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# New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause

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# NEW GROUPS AND OLD DOCTRINE: RETHINKING CONGRESSIONAL POWER TO ENFORCE THE EQUAL PROTECTION CLAUSE

WILLIAM D. ARAIZA\*

## ABSTRACT

*This Article considers the Supreme Court's current approach to judicial review of federal legislation enforcing the Equal Protection Clause. It starts from the assumption that the Court will not abandon the judicial supremacy principle it expressed in City of Boerne v. Flores; thus, any approach to congressional enforcement power must accommodate that supremacy. The Article begins by critiquing the Court's current understanding of Boerne, and explaining how new and pending enforcement legislation pose major challenges under that doctrine. It then sketches a theory of the enforcement power which requires Congress to abide by judicial statements of constitutional meaning, but where judicial opinions are read more carefully to distinguish between true statements of constitutional law and subconstitutional decision rules. Congressional enforcement power must not conflict with the former. In addition, to the extent those statements are vague or general, they nevertheless channel congressional enforcement discretion by pointing to follow-on inquiries that Congress must satisfactorily answer in order for the Court to uphold its legislation. The Article then applies this new approach to three new pieces of equality legislation that are either currently in force or under consideration: the Employment Non-Discrimination Act, employment protection for transgendered people, and the Genetic Information Nondiscrimination Act. This application illustrates the theory in action. It also allows us to draw more general conclusions about the theory's workability and appropriateness as a tool for reviewing future enforcement legislation, both under the Equal Protection Clause and other components of the Fourteenth Amendment.*

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## I. INTRODUCTION

Judicial doctrine concerning congressional power to enforce the Reconstruction Amendments<sup>1</sup> has reached an impasse. A decade ago in *City of Boerne v. Flores*<sup>2</sup> the Court reached a consensus that the enforcement power did not give Congress the power to impose its own interpretation of the Constitution.<sup>3</sup> Asserting its supremacy in stating constitutional meaning, the Court authorized Congress only to enact legislation that is “congruent and proportional” to the relevant constitutional evil identified by the Court.<sup>4</sup> Post-*Boerne* cases revealed a sharp split on the application of this “congruence and proportionality” test, with a slim majority asserting the supremacy of essentially all judicial doctrine.<sup>5</sup>

This aggressive reading of *Boerne* should be reexamined. It creates the anomaly of elevating to the level of supreme and authoritative constitutional interpretation judicial doctrine that rests on the Court’s confessed inability to discern what the Constitution truly requires in a given case. The problem is compounded when such doctrine confronts an enforcement statute that is supported by congressional fact-finding and normative judgments that provide a superior answer to the constitutional questions the Court has confessed an inability to answer precisely. In such cases, a majority of Justices has sought to defend the perceived attack on judicial supremacy by engaging in a fruitless and disrespectful nit-picking of the factual record compiled by Congress.<sup>6</sup>

This problem is nearing a critical phase. Congress has either recently enacted, or is poised to enact, several antidiscrimination

1. U.S. CONST. amends. XIII, XIV, & XV.

2. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

3. *Id.* at 519.

4. *Id.* at 520.

5. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (concluding that because equal protection doctrine accorded age discrimination only rational basis review it would be harder for Congress to demonstrate the existence of a constitutional problem warranting enforcement legislation); *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (expanding the effective reach of this approach by dismissing a sizable congressional record documenting discrimination against the disabled, largely due to the constitutional status of the type of discrimination targeted).

6. The best-known example of this proof skepticism is the Court’s opinion in *Garrett*, where the Court went to pains to disqualify from relevance a large set of examples of disability discrimination, including examples that were known to Congress during its consideration of the ADA. *See* 531 U.S. at 369-72.

laws that will challenge the Court's doctrinal supremacy approach to congressional enforcement power. The areas this legislation addresses—sexual orientation discrimination, transgender discrimination, and genetic make-up discrimination—do not enjoy the high-profile status or historical pedigree that mark the racial equality goal that most often comes to mind when thinking about the enforcement power.<sup>7</sup> However, this legislation raises its own challenges to the Court's post-*Boerne* approach to the enforcement power. Most importantly, the discrimination it targets implicates judicial doctrine whose rigidities, ambiguities, and holes create an inadequate constitutional baseline against which to judge these laws' constitutionality. As a result, application of the current approach to this new legislation will present serious challenges to the Court.<sup>8</sup>

In addition, the Court's exceptionally strict test for the relevance of congressional fact findings supporting enforcement legislation<sup>9</sup> casts doubt on congressional action when the truly relevant facts relate more to perceptions of social reality than to empirical data. For example, the cultural meaning society accords to physical or mental disability is surely relevant to the invidiousness of disability discrimination. Yet some of the Court's post-*Boerne* cases indicate that a congressional finding to that effect would be irrelevant to its analysis of congressional enforcement power.<sup>10</sup>

Unless the Court changes its approach to congruence and proportionality, these problems will only deepen as Congress responds to new groups' demands for antidiscrimination laws. In this scenario, as a politically responsive Congress enacts new legislation protecting new groups, analogous judicial doctrine lags. It may lag simply because the lack of significant litigation hinders doctrinal

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7. Indeed, the most recent enforcement power case, *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504, 2508 (2009), considered whether the preclearance provisions of the Voting Rights Act (VRA) constituted appropriate congressional enforcement of the Fifteenth Amendment. The Court avoided reaching that constitutional issue only by deciding the case on a statutory ground that many considered a stretch. See, e.g., Posting of Heather K. Gerken to Balkinization, <http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html> (June 22, 2009, 10:42 EST). But see *Holder*, 129 S. Ct. at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part) (concluding that the provision exceeded congressional enforcement power). Similarly, the foundational modern cases construing the enforcement power involved the VRA. See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding Section 4(e) of the VRA as appropriate legislation enforcing the Equal Protection Clause of the Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding other parts of the VRA as appropriate legislation enforcing the Fifteenth Amendment).

8. See *infra* Part III(B).

9. *Garrett*, 531 U.S. at 369-71 (requiring Congress to make specific legislative findings that there is a substantial amount of unconstitutional state conduct that is more than "adverse, disparate treatment by state officials").

10. See, e.g., *id.* at 371 (dismissing evidence of general societal discrimination against the disabled as irrelevant to the congruence and proportionality analysis).

development. It may also lag because the Court has apparently sworn off creating new suspect classes, preferring instead to resolve new equal protection problems by varying the actual scrutiny accorded under the rational basis test<sup>11</sup> but thereby essentially freezing the current doctrinal status of all nonsuspect classes.<sup>12</sup> Or it may lag because the issue presented by the discrimination is nuanced and difficult for generalist judges to evaluate—for example, whether differential treatment of a group actually benefits that group.<sup>13</sup> Whatever the reason, this lag means that an enforcement power doctrine focusing nearly exclusively on judicial statements of constitutional meaning threatens to generate a growing disconnect between the Court's formal equal protection doctrine and Congress's evolving sense of which groups require statutory protection for their basic equality rights.

Unless the Court is content to block the recognition of new equality rights by the first national political regime in a decade unambiguously committed to civil rights, it should take the opportunity presented by these statutes to rethink its approach to congruence and proportionality. Such a rethinking need not require an abandonment of *Boerne's* judicial supremacy principle. However, it does require a reconsideration of its scope. In particular, it requires a recognition that not every judicial pronouncement in a constitutional law case constitutes a statement of constitutional meaning.

In turn, this task requires grappling with a larger, more conceptual, point about courts and the enunciation of constitutional norms. Critiquing the Court's application of *Boerne* necessarily raises the question whether judge-made doctrine differs from underlying constitutional meaning. This issue is not new: the argument for distinguishing between constitutional doctrine and constitutional law dates back at least as far as Professor Sager's now-classic article on underenforced constitutional norms,<sup>14</sup> and, as Professor Sager notes himself, in some ways well before that.<sup>15</sup>

11. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (declining to make the mentally disabled a suspect class, but nevertheless employing de facto heightened scrutiny).

12. The Court has not created a new suspect class since it elevated gender and legitimacy to quasi-suspect class status in the 1970s. See *id.* at 445-46 (expressing reluctance to increase the number of suspect classes). But see *United States v. Virginia*, 518 U.S. 515, 557-58 (1996) (arguably further heightening scrutiny for gender classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-11 (1989) (establishing strict scrutiny for all racial classifications, including those defended as benign or compensatory).

13. See, e.g., *Cleburne*, 473 U.S. at 442-44 (explaining that the treatment of the mentally retarded is often difficult and technical, and it is better suited for legislators and qualified professionals to make the determination, rather than the judiciary).

14. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing for a

This Article updates the arguments on this issue and applies them to new factual contexts.<sup>16</sup> Professor Sager wrote during a period when congressional enforcement power was governed by the generous standard enunciated in *Katzenbach v. Morgan*.<sup>17</sup> The debate his article helped engender played out in the shadow of the Court's consideration of the Religious Freedom Restoration Act (RFRA),<sup>18</sup> which pressed congressional enforcement power to its limit by countermanding a Court decision interpreting the Free Exercise Clause.

*Boerne's* rejection of RFRA and explicit embrace of judicial supremacy changed the doctrinal ground on which enforcement power issues would be debated. It did not, however, obviate the importance of the underlying distinction between constitutional law and constitutional doctrine. Thus, *Boerne* did not render obsolete the thesis this Article advances. Indeed, by requiring that enforcement legislation have some relationship to the Fourteenth Amendment right sought to be enforced, *Boerne's* congruence and proportionality test reaffirmed the importance of accurately delineating the scope of the underlying right. It thus requires us to consider the degree to which judicial doctrine fully exhausts the content of constitutional rights. Conversely, it also requires us to consider the degree to which constitutional rights evade judicial application but nevertheless continue to exist, thus justifying congressional enforcement legislation. The likely appearance of new civil rights legislation therefore requires us to reexamine these issues in the context of the Court's post-*Boerne* jurisprudence and to critique that jurisprudence to the extent it is mistaken.

This Article has modest aspirations. It does not challenge judicial supremacy<sup>19</sup> or even the congruence and proportionality standard; rather, it takes the Court's doctrine as it stands<sup>20</sup> and argues only for

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distinction between judiciary enforcement of constitutional norms and the extent to which those norms are otherwise enforceable and valid).

15. See *id.* at 1222-24.

16. See William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519 (2005) [hereinafter Araiza, *The Section 5 Power*]; William D. Araiza, *Courts, Congress, and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199 (2004); William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39 (2004); 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 (2002).

17. 384 U.S. 641 (1966).

18. 42 U.S.C. § 2000bb (1993).

19. This Article does not advocate what has become known as "popular constitutionalism," in which citizens acting via day-to-day politics are said to have the authority effectively to amend the Constitution. Cf., e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

20. See *supra* note 7 (noting the consensus that the Court is supreme in its interpretation of the Constitution).

a more sophisticated application. Because it takes the congruence and proportionality standard as a given, the Article also necessarily assumes both the existence of a distinction between the announcement and the enforcement of Fourteenth Amendment rights<sup>21</sup> and the Court's exclusive authority in the former. Scholars have mounted trenchant challenges to both of these positions.<sup>22</sup> Again, though, the assumed continuation of the congruence and proportionality standard, which enjoyed broad support on the Court when announced in *Boerne*,<sup>23</sup> means that progress in the project of allowing Congress a larger role in ensuring equality requires working within the framework of that standard.<sup>24</sup>

The Article is also limited in its identification of the types of rights to which its analysis of congressional power may be useful. It applies its argument about the larger role for congressional enforcement of Fourteenth Amendment rights only to the equal protection right to be free of inappropriate classifications. The overall theory sketched by the Article should apply to congressional enforcement of other Fourteenth Amendment rights; to be credible, a theory of the enforcement power cannot be arbitrarily limited to one set of Fourteenth Amendment rights. However, the special character of equal protection makes that theory especially powerful with regard to those rights and renders equal protection the appropriate vehicle for introducing and defending it.

Finally, this Article does not directly speak to congressional power to enforce rights that judicial doctrine itself identifies with precision. As will become clear, this Article focuses on the situations—exemplified by the equality legislation identified above—where judicial doctrine can only provide the broadest outlines of what equal protection requires. Other components of the equal protection guarantee—for example, the guarantee against racial discrimination—have been identified with relative precision (as

21. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

22. See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (critiquing the distinction); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (critiquing the exclusive judicial role).

23. See *infra* note 77 and accompanying text. But see *Tennessee v. Lane*, 541 U.S. 509, 554-58 (2004) (Scalia, J., dissenting) (abandoning the test). Justice Souter also implied an openness to considering the more generous *Morgan* standard for reviewing enforcement legislation. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (Souter, J., concurring).

24. The strong normative argument for ultimate judicial supremacy in the exposition of constitutional meaning focuses largely on the counter-majoritarian nature of judicial review as a positive way of protecting unpopular rights and minority groups. Evaluation of this argument is beyond the scope of this Article, which instead simply takes *Boerne*'s statement of judicial supremacy as an assumed starting point for considering congressional enforcement power.

controversial as the Court's decision might be).<sup>25</sup> In such situations enforcement legislation is best understood as more classically remedial in the sense that it takes as a given the shape of the right at issue and simply provides means for vindicating it. Such situations raise conceptually different questions about the proper scope of congressional power.<sup>26</sup>

Despite these limitations, the consequences of this Article remain weighty. Equal protection is in many ways Americans' favorite child among Fourteenth Amendment rights. Equality, perhaps even more than liberty, has been a defining feature of Americans' perception of their contribution to the world's heritage of democratic government. "Equality" captures better than any word the egalitarian, class-free aspirations underlying American political progress since the Revolution.<sup>27</sup> As one commentator remarked, a concern that laws be general in application has been described as "the chief constitutional development of pre-Civil War America."<sup>28</sup> For most of the twentieth century it has been the least controversial engine of American constitutional progress, often compared favorably to the alternative of substantive rights protected under the banner of due process.<sup>29</sup> Indeed, one canonical comparison of substantive and equality rights celebrates the latter as an ultimate recognition of democratic self-government.<sup>30</sup>

Thus, congressional action targeting equality has played, and can be expected to play, an outsized role when Congress uses its enforcement power. Simply put, Americans understand equality arguments, and Congress translates that understanding into

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25. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (requiring that race-based affirmative action plans be subject to strict scrutiny).

26. For example, this Article does not directly address the controversy surrounding the constitutionality of the VRA. See Gerken, *supra* note 7. Aside from the VRA's constitutional authority resting on the Fifteenth rather than the Fourteenth Amendment, which may or may not call for a separate test, see *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (concluding that congressional authority under both the Fourteenth and Fifteenth Amendments is judged under the same test), the VRA was designed to remedy the continuing effects of intentional racial discrimination, which the Court itself would consider unconstitutional. See *id.* at 308. See also *infra* note 236.

27. See generally SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2005); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

28. Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1375 (1990); see also Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251-68 (1997).

29. See, e.g., *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300-01 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me. This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.").

30. *Ry. Express Agency, v. New York*, 336 U.S. 106, 111-12 (1949) (Jackson, J., concurring).



legislation.<sup>31</sup> This fact puts us on notice to expect aggressive congressional action enforcing equal protection. Thus the stage is set for an examination of the legitimacy of that congressional action within the confines of a doctrine that accords ultimate law stating power to the Court.

The importance of this project is not diminished by the fact that other congressional powers—most notably, the interstate commerce power and the spending power—may authorize equality-enforcing legislation.<sup>32</sup> Even assuming the commerce power would authorize regulation of all areas in which Congress may wish to regulate to ensure equality,<sup>33</sup> the Commerce Clause suffers from the well-known limitation that it does not allow imposition of retrospective relief on unwilling states.<sup>34</sup> Since damages, back pay awards, and other types of retrospective relief may serve as the strongest deterrents to legal violations,<sup>35</sup> their unavailability against state government violators significantly reduces the attractiveness of the commerce power as an alternative regulatory path.<sup>36</sup>

For its part, the spending power may authorize Congress to require states to waive Eleventh Amendment immunity in return for federal grants on a related topic.<sup>37</sup> However, some commentators have perceived a trend in which the federal courts, led by the

31. See Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 475-78 (2010).

32. Cf. Harper Jean Tobin, *The Genetic Information Nondiscrimination Act of 2008: A Case Study of the Need for Better Congressional Responses to Federalism Jurisprudence* 40-41 (May 7, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1375684> (calling for Congress to use its spending power to ensure the constitutionality of the Genetic Information Nondiscrimination Act).

33. This assumption is by no means unassailable. See, e.g., Kevin Schwartz, Note, *Applying Section 5: Tennessee v. Lane and Judicial Conditions on the Congressional Enforcement Power*, 114 YALE L.J. 1133, 1171-72 (2005) (noting the doubts that application of the ADA to activities such as voting and accessing courthouses would fall within the commerce power). The VRA might also be vulnerable to a Commerce Clause attack in light of the limitation of deferential commerce power review to situations where Congress is regulating an economic activity. See *United States v. Lopez*, 514 U.S. 549, 561 (1995). But see *Gonzales v. Raich*, 545 U.S. 1, 28-29 (2005) (adopting a broad definition of economic activity).

34. See generally *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (upholding states' sovereign immunity).

35. This might especially be the case in civil rights statutes, where individual victims may have little incentive to sue if the only relief available is injunctive relief or job reinstatement.

36. By contrast, Section 5 of the Fourteenth Amendment allows imposition of such relief. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

37. See *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) (setting forth the constitutional test for conditional spending grants to states). The *Dole* test is quite lenient, and the spending power has become a fallback congressional power that can be used whenever another authority is questionable. Ronald J. Krotoszynski, Jr., *Listening to the 'Sounds of Sovereignty' but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 17 (1998) ("In sum, even in this brave new world of post-post New Deal federalism, there is really no doubt that *South Dakota v. Dole* permits Congress to use the spending power to accomplish indirectly that which it may not accomplish directly." ). But see *infra* note 41.

Supreme Court, read such spending conditions narrowly.<sup>38</sup> While formally only statutory interpretation opinions, they may well have the effect of constitutional decisions to the extent the legislative process is sufficiently daunting that Congress may never override them. Furthermore, aggressive override attempts could well prompt the Court to tighten constitutional limits on the spending power, a move that has been expected since the Court's federalism revolution began in earnest nearly twenty years ago.<sup>39</sup>

More fundamentally, congressional use of the commerce or spending power to enact equality legislation denigrates the symbolic value of the enforcement power and the Equal Protection Clause more generally. While the concrete effect of legislation does not turn on the authority on which it is based,<sup>40</sup> the public's understanding of and appreciation for the Equal Protection Clause is undermined when Congress is reduced to enforcing equality either by regulating the interstate movement of goods and services<sup>41</sup> or as an incident to a decision to spend money. Quite literally, if Congress can reach such results without using the enforcement power and makes a habit of doing so, it necessarily raises the question of why the enforcement power matters at all.

This is not to denigrate the importance of Congress's Article I powers or their authority for equality-enforcing legislation.<sup>42</sup> The point is simply that there is a cost in public understanding of constitutional principles, and thus in their legitimacy, when Congress is forced to hide the ball. This is especially true with regard to equality legislation. If Americans appreciate nothing else about their governmental system, it is that it promises a regime marked by equality. When congressional attempts to enforce that promise are disguised as regulations of commerce or conditions attached to spending grants, an opportunity is lost for Congress and the people to engage in a dialogue

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38. See generally, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345 (2008) (analyzing the Court's interpretation of the spending power); Tobin, *supra* note 32

39. See, e.g., Bagenstos, *supra* note 38, at 346-47.

40. Some grants of authority may authorize different types of regulation or different types of remedies. Most notably for our purposes, the enforcement power authorizes Congress to make states liable for retrospective relief while the commerce power does not. Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58-73 (1996) (denying relief in commerce regulation), with *Fitzpatrick*, 427 U.S. at 456 (authorizing relief in enforcement legislation).

41. E.g., *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring) ("I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."); cf. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250, 252 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 as appropriate regulation under the Commerce Clause and declining to consider its constitutionality as enforcement legislation).

42. See, e.g., *Heart of Atlanta Motel*, 379 U.S. at 255 (noting that Congress' intent when regulating interstate commerce does not matter to the question of its authority).

about what equality means. To the extent such attempts circumvent, rather than engage, Supreme Court doctrine about equal protection, the lost opportunity is even more unfortunate.

In short, the enforcement power matters. Because it matters, it is important to get it right.

This Article proceeds in five parts. Part II examines the rise of new social groups demanding nondiscrimination protection. It then briefly sets forth how enforcement power review of new equality legislation may challenge the Court, given its current approach to the congruence and proportionality standard.

