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The Section 5 Power and the Rational Basis Standard of Equal Protection

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This Article addresses the current controversy over the scope of Congress's power to enforce the Equal Protection Clause. Recent Section 5 cases have engendered much criticism, some of it focused at the Supreme Court's seeming disrespect for Congress's fact-finding capabilities, some of it on the "congruence and proportionality" standard the Court has enunciated, and the most aggressive of it arguing that Congress should have a greater role in determining constitutional meaning.

This Article takes a different tack. It focuses not on what power Congress should have vis-à-vis the Court, but rather, on what the Court has actually said about equal protection. It argues that many equal protection decisions do not represent abstract statements of equal protection law; instead, they reflect the outcome of decisional methods that speak to underlying constitutional concerns but which don't themselves yield statements about what the Equal Protection Clause means. Thus, less equal protection "law" exists than is commonly assumed. In turn, more room exists for Section 5 legislation.

The Article focuses on the rational basis standard. It argues that the rarity of judicial strike downs under that standard does not mean that almost all classifications so reviewed satisfy the Equal Protection Clause. Instead, it suggests that that standard is better understood as a statement by the court that it often doesn't have the capability confidently to identify violations of the Clause's underlying rule against unreasonable classifications. The implication under the latter view is that the decision upholding the law does not itself amount to a declaration of constitutional law, which Congress is therefore obliged to respect when the latter seeks to enforce the Clause.

The Article argues that the Court's own explanations and applications of the rational basis standard support this judicial-restraint characterization. It then argues that the reasons for that restraint apply with much less force to Congress, given the latter's institutional characteristics. The Article then applies these insights to the Court's explanation, in City of Cleburne v.

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Cleburne Living Center, *of why it would not grant suspect class status to the mentally retarded. Cleburne's explanation allows a comparison of Congress's and the Court's abilities to determine whether a classification runs a high risk of being constitutionally unreasonable.*

The Article then confronts a final theoretical problem: If most rational basis cases don't reflect true declarations of equal protection law, and if rational basis cases comprise the vast majority of equal protection claims, then where is the law in the Equal Protection Clause? The Article suggests that lurking in the rational basis cases is a fundamental principle of equal protection law—the rule against animus. The last major part of the Article considers if, and how, this antianimus rule could cabin would otherwise seem to be a very broad Section 5 power.

The Article concludes by speculating about what this analysis means for Section 5 enactments addressing gender and race. In particular, the Court's gender jurisprudence implies a significant role for congressional input via the Section 5 power. The Article also speculates whether this analysis illuminates the scope of Congress's power to address substantive rights under the Due Process Clause or other clauses of the Fourteenth Amendment.

The issue of the scope of the United States Congress's power to enforce the Fourteenth Amendment of the United States Constitution[1] has occupied courts and commentators for a generation. Nearly forty

1. U.S. CONST. amend. XIV.

years ago, the seminal cases of *South Carolina v. Katzenbach*[2] and *Katzenbach v. Morgan*[3] granted Congress broad authority to enforce the Reconstruction Amendments,[4] thereby provoking both sharp dissents[5] and voluminous academic evaluation and speculation. More recently, since 1997, the United States Supreme Court has made cutbacks on Congress's power under Section 5 of the Fourteenth Amendment,[6] an important part of its states-rights agenda, striking down parts of four statutes as exceeding Section 5's grant of authority to Congress.[7]

Since *South Carolina* and *Morgan*, the Court has experimented with a variety of approaches to the judicially enforced scope of the Equal Protection Clause, a basic component of the Reconstruction Amendments. At the start of this period, the Court subjected almost all statutes facing an equal protection challenge to the same toothless "rational basis" standard.[8] The only exceptions were statutes that classified on the basis of race[9] and those that provided for unequal

2. 383 U.S. 301, 324 (1966).

3. 384 U.S. 641, 648 (1966).

4. *South Carolina* was in fact a case interpreting the scope of Congress's power to interpret the Fifteenth Amendment, which has an identically worded congressional-enforcement provision. 383 U.S. at 308. This Article argues for an approach to congressional-enforcement power that turns on the unique characteristics of the particular constitutional right being furthered. Thus, technically, this analysis does not automatically apply to the Fifteenth Amendment's enforcement provision. However, at the time *South Carolina* and *Morgan* were decided, it was assumed that the enforcement powers in the two Amendments were of equal scope. The Thirteenth Amendment, because it proscribes private as well as government action, presents its own complexities with regard to congressional enforcement, and will not be discussed in this Article. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (considering legislation enacted pursuant to Congress's power to enforce the Thirteenth Amendment).

5. *See, e.g.*, *Morgan*, 384 U.S. at 659 (Harlan, J., dissenting).

6. U.S. CONST. amend. XIV. § 5.

7. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001) (striking down part of the Americans with Disabilities Act as inappropriate Section 5 legislation); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (reaching the same conclusion with regard to the Age Discrimination in Employment Act (ADEA)); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (striking down the Patent and Plant Variety Protection Remedy Clarification Act); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act). *But see* Tennessee v. Lane, 158 L. Ed. 2d 820, 835 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724 (2003) (upholding the Family and Medical Leave Act as appropriate Section 5 legislation).

8. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (holding that the Kansas Legislature was free to decide whether legislation was needed to deal with debt adjustment and that such legislation did not violate due process, nor did it deny equal protection to nonlawyers).

9. *See, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969). *McDonald* also suggested that wealth was a suspect classification, but the Warren Court's move in that direction never matured into a hard rule and was rejected in the first Term of the

distribution of fundamental rights,[10] which were subjected to a much higher level of scrutiny that, as a practical matter, nearly always resulted in the statute being struck down.

This straightforward approach to equal protection soon gave way. In the 1970s, the Court experimented with higher levels of scrutiny for gender, illegitimacy, and alienage classifications, before settling on an amorphous intermediate status for the first two and strict scrutiny for some of the third.[11] During the 1980s, the Court became less tolerant of gender classifications, and in 1996, it ratcheted gender to nearly full-blown suspect class status.[12] Even then, though, it cautioned that it would still accept gender classifications justified as compensatory or reflecting real gender differences, and it fulfilled that prediction several years later.[13] The 1980s also witnessed a slow, uneven march toward expanding the strict scrutiny accorded to race-based decisionmaking defended as compensatory or otherwise benign. As with gender, that march seemed to have reached its logical endpoint in the 1990s, when the Court subjected affirmative action contracting set-asides to strict scrutiny.[14] However, the Court soon revealed that its attitude about race, like its attitude toward gender, reflects significant sensitivity to context. Most notably, in 2003, the Court accorded to the University of Michigan Law School's race-conscious admissions policy a scrutiny that was clearly less strict than that accorded the contracting programs reviewed in previous years.[15]

Perhaps most interestingly, the early- to mid-1980s witnessed a spate of cases in which the Court experimented with the rational basis standard. During this period, the Court used a more muscular version of that standard to strike down classifications based on mental

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Burger Court. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (finding no justification for employing heightened scrutiny to classification based on wealth).

10. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 581 (1964) (applying heightened scrutiny to a law resulting in unequal distribution of voting rights).

11. Clark v. Jeter, 486 U.S. 456, 461 (1988) (summarizing previous illegitimacy cases as enunciating an intermediate scrutiny standard); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (employing intermediate scrutiny for gender classifications); Mathews v. Diaz, 426 U.S. 67, 82 (1976) (employing rational basis scrutiny for federal law alienage classifications); Graham v. Richardson, 403 U.S. 365, 376 (1971) (providing for strict scrutiny for state law alienage classifications).

12. *See* United States v. Virginia, 518 U.S. 515, 555 (1996).

13. *See* Nguyen v. INS, 533 U.S. 53, 64 (2001) (upholding gender classification based on a perceived real difference between the status of motherhood and fatherhood).

14. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)

15. Grutter v. Bolinger, 539 U.S. 306, 342-43 (2003).

retardation,[16] status as an illegal alien minor,[17] and duration of state residence.[18] Since then, the Court has continued on occasion to employ a more muscular rational basis review to strike down laws on equal protection grounds.[19]

As this brief tour makes clear, the Court has departed significantly from the standard understanding of all three levels of review that comprise the formal structure of equal protection law, in favor of a more contextual approach. These cases, especially the "rational basis plus" cases from the 1980s, coincided with a fundamental questioning of the three-tiered structure and the political process theory that underlay it.[20] Recent cases in which the Court's result could not be easily tied to the ostensible scrutiny standard employed[21] have made that fundamental questioning even more relevant.

The combination of the Court's new limitations on the Section 5 power and the blurring of the Court's equal protection jurisprudence makes it an appropriate time to rethink the relationship between Congress, the Court, and the Equal Protection Clause. An obvious response to a Court that seems unenthusiastic about a rigid doctrinal structure, and more interested in contextual answers to equal protection questions, is to accord increased respect to legislative input. If context matters, the argument goes, then Congress, as the federal branch most attuned to shifting or nuanced social reality, should play a larger role in equal protection decisionmaking.

Yet congressional action is impeded by the very text that it could potentially rejuvenate. The fact that Congress's power is limited to "enforcing" the Equal Protection Clause means that that power is necessarily tied to the meaning of that provision. By itself this requirement is unremarkable: all it means is that when Congress seeks

16. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

17. Plyler v. Doe, 457 U.S. 202, 223-25 (1982).

18. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 622-23 (1985); Zobel v. Williams, 457 U.S. 55, 61 (1982).

19. *See* Bush v. Gore, 531 U.S. 98, 107-09 (2000) (finding an equal protection violation in different counting methods used by state vote-tabulation boards counting votes for the same election); Romer v. Evans, 517 U.S. 620, 633 (1996) (finding an equal protection violation in a state constitutional provision denying any protected status based on sexual orientation); *see also* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (finding equal protection to be violated by a state law criminalizing same-sex, but not opposite-sex, sodomy, as lacking a rational basis).

20. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 744-46 (1985); *see also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1079-80 (1980).

21. *See* cases cited *supra* note 19 and accompanying text.

to enforce the Equal Protection Clause, its action must have some link to the meaning of equal protection. But because the Fourteenth Amendment also includes a judicially enforceable component, questions about the acceptable range of congressional action inevitably require consideration of how the courts have understood that guarantee. In turn, if the meaning of the Amendment is thought to depend solely and completely on what the Court says the Clause means—in other words, if we adopt a juricentric model—then lack of clarity in the Court's equal protection jurisprudence necessarily infects, and thus impedes, congressional attempts to breathe new life into it.

Scholars, most notably Robert Post and Reva Siegel, have argued for a robust congressional role in defining the meaning of the Fourteenth Amendment.[22] Their argument focuses largely on the struggle for control over the Constitution's meaning; in particular, it critiques the judicial supremacy claim they find implicit in the Court's recent Section 5 jurisprudence. But such arguments should be attuned to the particular Fourteenth Amendment provision at issue. This Article focuses on the Equal Protection Clause. It argues that the Supreme Court itself has often refrained from explicit pretensions to judicial omniscience in equal protection cases. It therefore suggests that much of the Court's equal protection jurisprudence does not authoritatively announce constitutional norms. The Article builds on that conclusion to suggest that the relative paucity of judicially announced equal protection "law" opens the way for Congress to be more creative in applying the few equal protection norms that the Court has in fact announced.

This Article argues for broader congressional power to enforce the Equal Protection Clause, within the framework of ultimate judicial supremacy over the Constitution's meaning, using as an illustration the Court's explanation and application of the rational basis standard. It argues that the Court's use of that standard is best understood as a prudential response to its inability to declare with confidence whether a statute conforms to equal protection's requirements, rather than as a statement that the challenged statute is probably constitutional in some abstract sense. If one accepts this characterization of what the Court is

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22. *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 444 (2000).

doing when it applies rational basis scrutiny, it follows that neither a court's decision to apply that standard, nor its upholding of a statute against it, constitutes "law" that binds Congress in its use of its Section 5 power.[23] Rather, the Section 5 power is more properly cabined by a proper consideration of both what the Court has actually determined about the relevant equal protection right and what institutional advantages make Congress better suited to apply whatever legal rule the Court has in fact provided.

This argument assumes that Congress is indeed limited to "enforcing" the provisions of the Fourteenth Amendment, and that "enforcing" those provisions precludes a role for Congress in second-guessing authoritative Supreme Court statements of the Fourteenth Amendment's meaning. This assumption reflects the reality of current law. In *City of Boerne v. Flores*, the leading case in the Court's new Section 5 jurisprudence, the Court embraced this judicial interpretive supremacy principle,[24] from which no Justice explicitly dissented,[25] and which was joined by two of the four Justices who have voted in favor of congressional authority in every subsequent Section 5 case.[26] Whatever its merits, the judicial superiority principle appears firmly entrenched in the doctrine. Where this Article diverges from current doctrine is in its suggestion that the Court's resolution of an equal protection claim does not necessarily produce an authoritative statement of the Clause's meaning, warranting status as superior judicially announced law. The case law supports this more modest understanding of the Court's jurisprudence, which thus makes this approach a more promising vehicle for carving out a broader Section 5 power.

The general point that courts do not speak authoritatively on every constitutional issue has been made before, most notably in Professor Sager's now classic article on underenforced constitutional

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23. A decision to strike a law down, by contrast, may well constitute an equal protection "law." *See infra* note 202 and accompanying text.

24. 521 U.S. 507, 516-21 (1997).

25. Justice O'Connor dissented on the underlying substantive question of whether the federal statute did in fact conflict with the properly understood constitutional rule, but explicitly agreed otherwise with the Court's congruence and proportionality discussion. *See id.* at 546 (O'Connor, J., dissenting). Justice Souter dissented on the underlying issue without expressing a view on the Section 5 question, *see id.* at 565 (Souter, J., dissenting), as did Justice Breyer, *see id.* at 566 (Breyer, J., dissenting).

26. In particular, Justices Stevens and Ginsburg either joined the majority's opinion in *Boerne* or explicitly agreed with its statement on this point.

norms.[27] What is new since that article, though, is the rise of the less rigid, more contextualized approach to equal protection sketched above.[28] That approach, and especially its application in the "rational basis plus" cases, illustrates the Court's estimation of the limits of judicial review under the Equal Protection Clause. In particular, the Court's discussion of the rational basis standard in such cases indicates that that standard flows more from the institutional limits on judicial review of legislative classifications, and less from the likelihood that a given classification is constitutional in the abstract sense. At the same time, the Court's application of more muscular rational basis review involves it in contextualized decisionmaking that, exactly because it is more sensitive to the underlying context, is less reflective of legal principles and more reflective of particularistic applications of principle to fact. The more contextualized the issues become, however, the stronger the argument is that Congress should have a say in the matter, given its superior capacity to distinguish reasonable differential treatment of a group from exclusion or animus targeted at that same group.

This Article is one component of a broader project that seeks to delineate the proper scope of Congress's power to enforce the Equal Protection Clause by examining the Court's own statements about the Clause's meaning. Those statements include the three-tiered scrutiny structure that still ostensibly answers all equal protection issues, the state action requirement, the expansion of the Clause's scope to include more than discrimination aimed particularly at African-Americans or even based generally on race, and the privileging of certain rights as especially requiring equal state distribution (the so-called "fundamental rights prong" of the Clause). In order to determine how those statements relate to congressional-enforcement power, it is important to understand their status as equal protection "law" or mere decisional devices. This Article begins that process by examining the three-tiered scrutiny structure, in particular, the rational basis standard and that standard's implications for congressional-enforcement power.

Part I of the Article begins this task by laying out and defending the proposition that the rational basis standard is in fact merely a decisional device, grounded in the institutional limitations of judicial review. It examines the Equal Protection Clause, in particular the rule against unreasonable or arbitrary classifications, and considers what

27. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1263 (1978).

28. *See* cases cited *supra* notes 11—19 and accompanying text.

the Court has said about the role of legislatures (both state and federal) in determining the reasonableness of classifications. It argues that the Court itself has conceded its incompetence in many—though, importantly, not all—situations to determine whether a legislative classification is reasonable. In particular, Part I argues that the Court's explanation for granting only rational basis review to most classifications amounts to just such a concession.

Part II presents the case that Congress is better institutionally suited than the courts to consider the reasonableness of most legislative classifications.[29] Some of these features are obviously relevant to the Section 5 issue—for example, Congress's superiority at finding facts. Others are not so obviously relevant—for example, Congress's capacity for acting by fiat, rather than as the result of a process of self-conscious legal reasoning. For our purposes, the important point is that these factors operate with special force when the issue is enforcement of the equal protection guarantee.

Part II then considers *City of Cleburne v. Cleburne Living Center, Inc.*,[30] probably the best-known of the "rational basis plus" cases from the 1980s, and in particular the majority's explanation for not granting suspect class status to the mentally retarded.[31] While the Court struck down the government action in *Cleburne*, it purported to do so based on the rational basis standard, after rejecting suspect class status for the mentally retarded.[32] This combination—rare and intriguing, and thus the source of much academic commentary—provides a rare window into the Court's reasoning when confronted with a statute that is suspicious enough to warrant an eventual strike down, but nevertheless aimed at a group that the Court does not consider deserving of official, across-the-board judicial solicitude. Examination of the Court's suspect class analysis in *Cleburne* highlights the institutional concerns identified in Part II.A and suggests how congressional action may be better able to combat whatever equal protection flaw resides in treatment of that group.

