terms, no current Justice was sitting the last time the Court purported to engage in such an analysis. Thus, the current generation of the Court has not seriously engaged the political process theory that guided much of the Court's equal protection thinking during the Burger Court.<sup>5</sup>

In its place, the Court has employed analytical approaches that attempt to cut through the mediating principles that constitute suspect class analysis.<sup>6</sup> Two examples are particularly notable. First, in its modern race jurisprudence, the Court has embraced a presumption that the Constitution requires color

Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419-20 (1996). For convenience, this Article sometimes refers to section 3 of DOMA as simply "DOMA." References to DOMA should be understood as references only to section 3, unless the context otherwise clearly indicates.

<sup>3</sup> See Ernest Young & Erin Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012-2013 CATO SUP. CT. REV. 117 (arguing that *Windsor* constitutes an unusually sophisticated application of the connection between federalism and individual rights); *infra* notes 139-46 and accompanying text (explaining *Windsor*'s deviation from traditional equal protection "fit" analysis).

<sup>4</sup> See *Windsor*, 133 S. Ct. at 2695 (striking down section 3 of DOMA as violating the equality principles of the Fifth Amendment Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 635 (1995) (striking down Amendment 2 to the Colorado Constitution as violating the Equal Protection Clause); *Lawrence v. Texas*, 539 U.S. 559, 580 (2003) (striking down Texas's sodomy law as violating substantive due process); *id.* at 580 (O'Connor, J., concurring) (agreeing with the result on an equal protection ground).

<sup>5</sup> By contrast, from time to time the Court has continued its tendency to employ an explicitly political process-based approach to dormant Commerce Clause questions. See, e.g., *W. Lynn Creamery v. Healy*, 512 U.S. 186, 200 (1994) (striking down a combination neutral tax and local subsidy program, although each component was constitutional by itself under longstanding precedent, in part because their combination had the effect of removing in-state industries as natural political opponents of the law).

<sup>6</sup> *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting) (explaining that "[t]he modern tiers of [equal protection] scrutiny . . . are a heuristic to help judges determine when classifications have that 'fair and substantial relation to the object of the legislation,'" which equal protection requires (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971))); see, e.g., William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889, 896-933 (2011) (explaining how Justice Stevens's equal protection and free speech jurisprudence attempted to cut through such mediating principles to apply actual constitutional law); Allison Moore, *Loving's Legacy: The Other Antidiscrimination Principles*, 34 HARV. C.R.-C.L. L. REV. 163, 167 (1999) (explaining how suspect class analysis constitutes a set of mediating principles rather than core constitutional law).

blindness, basing this conclusion on a combination of moral imperative and the Court's perception of the core meaning of the Fourteenth Amendment with regard to race.<sup>7</sup> Second, in its famous series of "rational basis plus" cases, it has attempted to discern when discrimination is motivated by illegitimate animus.<sup>8</sup> These disparate approaches share a concern with applying core equal protection law (as the Court understands that law) rather than deciding cases based on a decisional heuristic, such as political process theory, that attempts to approximate the results a court would reach if it were able accurately to discern and apply equal protection's core meaning.<sup>9</sup> *Windsor* is simply the most recent – and perhaps most extreme<sup>10</sup> – example of this more direct approach to equal protection.

The Court's approach holds both perils and promise for equal protection doctrine generally. But for current purposes, the importance of the Court's approach lies in its implications for congressional power to enforce the Equal Protection Clause – the so-called "enforcement power" or "Section 5 power."<sup>11</sup> Judicial doctrine insists that enforcement legislation be "congruent and proportional" to the constitutional violation Congress seeks to remedy.<sup>12</sup> In stark contrast to its underlying equal protection jurisprudence, the Court's Enforcement Clause jurisprudence has, at least until very recently, relied heavily on a group's suspect class status when determining whether enforcement legislation benefitting that group satisfies the congruence and proportionality test. The doctrinal template was straightforward: If the benefitted group was a suspect or quasi-suspect class, "it was easier for Congress to show a pattern of state constitutional violations" justifying enforcement legislation.<sup>13</sup> If it was not, then Congress's task was more difficult: It would have to "identify, not just the existence of [discriminatory] state decisions, but a 'widespread pattern' of irrational reliance on such [non-suspect] criteria."<sup>14</sup>

---

<sup>7</sup> See *infra* notes 100-06 and accompanying text (discussing how the Court has reached its presumptive rule requiring colorblindness).

<sup>8</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that mental retardation is not a suspect classification but nevertheless striking down the city's zoning decision on the ground that it reflected unconstitutional animus against the mentally retarded).

<sup>9</sup> See *infra* notes 178-79 (explaining the idea of a constitutional heuristic and applying that concept to equal protection review).

<sup>10</sup> See *infra* notes 144-46 and accompanying text (explaining why *Windsor* potentially reflects an unusually explicit version of this approach to equal protection law).

<sup>11</sup> U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

<sup>12</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (announcing the "congruence and proportionality" standard).

<sup>13</sup> *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

<sup>14</sup> *Id.* at 735 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90 (2000)).

Recently this template has deteriorated. In 2012 the Court held that a provision of the Family and Medical Leave Act (FMLA)<sup>15</sup> exceeded Congress's enforcement power, even though the FMLA was enacted to combat sex discrimination, a phenomenon that triggers heightened equal protection scrutiny.<sup>16</sup> In 2013 the Court struck down the coverage formula for the preclearance provisions of the Voting Rights Act (VRA),<sup>17</sup> which protects against race discrimination in voting.<sup>18</sup> These decisions depart from the template described in the previous paragraph in that the Court in these cases struck down enforcement legislation as exceeding Congress's power even though the targeted discrimination – respectively, based on sex and race – triggered heightened judicial scrutiny.<sup>19</sup>

Thus, the Court's enforcement power doctrine has entered a potentially transitional stage. The decision in *Windsor* confirms that future equal protection decisions considering equality claims by emerging<sup>20</sup> groups will likely turn less on application of suspect class doctrine and more on the Court's holistic, if ad hoc and particularized, estimations of the rationality and public-purpose basis for a challenged law.<sup>21</sup> At the same time, the Court's

<sup>15</sup> Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994).

<sup>16</sup> See *Coleman v. Court of Appeals*, 132 S. Ct. 1327, 1338 (2012).

<sup>17</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

<sup>18</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). The relevance of *Shelby County* is very slightly more attenuated than that of the other cases discussed in this Article because of its ambiguous doctrinal foundation. The Court suggested that the constitutionality of the coverage formula presented questions under both the Fourteenth and Fifteenth Amendments, see *id.* at 2622 n.1, although its analysis focused on the Fifteenth Amendment, see *id.* at 2619-29 (referring to the Fifteenth Amendment). More relevant for our purposes, the Court was also notably vague in its statement of the standard by which it reached its decision to reject the coverage formula. See *id.* at 2622 n.1 (referring to a prior case, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009), as setting the applicable standard of review); *Nw. Austin*, 557 U.S. at 204 (declining to decide whether the VRA was properly reviewed under the congruence and proportionality standard).

<sup>19</sup> Indeed, in the case of the VRA, the right at issue – voting – is also one that enjoys heightened protection as a matter of the “fundamental rights strand” of equal protection. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (stating that the right to vote is a “fundamental political right” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))); *Shelby Cnty. v. Holder*, 679 F.3d 848, 860 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013).

<sup>20</sup> “Emerging” groups in this context means simply groups whose suspect-class status has not yet been determined by the Court. In most cases, this characteristic traces back to the fact that the group was not sufficiently visible or organized to mount colorable equal protection claims during the period when the Court employed suspect class analysis more regularly. See, e.g., *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting from denial of certiorari) (acknowledging that as of 1985 the suspect classification status of sexual orientation had not yet been determined by the Court).

<sup>21</sup> Of course, lower courts may feel themselves more constrained to apply standard suspect class doctrine. Indeed, one recent post-*Windsor* case relied on that decision to

Enforcement Clause doctrine, which until 2012 was tied closely to suspect-class analysis, is possibly entering a state of flux.

The uncertainty caused by the combination of these developments likely will come to a head soon. At some point in the not-too-distant future, Congress will likely enact the Employment Non-Discrimination Act (ENDA),<sup>22</sup> a law that would ban workplace discrimination (including by state employers) on the basis of sexual orientation and perhaps gender identity. Although not currently on the legislative agenda, expansion of federal public accommodations laws to include sexual orientation is also a possibility.<sup>23</sup> Beyond sexual orientation and transgender identity, the Genetic Information Nondiscrimination Act (GINA),<sup>24</sup> which is already law, restricts discrimination on the basis of one's genetic makeup. Congress has also expanded the Americans with Disabilities Act in a way that potentially protects at least some obese persons.<sup>25</sup>

While all these laws either are or would be constitutional under the Commerce Clause,<sup>26</sup> plaintiffs' ability to obtain retrospective relief against state governments violating these laws rests largely on those laws being upheld as enforcement legislation.<sup>27</sup> But their bona fides as enforcement legislation is

---

conclude that sexual orientation discrimination requires heightened judicial scrutiny. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) ("In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.").

<sup>22</sup> Employment Non-Discrimination Act, H.R. 1755, 113th Cong. (2013).

<sup>23</sup> Other possibilities for federal legislation include guidelines for antibullying programs in schools (which might include sexual orientation as a protected class) and federal protection for gay and lesbian adoption and parentage rights. Unlike the legislation mentioned in the text, these types of laws would presumably have to rest either on Congress's spending power or its power to enforce the Fourteenth Amendment, given limits on Congress's power to regulate interstate commerce. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (suggesting strongly that federal regulation of family law and education matters would not come within Congress's regulatory power under the Commerce Clause). The spending power may also be an unsure foundation for such legislation. *See* cases cited *infra* note 29.

<sup>24</sup> Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (restricting employment and insurance discrimination on the basis of genetic information).

<sup>25</sup> *See generally* Shannon Liu, Note, *Obesity as an "Impairment" for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141 (2010) (considering whether the 2008 amendments to the Americans with Disabilities Act provide protection for obese persons).

<sup>26</sup> *But see supra* note 23 (suggesting other federal antidiscrimination legislation that the Commerce power might not support).

<sup>27</sup> *Compare* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (prohibiting Congress from making nonconsenting states liable for retrospective relief when legislating under its



an open question. None of these classifications – sexual orientation, gender identity, genetics, or obesity – can claim protection as a suspect class; unless the Court reverses the course of its equal protection jurisprudence, none of them ever will.<sup>28</sup> At the same time, despite recent hints to the contrary, the Court’s current Enforcement Clause doctrine requires such protection in order for these statutes to receive something other than highly skeptical judicial review. Something has to give.

Even if plaintiffs could obtain full relief for state government violations of antidiscrimination laws enacted under the Commerce Clause or the Spending Clause,<sup>29</sup> there would remain deeper reasons to worry about the scope of Congress’s enforcement power. Two generations ago, Justices Douglas and Jackson protested the Court’s decision to rely on the Commerce Clause to invalidate a California law preventing the importation of indigent persons into the state.<sup>30</sup> For Justice Douglas it seemed plain that “the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”<sup>31</sup> Justice Jackson expressed concern that “[t]o hold that the measure of [a human’s] rights is the commerce clause is likely to result

---

Article I power), *with* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (authorizing Congress to do the same when it legislates under its power to enforce the Fourteenth Amendment). To the extent the Spending Clause might authorize such relief as a condition for states receiving federal funding, recent cases hint at a cutback in that power as well. *See* cases cited *infra* note 29.

<sup>28</sup> EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 69 (2d ed. 2008) (“For all practical purposes the constitutional doctrine regarding suspect classes is a dead letter. . . . [T]he Court has no intention of creating any new suspect classes.”); Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court’s Suspect Classification Jurisprudence*, 50 *WASHBURN L.J.* 33, 44-45 (2010) (remarking that the Court has not recognized a new suspect class since the mid-1970s); Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 *PEPP. L. REV.* 1021, 1030 (2011) (hypothesizing that the Court may not recognize any group as a new suspect class but instead provide gradations within the rational basis inquiry).

<sup>29</sup> *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (holding that Congress exceeded its power under the Spending Clause to attach particular conditions to Medicare program grants to states through an analysis that suggests more careful scrutiny of conditional spending grants to states); *see also* *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l*, 133 S. Ct. 2321, 2331-32 (2013) (holding that Congress violated the First Amendment when it attached funding conditions on grants to private parties that forced the recipient to alter its position in programs other than the one funded by the allocated funds). Under current law, Congress lacks the power to authorize retrospective relief against states when it legislates under its power to regulate interstate commerce. *Seminole Tribe*, 517 U.S. at 72-73 (undermining the Commerce Clause authority for the availability of such relief).

<sup>30</sup> *Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (Douglas, J., concurring); *id.* at 182 (Jackson, J., concurring).

<sup>31</sup> *Id.* at 177 (Douglas, J., concurring).

eventually either in distorting the commercial law or in denaturing human rights.”<sup>32</sup>

These concerns resonate today. Even if Congress’s Article I powers provided all the power Congress needed to ensure that states respect basic human rights, lodging that authority securely in the Enforcement Clause ensures that human rights legislation rests on its appropriate foundation. Locating that correct foundation ensures that Congress’s constitutional deliberation focuses on how best to secure those rights, rather than on the interstate commerce effects when those rights are violated.<sup>33</sup> Such deliberation can only encourage the public constitutional discourse necessary to maintain ultimate popular sovereignty. This Article is therefore part of a larger project to ground Congress’s power to enforce constitutional rights where it belongs – in the aptly named Enforcement Clause.<sup>34</sup>

This Article surveys the state of Enforcement Clause doctrine in the wake of *Windsor*’s reaffirmation of the Court’s ad hoc, particularized approach to equal protection. Part I explains the doctrinal developments that have caused the tension described above. Part I.A begins with a brief description of the

---

<sup>32</sup> *Id.* at 182 (Jackson, J., concurring).

<sup>33</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (examining Congress’s evidence that racial discrimination in public accommodations affected interstate commerce).