Part III engages this difficulty. It begins with a brief tour of how the Court has applied the congruence and proportionality test. While it reached broad consensus in *Boerne* that the Court is supreme in the interpretation of the Constitution, and that enforcement legislation must conform to that interpretation, since then it has split badly on what that interpretive supremacy really means. As explained in Part III (A), in post-*Boerne* cases a narrow majority of Justices has essentially required that enforcement legislation be congruent and proportional to the Court's own equal protection doctrine, even when that doctrine is explicitly based on institutional limitations and not an understanding of true constitutional meaning. Part III (B) explains how this approach to congruence and proportionality creates problems for judicial review of the three examples of nondiscrimination legislation discussed here, given the incompleteness and ambiguity of the Court's doctrine on these issues.

In light of these difficulties, Part IV critiques the Court's current doctrinal supremacy approach to enforcement legislation. It criticizes that approach as illogical, since it privileges judicial doctrine even when that doctrine explicitly rests on judicial confessions of inability to discern the true constitutional requirement in a given case. It also argues that it is unworkable, given the problems discussed in Part III (B).

Part V builds on this critique to suggest a new approach to the enforcement power. This approach retains *Boerne's* concept of judicial supremacy but limits its scope by adopting a more modest understanding of what counts as constitutional interpretation enjoying that supreme status. In particular, Part V (A) explains that the Court should approach legislation enforcing the Equal Protection Clause by first examining the degree to which its own equal protection doctrine states true constitutional principles and, conversely, the extent to which it rests on judicially workable decision rules that do not themselves fully exhaust the constitutional rule. It argues that the Court's doctrine should furnish the baseline against which legislation

is tested for congruence and proportionality only to the extent that the doctrine reflects true constitutional principles.

The fact that much of the constitutional principle discernable in equal protection doctrine is couched at a general level means that the equal protection decisions, properly understood, impose relatively few concrete limits on congressional enforcement authority. However, Part V (A) argues that such broad principles serve a second, more significant, limiting function on congressional power. Those principles channel congressional authority by pointing to inquiries that would reveal more of the true constitutional rule. Thus, judicial doctrine points to the proper questions to be answered by Congress when it writes enforcement legislation. In the context of equal protection, those questions deal not just with the state of empirical reality but also the normative status of certain classifications in light of American society's consensus about which inequalities are fundamentally fair and which are not. Congress's answers to those questions are properly reviewable by courts, with the caveat that courts must keep in mind the fact that these questions are primarily within Congress's institutional competence to answer. Thus, judicial review of Congress's answers, while real, must be limited.

Part V (B) then examines the Court's modern equal protection doctrine to determine what constitutional principles can be gleaned. It concludes—perhaps unsurprisingly—that judicial doctrine states a significant amount of true constitutional principle. However, many of those statements are couched at a high level of generality and, thus, do not furnish strict limits on congressional enforcement power. This fact highlights the importance of the second, channeling, function played by those judicial statements. Part V (C) applies this analysis to the current and proposed enforcement legislation discussed earlier in the Article. Part V (D) explains how this Article's approach affects the appropriate breadth of enforcement legislation.

Part VI summarizes the approach worked out and applied in Part V. It concludes the Article by defending it as an appropriate harmonization of judicial supremacy in the enunciation of constitutional principle and congressional authority and competence to participate in the project of enforcing constitutional rights.

## II. NEW GROUPS AND NEW CHALLENGES

In recent decades America has become an increasingly pluralistic society, marked by individuals coalescing into groups and demanding protection for their rights as members of those groups. Such groups, as varied as the disabled and gays and lesbians, used the civil rights model pioneered by African Americans as the template for their organizing and their self-perception as a social group subject to

discrimination.<sup>43</sup> Legislative bodies, including Congress, have responded by enacting nondiscrimination legislation protecting them. As a result, the civil rights landscape that in the 1960s focused nearly exclusively on race now acknowledges concerns based on membership in a wide variety of groups.<sup>44</sup>

Federal protection for these groups has generally taken the form of legislation that treats the issue as one of discrimination,<sup>45</sup> and thus susceptible to a nondiscrimination mandate along the lines of the 1964 Civil Rights Act. For example, Congress has enacted the Americans with Disabilities Act (ADA)<sup>46</sup> and the Genetic Information Nondiscrimination Act (GINA),<sup>47</sup> and is considering the Employment Non-Discrimination Act (ENDA), which would protect gays, lesbians, and, potentially, transgendered people from employment discrimination.<sup>48</sup> Such legislation generally enjoys a strong constitutional foundation in the Commerce Clause, even after the

43. See, e.g., JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993); Stephen Reinhardt, *Legal and Political Perspectives on the Battle over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11, 16 (2005).

44. Indeed, even with the race category, concerns have expanded beyond African Americans and Caucasians to include Latinos, Asian Americans, Native Americans, and others. The rise in these groups' consciousness reflects the same increasing pluralism that has led to the rise of consciousness of membership in other groups. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 477-80 (1954) (discussing the existence of Mexican Americans as a recognizable social group in Texas).

45. As might be expected, this legislation varies based on political conditions and each group's distinctive needs. For example, the Genetic Information Nondiscrimination Act focuses on insurance and employment discrimination, while the Americans with Disabilities Act includes public accommodation provisions. Political realities also matter. For example, the Employment Non-Discrimination Act does not allow employees to bring claims based on disparate treatment. See H.R. 2981, 111th Cong. § 4(g) (2009); compare *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (recognizing disparate treatment claims in the context of the Civil Right Act of 1964's prohibitions on race and sex discrimination in employment).

46. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12300 (2006).

47. Genetic Information Nondiscrimination Act, 42 U.S.C. §§ 2000ff (2008).

48. See, e.g., Patricia Nemeth & Terry W. Bonnette, *Genetic Discrimination in Employment*, 88 MICH. BAR J. 42, 42 (2009) (describing the Genetic Information Nondiscrimination Act modeled on Title VII of the Civil Rights Act of 1964); Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation About Communication*, 35 FLA. ST. U. L. REV. 947, 970 (2008) (noting that the ADA was modeled after the Civil Rights Act).

This Article does not examine the detail of the legislation it considers, except as necessary to the broad constitutional analysis that is its focus. First, except for GINA, such legislation remains un-enacted; thus, detailed examination of any bill's provisions may be rendered obsolete. More importantly, the fundamental issue this Article considers is the constitutional status of the discrimination targeted by legislation, rather than the legislation itself. This larger status question is key to the Court's current enforcement power analysis. See generally *infra* Part III. Concededly, the scope of the given piece of enforcement legislation is also relevant to this analysis. See *id.* However, the latter analysis cannot be performed until the preliminary inquiry reveals how much enforcement discretion Congress enjoys. This means that opportunities exist for applying this approach to particular pieces of actual enforcement legislation.

recent cutbacks on this power.<sup>49</sup> However, the Commerce Clause has an important limitation as a source of regulatory authority: it does not authorize Congress to make states liable for retrospective relief such as damages or back pay awards.<sup>50</sup> Moreover, substantive cutbacks in that clause raise the possibility that certain applications of these statutes might exceed congressional authority.<sup>51</sup> For these reasons, if not also for the symbolic importance of identifying these statutes as civil rights protections rather than regulations of commerce,<sup>52</sup> it matters whether these laws can be upheld as legislation enforcing the Fourteenth Amendment.

New and prospective civil rights legislation raise difficult issues. The Court's modern Enforcement Clause jurisprudence, announced in *City of Boerne v. Flores*, rests on the idea of ultimate judicial supremacy in the enunciation of constitutional principles.<sup>53</sup> To the extent that enforcement legislation conflicts with court-announced constitutional meaning, as in *Boerne* itself, this principle requires the Court to strike down the legislation as "inappropriate" enforcement legislation.<sup>54</sup>

*Boerne's* judicial supremacy principle challenges legislation addressing discrimination that has only recently become known. Judicial doctrine may well lag behind the social perceptions that give rise, in turn, to group consciousness, demands for legislation, and legislation itself.<sup>55</sup> Time lags aside, courts may also experience particular difficulties in determining when unequal treatment truly constitutes invidious discrimination. Courts have come to understand that race discrimination is always problematic, even if not always unconstitutional; its understanding of gender discrimination has evolved as well,<sup>56</sup> even if it recognizes that gender classifications sometimes present harder constitutional questions. However, other categories of discrimination are not so clear cut. For example, certain

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49. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the Violence Against Women Act as beyond the Commerce Clause power); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (striking down the Gun Free School Zones Act as beyond the Commerce Clause).

50. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58-73 (1996).

51. See, e.g., Schwartz, *supra* note 33, at 1171-72 (noting the doubts that application of the ADA to activities such as voting and accessing courthouses would fall within the Commerce Clause power).

52. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) (noting the purpose of the Civil Rights Act of 1964 as a mechanism for protecting human dignity and considering whether the statute could be upheld as enforcement legislation).

53. See *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

54. *Id.* at 532-36.

55. See, e.g., Stephen Reinhardt, *supra* note 43, at 14-15 (noting this dynamic in the history of the racial and gender equality movements).

56. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Nguyen v. INS*, 533 U.S. 53, 62-64 (2001).

classifications may in fact reflect real differences or redound to the benefit of the group in question.<sup>57</sup> Other classifications may rest on perceptions of social reality that are not easily reducible to the standard "fit" analysis that is the staple of conventional equal protection review.<sup>58</sup>

These and other complications make it harder for courts to perform principled equal protection review of new types of discrimination. While one might expect some of these problems to abate over time in a learning process perhaps parallel to the Court's learning about gender discrimination,<sup>59</sup> others may be more resistant. At any rate, in the meantime judicial doctrine remains unclear even as Congress moves ahead and addresses new forms of discrimination.<sup>60</sup> To the extent doctrine influences how the Court perceives these laws' Section 5 bona fides, this doctrinal confusion poses a real challenge for enforcement legislation.

The next Part addresses both sides of this challenge. First, it sets forth the Court's current approach to the congruence and proportionality standard.<sup>61</sup> It explains that approach privileges not just constitutional meaning, but constitutional meaning as expressed in judicial doctrine. It then considers judicial doctrine concerning three types of discrimination addressed by new or pending legislation—sexual orientation, transgendered status, and genetics.<sup>62</sup> That discussion notes the ambiguities and confusions of those doctrines. When combined, the Court's elevation of its own doctrine as supreme constitutional meaning and the ambiguity of some of that doctrine creates a significant problem for judicial review of enforcement legislation.

57. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 444 (1985) (noting these doubts in the context of mental retardation classifications).

58. See *infra* Part III(B)(1) (discussing lower courts' sexual orientation discrimination jurisprudence).

59. Compare, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a Michigan law limiting the ability of women to work in taverns unless related to the owner), *overruled on other grounds* by *Payne v. Tennessee*, 501 U.S. 808, 830 (1991), with *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion) (arguing that sex discrimination should receive strict scrutiny).

60. Moreover, a decision rejecting an equal protection claim becomes an obstacle to further judicial learning via *stare decisis*. Obviously, *stare decisis* is not absolute; moreover, a narrower ruling would present less of an obstacle than a broad one, such as a holding that a particular group is undeserving of suspect class status. Still, under the Court's current application of *Boerne*, a court decision rejecting an equal protection claim may pose obstacles for subsequent enforcement legislation addressing that same discrimination.

61. See *infra* Part III(A).

62. See *infra* Part III(B).

### III. CONGRESSIONAL ENFORCEMENT POWER: ITS SIGNIFICANCE, SCOPE, AND LIMITATIONS

#### A. *The Congruence and Proportionality Test*

The recent evolution of the enforcement power is a well-known and often-told story. This Article therefore provides only a summary of that evolution.<sup>63</sup>

The modern story begins with *Katzenbach v. Morgan*, which upheld a portion of the Voting Rights Act that prohibited the use of English literacy tests to exclude voters educated in Puerto Rico.<sup>64</sup> The case presented a complex issue, since seven years earlier the Court rejected a facial constitutional attack on such tests.<sup>65</sup> Nevertheless, the *Morgan* Court upheld the law, concluding that the statute, by protecting the voting power of Puerto Rican communities, constituted an appropriate means to ensure their fair treatment by government.<sup>66</sup> More controversially, the Court also said that Congress could have rationally concluded that a proper interpretation of the Fourteenth Amendment condemns literacy requirements.<sup>67</sup> This latter conclusion—that Congress could substitute its own constitutional interpretation for the Court’s—generated a dissent from Justice Harlan<sup>68</sup> and much scholarly commentary.<sup>69</sup> However, it remained formally undisturbed for thirty years.

*City of Boerne v. Flores* changed that by striking down, as inappropriate enforcement legislation, the Religious Freedom Restoration Act of 1993 (RFRA).<sup>70</sup> RFRA represented Congress’s response to the Court’s decision in *Employment Division v. Smith* that the Free Exercise Clause was not violated by neutral, generally applicable laws that only incidentally burdened religious conduct.<sup>71</sup> RFRA prohibited imposition of such incidental burdens unless the government action was narrowly tailored to promote a compelling government interest.

The *Boerne* Court found RFRA to exceed Congress’s enforcement power. According to Justice Kennedy’s majority opinion, the drafting history of the Fourteenth Amendment reflected an intention to limit

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63. For longer discussions of the Court’s enforcement power jurisprudence, see William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39 (2004).

64. 384 U.S. 641, 657-58.

65. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959).

66. 384 U.S. at 652-53.

67. *Id.* at 653-54.

68. *Id.* at 659, 667-68 (Harlan, J., dissenting).

69. See Robin-Vergeer, *infra* note 340, at 697 n.438 (discussing commentary about *Morgan*).

70. See U.S. CONST., amend. XIV, § 5 (authorizing Congress to enforce the Fourteenth Amendment by “appropriate” legislation); 42 U.S.C. § 2000bb1-4 (1993); 521 U.S. 507, at 532-36 (1997).

71. *Employment Div. v. Smith*, 494 U.S. 872, 883-86 (1990).



Congress to enforcing the Fourteenth Amendment, rather than independently interpreting it.<sup>72</sup> While the Court acknowledged that the line between enforcement and interpretation “is not easy to discern,”<sup>73</sup> it concluded that RFRA crossed that line by not exhibiting a “congruence and proportionality” between its provisions and the targeted constitutional evil.<sup>74</sup> The Court first concluded that “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry,”<sup>75</sup> thus rejecting RFRA’s defenders’ claim that the law was aimed at preventing intentional religious discrimination by dispensing with plaintiffs’ need to prove intentional conduct. Second, the Court concluded that RFRA’s wide sweep and stringent liability rule swept too much constitutionally innocent conduct within its ambit for it to satisfy the Court’s new “congruence and proportionality” test.<sup>76</sup>

Six Justices, running the ideological gamut of the current Court, joined the majority opinion in *Boerne*.<sup>77</sup> Since then, however, the Court has split sharply on the application of *Boerne*. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, a five Justice majority held that Congress exceeded its enforcement power when it abrogated state sovereign immunity to federal law patent infringement suits.<sup>78</sup> Defenders of the statute argued that Congress acted to prevent states from depriving patent holders of property without due process.<sup>79</sup> However, the Court concluded that Congress had insufficient evidence to conclude that states often infringed patents and that state law remedies provided inadequate remedies for actual violations.<sup>80</sup> Justice Stevens, dissenting, took issue with this claim of inadequate fact finding, arguing that Congress heard testimony of such infringements and found that they were likely to increase in the future.<sup>81</sup> He also argued

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72. See 521 U.S. at 516-24.

73. *Id.* at 519.

74. *Id.* at 520.

75. *Id.* at 530.

76. See *id.* at 531-36.

77. See *id.* at 509. This number undercounts the Court’s consensus, as Justice O’Connor would have joined the majority had she agreed with the Court’s resolution of the underlying Free Exercise analysis in *Smith*. See *id.* at 545 (O’Connor, J., concurring in part) (“I agree with much of the reasoning set forth [in the majority’s development of the congruence and proportionality test]. Indeed, if I agreed with the Court’s standard in *Smith*, I would join the opinion.”). Justices Souter and Breyer both expressed doubt about *Smith*, and for that reason expressed no opinion on the underlying enforcement power issue. See *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting). Thus, none of the Justices in *Boerne* expressed disagreement with the congruence and proportionality standard. But see *Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting) (abandoning this test).

78. 527 U.S. 627, 647-48 (1999).

79. *Id.* at 641-42.

80. *Id.* at 640-48.

81. *Id.* at 648, 655-57 (Stevens, J., dissenting).

that Congress could have found that state law remedies were inadequate, given exclusive federal court jurisdiction over patent claims.<sup>82</sup> In his view, this feature of patent law made it likely that such remedies would not exist and would be inconsistently applied.<sup>83</sup>

*Florida Prepaid's* focus on the adequacy of congressional fact finding set the stage for subsequent enforcement power decisions.<sup>84</sup> In *Kimel v. Florida Board of Regents*, the same five Justice majority as in *Florida Prepaid* held that the Age Discrimination in Employment Act (ADEA)<sup>85</sup> was not valid enforcement legislation.<sup>86</sup> Paralleling *Boerne* and *Florida Prepaid*, the Court faulted the ADEA for not including sufficient fact finding about the prevalence of the underlying constitutional problem and for imposing a liability rule that outstripped the constitutional evil.<sup>87</sup> Importantly, though, the Court identified the constitutional evil as age discrimination that failed the Court's own rational basis test.<sup>88</sup> Thus, the Court concluded that the prohibition on such discrimination constituted the full scope of the constitutional requirement.<sup>89</sup>

Both components of *Kimel's* reasoning faced difficult challenges in the next case, *Board of Trustees of the University of Alabama v. Garrett*.<sup>90</sup> In *Garrett*, the same five Justice majority held that the employment provisions of the ADA exceeded congressional enforcement power. The Court traced *Kimel's* analysis, faulting congressional fact finding and expressing concern about the statute's sweep in relation to the underlying constitutional evil. Nevertheless, *Garrett* presented the Court with a harder case on both points. First, Congress engaged in extensive fact finding in enacting the ADA, which led it to find numerous examples of disability discrimination by state and local governments.<sup>91</sup> Second, the Court's identification of the right at issue was complicated by the fact that in *City of Cleburne*

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82. *Id.* at 658.

83. *Id.* at 659.

84. *But see*, *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Violence Against Women Act exceeds the enforcement power because it regulated private conduct rather than state government conduct). The question of the enforcement power's applicability to private conduct is interesting and difficult but beyond the scope of this Article.

85. 29 U.S.C. §§ 621-634 (2006).

86. 528 U.S. 62, 62 (2000).

87. *See id.* at 82-91.

88. *See id.* at 83-84.

89. *Id.* at 84. Justice Stevens, writing again for the same dissenters as in *Florida Prepaid*, did not focus on the enforcement power issue. Instead, he argued that Congress should have the power to abrogate state sovereign immunity when legislating under the Commerce Clause. *See id.* at 92-99 (Stevens, J., dissenting).

90. 531 U.S. 356 (2001).

91. *See id.* at App. C (Breyer, J., dissenting); *cf. Kimel*, 528 U.S. at 89 (describing the evidence of states discriminating on the basis of age as consisting "almost entirely of isolated sentences clipped from floor debates and legislative reports").

*v. Cleburne Living Center*, the Court had struck down an instance of disability discrimination as violating equal protection.<sup>92</sup> This fact made it harder for the Court to dismiss the right at issue as a narrow one that justified only narrow enforcement legislation.

The Court's responses to these challenges reflected its determination to limit congressional enforcement authority. First, it rejected the relevance of any facts except for those illustrating action by state governments that would have risen to the level of unconstitutional discrimination had they been litigated in court.<sup>93</sup> Second, it characterized *Cleburne* as a rare but straightforward case of government action failing rational basis review.<sup>94</sup> In particular, it failed to consider whether *Cleburne's* institutional competence-based reason for not formally applying heightened scrutiny,<sup>95</sup> and its de facto heightened scrutiny<sup>96</sup> suggested a potentially deeper problem with disability discrimination. Justice Breyer, writing for the four dissenters, protested both the Court's refusal to credit the relevance of much of Congress's fact finding and its failure to allow Congress more latitude to determine when discrimination becomes arbitrary and, hence, unconstitutional.<sup>97</sup>

In cases from 2003 and 2004, the Court's enforcement power jurisprudence took a different turn. In *Nevada Department of Human Resources v. Hibbs*, a six Justice majority upheld the Family and Medical Leave Act (FMLA) against an enforcement power challenge.<sup>98</sup> The Court described the FMLA, which mandates gender-neutral access to medical and family leave, as aiming to counteract employers' stereotypes that women were less reliable employees because of their family care duties.<sup>99</sup> The Court's enforcement power analysis then commenced with its observation that gender classifications received heightened judicial scrutiny.<sup>100</sup> After describing the facts Congress found, using a much more generous standard than in *Garrett*,<sup>101</sup> the majority explicitly concluded that

92. 473 U.S. 432, 450 (1985).