After briefly considering institutional differences between state legislatures and Congress,[33] Part II concludes by considering limits on this competence-based conception of the Section 5 power. First, it explains how this institutional competence argument fits within the

29. *See infra* Part II.A.
30. 473 U.S. 432 (1985).
31. *See infra* Part II.B.
32. *See Cleburne*, 473 U.S. at 441-43.
33. *See infra* Part II.C.

formal requirement—assumed by this Article—that congressional action "enforcing" the Equal Protection Clause be distinguished from congressional attempts to "interpret" it.[34] If that argument can be understood as responding to the separation of powers concerns raised by this argument, then Part II.E explains how this conception similarly respects federalism, by providing a principled, if admittedly imprecise, limit on Congress's superintending power over states.[35]

Part III speculates on the applicability of this analysis beyond situations where judicial review is performed under the rational basis standard. In particular, it briefly examines the judicially declared law applicable to gender and race classifications and considers how much room that law leaves for congressional action under Section 5. These thoughts are preliminary, and are designed more to prompt further study and thought. Part IV concludes by briefly considering the applicability of this analysis beyond equal protection, to the substantive rights guarantees of the Fourteenth Amendment.

I. THE NATURE OF THE EQUAL PROTECTION GUARANTEE

A. *The Dilemma of Equal Protection, the Court's Answer, and the Implications of That Answer*

Equal protection is unique among constitutional rights, both for its ubiquity and its lack of an easily identifiable, substantive core. Other constitutional prohibitions apply to discrete types of government acts, even if difficult analysis is required in order to decide whether those prohibitions have been violated. Equal protection violations, though, can be claimed any time government treats two individuals differently, a situation that results from almost any government action, from placing citizens in internment camps because of their ethnicity[36] to refusing to supply municipal services as retaliation for a squabble.[37]

In addition to their ubiquity, equal protection claims are marked by a lack of a substantive standard by which they can be evaluated. Most constitutional claims can be judged by standards derivable from sources we might be comfortable describing as "legal." Such sources include, for example, the common law meaning of terms or practices, the Drafters' intent, and the implications of a particular provision for the form of government established in the Constitution. Thus, a Fourth

34. *See infra* Part II.D.
35. *See infra* Part II.E.
36. *See* Korematsu v. United States, 323 U.S. 214, 234-35 (1944).
37. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).

Amendment claim might be judged against what the Framers, with their common law understandings, would have considered a "search,"[38] an Eleventh Amendment argument might be made based on the Drafters' understanding of the federal system they believed they were reinforcing,[39] and a speech restriction might be analyzed against the content-neutrality rule, which itself derives from an understanding of what self-government requires.[40] Equal protection claims, however, require a court simply to determine the reasonableness of the challenged classification. Except in some very limited cases in which the Clause's drafting history provides assistance in making that determination,[41] the reasonableness of a classification must be determined using sources that, in a significant way, are not "legal" in origin, and thus not susceptible to authoritative judicial pronouncements.

Consider a well-known case: is it reasonable for a legislature to prohibit owners of panel trucks from displaying other businesses' advertising, while allowing them to display their own?[42] In one sense, the two groups are clearly alike: truck owners who place advertising on the sides of their trucks. In another sense, they are different, given the distinct sources of the advertising. There is no objective natural difference or similarity between these, or any, groups,[43] and thus no

38. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34-35 (2001) (considering whether a "search" has occurred based on the privacy expectations the Framers might have had, based on common law protections).

39. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (justifying its view of the scope of Eleventh Amendment sovereign immunity based on the understanding of the original Drafters of the Constitution).

40. For the classic statement of the self-government rationale for speech protection, see *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

41. For example, a rule against invidious race classifications might be derived from the intent of the Drafters and the overall historical context of the Fourteenth Amendment. Even here, though, the Drafters' intent and historical context might not furnish support for a full prohibition on such classifications, because it seems at least arguable that the Drafters were concerned about equality with regard to only certain classes of rights, not including social equality and voting. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 200 (1970) (Harlan, J., concurring in part and dissenting in part) (concluding that the historical evidence indicates that section 1 of the Fourteenth Amendment did not address discrimination in voter qualifications).

42. *See* Ry. Express Agency v. New York, 336 U.S. 106 (1949).

43. As Professor Tribe argued more than twenty years ago when critiquing process-based constitutional theories: "One cannot speak of 'groups' as though society were objectively subdivided along lines that are just there to be discerned. Instead, people *draw* lines, attribute differences, as a way of ordering social existence . . . ." Tribe, *supra* note 20, at 1074 (emphasis in original). As a result, judgments about the appropriateness or reasonableness of a classification are fundamentally value choices: "the conclusion that a legislative classification reveals prejudicial stereotypes must, at bottom, spring from *a disagreement*

objective method of determining whether groups are truly being treated equally.

Despite this difficulty, the Supreme Court has had to find a meaning for equal protection. Its search for meaning in the Clause has led it to employ a variety of methodologies. Before 1937, the Court sometimes decided equal protection cases based on the extent to which the challenged statute classified in a way that deviated from common law regulation.[44] On this theory, the common law, as the presumed natural result of legal development applied by apolitical judges, provided an objective reference point against which to judge the appropriateness of classifications.[45] This approach sought to uncover natural, or objective, social relations as the anchor for the requirement of equality before the law, much like *Lochner*-era jurisprudence, of which it was a contemporary, sought to determine whether social legislation undermined natural rights to contract protected in the Due Process Clause.[46]

After 1937, the theory derived from footnote 4 of *United States v. Carolene Products Co.* was thought to provide a comprehensive mechanism for determining, if not the actual reasonableness of a classification, then at least the degree of scrutiny with which the Court would examine it.[47] *Carolene*'s influence on equal protection law is well known, but its implications merit some consideration. Briefly, the theory suggests that equal protection claims should be evaluated based on the challenged party's ability to protect its interests in the political process.[48] If a burdened group was determined to be so able, *Carolene* required that courts apply only the most minimal test of rationality to

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with the judgments that lie behind the stereotype: judgments about the propriety of the options left to individuals or the burdens imposed on them." *Id.* at 1075 (emphasis in original).

44. *Compare, e.g.*, Borden's Farm Prods. Co. v. Ten Eyck, 297 U.S. 251, 262-63 (1936), *with* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 273-74 (1936) (reaching opposite results with regard to different provisions of New York law regulating competition in the milk business, largely based on whether the regulation mirrored the market distinctions that surfaced during the previous period of common law governed regulation).

45. The apolitical character of the courts that developed common law rules was important to the pre-1937 structure of equal protection. By erecting as the reference point for equal protection claims a set of rules developed by judges, courts were able to claim that they were guarding against the "class legislation" or class favoritism that they saw as a likely result of the political process. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

46. *See id.*

47. 304 U.S. 144, 152 n.4 (1938).

48. *See id.*

the classification.[49] By contrast, if a government action burdened a particular national or religious minority, or more generally a "discrete and insular" minority that faced "prejudice," then more searching scrutiny would be appropriate. This much is standard, and well understood.[50]

While *Carolene*'s political process theory has never served as the sole vehicle for conceptualizing equal protection in the modern era, it has played an important role in the development of the three-tiered scrutiny scheme that characterizes modern equal protection law.[51] Consequently, if that theory is based, even in part, on concerns about judicial competence to spot equal protection violations, rather than on its accuracy in actually spotting unconstitutional conduct, then the way is open, at least preliminarily, for a larger congressional role in vindicating equal protection.

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49. *See id.*

50. Footnote 4 goes beyond this situation, to address others in which judicial deference may be unwarranted. In particular, it addresses situations in which the challenged government action appears to contravene one of the provisions of the Bill of Rights and in which the government action impacts the workings of the political process. The latter of these situations reflects another occurrence of the same political process malfunction motivating the footnote's concern about discrete and insular minorities, discussed in the text. In both situations, the political process cannot be trusted to produce a result that is more or less public-regarding, because the legislature would be motivated either to shut down political participation to entrench itself in power, or to ignore the concerns of groups that, by definition, do not enjoy political clout.

The situation posed by government action that contravenes a Bill of Rights' provision is different. The Court's refusal to defer in such situations reflects its understanding that there is a democratic mandate for judicial review in those cases, a mandate that derives from the explicit limitations enacted by the people when ratifying the Amendments. The Court's refusal to defer also reflects the greater confidence the Court has in its own capabilities, not just when there is an explicit text, but when that text enshrines rules that are more determinate than those created by the Court under the rubric of substantive due process. The equal protection guarantee would be just as indeterminate, requiring judicial deference except, again, where the legislative process could not be trusted.

51. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442-43 (1985) (rejecting heightened scrutiny for classifications involving the mentally retarded, based on similar factors); Frontiero v. Richardson, 411 U.S. 677, 686-88 (1973) (plurality opinion) (arguing in favor of heightened scrutiny for gender classifications based on factors akin to those noted in *Carolene*); *see also, e.g.*, Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc) (arguing for heightened scrutiny for sexual orientation classifications based on *Carolene*'s factors). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). The fundamental rights strand of equal protection relies less on *Carolene*, although it should be noted that the two rights embraced within that strand but not within modern substantive due process, travel and voting, deal with situations addressed by *Carolene*, respectively, burdening political outsiders and closing off the standard method of political redress. *Carolene*'s political process theory has also been thought to play a great role in the post-1937 Court's increased solicitude for religious minorities and free speech. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 246 (1991).

In fact, *Carolene* is quite consistent with a concern about relative institutional competences. The text of the opinion to which footnote 4 is appended enacts a presumption that facts exist supporting the legislature's judgment, except when the statute comes within one of the categories specified in the footnote.[52] This language deserves consideration. In general, presumptions can reflect either confidence that the presumed fact does in fact exist, problems with proving the existence of such a fact, or a simple policy preference for the side benefiting from the presumption.[53]

It is at least arguable that the presumption enacted in *Carolene* reflects the second of these uses, that is, courts' relative incompetence to second-guess legislatures regarding the existence of the facts necessary to support the constitutionality of the challenged statute. *Carolene* appeared at the end of, and as a response to, an era of judicial imperialism, when the Supreme Court aggressively reviewed laws for conformance with the Court's constitutional vision of class-neutral legislation anchored in the assumed neutrality of the common law. The Court's attempt to enforce this vision caused severe strains, starting as early as the 1890s and increasing up until 1937, as that vision forced courts to distinguish valid police-power regulations from invalid class-biased legislation.[54] Thus, workplace sanitation laws were distinguished from minimum wage laws, which were in turn distinguished from maximum working hours laws, which in turn were distinguished from hours laws benefiting all workers and those benefiting women, or those benefiting miners and those benefiting bakers.[55] The collapse of the Court's serious attempt to distinguish public-regarding from faction-based laws surely suggests that *Carolene*'s presumption in favor of legislative judgments was based as much on an admission of institutional incompetence as from a sudden understanding that almost all social and economic legislation was constitutional in some abstract sense.

Occasionally, the Court has gone beyond process theory in interpreting equal protection. Race classifications present an interesting

52. *See Carolene*, 304 U.S. at 153.

53. *See, e.g.*, ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW 103-04 (1998).

54. For a description and analysis of this struggle from the 1890s to 1937, including descriptions of the Court's treatment of these particular types of laws, see GILLMAN, *supra* note 45, at 101-293.

55. *See id.*

example.[56] The Court's longstanding skepticism about race classifications, beginning with *Korematsu v. United States*,[57] could easily have been justified by process-based concerns. African-Americans were surely on Justice Stone's mind when he spoke in *Carolene* of prejudice against discrete and insular minorities,[58] and Justice Murphy's dissent in *Korematsu*, while never citing *Carolene*, illustrates how social ostracism, physical and cultural differences, and simple dislike combined to create the inaccurate stereotyping that characterized the Japanese exclusion orders.[59] But process-based concerns were never primary in the Court's explanations for its race jurisprudence. The pre-*Brown*[60] cases dealing with segregation in higher education focused simply on whether the separate school was in fact equal.[61] *Brown* itself relied on sociological evidence indicating the inherent tension between "separate" and "equal,"[62] and the post-*Brown* per curiam opinions were devoid of any analysis.[63] In recent years, where the focus has shifted to affirmative action plans that *benefit* racial minorities, the fit between the doctrine and process theory has become even more tenuous, calling forth either a halfhearted, unconvincing explanation or a denial of process theory's relevance altogether.[64]

The Court's thinking about race reflects its confidence in its own ability to distinguish between benign and invidious classifications, at least with regard to certain classification tools. The affirmative action cases of the past fifteen years have made it especially clear that the Court considers race classifications suspect on their own merits, as presumptively unreasonable, without any help from intermediating tools such as process analysis. Even *Grutter v. Bollinger*,[65] in which

56. Gender presents another example, but its explication will wait until the Article develops its theory further. *See infra* Part III.A.

57. 323 U.S. 214, 216 (1944).

58. *See* 304 U.S. at 153.

59. *See Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).

60. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

61. *See, e.g.*, McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950) (graduate school); Sweatt v. Painter, 339 U.S. 629, 635 (1950) (law school).

62. 347 U.S. at 494-95.

63. *See, e.g.*, Schiro v. Bynum, 375 U.S. 395, 395 (1964) (per curiam) (city auditorium); Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (public facilities); Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam) (public golf course), *rev'g* 223 F.2d 93 (5th Cir. 1955); Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches), *aff'g* 220 F.2d 386 (4th Cir. 1955).

64. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989) (suggesting that political process theory cuts against the constitutionality of the affirmative action plan at issue because blacks constituted 50% of the population of the city and controlled five of nine city council seats of the city that enacted the preference).

65. 539 U.S. 306, 342 (2003).

the Court applied a less strict version of strict scrutiny, seems to reflect a Court that has come to its own conclusion about the acceptability of race classifications in higher education, rather than accepting educational affirmative action because of some process-based explanation.[66] By eschewing the intermediating tool of process-based explanations, the Court has found direct meaning in the Clause itself. In so doing, it draws into sharp relief the indirect, derivative meaning to be gleaned from its application of the rational basis standard to other classifications. As suggested earlier, the derivative nature of the Court's statements in rational basis cases suggests potential congressional authority to go beyond them.

Of course, in a world where only courts make constitutional determinations, the distinction between abstract constitutionality and a court's particular level of deference makes no practical difference. In such a world, if the burden of persuasion is on the challenger to prove unconstitutionality by some high standard, then in all likelihood the statute *is* constitutional exactly because a court will likely uphold it. But in an alternate world, where other entities possess at least some authority to make constitutional decisions, the distinction does make a difference. In particular, if the presumption of constitutionality reflected in the rational basis standard reflects limitations on courts' competence to make a constitutional determination, then space exists for other branches to speak to those issues. In such a situation, constitutional lawmaking space (if not necessarily "interpretive" space) remains unfilled by courts, and thus presumably should be fillable by other branches. The political question doctrine serves as a rough analogy: if, as the Court states, the existence of a political question depends in part on whether the decision requires recourse to standards that are not judicially manageable,[67] then decisions about what the Constitution means are made by other branches. Analogously, this Article argues that the rational basis standard reflects the Court's understanding that standards for judging the reasonableness of some classifications are

66. For example, nowhere in *Grutter*'s less-than-strict strict scrutiny is there found the argument that affirmative action is acceptable because it represents the white majority's decision to burden itself, the obvious process-based justification for allowing affirmative action. *Cf.* John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739-41 (1974) (arguing that to cure society of racism there must be many more African-American professionals, and to do this race must be taken into account when allocating opportunities).

67. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) (holding that alleged equal protection violations related to state apportionment statutes did not present nonjusticiable political questions).

simply beyond judicial ken. To complete the political question analogy, as the textual commitment of a decision to another branch of government justifies commitment of that issue to that branch, so too Section 5 is evidence that some constitutional decisions are in fact "committed" to Congress, or at least that Congress has a role along with the Court in making them.

In sum, both the very nature of equal protection claims and the font of modern equal protection law are consistent with an institutional competence-based congressional authority to vindicate the equal protection guarantee. This argument is buttressed by the Court's explanations of its equal protection doctrine, which follow in Part I.B. Those explanations focus largely on the proper role of courts in reviewing legislative classifications. They indicate that the Court's self-perceived role requires it to stop short of making conclusive pronouncements about what equal protection requires. This Article argues that the incompleteness of the Court's pronouncements leaves a constitutional lawmaking hole that may be appropriate for Congress to fill.

B. The Significance of the Rational Basis Standard

1. The Theoretical Grounding of the Rational Basis Standard

In considering the completeness of the Court's pronouncements about equal protection, this Article focuses on the Court's statements about the rational basis standard. Does the Court's decision to apply rational basis signal its belief that the law is most likely constitutional in some abstract sense, thus justifying such deferential review? Or does such a decision imply that courts are only competent to give the law the most deferential review, even though such review might allow significant unconstitutional conduct to slip through? It speaks to the degree to which we have internalized the idea of judicial supremacy that we might have to think a moment before distinguishing between these possibilities. But the few instances in which the difference has either been asserted or become relevant make it clear that the difference exists, even if largely submerged.[68]

Unquestionably, the Court can impose limits on its own law-declaring power that are not commanded by the Constitution.