<sup>34</sup> See generally William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27 (2009) (considering the lessons the equal protection “class of one” doctrine holds for congressional power to enforce the Fourteenth Amendment); William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878 (2013) [hereinafter Araiza, *Deference*] (considering the deference due congressional factfindings supporting rights-limiting and rights-enforcing legislation); William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damage Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1 (2002) (considering whether the Supreme Court would uphold an ENDA provision prohibiting sexual orientation discrimination in employment in light of its decision in *Board of Trustees of the University of Alabama v. Garrett*); William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451 (2010) [hereinafter Araiza, *New Groups*] (challenging the Supreme Court’s approach to its review of Equal Protection Clause cases and positing an alternative theory of enforcement power); William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39 (2004); William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519 (2005) (arguing that a broader Section 5 power is appropriate in light of recent equal protection decisions under the rational basis standard); William D. Araiza, *The Troubled Adolescence of City of Boerne v. Flores*, in *CONTROVERSIES IN EQUAL PROTECTION CASES IN AMERICA* (Anne Richardson ed.) (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2174446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174446) (considering the problems that arise when the Court reviews enforcement legislation skeptically).

congruence and proportionality standard and how the Court has applied that standard since its 1997 introduction in *City of Boerne v. Flores*.<sup>35</sup> That Section reveals the close connection the Court has drawn between Congress's enforcement power and the Court's own equal protection doctrine, most notably its suspect class jurisprudence. Part I.A concludes, however, with a discussion of recent cases suggesting an erosion of that close connection. Part I.B next describes the breakdown of the Court's suspect class jurisprudence. That description culminates with *Windsor*. Part I.B explains how *Windsor* potentially makes a conclusive break with suspect class analysis in favor of a more direct, but particularized, pointillist<sup>36</sup> constitutional methodology.

Part II considers the implications of these developments. It begins by observing that legislative developments are hastening the arrival of a moment of truth for the enforcement power.<sup>37</sup> With GINA and potential obesity protections enacted, and ENDA – perhaps with a gender identity component – under serious consideration, the United States Code may soon feature laws based on the Enforcement Clause that protect several groups whose suspect class status is unknown and may never be determined conclusively. Part II then considers the problem such legislation poses for the Court's current combination of equal protection and enforcement power jurisprudence.<sup>38</sup> It explains that courts will find it difficult to apply the congruence and proportionality test's fundamental requirement – that courts measure the relationship between enforcement legislation and the targeted constitutional right – when that right has been identified in the narrow, particularistic way reflected in *Windsor*. To the extent *Windsor* heralds a new approach to equal protection issues, this difficulty will become widespread.

Part III offers a way forward. It suggests that *Windsor* reflects the Court's attempt to read the social meaning of legislation, and to test that meaning against equal protection's core requirement that government act only in pursuit of a public purpose. This judicial willingness to read social meaning into legislation suggests that the Court should respect Congress's performance of that same function when enacting enforcement legislation. Indeed, such judicial respect is especially appropriate in light of Congress's superior capability and legitimacy to perform that task.<sup>39</sup> Part III lays out such an

---

<sup>35</sup> 521 U.S. 507, 510 (1997) (striking down the Religious Freedom Restoration Act as violating the newly announced “congruence and proportionality” requirement for enforcement legislation).

<sup>36</sup> See Pierre Courthion, *Georges Seurat*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/536352/Georges-Seurat#ref235846> (last visited Nov. 6, 2013), archived at <http://perma.cc/U6JM-D9RE> (explaining that Pointillism is a “technique for portraying the play of light using tiny brushstrokes of contrasting colors”).

<sup>37</sup> See *infra* Part II.A.

<sup>38</sup> See *infra* Part II.B.

<sup>39</sup> See Araiza, *Deference*, *supra* note 34, at 887-93 (citing expertise and authority as factors for determining the appropriate amount of deference owed Congress when it finds

argument. After summarizing the problem explained in Part II,<sup>40</sup> it translates *Windsor*'s approach into the very different context of legislative action,<sup>41</sup> and explains how that translation justifies Congress in applying *Windsor*'s pointillist approach to legislation's inevitably broader brushstrokes.<sup>42</sup> Part III concludes by applying this approach to a case challenging the Enforcement Clause bona fides of a hypothetical ENDA statute.<sup>43</sup>

## I. THE COMING DOCTRINAL COLLISION

### A. *The Enforcement Clause, the Congruence and Proportionality Standard, and Suspect Classes*

In 1997 the Supreme Court, in the midst of its remarkable campaign to limit federal power,<sup>44</sup> decided *City of Boerne v. Flores*, and thus introduced the modern judicial formula governing congressional power to enforce the Fourteenth Amendment<sup>45</sup> – the “congruence and proportionality” standard. While only a component of the Rehnquist Court's larger federalism agenda, *Boerne* was nevertheless unique: nearly all of the Court's other major federalism cases of that era were decided on the same sharply split five to four votes,<sup>46</sup> but *Boerne* gained adherence across the Court's ideological

---

facts supporting individual rights legislation).

<sup>40</sup> See *infra* Part III.A.

<sup>41</sup> See *infra* Part III.B.

<sup>42</sup> See *infra* Part III.C.

<sup>43</sup> See *infra* Part III.D.

<sup>44</sup> See, e.g., JEROLD WALTMAN, CONGRESS, THE SUPREME COURT AND RELIGIOUS LIBERTY: THE CASE OF *CITY OF BOERNE V. FLORES* 3 (2013) (discussing how in the 1990s “the Rehnquist Court was in the midst of what has been called a ‘federalism revolution’”).

<sup>45</sup> *Boerne* dealt with Congress's power to enforce the Fourteenth Amendment's Due Process Clause. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding that it is within Congress's authority to “secure the guarantees of the Fourteenth Amendment” (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))). The Court, however, stated its rule as generally applicable to Fourteenth Amendment enforcement legislation, and soon applied *Boerne*'s test to legislation enforcing the Equal Protection Clause. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (testing the Age Discrimination in Employment Act, enacted to enforce the equal protection rights of elderly people, against the congruence and proportionality standard).

<sup>46</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 617, 627 (2000) (holding that Congress's power to provide a federal civil remedy for victims of gender-motivated violence is unsustainable under both the Commerce Clause and Section 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898, 933 (1997) (finding that the requirement that background checks be conducted on handgun purchasers imposed unconstitutional obligations on state officers to execute federal laws); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997) (holding that the Tribe's action against the State of Idaho was barred by the Eleventh Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding Congress did not have the power under the Indian

spectrum.<sup>47</sup> The Court, however, soon split badly along its usual ideological lines when applying *Boerne*'s standard. Fuller explanations of the Court's application of the congruence and proportionality standard have appeared elsewhere in academic literature.<sup>48</sup> This Part provides only a partial narrative, focusing on one aspect of that doctrinal development: the Court's use of its own suspect class jurisprudence as a key component of its analysis of legislation enforcing the Equal Protection Clause.<sup>49</sup>

---

Commerce Clause to abrogate the State's Eleventh Amendment Immunity); *United States v. Lopez*, 514 U.S. 549, 566-68 (1995) (finding the Gun-Free School Zones Act exceeds Congress's power under the Commerce Clause). *But see* *New York v. United States*, 505 U.S. 144, 149 (1992) (holding, by a six-to-three vote, that several provisions of the Low-Level Radioactive Waste Policy Amendments Act violated the Constitution's federalism principles).

<sup>47</sup> Justice Kennedy's opinion for the Court was joined in relevant part by Chief Justice Rehnquist and Justices Scalia and Thomas (all three of whom were members of the five-justice bloc that reshaped the Court's federalism jurisprudence in the 1990s), as well as by Justices Stevens and Ginsburg (both of whom were consistent opponents of the majority's federalism agenda). Justice O'Connor, joined in part by Justice Breyer, agreed with the Court's enforcement power analysis, even though they were on opposite sides of the other major federalism cases of the era. They dissented in *Boerne* solely because they disagreed with the scope of the underlying right the enforcement legislation sought to promote. Justice Souter did not reach the enforcement power question. Thus, no Justice expressly disagreed with the majority's congruence and proportionality analysis, seven agreed with it fully, an eighth agreed with it partially, and one expressed no opinion.

<sup>48</sup> *See generally* Rebecca Goldberg, *The "How" of Enforcing the Fourteenth Amendment: Why the Rehnquist Court's Treatment of Implementation, Not Interpretation, Is the True Post-Boerne Failing*, 47 WASHBURN L.J. 47 (2007) (arguing that the Supreme Court's treatment of congressional implementation in *Kimel* and *Garrett*, rather than *Boerne*, are the sources of Congress's loss of interpretive power under the Rehnquist Court); Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1 (2007) (exploring the scope of Congress's enforcement power when the abrogation of state sovereign immunity is not at issue); Michael J. Neary, *Reversing a Trend: An As-Applied Approach Weakens the Boerne Congruence and Proportionality Test*, 64 MD. L. REV. 910 (2005) (explaining that the Supreme Court decision in *Lane* significantly deviates from the congruence and proportionality test first enunciated in *Boerne*, and as a result, undermines the restrictions on Congress's Section 5 authority); Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567 (2003) (examining the effects of grounding Congress's enforcement powers in the congruence and proportionality standard rather than a traditional means-ends test and comparing the congruence and proportionality test to similar standards of judicial review in other countries).

<sup>49</sup> This focus means that cases dealing with legislation enforcing the Due Process Clause are either not treated, or considered only in passing. *Cf., e.g.,* *United States v. Georgia*, 546 U.S. 151, 153 (2008) (considering whether the provisions in the Americans with Disabilities Act considered in *Lane* constitute appropriate enforcement legislation in the context of a

The first case applying the *Boerne* standard to equal protection enforcement legislation was *Kimel v. Florida Board of Regents*.<sup>50</sup> *Kimel* considered the Enforcement Clause foundation for the Age Discrimination in Employment Act (ADEA).<sup>51</sup> The Court drew a tight connection between the proportionality prong of the congruence and proportionality test and the equal protection status of age discrimination. After reviewing the Court's age discrimination jurisprudence, the Court concluded:

Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.<sup>52</sup>

The Court then rejected the plaintiffs' argument that the ADEA's limitations and exceptions restricted the statute's reach to the point that it prohibited only the arbitrary age discrimination that would fail rational basis review if challenged under the Equal Protection Clause itself.<sup>53</sup> Throughout this analysis, then, the focus remained on the relationship between the statute's scope and the Court's rule that age discrimination violated the Constitution only if it failed rational basis review.<sup>54</sup>

---

claim that a prison has violated the plaintiff's Eighth Amendment rights); *Tennessee v. Lane*, 541 U.S. 509, 513 (2004) (considering whether the public accommodations provisions of the Americans with Disabilities Act, as applied to access to courthouses, constitute appropriate legislation enforcing the Due Process right to access to the judicial process); *Fla. Prepaid Postsecondary Sav. Plan v. College Sav. Bank*, 527 U.S. 627, 630 (1999) (considering whether a federal law making states liable for patent violations was appropriate legislation enforcing the Due Process Clause). One equal protection enforcement case this Article does not discuss is *United States v. Morrison*, where the Court rejected the enforcement power foundation for the Violence Against Women Act. 529 U.S. 598 (2000). The Court in that case rested its decision on the statute's regulation of private, rather than state, conduct. *See id.* That reasoning raises an issue that lies beyond the scope of this Article.

<sup>50</sup> 528 U.S. 62, 82-86 (2000).

<sup>51</sup> Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 602, 604-05 (codified as amended at 29 U.S.C. §§ 621-634), *invalidated in part by Kimel*, 528 U.S. 62.

<sup>52</sup> *Kimel*, 528 U.S. at 86 (citation omitted) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

<sup>53</sup> *Id.* at 86-88.

<sup>54</sup> At the end of its analysis, the Court conceded that the ADEA might still be constitutional if Congress had identified a serious age discrimination problem that required a powerful prophylactic remedy. It concluded, however, that Congress had not demonstrated

A year later, in *Board of Trustees of the University of Alabama v. Garrett*,<sup>55</sup> the Court took the next step in elevating its scrutiny of enforcement legislation protecting the equal protection rights of non-suspect classes. *Garrett* considered the enforcement power bona fides of the employment provisions of the Americans with Disabilities Act (ADA).<sup>56</sup> While disability, like age, had been identified by the Court as a non-suspect class,<sup>57</sup> two factors made the Court's consideration of the ADA a more complicated enterprise than its relatively quick dismissal of the ADEA in *Kimel*. First, the Court's underlying equal protection jurisprudence sent a more ambivalent message about disability discrimination.<sup>58</sup> Second, in the ADA Congress compiled a more detailed record of state government discrimination.<sup>59</sup> These features forced the Court to build on its analysis in *Kimel*.

The first problem facing the *Garrett* Court – the equal protection status of disability discrimination – arose from the fact that sixteen years earlier, in *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>60</sup> the Court, while finding that the mentally retarded did not constitute a suspect class,<sup>61</sup> nevertheless applied what judges<sup>62</sup> and commentators<sup>63</sup> agreed was a stricter version of rational basis review. Relegating the matter to a footnote, the *Garrett* Court brushed off the argument that *Cleburne*'s unusually stringent review reflected anything other than application of traditional rational basis scrutiny.<sup>64</sup>

the existence of a serious problem with states engaging in age discrimination. *Id.* at 90-91 (“A review of the ADEA’s legislative record as a whole . . . reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.”).

<sup>55</sup>  *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

<sup>56</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 502, 104 Stat. 327, 370, *invalidated in part by Garrett*, 531 U.S. at 356.

<sup>57</sup> *Garrett*, 531 U.S. at 366 (reaffirming the Court’s holding in *Cleburne* that mental retardation is not a suspect class).

<sup>58</sup> *See infra* notes 60-63 and accompanying text (reviewing the general understanding that the Court had previously applied a stricter than usual rational basis test to legislation discriminating on the basis of mental retardation).

<sup>59</sup> *Garrett*, 531 U.S. at 377-78 (Breyer, J., dissenting) (reviewing the legislative record documenting discrimination against persons with disabilities, which included thirteen congressional hearings and task force hearings in every state).

<sup>60</sup> 473 U.S. 432 (1985).

<sup>61</sup> *Id.* at 442-47.

<sup>62</sup> *Id.* at 458 (Marshall, J., concurring in part and dissenting in part) (“[T]he Court’s heightened-scrutiny discussion is even more puzzling given that *Cleburne*’s ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny.”).

<sup>63</sup> *See, e.g.*, Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1400 (2011) (describing *Cleburne* as applying “muscular” rational basis review).