93. See *Garrett*, 531 U.S. at 368-72. Indeed, the Court did not include as relevant evidence about conduct performed by local government on the ground that local governments did not enjoy Eleventh Amendment sovereign immunity. See *infra* note 169 (critiquing this component of the Court's analysis).

94. *Id.* at 366 n.4, 367.

95. See Araiza, "The Section 5 Power," *supra* note 16, at 559-64.

96. See *Cleburne*, 473 U.S. at 456-57 (Marshall, J., concurring in part) (noting the rigor of the majority's ostensible rational basis analysis).

97. See *Garrett*, 531 U.S. at 378-82 (Breyer, J., dissenting).

98. 29 U.S.C. § 2601 (2006); 538 U.S. 721, 737 (2003).

99. See 538 U.S. at 728-29.

100. *Id.*

101. For example, the Court cited evidence of private employer conduct and conduct not on the precise issue as that addressed by the FMLA. See *id.* at 744, 746-49 (Kennedy, J., dissenting) (arguing that the Court's treatment of evidence was inconsistent with its treatment of the evidence in *Garrett*).

“[b]ecause the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.”<sup>102</sup> Thus, *Hibbs* both reflected a more generous evidentiary standard and made the congruence and proportionality standard easier to satisfy by describing the constitutional evil as more serious and thus appropriately attacked with broad enforcement legislation.

The next year, in *Tennessee v. Lane*, the Court again gave a more hospitable reception to enforcement legislation.<sup>103</sup> *Lane* upheld against an enforcement power challenge the public accommodations provisions of the ADA as applied to access to courtrooms.<sup>104</sup> As in *Hibbs*, the Court gave a generous reading to the congressional factual record.<sup>105</sup> As in *Hibbs*, this evidentiary generosity was paired with an observation that the right at issue—here, court access—had been held by the Court to enjoy special judicial protection.<sup>106</sup> Indeed, the Court explicitly concluded that the ADA’s “reasonable accommodation” requirement was congruent and proportional to the constitutional evil it targeted because that standard tracked the constitutional requirement for judicial access.<sup>107</sup>

Taken together, these cases illustrate the Court’s attempt to maintain its interpretive supremacy by enshrining judicial doctrine as the baseline to which enforcement legislation must be congruent and proportional.<sup>108</sup> *Boerne* established the basic idea of judicial supremacy when it identified *Smith* as the constitutional rule to which RFRA had to be congruent and proportional. Later cases featured disagreement

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102. *Id.* at 736.

103. 541 U.S. 509 (2004).

104. *Id.* at 531.

105. Indeed, the Court even credited facts included in a disability rights task force whose findings were excluded in *Garrett*. See *id.* at 542-46 (Rehnquist, C.J., dissenting).

106. See *id.* at 522-23.

107. See *id.* at 531-33.

108. In *United States v. Georgia*, 546 U.S. 151 (2006), the Court was able to avoid a difficult enforcement power issue by reaching the uncontroversial conclusion that the ADA was valid enforcement legislation to the extent the plaintiff used the ADA to seek remedies for alleged actual violations of court-declared constitutional rights.

Last year in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009), the Roberts Court had its first real opportunity to consider the enforcement power. *Northwest Austin* considered the constitutionality of Congress’s 2006 extension of the VRA’s preclearance requirement. The Court did not decide that issue, resolving the case instead on a statutory ground. *Id.* at 2514-15. However, in dicta it questioned the appropriateness of the statute, in particular its coverage formula based on decades-old voting data. *Id.* at 2510. The VRA is based on congressional power to enforce the Fifteenth, rather than the Fourteenth, Amendment. *Id.* at 2523-24. Moreover, it combats discrimination explicitly addressed by the Amendment. *Id.* For these reasons—especially the latter—it is tangential to the arguments made in this Article. Still, the Court’s doubts about the VRA’s constitutionality suggest the importance of rethinking the Court’s approach to ensuring the supremacy of its constitutional interpretations.

over the precise nature of the baseline constitutional rule. For example, in *Garrett* the Justices disagreed over whether *Cleburne* suggested that disability discrimination presented a more significant problem than suggested by its formally nonsuspect status. Similarly, in *Lane* they disagreed over whether to analyze the ADA's public accommodation provisions as a whole or as applied to the fundamental right to judicial access. Post-*Boerne* precedent suggests that the Court's determination of the constitutional status of the right at issue in turn determines the leniency of its review of Congress's fact finding. Thus, that doctrinal determination largely seals the fate of enforcement legislation, by both establishing the denominator of the fraction that roughly comprises the congruence and proportionality test and determining the generosity with which the Court will review Congress's fact finding.

*B. First Cuts at Applying the Standard: Sexual Orientation, Transgendered People, and Genetics Under Current Doctrine*

This Article argues that that the Court has seriously misapplied the congruence and proportionality test by reflexively treating its own equal protection jurisprudence as a baseline for performing congruence and proportionality analysis. It begins the argument by explaining how the Court's current approach will raise serious logical difficulties when it considers recent and pending legislation responding to new groups' demands for equality.<sup>109</sup>

*1. Sexual Orientation*

The Court's sexual orientation jurisprudence is evolving.<sup>110</sup> After denying review in a case that presented the question whether sexual orientation was a suspect class,<sup>111</sup> the Court in the very next term decided *Bowers v. Hardwick*,<sup>112</sup> rejecting a claim that same-sex intimacy was protected by the privacy guarantee of the Due Process Clause. *Hardwick* largely froze development of equal protection

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109. See *supra* text accompanying note 45.

110. This Article begins its review of this jurisprudence with the first instance of the question being directly posed to the Court. Earlier discussions of homosexuality generally assumed the validity of legislative discrimination against gays and lesbians. See generally, e.g., *Boutilier v. INS*, 387 U.S. 118 (1967) (rejecting vagueness challenge to congressional law mandating the exclusion of homosexuals without considering whether the discrimination itself violated the equality component of the Fifth Amendment); see also *Ratchford v. Gay Lib*, 434 U.S. 1080, 1080-86 (1978) (Rehnquist, J., dissenting from denial of certiorari) (arguing for the Court to hear a case challenging a state university's refusal to fund a campus gay rights organization on the ground that the organization would incite violations of the state's sodomy law and assuming without discussion that the sodomy law itself was valid).

111. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting from denial of certiorari).

112. 478 U.S. 186 (1986).

doctrine with regard to sexual orientation. While not ostensibly an equal protection case, courts after *Hardwick* often rejected claims of sexual orientation discrimination based on the rationale (however faulty) that such discrimination could not present a constitutional problem since the conduct that supposedly distinguishes the group could be criminalized.<sup>113</sup> While *Romer v. Evans* destabilized this reasoning, *Romer's* description of Amendment 2 as nearly unique, and its unconventional constitutional analysis, effectively left in place the preexisting doctrinal structure unfriendly to claims of sexual orientation discrimination.<sup>114</sup>

*Lawrence v. Texas* raised the possibility of a thaw.<sup>115</sup> By overruling *Hardwick*, the Court removed the “we can discriminate against the sinner if we can punish the sin” argument. Indeed, in an inversion of that argument, the Court suggested that the continued existence of sodomy laws was problematic because it invited more general stigmatization of gays and lesbians “both in the public and in the private spheres.”<sup>116</sup> Justice O'Connor concurred on explicitly equal protection grounds.<sup>117</sup> Importantly, she suggested that she was applying heightened equal protection scrutiny, given the Texas statute's apparent grounding in simple animus and its impact on personal relationships.<sup>118</sup> Together with *Romer*, these facets of *Lawrence* have raised the possibility of new equal protection evolution for gays and lesbians.

Lower court precedent would also presumably influence the Court's congruence and proportionality analysis of ENDA. Given that the Supreme Court has not determined the constitutional status of sexual orientation discrimination, and in the last forty years has decided only one, unusual, sexual orientation claim,<sup>119</sup> lower court decisions would surely be relevant to the Court's evaluation of the constitutional problem posed by sexual orientation discrimination, and thus its conclusion about the constitutionality of federal enforcement legislation on the topic.<sup>120</sup>

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113. See *Romer v. Evans*, 517 U.S. 620, 640-41 (1996) (Scalia, J., dissenting) (arguing that a state ought to be able to disfavor homosexual status if it could constitutionally prohibit sodomy, which he described as the conduct that defined that status); see also Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1734-35 (1993)..

114. See, e.g., *Equality Foundation v. Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997) (noting that *Romer* did not analyze sexual orientation under strict scrutiny or intermediate scrutiny, but instead applied the deferential “rational relationship” test).

115. 539 U.S. 558 (2003).

116. *Id.* at 575.

117. See *id.* at 579 (O'Connor, J., concurring).

118. See *id.* at 579-80.

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

120. Indeed, the very existence of these claims would help establish the existence of a constitutional issue appropriately subject to enforcement legislation. See Bd. of Trs. of

That precedent, however, speaks with an uncertain voice. While no circuit currently views sexual orientation as a suspect class,<sup>121</sup> claims of unconstitutional sexual orientation discrimination have not fared as poorly as one might expect in light of courts' decisions to apply only rational basis scrutiny. Outside of claims relating to custodial environments (namely, prisons and the military), marriage, child rearing, and family, gay plaintiffs have often succeeded in challenging discriminatory state government actions.<sup>122</sup> Strikingly, these successes are won via rational basis review, because either the court concludes that rational basis is the appropriate level of scrutiny,<sup>123</sup> or the court declines to decide the level of scrutiny question given its conclusion that the government action lacks even a rational basis.<sup>124</sup>

The success of these rational basis claims presents at least a potential conundrum for the Court's consideration of the congruence and proportionality of a statute such as ENDA. On the one hand, the lower courts' determinations that rational basis is the appropriate standard would suggest, according to the Court's own Section 5 doctrine, that sexual orientation classifications are generally constitutional.<sup>125</sup> In turn, that conclusion would require more skeptical review of enforcement legislation. On the other hand, the existence of cases where government action fails the rational basis test suggests that some nontrivial percentage of sexual orientation discrimination is simply irrational. Ironically, that presumed irrationality would logically support extensive congressional enforcement legislation under the congruence and proportionality standard. After all, if much sexual orientation discrimination is unconstitutional regardless of the scrutiny it receives, then sexual

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Univ. of Ala. v. Garrett, 531 U.S. 356, 375-76 (2001) (Kennedy, J., concurring) (finding support for the ADA's lack of congruence and proportionality in the lack of claims brought in lower courts alleging unconstitutional discrimination based on disability).

121. However, in recent years a number of state courts have begun to recognize gays and lesbians as suspect classes under those states' own constitutional equal protection provisions. *E.g.*, Shineovich v. Kemp, 214 P.3d 29 (Or. Ct. App. 2009); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009); Kerrigan v. Comm'r of Public Health, 957 A.2d 407 (Conn. 2008); In re Marriage Cases, 183 P.3d 384, 441-42 (Cal. 2008). *But see* Conaway v. Deane, 932 A.2d 571, 608 (Md. 2007); Andersen v. King County, 138 P.3d 963, 975 (Wash. 2006) (rejecting such claims).

122. *See, e.g.*, Price-Cornelison v. Brooks, 524 F.3d 1103 (10th Cir. 2008) (finding discriminatory nonenforcement of a protective order); Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (finding discriminatory school harassment); Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997) (finding discriminatory arrest); *see also infra* note 268.

123. *E.g.*, Pugliese v. Long Island R.R., No 01 CV 7174(NGG), 2006 WL 2689600, at \*8 (E.D.N.Y. Sept. 19, 2006).

124. *See* Nabozny v. Podlesny, 92 F.3d 446, 457-58 (7th Cir. 1996); Stemler, 126 F.3d at 874.

125. *See e.g.* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000).

orientation discrimination presumably constitutes a significant constitutional problem.

Beyond this mild irony lies a deeper point about how judicial equal protection doctrine corresponds to constitutional reality. Underlying gay plaintiffs' relative success in equal protection claims is courts' implicit conclusion that, except in very limited areas, sexual orientation is simply a constitutional irrelevancy. These cases do not turn on the fit between the classification and a legitimate government purpose; courts considering the issue have simply concluded that no good reason justifies using sexual orientation as a tool for deciding which students should be protected at school,<sup>126</sup> which drunk drivers arrested,<sup>127</sup> or which protective orders enforced.<sup>128</sup>

However, this case law coexists only tenuously with the cases where gay plaintiffs have lost. Those cases, especially the military and child rearing cases,<sup>129</sup> usually involve the most deferential rational basis review, which results in a government win based on debatable findings that the legislature either did make (as in the "Don't Ask, Don't Tell" policy) or might have made (as is often the case with regard to restrictions on parental rights).<sup>130</sup> The deference these courts apply stands in tension with the skepticism inherent in courts' conclusions in other sexual orientation cases where the court is unable to perceive even the hint of a rational basis for the government action. The tension lies not as much in the differing results as in the entirely different nature of the court's inquiry. In particular, the military and child rearing cases suggest that sexual orientation is a fundamentally nonproblematic classification tool. By contrast, the other cases suggest that many sexual orientation classifications fail even the most basic requirement that government act rationally.<sup>131</sup>

The upshot of this equivocal and confused lower court case law is that sexual orientation simply does not fit into the Court's existing equal protection jurisprudence. That jurisprudence suggests that as one rises from rational basis review to intermediate and finally strict scrutiny one finds classification tools that generally are less and less

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126. *Nabozny*, 92 F.3d at 458.

127. *Stemler*, 126 F.3d at 873.

128. See *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008).

129. The marriage cases are somewhat *sui generis* given the government's usual argument that bans on same-sex marriage either encourage procreation or simply reflect traditional definitions of a term. See generally, e.g., David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001) (analyzing these and other arguments opposing same-sex marriage).

130. See, e.g., *Lofton v. Sec'y of the Dep't of Children and Family Serv.*, 358 F.3d 804, 824-25 (11th Cir. 2004).

131. E.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 61 (2001) ("[T]he American constitutional tradition has long recognized a judicial authority, not necessarily linked to any specifically enumerated guarantee, to invalidate truly arbitrary legislation.").



constitutionally acceptable, regardless of the factual context.<sup>132</sup> By contrast, sexual orientation discrimination claims resemble Superman: so strong that courts can find no conceivable reason for government discrimination except in certain (Kryptonite) cases, where the claims suddenly become powerless against exceptionally deferential rational basis review. At the very least, such dichotomous results render far more challenging what has up to now been the relatively straightforward nature of the Court's post-*Boerne* case law: legislation benefitting suspect classes gets upheld while legislation benefitting nonsuspect classes gets struck down.<sup>133</sup>

It is anything but clear how such jurisprudence could guide the Court's analysis of whether ENDA is congruent and proportional to the Court's own view of the constitutional problem presented by sexual orientation discrimination. Not only is the equal protection status of sexual orientation unclear, as noted above, but *Lawrence's* statements about the stigma sodomy laws impose on gays and the inappropriateness of morality-based rationales for regulation undermine the constitutionality of much sexual orientation discrimination, given its basis in moral objections, constituent dislike of the targeted group, or "tradition."

This confused jurisprudence is worlds apart from the straightforward *Murgia/Bradley/Gregory* trilogy of age discrimination cases the Court deployed so confidently in *Kimel* to cast doubt on Congress's use of its Section 5 power to legislate against age discrimination. It is also quite distinct from the Court's statement in *Hibbs* that the suspectness of gender discrimination made it easier for Congress to show a serious risk of unconstitutional conduct warranting a response via the FMLA. The situation with regard to sexual orientation discrimination is at least slightly closer to that of the disabled as set forth in *Garrett*. The only case the *Garrett* Court could cite to establish the constitutional status of the equal protection right Congress was seeking to enforce was its ambivalent decision in *Cleburne*, where the Court, despite rejecting heightened

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132. For example, in *Johnson v. California*, 543 U.S. 499 (2005), only two members of the Court dissented from the proposition that, even with regard to prisoners, the right to be free of racial classifications is such that even temporary racial segregation is subject to strict scrutiny. See *id.* at 507-15.

133. See *supra* Part III(A). The Court's recent critique of the VRA, see *United States v. Georgia*, 546 U.S. 151 (2006), does not fit this pattern, perhaps due to the reach of the VRA into the heart of states' prerogatives to conduct their own elections, and, perhaps ironically given the history of the VRA, the statute's imposition of these burdens on only some states, based on now decades-old criteria. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) ("The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."); cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the original VRA in part because of its application only to certain states shown to have violated voting rights).

scrutiny for the mentally retarded, nevertheless performed relatively careful judicial review. However, *Garrett* simply ignored this ambivalence, instead describing *Cleburne* as a straightforward case where standard rational basis review resulted in the government action being struck down.

As illustrated above, the Court's gay rights jurisprudence is more extensive than its constitutional disability jurisprudence, with multiple statements pointing in different directions. It is certainly possible that the Court in its review of ENDA could simply repeat its performance in *Garrett* and distinguish away the combination of *Romer*, Justice O'Connor's concurrence in *Lawrence*, and the *Lawrence* majority's statements about moral disapproval and the stigmatization of gays. However, such a bravura performance would surely harm the Court's credibility. As a practical matter it is open to question how likely such a performance would be, given the fact that a majority decision to do so would undoubtedly require the concurrence of Justice Kennedy, the author of both *Romer* and *Lawrence*.<sup>134</sup>

Alternatively, the Court could use the occasion of a Section 5 challenge to ENDA to settle the equal protection status of sexual orientation. However, such a move would be perilous for a moderately conservative Court. As noted above, denying suspect class status to sexual orientation discrimination would require it to dismiss or distinguish away more than a trivial set of holdings and dicta from *Romer* and *Lawrence*, including Justice O'Connor's concurrence which not only recognized some degree of heightened scrutiny for gays, but found support for that scrutiny in prior case law. A formal holding that sexual orientation was not suspect would also stand in some tension with lower court decisions, holding in a number of instances that sexual orientation discrimination was unconstitutional. Of course, these holdings were themselves based on application of rational basis review. However, officially sanctioned rational basis review that generated multiple holdings of unconstitutionality could not stand long as a serious standard; at some point, a palpable tension would arise between these holdings and the officially nonsuspect status of sexual orientation discrimination.<sup>135</sup> Conversely, explicitly granting suspect class status to sexual orientation at this point in history would unleash a specter that undoubtedly many on the Court would prefer to avoid: the claim

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134. We are assuming that the Court looks only to federal courts' constitutional doctrine when determining the degree of constitutional protection accorded gays and lesbians. The addition of other players' opinions—such as those of state supreme courts—may make a casual, *Garrett*-style dismissal of gays' constitutional status even more difficult to justify. See *infra* Part IV.

135. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 682-84 (1973) (plurality opinion) (recounting the Court's purportedly rational-basis decision in *Reed v. Reed*, 404 U.S. 71 (1971), and concluding that the Court must have been actually performing heightened review).

that marriage discrimination, currently enshrined in the state constitutions of over half the states, many in recent referenda, violated equal protection.<sup>136</sup>

Given these concerns, it is perhaps not surprising that the Court has avoided conventional equal protection analysis of sexual orientation classifications. In *Lawrence*, the Court majority avoided the question nearly entirely and in *Romer* the Court described Amendment 2 as a rare, per se violation of equal protection. Even its alternate holding, that Amendment 2 was the product of illegitimate animus, avoided the larger question by casting the case as involving a bizarrely broad statute that simply could not be justified by any rational explanation.

Thus, the Court would probably find it difficult to reach a coherent result about the suspect class status of sexual orientation discrimination with which it could be comfortable. Yet, under the current version of its congruence and proportionality test, it would have to do just that in order to evaluate ENDA as enforcement legislation.

## 2. *Transgender Discrimination*

If sexual orientation discrimination presents a problem of a contradictory jurisprudence then discrimination against the transgendered presents the problem of a jurisprudence that cannot even settle on its proper focus. Discrimination against transgendered people has been described and analyzed as a species of both gender discrimination and sexual orientation discrimination, as well as a type of discrimination in its own right.<sup>137</sup> This multiplicity is not necessarily surprising. Since transgender discrimination is rooted in social discomfort with the failure of people to conform to gender expectations, it can be described as a variant of gender or sexual orientation discrimination.