68. One well-known illustration of this distinction was President Jefferson's pardoning of individuals convicted of violating the Alien and Sedition Act on the ground that the law was unconstitutional. On this issue, see generally Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

Justiciability limitations and the political question doctrine present perhaps the clearest examples; in addition to their constitutional dimensions, both of these doctrines also reflect courts' prudential decisions not to decide a case.[69] The question for us is whether rational basis review reflects an analogous prudential limit, not on the appropriateness of a court hearing a claim at all, but rather on the aggressiveness with which it will conduct that review. On this question the Court has been ambivalent. In applying the rational basis standard, the Court has spoken of what the Equal Protection Clause requires, and in upholding statutes, it has spoken of those laws satisfying the Constitution.[70] But such statements do not prove that the rational basis standard itself represents the extent of the Constitution's commands. Rather, these statements, as expressions of the results in those cases—normally, that the government wins—are consistent with both a view that in the abstract the Constitution demands nothing more than rational basis review and a view that rational basis scrutiny represents the best the Court can offer in deciding the case in front of it.

A better source for understanding the status of the rational basis standard is the Court's more thorough explanations of it. It is fair to take the Court at its precise word in such situations, where it self-consciously explains its decisional method, as opposed to where it simply announces the result of a case. In explaining the rational basis standard, the Court sometimes refers to it as a paradigm of *judicial* restraint.[71] That description of the rational basis standard deserves some attention. Presumably, if the Court saw the rational basis standard as the abstract limit of the Equal Protection Clause's scope in cases other than those affecting suspect classes or fundamental rights, then we might expect to see more discussion about the federalism

69. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (discussing prudential limits on standing); *Baker*, 369 U.S. at 216-17 (finding a mixture of constitutional and prudential concerns in cases held to be political questions).

70. *See, e.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 106 (2003) (holding that a state tax of 36% on slot machines, while riverboat machines were taxed only 20%, did not violate equal protection guarantees); Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (holding that a challenged California property tax and assessment system did not violate the equal protection guarantee).

71. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 205 n.10 (2003); Bd. of Trs. v. Garrett, 531 U.S. 356, 376, 383 (2001) (Breyer, J., dissenting); FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993); *see also* Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

implications of heightened scrutiny, and less about the problems inherent in *judicial* scrutiny in particular.[72]

Part of the explanation for this lack of discussion about federalism in rational basis cases may lie in the existence of an equal protection component to the Fifth Amendment, applicable to the federal government, which the Court generally considers to be the exact replica of the Fourteenth Amendment's equal protection guarantee.[73] Because a rational basis standard justified by federalism concerns would not apply to the Fifth Amendment's equal protection guarantee, and thus would create different constitutional tests for federal and state classifications, the Court may well have decided simply to tie both rational basis standards to judicial incompetence.[74]

Alternatively, it bears repeating that criticisms of the Supreme Court before 1937 focused largely on the Court's assertion of the ability to discern constitutional lines that distinguished between, for example, public-regarding and class-based legislation, direct and indirect effects on interstate commerce, and intelligible statutory guidance and unconstitutionally vague delegations. The post-1937 Court's retreat from attempts to draw such lines suggests the more deferential modern tests may be based on concerns about judicial competence.[75] However explained, though, the link between the rational basis standard and judicial incompetence creates, at least in theory, room for congressional supplementation of the standard.

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72. In fairness, opinions discussing the rational basis standard also observe that the government is allowed some play in the joints, and that equal protection does not normally require a perfect fit between ends and means. *See, e.g., Beach Communications*, 508 U.S. at 315. As this Article later explains, however, this observation does not precisely correspond to the extraordinary deference that characterizes normal rational basis review, which ultimately remains based on limitations inherent in judicial review. *See infra* notes 135-136 and accompanying text.

73. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that the review to be accorded to federal affirmative action contracting set-asides should be the same as that accorded similar set-asides instituted by state governments). On the general question of whether the equal protection guarantees applicable to the federal and state governments should be treated the same, see Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 995-96 (1979).

74. This is not to say that federalism concerns are never mentioned when the Court explains the rational basis standard. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441-42 (1985) ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."). Obviously, even this reference to federalism comes with a companion reference to the separation of powers, namely, the appropriate role of courts as compared with legislatures.

75. *See supra* notes 53-55 and accompanying text.

The Court's statements about the institutional roles foundation for the rational basis standard also find strong support in underlying equal protection doctrine. Most notably, *Carolene*'s solicitude for discrete and insular minorities suggests that, by contrast, politically competitive groups should be required to fight their battles in the legislature and generally barred from seeking judicial protection when they lose.[76] Indeed, the Court has located this conception of the rational basis standard in the underlying governing structure established in the Constitution: as the Court has stated on numerous occasions, "[*t*]*he Constitution presumes that*, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[77]

Finally, a basic component of the rational basis test itself also supports the argument that that test is one fundamentally grounded in judicial restraint. Rational basis review allows courts to hypothesize a governmental interest that might be furthered by the challenged classification. Theoretically, a rational basis standard could exist in which the court discerns the actual intent of the legislature, and then applies very deferential review to the link between that intent and the classification. Justice Brennan called for this type of review,[78] which would truly be a rational basis "test." But courts' license to hypothesize the government interest at stake remains a solid part of the doctrine. There is good sense in this rule, given the well-known difficulty in identifying, and the conceptual challenge in even imagining, a real and unitary legislative intent. Nevertheless, such hypothesizing, as necessary as it might be, generates results that simply cannot be described as authoritative statements about the classification's arbitrariness. Such hypothesizing may be unavoidable, and even good judicial practice, but that conclusion simply means that courts are often unable to conduct the ends-means fit analysis that ostensibly comprises the doctrine.

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76. *See* 304 U.S. 144, 152 n.4 (1938).

77. Vance v. Bradley, 440 U.S. 93, 97 (1979) (emphasis added); *see also, e.g.*, *Beach Communications*, 508 U.S. at 313; Nordlinger v. Hahn, 505 U.S. 1, 17 (1992); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 n.12 (1980) (quoting *Bradley*).

78. *See Fritz*, 449 U.S. at 185 (Brennan, J., concurring); *see also* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679, 682 (1981) (Brennan, J., concurring) (calling for, in dormant commerce power cases, an inquiry into the state's actual motivation in enacting the challenged law, and then a determination of whether that motivation, if a legitimate one, was rationally related to the law).

2. The Court's Decision to Apply Rational Basis: *Cleburne*

Beyond the Court's explanation and application of the rational basis test, its analysis of when the test applies also sheds light on its ultimate meaning. In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court provided an unusually thorough explanation of its decision to employ the rational basis standard rather than a higher level of scrutiny.[79] The Court's rejection of higher scrutiny provides insights into the Court's understanding of rational basis.

In *Cleburne*, the Court reviewed a city's decision to deny a zoning variance that would have allowed a group home for the mentally retarded to locate in a residential area.[80] While the Court ultimately struck down the city's decision, it did so based on rational basis scrutiny, rejecting the appellate court's decision to grant quasi-suspect class status to the mentally retarded.[81] The Court began its suspect class inquiry by noting that all parties agreed that the mentally retarded were in fact relevantly different from mainstream society, in their reduced ability to function.[82] Appropriate treatment of that group, the Court observed, was "a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[83] The Court then noted the legislative response to the issues faced by the retarded, a response that the Court concluded "belie[d] a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[84] The Court then combined these three observations—that the mentally retarded are relevantly different, that the differences required professional judgments about how best to respond, and that legislatures have gone some distance toward addressing their unique problems—to conclude that "governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable."[85]

Still focusing on the fact that the mentally retarded were different from mainstream society, and noting the beneficial differentiation reflected in the legislation the Court cited, the Court then expressed concern that heightened review would jeopardize such beneficial

79. 473 U.S. 432, 442-46 (1985).
80. *Id.* at 436-37.
81. *See id.* at 440-41.
82. *See id.* at 442.
83. *Id.* at 443.
84. *Id.*
85. *Id.* at 444.

differential treatment.[86] Because it might be difficult for a nonexpert court to distinguish between truly invidious laws and those that only seemed so, the Court concluded that government must be given "a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts."[87]

Completing its suspect class analysis, the Court restated its conclusion that the legislative response to mental retardation belied the conclusion that the mentally retarded were politically powerless, and thus in need of judicial solicitude.[88] Finally, the Court suggested that, even if the mentally retarded did satisfy the criteria for suspect class status, the Court would still hesitate to grant it:

> [I]f . . . the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities . . . who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[89]

Taken as a whole, *Cleburne*'s suspect class analysis speaks far more of judicial competence than confidence in the underlying constitutionality of classifications based on mental retardation. The insight underlying most of the Court's analysis was the reality of difference between the mentally retarded and mainstream society.[90] That difference, being one that almost necessarily made at least some classifications appropriate, led the Court explicitly to recognize its inability to distinguish between beneficial and invidious government conduct.[91]

Of course, the *Cleburne* Court did express confidence that "the vast majority" of legislation singling out the mentally retarded was "not only legitimate, but desirable,"[92] and thus, presumably, constitutional even in the abstract sense. But this conclusion was derivative rather than direct. Specifically, it was based on examples of clearly

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86. *See id.* at 444-45. In particular, the Court noted that some beneficial classifications of the mentally retarded, such as state-mandated special education, "might be perceived to disadvantage" the retarded. *See id.* at 444.

87. *Id.* at 445.

88. *See id.*

89. *Id.* at 445-46.

90. *See id.* at 442.

91. *See id.* at 445.

92. *Id.* at 444.

beneficial singling out by a society the Court labeled as "civilized and decent."[93] In turn, that label—a crucial one, which essentially disqualified the mentally retarded from suspect class eligibility under the literal terms of footnote 4[94]—must have flowed from the Court's confidence that a society that had taken such great pains to assist the retarded should generally be trusted to have their best interests at heart, at least where direct, judicially accessible evidence does not point to the contrary. Indeed, the derivativeness of the Court's conclusion is made clear in the final sentence of the Court's suspect class analysis:

> Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.[95]

To conclude that the Court's use of rational basis is based on such a derivative analysis, rather than on direct judicial confidence in the reasonableness of a classification, does not by itself suggest that Congress has broader power under Section 5. It does, however, reflect the existence of a vacuum in which constitutional norms are not fully enforced by the courts. Because that space exists due to institutional considerations—that is, the Court's own estimation of its inability to derive and apply norms—it makes sense to consider whether Congress's unique abilities and place in the government system justify conferral of authority on it, via Section 5.

The next Part of this Article examines in more detail the institutional differences between legislatures and courts, in order to identify more precisely the qualities of the former that make them better suited to making at least certain types of determinations about equal protection.[96] It concludes that several qualities normally attributed more to Congress than the courts are relevant to the issues raised by equal protection. Untangling the differences between courts

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93. The full quote reads as follows: "Such legislation [as cited by the Court in the immediately preceding paragraph] reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences . . . is not only legitimate but also desirable." *Id.*

94. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citing "prejudice against discrete and insular minorities" as a special condition that might justify heightened judicial review of government action).

95. *Cleburne*, 473 U.S. at 446.

96. *See infra* Part II.

and legislatures on these points will leave us with a rough sketch of the relevant functional differences between Congress and the courts, which should assist us in determining the appropriate scope of the Section 5 power. The Article then applies the lessons learned to *Cleburne*, illustrating how Congress's capabilities translate into a case where the Court was especially concerned about its own role.[97]

Two more tasks will then remain. First, given this Article's assumption of judicial supremacy,[98] it will be necessary to consider how congressional "enforcement" should relate to judicial "interpretation." Second, it will be necessary to consider the federalism implications of a broad congressional-enforcement power. If we assume that the Equal Protection Clause does not give the federal government (whether federal courts or Congress) plenary revisory power over state legislation, this analysis demands an understanding of the enforcement power that appropriately cabins Congress, just as the rational basis standard cabins the courts. In short, these two latter tasks address how our emerging understanding of congressional authority relates to the authority of the two other players in the game: the federal courts (the discussion of the meaning of the terms "enforcement" and "interpretation")[99] and the states (the federalism discussion).[100]

Part II concludes by suggesting in general how this approach nevertheless leaves Congress within a properly limited sphere of authority.[101] As will become clear, the approach to Section 5 sketched in Part II would, if applied to the hilt, provide Congress with broad congressional authority to act. The last part of Part II explains how such power can best be understood to comport with the understanding that neither Section 5 nor the Fourteenth Amendment as a whole was intended to provide the federal government with a general power to overturn any and all actions of state governments.

II. CONGRESS AND EQUAL PROTECTION

A. Legislative Competence and Equal Protection

Our initial insight that equal protection issues require judgments about social reality in a way that other constitutional provisions do not

97. *See infra* Part II.B.
98. *See supra* notes 24-26 and accompanying text.
99. *See infra* Part II.D.
100. *See infra* Part II.E.
101. *See infra* Part II.E.

suggests, in some general way, Congress's "institutional competence" to play a special role in vindicating the equal protection guarantee. It is certainly logical to consider a legislature (and especially the national legislature) the governmental institution that most accurately mirrors society. Thus, why not trust it to determine which groups merit similar treatment under particular circumstances, and which do not, at least when legal sources do not provide a judicially accessible answer? But an intuition about institutional competence is obviously insufficient. Follow-up questions immediately arise. Competence about what? What characteristics of legislatures endow them with this competence? How much deference does this competence differential justify? What if the legislature would tend to find a particular classification appropriate when a judicial determination found the opposite?

This Subpart of the Article begins to answer these important questions. It considers four characteristics of legislatures that render them better able than courts to determine when differential treatment is unreasonable and to remedy perceived violations.

1. Legislatures' Popular Mandate

Most fundamentally, legislatures are presumed to have a popular mandate for their actions, based on legislators' electoral success and accountability. That mandate should empower them to go beyond courts in reordering social relations to conform to the broad requirements of equal protection. Such a mandate may be necessary, or at least useful, in light of the work equal protection is sometimes expected to perform in our system.

Consider the intent requirement in antidiscrimination law announced in *Washington v. Davis*.[102] The *Davis* Court expressed a great deal of concern about a disparate impact rule, finding it to be unsupported by case law,[103] inconsistent with the Court's underlying theory of equal protection as an individual guarantee,[104] and troubling in its broad implications.[105] With regard to the last point, the Court noted that a disparate impact rule would subject a whole variety of tax, social welfare, and regulatory programs to stringent judicial scrutiny, because those programs impacted minorities, who tend to be poorer, differently than whites, who tend as a group to be wealthier.[106] The

102. 426 U.S. 229, 242 (1976).
103. *See id.* at 239-45.
104. *See id.* at 245-47.
105. *See id.* at 247-48.
106. *Id.* at 248.

Court also noted, though, that Congress had mandated a disparate impact test in the field of employment discrimination generally (that is, applicable to private and public employers, and authorized by the Commerce Clause), and implied that Congress might also be able to legislate such a rule in other areas.[107]

Surely one justification counseling congressional over judicial action on an issue like the intent requirement is the broad effect a disparate impact rule would have on government and society. When such a momentous rule is not compelled by unambiguous sources such as a clear textual command, its legitimacy, not just as policy, but as an understanding of what the Constitution requires, depends at least in part on whether it emanates from a politically accountable institution. For example, it may be more legitimate for Congress, rather than a court, to decide that equal protection requires the repeal of college draft deferments or the prohibition of regressive sales taxes, both of which favor wealthier whites over poorer racial or ethnic minorities. The lack of clear constitutional prohibitions against such long-standing practices, either in the text or derived from judicially accessible interpretive tools, when combined with the fundamental changes such decisions would work in governmental operations, counsel congressional rather than judicial action. This is true for the simple reason that fundamental changes in government policy normally should be made by representative branches.

Of course, this is not to say that controversial or radical changes in society cannot emanate from the Court under the auspices of an interpretation of the Equal Protection Clause. Cases such as *Brown v. Board of Education*[108] make clear that the Court can sometimes either

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107. *See id.* at 247-48; *see also id.* at 238 n.10 (noting that in 1972, Title VII had been amended to cover federal employees). It is unclear what source of power the Court had in mind when it suggested that Congress could legislate a disparate impact rule going beyond employment and affecting the "tax, welfare, public service, regulatory and licensing statutes" on which the Court had declined to impose its own disparate impact rule. The two main sources of that power would be the Commerce Clause and Section 5. However, for a Court that had heard oral argument in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the day after it heard the argument in *Davis*, and decided the cases less than three weeks apart, it is quite possible that a majority of the Court thought the Commerce Power did not authorize Congress to regulate how states designed their tax, welfare, and regulatory policies. Thus, it is likely that the *Davis* Court had the Section 5 power in mind when it made this statement.

Ultimately, the argument in the text does not depend on the resolution of this issue. The point of the *Davis* example is to illustrate how and why the Court might be unwilling to impose broad-based changes on government structure in order to satisfy possible equal protection requirements, and how, institutionally, Congress may be better suited to impose them.