<sup>64</sup> *Garrett*, 531 U.S. at 366 n.4 (“Applying the basic principles of rationality review,

The Court's resolution of the level of scrutiny problem paved the way for its consideration of the implications of Congress's lengthy record of discrimination against disabled workers. The Court reviewed that record exceptionally strictly, in a way that reduced most of Congress's examples to irrelevance.<sup>65</sup> Taken together, the Court's review amounted to an insistence that the only relevant instances of discrimination were those committed by a state (rather than private entities or even subunits of state government),<sup>66</sup> which, if challenged in court, would fail rational basis scrutiny.<sup>67</sup> Given these criteria – in particular, the requirement that any relevant example reflect not just irrational discrimination, but discrimination so irrational as to fail the Court's own rational basis standard, complete with that standard's progovernment presumptions<sup>68</sup> – it was unsurprising that the Court concluded that Congress had failed to identify a pattern of relevant conduct justifying the ADA's employment provisions as enforcement legislation.<sup>69</sup> Thus, as with *Kimel*, the *Garrett* Court's analysis ultimately turned heavily on the suspect class status of the benefitted group. Indeed, *Garrett*'s insistence on reviewing enforcement legislation according to the judicially created suspect class template was so pronounced that prominent scholars began referring to the Court's Enforcement Clause doctrine as “juricentric.”<sup>70</sup>

---

*Cleburne* struck down the city ordinance in question.”).

<sup>65</sup> *Id.* at 369-72 (discounting congressional findings of discrimination against the disabled because most of these findings only implicated private employers, and the findings of state discrimination were only “unexamined, anecdotal accounts”).

<sup>66</sup> *Id.* at 369 (criticizing the congressional record supporting the ADA for its dearth of “incidents” that “deal with activities of States”); *id.* at 368-69 (refusing to consider examples of discrimination from sub-units of state governments).

<sup>67</sup> *Id.* at 372 (holding that “even were it possible to squeeze out of these examples [of discrimination against people with disabilities] a pattern of unconstitutional discrimination by the States,” the ADA would fail because “it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities” instead of new facilities that accommodate disabled employees).

<sup>68</sup> *See, e.g.,* *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993) (setting forth the evidentiary presumptions in favor of government action that is challenged as failing the rational basis standard).

<sup>69</sup> As in *Kimel*, the *Garrett* Court then considered whether the statute's scope sufficiently cabined state liability for the law to be considered congruent and proportional to the underlying constitutional violation. 531 U.S. at 372-74. Also as in *Kimel*, the Court found the statute to be not sufficiently cabined. *Id.* (“[T]he rights and remedies created by the ADA against the States . . . raise . . . concerns as to congruence and proportionality . . .”).

<sup>70</sup> *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1, 2 (2003); *see also* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 *IOWA L. REV.* 465, 474-76 (2013); Kevin S. Schwartz, Note, *Applying Section 5: Tennessee v. Lane and Judicial Conditions on the Congressional Enforcement Power*, 114 *YALE L.J.* 1133,



This practice continued in the next case, even though it produced the opposite result. In *Nevada Department of Human Resources v. Hibbs*,<sup>71</sup> the Court upheld provisions of the FMLA allowing workers time off for the care of ill family members.<sup>72</sup> The State defended the provisions as legislation enforcing the equal protection right to sex equality.<sup>73</sup> The Court agreed, employing a markedly more lenient congruence and proportionality review than that in either *Kimel* or *Garrett*. For example, the Court relied upon private-sector data,<sup>74</sup> accepted disparate impact results rather than insisting on only results flowing from discriminatory intent,<sup>75</sup> and rejected the argument that FMLA leave was unnecessary in light of state governments' decisions to grant such leave as a matter of state law.<sup>76</sup> In a key passage, the Court harmonized this more lenient review with its more stringent review in *Kimel* and *Garrett* in a way that explicitly linked the fate of enforcement legislation to the suspect class status of the benefitted group. The following passage can be understood as summing up the first phase of the Court's application of the congruence and proportionality standard to equal protection enforcement legislation:

[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.

We reached the opposite conclusion in *Garrett* and *Kimel*. In those cases, the § 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is a rational basis for doing so . . . .

Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based

---

1134-35 (2005).

<sup>71</sup> 538 U.S. 721 (2003).

<sup>72</sup> *Id.* at 740 (concluding that the FMLA provision is “congruent and proportional to its remedial object, and can ‘be understood as responsive to, or designed to prevent, unconstitutional behavior’”).

<sup>73</sup> *Id.* at 730-32.

<sup>74</sup> *Id.* at 730.

<sup>75</sup> *Id.* at 749-50 (Kennedy, J., dissenting) (criticizing the majority for relying on evidence that “could perhaps support the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment”).

<sup>76</sup> *Id.* at 732-33 (finding that FMLA is necessary regardless of such state law measures because the FMLA is what motivated some states to act, and many others had yet to pass such measures).

classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.<sup>77</sup>

More recent cases have called into question the close connection between a group's suspect class status and the deference enjoyed by enforcement legislation. These more recent cases have thus introduced a potentially new phase in the evolution of the congruence and proportionality standard. In 2012, in *Coleman v. Court of Appeals of Maryland*,<sup>78</sup> the Court struck down a different set of FMLA provisions, providing leave time for an employee to attend to his own illnesses.<sup>79</sup> Like the statute's family-care provisions, the FMLA's self-care provisions were defended as legislation enforcing the equal protection right to sex equality.<sup>80</sup> Defenders argued that the self-care provisions helped mitigate the sex-skewed impact of the FMLA's family-care provisions.<sup>81</sup> They suggested that employers would likely view those latter provisions as a benefit primarily utilized by women, who employers presume to be primarily responsible for caring for ill family members.<sup>82</sup> This dynamic, they suggested, would redound to women's detriment, as the FMLA would ultimately be seen as making women less attractive as employees. The defenders thus argued that the self-care provisions mitigated that effect by providing a benefit that employees would use on a sex-neutral basis.<sup>83</sup>

As legislation targeting sex discrimination, under the existing template the self-care provisions would receive relatively lenient review. But they did not. Breaking with that template, the plurality<sup>84</sup> expressed skepticism about the

---

<sup>77</sup> *Id.* at 735-36 (citations and internal quotation marks omitted).

<sup>78</sup> 132 S. Ct. 1327 (2012).

<sup>79</sup> *Id.* at 1338 (plurality opinion) (striking down the provisions because Congress failed to "identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations").

<sup>80</sup> *Id.* at 1334-35 (reviewing the petitioner's argument that "[t]he self-care provision . . . addresses sex discrimination and sex stereotyping").

<sup>81</sup> *Id.* at 1335-37 (reviewing and rejecting this argument).

<sup>82</sup> *Id.* at 1335 ("Petitioner argues that employers may assume women are more likely to take family-care leave than men and that the FMLA therefore offers up to 12 weeks of leave for family care and self care combined.").

<sup>83</sup> *Id.* ("According to petitioner, when the self-care provision is coupled with the family-care provisions, the self-care provision could reduce the difference in the expected number of weeks of FMLA leave that different employees take for different reasons."). Defenders of the law also argued, separately, that the provision of self-care leave protected against pregnancy discrimination. *See id.* (rejecting this argument).

<sup>84</sup> Justice Kennedy wrote for himself, Chief Justice Roberts and Justices Thomas and Alito. *Id.* at 1332. Justice Scalia concurred only in the judgment, continuing to register his disagreement with the congruence and proportionality standard, which he had signed onto in *Boerne* and subsequent cases, but which he abandoned in *Tennessee v. Lane*, 541 U.S. 509, 557-58 (2004) (Scalia, J., dissenting), in favor of a much stricter rule prohibiting

value of the self-care provisions in mitigating any sex-skewed impact flowing from the FMLA's family-care provisions.<sup>85</sup> Indeed, the plurality even cited the availability of self-care leave under state law as evidence of the lack of a constitutional problem, thus arguably contradicting *Hibbs's* dismissal of similar state provision of family-care leave.<sup>86</sup> Given this relatively stringent review, it is perhaps unsurprising that the *Coleman* plurality never quoted *Hibbs's* language about the easier evidentiary task Congress faced when enacting enforcement legislation benefitting a group the Court had identified as a suspect class.

It is possible to read *Coleman* as consistent with the *Kimel-Garrett-Hibbs* template. As explained above, in *Coleman* the plurality simply did not believe that the self-care provisions achieved any significant improvement in sex equality.<sup>87</sup> It is possible, perhaps, that *Coleman* has introduced a new, preliminary, requirement that enforcement legislation be minimally effective before it will be tested for congruence and proportionality. Under this reading, before legislation like the self-care provisions can be tested under *Hibbs's* more generous approach to judging congruence and proportionality, a court has to be convinced that the legislation actually furthers the sex equality goal. To be sure, *Coleman* did not explicitly impose such a hurdle. Nevertheless, such a reading renders *Coleman* more consistent with earlier cases that did not mention such a requirement, perhaps because the earlier statutes (the ADEA, the ADA, and the FMLA's family-care provisions) clearly advanced the

---

prophylactic enforcement legislation except in the context of race discrimination, *see Coleman*, 132 S. Ct. at 1338 (Scalia, J., concurring in the judgment).

<sup>85</sup> *Coleman*, 132 S. Ct. at 1334-38.

<sup>86</sup> The two situations may not be precisely alike. In *Hibbs* the majority acknowledged that some states had provided family leave, but then went on to critique the comprehensiveness of those benefits. *See Hibbs v. Nev. Dep't of Human Res.*, 538 U.S. 721, 733-34 (2003) (reviewing the "shortcomings of some state policies," including state measures that provide childcare leave only for women, thereby "reinforc[ing] the very stereotypes that Congress sought to remedy through the FMLA"). Nevertheless, *Hibbs's* first, and presumably primary, answer to the argument that state-granted family leave rendered enforcement legislation on that topic unnecessary focused on the fact that states did not begin considering such leave until federal leave legislation was introduced. *See id.* at 732-33. Taking this response seriously would suggest that *Coleman* also should have engaged the chronology question when determining the significance of states' provision of self-care leave. It did not. *See Coleman*, 132 S. Ct. at 1334-35.

<sup>87</sup> *See, e.g., Coleman*, 132 S. Ct. at 1335-37 (rejecting the argument that the self care provision furthered sex equality by serving as a necessary adjunct to the family care provisions upheld in *Hibbs*); *id.* at 1335 ("Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self care provision is unrelated to these supposed wrongs."). *But see id.* at 1337-38 (acknowledging that most single parents are women, and thus suggesting that the self-care provision may remedy employers' leave restrictions that have a disparate impact on women).

asserted goals, leaving as the only question whether they were *too* aggressive – that is, not congruent and proportional – in achieving them.<sup>88</sup> Still, at least in the absence of an explicit Court statement to this effect, an equally plausible reading is that *Coleman* does mark some type of break with the *Kimel-Garrett-Hibbs* template.

That template has continued to erode. In 2013, the year after *Coleman*, the Court struck down the formula by which states were made subject to the preclearance provisions of the VRA.<sup>89</sup> The VRA was designed to protect the voting rights of racial minorities, thus combining protections based on race with the right to vote, which is one of the few rights subject to a presumptive constitutional requirement of equal distribution.<sup>90</sup> Thus, one would expect judicial review of the VRA to be quite deferential. The Court in *Shelby County v. Holder*, however, second guessed the preclearance provision's coverage formula, concluding that Congress's failure to update that formula for several decades rendered it irrational in light of improvements in minority voting statistics in the covered jurisdictions.<sup>91</sup>

Nevertheless, the impact of *Shelby County* on the Fourteenth Amendment enforcement power is unclear. Most notably, the Court's statement of the relevant standard of review is quite opaque. The VRA was enacted and defended as legislation enforcing both the Fourteenth and the Fifteenth Amendments.<sup>92</sup> In particular, the Court originally upheld the preclearance provisions at issue in *Shelby County* as legislation enforcing the Fifteenth Amendment.<sup>93</sup> The Court has never held that *Boerne's* congruence and proportionality standard applies to legislation enforcing the Fifteenth Amendment. In *Shelby County*, the Court's discussion of its standard of review simply cited as controlling its earlier VRA case, *Northwest Austin Municipal Utility District Number One v. Holder*, where the Court was presented with, but avoided, the enforcement power question.<sup>94</sup> *Northwest Austin*, however,

<sup>88</sup> To state this requirement is not, of course, to express agreement either with it or how it is applied. *Cf. id.* at 1339 (Ginsburg, J., dissenting) (disagreeing with the majority's analysis of the self care provision).

<sup>89</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

<sup>90</sup> *See Reynolds v. Sims*, 377 U.S. 533, 576 (1964) (identifying the right to vote as one that must presumptively be accorded equally); *Shelby Cnty. v. Holder*, 679 F.3d 848, 860 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612.

<sup>91</sup> *Id.* at 2630-31.

<sup>92</sup> *Id.* at 2622 n.1 (citing an earlier case presenting the constitutionality of the coverage formula as raising issues under both the Fourteenth and Fifteenth Amendments (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009))); *id.* at 2634 (Ginsburg, J., dissenting) ("After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement of this front.").

<sup>93</sup> *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>94</sup> *Shelby Cnty.*, 133 S. Ct. at 2615-16 (quoting the standard set forth in *Northwest Austin* and declaring that "[t]hese basic principles guide review of the question presented here").

explicitly refused to decide whether the congruence and proportionality test applied to the VRA.<sup>95</sup> *Shelby County's* description of the current coverage formula as “irrational”<sup>96</sup> could thus either suggest application of the rationality standard previously applied to legislation enforcing the Fifteenth Amendment,<sup>97</sup> or a conclusion that the formula failed any standard that might conceivably apply.

Leaving standard of review formulas aside, *Shelby County's* overall message remains clear: even legislation aimed at protecting suspect classes and fundamental rights may not receive deferential treatment in the future. In this sense, *Shelby County* reinforces *Coleman's* suggestion that the template that has framed application of the congruence and proportionality standard for over a decade is now open to question.

### B. *The Breakdown of Suspect Class Doctrine*

*Coleman* and, more speculatively, *Shelby County* suggest a possible change in the Court's Enforcement Clause doctrine away from heavy reliance on the suspect class status of the group benefitted by enforcement legislation. If ultimately borne out, that evolution would be welcome news, given the gradual but unmistakable erosion of the Court's suspect class jurisprudence.