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136. It would also raise questions about the constitutionality of sexual orientation-based restrictions on child rearing and military service, as well as sexual orientation classifications in the prison setting. Military and prison discrimination may survive heightened scrutiny due to the deference traditionally accorded the administrators of those institutions. *See, e.g.,* *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (upholding military restriction on the wearing of visible religious symbols, based largely on deference to military judgment). *But see* *Johnson v. California*, 543 U.S. 499, 507 (2005) (requiring strict scrutiny of state penal policy housing new inmates based on race until they are investigated for possible violence factors, despite argument that prison administrators need the discretion to act to prevent race-based gang violence). However, child rearing restrictions may be more vulnerable. *Cf., e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (striking down the argument that the children will be impacted by others' racial prejudice as a basis for child custody awards).

137. Most of the cases to have considered transgender discrimination have occurred in the Title VII context, though a number of cases directly raise Fourteenth Amendment issues. At any rate, courts are beginning to hold that at least some Title VII theories apply in the Fourteenth Amendment context as well. *See infra* note 295.

Judicial decisions reflect this ambivalence, with courts evaluating transgendered plaintiffs' claims under all three rubrics. According to some commentators, however, the multiplicity of theories has, ironically, redounded to these plaintiffs' detriments. These commentators argue that the multiple ways of construing a transgendered plaintiff's claim allows an unsympathetic court to conclude that the claim is really of a disfavored type. Thus,

[i]n jurisdictions that do not prohibit discrimination on the basis of sexual orientation, courts have emphasized the similarity of gay and transgender people, relying upon decisions that have excluded lesbians and gay men from protection under Title VII as a rationale for excluding transsexual people. At the same time, courts in jurisdictions that protect lesbians and gay men have concluded that transsexualism is distinct from sexual orientation and have dismissed sexual orientation claims by transsexual plaintiffs on that basis.<sup>138</sup>

Similarly, courts have often rejected transgender discrimination claims brought on a gender discrimination theory by concluding that the two types of discrimination are distinct.<sup>139</sup> These results illustrate that a primary problem with transgender discrimination is the instability of the very concept.

This naming problem carries implications for congruence and proportionality analysis of a federal law restricting transgender discrimination. As explained earlier, a foundational part of that analysis requires a court to identify the right Congress sought to protect.<sup>140</sup> In the case of transgender discrimination this step of the analysis is even more crucial, given the variety of possibilities and their different constitutional implications. If the Court identifies transgender discrimination as sex discrimination then presumably it will find it easier to uphold transgender discrimination legislation on the authority of *Hibbs*.<sup>141</sup> Understanding transgender discrimination as sexual orientation discrimination presumably ties its enforcement power fate to that of gays and lesbians. Finally, identifying it as a distinct category raises a question similar to that in *Kimel* and *Garrett*, where an enforcement power statute was struck down because the protected group had never succeeded in convincing

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138. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 43 (2000); see also Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 285-332 (1997).

139. See Currah & Minter, *supra* note 138, at 39-42.

140. See *supra* text accompanying notes 84-107.

141. Indeed, such a move by the Court would lead to the ironic result that enforcement legislation would be more likely to be upheld when it benefitted transgendered people than when it benefitted gays and lesbians, despite the fact that the inclusion of transgendered protection in ENDA has cost that bill political support in the past.

courts that discrimination against it presented a significant constitutional problem.

These “merely” doctrinal stakes conceal the fundamental nature of the naming decision. Gender discrimination has been and remains a highly contested concept. From early assumptions that it included only discrimination based on the biological status of being male or female, courts’ understanding of gender discrimination has progressed, often under pressure from legislatures,<sup>142</sup> to encompass discrimination on the basis of sexual stereotypes and gender performance. On the other hand, this evolution is not complete. As scholars of transgender discrimination have noted, after *Price Waterhouse v. Hopkins*<sup>143</sup> held that enforcement of stereotypical gender expectations constitutes sex discrimination, one might have expected courts to understand all types of gender-expectations discrimination to come within the ambit of “sex discrimination.”<sup>144</sup> However, courts have largely rejected the application of this argument to the transgendered.<sup>145</sup> Lower courts’ sharply mixed answer to the categorization question for transgendered plaintiffs suggests that enforcement legislation benefitting them would require the Court to make a preliminary categorization decision that would likely determine that statute’s fate.<sup>146</sup>

### 3. *Genetics*

If sexual orientation discrimination presents the Court with too many precedents and transgender discrimination with fundamentally ambivalent ones, then genetics presents the Court with too few. The

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142. For example, it was Congress that compelled courts to view pregnancy discrimination as sex discrimination. *Compare* *Geduldig v. Aiello*, 417 U.S. 484 (1974) (concluding that pregnancy discrimination is not sex discrimination under the Equal Protection Clause), *and* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (finding that an employer’s failure to cover pregnancy-related disabilities in the disability plan did not violate Title VII of the Civil Rights Act of 1964), *with* the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (defining pregnancy discrimination as sex discrimination).

143. 490 U.S. 228 (1989).

144. *See also* *Nev. Dep’t of Human Res. v. Hibbs*, 528 U.S. 721 (2003) (upholding the FMLA as appropriate legislation enforcing sex equality after describing that statute as designed to combat the stereotype of women as less reliable employees in light of their assumed primary responsibility for child and family care).

145. *See, e.g.*, Melinda Chow, Comment, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 HARV. J.L. & GENDER 207, 210 (2005) (citing cases).

146. The way Congress chooses to identify this discrimination would presumably be relevant to the Court’s enforcement power analysis. Thus, if Congress chooses to protect transgendered people by expanding Title VII’s definition of sex to include transgendered status, the Court would analyze the statute as legislation enforcing gender equality. The Court should give significant deference to these types of normative judgments embedded in enforcement legislation, subject to review for reasonableness. *See infra* text accompanying notes 293-95. However, such deference is not necessarily a sure thing under the Court’s doctrinal supremacy approach to the enforcement power.

Court's acceptance of genetic discrimination in *Buck v. Bell*<sup>147</sup> soon came under pressure in *Skinner v. Oklahoma*,<sup>148</sup> where Chief Justice Stone's concurrence expressed doubt about arbitrary state conclusions concerning the heritability of criminal tendencies.<sup>149</sup>

By the time *Skinner* was decided, eugenics-driven disability discrimination was already falling into disrepute, largely due to its association with Nazism. However, post-war advances in genetics increased the feasibility of sorting employees based on their genes.<sup>150</sup> By the 1970s, African Americans were claiming that the discovery of the gene for sickle cell anemia had led to employment discrimination based on fears that they were especially susceptible to falling ill.<sup>151</sup> Claims have also arisen where the genetic discrimination was not tied to race or another established equal protection classification. In at least one case the Equal Employment Opportunity Commission sued an employer that had tested its employees without informing them, alleging a violation of the ADA.<sup>152</sup> The claim was settled, thus leaving unanswered the question whether discrimination based solely on genetic makeup, without the employee manifesting any symptoms of a disease, violated the ADA.<sup>153</sup>

As a matter of standard enforcement power jurisprudence, this history provides inadequate support for GINA as "appropriate" enforcement legislation. Cases such as *Garrett* require the existence of a history of discrimination that would be remedied or deterred by enforcement legislation. Under *Garrett*, such history must be of cases where a state, not a private party or even a substate entity, has engaged in discrimination that a court would find to violate equal protection. Even as modified by *Hibbs* and *Lane*, the basic requirement remains that constitutionally significant discriminations have occurred. The history recounted above, of predominantly private-party conduct challenged, if at all, on statutory rather than

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147. 274 U.S. 200 (1927).

148. 316 U.S. 535 (1942).

149. *Id.* at 543 (Stone, C.J., concurring).

150. See U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, *Genetic Monitoring and Screening in the Workplace*, OTA-BA-455, at 6 (Oct. 1990), available at <http://www.fas.org/ota/reports/9020.pdf>.

151. *Id.* at 11 (noting that sickle-cell anemia, among other diseases, heightens carcinogenic or toxic susceptibility to environmental agents); see also *id.* at 42.

152. See Genome.gov, Cases of Genetic Discrimination, <http://www.genome.gov/12513976> (last visited July 30, 2010).

153. Whether this interpretation of the ADA is correct is an open question. See, e.g., Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1514-32 (2002) (noting Supreme Court Justices' reluctance to read the ADA in this manner and suggesting conceptual and practical problems with applying a discrimination framework to genetic issues).

constitutional grounds<sup>154</sup> and not resolved by an authoritative court opinion, appears to fall far short of this standard.<sup>155</sup>

#### IV. THE CRITIQUE OF A DOCTRINE-BASED ENFORCEMENT POWER

The above analysis illustrates the problems the Court might face if it applied its current approach to the congruence and proportionality test to new antidiscrimination legislation. The problems flow from the Court's uncritical use of judicial doctrine to furnish the constitutional rule against which this enforcement legislation is tested. To the extent such doctrine is ambivalent (as with sexual orientation), unsettled as to the basic identification of the discrimination (as with transgender discrimination), or nonexistent (as with genetics) it furnishes an unstable constitutional foundation against which to analyze such legislation.

Commentators and dissenting judges have made a similar point when critiquing previous applications of the congruence and proportionality test. They criticize the Court's use of equal protection doctrine, in particular the rational basis standard, to conclude that the discrimination targeted by the legislation does not present a serious constitutional problem.<sup>156</sup> They note that the rational basis standard, far from being a mechanism for ferreting out equal protection violations, is a tool of judicial restraint, driven by concerns about courts' authority and ability to second-guess legislative classification judgments.<sup>157</sup> According to these critics, such self-restraint may be appropriate, and even laudable; however, the doctrinal test expressing that restraint should not be understood as the constitutional baseline against which to judge enforcement legislation. This Part of the Article summarizes and extends these criticisms, and sets up the argument in the next Part for a reconceptualization of the congruence and proportionality test.

Under current enforcement power doctrine, the Court's own denomination of a group as a suspect class plays a major role in determining the scope of congressional enforcement power. *Hibbs* made this explicit with its statement that the suspect class status of gender made it easier for Congress to show a pattern of equal protection violations that thereby justified congressional legislation.<sup>158</sup>

154. *But see* *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998) (considering, constitutional Title VII and ADA claims against a laboratory jointly administered by the federal government and a state government based on collection of genetic information).

155. *See infra* note 305.

156. *See, e.g.*, *Post & Siegal*, *supra* note 22, at 8; *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 382-85 (2001) (Breyer, J., dissenting).

157. *See infra* notes 162-68.

158. 538 U.S. 721, 736 (2003).

*Garrett* made this connection even more clearly through its dismissal of the importance of its decision in *Cleburne*.<sup>159</sup> In *Garrett* the Court insisted that *Cleburne* simply reflected a government action failing the standard rational basis test. The Court refused to consider the possibility that its unusual holding—not to mention its explicitly institutional competence-based rationale for refusing to accord higher scrutiny to the mentally retarded—reflected a potentially deeper constitutional problem with disability discrimination.

*Garrett's* treatment of *Cleburne* reveals the extreme juricentric nature of the Court's application of the congruence and proportionality test.<sup>160</sup> Rather than reading *Cleburne* as teaching that disability discrimination sometimes exists even to the point where a court can recognize it through the normal litigation process, and thus concluding that congressional action on the topic ought perhaps be given special respect, the Court instead focused on its doctrine—the fact that the *Cleburne* Court applied only rational basis review. It was that latter feature of the case—the doctrinal category into which the discrimination fit rather than the Court's reasoning or result—that governed how the *Garrett* Court read *Cleburne* and thus how much leeway Congress would have applying the employment provisions of the ADA to the states.

This sort of privileging of doctrine over underlying constitutional meaning is inevitable when the court acts without the benefit of an enforcement statute. In such a case, all a court can do is apply its doctrine unless some analytical breakthrough allows it to discern more clearly the true meaning of a provision.<sup>161</sup> Nevertheless, judicial doctrine may well reflect that true meaning only imperfectly. This is often the case when doctrine accords only rational basis scrutiny to equal protection review of a given classification. Denial of suspect class status and its attendant heightened scrutiny, when based on the political process approach of *United States v. Carolene Products*,<sup>162</sup> does not flow directly from a court's estimation that classifications burdening that group are likely constitutional. Instead, it rests on an implicit conclusion that the affected group suffers no special political disabilities preventing it from rectifying its poor treatment on its own, without judicial assistance.<sup>163</sup> The group's

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159. See *supra* notes 94-96.

160. See generally Post & Siegel, *supra* note 22 (criticizing the Court's juricentric conception of constitutional interpretation).

161. Compare, e.g., *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2584-88 (2008) (applying Sixth Amendment precedent to decide issue of when right to counsel attaches in a given context), with *id.* at 2595 (Thomas, J., dissenting) (arguing that the original meaning of the Sixth Amendment required overruling of that precedent).

162. 304 U.S. 144, 152 n.4 (1938).

163. See, e.g., *FCC v. Beach Commc'ns Comm'n, Inc.*, 508 U.S. 307, 314 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident



presumed political clout may well allow it to resist unfair burdens, but any conclusion that it enjoys fair treatment flows only indirectly, as an inference from that presumed influence. Still, as indirect as the *Carolene* approach is, it provides at least a theoretically plausible way for a court to implement the otherwise vacuous command that government treat people equally.<sup>164</sup> In other words, in the absence of other guideposts, *Carolene* provides a plausible, if imperfect,<sup>165</sup> approach to equal protection review that is consistent with limited judicial competence in this area.<sup>166</sup>

However, in *Garrett* the Court privileged judicial doctrine over underlying meaning in a very different context—the authority of Congress to craft rules enforcing the underlying meaning of the Equal Protection Clause. Faced with a constitutional rule the Court could only partially demarcate via suspect class analysis<sup>167</sup> and a federal statute that sought to demarcate it more precisely, the Court tested that statute not against the rule itself, but instead against the Court's own institutionally limited reading of that rule.<sup>168</sup> *Garrett's* failure to recognize that *Cleburne* did more than simply apply the rational basis standard for judicial review of disability classifications suggests a simplistic, overly rigid, application of the congruence and proportionality test.

*Garrett's* treatment of *Cleburne* reflects one facet of the phenomenon in which judicial evaluations of equal protection claims, with all the limitations that flow from courts' institutional characteristics, furnish the baseline for application of the congruence

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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.") (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

164. See Westen, *infra* note 198 (discussing the vacuous nature of the equal protection command).

165. For compelling criticisms of *Carolene's* real-world coherence, see Ackerman, *infra* note 240; Tribe, *infra* note 277.

166. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376-89 (2001) (Breyer, J., dissenting) (discussing the institutional-competence and institutional-role bases for rational basis review).

167. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (denying suspect class status to the mentally disabled in large part because of concerns over judicial inability to distinguish between invidious and benign singling-out of that group, and because the concern that other groups might also demand suspect class status).

168. Similarly in *Kimel*, the Court tested the ADEA against a very narrow constitutional right to be free from age discrimination. See 528 U.S. 62, 82-88 (2000). However, of the three cases *Kimel* relied on to establish the narrowness of that right, two of them relied on the plaintiffs' concession that age was not a suspect class. See *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979). In the third case, the Court rejected a claim that age was a suspect classification based on a *Carolene* political process analysis. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314-16 (1976). Thus, in the only case relied on by *Kimel* in which the Court actively considered the constitutional status of age discrimination, it reached a conclusion not based on an analysis of true constitutional meaning, but instead based on *Carolene's* mediated political process approach.

and proportionality test. Another facet emerges in *Garrett's* insistence that proof of constitutional violations had to take the form of evidence that would hold up in court. Thus, the Court demanded proof that disability discrimination had been performed by states, rather than private actors or even subunits of state government.<sup>169</sup> Moreover, the relevant conduct was not just disability discrimination, but disability discrimination that a court would likely have adjudged to violate equal protection.

The Court's outright rejection, as irrelevant, of evidence that private parties or nonstate government entities had discriminated, and that states had discriminated in ways whose unconstitutionality was not obvious, amounts to a rejection of circumstantial evidence tending to prove, even if only indirectly, the existence of unconstitutional state discrimination.<sup>170</sup> In essence, rather than requiring evidence tending to prove the existence of unconstitutional state action,<sup>171</sup> the Court required actual *examples* of such action. Thus it rejected evidence that might prove the existence of a constitutional problem as a more general matter, such as evidence that certain types of workplaces often feature certain types of discrimination. It fits within *Garrett's* litigation-centric approach to evidence that this latter type of evidence is the type normally found by nonjudicial bodies such as legislatures.

This component of *Garrett* reveals not just the juricentric, but the *litigation-centric* nature of the Court's Section 5 doctrine. This same feature is revealed by Justice Kennedy's concurring opinion. Justice Kennedy rejected the ADA as appropriate enforcement legislation based in part on the lack of any significant history of litigation

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169. See 531 U.S. at 368-72. Even assuming *Garrett's* crabbed reading of the type of evidence revealing the existence of a constitutional problem, it is difficult to understand the sense behind the Court's use of the availability of Eleventh Amendment immunity to distinguish between relevant and irrelevant evidence that states are engaged in unconstitutional conduct. See *id.* at 368-69. Eleventh Amendment immunity may in fact distinguish states from counties for purposes of amenability to lawsuits, but it does not distinguish them for purposes of determining constitutional violations, unless Enforcement Clause legislation plays no role other than simply defeating an otherwise-available sovereign immunity defense. But Enforcement Clause legislation should play a greater role than that: it should serve as a limit on and remedy for all Fourteenth Amendment violations, regardless of whether they are committed by an entity that enjoys Eleventh Amendment immunity. The Court's analysis here reduces the Enforcement Clause power to an unprincipled litigation tool rather than a principled grant of power to Congress to enforce the Fourteenth Amendment against all entities to which it applies. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (justifying the *Ex parte Young* doctrine as an unprincipled compromise between state sovereign immunity and the need for a federal forum to vindicate federal rights).

170. See *Garrett*, 531 U.S. at 368-72; see also *id.* at 376-90 (Breyer, J., dissenting)

171. See BLACK'S LAW DICTIONARY 595 (8th ed. 2004) (defining evidence as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact").

alleging unconstitutional disability discrimination.<sup>172</sup> For Justice Kennedy, the lack of such litigation indicated the lack of likely constitutional violations. While this is not implausible, he failed even to consider the possibility that this absence may have resulted from the limitations of litigation as a vehicle for vindicating such rights, rather than a lack of constitutional violations.

As explained earlier,<sup>173</sup> the harshness of the evidentiary approach was somewhat mitigated in *Hibbs* and *Lane*. It is doubtful, though, whether their evidentiary generosity would persist into cases testing the statutes discussed in this Article. *Hibbs* and *Lane* considered legislation protecting rights that enjoy heightened judicial protection. Harmonizing them with *Garrett* and *Kimel*, it appears that the greater judicial protection enjoyed by those rights is what led the Court to take a more generous evidentiary approach. Given the uncertain constitutional status of the rights at issue, the legislation examined in the Article would probably face the tougher evidentiary approach from *Garrett*, rather than *Hibbs*' and *Lane*'s more lenient approaches.<sup>174</sup>

As commentators have correctly argued, the aspects of *Garrett*'s analysis discussed above reflect a seriously mistaken application of the congruence and proportionality test. Congress should not be required to calibrate the scope of its enforcement legislation to the doctrinal categories the Court has constructed to guide its own decisions. Nor should its factual conclusions be deemed irrelevant because they do not satisfy the particularity required of evidence admissible in trials.<sup>175</sup> Rather, even assuming the correctness of the congruence and proportionality test, the baseline to which the enforcement legislation has to be congruent and proportional is not the court-created doctrine, but underlying constitutional meaning. After all, Section 5 authorizes Congress to enforce the Fourteenth Amendment, not the Court's own, institutionally constrained, reading of the Amendment. If judicial statements about the Amendment's meaning should matter at all to the question of Congress's enforcement authority (and of course they should) then this underlying meaning should be the lodestar guiding the Court's

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172. *Garrett*, 531 U.S. at 374-76 (Kennedy, J., concurring).

173. See *supra* Part III(A).

174. It is also worth noting that the swing votes in *Hibbs* and *Lane*—Justice O'Connor and (in *Hibbs* only) Chief Justice Rehnquist—have been replaced by Justice Alito and Chief Justice Roberts, respectively. While Chief Justice Roberts did not have occasion while on the Court of Appeals to consider the scope of the Enforcement Clause power, Justice Alito did, holding that the Family and Medical Leave Act exceeded congressional power. See *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3rd Cir. 2000). *Hibbs* superseded this holding; nevertheless, it provides at least one indicator that Justice Alito may take a harder line on congressional power than Justice O'Connor did.