108. 347 U.S. 483 (1954).

precipitate a social movement for equality or at least join in at an early stage, even when traditional constitutional interpretation tools yield ambivalent answers. In *Brown*, those tools did yield quite ambivalent answers: the Court had to deal with the fact that segregation was not clearly prohibited by the bare text of the Clause, was quite possibly acceptable to a large number of those voting for its ratification, was widely practiced at ratification, and had been officially accepted by the Court for a half-century. Nevertheless, the Court discounted the ambivalence of the Drafters' intent and the historical evidence, distinguished and then overturned *Plessy v. Ferguson*,[109] and took the correct step of requiring the overhaul of the nation's public schools.

Still, it is worth considering *Brown*'s at best partial success and wondering whether integration would have been more successful if Congress had more aggressively assisted the Court.[110] Indeed, the steps Congress did take—most notably the conditioning of federal education funds on desegregation—helped quicken the pace of change.[111] This is not to say that integration would have occurred immediately, peacefully, and comprehensively had the effort been led by Congress. The anti-*Brown* rhetoric of segregationists, criticizing *Brown* as a judicial usurpation,[112] was largely opportunistic—that is, much, if not most, of that opposition was based on the rejection of integration itself, not the fact that integration was being "illegitimately" imposed by courts. Still, the enhanced legitimacy that undeniably flows when a social revolution is led by Congress, rather than the courts, renders the former an indispensable player in making such revolutions succeed.[113] This is especially the case when judicial pronouncements are based on indeterminate constitutional language, of which the Equal Protection Clause is a prime exemplar. This is not to say that those judicial pronouncements are illegitimate. Nor is it to say that, as a matter of

109. 163 U.S. 537 (1896). In a technical sense, *Plessy* was not overturned by *Brown*, given the latter's emphasis on the importance of education in twentieth-century U.S. life and the empirical evidence suggesting that, in the context of children's education, separate could never be equal. It took the per curiam opinions of the subsequent several years, which struck down Jim Crow laws across the entirety of government action, to provide the real overruling of *Plessy*'s holding that separate but equal facilities did not offend the Constitution.

110. *See generally* William D. Araiza, *Courts, Congress, and Equal Protection: What* Brown *Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199 (2004).

111. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 46-54 (1991).

112. For example, the so-called "southern manifesto" of southern congressmen's opposition to *Brown* spoke in these terms. *See* 102 CONG. REC. H4515 (daily ed. Mar. 12, 1956) (statement of Rep. Smith).

113. *See generally* Araiza, *supra* note 110.

institutional role, courts should stand on the sidelines when controversial equality issues arise. It is, however, to suggest that in some cases the popular legitimacy attached to legislative action makes such action a necessary part of the attempt fully to implement the guarantees of the Equal Protection Clause.

2. Line-Drawing by Courts and Legislatures

Additionally, legislatures can draw certain lines better than courts. In particular, legislatures can embrace distinctions that are arbitrary, in the sense of being based not on principled reasoning but instead on the practical need for a line, even if that line could be drawn in another place with just as much justification. In Archibald Cox's words, this type of line is arbitrary "in the sense that it makes a sharp cut off at some point in a range shading from one extreme to the other by infinitely small differences of degree."[114]

Judicial drawing of such arbitrary lines creates problems for reasons relating to the source of judicial legitimacy. The legitimacy of judicial line-drawing derives largely from a court being able to defend its decisions as the results of reasoned decisionmaking, explainable (and explained) in terms of legal principle.[115] That type of reasoning—deriving principles from earlier cases, applying linguistic and other interpretive tools to ambiguous texts, finding underlying structural principles in a particular textual provision, and then applying the resulting law to the facts of the case—is in tension with the line-drawing described by Professor Cox.[116] By contrast, Congress does not gain its legitimacy from principled explanation, but instead by simply acting in the public good, constrained only by barebones procedural requirements,[117] by textual[118] and penumbral[119] boundaries on its power,

114. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 CINCINNATI L. REV. 199, 230 (1971).

115. For example, the extent to which courts may decide cases without issuing precedential opinions is an issue. *See, e.g.*, Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc). To continue the analogy, agencies, another nonelected branch of government, are generally required to provide reasons for their actions. *See, e.g.*, 5 U.S.C. § 553(c) (2000) (requiring that an agency provide a basis for its decision to promulgate a rule); 5 U.S.C § 557(c) (requiring that an agency provide a basis for its decision); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983). For a well-known statement of the requirement of this sort of reasoning, see *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (speaking of substantive due process as a "rational continuum" rather than a matter of "unguided speculation").

116. Cox, *supra* note 114, at 230.

117. *See* INS v. Chadha, 462 U.S. 919, 949-51 (1983) (requiring bicameralism and presentment before Congress can act in a way having legislative effect).

and by the legitimacy bestowed by elections. As long as it stays within these broad limits, Congress can act in a plenary fashion. Because it need not explain itself in the way a court must, it may draw lines that a court would find difficult to justify as an application of legal principle. Such an advantage is clearly relevant in the context of the Equal Protection Clause, which ultimately concerns federal supervision of state classifications. In supervising those classification decisions, Congress or a court might also need to draw a line. This Article suggests that Congress is superior at that task.

Of course, sometimes courts must draw arbitrary lines of the sort described by Professor Cox.[120] Indeed, this is the situation in a normal Fourteenth Amendment case, in which the court must evaluate the claim without the assistance of a Section 5 statute providing a precise rule of decision. In the course of that evaluation, the court may very well have to draw the arbitrary line not provided by Congress. Consider *County of Riverside v. McLaughlin*.[121] In that case, the Court faced the question of how promptly the Constitution required government to provide a probable cause hearing to an individual arrested without a judicial warrant.[122] In a previous case, *Gerstein v. Pugh*, the Court had required that such hearings be conducted "promptly," while giving states the opportunity to integrate probable cause determinations into other pretrial proceedings.[123] Unsurprisingly, such a vague and ambivalent mandate caused a spate of "systemic challenges" to pretrial procedures that, in the Court's words, put "federal judges in the role of making legislative judgments and overseeing local jailhouse operations."[124]

Given the need for more guidance, the Court provided it. With remarkably little analysis, the Court simply announced a rule that warrantless detentions provided within forty-eight hours were presumptively constitutional, unless delayed for some inappropriate

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118. Such limits would include, but not be limited to, the individual rights guarantees provided by the Bill of Rights.

119. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (prohibiting Congress from abrogating state sovereign immunity when legislating under its Article I power, based on the postulates implicit in the Eleventh Amendment); New York v. United States, 505 U.S. 144, 188 (1992) (prohibiting Congress from "commandeering" state governmental apparatuses for federal regulatory uses, based on nontextual requirements of federalism).

120. *See supra* note 114 and accompanying text.

121. 500 U.S. 44 (1991).

122. *See id.* at 58.

123. 420 U.S. 103, 125 (1975).

124. *McLaughin*, 500 U.S. at 56.

reason such as ill will.[125] Longer delays would be presumed unconstitutional and would lead to a finding of a constitutional violation unless the state proved the existence of an emergency or some other extraordinary circumstance.[126]

The forty-eight-hour rule enunciated in *McLaughlin* is truly arbitrary, in the sense used by Professor Cox. It was based neither on text nor history,[127] nor even on the accumulated experience of judges applying a broad principle and over time reaching a consensus as to what constitutes appropriate delay.[128] This characterization is not necessarily a criticism, because the announcement of a presumptive forty-eight-hour rule may have been the best judicial solution to the problem of particularizing a vague constitutional command. Indeed, leaving the matter as vague as *Gerstein* had left it caused the problems that led the Court to revisit the issue in *McLaughlin*.[129] Nor would it have been clearly better for the Court simply to have reviewed the facts in *McLaughlin* and decided that the delay was or was not unreasonable; such a minimalist result would have provided almost no guidance to the lower courts. Thus, the Court may have done the best it could. Still, there is surely something jarring about the lack of judicially cognizable evidence pointing to a bright line and the Court's enunciation of such a line.

By contrast, Congress could have imposed a forty-eight-hour requirement with much more legitimacy than the *McLaughlin* Court, because it would not have had to justify its choice of forty-eight hours as the product of legal reasoning. Such a Section 5 statute would not obviate the need for judicial examination of the issue; however, that examination would be far easier than the one the Court had to perform in *McLaughlin*. For example, a state might argue that a congressionally imposed forty-eight-hour rule imposed requirements so much more restrictive on states than that required by the Constitution that it constituted inappropriate Section 5 legislation. Conversely, a prisoner might argue that the statutory rule either insufficiently guaranteed his Sixth Amendment rights (incorporated against the states via the

125. *See id.*

126. *See id.*

127. For example, there was no common law rule that such a hearing would have to take place by the end of the day after the arrest was made.

128. For example, dissenting in *McLaughlin*, Justice Scalia argued that lower courts' application of the proper legal standard—promptness, without concern for administrative convenience—yielded a consensus result that, in most cases, twenty-four hours would be sufficient. *See* 500 U.S. at 67-68 (Scalia, J., dissenting).

129. *See id.* at 57-58.

Fourteenth Amendment) or even violated them, if, for example, the statute immunized complying states from constitutional liability, via some sort of safe-harbor provision.[130]

Note, though, that judicial review of these claims would not involve the Court in the kind of line-drawing it felt compelled to perform in *McLaughlin*. The State's argument would require the Court simply to determine whether the Section 5 statute was congruent and proportional to the scope of the underlying constitutional right, without requiring the Court to delineate the scope of that right with complete precision. The prisoner's argument would again require the Court to test a precise rule—the federal statute—against underlying constitutional requirements, without requiring that those requirements be delineated in complete detail. The Court's task in the prisoner's case would be somewhat harder than in the State's case: while in the State's claim the Court would simply have to decide whether the statute was close enough (i.e., congruent and proportional) to the constitutional rule, the prisoner's claim would require the Court to make a finer judgment, namely, whether the statute crossed over the constitutional line, allowing conduct that the Sixth Amendment prohibited. But even this task is easier than the task in *McLaughlin* because all the Court would have to decide is whether the statute crossed over the line, without having to explain comprehensively, as it felt compelled to do in *McLaughlin*, where that line is drawn. In short, the Section 5 statute would provide a target at which the Court could aim its analysis, making it unnecessary for the Court to explain the precise metes and bounds of the underlying constitutional right.[131]

The equal protection guarantee suffers from an even starker lack of judicially accessible meaning than the Sixth Amendment, thus again making legislative line-drawing a useful supplement to judicial action. In the case of equal protection, the line-drawing problem flows from

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130. *Cf., e.g.*, Dickerson v. United States, 530 U.S. 428, 442 (2000) (striking down a federal law prescribing the standard for use of confessions as inconsistent with the constitutional rule the Court held was enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966)). A similar problem was posed in *Katzenbach v. Morgan*, 384 U.S. 641, 643-46 (1966), when New York argued that section 4(e) of the Voting Rights Act itself was unconstitutional in that it amounted to invidious discrimination between different groups of non-English speakers. *See infra* notes 198-202 and accompanying text.

131. Of course, current Section 5 jurisprudence does speak of the Court having to determine "the metes and bounds" of the constitutional right sought to be enforced. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001). But because the Section 5 inquiry is ultimately concerned with the degree of fit between the enforcement statute and the underlying right, there is less need to determine those "metes and bounds" with the same precision as when the ultimate issue is the scope of the constitutional right itself.

the lack of legal standards that help courts distinguish between reasonable and unreasonable classifications. A decisional device such as the denomination of a group as a suspect class might help a court decide the issue, but, as suggested by *Cleburne*, such a device at best provides only an approximation of the constitutional requirement; statutes might still be struck down under the rational basis standard,[132] while they might be upheld under a stricter one.[133] Moreover, determining whether a group is a suspect class is itself an exercise in line-drawing, as the *Cleburne* Court made clear when it expressed its discomfort at the prospect that granting that status to the mentally retarded might make it impossible to deny it to groups such as the aged and the infirm.[134]

This analysis suggests a larger congressional role in enforcing the equal protection guarantee, given the nature of the inquiry that equal protection mandates. In particular, Section 5 statutes, as lines drawn by an entity that draws its legitimacy from a source other than its pretensions to accuracy in discerning constitutional rules, need not be the result of the interpretive process, with all its constraints and methodological requirements. But the rules in Section 5 laws still need to be anchored in some legal principle. This issue—a crucial one going to the heart of the Section 5 power—is taken up later in this Article. For now, it suffices to acknowledge that Congress's superior flexibility in drawing arbitrary lines comes with a price—the need to justify those lines as something other than an interpretation of the Constitution. The basic point remains, however: Congress does have more line-drawing flexibility than courts, and that flexibility should logically allow Congress a significant role in prescribing rules of conduct as part of its Section 5 power, especially with regard to equal protection.

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132. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633 (1996) (holding an amendment to the Colorado Constitution, which prohibited all legislative, judicial, or executive action designed to protect homosexuals from discrimination, to be an unconstitutional violation of the equal protection clause); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (striking down as unconstitutional certain zoning laws that prohibited the establishment of group homes for the mentally retarded in certain zoning districts); Plyler v. Doe, 457 U.S. 202, 223 (1982) (striking down a Texas law denying education to noncitizen children of illegal immigrants, despite their status as a nonsuspect class).

133. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding a race-based affirmative action policy); Nguyen v. INS, 533 U.S. 53, 64 (2001) (upholding a gender-based immigration regulation).

134. *See* 473 U.S. at 445-46.

3. Congress's Role in Determining Animus

As discussed earlier, the equal protection guarantee applies to all government classifications, not just to the race classifications that were undoubtedly at the center of the Drafters' concerns.[135] Yet, it should also be uncontroversial that the Equal Protection Clause was not intended to give federal courts (or Congress, via Section 5) a freewheeling power of review over all state laws that classify. Government requires experimentation, and it should not be beyond government's power to make good faith mistakes with regard to the classifications that will best further its legitimate interests, at least when those classifications do not touch the forbidden territory of racial oppression. While to an important degree the rational basis standard speaks to judicial competence concerns, equal protection's underlying rule, that states need not be perfect when they draw lines, should also limit Congress when it uses its Section 5 power.

Thus, the Equal Protection Clause applies to all classifications, but usually does not require perfect classifications. But if the Clause does apply, then presumably it must impose some requirement. At the very least, equal protection should require governmental good faith. If that good faith is missing, there is no reason to give government the benefit of the doubt and to allow it to draw imperfect lines. Therefore, if there is a judicially discovered principle in the Equal Protection Clause, beyond a guarantee of racial equality, it must be a prohibition on animus. This Article suggests that the nature of animus is such that Congress is better able than courts to recognize it.

In theory at least, the rational basis standard guards against animus. In the rare cases where statutes fail that standard, the Court often concludes that the statute was motivated by animus against the burdened group. Such a conclusion logically follows from a failure to satisfy rational basis: if there is not even a rational argument that a particular classification might further a legitimate government interest, then the only possible conclusions are that the government is utterly irrational or motivated by an illegitimate interest. The first of these possibilities is extraordinarily rare.[136] As for the second possibility, the

135. *See supra* text accompanying notes 36-37.

136. In *Allegheny Pittsburgh Coal Co. v. County Commission*, the Court struck down a West Virginia county's acquisition-value tax valuation scheme, holding that it violated a taxpayer's equal protection rights in light of state law requiring a more uniform tax rate. 488 U.S. 336, 345-46 (1989). Because acquisition-value schemes were upheld three years after *Allegheny*, *see* Nordlinger v. Hahn, 505 U.S. 1, 17 (1992), the flaw in the West Virginia

Court's clearest discoveries of such illegitimate interests are in *City of Cleburne v. Cleburne Living Center, Inc.*[137] and *Romer v. Evans*,[138] where, after disposing of the state's arguments that the challenged law furthered a legitimate state interest, the Court was left with the conclusion that the statute must have been motivated by animus.[139]

But while sometimes the rational basis standard detects animus, there is good reason to believe that it does not do a complete job. Animus—in the Supreme Court's words, "a bare . . . desire to harm a politically unpopular group"[140]—can be discovered directly, by reaching direct conclusions about legislative motivations, or indirectly, by eliminating all legitimate explanations for a classification, leaving nothing as a motivation except simple dislike. *Cleburne* and *Romer* provide examples of both methods. In *Cleburne*, the Court found it easy to attribute animus to the city's denial of a permit for a group home for the mentally retarded, as the city defended its actions by, among other things, reference to residents' fear and dislike of the mentally retarded and concern about harassment by students at nearby schools.[141] By explicitly citing residents' fears and dislikes as a reason

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scheme must have been its irrationality as a means of ensuring the uniformity mandated by superior state law.

In two cases, the Court struck down as irrational state laws that distinguished between newer and longer-term state citizens. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 622-23 (1985), *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982). These cases are somewhat different from *Allegheny*, in that the burdened classes—future immigrants into the state—were in a real way shut out of the decisionmaking process. For this reason, these cases should probably not be read as true "utter irrationality" cases, but instead as cases where a group was almost by definition shut out of the political process, thus justifying more critical judicial scrutiny. That heightened scrutiny was also justified by the federalism concerns inherent in state laws that created different classes of state citizenship depending on date of arrival. *See Zobel*, 457 U.S. at 65 (Brennan, J., concurring) (discussing the right to travel as a federal interest implicated by the statute); *id.* at 71 (O'Connor, J., concurring) (same); *see also* Saenz v. Roe, 526 U.S. 489, 506 (1999) (striking down a California law restricting recent arrivals' welfare benefits to that of their state of origin, based on the federal right to move from state to state, enshrined in the Fourteenth Amendment's Privileges and Immunities Clause).