If not already dead,<sup>98</sup> suspect class analysis is in deep senescence. For at least two decades, scholars have remarked on the Court's reluctance to create new suspect classes based on political process analysis.<sup>99</sup> Two decades ago, however, they could point to *Cleburne* as a relatively recent example of the Court at least engaging in such analysis. From the current vantage point, what is remarkable is not so much the Court's unwillingness to create new suspect classes but its unwillingness even to consider that possibility. *Cleburne*, decided almost thirty years ago, marks the last time the Court engaged in a serious suspect class analysis.

This abandonment of political process-based suspect-class analysis is not for lack of opportunities to use it. In 1989, in *City of Richmond v. J.A. Croson Co.*,<sup>100</sup> the Court faced a credible argument that race-based affirmative action set-asides merited something less than strict scrutiny because those plans

---

<sup>95</sup> See *Nw. Austin*, 557 U.S. at 204 (“That question [dealing with the standard of review] has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.”).

<sup>96</sup> *Shelby Cnty.*, 133 S. Ct. at 2630-31.

<sup>97</sup> See *Katzenbach*, 383 U.S. at 326-27 (announcing the rationality standard in this context).

<sup>98</sup> See GERSTMANN, *supra* note 28.

<sup>99</sup> See, e.g., Mark Strasser, *Suspect Classes and Suspect Classifications: On Discrimination, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 947 & n.63 (1991); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

<sup>100</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

reflected the white majority's decision to burden itself for the benefit of a minority group.<sup>101</sup> Yet the Court began its discussion of the scrutiny level, not with political process analysis, but rather with a discussion of the substantive evils of government race consciousness.<sup>102</sup> When it did get to the political process argument – an argument the Court's phraseology suggested stood in logical tension with the Court's earlier identification of those harms<sup>103</sup> – the Court provided a formalistic, halfhearted, and unconvincing application of political process reasoning to justify heightened scrutiny of the particular plan at issue in *J.A. Croson*.<sup>104</sup> To be sure, the Court continues to apply heightened scrutiny in race cases, and appears to take seriously the question of the scrutiny level. Indeed, two days before deciding *Windsor*, the Court vacated an appellate court decision reviewing a university's race-based affirmative action plan, on the ground that the lower court had misapplied the strict scrutiny standard.<sup>105</sup> The Court, however, reaffirmed its commitment to a substantive, rather than a process-based understanding as to why racial classifications merited such heightened review.<sup>106</sup>

---

<sup>101</sup> See, e.g., Brief Amicus Curiae of the American Civil Liberties Union et al., *J.A. Croson*, 488 U.S. 469 (No. 87-998), 1987 WL 880105, at \*9-21 (using political process reasoning to argue for a less-than-strict level of judicial review of affirmative action plans designed to assist politically powerless minorities); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (“When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent standard of review, are lacking.”).

<sup>102</sup> *J.A. Croson*, 488 U.S. at 493 (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

<sup>103</sup> See *id.* at 495 (“Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case.” (emphasis added)).

<sup>104</sup> See *id.* at 495-96 (observing that blacks occupied five of the nine seats on the Richmond City Council when the set-aside plan was adopted).

<sup>105</sup> See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013).

<sup>106</sup> See *id.* at 2418 (describing race classifications as “odious to a free people,” “contrary to our traditions,” and “seldom . . . a relevant basis for disparate treatment” (citations and internal quotation marks omitted)); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 308-09 (1991) (“For the first time the Justices have been forced to choose between a political process theory, which identifies suspect classifications according to criteria of historical discrimination and political impotence, and a more openly normative theory of ‘relevance,’ which banishes certain criteria from governmental decisionmaking on the ground that they should be irrelevant. . . . [T]he Court’s recent affirmative action jurisprudence demonstrates . . . a clear choice for the relevance approach . . .”).

Four years after *J.A. Croson*, the Court had an opportunity to revisit *Cleburne*'s suspect class analysis. In *Heller v. Doe*,<sup>107</sup> the Court considered an equal protection challenge to a state's procedure for civil confinement of the mentally ill.<sup>108</sup> Justice Kennedy, on behalf of the Court, upheld the state procedures as satisfying the rational basis standard.<sup>109</sup> Justice Kennedy observed the plaintiffs' argument in favor of applying heightened scrutiny, but refused to address it, on the ground that it had not been raised in the lower courts.<sup>110</sup> In deciding to apply the rational basis standard, Justice Kennedy cited *Cleburne* as an example of the Court having applied that level of scrutiny to mental retardation classifications.<sup>111</sup> In a manner previewing its analysis in *Garrett*,<sup>112</sup> however, the *Heller* majority implied that *Cleburne*-style rationality review did not differ from the traditional, highly deferential scrutiny normally associated with the rational basis standard.<sup>113</sup> In other words, when presented with an opportunity to address whether *Cleburne* had enshrined a de facto heightened-scrutiny standard, and the level of scrutiny issue more generally, the Court demurred on both questions.

In turn, three years after *Heller*, the Court in *United States v. Virginia*<sup>114</sup> confronted political process-based arguments both for and against raising the level of scrutiny accorded sex classifications.<sup>115</sup> Those arguments largely

---

<sup>107</sup> 509 U.S. 312 (1993).

<sup>108</sup> *Id.* at 315 ("At issue here are elements of Kentucky's statutory procedures, enacted in 1990, for the involuntary confinement of the mentally retarded.").

<sup>109</sup> *Id.* at 333 ("[T]here are plausible rationales for each of the statutory distinctions challenged by respondents in this case.").

<sup>110</sup> *See id.* at 318-19 ("This claim is not properly presented. Respondents argued before the District Court and the Court of Appeals only that Kentucky's statutory scheme was subject to rational-basis review, and the courts below ruled on that ground."). Justice Blackmun dissented, restating his view from *Cleburne* that mental retardation discrimination should trigger heightened scrutiny. *See id.* at 334-35 (Blackmun, J., dissenting). Justice Souter's dissent agreed with the majority's decision not to reach the suspect class question. *Id.* at 336 (Souter, J., dissenting). Justice Souter would have struck down the challenged law on the authority of *Cleburne*, however, which he described in ways suggesting that that case applied something more stringent than traditional rational basis review. *See id.* at 335.

<sup>111</sup> *See id.* at 321 (majority opinion) (citing *Cleburne*, 473 U.S. 432, and *Schweiker v. Wilson*, 450 U.S. 221 (1981)). *But see id.* at 335 (Souter, J., dissenting) (suggesting that *Cleburne* had applied something more than traditional, highly deferential, rational basis review).

<sup>112</sup> *See supra* note 64 and accompanying text (describing the *Garrett* Court's assertion that *Cleburne*'s standard of review was nothing more than traditional rational basis review).

<sup>113</sup> *See Heller*, 509 U.S. at 321 ("In neither [*Cleburne* nor *Schweiker*] did we purport to apply a different standard of rational-basis review from that just described." (citing *Cleburne*, 473 U.S. 432 (1985))).

<sup>114</sup> 518 U.S. 515 (1996).

<sup>115</sup> *See* Brief for the Petitioner, *Virginia*, 518 U.S. 515 (No. 94-1941), 1995 LEXIS 583,

followed the template established by the Court's earlier suspect class jurisprudence, engaging issues such as the history of discrimination against women,<sup>116</sup> the immutability of the sex characteristic,<sup>117</sup> and the current political status of women.<sup>118</sup> The Court, however, did not directly respond to those arguments or the dissent's suggestion that political process analysis should have led the Court to *reduce* the level of scrutiny accorded sex classifications.<sup>119</sup> Justice Ginsburg, writing for six justices, observed as a historical matter the political process reasoning underlying the Court's seminal case arguing that sex discrimination merited heightened scrutiny.<sup>120</sup> She did not, however, employ that reasoning to reengage the standard of review question. Instead, she purported to follow existing precedent – in particular, case law requiring that sex classifications be supported by an “exceedingly

---

at \*48-54 (arguing that sex should be raised to full suspect class status); Brief of Amici Curiae Independent Women's Forum et al. in Support of Respondents, *Virginia*, 518 U.S. 515 (No 94-1941), 1995 LEXIS 645, at \*12-22 [hereinafter Brief of Amici Curiae] (urging against such a ratcheting up).

<sup>116</sup> Compare Brief for the Petitioner, *supra* note 115, at \*51 (“Respondents here seek to perpetuate a sex-based exclusion that dates from a time when women could neither vote nor ‘hold office, serve on juries, or bring suit in their own names and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.” (citation omitted)), with Brief of Amici Curiae, *supra* note 115, at \*11 (acknowledging the argument based on this history of discrimination against women, but arguing against an increase in the scrutiny level accorded sex classifications).

<sup>117</sup> Compare Brief for the Petitioner, *supra* note 115, at \*50 (“[S]ex, like race, is an immutable and highly visible characteristic . . .”), with Brief of Amici Curiae, *supra* note 115, at \*14 (“Despite the fact that mental retardation is an immutable characteristic, beyond the individual's control . . . the Court [in *Cleburne*] would not upgrade the level of scrutiny applied to this type of legislative classification.”).

<sup>118</sup> Compare Brief for the Petitioner, *supra* note 115, at \*52 (“Despite the fact that women are a numerical majority in the United States, women remain vastly politically underrepresented in state and federal government: The relative political powerlessness also demonstrates the need for searching judicial analysis when government treats men and women differently.”), with Brief of Amici Curiae, *supra* note 115, at \*18 (“Women already have the political power to elect women to represent them; indeed if all women voted the same and chose to elect only women, virtually every elected office in the United States could be filled by a woman.”), and *id.* at \*19-21 (providing statistics suggesting women's equality in the marketplace).

<sup>119</sup> *Virginia*, 518 U.S. at 566, 575 (Scalia, J., dissenting) (citing *Carolene Products* and suggesting that application of standard suspect class criteria would result in sex classifications receiving only rational basis review (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))).

<sup>120</sup> See *id.* at 531 (“Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, ‘our Nation has had a long and unfortunate history of sex discrimination.’” (citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973))).



persuasive justification”<sup>121</sup> – while quite arguably ratcheting up that scrutiny to the point where it was, as a practical matter, the equivalent of strict scrutiny.<sup>122</sup>

The Court’s refusal to engage with suspect class analysis continued with the trio of gay rights cases decided by the Rehnquist and Roberts Courts. In *Romer v. Evans*,<sup>123</sup> decided in the same term as *United States v. Virginia*, the Court applied a combination of novel equal protection analysis and seemingly heightened rational basis scrutiny to strike down a Colorado constitutional amendment denying gays and lesbians protected class status under state law.<sup>124</sup> The Court’s analysis – finding the law both to constitute a per se violation of equal protection and to violate standard rational basis review – is well known, if controversial, among both judges<sup>125</sup> and scholars.<sup>126</sup> For our purposes, the important point is that the Court failed even to consider the suspect class status of gays and lesbians, an issue that had been presented to the Court since at least the mid-1980s.<sup>127</sup>

This evasion continued into the new century. In *Lawrence v. Texas*, a six-Justice majority struck down Texas’s sodomy law.<sup>128</sup> One member of that majority, however, did not join the five Justices voting to invalidate the law as

<sup>121</sup> *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

<sup>122</sup> *See id.* at 542 (implying that as long as one woman could succeed at and benefit from VMI’s unique pedagogical approach the state’s exclusion of women failed equal protection scrutiny). Any such ratcheting up was soon called into question by the Court’s application of markedly more deferential review in its next major sex discrimination case. *Nguyen v. INS*, 533 U.S. 53, 74 (2001) (O’Connor, J., dissenting) (arguing that the majority had applied mistakenly deferential review in contradiction to the Court’s sex discrimination precedents).

<sup>123</sup> 517 U.S. 620 (1996).

<sup>124</sup> *See id.* at 632 (“[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation.”).

<sup>125</sup> *See, e.g., id.* at 653 (Scalia, J., dissenting) (“Today’s opinion has no foundation in American constitutional law, and barely pretends to.”).

<sup>126</sup> For evaluations of the Court’s analysis in *Romer*, see Robert D. Dodson, *Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271 (1999); Katherine M. Hamill, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v. Hardwick*, 77 B.U. L. REV. 655 (1997); Mark Strasser, *Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer, and Electoral Process Guarantees*, 64 ALB. L. REV. 949 (2001); Mark Strasser, *Statutory Construction, Equal Protection, and the Amendment Process: On Romer, Hunter, and Efforts to Tame Baehr*, 45 BUFF. L. REV. 739 (1997).

<sup>127</sup> *See, e.g., Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting from denial of certiorari); *see also Pruitt v. Cheney*, 506 U.S. 1020, 1020 (1992) (denying certiorari in a case where the appellate court had required the Army to present evidence validating the rationality of a policy excluding gays and lesbians, and thus engaging in a more active form of rational basis review).

<sup>128</sup> *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

a violation of the Due Process Clause. Instead, noting that the Texas law applied only to same-sex sodomy, Justice O'Connor relied on the Equal Protection Clause to condemn the law as unconstitutional sexual orientation discrimination. In her opinion, Justice O'Connor suggested that sexual orientation classifications merited heightened scrutiny. Citing the *Moreno-Cleburne-Romer* trio of rational basis plus cases, she concluded that "[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."<sup>129</sup>

Justice O'Connor's recognition that rational basis review can occur in a more heightened register provided part of the backdrop of doctrinal options the Court faced in its final gay rights decision to date, *Windsor*.<sup>130</sup> The majority in *Windsor* had before it the precedent of a concurring (although not decisive)<sup>131</sup> opinion explicitly acknowledging and applying a heightened level of scrutiny for sexual orientation discrimination. As the Court approached *Windsor* it also had before it the option of replaying the progression of its sex equality jurisprudence a generation earlier. The modern era of the Court's sex equality jurisprudence began with the Court's 1971 decision in *Reed v. Reed*, striking down, for the first time, a sex classification as violating equal protection.<sup>132</sup> The *Reed* Court concluded that the state law, which instituted a preference for male over female relatives as estate administrators, failed traditional rational basis review.<sup>133</sup> That conclusion was perhaps unconvincing; the Idaho law may have been unfair, but given the likely educational differences between men and women in that era the classification cannot be deemed so irrational as to fail traditional rational basis review. Two years later, when Justice Brennan cited

---

<sup>129</sup> *Id.* at 580 (O'Connor, J., concurring in the judgment).