175. See Araiza, *Courts, Congress, and Equal Protection: What Brown Teaches Us About the Section 5 Power*, *supra* note 16, at 229-30.

congruence and proportionality analysis, rather than the presumptions and deference inherent in the rational basis standard.

#### V. A LAW-BASED RECONSTRUCTION OF THE CONGRUENCE AND PROPORTIONALITY STANDARD

Much of the argument sketched out in Part IV has been made before, both in critiques of the Court's Section 5 jurisprudence and more general analyses of the relationship between constitutional meaning and constitutional doctrine.<sup>176</sup> Implicit in this analysis is the idea that the Court's equal protection opinions often state less meaning than is commonly assumed. This idea flows from Professor Sager's 1978 article on underenforced constitutional norms, and from subsequent scholarship debating the existence and implications of a meaningful gap between judicial doctrine and constitutional meaning.<sup>177</sup>

This Article argues that a better approach to the congruence and proportionality standard starts with a recognition that judicial doctrine does not necessarily exhaust constitutional meaning. Under this approach, a court dealing with a Section 5 challenge would first determine the extent to which the relevant judicial doctrine reflects true constitutional meaning with regard to the subject area covered by the statute. That meaning would then provide the baseline against which the statute could be tested for congruence and proportionality.

This approach is especially useful for considering legislation designed to enforce the Equal Protection Clause. As explained later,<sup>178</sup> equal protection is unique among Fourteenth Amendment rights in the degree to which judicial doctrine does not fully reflect constitutional meaning. For the time being, assuming this assertion is true, it is especially inappropriate to use this doctrine as the source of strict limits on equality-enforcing legislation. This is not to say that equal protection doctrine is completely devoid of statements of core constitutional meaning. Those statements do in fact limit congressional power, though not to the degree suggested by the post-*Boerne* case law.

In addition to demarcating the boundaries of congressional power, those limits also point to follow-on inquiries required to fully apply the equal protection guarantee. By channeling congressional power in this way, judicial statements of constitutional principle play an

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176. See generally, e.g. Kermit Roosevelt, III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) (discussing various doctrines); Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, *supra* note 16 (discussing enforcement power).

177. See, e.g., Eisgruber, *infra* note 340; Robin-Vergeer, *infra* note 340; see also *infra* note 182.

178. See *infra* Part V(B).

additional role in uncovering the proper scope of the enforcement power beyond simply demarcating its outer limits.<sup>179</sup>

This approach to the enforcement power does not abandon the congruence and proportionality test or the principle of judicial supremacy that underlies it. In particular, it does not contemplate a *Morgan*-style sharing of interpretive authority between Congress and the Court.<sup>180</sup> It does, however, moderate the implications of judicial supremacy for congressional participation in the constitutional project. In particular, it acknowledges that, while the judiciary may be supreme within the realm of interpreting the Constitution, institutional or other constraints may prevent the Court from fully applying that meaning to concrete situations. It then argues that Congress should have the authority to fill those gaps in application. Significantly, however, congressional authority is cabined. First, this approach acknowledges a legal limit: enforcement legislation must respect whatever constitutional meaning the Court has been able to articulate. Second, even within the realm where Congress has the bare legal authority to act, this approach imposes an outer limit on congressional discretion. In particular, while this approach envisages broad congressional discretion to make the follow-on determinations courts identify as relevant to a full application of constitutional meaning, courts retain the authority to review those determinations to ensure their reasonableness.<sup>181</sup>

179. Moreover, judicial decisions often leave these questions unanswered because institutional limitations make it difficult for courts to fully answer them. As will be explained, Congress has the power to answer these questions accurately and legitimately.

180. See *supra* notes 64-69.

181. See *infra* text accompanying note 343. The idea that courts retain the authority to review enforcement legislation for reasonableness unavoidably raises the question of whether the enforcement power is as extensive as the congressional power under Article I's Necessary and Proper Clause. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 175-80 (1980) (concluding that Congress's power to enforce the Fifteenth Amendment is as broad as its power under the Necessary and Proper Clause). But see *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding that Congress needs only a rational basis to believe that a regulated activity, in the aggregate, substantially affects interstate commerce for its regulation to be necessary and proper to the vindication of its power to regulate interstate commerce). This more limited understanding of the enforcement power may be necessary to remain faithful to *Boerne*'s vision of judicial supremacy in the determination of constitutional meaning. Because the Court has been so active in demarcating the bounds of otherwise vague Fourteenth Amendment guarantees of equal protection and due process, fidelity to *Boerne* almost necessarily implies a meaningful limitation on congressional discretion to enforce that guarantee. Otherwise, judicial supremacy is simply a formal concept easily overcome by congressional legislation that purports to enforce that provision. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997) (considering whether Congress had sufficient evidence of widespread violations of the constitutional rule against intentional religious discrimination to justify RFRA as legislation enforcing that rule); see also *infra* text accompanying note 314. In essence, taking *Boerne* seriously—as this Article does—means restricting, at least to some degree, congressional discretion to use its enforcement power to enforce rights not precisely identified by the Court.

### A. Initial Objections

This approach raises both conceptual and practical objections. First, the distinction between equal protection “law,” derived from abstract legal analysis and judicial doctrine (such as the rational basis standard) which is based at least partly in considerations of institutional role and competence, calls to mind recent criticism about what Daryl Levinson has labeled “rights essentialism.”<sup>182</sup> This critique argues that it fundamentally misapprehends the idea of law and is misleading and counterproductive to posit the existence of abstract, Platonic ideals of rights in contradistinction to the messy, contingent, imperfect results that obtain when courts enforce or implement those rights.<sup>183</sup> Under the antiessentialist view, constitutional provisions consist simply of their judicial enforcement and ought to be thought of as such.

In addition to arguing that we confuse ourselves when we purport to recognize a distinction between rights and their implementation, this critique also notes the practical difficulty of untangling these two concepts in judicial doctrine.<sup>184</sup> A trenchant criticism of this distinction argues that most of the Court’s constitutional decisions feature both analytical and pragmatic reasoning. It further argues

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The Court’s Necessary and Proper Clause jurisprudence—most notably its inquiry whether a challenged federal regulation is sufficiently necessary and proper to carry out congressional regulation under the Interstate Commerce Clause—is not as rigidly insistent on ultimate judicial supremacy. Compare, e.g., *Raich*, 545 U.S. at 22 (majority opinion) (requiring only that Congress have a rational basis for believing that the regulated activity substantially affect interstate commerce), with *id.* at 52-57 (O’Connor, J., dissenting) (demanding more proof that the challenged regulation was in fact necessary and proper to the effectuation of Congress’s regulation of the interstate market in illicit drugs). But see *United States v. Lopez*, 514 U.S. 549, 564-65 (1995) (rejecting the government’s argument that a federal prohibition on carrying a gun into a school zone is constitutional because of its interstate commerce effects, not because those effects do not exist but because such reasoning would be incompatible with judicially enforced rules of federalism). It would take this Article far afield to speculate about the reasons for this discontinuity. For current purposes the important point is that taking both *Boerne* and Commerce Clause jurisprudence as givens requires the conclusion that the scope of congressional discretion under the Enforcement Clause is simply narrower than its authority under the Commerce Clause. In particular, *Boerne* entails restrictions on Congress’s use of its discretion that do not exist as clearly in the Commerce Clause argument. But see *United States v. Morrison*, 529 U.S. 598, 615 (2000) (striking down a federal remedy for acts of violence committed against women and again rejecting the government’s defense of the statute as inconsistent with judicially-enforced rules of federalism).

182. Levinson, *supra* note 22, at 857.

183. See *id.* at 858; see also Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship* and *District of Columbia v. Heller*, 75 TENN. L. REV. 789, 796-97 (2008) (noting this critique).

184. See, e.g., Levinson, *supra* note 182, at 923-24 (identifying a large number of constitutional provisions that plausibly are underenforced); see also William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1352 n.146 (2007) (noting the lack of lower court analysis of the distinction between institutional and analytical bases for Thirteenth Amendment decisions).

that much of the Court's seemingly analytical reasoning turns in part on the Court's concern for finding a judicially workable rule.<sup>185</sup> Thus, not only do opinions resist easy classification on this basis, but in any given opinion, the two types of reasoning may be woven together in ways that are impossible to disentangle.

These objections arguably have even greater force in the equal protection context, given changes in equal protection doctrine over the last several decades. Most notably, over the last thirty years courts have expanded the scope of classifications that receive serious equal protection scrutiny, and, in doing so, have employed significantly more contextualized analysis.<sup>186</sup> As a result, the simple, two-tiered review developed during the Warren Court, in which racial classifications received strict scrutiny that was invariably fatal while all others received toothless rational basis scrutiny, has been rendered far more complex. Today, equal protection doctrine has expanded to three tiers of review; moreover, each tier exhibits markedly different levels of judicial scrutiny and features exceptions from even those already vague levels. Distilling this contextualized, almost *ad hoc* body of case law into a set of principles grounded in the Constitution is no easy task.

Nevertheless, the assumptions underlying this Article require that we attempt it. In particular, this Article assumes the stability of *Boerne's* distinction between constitutional interpretation and constitutional enforcement. This distinction was accepted across the Court's ideological spectrum in *Boerne*, and, despite spirited dissents in subsequent enforcement power cases, neither wing of the current Court has fundamentally disagreed with the idea that the Court remains the authoritative source of constitutional meaning. Given the existence of Justice Brennan's broader understanding of congressional power in *Katzenbach v. Morgan*<sup>187</sup> as a competing model, the Justices' continued, near unanimous embrace of the *Boerne* distinction reflects a consensus that is unlikely to break apart anytime soon.<sup>188</sup> At the very least, any move back toward the Brennan position would likely be a gradual one. Thus, any realistic call for a rethinking of the enforcement power should begin with an understanding that the Court plays a unique role in determining constitutional meaning. Once one concedes that, then any conception of the enforcement power must distinguish between the power to interpret and the power to enforce.

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185. See Levinson, *supra* note 22, at 923-24 (citing a wide variety of constitutional provisions that arguably are underenforced given courts' confessed institutional incompetence).

186. See, e.g., Araiza, *The Section 5 Power*, *supra* note 16, at 522-23.

187. See *supra* notes 64-69.

188. See *supra* note 77.

That task may not be completely hopeless. Many of the Court's equal protection opinions explicitly acknowledge that the judiciary's institutional limitations cabin its ability to fully apply constitutional meaning. Such acknowledgements, by distinguishing between what the Court really knows about equal protection and what it can only dimly perceive or imperfectly apply, provide a conceptual opening for legislation to apply whatever equal protection law the Court can in fact state confidently. Moreover, some of the Court's statements about underlying equal protection meaning clearly suggest a role for congressional legislation applying that meaning. For example, often those statements incorporate as part of equal protection law social constructs, such as animus, that are best instantiated and applied by more politically responsive bodies.<sup>189</sup> Thus, to the extent the Court's constitutional analysis requires such social judgments it invites congressional action making them. In sum, in at least some cases, equal protection law is especially likely to be under enforced, and Congress is especially suited to remedy that condition.

The next part of the Article considers which equal protection issues may be especially susceptible to an enforcement power analysis that turns on the degree to which the relevant judicial doctrine is analytical or institutionally based. The goal of this investigation is not to rigidly categorize every major doctrine either as one based on the Constitution or simply as a judicially workable decision rule. Such a categorization would miss the point: *every* constitutional doctrine has at least *some* grounding in constitutional principle. Instead, this investigation aims to identify the doctrines that are sufficiently grounded in institutional concerns as to warrant the conclusion that they do not effectuate the constitutional rule with any level of precision.<sup>190</sup>

Of course, the fact that the Court has in fact stated relatively little equal protection law in an area does not thereby give Congress

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189. The superior capacity of legislatures to make such judgments can be inferred from Justice Scalia's famous comment from his dissent in *Romer v. Evans* that "[t]he Court [had] mistaken a Kulturkampf for a fit of spite." *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Taking his accusation at its word, one is struck by the courts' lack of competence to tell the difference between these two concepts.

190. One might very roughly analogize such a doctrine to a constitutional issue that is held to constitute a nonjusticiable political question. Part of the political question calculus involves considering whether judicially discoverable legal standards exist to decide the issue, and whether the issue is one that relies on determinations within the competence of courts. A decision that such standards do not exist supports the conclusion that the issue is a political question which has been committed to resolution by one of the other branches. These cases do not hold that Constitution is silent; rather, they hold that application of the constitutional rule requires nonlegal expertise. Similarly, an equal protection doctrine grounded more in institutional concerns than analytical ones suggests that full application of the constitutional rule requires the input of the political branches, even if equal protection is sufficiently judicially accessible as a concept that some judicial interpretation and application is possible.



unlimited latitude to legislate on that topic. Such an approach would essentially hand Congress a blank check anytime the Court could not conclusively determine the precise shape of the relevant constitutional rule. To avoid this result, this Article's approach to congruence and proportionality requires that courts ask important questions about those judicial statements and the enforcement legislation in question. For example, even a limited statement from the Court might still preclude enforcement legislation that contradicts the principles underlying that statement. A limited statement might also suggest the follow-on determinations or inquiries that are relevant to a fuller application of the constitutional rule; to the extent the enforcement legislation is not based on those determinations it could not be defended as a fuller application of that statement. Finally, even if the enforcement statute did reflect congressional answers to those judicially indicated follow-on inquiries, a court might still judge those answers unreasonable.<sup>191</sup>

In this approach, judicial doctrine plays two roles with regard to enforcement legislation. First, it sets the underlying constitutional rule, and in that way, constrains congressional power to move in a different direction. Second, doctrine reveals, with varying degrees of explicitness, the gaps between it and the underlying constitutional rule. These revelations channel congressional enforcement power by pointing toward the types of inquiries and determinations that are appropriate to enforcing the constitutional rule. They thus constrain congressional power, not by taking certain substantive choices off the table (as with the first role), but rather by setting forth the ways in which Congress can use its particular institutional authority and strengths to enforce the underlying rule.<sup>192</sup> In this way the second

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191. See *infra* text accompanying note 344 (suggesting the standard of review that should be applied to these determinations).

192. This dynamic may be analogized to a congressional delegation to an administrative agency to fill in the holes created by a broadly worded statute. In that situation the statute both sets forth the fundamental policy and directs the agency to fill in any gaps by considering the factors specified in the statute. The agency's implementation must be consistent with whatever meaning can be gleaned from the statute, reflect a consideration of the factors Congress directed the agency to consider, and be reasonable. See *Chevron, USA v. NRDC*, 467 U.S. 837, 843-45 (1984); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-21 (1971). Analogously, in the enforcement context, the Court sets forth the constitutional rule, the enforcement of which the Constitution then "delegates" to Congress via Section 5 of the Fourteenth Amendment.

Of course the analogy cannot be pressed too far. Most notably, an agency is not a branch of government coequal to Congress or a federal court; by contrast, the two actors in the enforcement context are coequal. In *Garrett*, Justice Breyer faulted the majority for insisting that Congress demonstrate in the ADA a degree of fact finding and proof he found more appropriate for a court to demand from an agency. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (Breyer, J., dissenting). But the larger analogy remains. In both cases the initial policy-making body (the Court in the Fourteenth Amendment context and Congress in the statutory one) sets forth the governing rule, often at a level of generality that is incapable of providing sufficiently precise rules of conduct. Thus, in both cases the

role can be seen as the logical next step in the enforcement power analysis after determining which substantive choices the Court's doctrine precludes. As will be explained, this second role becomes quite important when, as with the statutes discussed in this Article, Congress acts in the shadow of judicial doctrine that itself says very little about what equal protection requires and thus precludes very few regulatory options.

This analysis points the way for the rest of this Article. The first step in the argument considers how much of the Court's doctrine consists of true equal protection law. After deriving the content of that law, the next step considers the evidence a court should consider when determining whether the congressional legislation stays within the channels cut by that law. As will become clear, this latter step also speaks to the federalism concerns that properly limit congressional enforcement power.<sup>193</sup> Finally, this Article applies this analysis to the new legislation discussed earlier. This part of the Article provides real world applications of this approach. It thus helps clarify the constitutional questions raised by these new statutes. It also illustrates a more general method of analysis that courts can use when considering future enforcement legislation.

### B. *The Limited Nature of Equal Protection Doctrine*

Equal protection doctrine includes a spectrum of judicial pronouncements from those announcing broad, abstract legal principles to those explicitly resting on institutional competence

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power to enforce the rule is delegated (either through the Enforcement Clause or the statute) to a body capable of translating that broad command into workable rules of conduct. Finally, and most importantly for our purposes, in both cases the legality of those enforcement actions turns on the degree to which the enforcing body has both stayed within the bounds of the rule it is enforcing and instantiated it by resolving the follow-on inquiries mandated by that underlying rule. Compare, e.g., *Chevron*, 467 U.S. at 838 (upholding an agency's construction of a vague statute as long as it is reasonable), with *Overton Park*, 401 U.S. at 416-21 (requiring the agency to implement a statute by considering the factors the statute directs it to consider and acting reasonably in doing so). Again, the key difference lies in the constitutional status of the enforcing entity (the agency, as opposed to Congress), which in turn affects the appropriate degree of deference the enforcing institution's decisions should enjoy when performing these functions. See *infra* text accompanying note 344. (discussing the appropriate standard of review of congressional performance of these functions).

Even after accounting for the appropriate amount of deference Congress should enjoy in this dynamic, this approach is nevertheless subject to the objection that the Thirty-Ninth Congress anticipated Congress enjoying a more independent role in enforcing the Fourteenth Amendment. This objection pushes the argument in this Article up against *Boerne's* vision of the judiciary's supreme authority in determining constitutional meaning. Consistency with that vision—which this Article takes as given—requires some degree of congressional subservience in the task of interpreting the Fourteenth Amendment, even if that subservience was not part of the Amendment's original design. See *supra* note 181 (discussing this idea in more detail); see also *infra* text accompanying notes 308-09.

193. See *infra* text accompanying notes 278-84.

concerns and abjuring any pretense to stating underlying constitutional principle. As scholars have noted, different types of statements often appear in the same opinion and even depend on each other.<sup>194</sup> For that reason, unraveling the Court's reasoning to reveal its analytical and institutional strands presents a difficult challenge. Nevertheless, the task is necessary if one is to craft an approach to the enforcement power that respects judicial supremacy while recognizing that courts sometimes do not fully state constitutional meaning. Fortunately, one can begin to credibly perform this work, thus allowing us to begin sketching out a reimagined enforcement power. This subpart considers what broad constitutional principles can be gleaned from the Court's equal protection jurisprudence.

### 1. *The Scope of the Equal Protection Guarantee*

Begin with some clear statements of equal protection's basic meaning. Most fundamentally, case law indicates that the equal protection guarantee applies to everyone all of the time. As is well known, the Court has found equal protection violations in government classification schemes affecting a wide variety of groups and government action.<sup>195</sup> Indeed, the Court has held, in a very brief *per curiam* opinion suggesting that the question was neither difficult nor novel, that discrimination can run afoul of equal protection even when it is not based on membership in a class.<sup>196</sup> Given these results, as well as the Court's repeated insistence that equal protection requires government to treat likes alike,<sup>197</sup> it seems fair to say that one fundamental principle of equal protection law is that the equality guarantee applies to everyone and to every government action.<sup>198</sup>

194. See, e.g., Levinson, *supra* note 22, at 862.

195. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (*per curiam*) (sewer hookups); *Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003) (college admissions); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (beer sales).

196. *Village of Willowbrook*, 528 U.S. at 565.

197. See Westen, *infra* note 198, at 567 n.103. These cases reflect the Court's embrace of an equality rule focused ultimately on treating likes alike. This rule may be in tension with the class-based, stigma concepts advocated by many scholars as a better understanding of equality. See, e.g., Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 841-42 (2003) (discussing the stigma concept). This Article takes the Court's approach as a given, as its fundamental concern is how to relate antidiscrimination statutes to the underlying meaning of equal protection as provided by the Court. The Court's recent approval of the class-of-one theory of equal protection reinforces its embrace of this approach. See *Village of Willowbrook*, 528 U.S. at 565.