137. 473 U.S. 432 (1985).

138. 517 U.S. 620 (1996).

139. *See id.* at 634 ("A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."); *Cleburne*, 473 U.S. at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . ."). In *Cleburne*, the inference of animus was more direct, as some of the justifications offered by the state—e.g., neighborhood fear and dislike of the mentally retarded who wanted to live nearby—were cited as direct evidence of animus. *See id.* at 448-49. In *Romer*, the inference of animus was more indirect, as it was based on a conclusion that none of the State's legitimate interests were in fact plausible. *See* 517 U.S. at 636.

140. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

141. *See Cleburne*, 473 U.S. at 448.

for the challenged action, the city made the plaintiffs' case about the animus lurking in the government's action.[142] In *Romer*, by contrast, the state justified its actions by reference to theoretically legitimate concerns about conservation of law enforcement resources and protection of the associational rights of small-scale landlords who preferred not to rent to gays and lesbians.[143] After discounting the plausibility of these justifications due to the extraordinary disconnect between them and Amendment 2's scope,[144] the Court concluded that Amendment 2 could only have been motivated by animus.[145]

Both of these approaches present problems for courts. First, indirect imputations of animus, as in *Romer*, require the Court to go beyond the normal deferential level of review that characterizes the rational basis standard. That standard requires only the most tenuous connection between the classification and a legitimate government interest; mere over- or under-inclusiveness does not doom the government's action. The fact that the Court demanded a tighter connection in *Romer* does not mean that it is willing to do so in every situation; indeed, such heightened scrutiny is, by its very terms, inconsistent with the Court's own explication of rational basis review.

Direct identification of animus, as in *Cleburne*, seems at first blush a more promising approach. But serious problems attend this method as well. Government will rarely justify its actions only by reference to fear and dislike of the burdened group. Indeed, in *Cleburne* itself, the city offered other justifications for its action, which required the Court to engage in the same heightened ends-means review as in *Romer*.[146] In the absence of official government incorporation of private biases, direct identification of animus requires courts to draw conclusions about the subjective intent of government decisionmakers. Such conclusions are difficult to draw with confidence, and, indeed, the Court has on other occasions cautioned against overreliance on the evidence necessary to draw such conclusions.[147]

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142. *See id.*

143. *See Romer*, 517 U.S. at 635.

144. Adopted by a statewide referendum, Amendment 2 amended the state constitution to prohibit state actors from recognizing any protected status based on sexual orientation. *Id.* at 623-24.

145. *See id.* at 635.

146. *See Cleburne*, 473 U.S. at 449-50 (discounting the plausibility of legitimate reasons for the permit denial, such as concern about evacuation during floods).

147. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 382-85 (1968). The Court's embrace of the intent standard for equal protection claims generally, *see* Washington v. Davis, 426 U.S. 229, 242 (1976), is not to the contrary, because the Court has made clear that intent can be inferred from indirect evidence, in much the same way that animus can be inferred by

These problems suggest the difficulty the Court has had explaining its "rational basis plus" cases. Indeed, Justice O'Connor was recently moved to acknowledge that cases such as *Cleburne* and *Romer* involved something more than traditional rational basis review,[148] a suggestion the rest of the Court has not been willing to embrace, at least officially.[149]

Most relevant to the difference between legislative and judicial competence to find animus, however, is the very nature of the concept. Animus, as the Court uses that term, is nothing more than a label placed on an irrational government action where a court suspects that there is more than mere irrationality afoot. To see why this is so, consider *Allegheny Pittsburgh Coal Co. v. County Commission*, in which the Court struck down, as unconstitutionally irrational, a property-tax valuation scheme that overvalued newly purchased property relative to long-held property.[150] Unlike most cases in which a state action was struck down as failing rational basis, the Court's decision in *Allegheny* made not even a suggestion that the State's action was motivated by animus.[151] The lack of such a suggestion is completely understandable; after all, nobody would suspect that society harbors a hatred for recent purchasers of property. But this explanation indicates the conclusory nature of the label, as something we attach when we suspect that legislatures have done more than make a good faith mistake. If animus is indeed simply a label reflecting such an intuitive judgment, then Congress may be better suited than courts to reach that judgment, or, at the very least, should share with the courts some authority to reach it.

Describing animus as a label is simply another way of stating that it is a value choice, a characterization we choose to give to a government action. As a value choice, there is every reason to give Congress at least some authority to make it. Congress, as a national and representative institution, is far better placed to attach social meaning to classifications, which is essentially what happens when a

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rejecting the plausibility of legitimate reasons for a given classification. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (discussing factors relevant to a judicial finding of discriminatory intent).

148. *See* Lawrence v. Texas, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring).

149. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 366 (2001) (concluding that *Cleburne* was the result of traditional rational basis review). Interestingly, Justice O'Connor joined in that opinion. *See id.* at 374-76 (Kennedy & O'Connor, JJ., concurring).

150. 488 U.S. 336, 346 (1989).

151. *See id.* at 336-46. *But see* Romer v. Evans, , 517 U.S. 620, 636 (1996); *Cleburne*, 473 U.S. at 450; U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (all suggesting or explicitly finding animus).

court holds a classification to be based on animus. Finding animus requires consideration not just of the extent to which legitimate government ends might be served by a particular classification—that is, traditional ends-means fit analysis—but also of the underlying message a classification communicates. To return to the example of *Allegheny*, we would normally not view as animus-based a classification of property owners based on when they bought, because there's nothing in our society that makes us concerned about visceral dislike of recent property purchasers. But consider a society transitioning from feudal to capitalistic, where recent property purchase might be seen as indicating status as a social-order disrupting parvenu. In such a society, recent property purchasers might well be the victims of visceral dislike (at least by long-established groups). Which governmental institution is best suited to determine which of these two societies we live in? Most of us would say Congress.

4. Congress as Fact Finder

One institutional advantage the Court has long-conceded to Congress is the latter's superior fact-finding ability. But even here, the Court's recent Section 5 jurisprudence and its recent federalism jurisprudence generally have imposed more exacting requirements than in the past. In *United States v. Lopez*, for example, the Court expressed a preference for explicit findings linking regulated conduct to interstate commerce when the link was not otherwise immediately visible to the Court.[152] In the Section 5 cases starting with *City of Boerne v. Flores*,[153] the Court has insisted that the challenged statute be supported by findings documenting the widespread prevalence of precisely described conduct. For example, in *Kimel v. Florida Board of Regents*, the Court examined the legislative record for specific examples of unconstitutionally invidious state-sponsored discrimination (in that case, based on age).[154] According to the Court, this careful review was necessitated by the broad scope of the burdens the challenged statute placed on states, burdens that went beyond the

152. *See* 514 U.S. 549, 563 (1995). In the next case after *Lopez* where the Court struck down a statute as exceeding the commerce power, the Court discounted altogether the existence of facts tending to show a link between the regulated activity and interstate commerce, concluding that those facts established the kind of attenuated connection that was simply insufficient to justify federal regulation. *See* United States v. Morrison, 529 U.S. 598, 614-15 (2000).

153. 521 U.S. 507 (1997).

154. 528 U.S. 62, 91 (2000) (striking down applicability of the ADEA to the states as inappropriate Section 5 legislation).

requirements of the Equal Protection Clause as applied via the rational basis standard.[155] The Court found the legislative record inadequate, as too skimpy or only tangentially related to the unconstitutional conduct Congress was purporting to deter.[156] In *Board of Trustees v. Garrett*, the Court insisted on even more precise findings.[157] In particular, it refused to consider findings of discrimination by subunits of state governments; questioned whether the identified instances of state discrimination amounted to unconstitutional conduct; and concluded that even if they did, they did not comprise a sufficiently widespread pattern to justify the challenged statute.[158]

Commentators have debated the Court's recent attitude toward congressional fact-finding, with some considering it disrespectful of a coordinate branch and uncomprehending of the realities of the legislative process, and others endorsing it with varying degrees of enthusiasm.[159] This Article does not directly join that debate. Rather, this Article focuses on the type of fact-finding competence that is most relevant to the argument that, among Fourteenth Amendment rights, equal protection is uniquely susceptible to congressional action. Unlike fact-findings relevant to other legal rights, fact-findings with regard to equal protection ultimately speak to whether a government classification reflects an illegitimate value choice about the social status of particular classes. Unlike, for instance, congressional fact-findings about the scope of state patent infringements or the adequacy of state law remedies—findings that, while perhaps deserving of some deference, can at least be evaluated by a court using methods

155. *Id.* at 88-91.

156. *See id.* at 89 (describing "isolated sentences clipped from floor debates and legislative reports," discrimination that was traced only to one state, which remained legal under the challenged statute; and discrimination performed by private entities, tied to state governments only by analogy).

157. 531 U.S. 356, 368-72 (2001) (striking down applicability of Title I of the Americans with Disabilities Act to the states, holding it to be inappropriate Section 5 legislation).

158. *See id.*

159. *See, e.g.*, Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New 'On The Record' Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 329 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 141-43 (2001); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 697-98 (1996); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 760 (1996); Harold J. Krent, *Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 733-34 (1996).

accessible to it[160]—a finding that "refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification" requires an evaluation of the social meaning of the state's action, a meaning that a democratically elected Congress is better suited than a court to attach.[161]

Of course, a Congress interested in regulating, say, disability-based discrimination must do more than simply announce its value choice that such discrimination is irrational or animus-driven. In order to justify imposing burdens on the state, there must be at least some finding that such a burden is justified by the existence of such unconstitutional action.[162] But if the constitutional harm of disability discrimination lay in the social meaning it communicates, and if Congress is better than courts at determining that social meaning, then there is surely no justification in the Court requiring, as it did in *Garrett*, that the facts found by Congress be sufficient to convince a court to strike down such conduct as failing rational basis. This is not to say that courts should never make such judgments; indeed they must when a plaintiff brings an equal protection challenge against a classification that is not the subject of a Section 5 statute. But there is no reason to privilege judicial findings on these issues. Indeed, the rational basis standard, properly understood, reflects the courts' acknowledgement of their difficulty in authoritatively concluding that such facts exist.

As always in the Section 5 context, Congress's latitude to act must be understood in relation to its power merely to "enforce" the Fourteenth Amendment. This limitation on the Section 5 power reflects the Article's starting point that current Supreme Court doctrine enforcing a line between "enforcement" and "interpretation" is settled and not the object of disagreement among the Justices.[163] Thus, in the Section 5 context, Congress's fact-finding competence necessarily

160. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645-46 (1999) (questioning whether negligent action can amount to infringement of a patent and thus to deprivation of a property interest); Ingraham v. Wright, 430 U.S. 651, 696 (1977) (considering the adequacy, for due process purposes, of a post-deprivation remedy for a violation of a child's liberty interest in not being subject to state-sponsored corporeal punishment).

161. *Garrett*, 531 U.S. at 384 (Breyer, J., dissenting).

162. The literature on this topic is largely addressed to the degree of deference owed congressional findings of this sort. *See, e.g.*, Bryant & Simeone, *supra* note 159, at 367 (arguing that *Katzenbach v. Morgan*, 384 U.S. 641 (1966), must be read as enunciating a broad rule of deference to facts that Congress might have found to justify a Section 5 enactment); Buzbee & Schapiro, *supra* note 159, at 107-08 (same).

163. *See supra* notes 24-26 and accompanying text.

stands in relation to the Court's own interpretation of the Fourteenth Amendment. For example, if the appropriate way to understand the Court's attitude toward age discrimination is that such discrimination is so rarely constitutionally problematic as to warrant only rational basis review, then a broad congressional prohibition of such discrimination might be thought to require convincing facts indicating that much age discrimination was in fact so irrational as to be unconstitutional. This was the way the Court reviewed Congress's fact-findings in *Kimel*.[164] The Court noted that the group protected by the statute was not a suspect class; acknowledged the possibility that the problem posed by age discrimination could have been worse than it thought; and proceeded to determine whether Congress had in fact so found, concluding that it had not, or at least that the evidentiary support for that finding was insufficient.[165]

This Article argues, however, that the Court has in fact misunderstood the implications of a decision to subject a particular classification, such as age, to only rational basis review. It argues that such a decision does not mean that almost all such classifications are constitutional, but instead, that courts do not have the authority to second-guess the state's judgment. Given its unique characteristics, Congress should have that authority. This Article argues that the Court misunderstands what it means to be a nonsuspect class, and what authority Congress thereby has to consider the reasonableness of such classifications, and therefore necessarily misunderstands the role of fact-findings in supporting Section 5 enactments.

Properly understood, Congress's fact-finding competence addresses more than whether it has found facts that, if a court had found, would move the latter to hold that equal protection had been violated. That model of congressional fact-finding reduces Congress to a pure adjunct of the Court, an inappropriate role when, as in rational basis cases, the Court has confessed its inability to fully discern when the Constitution is being violated. Rather, Congress's ability to find facts should justify its making an independent determination when the judicially announced constitutional rule is being violated. Note that the larger question of what constitutes a constitutional violation is still reserved to the judiciary; in rational basis cases, this is the rule against arbitrary or invidious classifications.

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164. *See* 528 U.S. 62, 82-92 (2000).

165. *See id.* (noting that age is not a suspect classification); *id.* at 89-92 (finding insufficient evidentiary support for a congressional fact-finding adequate to justify the ADEA's broader rule).

This Article argues that Congress is uniquely suited to uncover and evaluate facts that determine whether or not that rule has been violated.

B. Application of These Characteristics: Cleburne

The characteristics of legislatures discussed above surface in the Court's suspect class analysis in *Cleburne*.[166] The appropriate place to start is with the Court's final, and most overtly prudential, justification for rejecting suspect class status for the mentally retarded. Recall that the Court concluded its suspect class analysis by expressing concern that a contrary holding would encourage a flood of other groups to request similar status.[167] Extraordinarily, the Court described these groups—consisting of at least "the aging, the disabled, the mentally ill, and the infirm"[168] in terms that seem to make them prime candidates for suspect class status:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult . . . to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.[169]

This passage gives pause. It suggests that satisfaction of the standard criteria for suspect class status immutability, a history of discrimination, and political powerlessness[170]—do not necessarily mean that a court should *hold* that the group is in fact a suspect class.[171] Unless the Court is implicitly abandoning those criteria (an explanation unsupported elsewhere in the opinion or in the Court's subsequent equal protection jurisprudence[172]), the Court must have believed that sometimes the negative prudential consequences of granting suspect class status outweigh legal arguments in favor.

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166. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

167. *Id.* at 445-46.

168. *Id.* at 446.

169. *Id.* at 445.

170. *See, e.g.*, *id.* at 445-46 (discussing criteria for suspect class status).

171. It is worth noting that two of the groups so described—the aged and the disabled—have been the subjects of Section 5 legislation that the Court has struck down in recent years. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 383 (2001) (striking down part of the Americans with Disabilities Act as inappropriate Section 5 legislation); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (reaching the same conclusion with regard to the ADEA).

172. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987) (using these criteria to determine whether a group constitutes a suspect class); Lyng v. Castillo, 477 U.S. 635, 638 (1986) (same).

Obviously, one of those consequences feared by the Court was the prospect that if the mentally retarded were granted suspect class status, many other groups could make similar arguments for heightened scrutiny. This "floodgates" concern is a legitimate one—at least since the legal realists, it has been accepted that a court formulating a legal rule must be aware of the rule's practical implications as well as its formal logic. In this case, the potential opening up of the floodgates to suspect class claims by a variety of other groups would present the Court with a dilemma: either expand greatly the judicial role in equal protection analysis, with all the attendant implementation problems and concerns about judicial over-reaching, or else attempt to distinguish between groups in ways that would be criticized as unprincipled.[173] A line had to be drawn, the Court seems to say. In *Cleburne*, it drew the line at the very beginning.

These concerns about overreaching and line-drawing are much less salient for a legislature. As a political institution with a constantly renewed democratic mandate, Congress is less susceptible to the charge of imperialism.[174] The idea of self-limitation is at least formally inapplicable to the body that represents the people, and whose powers, within its proper sphere, are understood to be plenary. Congress's democratic legitimacy also spares it from the requirement that it use legal reasoning to justify the lines it draws. Thus, unlike the Court,

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173. *See, e.g.*, Washington v. Davis 426 U.S. 229, 248 (1976) (noting the large number of governmental decisions that would be subject to strict scrutiny under a disparate impact standard).

174. Of course, Congress is sometimes criticized for over-legislating, that is, legislating in areas that as matters of policy should be left to state and local governments, even if such legislation is clearly within Congress's constitutional powers. It is also criticized for encroaching on the constitutional prerogatives of other governmental entities, most notably the executive branch and the states.

The first of these criticisms ultimately founders on the simple fact that if the polity desires less federal regulation, it can vote in accordance with that wish. Past electoral events, most notably the 1994 congressional elections that brought to power Republican leaders committed to devolving authority onto the states, suggest that there is not an unceasingly upward ratchet of federal regulation as compared with state autonomy.