<sup>130</sup> This Article does not classify as "gay rights" decisions, such as *Windsor*'s companion, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), that are decided on jurisdictional grounds, or others, such as *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), that, while involving gay rights litigants and claims, are decided on grounds at least ostensibly tangential to due process claims to same-sex intimacy or equal protection claims against sexual orientation discrimination.

<sup>131</sup> Justice Kennedy's due process opinion in *Lawrence* spoke for a majority of Justices, thereby rendering Justice O'Connor's vote and rationale unnecessary to the resolution of the case. *Cf. Marks v. United States*, 430 U.S. 188, 197 (1977) (explaining the role of a concurring opinion's analysis when the concurring Justice is necessary to the formation of a court majority).

<sup>132</sup> *Reed v. Reed*, 404 U.S. 71, 76 (1971).

<sup>133</sup> *Id.* ("The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective . . . . We hold that it does not.").

*Reed* as support for his argument for heightened scrutiny of sex classifications, he made exactly this point.<sup>134</sup>

Mapping this progression onto sexual orientation classifications, it seemed to many post-*Romer* observers that *Romer* would end up playing a similar role as *Reed*: a case that ostensibly applied rational basis review to strike down discrimination, but that would eventually come to be described as an example of *sub silentio* heightened scrutiny in a subsequent case that made that heightened scrutiny explicit.<sup>135</sup> Such expectations may have been further raised when Justice O'Connor in *Lawrence* cited *Romer* as an example of just such heightened scrutiny.<sup>136</sup> Thus, as the Court approached *Windsor* the stage was set for the last act in the drama, where the Court would bestow heightened scrutiny on sexual orientation, explaining that that decision simply brought into the open what had been implicit since *Romer*. As if on cue, the plaintiff in *Windsor* – and extraordinarily, the government defendant as well – argued that sexual orientation should be a suspect class,<sup>137</sup> a position also taken by the lower court.<sup>138</sup>

But the Court again demurred, and refused to consider whether sexual orientation constituted a suspect class. Instead, Justice Kennedy's analysis in *Windsor* combined concepts of due process, equality, and federalism to render a much more direct verdict on the constitutionality of section 3 of DOMA. After observing states' traditional role in regulating marriage and the federal government's general practice of respecting state marriage decisions,<sup>139</sup> he explained that a state's decision to grant a particular group the right to marry

<sup>134</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 683-84 (1973) (plurality opinion) (“[T]he Court [in *Reed*] implicitly rejected appellee’s apparently rational explanation of the statutory scheme . . . . This departure from ‘traditional’ rational-basis analysis with respect to sex-based classifications is clearly justified.”).

<sup>135</sup> See, e.g., Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN’S L.J. 263, 270 (2004) (illustrating these predictions).

<sup>136</sup> See *id.* at 282-83 (highlighting Justice O’Connor’s *Lawrence* concurrence in this way).

<sup>137</sup> See Brief for the Petitioner at 18-37, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (“[C]lassifications based sexual orientation should be subject to heightened scrutiny.”); Brief for Respondent at 17-32, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (“Over the years, the Court has applied heightened scrutiny to classifications based on race, sex, illegitimacy, alienage, and national origin or ancestry. . . . Discrimination on the basis of sexual orientation – which DOMA surely constitutes – requires heightened scrutiny.”); see also *Windsor*, 133 S. Ct. at 2683 (discussing the Justice Department’s letter to Congress informing it of its opinion that sexual orientation discrimination merits heightened judicial scrutiny).

<sup>138</sup> See *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013).

<sup>139</sup> See 133 S. Ct. at 2689-92 (“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.” *Id.* at 2191.).

“conferred upon [members of that group] a dignity and status of immense import.”<sup>140</sup> While recognizing that Congress has occasionally enacted “discrete”<sup>141</sup> statutes prescribing who could take advantage of the status of “married” for particular federal purposes, he cautioned that section 3’s broad applicability to over 1000 federal rights and responsibilities accessible to married persons raised the possibility that section 3 was aimed simply at “demeaning” persons in same-sex relationships.<sup>142</sup> Upon investigating section 3’s text and legislative materials, Justice Kennedy concluded that section 3 had precisely this invidious motivation and was thus unconstitutional.<sup>143</sup> Notably, he reached this conclusion without considering whether sexual orientation constituted a suspect basis for classification and without even identifying a standard of review. Indeed, he reached this result without examining whether the statute had even a rational connection to a legitimate government interest.

Much of this analysis echoes Justice Kennedy’s earlier decision in *Romer* – most notably his avoidance of the suspect class question and his focus on the challenged legislation’s broad impact.<sup>144</sup> Yet in important ways, *Windsor* goes even further than *Romer* in abandoning traditional equal protection review. As observed above, unlike in *Romer*, Justice Kennedy in *Windsor* did not even perform the standard task of testing the statute for a rational connection to the proffered legitimate government interests.<sup>145</sup> Instead, to a degree much more direct than even in *Romer*, in *Windsor* he cut to the core of the equal protection guarantee, finding direct evidence of animus in DOMA’s legislative materials.<sup>146</sup>

So understood, *Windsor* is doubly significant for the future of suspect-class analysis. First, it reflects yet another foregone opportunity for the Court to

---

<sup>140</sup> *Id.* at 2692.

<sup>141</sup> *See id.* at 2690 (“Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has far greater reach . . .”).

<sup>142</sup> *See id.* at 2694 (“This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . .”).

<sup>143</sup> *See id.* at 2695 (“[The investigation of these factors] requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

<sup>144</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1995) (discussing the implications of the breadth of Colorado’s Amendment 2).

<sup>145</sup> *Id.* at 635 (testing Amendment 2’s fit against the rationales proffered by the state government of Colorado). *But see* Young & Blondel, *supra* note 3, at 137-42 (suggesting that the Court at least implicitly took some account of at least some justifications for section 3 in *Windsor*).

<sup>146</sup> *Windsor*, 133 S. Ct. at 2693 (“The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence.”).

apply suspect class analysis – or even to acknowledge the possibility that sexual orientation could be a suspect class.<sup>147</sup> That avoidance also shattered the *Reed-Frontiero* template, in which an early case decided on minimalist rational basis grounds ultimately provided support for a broader decision granting that group heightened scrutiny.<sup>148</sup> Second, *Windsor*'s confident conclusion<sup>149</sup> that section 3 reflected nothing but animus suggests an alternative approach to equal protection, one that abjures reliance on the indirect mediating principles implicit in suspect-class analysis (and even in traditional “fit” analysis) in favor of a more direct examination of a challenged law's constitutionality. Suspect class analysis finds its antecedents in *Carolene Products*'s suggestion in footnote 4 that “prejudice against discrete and insular minorities” may be “a special condition” meriting heightened judicial scrutiny due to a breakdown in the political process.<sup>150</sup> By suggesting that political process breakdown provides the justification for heightened scrutiny, footnote 4 – and ultimately, its doctrinal expression in suspect class analysis and the tiered scrutiny structure – reveals its foundations as a methodology that allows courts to infer indirectly the existence of constitutional problems.<sup>151</sup> By abandoning that approach in favor of a direct inquiry into whether a statute reflects government pursuit of private biases, *Windsor*, perhaps even more than *Romer*, signals a potentially decisive break with much of the Court's traditional equal protection jurisprudence.

---

<sup>147</sup> Compare *Windsor*, 133 S. Ct. 2675 (striking down section 3 of DOMA without deciding whether sexual orientation is a suspect class or even acknowledging that possibility beyond noting the executive branch's and the lower court's positions on the issue), with *Heller v. Doe*, 509 U.S. 312, 319 (1993) (acknowledging the argument that the mentally retarded or the mentally ill might constitute a suspect class, but declining to reach the merits of that argument because the plaintiffs had not presented it before the lower courts), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (recognizing an argument that a racial majority's decision to burden itself for the benefit of a minority might justify a lesser scrutiny standard for race-based affirmative action targeting the politically weaker group for benefits, but rejecting it as inapplicable in the immediate case).

<sup>148</sup> Of course, this still might happen in the future in the context of sexual orientation. But the second reason *Windsor* is so significant, explained in the text immediately after this footnote, casts doubt on this possibility.

<sup>149</sup> See generally Jennifer Mason McAward, *The Confident Court*, 47 LOY. L.A. L. REV. (forthcoming 2014) (arguing that the current Court exhibits unusual confidence in reviewing the judgments of other institutions).

<sup>150</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>151</sup> See *id.*; *supra* note 6 and accompanying text (quoting Justice Alito as suggesting this understanding of the suspect class/tiered scrutiny structure of equal protection law).

## II. THE ENFORCEMENT POWER AND THE PERILS OF CONSTITUTIONAL POINTILLISM

### A. *The Coming Conflict*

*Windsor*'s potentially conclusive rejection of suspect class analysis raises serious questions about the future of Enforcement Clause doctrine. As Part I explains,<sup>152</sup> the post-*Boerne* Enforcement Clause doctrine has relied heavily on the suspect class status of the group benefitted by the challenged legislation. While *Coleman* and *Shelby County* suggest some erosion of that approach, the approach is sufficiently ingrained that the disconnect between it and the Court's general abandonment of suspect class analysis culminating in *Windsor*, presents cause for concern.<sup>153</sup>

This disconnect will have serious consequences as Congress continues to respond to the equality claims of non-suspect classes. The remarkable shift in public and congressional perceptions about same-sex marriage has quite possibly changed the political dynamic for the ENDA, making its enactment more likely. The ENDA's backers may even succeed in including employment protection for transgendered workers, a step that in the past has proved fatal to the bill's prospects. In ways not possible before the recent shift of opinion on marriage rights, it is also possible to envisage other sexual orientation equality legislation, such as public accommodations protection and even potentially federal protections against discriminatory state parentage and adoption laws. Moreover, equality legislation benefitting other emerging groups already exists. The GINA, which restricts discrimination based on one's genetic makeup, is already law.<sup>154</sup> Other groups, such as the obese, are beginning to press their equality claims, and have already achieved some measure of success.<sup>155</sup>

Sexual orientation, transgendered status, genetic makeup, obesity: these highly disparate classification tools share the characteristics that they either are or may soon be the subject of federal Enforcement Clause legislation, have never had their suspect class status determined by the Court, and likely never will. If, and when, enforcement power challenges to these statutes reach the Court, the Court will have to review its own recent equal protection jurisprudence in order to determine whether the challenged statutes satisfy the congruence and proportionality test. As it currently stands, that jurisprudence –

---

<sup>152</sup> See *supra* Part I.A.

<sup>153</sup> Indeed, as explained previously, it is possible to read *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and potentially *Coleman v. Court of Appeals*, 132 S. Ct. 1327 (2012), as consistent with the Court's prior Enforcement Clause jurisprudence. See *supra* Part I.

<sup>154</sup> Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 29 & 42 U.S.C.).

<sup>155</sup> See generally Liu, *supra* note 25 (considering whether the 2008 amendments to the Americans with Disabilities Act provide protection for obese persons).

at least as it deals with groups whose suspect class status has not been determined – takes the form of a particularized, ad hoc investigation into the legislation’s public purpose. The next Section considers the enforcement power implications of that style of equal protection scrutiny.

B. *One Without the Other: The Enforcement Power in a World of Constitutional Pointillism*

One way to think about the enforcement power is to envision two concentric circles. The outer circle represents the set of liability and remedy rules enacted in the enforcement statute. The inner circle depicts the seriousness of the constitutional problem that the statute targets. The size of the inner circle may vary according to the regard the Court gives Congress’s ability, through its legislative work product, to expand that circle through conclusions that the constitutional problem targeted is either more serious than the Court had perceived or unusually resistant to remedial action.<sup>156</sup> The distance between those two circles determines the statute’s congruence and proportionality. While crude, this visualization captures the basic insight that the congruence and proportionality standard, at base, requires some reasonable relationship – literally, some congruence and proportionality – between the right protected and the means employed to protect it.

The viability of this approach, however, depends on the inner circle being susceptible to a coherent representation. The type of particularized constitutional analysis performed in *Windsor* makes it difficult to reduce to a diagram the scope of a Fourteenth Amendment right that Congress might seek to enforce via legislation. This is not necessarily a criticism of Justice Kennedy’s analysis. The Court in *Windsor*, just like the Court in *Romer* and *Cleburne*,<sup>157</sup> cut through the mediating principles of suspect class and tiered scrutiny analyses to decide, as a matter of core constitutional law, that the classifications in those cases violated equal protection’s fundamental requirement that government action pursue a legitimate public purpose.<sup>158</sup>

---

<sup>156</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (“[I]t is sufficient for [the Court’s determination that the ADEA was unconstitutional] to note that Congress failed to identify a widespread pattern of age discrimination by the States.” (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999))).

<sup>157</sup> See *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (striking down a federal provision prohibiting unrelated persons living together, and cautioning that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest” (emphasis omitted)). This language became the foundation for the Court’s later decisions finding challenged government actions to have been infected with animus. See *infra* note 180 (examining the influence of *Moreno*’s language on other Equal Protection Clause cases).

<sup>158</sup> See, e.g., H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 275 (2011) (“The baseline of the

There is much to applaud in calling something what it really is – in these cases, mean-spirited attempts to burden a group for reasons that amount to simple dislike – even if, by and large, a court should show some humility when accusing a legislature (especially the federal legislature) of acting out of such motives.<sup>159</sup> Indeed, the difficulty the Court had encountered in leveling such direct verdicts on legislative action is partly what led it to abandon its pre-1937 “class legislation” approach to constitutional rights, which sought to distinguish between valid legislation that pursued legitimate police power goals and invalid “class legislation” that impaired rights or discriminated against groups for no legitimate reason.<sup>160</sup> The Court’s abandonment of that approach led it to embrace in its place a methodology that focused on both textually precise rights, which make judicial review more legitimate, as well as on legislation that either directly impairs political participation or harms politically powerless minorities, which provides a warning signal that the legislation did not fairly account for all groups’ interests.<sup>161</sup> But that latter, indirect approach to constitutional adjudication is exactly that – indirect. *Windsor*, by abjuring such indirect constitutional jurisprudence, cuts to the core of what equal protection requires.