198. Scholars have argued that equal protection is impossible to understand without a conception of substantive rights. See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 565 (1982) (substantive rights "provide the standards by which people are rendered 'alike' or 'unalike'"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1, at 991 (1978). They thus criticize as misconceived any idea that equal protection

This result was not foreordained. The Court could have interpreted the Equal Protection Clause to guarantee equality only with regard to a certain set of rights.<sup>199</sup> Alternatively, it could have interpreted it to guarantee across-the-board equality, but only for certain groups or only against certain types of classifications.<sup>200</sup> Or it could have interpreted it as a guarantee of equality only with regard to certain types of government action, for example, “protective” action.<sup>201</sup> At the very least it could have simply refused to endorse the class-of-one theory, instead insisting that equal protection applied only to discrimination against individuals in their capacity as members of identifiable groups. The Court’s rejection of all these approaches in favor of its all-encompassing rule of “likes should be treated alike,” whatever the correctness of that rule as a historical matter,<sup>202</sup> should be understood as creating part of the law of the Equal Protection Clause. This rule is not driven by institutional concerns. It appears to be, in any realistic sense, constitutional “law.”

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imposes a “presumption of equality” rule of the sort encapsulated by the “likes should be treated alike” formula. See *Westen*, 539 n.8 (identifying the “treating likes alike” rule as the fundamental formal rule of equality); see also *id.* at 542 (“The only claims that do not qualify as ‘rights’ are claims that ‘likes should be treated alike.’”) (emphasis omitted). Since this part of the Article aims only to describe the Court’s jurisprudence, it need not evaluate that claim’s underlying logic or correctness. However, even assuming the correctness of this critique, the results of the Court’s rational basis cases reveal at the very least that all persons enjoy a “substantive” equal protection right to nonarbitrary government treatment. Indeed, as explained below, the rational basis cases may suggest more extensive rights that come closer to the “likes should be treated alike” formula. But even if this latter claim fails, the cases where the Court finds equal protection violations under the rational basis standard without even a hint that the burdened group merits heightened scrutiny, as well as the Court’s endorsement of the “class-of-one” theory of equal protection, reveal an equal protection right that, whether substantive or purely equality-based, applies universally.

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

200. E.g., *Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (“We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]. [The Clause] is so clearly a provision for that race . . . that a strong case would be necessary for its application to any other.”).

201. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433-51 (1992) (arguing that the Equal Protection Clause is fundamentally about the requirement that government provide equality in the protection for rights, rather than in the rights themselves).

202. See, e.g., Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 623 (2005) (“The contemporary consensus that gender-based discrimination represents a fundamental injustice displaced the original understanding of the Equal Protection Clause . . .”).

## 2. *The Public Purpose Requirement*

Equal protection law can also be understood as requiring that determinations of likeness or unalikehood be motivated by a legitimate public purpose. If nothing else about equal protection is established, it must nevertheless remain the case that unequal treatment cannot be justified by an illegitimate motive. As one commentator observed, quoting Charles Black's seminal defense of *Brown v. Board of Education*:

[A]lthough the full meaning of the equal protection clause is not obvious, it is quite clear that equality does not exist when "a whole race or people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station."<sup>203</sup>

Discerning the existence of a public purpose may be difficult: it is always possible that a court may, in Justice Scalia's words, "mistake[] a Kulturkampf for a fit of spite."<sup>204</sup> Indeed, as scholars have noted, much constitutional doctrine in recent decades may reflect a preference for judicial scrutiny of the means, rather than ends, of government action.<sup>205</sup> Part of this focus may reflect a discomfort with or felt inability to distinguish between varying degrees of the importance of the government purpose at stake.<sup>206</sup> Thus, the thought goes, it is better to focus on the degree of fit between ends and means than determine whether a particular end is "legitimate," "important," or "compelling." However, one can distinguish this purpose-weighting issue from the minimum requirement that the purpose pursued by government must be *at least* legitimate—i.e., public regarding. This requirement is deeply rooted in the Reconstruction generation's concern with class legislation thought to be motivated solely by a desire to provide private benefits to powerful interests. Even more fundamentally, this concern traces back to Madison's concern for controlling factions.<sup>207</sup> As noted earlier, the requirement is so fundamental that it transcends any particular constitutional provision.<sup>208</sup>

203. David Orentlicher, *Discrimination Out of Dismissiveness: The Example of Infertility*, 85 IND. L.J. 143, 147 (2009) (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960)). Scholars have noted that the requirement that government action be driven by concerns for the public good rather than oppression for its own sake is so basic as to transcend any particular constitutional provision. See *supra* note 131.

204. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

205. E.g., Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997).

206. See *id.* at 308.

207. See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 29-32 (1993).

208. See *supra* note 132.

Indeed, despite any reluctance courts may have had in distinguishing between legitimate, important and compelling interests, over the last quarter century the Supreme Court has not been averse to examining whether government action lacked any legitimate purpose at all. First, the cases finding government action to have failed the rational basis standard are best explained as turning on the illegitimacy of certain government purposes. These include both the residency date and duration cases<sup>209</sup> and at least the first two cases of the *Moreno/Cleburne/Romer* trilogy.<sup>210</sup> Second, at the other end of the standard of review spectrum, the cases applying strict scrutiny to government affirmative action explicitly refer to the Court's suspicion that illegitimate purposes may be lurking when government considers race in its decisionmaking.<sup>211</sup>

Both of these sets of cases are important for revealing how the Court thinks about true equal protection law. Strikedowns of government action under the rational basis standard are rare, and, more importantly, stand in tension with *Carolene's* presumption of constitutionality and theory of why some classifications receive heightened review.<sup>212</sup> These cases' focus on illegitimate purpose thus suggests that the Court is cutting through the mediating doctrine of *Carolene*-based tiered review and resting its decisions on a true constitutional rule. For their part, the affirmative action cases also

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209. See Bhagwat, *supra* note 205, at 312 n.54 (collecting cases).

210. See, e.g., Bhagwat, *supra* note 205, at 327 (concluding that it is "difficult to explain [*Moreno*, *Cleburne*, and *Romer*] as anything but cases examining the legitimacy of government purposes"). In *Moreno* and *Cleburne*, the Court pointed to direct evidence of an illegitimate animus directed at the burdened groups: respectively, legislative history attacking "hippie communes" and the city's argument that it had denied the permit for the group home for mentally retarded persons based on constituents' fear and dislike of the mentally retarded. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985); *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). In *Romer*, the Court did not have such direct evidence of animus; thus, its inquiry focused more on the fit between Amendment 2 and the legitimate purposes proffered by the state. See *Romer v. Evans*, 517 U.S. 620, 635 (1996). However, after concluding that there was an insufficiently tight fit between Amendment 2 and those legitimate ends, the Court concluded that only animus could have motivated Colorado citizens. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (reviewing *Moreno*, *Cleburne*, and *Romer* and concluding based on them that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause").

211. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (explaining that strict scrutiny is necessary in part to "smoke out" instances where race-conscious government action is motivated by notions of inferiority or "simple racial politics"); see also Winkler, *infra* note 214, at 802-03 (discussing and quoting those cases); Bhagwat, *supra* note 205, at 341 ("Perhaps the clearest example of a 'limited purposes' approach in the Court's jurisprudence can be found in its equal protection decisions regarding race, most notably in its recent affirmative action cases.").

212. See, e.g., *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.") (citation omitted).

reveal a discomfort with *Carolene*. Indeed, in *Croson*, Justice O'Connor questions *Carolene*'s relevance to equal protection law and then gives only the weakest *Carolene*-based justification for according strict scrutiny to affirmative action plans.<sup>213</sup> Here, too, the Court appears to be cutting through doctrine in order to rest its decision on true constitutional principle: in this case, the principle that racial classifications run too great a risk of impermissible motivation to receive anything but the strictest scrutiny.<sup>214</sup> In the end, the Court's conclusions in both of these areas eschew the political process theory that aims to approximate the constitutional rule via a judicially workable formula, in favor of resting on the constitutional requirement of a legitimate government purpose.

### 3. *Minimum Rationality*

The cases discussed above, while accounting for a large percentage of the "rational basis plus" cases, still leave at least one result unexplained. In *Allegheny Pittsburgh v. County Commission of Webster County*,<sup>215</sup> the Court struck down as irrational a tax assessor's valuation of the plaintiff's properties based on acquisition value despite the state constitution's rule that all property be assessed based on its market value.<sup>216</sup> The Court concluded that the county assessor's use of an acquisition value scheme, in defiance of the state constitution's market value-based requirement, created unconstitutional inequality.

*Allegheny Pittsburgh* is a muddled opinion. It insists that a state has great discretion to adopt whatever assessment method it wishes, including an acquisition value scheme, despite the inequalities an acquisition value scheme would create.<sup>217</sup> Therefore, it seems to rest on the fact that the county assessor's action violated state law.<sup>218</sup> As

213. *Croson*, 488 U.S. at 495-96 (observing that African-Americans controlled five of the nine seats on the Richmond City Council that instituted the challenged affirmative action program).

214. See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 802-03 (2006) (citing cases and commentary concluding that identification of illegitimate government purpose is the central justification for strict scrutiny); *id.* at 802 ("The motive theory of strict scrutiny has its most profound impact in equality cases.").

215. 488 U.S. 336 (1989).

216. See *id.* at 343-45. The assessor periodically adjusted the value of property that had not recently been sold, but those adjustments did not promise to bring their valuations in line with recently-sold property within what the Court considered a reasonable amount of time. See *id.* at 338.

217. Indeed, the Court confirmed this reading three years later when it upheld California's acquisition value assessment scheme. *Nordlinger v. Hahn*, 505 U.S. 1, 27-28 (1992).

218. This is the only analysis that explains the Court's reliance on the quantitative inequality produced by the assessor's decision. *Allegheny*, 488 U.S. at 344-45. If that quantitative inequality had independent constitutional significance apart from the

pointed out by Justice Thomas three years later, however, this rationale would apparently mean that the Equal Protection Clause is violated whenever a state official “irrationally” breaks state law and thereby treats a regulated party differently from those treated according to the state law rule.<sup>219</sup> As Justice Thomas noted, this could not conceivably be correct.

This confusion perhaps reduces the import of *Allegheny Pittsburgh* and justifies describing it as an outlier case. But piercing its doctrinal confusion reveals a solid, fundamental rule about equal protection: leaving aside any concern about animus, government classifications must be rational. Like the public purpose requirement, the rationality requirement seems so obvious as to be a triviality. But it seems trivial only because it is so fundamental. Government action that lacks any justification in a legitimate public goal, if not ultimately motivated by animus, has to be understood as an utterly arbitrary expression of a despot’s whim.<sup>220</sup> This guarantee against arbitrariness applies with particular force to equal protection: by focusing on classification rather than substantive rights, equal protection requires government rationality if it is to have any meaning at all.

#### 4. Strike Downs

Decisions striking down government action as unconstitutional provide another source of constitutional principles. In most cases, such decisions reflect principles that are precise enough or capable enough of judicial application to warrant courts exercising their power to nullify government action.

Two very different types of cases provide examples. The Court’s post-*Brown*, pre-affirmative action, race cases illustrate courts’ application of a constitutional principle against racial classification.<sup>221</sup>

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assessor’s violation of the state constitutional assessment rule, then presumably the similar quantitative inequalities in *Nordlinger* would have led the Court to strike down the California assessment scheme. See *Nordlinger*, 505 U.S. at 14-15 (distinguishing *Allegheny County* on this ground).

219. *Nordlinger*, 505 U.S. at 25-26 (1992) (Thomas, J., concurring).

220. A colorful and insightful example of such a whim is the fictional revolutionary in Woody Allen’s movie *Bananas*: after toppling the military dictator and gaining power, the revolutionary becomes irrational, ordering, among other things, that underwear should be worn on the outside.

221. 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. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (public golf course), *rev’d* 223 F.2d 93 (5th Cir. 1955); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches), *aff’d* 220 F.2d 386 (4th Cir. 1955). These cases are picked rather than race cases in general because cases considering race conscious government action defended as benign or compensatory may raise at least slightly more ambiguity about the clarity and precision of the rule they announce. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (insisting that the strict scrutiny accorded affirmative



Whatever the limits of that rule, this principle is sufficiently precise and judicially workable to provide a rule of decision.<sup>222</sup> A very different type of principle is visible in the *Moreno/Cleburne/Romer* trilogy. In those cases, the relevant constitutional principle—that government action must not reflect animus—is vague and difficult enough to apply that courts usually do not apply it directly to strike down government action. The result is that they usually uphold challenged government action alleged to violate this principle. The exceptions occur when, as in *Moreno* and *Cleburne*, the animus is so clearly visible that a court can uncover it as an empirical matter,<sup>223</sup> or, as in *Romer*, the action is unexplainable on any other grounds but animus, thus revealing it by a process of elimination.

Courts are warranted in striking down government action when equal protection principles are either sufficiently precise, as in the race cases, or general but sometimes subject to judicial application on a case-by-case basis, as in the *Moreno/Cleburne/Romer* trilogy. Both types of cases reveal constitutional principles that vary only in their susceptibility to easy judicial application and, thus, their usefulness as actual rules determining the outcomes of cases. In turn, the level at which the relevant principle can be applied by courts determines the level at which a particular strikedown decision should be thought of as announcing a principle of constitutional law to which congressional action must conform.<sup>224</sup>

To complicate matters, however, sometimes strikedowns do not reflect application of constitutional principles. Rather, there may be times when courts will strike down a government action based not on the application of a constitutional principle but on the application of a nonconstitutional judicial prophylactic rule. Probably the most prominent example of such a rule is the set of warnings *Miranda v. Arizona* required police to give criminal suspects as a way of safeguarding suspects' rights against self-incrimination.<sup>225</sup> Until *Dickerson v. United States*,<sup>226</sup> it was thought by many that this

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action programs is not "fatal in fact"); see also *Grutter v. Bollinger*, 539 U.S. 306, 326-28 (2003) (performing strict scrutiny yet deferring to the university's pedagogical determinations about the racial diversity necessary for effective instruction).

222. A longer discussion of this rule is provided in the next Part. See *infra* Part V (B)(5).

223. See *Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (noting legislative history attacking "hippie communes"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (noting the city's argument that its constituents disliked and feared the mentally retarded).

224. Thus, for example, an enforcement statute mandating that states require segregated restaurant facilities or explicitly authorizing the Cleburne Town Council to withhold the approval for the group house for the mentally retarded would not constitute appropriate enforcement legislation.

225. *Miranda v. Arizona*, 384 U.S. 436 (1966).

226. 530 U.S. 428 (2000).

requirement was not a matter of constitutional principle, but rather a judicially workable prophylactic measure designed to secure the underlying right in the most workable way for reviewing courts.<sup>227</sup>

Such instances of judicial prophylaxis are rare—and for good reason—given the significant issues of judicial power that arise when courts strike down government action based on requirements that are not themselves constitutionally mandated.<sup>228</sup> To the extent such judicial prophylactic rules exist, however, they teach us that some care is required before concluding that a judicial strikdown necessarily reflects a constitutional principle in action. Of course, a constitutional principle lurks somewhere in every such case. In *Miranda*, for example, even assuming that the required police warnings were not constitutionally required, that requirement was nevertheless grounded ultimately in the Constitution's non-self-incrimination right. Until *Dickerson*, however, one could have concluded that the result in *Miranda* was not proximately driven by that right but rather by the need for a judicially workable way of enforcing that underlying right. *Dickerson* resolved this issue—rightly or wrongly—in favor of the constitutional status of the *Miranda* warnings themselves. However, the example of the pre-*Dickerson* argument that those warnings were not constitutionally compelled means that even judicial strikdowns must be carefully examined for their constitutional rule content.

### 5. Other Equal Protection Law? Race and Fundamental Rights

Further investigation may reveal more equal protection law. First, as noted in the previous Section, the strong presumption against racial classifications of any kind may constitute true equal protection meaning. The affirmative action cases of the last twenty years have produced a consistent, if narrow, majority for the proposition that government use of race is always suspect.<sup>229</sup> This proposition may rest on either the original understanding of the Equal Protection Clause,<sup>230</sup> or it may rest on an application of the Clause's underlying rule against irrational or nonpublic regarding classifications.<sup>231</sup> Under either understanding, the Court's current approach to race reflects a reasoning process unmediated by any institutionally-based constraints. In particular, the decision, now at least twenty years

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227. Indeed, it still may be the case, to the extent that *Dickerson* noted *Miranda* did not preclude the legislative branch's ability to offer other ways of protecting the right against self-incrimination. See *id.* at 440.

228. See *id.* at 444-65 (Scalia, J., dissenting).

229. But see *supra* note 221.

230. E.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

231. See *infra* note 241

old,<sup>232</sup> to subject affirmative action plans to strict scrutiny strongly suggests a rejection of a political process-based approach to racial classification that might be explained on *Carolene*-based institutional competence grounds.<sup>233</sup> Instead, the Court's acceptance in the race context of what Michael Klarman has called "a more openly normative theory of 'relevance,' which banishes certain criteria from governmental decisionmaking on the ground that they should be irrelevant"<sup>234</sup> suggests that the Court is finding direct constitutional meaning in the presumptive rule against racial classifications.<sup>235</sup>

Second, the fundamental rights strand of equal protection suggests that the Court has identified substantive values that are sufficiently important to require a presumption of equality in their distribution. Concededly, the Court's choice of the rights thereby protected—voting, travel, and potentially some minimum education—can be explained in process-based terms, thus suggesting that their constitutional status flows from the likelihood of a political process breakdown rather than their independent constitutional stature. However, the Court's explanations of why these rights are protected are not cast in these terms. This suggests at least the possibility that these rights in fact derive from the Court's authoritative interpretation of the Constitution.

Ultimately, this Article does not need to consider the constitutional status of either the race classification principle or the fundamental rights strand. Its focus on new and likely upcoming civil rights legislation, which do not implicate those parts of the doctrine, allows us to bracket these difficult issues.<sup>236</sup> Important work can be

232. The "at least" refers to the ambiguous constitutional status of affirmative action before *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). For examples of pre-*Croson* opinions reflecting a lack of consensus on the Court on this issue, see *United States v. Paradise*, 480 U.S. 149 (1987); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

233. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (rejecting the idea that "the race of the benefited group is critical to the determination of which standard of review to apply"); *Croson*, 488 U.S. at 493-94 (calling into question whether political process theory is relevant for determining the appropriate level of scrutiny for racial classifications).

234. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 309 (1991).

235. This may also be the case with regard to gender. See *infra* text accompanying note 243.

236. Thus, for example, this Article does not address the constitutionality of the VRA, an issue the Court recently considered but left undecided in favor of reaching a narrower result. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009). The VRA raises questions of how far Congress may go in combating violations of rights clearly established by Supreme Court precedent. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308-15 (1966) (noting the examples of violations of the Fifteenth Amendment that the original VRA attempted to combat). Attacks on the current VRA's constitutionality argue that those violations have been sufficiently stamped out that the VRA's provisions are no longer appropriate mechanisms for wiping them out. See, e.g., *Holder* at 2525-27 (Thomas,

done considering the constitutional status of the Court's doctrine on these issues and, by extension, the discretion Congress should enjoy when enforcing those rights.<sup>237</sup> This Article simply notes the issue and offers the brief discussions above as a jumping-off point for future examination.

#### 6. *Is Judicial Deference a Constitutional Principle?*

At this point, equal protection law appears to run out. The broad rule requiring government to treat likes alike across all types and spheres of government action constitutes an invitation to the Court to review any legislative action classifying individuals—that is, almost any government action. Leaving aside the modern Court's treatment of race and possibly gender,<sup>238</sup> the breadth of the judicial authority conveyed by this interpretation has naturally led the Court to refrain from enforcing the full force of this rule and to craft doctrines that commanded lower courts to do similarly. The most famous of the Court's formulas setting out its limited review of equal protection claims is, of course, its political process theory from *Carolene Products*. However, even before then the Court was refraining from second-guessing classification decisions that seemed reasonable to the Court via a doctrinal formula that allowed government the latitude to draw classification lines that were less than perfect.<sup>239</sup>

Do these deference formulas reflect a limitation of the Equal Protection Clause itself or simply salutary judicial self-restraint in enforcing its full scope? In a world without congressional enforcement power this question makes no practical difference, since under either conception the reviewing court asks the same question—is the classification reasonable? However, it does matter when one considers that power. If reasonableness is the constitutional rule itself—*i.e.*, if rationality is not merely the minimum requirement of equal protection but rather its full substance—then enforcement legislation targeting reasonable but nevertheless inaccurate classifications would presumably exceed congressional power. By contrast, if the reasonableness requirement is merely a judicial gloss on a constitutional principle that is in fact significantly more demanding, Congress may enjoy more latitude to enact aggressive enforcement legislation.

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J., concurring in part and dissenting in part). Such arguments present a conceptually different issue from the issue considered in this Article—congressional power to enforce (at the level of a precisely targeted statute) equal protection violations that judicial doctrine identifies only in the most general way.