The second criticism can be countered by observing that judicially imposed limits on Congress's power have the potential to cabin Congress's power to usurp other branches' constitutional authority. The current Court has shown significant willingness to impose such limits on Congress, especially with regard to Congress's regulation of the states or usurpation of state regulatory prerogatives. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1999); United States v. Morrison, 529 U.S. 598 (2000); New York v. United States, 504 U.S. 144 (1992); City of Boerne v. Flores, 521 U.S. 507 (1997). As suggested later in the Article, judicially enforceable limits on Congress's Section 5 power do exist. *See infra* Part III.B. The important point for our purposes is that within those limits, Congress's power is plenary; that is, it does not require principled justifications for when Congress regulates and when it declines to.

Congress can legitimately provide extra protection for, say, the mentally retarded while denying it to the aged.

An analogue to the line-drawing problem appears in *Katzenbach v. Morgan*, one of the foundational Warren Court Section 5 cases.[175] In *Morgan*, the Court upheld as a valid Section 5 enactment section 4(e) of the Voting Rights Act of 1965, which required states to grant voting rights to Spanish speakers who had attained a sixth-grade education in Spanish-language American-flag schools (essentially, schools in Puerto Rico).[176] For present purposes, the interesting part of *Morgan* is the Court's answer to the State's argument that section 4(e) itself constituted invidious discrimination, by distinguishing between non-English speakers with regard to the right to vote.[177] Justice Brennan's response—that section 4(e) was "a reform measure"[178] and thus did not call forth the strict scrutiny required when a statute denied rights—moves toward the same understanding put forward in this Article about legislatures' superior capacity for line-drawing.[179] His response relies on his conclusion, earlier in the *Morgan* opinion, that the Section 5 power is plenary, and thus provides the legislature with broad authority to pick and choose the problems that call most urgently for legislative correction.[180] While *Morgan*'s description of the Section 5 power as plenary is usually cited as authority for Congress to go beyond the constitutional rule enunciated by the Court,[181] it also supports his deference toward Congress's decision *not* to go farther than it did, that is, to draw lines between groups that receive a benefit and those that do not.

Justice Brennan's task in answering the state's argument was especially challenging because section 4(e) dealt with a judicially declared fundamental right,[182] where the availability of judicially cognizable sources of meaning might have warranted higher judicial

175. 384 U.S. 641 (1966).

176. *See id.* at 648.

177. *See id.* at 656.

178. *Id.* at 657.

179. Indeed, that answer cited the familiar rational-basis standard concept that legislatures could attack problems "one step at a time." *See id.*

180. *See id.* at 655-56.

181. *See, e.g.*, Robert A. Destro, *"By What Right?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion"*, 29 IND. L. REV. 1, 80 (1995); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 118-19; Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 905 (1994).

182. *See* Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

scrutiny. In other words, the State in *Morgan* could reasonably have argued that congressional line-drawing is especially questionable when, as in section 4(e), the differential treatment concerned a fundamental right such as voting. By contrast, when, as in *Cleburne*, the issue is purely whether legislation burdening a group should get higher scrutiny without any fundamental right at stake, the constitutional question reduces to whether judicially cognizable differences, explainable in the language of legal doctrine, exist between groups that justify granting suspect class status to one group but not another. As the Court in *Cleburne* suggested in its "floodgates" paragraph, judicially accessible reasoning may not be available to distinguish between, in that case, the mentally retarded on one side and the aged, the disabled, and the infirm on the other.[183] In turn, that lack of reasoning might lead the Court to err on the side of protecting none of those groups. But Congress, as long as it remains within the scope of power Section 5 grants it (a big if, examined below[184]), need not make such all-or-nothing decisions.

Institutional competence also helps explain another justification the *Cleburne* Court offered for denying suspect class status to the mentally retarded. In the paragraph immediately following the one quoted above,[185] it stated:

> Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.[186]

183. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).
184. *See infra* Part II.E.
185. *See supra* text accompanying note 169.
186. *Cleburne*, 473 U.S. at 446.

In essence, the Court concludes here that heightened scrutiny is too blunt a tool to apply to classifications based on mental retardation, where instances of unconstitutional conduct are mixed in with mainly legitimate government action.

So understood, the Court again indicates a concern with line-drawing. Unlike the concern noted above, though, in which line-drawing concerned different groups seeking suspect class status, this latter concern can be described as on a micro level, namely, between particular legitimate and illegitimate burdens imposed on a given group. This type of line-drawing problem implicates a different competence concern. Here, the Court faces a classification criterion, mental retardation, that is mainly legitimate, but can be misused (as the Court held it was in *Cleburne* itself). The fact that most uses of the criterion are legitimate deprives the Court of strict scrutiny, its most useful tool in determining equal protection violations, much like the presence of significant numbers of civilians in a combat area deprives a humane military force of the option of using its most indiscriminate weapons. Thus, the Court must go in on foot, parsing good from bad classifications as they arise, much like an army in this situation must go house to house.

Congress is better situated than courts to engage in this particularized sifting, because Congress can mold a Section 5 statute to address what are perceived to be the most serious threats of unconstitutional conduct. A statute can provide a detailed set of regulations for one subject area and a different set for another, while leaving a third area largely untouched, all based on perceived constitutional concerns. In the context of mental retardation, for example, Congress could impose more intrusive requirements with regard to zoning laws, which it might perceive as especially susceptible to animus-based manipulation based on residents' unreasonable fears of retarded individuals, and less intrusive requirements, or none at all, with regard to education, if it appears that states can be trusted to do the right thing, or if the "right thing" is a matter of honest disagreement among professionals. In short, the flexibility inherent in legislative action allows Congress to more effectively detect and remedy the merely occasional equal protection violations that burden most groups in society.

Judicial decisionmaking does not allow for this flexibility. A court considering a rational basis challenge to a government action tests the facts against the single, broad legal principle that government action may not be based on animus or, as in *Allegheny*, on some

extreme level of irrationality. Thus, a court's decision striking down a government action as lacking a rational basis is almost necessarily particularistic. Under standard doctrine, that decision means that every legitimate explanation for the challenged action has been considered and found wanting, revealing an unusual, almost idiosyncratically foolish or mean-spirited government action.[187] Such a decision sends a decidedly mixed message to lower courts. On the one hand, the action struck down is condemned as severely irrational or mean-spirited, while on the other hand, the court's focus is necessarily so particularized that the precedential impact of that decision is presumably quite narrow.[188] This problem is compounded by the fact that judicial review yields an all-or-nothing result—an affirmance or a strike down. These characteristics of rational basis review make it less of an effective guard against unthinking or animus-based action, and more an arbitrary lightning bolt that, when effective at all, completely wipes out one action but leaves similarly problematic conduct untouched. Congress, with the flexibility inherent in legislation, can craft a result that is at once broader, in the sense of applying to a general species of potentially problematic government action, and more nuanced, in the sense of imposing rules that fall between complete approval and outright prohibition.

C. Congress Versus State Legislatures

Up to this point, most of the institutional argument in favor of Congress could apply just as easily to state legislatures. This Article has occasionally referred to characteristics of Congress that distinguish it from state legislatures—most notably, Congress's nationwide

187. One is reminded here of Tolstoy's words in *Anna Karenina*: "happy families are all alike; every unhappy family is unhappy in its own way." LEO TOLSTOY, ANNA KARENINA 3 (Constance Garnett trans., Barnes & Noble Books 1997) (1878). My attention was called to this quote by a work by Laurence Tribe. *See* Laurence Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future-Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 (1999) (paraphrasing Tolstoy).

188. Such a decision might serve as a signal to other courts that the burdened group should not be considered a per se loser in any equal protection claim. In that sense, the victory, for example by the retarded in *Cleburne*, could be seen as informal precedent that retardation classifications should be examined with some care. Moreover, such a decision might be cited as support for a subsequent grant of suspect-class status, on the ground that the earlier decision was in effect an example of that group receiving heightened scrutiny. This is, for example, a common explanation of the evolution of gender as a suspect class. In *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973), Justice Brennan's plurality based its argument for heightened scrutiny for gender classifications in part on the fact that in *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), the Court had in fact already started scrutinizing such classifications more carefully.

representativeness—but for the most part the claims made above could apply almost as easily to a state legislature. This conclusion is troubling for any argument about the scope of the Section 5 power, because that power is aimed explicitly at states, and largely at state legislatures. Is there anything particular about Congress that justifies giving it a superintending power over state legislatures?

One obvious answer to this question rests on the text of the Fourteenth Amendment. Congress is different from state legislatures, this argument goes, because the Amendment says so. The Fourteenth Amendment limits states' prerogatives, and Section 5 accords an enforcement role, however defined, to Congress. This textual argument is buttressed by the undeniable fact that, whatever else the Drafters intended, they clearly meant to impose some federal constitutional limits, based on a basic principle of equality, on how states could treat individuals. These textual and historical arguments are necessary to understanding Congress's power under Section 5. Nevertheless, they do not relate to any unique institutional competence Congress may enjoy over state legislatures.

Still, institutional differences between Congress and state legislatures do exist, and have been recognized since 1787. Most notably, Madison's theory of faction rests on a belief that smaller republics were more prone to private-regarding, factional politics, the kind of politics that produces exactly the kind of animus that is one of the few solid rules emanating from the Court's equal protection jurisprudence.[189] Put another way, Congress's national scope ensures that, as between Congress and state legislatures, the former is best able to make determinations about the reasonableness of government classifications.

This institutional argument must not be overread. Madison's theory of factions is justly praised for its insight and explanatory power,[190] but using it to justify congressional power to override any state classification decision would surely place on it more weight than it can bear. There must be some external limits on that power, unless we are to conclude that the Drafters of the Fourteenth Amendment

189. *See* THE FEDERALIST No. 10 (James Madison).

190. *See generally, e.g.*, Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1330 (1994). For an innovative modern application of Madison's theory, see Alexandra Natapoff, *Madisonian Multiculturalism*, 45 AM. U. L. REV. 751, 752-56 (1996) (applying Madison's theory to critique the Supreme Court's insistence on race-blind government action).

intended to place in Congress a general veto power over any state legislation that classifies.

Ultimately, federalism-based limits on Section 5 do not derive mainly from functional considerations themselves, but from one of the relatively few solid rules of law that has emerged from courts' experience with the Equal Protection Clause. That rule, alluded to throughout this Article, but the specific focus of the next subsection, is the rule against animus.

D. The Antianimus Rule and the "Enforcement" of Equal Protection

The antianimus rule goes a long way toward integrating the Court's approach to equal protection with a richer understanding of the Section 5 power. That rule is in fact an interpretation of the equal protection guarantee, as opposed to a mere mechanism for deciding cases. The Court's interpretation of the Clause as enshrining a rule against all arbitrary classifications—that is, all classifications enacted simply to burden one group relative to another—constitutes a meaningful statement of law, and a reflection of judicial supremacy in the law-declaring function. Such a rule has strong historical support in the antebellum ideas of equality and nonarbitrariness that were clearly on the minds of the Fourteenth Amendment's Drafters.[191]

An understanding of equal protection as fundamentally a rule against animus allocates a significant role for Congress in marshaling its capabilities to give that rule life in concrete circumstances. Especially suited to congressional action are situations where detecting animus requires either significant findings of policy-type facts or finely tuned judgments about the social meaning accorded particular classifications, or where combating animus requires restructuring of social institutions.[192]

This suggestion of broader congressional competence does not trivialize the Court's law-declaring power. The antianimus rule was the product of judicial interpretations of the Equal Protection Clause, interpretations that rejected both broader and narrower views of the

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191. *See, e.g.*, GILLMAN, *supra* note 45, at 19-99; WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 64 (1988) ("Both in the debates in Congress during which the Fourteenth Amendment was framed and in the ratification debates in the states, proponents of section one . . . referred to the same libertarian and egalitarian principles that they had commonly used during the three previous decades.").

192. *See* Araiza, *supra* note 110, at 223.

Clause.[193] By rejecting other possible understandings of equal protection, the courts have stated authoritatively its meaning as a rule against animus. Such a statement reflects the *Marbury v. Madison* power "to say what the law is,"[194] and thus demonstrates the continued importance of the judicial role, not just in deciding cases under the Equal Protection Clause, but also in explaining what it ultimately means.

Another such statement of what the Clause actually means appears when the Court determines that a particular classification tool, most notably race, is presumed unreasonable. As argued earlier, the application of strict scrutiny to a classification such as race reflects the Court's confidence that the classifying criterion serves no legitimate purpose.[195] In such cases, the Court applies the device of strict scrutiny to give concrete meaning to the antianimus rule.[196] In those cases, the Court's analysis constitutes a direct interpretation of the equal protection guarantee, not an interpretation mediated through the filter of deferential review. That analysis should enjoy the status of a true judicial interpretation of the law, immune from congressional second-guessing (although still amenable to congressional protection[197]).

This analysis in turn presents a new perspective on the Court's declaration in *Morgan* that the Section 5 power is a one-way ratchet, authorizing expansions but not dilutions of court-found Fourteenth Amendment rights.[198] Subsequent commentators, as well as Justice Harlan dissenting in *Morgan* itself, have criticized the ratchet concept

193. The Clause could have been interpreted to protect only African-Americans, or even only ex-slaves. It could have been interpreted to ensure only that a law had to be applied equally to everyone to whom it applied, even if the law itself was facially discriminatory, or to apply only to a limited set of rights, such as those understood in the nineteenth century as "civil" rather than "political" or "social." The Clause could have been interpreted to deal not with classifications generally, but with the protection of groups. None of these paths was taken, or at least none enjoys judicial acceptance today. The Clause applies to all governmental classifications, from race-based decisionmaking to classifications based on membership in one economic interest group as opposed to another, regardless of whether the classification is with regard to provision of a right, only to intentional classifications, and to individuals as opposed to groups. The strong historical basis for the antianimus rule and its acceptance by the courts justify bestowing on it the status of constitutional rule rather than mere decisional aid.

194. 5 U.S. (1 Cranch) 137, 177 (1803).

195. *See supra* notes 65-66 and accompanying text.

196. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (noting that strict scrutiny of racial set-asides is necessary in order to distinguish between benign race classifications and ideas of racial inferiority or simple racial politics).

197. *See infra* Part III.B.

198. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

as unprincipled.[199] However, if decisions striking down laws on equal protection grounds are understood as instances in which courts are sufficiently confident in their ability to uncover extreme irrationality or animus, then they can be seen as first-order interpretations of equal protection, that is, instances of judicially supreme constitutional interpretation not subject to congressional override. Justice Brennan made a similar point in *Oregon v. Mitchell*, where, defending his ratchet theory, he said the following:

> a decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature.[200]

While Justice Brennan uses the language of fact-findings, he makes the same point set forth above—namely, that a decision striking down a law reflects judicial confidence in its ability to perceive unconstitutional conduct. In Justice Brennan's language, the state's facts "are so far wrong as to be unreasonable,"[201] while the theory sketched above speaks of government actions that are so clearly not aimed at a legitimate purpose as to justify a holding that the action was either irrational or motivated by animus. Under either formulation, a court's confidence in the correctness of its judgment precludes congressional action to override it, either because that congressional override would reflect the same implausible facts, or because the judicial decision reflects a true judicial application of the Equal Protection Clause, worthy of judicial supremacy, not simply application of a decisional device that is not itself the Clause.[202]

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199. *See id.* at 659, 668 (Harlan, J., dissenting); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 697 n.438 (1996) (citing critiques and defenses of the ratchet theory).

200. 400 U.S. 112, 249 n.31 (1970) (Brennan, J., dissenting).

201. *Id.*

202. But what if Congress or the state legislature does in fact come up with new evidence supporting facts found unreasonable by the Court? This issue may well be decided in the litigation over the new federal partial birth abortion statute. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201 (to be codified at 15 U.S.C. § 1531). In that statute, the Court, presumably in order to avoid the effect of the Court's strike down of a similar abortion restriction in 2000, *see* Stenberg v. Carhart, 530 U.S. 914, 937 (2000), purported to find, as a fact, that the prohibited abortion procedure was never medically necessary. *See* Partial Birth Abortion Ban Act § 2. Such a fact, if accepted, would impact the constitutionality of the law, given the current doctrine's concern with ensuring that women always have the ultimate choice, previability, to undergo an abortion in a way that would be safest for her. The new federal abortion statute affects substantive due process rights rather

If the Court's equal protection cases are understood based on the foregoing, then the congruence and proportionality concept, like the concept of judicial interpretive supremacy, remains a reasonable formula for testing Section 5 legislation. Under this Article's approach, congressional action must still be congruent and proportional to the underlying constitutional violations the Court has identified. What would be different are the conclusions about which judicial decisions reflect true constitutional interpretation, and which reflect prudential decisionmaking by the Court. True constitutional interpretation would be limited first, to the overall rule that government classifications not be so unreasonable as to be arbitrary; second, to particular decisions that certain classifications fail that test; and third, to the rule that race classifications should be reviewed with at least some skepticism.