Nevertheless, as normatively attractive as it may be, such direct constitutional analysis complicates the Court’s Enforcement Clause case law. Decisions such as *Windsor* are particularized, focusing precisely and uniquely on the idiosyncrasies of the challenged statute.<sup>162</sup> To analogize this approach to art, such decisions are pointillist, rather than reflective of broad doctrinal

---

American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in traditional thought has also meant that government’s actions are undertaken in good faith and for reasons that are generally seen to be appropriate.”).

<sup>159</sup> Cf. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943) (suggesting that local authorities may be more prone than Congress to fail to respect constitutional rights).

<sup>160</sup> For a full explanation of this concept and its application in constitutional law during the *Lochner* era, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

<sup>161</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (reserving heightened scrutiny for legislation that either appears to transgress one of the rights in the Bill of Rights or that appears to either restrict political participation rights or reflect prejudice against minorities that enjoy less access to the political process); see also *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) (reserving heightened scrutiny under the dormant Commerce Clause for state statutes that disproportionately burden entities or interests not represented within the state’s legislative process).

<sup>162</sup> For example, the Court’s analysis in *Windsor* relied heavily on section 3’s history, and even the name of the statute. See *United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013) (“The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.”).



brushstrokes.<sup>163</sup> By directly reviewing the challenged law for animus, such decisions cut to the core of what equal protection requires, rather than applying a broadly applicable level of heightened scrutiny. But such analysis remains, by definition, highly particularized. As Chief Justice Roberts recognized in *Windsor* itself, a conclusion that a legislature has acted with animus when enacting a particular statute does not reflect a broader conclusion about the general inappropriateness of that type of classification. It says little even about the likelihood that other statutes classifying on that same ground and on that same topic are similarly motivated.<sup>164</sup>

Of course, as a realistic matter, a finding of animus in a series of cases could lead a court to become more suspicious of a legislature's motivations whenever it classifies on that ground. But acting on that suspicion would, almost literally, amount to declaring the group suspect or quasi suspect. In the absence of such a declaration, a finding of animus in one case of sexual orientation discrimination would, at least formally, say little about the likely constitutionality of a different instance of discrimination against gays and lesbians.<sup>165</sup> Indeed, in both *Windsor* and *Romer*, Justice Kennedy buttressed the particularity of his animus conclusions by relying heavily on what he described as the highly unusual breadth of both DOMA and Amendment 2, as well as what he described as DOMA's unusual deviation from the federal law practice of respecting state definitions of marriage.

The result is that it is difficult to apply the congruence and proportionality test to a statute protecting a group that may have won equal protection victories, but only on such particularistic grounds. Unless one is going to *sub silentio* treat that group as a suspect class on the theory that several instances of legislative animus suggest a constitutional rule generally disfavoring such discrimination, the most one can do when considering an enforcement statute protecting that group is to ask whether the particular type of discrimination targeted by the enforcement statute is likely grounded in animus. To illustrate this point, consider the ENDA.<sup>166</sup> Given *Romer* and *Windsor*, at this stage of doctrinal development, a court considering the ENDA as enforcement legislation would presumably have to ask whether employment discrimination against gays and lesbians<sup>167</sup> is, as a general matter, motivated by animus.<sup>168</sup>

---

<sup>163</sup> See Courthion, *supra* note 36 (explaining that Pointillism is a "technique for portraying the play of light using tiny brushstrokes of contrasting colors").

<sup>164</sup> See *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) ("[T]he majority focuses on the legislative history and title of this particular Act; those statute specific considerations will, of course, be irrelevant in future cases about different statutes." (citation omitted)).

<sup>165</sup> See, e.g., *id.*

<sup>166</sup> Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

<sup>167</sup> To simplify the analysis, this example leaves out consideration of the ENDA's transgender protections.

<sup>168</sup> Of course, it is possible that such discrimination is merely "innocently irrational" – that is, lacking in any rational connection to a legitimate government interest, but

That constitutional harm – government action motivated by animus – is the only content of the “inner circle” against which the ENDA could be tested for congruence and proportionality,<sup>169</sup> given the lack of any judicial doctrine identifying sexual orientation as a generally suspect classification tool.

Such an inquiry might be conceptually difficult. As stated previously, it would require, as a condition of upholding the ENDA, a conclusion that sexual orientation employment discrimination is, *as a general matter*, based on animus. Such a conclusion would amount to a step beyond the conclusions in *Romer* and *Windsor* that the particular statutes in question were motivated by animus.<sup>170</sup> Moreover, the more generalized animus conclusion the Court would have to reach in order to uphold the ENDA seems, as a logical matter, more difficult for the Court to defend in light of *Garrett*’s insistence on a strong evidentiary record supporting enforcement legislation benefitting a non-suspect class.<sup>171</sup> Recall that *Garrett* insisted that such legislation be supported by a record of discrimination that, if litigated, would have been struck down as failing the rational basis test.<sup>172</sup> Applied to the ENDA, this requirement would

---

nevertheless “innocent” of any subjective bad intent. Such “innocent irrationality” is a conceptually troublesome concept, in light of its implied conclusion of utter government incompetence. It would be especially troublesome if this idea were transplanted from the context of direct equal protection review, where it is at least possible to conceptualize a particular government action as innocent of animus but nevertheless utterly irrational, *see, e.g., Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336, 345-46 (1989) (finding a state tax assessor’s decision unconstitutionally irrational without hinting that it was motivated by animus), to the very different context of enforcement legislation review, where it would entail a court concluding that an entire species of government action (here, sexual orientation employment discrimination) was similarly innocent but nevertheless utterly irrational. If an entire type of government conduct, for example, sexual orientation employment discrimination, is to be condemned as failing the rational basis test, it must be because of a conclusion about animus, rather than “pure” irrationality.

<sup>169</sup> *See supra* Part II.B (describing the “inner and outer circle” approach to applying the congruence and proportionality analysis as well as discussing the difficulty of applying this approach given *Windsor*).

<sup>170</sup> *See Windsor*, 133 S. Ct. at 2693 (holding DOMA unconstitutional given its violation of the basic equal protection principle that no law be “motivated by an improper animus”); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[Amendment 2] seems inexplicable by anything but animus toward the class it affects . . .”).

<sup>171</sup> *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-74 (2001) (finding that the ADA’s legislative record “fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled”).

<sup>172</sup> *Id.* at 368 (finding the ADA’s legislative record failed to establish a pattern of state discrimination that would be held unconstitutional under rational basis review). Of course, Amendment 2 and DOMA would stand as examples of sexual orientation discrimination struck down as animus-motivated legislation. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 632. But whether those state actions, related to topics other than employment discrimination, would satisfy a conscientious application of the *Garrett* standard, remains an open question, even if one adds to that list the scattering of lower court cases striking down

require the compilation of a record of sexual orientation employment discrimination that not only lacked any rational basis, but also was mean spirited. Of course, the Court could simply assert that *any* such discrimination exhibits animus. But such a holding would, yet again, go a long way toward declaring sexual orientation a suspect class. It would not go all the way: At least ostensibly, the holding would be limited to employment, leaving it possible, for example, for states to continue engaging in sexual orientation discrimination in other areas of life, such as parenting and marriage. Nevertheless, that holding would both reflect a step beyond *Romer* and *Windsor* and push hard against the Court's refusal to identify sexual orientation as a generally suspect class.

### III. A WAY FORWARD

#### A. *The Problem, Summarized*

Part II describes a paradoxical legal landscape. First, the record reveals two equal protection victories for gay rights advocates where the Court found the sexual orientation discrimination to be motivated by animus.<sup>173</sup> Those cases are notable for their failure even to acknowledge the possibility of an inquiry into the suspect classification status of sexual orientation. *Windsor*, the more recent of these cases, suggests an abandonment of traditional equal protection "fit" review,<sup>174</sup> in favor of a direct but ad hoc inquiry into whether a government action fails equal protection's fundamental requirement of public purpose motivation.<sup>175</sup> Second, and in tension with this first development, enforcement power doctrine as it currently stands still relies heavily on generalized suspect class determinations. *Coleman* may point to a different direction on this issue,

---

sexual orientation discrimination as based on unconstitutional animus. See Araiza, *New Groups*, *supra* note 34, at 472 n.122 (citing Circuit Court decisions striking down states discrimination against gay individuals).

<sup>173</sup> See *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 632. This number rises to three if one counts Justice O'Connor's separate opinion in *Lawrence*. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("The Texas sodomy law 'raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'" (quoting *Romer*, 517 U.S. at 634)).

<sup>174</sup> Cf. *Romer*, 517 U.S. at 632-33 (discussing the centrality of "fit" review to equal protection doctrine); William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *ECOLOGY L.Q.* 493, 505-06 (2007) (same).

<sup>175</sup> See *Windsor*, 133 S. Ct. at 2693 (inquiring into "whether a law is motivated by an improper animus or purpose" to ensure that it does not run afoul of the Constitution's minimum guarantee "that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group" (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973))).

but for now the different analysis in it and *Shelby County* remains too tentative to be confident that the Court has embraced a new approach.<sup>176</sup>

As Part II explains, these two components of the Court's current enforcement power inquiry combine to create a situation where the Court has recognized the constitutional flaws in a particular type of discrimination, but has done so utilizing an approach that undermines Congress's power to legislate against that same problem. This irony is compounded when one realizes that the Court's gay rights equal protection decisions – especially *Windsor* – reflect an aggressive probing of legislative action.<sup>177</sup> Thus, the paradox: The very aggressiveness of the Court's approach to the underlying equal protection question appears to exclude congressional participation in the same antidiscrimination project.

The possible enactment of ENDA and other gay rights-protective enforcement legislation will pressure the Court to resolve this paradox. The Court has no real alternative to finding a new path, unless it is content with either ignoring its own Enforcement Clause jurisprudence or, bizarrely, preventing Congress from participating in the same sexual orientation equality project on which the Court itself has embarked. Nor is this a problem limited to ENDA, or to sexual orientation discrimination more generally. Instead, it extends to all forms of discrimination that have not yet been denominated constitutionally suspect and either have attracted or will attract congressional attention. This Part concludes the Article by laying out a template for harmonizing the Court's new approach to equal protection with Enforcement Clause doctrine. In essence, it considers how the Court can incorporate *Windsor's* pointillist equal protection analysis into the congruence and proportionality test.

### B. *The Way Forward*

The key to resolving this issue lies, first, in understanding the difference between constitutional doctrine and constitutional law, and second, in according appropriate respect to legislation enforcing the latter. As scholars<sup>178</sup>

---

<sup>176</sup> See *supra* Part II.A (describing *Coleman* and *Shelby County* as potentially breaking from traditional enforcement power doctrine).

<sup>177</sup> See *Windsor*, 133 S. Ct. at 2693 (delving into DOMA's legislative history and finding its purpose was to interfere "with the equal dignity of same-sex marriages"); *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class . . . runs contrary to the values of the Constitution and the Equal Protection Clause . . ."); *Romer*, 517 U.S. at 635 (disparaging the Colorado legislature's Amendment 2 as "a status based enactment divorced from any factual context from which [the court] could discern a relationship to legitimate state interests").

<sup>178</sup> See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (discussing such decision rules as a general feature of constitutional law).

and judges<sup>179</sup> have recognized, the Court's suspect class doctrine reflects constitutional doctrine – that is, a set of judicially manageable rules that seek to apply underlying constitutional law, even if they are not themselves such law. By contrast, the Court's approach in cases such as *Windsor* reflects a much more direct, unmediated application of equal protection's core requirement that the government not classify in pursuit of a purely private interest, such as simple dislike of a group. This rule has not only driven many of the Court's rational basis plus equal protection cases,<sup>180</sup> but has been recognized as a foundational constitutional requirement transcending a particular clause.<sup>181</sup> *Windsor* directly engaged that rule. It examined DOMA, including the statute's legislative history and even its title, and concluded that it is “a law designed to injure the same class the State seeks to protect [that is, persons in state-recognized same-sex marriages],”<sup>182</sup> whose “interference with the equal dignity of same-sex marriages . . . was more than an incidental effect”<sup>183</sup> but rather “was its essence.”<sup>184</sup> It buttressed this conclusion by

---

<sup>179</sup> See *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting) (stating that “[t]he modern tiers of [equal protection] scrutiny . . . are a heuristic to help judges determine when classifications have that ‘fair and substantial relation to the object of the legislation’” that equal protection requires).

<sup>180</sup> The *Moreno-Cleburne-Romer* trilogy, Justice O'Connor's equal protection opinion in *Lawrence*, and the majority in *Windsor* all focus heavily on *Moreno*'s famous statement that “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Moreno*, 413 U.S. at 534; see *Windsor*, 133 S. Ct. at 2693 (quoting this phrase from *Moreno*); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (same); *Romer*, 517 U.S. at 634-35 (same); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447 (1985) (same). To be sure, whether *Lawrence* or *Windsor* is appropriately described as a rational basis plus case is open to question, given not only the Court's silence on the level of review it was applying in those cases, but more importantly its methodological approach that seems to abjure tiered scrutiny entirely. See *Windsor*, 133 S. Ct. at 2693 (holding DOMA unconstitutional without applying “fit” analysis or identifying the appropriate level of scrutiny); Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 782 (2013) (indicating, in the due process context, that the *Lawrence* majority declined to identify the scrutiny level it was applying, and suggesting the possibility that the *Lawrence* Court “rejected the tiers-of-scrutiny framework entirely”).

<sup>181</sup> See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 61 (2001) (“[T]he American constitutional tradition has long recognized a judicial authority, not necessarily linked to any specifically enumerated guarantee, to invalidate truly arbitrary legislation.”); see also *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) (acknowledging the fundamental nature of the rule against government action in pursuit of purely private interests); Powell, *supra* note 158, at 275 (“The baseline of the American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in traditional thought has also meant that government's actions are undertaken in good faith and for reasons that are generally seen to be appropriate.”).