237. Such work is clearly called for in the context of congressional authority to extend the VRA, given the Court's recent criticism of the statute's scope. See *Holder*, 129 S. Ct. 2504.

238. See *infra* notes 243-44.

239. See generally Richard S. Kay, *The Equal Protection Clause in the Supreme Court, 1873 - 1903*, 29 BUFF. L. REV. 667 (1980).

The evidence on this question is mixed. On the one hand, the *Carolene*-based structure of tiered scrutiny is generally understood as the Court's attempt to create a judicially workable approach to constitutional review in the face of the questionable legitimacy of such review in the service of unenumerated, or in this case vague rights.<sup>240</sup> In particular, *Carolene*'s rule reserving heightened equal protection scrutiny to legislation burdening discrete and insular minorities responds to the Court's inability to discern precisely when government classifications fails the fundamental equal protection requirement that likes be treated alike. Its formula of basing equal protection review on the likelihood that the political process is responsive to the burdened group allows the Court to approximate the results an omniscient judge would reach applying the underlying equal protection requirement of treating likes alike and pursuing legitimate purposes<sup>241</sup> while at the same time deferring to legislatures when their processes are deemed trustworthy.

Still, doubts remain. At the highest level of generality, one might argue that judicial deference comprises part of the underlying constitutional rule because the representative political structure the Constitution establishes ensures that groups will generally be treated fairly. On this understanding, judicial deference is not simply an instance of salutary self-restraint but instead fits within a broader structure in which most groups' right to equal treatment is ensured by the political process the Constitution establishes. But this argument becomes circular because that very same political process now includes congressional power to enforce equal protection. If, then, a court adopts this rationale for judicial deference, it seems to follow that a group's ability to convince Congress that states are treating it unfairly and thus to gain enactment of enforcement legislation should count as part of the underlying process justifying judicial deference. This results in a situation where, by hypothesis, reasonableness is all that is constitutionally required under equal protection, but where that conclusion derives in part from a political process that allows an open-ended congressional power to enforce equal protection. This approach thus leads us to *Morgan*'s most

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240. *E.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 713-14 (1985). On the vagueness of the equal protection command, see *supra* note 198.

241. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505-06 (2005) ("The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, '[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' We therefore apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.' ") (citation omitted).

generous reading of the enforcement power as a license to Congress to reinterpret the Fourteenth Amendment, a reading rejected by the Court ever since *Boerne*.

In recent decades, the Court's equal protection jurisprudence has evolved away from *Carolene's* purely process-based approach and toward more judicial consideration of the substantive appropriateness of the classification. The best known example of this phenomenon is the Court's adoption of a strong presumption against any racial classification. As scholars have noted, this decision is unexplainable in any convincing process-based terms. In addition, the Court's gender jurisprudence—in particular, its stated willingness to accord more deferential scrutiny to gender classifications that compensate women for past discrimination or otherwise serve to provide equal opportunity to women<sup>242</sup>—suggests a willingness to distinguish, as a substantive matter, between invidious and benign gender classifications.<sup>243</sup> Finally, the modern doctrinal translation of *Carolene's* "prejudice against discrete and insular minorities" formula includes, in addition to the process-based factor of political powerlessness, a more substantive inquiry into whether the classification tool is generally relevant to a purpose government can legitimately pursue.<sup>244</sup> Surely then, the pure process focus of the Court's *Carolene*-based equal protection jurisprudence has eroded.

Nevertheless, for our purposes, that process focus remains in place. The Court has consistently (if concededly not unwaveringly)<sup>245</sup> explained its decision to accord only rational basis review to a classification on its conclusion that the group at issue is presumed capable of protecting its interests in the political process. Its statements expressing confidence that the political process can be trusted to rectify improvident decisions therefore suggest, at most,<sup>246</sup> that such classifications are likely to be rational because irrational ones will be washed out of the political process. They should not be

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242. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

243. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (stating that strict scrutiny is necessary to distinguish between illegitimate uses of race and truly benign racial classifications designed to remedy past discrimination).

244. E.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (noting that sex "frequently bears no relation to ability to perform or contribute to society"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (noting that a characteristic's relevance to an interest the state may legitimately pursue affects the outcome of suspect class analysis). See also *Watkins v. U.S. Army*, 847 F.2d 1329, 1346 (9th Cir. 1988) (interpreting Supreme Court jurisprudence to inquire as part of suspect class analysis whether a classification is grossly unfair), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

245. See, e.g., *infra* note 247.

246. See, e.g., *supra* note 212.

taken to mean that the Court is making a substantive judgment about those classifications.<sup>247</sup>

Ultimately, it is probably impossible to determine with any certainty the Court's understanding of the status of the reasonableness rule. The evidence, to the extent it exists, is mixed. For example, the Court's explanations for the appropriateness of the rational basis standard cite concerns about federalism as well as separation of powers,<sup>248</sup> suggesting that states' freedom of action to classify stands against both federal judicial review and congressional enforcement power. But these terse statements are too thin to

247. It is important to note that the Court has not been completely consistent in explaining the status of the rational basis standard. Most notably, in *District of Columbia v. Heller*, the Court stated in a footnote that the rational basis standard constitutes "the very substance of the constitutional guarantee" when the constitutional command is a prohibition on irrational laws. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817-18 n.27 (2008) ("[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, 'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee.") (internal citation omitted). The Court cited an equal protection case, *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), as an example of such a command, thereby leaving no doubt that it considered equal protection as a command that is fully satisfied by the rational basis test. *Heller*, 128 S. Ct., at 2817-18 n.27.

It is hard to know what to make of this statement, which rivals the most aggressive statements equating judicial doctrine with constitutional meaning. At base, it equates three conceptually distinct ideas: a constitutional command (here, equal protection), a judicial gloss on that command (here, the prohibition on irrational government action), and a judicial review standard (here, the rational basis standard). For our purposes, the first two of these items may be equivalent: the judicial gloss on equal protection, as an interpretation of the Constitution, may have the status of equal protection "law" as this Article defines the term. Thus, enforcement legislation must be consistent with the judicial interpretation of equal protection—i.e., it must be congruent and proportional to a requirement that classifications not be irrational.

However, the third concept—the judicial review standard—remains distinct. There is no reason to think that the rational basis standard captures the core equal protection command, whether that command is the textual requirement of "equal protection" or the "reasonableness/rationality" gloss on that command. If nothing else, the burden of proof the rational basis standard places on the plaintiff, a court's freedom to hypothesize the government interest sought to be furthered, and the presumption that facts exist connecting that interest to the classification make clear that judicial review under that standard cannot constitute "the very substance" of the constitutional command.

Nor does the Court's statement square with established judicial doctrine. Most notably, it is hard to understand the justification for heightened scrutiny accorded race and gender classifications (or, for that matter, unequal distributions of equal protection fundamental rights) if the rational basis standard constitutes "the very substance" of the equal protection guarantee. One might respond that such classifications are presumptively irrational. However, such a response confuses the constitutional command (a prohibition on irrational classifications that may effectively prohibit most racial or gender classifications) and the standard of review used to effectuate that command (in the race context, strict scrutiny). A race classification may be irrational in the former sense but still satisfy the relaxed requirements of the rational basis standard. For these reasons, the statement in *Heller* must be considered an outlier, and an illogical one at that, and should not stand in the way of the larger point.

248. *E.g.*, *Cleburne*, 473 U.S. at 441-42.

support a conclusion on a question as basic as this: even they can be read as focusing on federal courts as inappropriate overseers of state governments, without speaking to congressional authority.

One might argue that cases like *Garrett* and *Kimel* resolve this issue in favor of reasonableness as a constitutional principle. There, the Court gave skeptical scrutiny to the ADA and the ADEA because the discrimination they addressed needed only to be rational to be constitutional, and thus were not appropriate targets of aggressive congressional enforcement legislation. But these cases prove too much. Rather than elevating the reasonableness requirement to the level of constitutional principle, they instead elevated the particulars of the rational basis standard—a related, but ultimately quite distinct, concept. The rational basis standard brings with it a set of presumptions and assumptions that are not part of any reasonableness requirement. For example, the rational basis standard requires that courts accept any conceivable justification for the classification and places the burden of proof on the plaintiff to disprove the plausibility of all such justifications. As suggested by reasonableness review in other constitutional contexts, this presumption is not a necessary part of a standard that defers to any reasonable legislative action.<sup>249</sup>

The Court's failure to confront this issue squarely means that, at least as far as existing doctrine is concerned, we do not have a good answer to the question whether, as a theoretical matter, the Equal Protection Clause requires perfect classifications or only reasonable ones. This failure should not be surprising: the Court is in the business of deciding cases, not drawing finely wrought theoretical distinctions that usually have little or no impact on pending cases.<sup>250</sup> But this distinction stops being theoretical when Congress uses its Section 5 power to enforce the equal protection rights of groups the Court has not recognized as suspect classes. In such cases, it matters whether the constitutional rule is merely reasonableness (in which case states' imperfect classifications may not justify federal enforcement legislation) or, at least theoretically, perfection (in which case Congress might possess the authority to impose more exacting standards).

As will become clear in the next Part, this Article's approach to the Section 5 power resolves this problem without answering this problem explicitly. A full explanation will have to wait: in brief, though, the

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249. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 752-89 (1997) (Souter, J., concurring) (performing reasonableness review under the liberty prong of the Due Process Clause without invoking the sorts of presumptions used in rational basis review).

250. The distinction does not affect most cases because even if equal protection does theoretically require perfection, the judicial self-restraint reflected in the rational basis standard means that imperfect but reasonable classifications will be upheld.



resolution lies in the Article's proposed requirement that congressional enforcement legislation reflect a broad social consensus that the targeted classifications are fundamentally unfair. This requirement of a social consensus rests on its own justification, set forth later in the Article. As a collateral benefit, however, this requirement has the effect of finessing the question posed here, by allowing congressional enforcement legislation only when the states' practices appear unreasonable in light of public opinion, broadly measured. Under this approach, then, even if we assume that the Equal Protection Clause requires perfection, the social consensus prerequisite for enforcement legislation will limit congressional action to situations where states can be said to be acting unreasonably.

### 7. *The Way Forward*

The new discrimination categories targeted by recent legislation challenge the Court's current equal protection jurisprudence. Unless the Court is content with blocking application of this new legislation to the states, these new categories will require the Court to either adjust that jurisprudence or acknowledge how it relates to underlying constitutional meaning and thus to congressional enforcement power. This Article assumes that the Court, which has been moving toward a more *ad hoc* application of the equal protection guarantee,<sup>251</sup> will not soon inaugurate an entirely new structure of equal protection doctrine that will be more suspicious of these new forms of discrimination and thus friendlier to congressional enforcement. It also assumes that the Justices may wish to avoid blocking the full enforcement of civil rights laws enacted by a politically united federal government enjoying significant popular support. Importantly, though, it also assumes that the Court is not willing to surrender its position as exclusive arbiter of constitutional meaning, as expressed in the congruence and proportionality standard.<sup>252</sup> This Article therefore suggests how the Court may be able to work within that standard to give more room for civil rights legislation.

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251. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558, 579-85 (2003) (O'Connor, J., concurring); *Romer v. Evans*, 517 U.S. 620 (1996).

252. It bears repeating that the Court's insistence on its own ultimate authority to interpret the Constitution has been embraced by both sides of the ideological divide. In addition to the well-known and often remarked-on conservative bloc's insistence on judicial supremacy in the federalism cases, it should be noted that no Justice dissented from Justice Kennedy's statement of judicial authority in *Boerne v. Flores*, and that the more liberal Justices have insisted on judicially enforced constitutional limits on the President's war-fighting powers. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In other areas as well, members of the Court have insisted on the final constitutional say in dialogues that have gone on between Congress and the political branches. See, *e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 676-91 (2004) (Breyer, J., dissenting) (complaining that Congress had done all the Court had required it to make Internet regulation more precisely targeted, only to have the Court continue to strike down such regulation).

The task, then, is to find a method that allows the Court to determine when equal protection enforcement legislation both stays within the constitutional limits described above and reflects Congress's strengths in applying Court-announced equal protection law. This task requires the Court to examine its own opinions, both to determine their constitutional rule content and also to identify the subsequent determinations needed to apply that content to various factual contexts.

The next part of the Article takes up this task. It does so inductively, beginning with a consideration of the new legislation addressed in this Article. In particular, the Article considers what current equal protection doctrine reveals about the constitutional rules relevant to the discrimination these statutes address. It then considers what follow-on inquiries and questions may help apply those rules more fully. Based on that inquiry, it reaches conclusions about appropriate congressional enforcement power in each of these areas. From there the Article reasons upward, culminating in a general approach to the enforcement power.

### *C. Applying the New Approach*

The next several subparts explain how this proposed approach to the enforcement power would apply to the sexual orientation, transgender, and genetics legislation described earlier. By demonstrating the viability of this approach, this analysis can point the way toward a more stable Enforcement Clause jurisprudence as courts confront new antidiscrimination legislation, the subjects of which we can only begin to imagine today.<sup>253</sup>

#### *1. New Legislation: The Common Issues*

The legislation at issue presents a common challenge to the Court: it regulates discrimination in an area where the Court has failed to state precise constitutional meaning.<sup>254</sup> These areas therefore require a congruence and proportionality analysis that recognizes the paucity of judicial statements of relevant constitutional meaning. Unless the Court takes advantage of cases testing this legislation against the Section 5 power to suddenly craft definitive constitutional rules on these topics, it will have to evaluate this legislation in the shadow of its own failure—and possibly its inability—to state the precise constitutional rule.

As explained above, the first step in this analysis must be the testing of such legislation against whatever relevant constitutional

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253. See, e.g., ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* (2008) (discussing obesity discrimination).

254. See *supra* Part III(B).

rules the Court has been able to discern. In the case of the new legislation discussed in this Article, these rules reduce to the first three (the ubiquity of the equal protection guarantee, the requirement of a public purpose, and minimum rationality), plus whatever law can be discerned from cases striking down analogous discrimination.

This paucity should not be surprising: the Equal Protection Clause, and the comprehensive equality principle that it has been taken to mean, is known for its vacuity and indeterminacy. Indeed, it is exactly in response to these characteristics that courts have developed mediating doctrines, such as *Carolene's* political process theory, to enable meaningful judicial review that is not completely *ad hoc*. Therefore, it should not be surprising that those same rules fail to impose significant restraints on congressional action.

Given this identification of the relevant constitutional rules, one might then conclude that this Article envisions no real constraints on the enforcement power. However, the constitutional requirements described above do impose meaningful limits on congressional power. These limits do not come in the form of hard and fast lines. Clearly, the requirement to treat likes alike in pursuit of a public purpose does not itself cabin congressional enforcement authority to the degree that, say, the presumption against racial classifications does. However, these requirements do point toward the inquiries and determinations Congress should have the power to make when enacting enforcement legislation. In other words, the task of ensuring that state governments classify appropriately and in pursuit of legitimate interests channels congressional action by suggesting the types of questions Congress would need to answer to justify enacting enforcement legislation.

Using this approach, the following three Sections discuss the analysis necessary for the Court to uphold the given piece of legislation under the enforcement power. After discussing each piece of legislation separately, the Article then considers the lessons drawn. It then concludes by integrating those lessons into an overall approach to the congruence and proportionality standard that is both appropriately hospitable to civil rights legislation while also respectful of the judicial supremacy that lies at the heart of that standard.

## 2. *Sexual Orientation*

As suggested by the cases described earlier,<sup>255</sup> American law and society exhibit conflicted views about sexual orientation. The cases divide starkly between those that fail to perceive any rational basis for sexual orientation discrimination and those that have no

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255. See *supra* Part III(B)(1).

difficulty doing so. While these results are at least theoretically consistent as simply the divergent products of the same rational basis test,<sup>256</sup> their tones are sharply inconsistent. The opinions striking down the government action imply that sexual orientation is self-evidently irrelevant. They give almost no consideration to the possibility that a rational basis might justify the government action, a striking feature given the deference and presumptions inherent in the rational basis standard. By contrast, cases upholding sexual orientation discrimination reflect the significant deference and presumptions characteristic of conventional rational basis review.<sup>257</sup>

Considering these cases as a whole, it is hard to avoid the sense that they reflect American public opinion more generally. Just as that opinion is evolving toward something of a consensus that sexual orientation discrimination in education, employment, market transactions, or day-to-day interactions with government is inappropriate,<sup>258</sup> so too courts have generally found that in such contexts sexual orientation discrimination is unconstitutional. This consensus translates into judicial doctrine via conclusions that such discrimination is either irrational or motivated by illegitimate animus.<sup>259</sup> By contrast, courts give significant deference to legislative conclusions in the areas of family and parenting,<sup>260</sup> where American public opinion remains deeply ambivalent.<sup>261</sup>

If the Supreme Court's response to enforcement legislation targeting sexual orientation followed the lower courts' lead, then its

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256. The state-court same-sex marriage cases stand apart, as a number of state supreme courts have considered sexual orientation a suspect or quasi-suspect class. See *supra* note 121. Given the higher stakes of federal constitutional status as a suspect class, it is unlikely sexual orientation will be elevated to the status of suspect class in the near future. See *infra* note 271.

257. These cases tend to be concentrated in the areas of prison administration, the military, and family and parental matters. Judicial review of prison and military issues is marked by an especially high degree of deference deriving from their special institutional contexts. *E.g.*, *Turner v. Safley*, 482 U.S. 78 (1987) (establishing a generally deferential review of prison regulations that restrict inmate rights); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (deferential judicial review of a Free Exercise claim in the military context). Thus, the deferential judicial review of sexual orientation discrimination in those areas may flow more from the institutional context than the general acceptability of sexual orientation discrimination. However, in family and parental issues—not coincidentally, areas where empirical proof is sharply contested or nonexistent and where legislative decisions are especially likely to rely on values and *a priori* definitions—courts exhibit significant deference to legislative findings and the conclusions legislatures draw from them.

258. For one poll on these issues, see Posting of Andrew Gelman to FiveThirtyEight: Politics Done Right, <http://www.fivethirtyeight.com/2009/06/gay-rights-are-popular-in-many.html> (June 13, 2009, 20:05 EST).

259. See *supra* note 122.

260. See, *e.g.*, *Lofton v. Sec'y of the Dep't of Children and Family Serv.*, 358 F.3d 804, 825 (11th Cir. 2004).

261. See *supra* note 258.

analysis would also be highly context-specific.<sup>262</sup> However, following the lower courts' lead would create a paradox, given the Court's current approach to congruence and proportionality. On the one hand, legislation such as ENDA would find support in precedent suggesting that it is rarely constitutional for government to discriminate on the basis of sexual orientation in market transactions. However, as noted above, that precedent employs a standard of review—rational basis—that presumes that most sexual orientation classifications are in fact constitutional.<sup>263</sup>

These two characteristics of lower courts' sexual orientation jurisprudence suggest the trouble the Court would encounter if it relied on its post-*Boerne* approach to congruence and proportionality to decide the constitutionality of a statute like ENDA. Use of the existing approach, with lower court precedent constituting at least some of the raw data,<sup>264</sup> would create a dilemma for the Court. Those courts have often found such discrimination to be unconstitutional, but have done so based on a doctrinal test that normally suggests the absence of a significant constitutional problem.<sup>265</sup> Thus the two components of these rulings point toward different answers to a key congruence and proportionality inquiry—the presence of a significant constitutional problem. As this analysis demonstrates, the precedent striking down such discrimination suggests the presence of such a problem, but the standard of review employed suggests the opposite.

This problem arises because of the special nature of judicial review of enforcement clause legislation. If the issue was simply the constitutionality of a particular act of sexual orientation discrimination, then the Court could resolve this problem as it did in *Cleburne* and, even more relevantly, *Romer*. In those cases the Court employed a more muscular version of rational basis review to ferret out particular instances where sexual orientation discrimination was either truly irrational or motivated by invidious purposes. Use of this more aggressive rational basis review allowed the Court to sift, on a case-by-case, action-by-action level between plausible uses of the classification tool and uses that were either irrational or invidious.

However, when the Court reviews enforcement legislation it usually confronts a broad rule of conduct applicable to an entire class of government actors, rather than a statute enacted by a particular

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262. Of course, federal action in the military context would not raise an Enforcement Clause issue, given plenary federal control over the armed forces.

263. Interestingly, these results appear far less explainable as the result of classic rational basis standards, which should generally lead courts to uphold government action. They are more explainable as the result of review against a true constitutional principle of reasonableness, shorn of the presumptions and anti-plaintiff hurdles that mark rational basis review.