It might be thought that this analysis results, ironically, in giving Congress more latitude to legislate with regard to nonsuspect classes, on the ground that in those situations the Court had confessed the sort of institutional incompetence described above, and less leeway to legislate with regard to suspect classes, especially race, where the Court is more confident of its own ability to determine what equal protection requires. This intuition is correct, but is only half the story. The foregoing analysis identifies two sources of Congress's powers to enforce the Equal Protection Clause. The first is the familiar one of enforcing, through congruent and proportional means, against classifications such as race that courts have identified as running a high risk of arbitrariness. Thus, results like that in *Morgan* would remain good law on the theory that the Court had identified a particular rule—that people should enjoy equal attention from government, regardless of their race or ethnicity—and Congress was simply enforcing that rule through a congruent and proportional statute.[203] The second basis for congressional power involves Congress enforcing, again through congruent and proportional means, the underlying judicial rule against arbitrary classifications, with the

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than equal protection rights. It may be that Congress has less latitude to find facts impacting the former as compared with the latter, on the theory that equal protection issues are more appropriately left to Congress than due process issues, given the more judicially accessible nature of due process analysis. But the litigation about the abortion law may nevertheless illuminate the Court's attitude toward subsequent congressional fact-finding regarding matters of constitutional rights that contradicts facts found by courts.

203. *See* City of Boerne v. Flores, 521 U.S. 507, 528 (1997) (discussing *Morgan* and describing section 4(e) as "a remedial measure to deal with discrimination in governmental services") (internal quotation omitted)).

understanding that in many cases courts themselves cannot identify every instance where such arbitrariness exists. This second approach is the one on which this Article has focused. But it is not inconsistent with the first. Indeed, it fits snugly next to it, as in both cases the operative inquiry asks whether Congress, using its unique institutional capacities, has appropriately applied the constitutional rule the Court has enunciated.

E. The Implications—and Cabining Them

At first blush, this analysis appears to carry extraordinarily broad implications. If legislatures have the leeway to determine what constitutes reasonable classifications when the Court, by adopting the rational basis standard, confesses its inability to do so, and if Section 5 gives Congress the authority to supervise the states in their own determinations on this issue, then Section 5 has become a powerful tool indeed. Because the rational basis standard applies to a breathtakingly broad array of modern legislation—indeed, to all legislation that classifies, with the exception of legislation that affects suspect classes or impacts fundamental rights—Congress's power to determine the reasonableness of classifications would give it the authority to police states' classification choices across this variety of regulatory fields, all under the rubric of ensuring that states not engage in invidious classifications. Section 5 would give Congress the power to forbid states from discriminating against, or in favor of, recent property purchasers as opposed to long-time owners,[204] relatives of riverboat captains as opposed to all other applicants for riverboat captain positions,[205] or truck owners who place their own advertising on the sides of their vehicles, as opposed to owners who rent out the sides of their trucks to others.[206]

But this fear of overly broad congressional power turns out to be unwarranted. Recall that this problem seemingly arises because the judicial rule in rational basis cases is seemingly that there is no rule—courts' incompetence to determine the reasonableness of most classifications means that they will uphold almost any legislative line-drawing. But there *is* court-made law here, and it adequately cabins Congress's Section 5 power. To repeat, the judicial rule for equal protection asks whether there is a reasonable relation between the statute

204. *See* Nordlinger v. Hahn, 505 U.S. 1, 4 (1992).
205. *See* Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 563-64 (1947).
206. *See* Ry. Express Agency v. New York, 336 U.S. 106, 108 (1949).

and a legitimate government interest. This formula makes clear that animus is not allowed; in the Court's words, "a bare . . . desire to harm a politically unpopular group"[207] can never justify a classification. Thus, in ensuring that states' classifications are reasonable, it may be appropriate to limit Congress to guarding against animus. In brief, the judicial rule is "no animus," and Congress's role in enforcing that rule is to determine when state classifications fail that test.

Does this rule provide any limit on the kind of legislation Congress could enact under its Section 5 power? What about the examples offered above?[208] This Article argues that an antianimus rule does in fact limit Congress, because animus is unlikely in many situations covered by the rational basis standard. Recall that under standard equal protection doctrine, rational basis is used when, among other things, the burdened group is held to not be characterized by an immutable characteristic, and not to have suffered a history of discrimination or to lack currently significant political power. Thus, the quintessential nonsuspect class is a group marked by its conduct rather than its immutable status, which has not suffered systemic exclusion from the political process, either historically or currently. Such groups may lose political battles, and thus be subject to unfavorable legislation, but it is unlikely that such losses could be described as motivated "by a bare . . . desire to harm" that group.[209] Thus, recent purchasers of property, nonrelatives of current riverboat captains, and truck owners who rent their trucks out for advertising would all seem to be unlikely victims of animus, and thus beyond the reach of Congress's Section 5 power.[210]

On the other hand, the mentally retarded, gays and lesbians, out-of-staters, the disabled, and others might find themselves at some time or another the victims of such animus. They may not be the victims of animus all the time. For example, the mentally retarded or physically disabled may be burdened because a state government decisionmaker sincerely believes, after carefully considering the issue, that differential treatment may be in their best interest. Out-of-staters may be burdened because of a mere desire to foist costs onto them, or to keep a state's resources for its own citizens, or they may be burdened in a legitimate effort by a state to keep for its citizens a resource for which those

207. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
208. *See supra* notes 204-206 and accompanying text.
209. *See Moreno*, 413 U.S. at 534.
210. *See supra* text accompanying notes 204-206.

citizens have paid.[211] As discussed at length earlier in this Article, the *Cleburne* Court's refusal to grant suspect class status to the mentally retarded can be understood as reflecting a belief that classifications involving the mentally retarded may sometimes be reasonable, and other times reflect animus, and that telling the two apart may simply be too difficult a task for the court, and one that is not advanced by a tool as blunt as across-the-board heightened scrutiny. Animus against the group is still possible, however, as the Court itself concluded when it struck down the zoning decision.[212] This Article suggests that Congress should also have authority to determine when animus motivates actions burdening nonsuspect groups.

Indeed, understanding *Cleburne*'s suspect class discussion in this way—as a recognition that there may sometimes be animus against a group like the mentally retarded, but that such animus has to be detected by a court on a case-by-case basis—supports a conception of Congress's Section 5 power in which Congress's task is to help the Court detect and counteract such animus. Because Congress is better than courts at determining social meaning, can detect when politicians may be under pressure to act based on constituent fear, and can attack problems in a more nuanced way than courts, it is this kind of task for which Congress is exactly suited. The "no animus" limitation on Congress's Section 5 power, then, turns out to be not an unprincipled line drawn simply to prevent Section 5 from becoming an all-purpose congressional check on state government. Instead, it fits quite consistently within the overall institutional competence thrust of this Article's thesis.

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211. *Compare, e.g.*, Vlandis v. Kline, 412 U.S. 441, 453 (1973) (upholding differential in- and out-of-state college tuition), *with* Zobel v. Williams, 457 U.S. 55, 65 (1982) (striking down an Alaska oil-royalty share scheme that favored longer-time residents over new arrivals). *See also* Saenz v. Roe, 526 U.S. 489, 506 (1999) (distinguishing welfare benefits, which are consumed within a state and which the state thus does not have a right to limit to bona fide new residents, from state-subsidized college educations, which are "portable" and thus for which the state has a legitimate interest in charging out-of-staters more).

The one example noted in the text but not discussed is homosexuals. There is a real question of whether discrimination against homosexuals can ever be rational, as least as long as the only justification offered in defense of the classification is the moral beliefs of the community, or fear of community disruption if gays are granted a particular benefit on equal terms with heterosexuals. *See, e.g.*, William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 29-37 (2002); *see also* Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (questioning the sufficiency of moral disapproval as a ground for legislative restrictions on conduct). This Article does not deal with that question.

212. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (concluding that the government's action was motivated by animus).

This analysis is generally consistent with the Court's current "congruence and proportionality" test. Both approaches seek to tie the Section 5 power to the judicially declared meaning of the Fourteenth Amendment. The difference lies in the identification of the unconstitutional action against which Congress is allowed to guard. Under this Article's approach, a court's Section 5 inquiry would recognize that courts have a difficult time uncovering animus in the context of nonsuspect classes, but would also acknowledge that such animus still exists, and that in many circumstances Congress is better suited to identify it. So understood, this approach is simply another way of arguing for greater judicial deference to congressional determinations of unconstitutional conduct, a proposal made frequently by commentators critiquing the Court's recent Section 5 decisions.[213] This proposal differs, though, in that it seeks to solve the *Marbury* problem, that is, the problem posed when a Section 5 statute is thought to redefine the Constitution by banning conduct the Court has upheld under the rational basis standard. It seeks to resolve that problem by reconceptualizing the rational basis standard, decoupling it from the Constitution itself, and explaining it as merely a decisional tool that does not itself represent an interpretation of the Constitution which Congress must respect.

Determining whether Congress was acting to prohibit animus-based actions by state government would present a difficult task for a court considering a challenge to a Section 5 statute. Under current doctrine, much of this difficulty is elided by the Court's embrace of the fiction that the rational basis standard means that governmental action reviewed under it is almost always constitutional in some abstract sense. Thus, the current Court, when reviewing a Section 5 statute assisting a nonsuspect class, distorts the analysis by requiring that the statute be justified as a remedy for a very small constitutional wrong. In turn, this requirement demands a very precisely tailored statute, because only a precisely tailored statute can be a congruent and proportional response to a trivial constitutional problem.[214] This

213. *See, e.g.*, sources cited *supra* note 22.

214. The other way of upholding a Section 5 statute aimed at a nonsuspect class is for Congress to supply sufficient facts to convince the Court that the constitutional wrong targeted by the statute is in fact more widespread than the Court had realized. In *Board of Trustees v. Garrett*, the leading Section 5 case considering this possibility, the Court required that that evidence itself be precisely targeted at proving this wider scope of constitutional violations. 531 U.S. 356, 368-72 (2001) (requiring that the evidence pertain to states, not counties or other parties not subject to the Eleventh Amendment; be relatively widespread; and be of the type to suggest liability had the victim sued in a court). The correctness of

doctrinal structure makes it relatively easy for the Court to find some overbreadth in the statute, which thus causes the statute to fail the congruence and proportionality test.[215]

By contrast, the approach suggested in this Article requires a court to be more nuanced when it identifies the constitutional wrong at which the statute is targeted. Under this approach, a court performing a congruence and proportionality analysis would start by acknowledging that the benefited group's status as a nonsuspect class means only that courts have not been able to state authoritatively whether discrimination against the group is often invidious. At this first stage of the analysis, where it reviews its own pronouncements about the status of that group, the court would have to keep an open mind on the question whether the challenged statute constitutes an attempt to deal with animus that a court may not have recognized, or alternatively whether it represents an illegitimate attempt by Congress to go beyond the judicially announced meaning of equal protection.

In answering that key question the court should be able to employ certain decisionmaking tools.[216] First, have courts themselves recognized that the relevant group has been the victim of animus? If so, as in the case of the mentally retarded,[217] homosexuals,[218] and participants in unconventional living arrangements,[219] then the Court should be more willing to accept Congress's determination. Second, standard suspect class criteria remain useful. Even if, by hypothesis, considerations of immutability, political powerlessness, and historical discrimination do not require labeling a classification criterion as suspect, the existence of one or more of these criteria lends credence to a

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Garrett's approach to the fact-finding issue is beyond the scope of this Article, which focuses instead on the characterization of the constitutional wrong, rather than on whether the wrong is, as an empirical matter, more widespread than the Court had previously understood.

215. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) ("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." (internal quotation and citation omitted)).

216. Use of decisional tools is not inappropriate in this context because the ultimate question is not what the Constitution requires, but rather whether Congress has kept close enough to the constitutional line as to satisfy the requirement of congruence and proportionality.

217. *See Cleburne*, 473 U.S. at 432.

218. *See* Romer v. Evans, 517 U.S. 620, 624 (1996).

219. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973).

conclusion that the particular conduct regulated by the Section 5 statute resulted from animus. Recall the "floodgates" analysis in *Cleburne*, where the Court implicitly recognized the *Carolene*-based argument in favor of suspect class status for the mentally retarded, but stepped back from bestowing that status because of a line-drawing concern.[220] Understanding the rational basis standard as a response to such prudential concerns provides increased flexibility for Congress, a body better suited to draw such lines, while avoiding any formal inconsistency between judicial use of the rational basis standard for that group and deferential judicial review of a Section 5 statute benefiting it.

The statute's characteristics themselves should also be relevant to a court's Section 5 analysis. For example, the statute's breadth should matter, just as it does under current "congruence and proportionality" analysis.[221] A group's failure to satisfy the Court's criteria for suspect class status indicates that the group is not prone to across-the-board, systematic denials of political access. Accordingly, an across-the-board statute benefiting those groups might be thought to exceed Congress's authority, by outrunning the extent to which the benefited group likely suffered from animus. It would also be appropriate for a court to consider whether the statute dealt with particular subject areas (for example, education or access to public benefits) where courts had already considered states to have acted unconstitutionally.[222]

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220. *See Cleburne*, 473 U.S. at 445-46 (conceding that the mentally retarded may have satisfied these criteria but nevertheless concluding for prudential reasons not to designate that group a suspect class).

221. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86-89 (2000) (discussing the breadth of the ADEA).

222. Denial of public assistance benefits and education based on status distinctions might be an example where a court could justifiably give broader room for congressional action. *See Moreno*, 413 U.S. at 530 (status of being legally related to other members comprising the household seeking benefits); Plyler v. Doe, 457 U.S. 202, 223-25 (2002) (status of being an illegal alien minor). The benefits cut-off in *Moreno* was required by federal law, which might raise the objection that a history of troubling *federal* practice should not justify judicial deference when Congress itself imposes restrictions on *state* governments. But again, if deference is due, it is not limited to situations where Congress found evidence that would convince a court—here, for example, evidence that state governments had acted. Such a limitation might be appropriate were a court, absent a Section 5 statute, to consider whether a state's benefits classification violated equal protection. But deference to Congress must mean deference to the kinds of evidence that Congress might consider relevant. In this case, for example, that evidence might include its own history of mean-spirited deprivations of public benefits. Similarly, a Section 5 statute restricting states' ability to draw racial or ethnic lines might profitably draw on Congress's suspicions of all government action based on race, a suspicion that Congress would have a right to have based on racist federal actions, such as the Japanese-American internments during World War II. *See* Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-4 (1988) (providing compensation for Japanese-Americans

Of course, the institutional factors discussed earlier are also relevant to the Section 5 inquiry.[223] Thus, to the extent that a statute reflects congressional fact-finding of the sort discussed above,[224] or draws lines of the sort not amenable to judicial reasoning,[225] or reflects Congress's better grasp of the realities of governing and of politics,[226] the statute should stand on stronger constitutional ground when challenged in the courts.

Finally, it is necessary to consider the issue of the overall appropriate level of deference to Congress in a Section 5 inquiry. Several of the criteria offered above for the Court's Section 5 inquiry are similar to those employed in current Section 5 analysis. Whether this Article's proposal really changes the analysis would depend on the level of deference the Court accords legislative determinations. This Article argues that a proper understanding of the rational basis standard impacts the appropriate level of deference that courts should accord Section 5 statutes. For example, under current Section 5 jurisprudence, a statute like the Americans with Disabilities Act faced a high hurdle as a Section 5 enactment, because it benefits a group that the Court considers, under its (mis)understanding of the rational basis standard, to almost never be the victim of unconstitutional discrimination.[227] Under the suggested approach, that presumption would not be as strong. Instead, the Court would understand its application of the rational basis standard less as a statement of its confidence that the group in question is almost never the victim of unconstitutional action, and more as a confession of courts' inability to evaluate classifications regarding that group.[228] Such a confession naturally implies a greater degree of deference to Congress, because now the statute does not directly contradict court-made equal protection law, but rather supplements a court's self-confessed inability fully to declare that law. This extra degree of deference cannot be pinpointed with any precision. Nor is it unlimited. Here, though, the

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interned during World War II); *see also* Araiza, *supra* note 110, at 230 (discussing the broader scope of evidence that Congress should be able to consider in determining whether state conduct runs a high risk of violating equal protection).

223. *See supra* Part II.A.

224. *See supra* Part II.A.4.

225. *See supra* Part II.A.2.

226. *See supra* Part II.A.

227. *See supra* notes 8-21 and accompanying text.

228. Recall that in *Cleburne*, the Court specifically mentioned the disabled as a group that might well deserve heightened scrutiny, if not for the prudential-based concern about opening the floodgates to other groups' claims. *See* 473 U.S. 432, 445-46 (1985); *see also supra* notes 166-172 and accompanying text.

criteria offered earlier play a role in cabining that deference around the judicially announced antianimus rule.

III. SECTION 5 BEYOND RATIONAL BASIS

The foregoing analysis has implications that go beyond situations where judicial review is governed by the rational basis standard. This analysis focused on that standard because it provides relatively clear insights about what a court does when it decides equal protection cases, which in turn reveals the contours of true equal protection "law" that mark the proper limits of Congress's Section 5 authority. This analysis should be amenable to considerations of Congress's authority to enforce the equal protection guarantee in situations where judicial review goes beyond rational basis. This Article now briefly speculates as to the Section 5 power in those situations. Fuller treatment of these issues, however, must await another occasion.