<sup>182</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>183</sup> *Id.* at 2693.

observing DOMA's broad reach, impacting every right and responsibility that flowed from a federal government recognition of a marriage,<sup>185</sup> and its deviation from the normal federal practice of respecting state-law marriage decisions.<sup>186</sup> While *Windsor's* observation about section 3's breadth echoed *Romer's* similar concern about Amendment 2,<sup>187</sup> *Windsor* is notable for its failure to consider possible legitimate justifications for DOMA – a standard of equal protection review analyzed by *Romer*<sup>188</sup> but not by *Windsor*.<sup>189</sup>

What does *Windsor's* approach mean for the constitutionality of gay rights enforcement legislation and, by extension, enforcement legislation benefitting other groups whose suspect class status remain undecided? The Court's enforcement power doctrine requires a court to examine the relationship between enforcement legislation and the underlying, court-identified, constitutional violation that the legislation targets. *Windsor's* approach to DOMA's constitutionality – its failure to give DOMA heightened review explicitly and its focus on the particularities of Congress's motivations – rather than standard "fit" review<sup>190</sup> – makes it difficult to measure that relationship. The inevitable generality of any legislation means that a Congress considering federal enforcement legislation would almost certainly draft it in general terms.<sup>191</sup> But cases such as *Windsor* identify the targeted constitutional violation with pinpoint – or pointillist – particularity.

---

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 2694 ("Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.").

<sup>186</sup> *Id.* at 2693 ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.").

<sup>187</sup> *Romer v. Evans*, 517 U.S. 620, 627 (1996) ("Sweeping and comprehensive is the change in legal status effected by [Amendment 2].").

<sup>188</sup> *Id.* at 635 (considering whether the justifications for Amendment 2, offered by the state, lend legitimacy to the legislation).

<sup>189</sup> See *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (exposing the majority's failure to consider the arguments put forth by the Bipartisan Legal Advisory Group (BLAG) party in defense of section 3). But see *Young & Blondel*, *supra* note 3, at 137-42 (suggesting that the majority at least implicitly considered some justifications for section 3).

<sup>190</sup> See *supra* note 164 (quoting Chief Justice Roberts' statement in *Windsor* that the majority's analysis of section 3 means nothing for judicial review of other marriage or sexual orientation discrimination, given the majority's focus on the particular motivations driving Congress to enact section 3).

<sup>191</sup> This would not have to be the case, if, for example, enforcement legislation was aimed at the action of a particular state, for example, a practice allowed by only one state in the nation. But even in such a case, the enforcement legislation would likely be worded in a generally applicable way, and its constitutionality would have to turn on whether the targeted state action was, as a general matter, likely unconstitutional. See *Katzenbach v. Morgan*, 384 U.S. 641, 645 n.3, 652-53 (1966) (acknowledging that section 4(e) of the

Thus, the question: How can *Windsor's* pointillist approach to constitutional law map onto or translate into judicial review of enforcement legislation? Perhaps it cannot. Perhaps *Windsor* does not imply any additional congressional enforcement authority to combat states' sexual orientation discrimination. But, as Part II explains, that conclusion would lead to the odd, hardly credible, and logically unacceptable result that consistent judicial vindications of sexual orientation equal protection claims are irrelevant to the constitutionality of congressional attempts to enforce the same constitutional right. Another, more intuitive approach proposes that the decisions from *Romer* to *Windsor* (including *Lawrence*) reveal a systemic constitutional problem with sexual orientation discrimination, thus justifying more deferential review of enforcement legislation on that topic. This approach, however, amounts to a backdoor bestowal of suspect class status on sexual orientation.<sup>192</sup> While such a bestowal might be welcome for reasons of transparency and doctrinal coherence, the Court has conspicuously failed even to consider the suspect class question ever since Justice Brennan called on the Court to do so nearly thirty years ago.<sup>193</sup> As explained previously,<sup>194</sup> *Windsor* provided the Court with a logical opportunity to do so. Indeed, it presented the unusual spectacle of both formal parties calling on the Court to address the suspect class question.<sup>195</sup> Nevertheless, the Court again demurred, confirming its long-standing disinterest in this approach.<sup>196</sup> Thus, this latter answer to the translation problem simply is not responsive to the Court's own conduct.

The translation question therefore requires another answer. Inevitably, it requires a court to translate *Windsor's* underlying approach into the institutional context of legislative action. In particular, it requires a court to consider how congressional deliberation on an enforcement statute might apply

---

Voting Rights Act was targeted at the protection of Puerto Rican voters in New York City, but was nevertheless phrased more generally).

<sup>192</sup> See Young & Blondel, *supra* note 3, at 144 ("Like *Romer*, *Windsor* leaves the strong impression that same-sex couples share many of the indicia that make racial and gender classifications suspect, even if the Court seems reluctant to say so outright."); cf. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736-37 (2003) (upholding enforcement legislation targeting state gender discrimination where the heightened level of scrutiny for gender classifications allowed Congress to more easily identify a pattern of state violations justifying enforcement legislation provision). Indeed, at least one lower court has read *Windsor* as indicating that sexual orientation discrimination in fact does merit heightened judicial scrutiny. See *supra* note 21.

<sup>193</sup> Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (calling on the Court to decide the suspect class status of sexual orientation discrimination).

<sup>194</sup> See *supra* notes 130-38 and accompanying text.

<sup>195</sup> See *supra* note 137.

<sup>196</sup> See, e.g., GERSTMANN, *supra* note 28 (pronouncing the death of suspect class analysis at the Court).

the *Windsor* Court's reasoning. This would not entail Congress independently interpreting the Constitution. The rule against animus is judicially derived, and in adapting and applying *Windsor's* approach Congress would simply be applying that rule. Of course, even that "mere" application of judicially stated constitutional law would require judicial review. In turn, that judicial review would require the Court to decide the difficult question of how deferentially to review Congress's determinations. Leaving that last, difficult question to the side,<sup>197</sup> the preliminary question is simply what a court should be looking for when it reviews enforcement legislation targeting the type of antigay animus the Court found in both *Romer* and *Windsor*, and that Justice O'Connor found in *Lawrence*.

Answering that question requires carefully examining the relative institutional legitimacy and capabilities of courts and Congress when examining state government action for animus. This examination suggests a promising line of thought: While courts may feel unable to reach broad conclusions about whether a particular species of discrimination is infused with animus, Congress may be better positioned to do just that.<sup>198</sup> As the institution whose nationwide representativeness, numerosity, and regularly renewed electoral legitimacy render it most representative of the nation's evolving sense of fairness, Congress should be presumed to have special authority when it pronounces a particular species of discrimination to be so fundamentally unfair as to reflect nothing but simple dislike – that is, animus.<sup>199</sup> Again, difficult questions might arise when a court seeks to decide exactly how much deference to accord such congressional determinations. But for now, if the question is simply how analysis such as that in *Windsor* can map onto the distinct context of legislative action, it is appropriate to focus on the significant institutional differences between courts and Congress when each polices state action for compliance with equal protection principles. Those differences point to a special role for Congress in identifying actions motivated by animus.<sup>200</sup>

---

<sup>197</sup> See generally Araiza, *Deference*, *supra* note 34 (analyzing the question of how much deference Congress should enjoy when it enacts legislation enforcing and limiting individual rights).

<sup>198</sup> See *id.* at 935-38 (showing that courts are limited in the amount of factfinding that they may perform in order to judge whether an example of differential treatment is appropriate or not, and explaining why legislators are better suited for this factfinding mission that results in enforcement legislation).

<sup>199</sup> See *id.* at 923-25, 936 (explaining Congress's unique capacity and authority to find facts relating to the enforcement of equal protection, and suggesting these characteristics of legislative action call for judicial deference to such findings).

<sup>200</sup> See *id.* at 923-25 (describing the institutional differences which lead the Author to conclude that legislators merit deference when reaching decisions concerning equal protection enforcement). Of course, it is possible for Congress to fail to use its capabilities to ferret out and correct instances of animus-motivated state government action. Indeed, if



It is important for the Court to engage in the mapping process called for in this Article. Failing to do so would disable Congress from participating fully in the same process of constitutional construction with regard to sexual orientation equality that the Court has engaged in since *Romer*. More generally, it would disable Congress from responding to the equality claims of other groups whose direct equal protection claims will likely be decided on the same ad hoc and particularized grounds employed in *Windsor*. The approach this Article proposes would allow Congress a meaningful role in enforcing the rights the Court itself has identified as central to the principle of equal protection. In particular, it adapts the enforcement power to the Court's new equal protection jurisprudence reflected in *Windsor*. The next Section explains this approach.

### C. *Adapting the Enforcement Power to Pointillist Constitutional Jurisprudence*

Two preliminary points bear repeating before elaborating on the approach suggested above.<sup>201</sup> First, the proposed approach addresses congressional power to enact enforcement legislation targeting a group's constitutional right to be free of animus-motivated state discrimination.<sup>202</sup> Second, the institutional

---

*Windsor's* analysis is correct, then section 3 of DOMA reflects Congress indulging in animus of its own. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was . . . [DOMA's] essence."). Nevertheless, the qualities discussed in the text still give Congress special capabilities in uncovering and correcting state government animus, and militate in favor of a strong enforcement power when it does so. Still, there remains the possibility that enforcement legislation may in fact perversely reflect or instantiate animus rather than correct it. In earlier work, the Author has discussed this possibility and offered an approach to prevent it. *See Araiza, Deference, supra* note 34, at 909-10, 935-36, 950-51 (explaining how enforcement legislation that conflicts with the Court's statement of core constitutional rules should be struck down as exceeding Congress's enforcement power).

<sup>201</sup> *See supra* Part III.B (introducing the approach the current Section explains more fully).

<sup>202</sup> Thus, this approach would not apply to enforcement legislation that sought to apply other constitutional rules the Court has found in the Equal Protection Clause. For example, it appears as though the Court has adopted an approach to race that finds in the Fourteenth Amendment a strong presumptive commitment to color blindness. *See, e.g., supra* note 106 (citing a prominent scholar's conclusion on this point and a recent Supreme Court case reaffirming it). This commitment is controversial among both scholars and judges. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (arguing that the Court's review of race classifications should distinguish between classifications that seek to include and those that seek to oppress); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (arguing that antisubordination should be understood as the Equal Protection Clause's motivating principle). Nevertheless, it appears to reflect the current Court's

difference between Congress and courts most relevant to this congressional power is that Congress's nationwide representativeness, numerosity, and constantly renewed electoral mandate render it better positioned to discern and, crucially, to instantiate into generally applicable rules the values held by U.S. citizens – in particular, estimations of the fundamental fairness (or lack thereof) inherent in certain types of discrimination.

These observations combine to support broad congressional power to enact enforcement legislation that reflects U.S. citizens' basic value judgments about the fairness of particular types of discrimination. Consider the inquiry the Court performed in *Windsor*: The Court examined the details of the statute in order to determine whether its "principal purpose and . . . necessary effect" was to "demean" a particular group of persons.<sup>203</sup> When translated into the context of Congress's particular institutional characteristics – in particular, its superior ability to legislate generally and to perceive and act on American values – *Windsor*'s approach suggests significant congressional competence and legitimacy to enact enforcement legislation premised on such conclusions.<sup>204</sup> Put simply, if *Windsor* reflects a judicial method that looks directly for animus where courts can find it – in unique statutes, enacted at unique times and under unique circumstances – then the congressional power to police against such constitutional violations should allow enforcement legislation based on analogous but broader concerns about animus and fundamental fairness.

The enforcement power latitude justified by Congress's institutional characteristics does not mean an unreviewable enforcement power. An unreviewable enforcement power would contradict *Boerne*'s insistence that a line exists between constitutional interpretation and constitutional enforcement, with congressional power extending only to the latter.<sup>205</sup> To be sure, scholars have sharply criticized both this limitation on congressional power and the idea of judicial supremacy that underlies it.<sup>206</sup> Moreover, the Court's seminal 1966 decision in *Katzenbach v. Morgan* broached a competing vision, in which the Court shared with Congress not just *enforcement* but

---

understanding of the Fourteenth Amendment's core constitutional rule regarding race. For this reason, enforcement legislation addressing race discrimination would have to adapt itself to the Court's core colorblindness rule, until the Court itself alters that rule.

<sup>203</sup> *Windsor*, 133 S. Ct. at 2695.

<sup>204</sup> *See id.*

<sup>205</sup> *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (acknowledging that Congress has the power to enforce provisions of the Fourteenth Amendment, but not to "decree the substance of the Fourteenth Amendment's restrictions on the States").

<sup>206</sup> *See, e.g., Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on the Section Five Power*, 78 IND. L.J. 1, 2 (2003) (criticizing the Supreme Court's imposition of "restrictive conditions on Congress's ability to exercise Section 5 power," and the "Court's claim to an exclusive authority to interpret the Constitution").

*interpretive* power.<sup>207</sup> In *Boerne*, however, Justices across the ideological spectrum rejected that broader vision of congressional power.<sup>208</sup> That rejection is implicit in *Boerne*'s congruence and proportionality standard, which this Article takes as an assumed starting point for the future of the enforcement power.<sup>209</sup>

Still, the enforcement power theory sketched above raises serious questions about whether it constitutes a de facto return to *Katzenbach* and its acceptance of congressional power to enact into law Congress's own interpretation of the Constitution. But, properly understood, this power is subject to significant judicial review. First, and most notably, the Court retains the power to determine the scope of the equal protection guarantee. Our modern understanding of equal protection as an across-the-board guarantee of equality for all persons with regard to all government actions arose only because successive Courts interpreted it that way. They need not have. The Court could have limited the guarantee to blacks,<sup>210</sup> or to racial equality more generally,<sup>211</sup> or even just to groups rather than individuals.<sup>212</sup> It could also have limited the equality guarantee to only the exercise of particular rights, most notably, the rights enshrined in the Civil Rights Act of 1866.<sup>213</sup> Indeed, it could also have interpreted that guarantee simply as mandating equality in the *protection* of rights – as, literally, a guarantee of the “equal protection of the laws” rather

<sup>207</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (“[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.”); *id.* at 668 (Harlan, J., dissenting) (critiquing the majority’s approach); *id.* at 651 n.10 (majority opinion responding to Justice Harlan’s critique).

<sup>208</sup> See *supra* note 47 (highlighting the broad agreement on the Court concerning the adoption of the congruence and proportionality standard).

<sup>209</sup> See *Boerne*, 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

<sup>210</sup> See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (“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.”).

<sup>211</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (describing the Due Process Clause and Equal Protection Clause together as “declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States”).

<sup>212</sup> Cf. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (finding uncontroversial the proposition that a plaintiff can state a valid equal protection claim as a “class of one”).

<sup>213</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 169-92 (1977) (arguing that the Fourteenth Amendment simply aimed at constitutionalizing the rights protected by the Civil Rights Act of 1866).

than “the protection of equal laws.”<sup>214</sup> The Court did none of this. As a matter of core constitutional interpretation, a function *Boerne* reserves to the judiciary, the Court has, instead, understood the clause as a generally applicable guarantee that all government classifications be at least minimally related to a legitimate government interest.<sup>215</sup>

Second, even congressional applications of this fundamental constitutional rule of minimal relationship to a legitimate, public-regarding purpose remain subject to judicial review. Judicial scrutiny, however, would focus on whether Congress had used its particular institutional capabilities appropriately to perform the type of analysis the Court itself appears to be performing as part of its new style of equal protection review. In particular, judicial review would examine whether enforcement legislation accurately reflected the current moral views of the American people about the fundamental fairness of the type of discrimination at issue.<sup>216</sup> Thus, courts would consider, for example, whether the type of discrimination targeted by an enforcement statute had been rejected by other government entities and civil society groups, as well as by the public. This review would seek to ensure that enactment of the challenged legislation reflected a societal consensus rejecting that discrimination, rather than an idiosyncratic congressional victory for a group that had not successfully made its equality argument to American society.

Such review would undoubtedly be difficult. Questions would arise about which groups’ opinions should matter the most, and how much of a consensus would be necessary in order to uphold an enforcement statute.<sup>217</sup> But the Court

---

<sup>214</sup> See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433-51 (1992) (arguing that the Equal Protection Clause is fundamentally about the requirement that government provide equality in the protection for rights, rather than in the rights themselves). The second phrase quoted in the text appears to come from Justice Field’s opinion in *Yick Wo v. Hopkins*. See 118 U.S. 356, 369 (1886) (“[T]he equal protection of the laws is a pledge of the protection of equal laws.”); Harrison, *supra*, at 1390 (identifying *Yick Wo* as the source for what he called this “piece of textual sleight of hand”).

<sup>215</sup> The requirement that the government interest be legitimate excludes animus or other private-regarding ends as appropriate goals government may legitimately pursue. See, e.g., Powell, *supra* note 158 (explaining this requirement).

<sup>216</sup> This provision for enforcement legislation reflecting the *current* views of U.S. citizens does not suggest that the constitutional rule itself changes. By definition, such evolving views occur at the level of *enforcement* of the constitutional rule, not its *interpretation*. The rule itself – against animus-based discrimination – does not change. Compare, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (identifying society’s “evolving standards of decency” when considering whether a particular punishment violates the Eighth Amendment), with *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872) (acknowledging that the deterioration of peonage or “coolie” systems to the point that they constituted slavery would trigger the Thirteenth Amendment’s prohibition).

<sup>217</sup> Many of these questions have been raised in response to what seems at first blush to be the analogous Supreme Court practice of “counting the states” to determine whether a

must ask these questions because, as reflected in *Windsor*, its own approach to underlying equal protection questions has changed. That change – away from heavy reliance on suspect class analysis and toward more precisely targeted examination of a statute’s compliance with equal protection’s core public purpose requirement – has undermined its current approach to Enforcement Clause cases, which relies heavily on that now seemingly abandoned suspect class methodology. *Windsor* makes this abandonment all the more emphatic. As such, it only increases pressure on the Court to alter its Enforcement Clause jurisprudence accordingly.

#### D. Application

The ENDA<sup>218</sup> presents a timely example of how this approach would play out.<sup>219</sup> A court considering the ENDA – for simplicity’s sake considered here in its stripped-down form, without transgender protections – would have to inquire whether American society had evolved to the point that it considers sexual orientation-based employment discrimination fundamentally inconsistent with equal protection’s promise that discrimination must be justified by something other than mere dislike of the burdened group. In reviewing whether Congress had appropriately reached that conclusion, a court would consider the policies and practices of employers across the United States. In contrast with the approach in *Garrett*, this inquiry would apply to not just state government employers, but also to private employers.<sup>220</sup> This broader inquiry is justified because the review proposed in this Article seeks to answer

---

national consensus had developed that a particular punishment is cruel and unusual and thus violates the Eighth Amendment. *See, e.g.,* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091-92 (2006) (critiquing this approach as indeterminate and inconsistent with federalism’s promise of states’ autonomy to select their own policies). An important difference between the Supreme Court’s use of this method in the Eighth Amendment area and this Article’s proposal is that this Article gives the “counting” decision in the first instance to Congress, through its perception of a national consensus as filtered through the national democratic process. While judicial review of enforcement legislation would review that perception, it would not do so as the Court does in the Eighth Amendment area – that is, in the first instance, as an unelected Court rejecting policies of states perceived to constitute a minority. Rather, judicial review in our context would check the use by the nationally accountable federal legislature of its explicit power to police states by enacting enforcement legislation.

<sup>218</sup> Employment Non-Discrimination Act, H.R. 1755, 113th Cong. (2013).

<sup>219</sup> In November 2013, the Senate passed the ENDA by a bipartisan vote of sixty-four to thirty-two. *See Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last visited Nov. 14, 2013), archived at <http://perma.cc/M3P7-6KFL>.

<sup>220</sup> *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (refusing to consider the history of disability-based employment discrimination engaged in by private employers, and even by subunits of state governments).

a fundamentally different question than did the review in *Garrett*. The relevant question would not be, as *Garrett* asked, whether states were engaging in conduct that a court applying the decisional rule of rational basis scrutiny would hold unconstitutional.<sup>221</sup> Rather, the proper question would be whether American society had condemned a particular practice – here, sexual orientation-based employment discrimination – as violating the constitutional rule against animus.

A court reviewing the ENDA would also examine other evidence. Did major civil society groups condemn sexual orientation-based exclusion from other basic arenas of social life? For example, the prevalence of sexual orientation protection in states' and municipalities' public accommodation ordinances, while not directly probative of a national consensus on *employment* discrimination, is relevant to public opinion about whether sexual orientation is a relevant discriminatory criterion with regard to inclusion in social life more generally. For this reason, other, more general nondiscrimination provisions – for example, those governing membership in unions, schools, and professional organizations – would also be relevant, if only indirectly, to ENDA's constitutionality. For a similar reason, statements by major social groups about the acceptability of such discrimination – for example, statements by affinity groups and political parties – would also matter, even if those groups did not engage in the workplace activities the ENDA would regulate.

This approach should not elicit the objection that, by soliciting opinion from a wide variety of social groups, it stacks the deck in favor of elite opinion.<sup>222</sup> First, such groups come in all shapes and ideologies, from corporations to universities to ethnic and social affinity groups. If performed appropriately, judicial review of such opinions should not systematically skew one way or the other. Second, and more importantly, it bears recalling that such review would become necessary only if Congress in fact enacted a piece of enforcement legislation. Thus, nonelite opinion would already have validated the fairness judgment instantiated in that legislation, to the extent such opinion is accurately reflected in antidiscrimination legislation that successfully runs the federal lawmaking gauntlet.<sup>223</sup>

---

<sup>221</sup> See *id.* at 365 (examining “the limitations § 1 of the Fourteenth Amendment places on States’ treatment of the disabled”).

<sup>222</sup> Cf. *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) (complaining that the Court, by finding a Colorado antigay law to be based on animus, had adopted the views of elite opinion in condemning the views of the people of Colorado).

<sup>223</sup> Of course, one can always question the extent to which congressional action reflects constituents’ values, as opposed to the preferences of narrower interest groups or even legislators’ own preference maximizations. See, e.g., Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1730 (2002) (listing several factors that may influence legislators’ actions beyond constituent preferences). Examples are probably of limited use in considering this objection: anecdotal evidence that changes in public opinion

One benefit of this methodology is that it contains within it a built-in limiting mechanism. If national consensus – however defined, and with the admitted difficulty in discerning it – becomes the relevant test for enforcement legislation, then one might expect enforcement legislation to be upheld when it reflects views society is already putting into practice. State governments are part of that society; indeed, for many defenders of judicially protected federalism, states are worth protecting exactly because states are thought to be more responsive to local opinion.<sup>224</sup> If judicial review of enforcement legislation asks, fundamentally, whether American society has condemned the type of discrimination the statute attacks, then such review likely will validate legislation to the extent that state and local governments have already taken the lead.

Obviously, the enforcement power implicates serious federalism issues, in addition to issues about the proper allocation of power between Congress and the courts. The approach sketched out here truly respects federalism by focusing enforcement power review, in part, on how states among other entities have applied the Court's understanding of the underlying right – here, the right to be free of animus-motivated discrimination. In a very real way, it reflects a positive, cooperative federalism, by allowing states a role in determining how constitutional obligations are imposed on them. That role necessarily must be indirect and limited: ultimately, it is for the Court to determine the meaning of those obligations and for both the Court and Congress to enforce them. But an approach to judicial review of enforcement legislation that seeks to translate the vague, Court-identified antianimus rule

---

on some issues has led to changes in legislators' positions that can be countered with other stories of congressional action that seems to fly in the face of public opinion. For example, the pollster and statistician Nate Silver has suggested that national public opinion on same-sex marriage caused some portion of the large shift in favor of same-sex marriage by many Senators. See Nate Silver, *Explaining the Senate's Surge in Support for Same-Sex Marriage*, N.Y. TIMES (Apr. 4, 2013, 8:13 AM), [http://fivethirtyeight.blogs.nytimes.com/2013/04/04/explaining-the-senates-surge-in-support-for-same-sex-marriage/?\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2013/04/04/explaining-the-senates-surge-in-support-for-same-sex-marriage/?_r=0), archived at <http://perma.cc/366L-J8EW>. By contrast, political reporters have noted that the public strongly supported the gun control measures that were nevertheless defeated in the Senate in early 2013. See Paul Steinhauser, *Public Opinion Gets Trumped in Gun Control Defeat*, POLITICAL TICKER (Apr. 17, 2013, 6:15 PM), <http://politicalticker.blogs.cnn.com/2013/04/17/public-opinion-gets-trumped-in-gun-control-defeat>, archived at <http://perma.cc/E6VY-T2N3>. Concededly, the “defeat” the gun control bill suffered in 2013 was simply the failure of the bill to receive a super majority; the bill received fifty-four votes. See *id.* At the highly general level required by the broad constitutional analysis this Article performs, perhaps the best we can say is that the imprimatur of congressional enactment is likely one of the most reliable indications that a particular policy or judgment enjoys the approbation of the American people.

<sup>224</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 570-71 (1985) (Powell, J., dissenting) (approving of Hamilton's and Madison's federalist views that citizens' ties, loyalties, and familiarity lie with the states).

into concrete rules of conduct must consider what American society understands as animus.

States, as part of that society – indeed, as entities thought to be closer to local opinion than distant federal representatives<sup>225</sup> – can play a useful role when the Court reviews Congress’s translation work. Such an approach is surely superior to the antagonistic federalism that marks the Court’s current approach to enforcement power cases. To see this, one need only contrast the result under this approach with the one promoted by the dissenters in *Hibbs*, who attacked the enforcement power basis for the FMLA’s family-care provisions exactly because states had already provided for family medical leave.<sup>226</sup> This latter approach exacerbates the mistake of the Court’s juricentric approach to the enforcement power reflected in the *Kimel-Garrett-Hibbs* line of cases,<sup>227</sup> by focusing on the extent to which states have or have not *violated* the constitutional command, rather than on how states, as part of and reflective of American society, *understand* that command. Put simply, preventing Congress from acting on a national consensus condemning a particular type of discrimination because states have already acted on that consensus is to turn federalism from a cooperative enterprise into an unnecessarily antagonistic one.

#### CONCLUSION: THE CHALLENGE OF POINTILLIST CONSTITUTIONALISM

Art historians tell us that pointillism is aimed at reproducing an accurate depiction of reality through the application of tiny dots of pure color. When filtered through human perception, those dots allow viewers to perceive the nuanced picture of light and shadow and color variations that exist in the world.<sup>228</sup> But without an infinite number of surrounding dots, any given pointillist dot fails to reveal that true reality.<sup>229</sup> *Windsor* is a pointillist opinion: By finding a core constitutional violation in the details of a particular statute, it marks a tiny dot of pure constitutional color. Indeed, just as a pointillist painting reminds viewers of the basic building blocks of our visual perception,<sup>230</sup> *Windsor*’s precise focus on equal protection’s core antianimus

---

<sup>225</sup> See *supra* note 224.

<sup>226</sup> See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 750-51 (2003) (Kennedy, J., dissenting) (criticizing the majority’s position because “the States appear to have been ahead of Congress in providing gender-neutral family leave benefits”).

<sup>227</sup> See *supra* note 70 and accompanying text (discussing the “juricentric” approach of the Court in Fourteenth Amendment jurisprudence).

<sup>228</sup> See *supra* note 163.

<sup>229</sup> Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2697 (2013) (Roberts, C.J., dissenting) (describing the majority’s analysis as saying little or nothing about the constitutionality of other examples of sexual orientation discrimination).

<sup>230</sup> See, e.g., Francisco Letelier, *Notes on Pointillism*, COLOR THEORY SPRING 2008 (Mar. 5, 2008, 10:14 AM), <http://fleteliercolortheory.blogspot.com/2008/03/notes-on-pointillism.html>, archived at <http://perma.cc/38U6-SHUN> (explaining this idea).



requirement provides a beneficial service by reminding both lawyers and citizens of what, at base, the Equal Protection Clause is all about.

Legislation, however, is by definition a work characterized by broad brushstrokes of mixed pigments. A doctrinal mandate that enforcement legislation be congruent and proportional to the underlying constitutional violation creates tension when, as with sexual orientation (and likely other classifications), the Court depicts that violation with a pointillist's brush. Thus, the challenge for Enforcement Clause doctrine is to recognize that Congress and the Court sometimes paint in different styles. Each style may be appropriate to the institution that employs it, and each style may faithfully reflect constitutional reality. But each is nevertheless distinct.

It may well be appropriate for the Court to require that enforcement legislation have some relation to court-stated law; at least this Article assumes the existence of that requirement. But if *Windsor* does ultimately herald a new style of equal protection analysis, even for only a discrete category of challenges, the Court will have to develop a method for translating broad congressional enforcement brushstrokes into its own evolving interest in a very different style of constitutional art.