A. Gender

In many ways, gender presents the most interesting application of this conception of the Section 5 power. Gender is especially interesting because of the nature of the Court's own view of gender classifications. At its most simplistic, scrutiny of gender classifications falls somewhere in the middle of the two dimensional scale bounded on one end by rational basis and on the other by strict scrutiny. Thus, the Court has concluded that, despite the general irrelevance of the gender characteristic, gender does matter in some situations. This conclusion renders gender different from race, even after the *United States v. Virginia* Court applied what seemed to be quite strict scrutiny to the gender classification in that case.[229] In fact, the *Virginia* Court itself expressly approved, at least in principle, gender lines drawn in order to compensate women for past discrimination and to ensure equal social and economic status for women.[230]

The Court's statements and actions in *Virginia* suggest a nuanced approach to gender that is far more complex than simply a mid-range position between the extremes of a two-dimensional scale. Instead, the Court's approach, both in *Virginia* and other cases, examines the

229. 518 U.S. 515 (1996); *see also* Nguyen v. INS, 533 U.S. 53, 73 (2001) (upholding a gender classification based on the Court's conclusion that the classification tracked real gender differences).

230. *See* 518 U.S. at 533.

rationale for and the context of a challenged gender line, in order to determine whether it is truly compensatory or reflective of real differences or, conversely, an inappropriate stereotype. In applying this approach, the Court has sometimes attempted to make this determination itself,[231] while at other times it has examined a legislature's motivations, with the aim of determining whether it made a good-faith, informed judgment that conditions existed justifying differential treatment.[232] In engaging in that motivational inquiry, the Court's gender cases have considered the historical background of the challenged classification[233] and the degree of deliberation with which the governmental body acted.[234]

This nuanced, contextualized approach to gender inevitably makes for a jurisprudence that is sometimes hard to understand: the Court's ringing statements in *Virginia* about the "exceedingly persuasive justification" needed for gender classifications and its application of an extremely tight ends-means analysis were followed five years later in *Nguyen* by a much more deferential approach.[235] For our purposes, the significance of this nuanced approach lay in the authority it should rightly provide Congress, via its Section 5 power. In particular, if a court has upheld a particular gender line as consistent with equal protection, that decision should not necessarily be considered equal protection "law" to the extent it relied on an inability to discern inappropriate legislative motivation or an inability to determine whether real, relevant gender differences existed.

Consider, for example, *Michael M. v. Superior Court*, in which the Court upheld a California statutory rape law that burdened males

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231. *See, e.g.*, *Nguyen*, 533 U.S. at 64-68 (concluding that a mother's necessary presence at birth makes it more likely that she, rather than the father, will have an opportunity to develop a relationship with the child); Craig v. Boren, 429 U.S. 190, 202 n.14 (1976) (casting doubt on the reliability of statistics indicating a difference in dangerousness between female and male drunk driving based on the possible biases of the law enforcement officers whose actions constitute the data points for the statistics).

232. *See, e.g.*, *Virginia*, 518 U.S. at 538-40 (examining the history of Virginia's provision of higher education to women to test the credibility of the state's claim that its exclusion of women from Virginia Military Institute was based on a desire to provide a diverse menu of educational opportunities for its citizens); Rostker v. Goldberg, 453 U.S. 57, 72 (1981) (examining the care and deliberation with which Congress decided to exclude women from draft registration).

233. *See, e.g.*, *Virginia*, 518 U.S. at 538-40.

234. *See, e.g.*, *Rostker*, 453 U.S. at 73-78 (noting the care with which Congress considered whether it was appropriate to require women to register for the draft).

235. The difference in tone between these cases becomes all the more striking when it is realized that the composition of the Court had not changed between them, and that three justices that had joined in the majority opinion or result in *Virginia* also joined the majority opinion in *Nguyen*.

more than females.[236] The Court upheld this law, with the plurality reasoning that it might have been motivated by a real gender difference—namely, the fact that only females can get pregnant—which allocated the risks of sexual activity differently, thus justifying California's attempt to equalize the risk.[237] Justice Brennan dissented, arguing in part that the real reason for the statute was a now-outdated view of young women as fragile beings, incapable of giving true consent, whose sexual purity needed to be protected.[238] One way to evaluate this disagreement is to say that courts are simply bad at determining a legislature's intent, and that therefore they should give the legislature the benefit of the doubt, at least when the issue does not turn on race. Indeed, this seems to have been the plurality's approach to the intent question.[239] However, there is less reason for Congress to give state legislatures the benefit of the doubt. If "intent" in a case like *Michael M.* is considered broadly to stand for the social meaning accorded a given legislative decision, then, as argued above,[240] there is good reason to give Congress more leeway than courts in evaluating the social meaning accorded statutes like California's.

Thus, if the question in gender cases is whether the state has perpetuated an archaic, demeaning stereotype of women, then Congress may well have something to add to a court's determination on that issue. As with rational basis review, this is not to suggest that courts have no role: a decision by a court that the state's action is in fact motivated by such a stereotype[241] would still be equal protection "law," at least with regard to that particular government action. But presumably many cases arise in which courts simply cannot be sure what motivated the government.[242] In cases like those, a court, as in

236. 450 U.S. 464, 475 (1981) (plurality opinion).

237. *See id.* at 470-73.

238. *See id.* at 494-96 (Brennan, J., dissenting).

239. *See id.* at 469-70 (plurality opinion).

240. *See supra* notes 159-162 and accompanying text.

241. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 n.14 (1976).

242. On this point it suffices merely to note the federal government's recent move to allow local schools to introduce more single-gender education, a decision that could reasonably be characterized as troubling retrogression in the fight for gender equality, or an appropriate concession to the very real empirical possibility that girls and boys learn differently and would benefit from gender-specific pedagogy. *See* George Archibald, *One-Sex Schools Can Be an Option*, WASH. TIMES, Mar. 4, 2004, at A1 (noting announcement by Secretary of Education that Title IX regulations will be changed to allow schools more leeway to engage in single-sex education). Of course, the propriety of a motivational inquiry of an administrative agency is different than one seeking to discern a legislature's intent. But both provide courts with difficult challenges. *See, e.g.*, United States v. Morgan, 313 U.S.

Michael M., may well defer to a possible legislative intent. Such decisions, just like decisions upholding statutes under the rational basis standard, should be seen as products of institutional competence concerns, not statements of constitutional law. Given that conclusion, and given Congress's particular institutional-based competence—in this case, to discern the social meaning behind a legislative classification—there is every reason to accord Congress significant leeway under its Section 5 power to restrict or regulate what the court had allowed.

The Court's analysis in *Nevada Department of Human Resources v. Hibbs*,[243] the recent decision upholding the Family and Medical Leave Act as a valid Section 5 enactment, highlights the value of this approach to the Section 5 power. *Hibbs* upheld the statute as a valid Section 5 enactment largely on the observation that the heightened scrutiny accorded gender made it easier for Congress to show a pattern of constitutional violations, to which the statute was a congruent and proportional response.[244] This approach, in which, like a see-saw, the higher the judicial scrutiny a group receives, the easier it becomes for Congress to justify a Section 5 statute aimed at that group, serves well enough as a rough guidepost. But given the above explanation of the Court's approach to gender, the *Hibbs* approach is surely overly simplistic. Any concerns about congressional overreaching are better accommodated by testing Section 5-based gender equality statutes against a deeper understanding of the Court's own gender jurisprudence, and against a more careful understanding of the extent to which, in that particular context, Congress is institutionally better-placed than the Court to give life to those judicially announced principles.

B. Race

In comparison to its rational basis, and even its gender jurisprudence, the Court's race jurisprudence reflects a great deal of confidence in its own ability to determine the reasonableness, and hence the constitutionality, of government actions.[245] The Court's

409, 422 (1941) (noting the general disfavor with which courts view inquiries into the mental processes of administrative decisionmakers).

243. 538 U.S. 721 (2003).

244. *See* 538 U.S. at 722.

245. *See supra* notes 56-66 and accompanying text. Even here, though, the Court has recently approached classifications more circumspectly, recognizing, at the very least, other entities' competence to reach conclusions on issues relevant to the equal protection analysis. Most notably, in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), the Court deferred to a

embrace of strict scrutiny in *Croson* and *Adarand* was clearly motivated by a conviction that government use of race is inherently problematic, thus rendering strict scrutiny necessary in order to confirm, to the Court's satisfaction, that use of race in that particular case is legitimate.[246] Again, it is worth noting that this suspicious treatment of race is not driven in these cases by process concerns (as indeed, it cannot be, given that these programs normally operate in favor of groups that constitute numerical minorities).[247] The strict scrutiny in these cases, then, derives not from an intermediating process concern, but rather from direct and fundamental judicial suspicion of the reasonableness of race-conscious government action.

Grutter v. Bollinger[248] and *Gratz v. Bollinger*,[249] when combined, reflect this judicial confidence. In the course of, respectively, upholding the University of Michigan Law School's admissions policy and striking down the University's undergraduate policy, the Court applied its own vision of equal protection law, in particular, its insistence that government consideration of race in the education context be individualized rather than wholesale. Ironically, by upholding the law school's program as sufficiently narrowly tailored, and thus proving that strict scrutiny was not "strict in theory, but fatal in fact,"[250] *Grutter* made clear that it would be the final judge of what strict scrutiny required. In other words, in *Grutter* the Court showed itself the master, not the servant, of strict scrutiny. Indeed, the very fact that in the two cases the strict scrutiny yielded different results strongly suggests that

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university's statement of the benefits flowing from a diverse student body, which in turn influenced the determination that the university had a compelling interest in such diversity.

246. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995) ("The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

247. *But see supra* discussion and text accompanying note 64 (noting *Croson*'s half-hearted attempt to explain how process theory justified strict scrutiny of the racial set-aside enacted by Richmond, Virginia).

248. 539 U.S. at 343 (upholding the University of Michigan Law School's admissions policies, despite their consideration of race).

249. 539 U.S. 244, 275 (2003) (striking down the University of Michigan's undergraduate college admissions policies, due to their inappropriate consideration of race).

250. *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

strict scrutiny is not simply a decisional aid, a sort of mirror image of rational basis in which a court nearly automatically strikes down government action just as rational basis normally results in an upholding. Rather, the tone and results of these opinions indicate that the Court was in fact making good on its own description of strict scrutiny given in the contracting cases of a decade ago—namely, that that standard is designed to allow the Court to reach an authoritative conclusion about the constitutionality of the challenged government action.[251]

In the case of race, then, the Court has stated "law" beyond the fundamental requirement of reasonableness; namely, a suspicion that race classifications are problematic and thus a requirement that, to be constitutional, they must be carefully drawn.[252] The support for such suspicion is well known. Most obviously, the Fourteenth Amendment's Drafters were fundamentally concerned with the situation of African-Americans, especially newly freed slaves, a concern that necessarily implied a larger concern with racial oppression. Moreover, the republican character of the American system was thought to be fundamentally incompatible with the notions of caste or taint that characterized antebellum race relations in the United States.[253]

The Court's greater willingness to declare what equal protection means in the race context necessarily suggests a somewhat more limited role for congressional action predicated on Congress's own understanding of what the antianimus rule requires. The Court has clearly stated—for better or worse—its view of the social meaning of race lines, and it has exhibited confidence in that view. The only other potential justification for a congressional challenge, via a statute that, for example, authorized states to engage in race-based affirmative

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251. *See* cases cited *supra* note 246.

252. *See Gratz*, 539 U.S. at 270 ("[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. . . .") (quotation omitted); *id.* at 302 (Ginsburg, J., dissenting) (agreeing that "careful judicial inspection" and "close review" of race classifications are necessary); *Grutter*, 539 U.S. at 326 (describing race as a "highly suspect tool") (quoting *Croson*, 488 U.S. at 493 (plurality opinion)); *id.* at 343 (Ginsburg, J., concurring) (agreeing with the majority's wish that affirmative action might become unnecessary in the next twenty-five years); *Adarand*, 515 U.S. at 228 (describing race classifications as "so seldom provid[ing] a relevant basis for disparate treatment" (quotation omitted)). This is true regardless of the fact that disagreement remains on the appropriate standard for reviewing affirmative action programs. *See Grutter*, 539 U.S. at 346 n.*) (Ginsburg, J., concurring) (reserving the question whether affirmative action programs should be reviewed with the same level of strictness as race classifications that "burden a historically disadvantaged group"); *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting) (suggesting that different levels of scrutiny may be appropriate).

253. *See* NELSON, *supra* note 191, at 13-39.

action, would be Congress's superior ability to find empirical facts. But against the conviction with which the Court believes in the inappropriateness of government's use of race, a claim by Congress simply to have found new empirical facts seems a weak justification for congressional action inconsistent with the Court's own attitude.

Obviously, this analysis does not mean that Congress is disabled from enacting Section 5 legislation with regard to race. Indeed, the Court's own aversion to race classifications is intuitively consistent with race-neutral antidiscrimination and equal opportunity legislation enacted pursuant to Section 5. Thus, for example, the application of federal employment race-discrimination laws to states would continue to be an appropriate Section 5 enactment. Renewal of the Voting Rights Act would also not contravene this analysis.[254] Nor does this analysis necessarily call into doubt race-conscious legislation, as long as that legislation is consistent with judicially declared law. That law allows some race-conscious government action, as both the Court's rhetoric[255] and results[256] make clear. However, this analysis does indicate that, in order to enact allegedly benign racial classifications, Congress must tailor its actions carefully to the limits enunciated by the Court. The determination of the exact dimensions of those limits must await another occasion.

IV. SECTION 5 BEYOND EQUAL PROTECTION

This Article was motivated by recent trends in the Supreme Court's constitutional law jurisprudence, most obviously, the new, controversial judicial role in scrutinizing Section 5 enactments ushered in by *City of Boerne*. But that controversy is exacerbated by the unstable condition of the Court's underlying Fourteenth Amendment jurisprudence, against which Section 5 enactments are tested under *City of Boerne*'s congruence and proportionality standard. That instability is most pronounced in the area of equal protection. As this Article has argued, the inherently nonlegal nature of equal protection

254. Questions might arise about the congruence and proportionality of such legislation to the underlying constitutional violations the statute seeks to correct. But those questions speak more to the congruence and proportionality analysis itself, which is not the focus of this Article.

255. *See supra* note 250 and accompanying text (noting that judicial statements insisting that strict scrutiny for race classifications is not "strict in theory, but fatal in fact").

256. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding a race-conscious law school admissions program to further the state's interest in a diverse student body in an elite law school); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971) (upholding the use of race-conscious remedies to remedy school segregation).

claims, plus the erosion, over the last twenty years, of the Court's three-tiered scrutiny structure, suggest the appropriateness of a broader Section 5 power, even within the framework of the judicial law-declaring supremacy announced in *City of Boerne*.

But what of other areas of the Fourteenth Amendment? In at least two recent cases, *Lawrence v. Texas*[257] and *State Farm Mutual Automobile Insurance Co. v. Campbell*,[258] the Supreme Court has struck down state laws as violations of substantive due process, even though the rights thereby protected were either not denominated fundamental or, in the case of punitive damages awards at issue in *State Farm*, are notoriously difficult to extrapolate into a judicially enforceable principle.[259] In so doing, the Court has once again ventured away from a mechanical application of its own doctrine, in this case, the rule that infringements of less-than-fundamental rights get only the most deferential scrutiny.[260]

Significant differences remain between substantive due process and equal protection, which may make this Article's Section 5 analysis not easily transferable from one doctrine to another. The most notable difference is the nature of the equal protection guarantee, which, as argued earlier in this Article, is unique among Fourteenth Amendment rights in its lack of a substantive legal core, and thus in its lack of judicially accessible sources of meaning.[261] Still, the Court's deviation from "normal" substantive due process review in these cases provides suggestive parallels to its more nuanced approach to equal protection in cases over the last twenty years. In turn, the Court's intimations of less rigid due process analysis justifies speculation whether this Article's approach to Section 5, where what the Court does not say about the underlying right is just as important as what it does say, may be relevant to Fourteenth Amendment rights beyond equal protection. If substantive due process doctrine is becoming just as contextualized and amorphous as equal protection doctrine, then the Court can be thought of as enunciating less and less constitutional law in that area as

257. 539 U.S. 558, 578 (2003).

258. 538 U.S. 408, 417 (2003); *see also* BMW v. Gore, 517 U.S. 559 (1996).

259. *See, e.g.*, *BMW*, 517 U.S. at 599 (Scalia, J., dissenting) (arguing that a state trial procedure leaving to the jury the decision of whether to impose punitive damages and in what amount, though still subject to review for "reasonableness," provides a defendant with process which he is due).

260. *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992), was also in this vein, as in that case, the Court departed from its normal two-tiered level of scrutiny of substantive due process in response to the uniquely compelling interests on both sides of the abortion question.

261. *See supra* Part I.A.

well. In turn, the lack of firmly established law in this area means that innovative Section 5 statutes are not as likely to outrun judicially announced principles, in violation of the congruence and proportionality standard. Thus, these developments in substantive due process may well argue for increased latitude for congressional legislation, as this Article has suggested is the case with equal protection.

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