264. See *supra* text accompanying notes 119-20.

265. See *supra* notes 122-24.

legislature or an action performed by a particular government official. Unlike these latter actions, an enforcement statute, unless it is unusually narrow in scope, presumably impacts an entire class of government actors, such as employers or managers of government-run public accommodations. In turn, the wholesale character of the enforcement statute requires the Court to make a more general determination about the constitutional problem the statute attempts to remedy.<sup>266</sup> Thus, if the Court believes that the congruence and proportionality of a statute depends on the Court's determination of the seriousness of the problem it confronts, it will have to make that determination at a wholesale level and not at the level of a particular action that, as in *Cleburne* or *Romer*, can be labeled irrational or invidious.<sup>267</sup> This creates the dilemma caused by the disjunction between the more contextualized rational basis review employed by lower courts to test sexual orientation discrimination and the standard's general pro-government bias.<sup>268</sup>

Thus the dilemma remains. The Court can resolve it only by revamping its underlying sexual orientation jurisprudence or reconceptualizing congruence and proportionality review. A general reevaluation of the Court's approach to sexual orientation, while welcome, appears unlikely. If social consensus means anything to the Court's equal protection jurisprudence, then the ambivalent public attitude toward sexual orientation augurs poorly for the Court granting suspect class status for gays and lesbians, especially given the implications that move would have for federal constitutional

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266. Indeed, in *Tennessee v. Lane*, the Court disagreed about the breadth with which the Court should review the constitutionality of the ADA's public accommodation provisions. Justice Stevens's majority opinion reviewed, and upheld, those provisions as narrowly applied to access to courthouses. 541 U.S. 509, 533-34 (2004). Chief Justice Rehnquist, dissenting, protested this narrowly drawn review, arguing that those provisions should stand or fall together. *Id.* at 540-41 (Rehnquist, C.J., dissenting).

267. This is true even if the Court were to adopt Justice Stevens's approach in *Lane*, since even that as-applied approach nevertheless required the Court to consider the ADA as applied to the entire class of situations where disabled individuals sought access to courts. *Id.*

268. Concededly, an important difference between *Garrett* and possible judicial review of ENDA is the existence of lower court cases striking down instances of employment discrimination against gays and lesbians as failing the rational basis test. *E.g.*, *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991). A decision upholding ENDA could simply rely on those cases for the proposition that sexual orientation employment discrimination is simply irrational, thus making ENDA's restrictions congruent and proportional to that underlying rule. But such an analysis would amount to a significant change in equal protection law: it would amount to a holding that a particular classification tool is largely prohibited even though it ostensibly receives the level of review that is reserved for situations where the political process can be trusted to function properly. Such a nuanced approach to equal protection may be welcome, but its context sensitivity would be in significant tension with current doctrine's primary focus on the classification tool itself and not the context in which government is acting.

claims for same-sex marriage rights. As the Court explained in *Cleburne*, suspect class status is a blunt tool that makes it difficult for the Court to defer to political decisions when such deference may be warranted as a matter of institutional competence, or simply politically savvy. In the case of sexual orientation, the continued public ambivalence about sexual orientation in the areas of marriage and family will probably push the Court away from announcing a rule requiring across-the-board heightened scrutiny.<sup>269</sup>

Thus, a Section 5 challenge to ENDA may force the Court to refocus the congruence and proportionality inquiry. In particular, an appropriate review of ENDA may require the Court to decouple its congruence and proportionality review from rigid conclusions drawn from the general level of scrutiny courts apply to sexual orientation discrimination. The Court would need to accord to enforcement legislation targeting sexual orientation the same sort of context-specific review that lower courts already effectively accord when considering constitutional challenges to sexual orientation discrimination.

Even leaving aside the fact that it would more closely track the results reached by lower courts, such a nuanced review of enforcement legislation logically follows from Congress's superior institutional ability to draw lines between different factual contexts involving sexual orientation discrimination. As questionable as *all* such discrimination ought to be, the fact remains that Congress, and legislatures generally, possess a superior ability to draw lines that would be arbitrary if drawn by courts. Thus, while courts are arguably doctrinally inconsistent when they defer to legislative discrimination against gays and lesbians in family and parenting matters while quickly dismissing such discrimination in other contexts, Congress, unconstrained by the need for formal consistency, should have the authority to guarantee equality in some contexts while not acting with regard to others. As an institution that explicitly aims to reflect public opinion, Congress surely has at least as much institutional justification as courts to draw lines between different social contexts, such as employment and marriage. Thus, the Court should give Congress latitude to determine what equal protection's command of

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269. A number of state courts have recently held sexual orientation to be a suspect class under their state constitutions. *See supra* note 121. However, it is not clear what impact these state court decisions would have on the federal constitutional issue. By contrast, a decision that sexual orientation constituted a suspect class under the federal constitution would immediately cast doubt on the decisions of a number of states to prohibit same-sex marriage. A Supreme Court that may want to let this issue play out longer in the political process might well refuse to pretermitt state-by-state development by imposing across-the-board heightened scrutiny for sexual orientation. Heightened scrutiny might also pretermitt political developments with regard to the military's exclusion of acknowledged gays and lesbians. *But see* *Goldman v. Weinberger*, 475 U.S. 503, 527-28 (1986) (upholding the military's imposition of restrictions on religious practice in the name of deference to military judgments).

reasonableness in fact requires in a particular context for sexual orientation discrimination. It would be truly ironic if the Court denied that sort of flexibility to Congress while asserting it for itself by applying the rational basis standard flexibly.

This analysis is not particularly new; commentators and judges have long remarked on Congress's superior ability to draw lines that would seem inappropriately arbitrary if drawn by courts.<sup>270</sup> What is new, however, is the challenge posed by ENDA. ENDA confronts the Court with a statute that both outlaws discrimination that the courts have also been suspicious of, while also favoring a group that is subject to other discrimination that the public has not yet come to fully condemn. By tackling a less controversial subset of sexual orientation discrimination, ENDA would respond to a social problem in a way that is more nuanced than courts can explicitly embrace in light of the formal rigidity of equal protection's tiered structure. There should be no reason for the congruence and proportionality standard to stand in the way of upholding such nuanced legislation simply because courts are institutionally unable to formally categorize social issues with the same flexibility as Congress.

Of course, judicial deference to congressional line drawing cannot turn simply on congressional ability to draw any set of lines. Rather such deference should turn on Congress's ability to draw lines in pursuit of constitutional principles declared by the Court. In the case of ENDA, those principles do in fact provide guidance channeling Congress's institutional capabilities. In particular, the constitutional requirement that legislation serve a public purpose, while itself so general as to be of little value as a limit on congressional power, points toward follow-on questions that Congress ought to have the authority to answer. The public purpose requirement furnishes a criterion against which a court can judge whether ENDA truly enforces equal protection by reflecting congressional expertise in applying a broad equal protection principle crafted by the Court.

What sorts of evidence or inquiries should channel congressional power to apply the public purpose requirement? Surely court precedents—both their results and their analyses—should play some role. Even if such precedents cannot demarcate the constitutional rule with precision, they nevertheless represent the most explicit attempts made by any institution to uncover constitutional meaning. In the case of ENDA, the fact that so much sexual orientation discrimination has been struck down surely suggests the presence of a constitutional problem that Congress ought to have significant latitude to remedy. Perhaps ironically, the argument for this latitude

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270. See, e.g., Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971).



is strengthened by the fact that most of these strikedowns have been based on application of the rational basis test. If much sexual orientation discrimination fails even this most deferential test then presumably it presents a serious constitutional issue. Of course, some sexual orientation discrimination satisfies the rational basis standard. Again, though, the distinction between the discrimination that survives judicial scrutiny and that which fails it should channel congressional power. To the extent that discrimination in market transactions—employment and provision of basic services—is especially likely to be struck down as unconstitutional, ENDA should have an easier time satisfying congruence and proportionality review, properly conceived.

More particularly, to the extent judicial precedent found these classifications to be motivated solely by animus, the core nature of such violations ought to strengthen the case for congressional enforcement authority. As noted earlier, a basic command of equal protection is that government not single out groups for a reason unrelated to the public interest.<sup>271</sup> The difficulty of applying that seemingly simple formula eventually led the Court to the political process approach of *Carolene Products*, which cited an open political process as a justification for courts to forego searching scrutiny of most classification decisions. However, cases in which courts concluded that a governmental classification was motivated by animus reveal violations of equal protection's core command that government act in pursuit of the general good. To the extent lower courts have made such conclusions about sexual orientation discrimination, such conclusions raise the likelihood that in prohibiting such discrimination Congress was in fact enforcing the constitutional command.

Factfinding, and Congress's factfinding power, should matter as well. As Justice Breyer argued in *Garrett*, in a challenge to Enforcement Clause legislation there is no good reason for the Court to refuse to consider evidence of broader social phenomena, such as evidence of conduct by private parties, to the extent it tends to prove unconstitutional conduct by states.<sup>272</sup> This is true even if such facts would not be relevant to a direct constitutional challenge to a particular state action. Indeed, the different relevance such broader evidence should have simply defines the difference between a direct

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271. See, e.g., Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 463 (2000) ("Long before equal protection doctrine had developed categories of suspect classifications or oriented itself toward the protection of specific groups, it had settled on the conclusion that state decisions must be justifiable by reference to public reasons, so that government action that flows merely from 'antipathy' or 'animus' is unconstitutional, whether or not it is subject to rational basis review.").

272. See *supra* text accompanying notes 169-72.

challenge to a particular state action and a challenge to an enforcement statute regulating an entire class of activity. Along with this broader conception of evidence should come respect for congressional factfinding ability. To the extent broader social facts are relevant to the underlying issue, there is every reason for the Court to respect congressional expertise to find such facts.

Social reality should matter as well. Sometimes animus can be found as an empirical matter—as, for example, in *Cleburne*, where the Court had evidence of the local government acting at the behest of constituents' explicit dislike of the mentally retarded.<sup>273</sup> However, more often animus is simply a label for a social judgment that certain reasons for acting are discreditable. John Hart Ely's analysis in *Democracy and Distrust* illustrates the point.<sup>274</sup> In *Democracy and Distrust* Ely mounted probably the most sophisticated attempt ever to construct a value-neutral, purely process-based understanding of equal protection. His analysis culminated with a conclusion that equal protection protects groups against others' refusal to deal with them—refusing, in his words, to allow them entry into the “pluralists' bazaar” of interest group politics—for reasons that were “discreditable.”<sup>275</sup> The qualifier at the end—that the reason for the exclusion had to be normatively undesirable—was necessary to rescue his theory from the obvious objection that many groups—criminals, for example—are not well treated in the political process, and for good reason.<sup>276</sup> However, as scholars have concluded, Ely was never able to explain how those reasons could be evaluated for discredibility, short of the normative inquiries he was trying to avoid.<sup>277</sup>

Enforcement Clause doctrine need not suffer from this same difficulty. The value judgments political branches can legitimately make about the fundamental fairness or arbitrariness of a classification should help establish the normative status of that classification, which can then inform judicial judgments about the scope of congressional enforcement power in that area. The judgments political branches and citizens themselves make about the appropriateness of a given classification reflect the social reality that gives content to the otherwise nearly empty ideas of “equal protection,” “treating likes alike,” and “public purpose.”

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273. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985).

274. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

275. *Id.* at 152.

276. *Id.* at 153-54.

277. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 739-40 (1985) (discussing the inability of the “prejudice” prong of the *Carolene* formula to rescue the theory from the need for value judgments); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-73 (1980).

However, an important caveat is in order. The grant to Congress of authority to perceive social reality and on that basis enact enforcement legislation treads close to Justice Brennan's vision in *Morgan* of congressional power to interpret the equal protection guarantee. Thus, it may be appropriate for courts to perform careful, if ultimately deferential, review of enforcement legislation relying on this theory.<sup>278</sup> Such review would seek to determine if the legislation in fact comports with the social consensus regarding the particular type of discrimination the statute targets. It would examine relevant equality decisions state legislatures and other political actors have made. The goal would be to determine whether other representative bodies have concluded that the discrimination targeted by the federal law is so fundamentally unfair that it violates the equality principle that is now housed in the Equal Protection Clause.<sup>279</sup>

Decisions by other broad-ranging social groups—*e.g.*, corporations, unions, educational institutions—would also be relevant.<sup>280</sup> The point of this inquiry would not be to determine if these actors had concluded that the discrimination at issue violated equal protection. Certainly, there is no logic to courts examining whether private actors have made a determination irrelevant to their normal operations. But even as applied to state and local governments, which *are* subject to equal protection, the inquiry should not be so limited. Rather, the inquiry should aim to determine whether a social consensus exists that certain discrimination is fundamentally unfair. It is consensus on that issue, not on a doctrinal analysis about how a court would apply the Equal Protection Clause, which provides the social understanding of discrimination supporting enforcement legislation. A contrary view commits the same mistake the Court

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278. Of course, enforcement legislation relying on other theories may be subject to different tests. For example, the VRA would appropriately be tested against the Court's determination that racial discrimination violates a true constitutional rule—indeed an explicit one, given the language of the Fifteenth Amendment. Judicial review of that statute would not need to consider social perceptions of racial discrimination, given that the statute targeted discrimination explicitly prohibited by the Constitution.

279. See, *e.g.*, Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians From Discriminatory Employment Practices*, 52 EMORY L.J. 515, 551 (2003) (arguing that enactment of state and local nondiscrimination protections created a consensus allowing the enactment of the Civil Rights Act of 1964, and suggesting that the same process could lead to the enactment of ENDA). A similar process is sometimes employed to determine the meaning of the Eighth Amendment, in light of its recognition of evolving social standards. *E.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 821-23 (1988) (plurality opinion) (finding the evolving practices of states probative in determining the constitutionality of executing a prisoner for a crime committed while he was a child); *id.* at 848 (O'Connor, J., concurring in judgment) (agreeing with this methodology); *id.* at 864-65 (Scalia, J., dissenting) (agreeing with the plurality's methodology as well).

280. See *id.* at 830-32 (plurality opinion) (considering the views of bar and professional organizations as relevant to the Eighth Amendment issue); see also *id.* at 852 (O'Connor, J., concurring in judgment) (noting that the Court has consulted juries' practices in resolving Eighth Amendment issues).

made in *Garrett*—namely, confusing judicial doctrine with statements of actual constitutional meaning. Given this broader understanding of what determinations should support Congress's decision to legislate, it makes sense to include the views of nongovernmental actors when undertaking this investigation.<sup>281</sup>

So understood, this principle furnishes real limits on congressional power. Most notably, it prevents Congress from deciding, in isolation, contrary to state government practice and apparent social consensus, that a certain classification practice is so unfair as to warrant congressional enforcement legislation. Such a statute would lack support from the relevant sources, and thus would be of doubtful constitutionality. At the same time, by counting among the relevant sources both federal and state judicial opinions, this approach would not leave Congress powerless to protect the rights of unpopular minorities, the groups that are usually thought to be the prime beneficiaries of the equal protection guarantee. Including countermajoritarian court decisions as a component of the social consensus that Congress can recognize and enforce ensures that Congress is not constrained from protecting rights that the *Carolene* principle itself would recognize as worthy of protection.

As a practical matter, this approach would likely result in a situation where Congress could not act until at least some degree of consensus had emerged that an equal protection problem exists. In one sense this is a modest statement of the enforcement power, turning as it does largely on the perceptions and conclusions of actors other than Congress. But in a normally functioning political process Congress would presumably not act alone in recognizing and enforcing an equal protection right. Indeed, it would be an unusual situation where no state or local government, no court, and no significant private opinion had expressed concern about a particular issue, but Congress thought it sufficiently important to warrant use of its Section 5 power. In a federal system governing a liberal civil society one might expect advocates for a particular right to press their case on a number of fronts, state and federal, legislative and judicial, public and private. Thus, to the extent Congress acts in response to constituent pressure, it would be expected that such pressure would have resulted in other levels of government, and other social groups, responding in a similar way.

As applied to ENDA, this approach would require a court to examine, in addition to judicial precedent, the evidence of sexual orientation discrimination, generally and particularly in employment, both by private and government employers. Such evidence would help establish the significance of the problem in a

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281. See *Thompson*, 487 U.S. 815.

fuller and more precise way than the current approach, exemplified by *Garrett*, which simply examines whether state employers had engaged in this discrimination, and indeed, whether that state employer discrimination would be judged unconstitutional by a court.<sup>282</sup> At the same time, this proposed approach would require a court to consider the prevalence of analogous protections in state and local law and the nondiscrimination policies of institutions such as corporations, unions, and universities.<sup>283</sup> As explained above, this latter information would help a court determine American society's attitude toward such discrimination.

Obviously, this approach raises difficult issues. What if a body of precedent consistently found state employer sexual orientation discrimination unconstitutional, but social practice did not reveal as clear a social consensus against it? Presumably precedent would trump to the degree those strikedowns suggest a constitutional rule against the practice. Nevertheless, the question would require candor and an explicit weighing process, presumably conducted with a thumb on the scale in favor of congressional power.<sup>284</sup> It is easy to imagine other combinations of the factors that matter in this analysis: the constitutional rule content of any applicable precedent, its precise applicability, and the strength of the social consensus on the issue. It is impossible to prejudge any set of facts, except at a very general level. Still, this Article argues that this approach is workable and avoids the artificiality and ultimate unworkability of *Garrett's* insistence that enforcement legislation be congruent and proportional not to the Constitution but to the Court's own doctrine.

### 3. *The Transgendered*

Discrimination protection for transgendered people would present its own unique challenge to the Court's Section 5 jurisprudence. As

282. *Cf. Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (taking the more narrow approach).

283. The appropriate role to be given religious institutions' views presents an interesting issue. Certainly, religious institutions are important actors in American life. On the other hand, significant Establishment Clause problems might arise were the Court to explicitly consider the position of religious organizations on matters of secular policy. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (striking down on Establishment Clause grounds a state law giving churches power to veto grants of liquor licenses in their immediate vicinity). As a very rough first cut at an answer, it might be appropriate to distinguish between the views of religious institutions and their adherents, with only the latter counting in the calculus and only in their capacities as citizens. On the other hand, the nature of the social consensus inquiry here—in particular, its goal of simply uncovering the normative understandings of the American people on a given issue, as expressed in part through the views of civil society groups—might obviate any Establishment Clause-based concerns with considering the views of religious organizations. This question requires significantly more consideration, however.

284. *See infra* text accompanying note 344 (suggesting an appropriate standard of review).

explained earlier in the Article,<sup>285</sup> transgender discrimination doctrine is marked by disagreement over the phenomenon itself. Under standard application of the congruence and proportionality standard, judicial review of such a statute would require the Court to resolve the naming issue as part of its identification of the right Congress sought to protect. In turn, the Court's decision on that issue would go a long way toward determining the outcome of the enforcement power analysis.<sup>286</sup>

Congress should have significant authority to resolve the naming issue, which is a paradigmatic example of the social fact finding Justice Breyer discussed in his *Garrett* dissent. In that opinion Justice Breyer argued that Congress was better suited than the Court to determine the existence of irrational, animus-based disability discrimination.<sup>287</sup> Justice Breyer relied on Congress's presumed institutional expertise to argue that the Court should defer to its determination that disability discrimination presented a significant constitutional problem.<sup>288</sup>

As applied to transgender discrimination, the institutional competence argument tilts even more strongly in Congress's favor. In this context the issue is even more basic than it was in *Garrett*, as the question to be answered goes to the very social categorization of the status at issue. Is transgender discrimination "really" discrimination based on gender performance, as transgender plaintiffs often argue? Or is it a separate category of discrimination, as courts have often concluded? These questions raise issues of social understanding, not legal logic. Their answers, like all answers to questions about group identity and difference, depend on social context and value choices, rather than abstract legal logic. As Laurence Tribe noted almost thirty years ago, "[o]ne 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—of deciding who may occupy what place, play what role, engage in what activity."<sup>289</sup>

Consider, for example, a federal statute that defined sex discrimination in Title VII to include gender identity.<sup>290</sup> This statute

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285. See *supra* Part III(B)(3).

286. See, e.g., Hendricks, *infra* note 290, at 214-15 (concluding that if the Court identified transgender discrimination as a subset of sex discrimination then a federal statute targeting the practice would stand a higher chance of surviving congruence and proportionality review).

287. *Garrett*, 531 U.S. at 384-85 (Breyer, J., dissenting).

288. See *id.*

289. Tribe, *supra* note 277, at 1074 (emphasis in original) (internal citations omitted).

290. At least one scholar has proposed this approach to the issue of transgender discrimination. See generally Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209 (2008).

would reflect a congressional conclusion that gender stereotyping as reflected in transgender discrimination constituted the same social phenomena as simple discrimination on the basis of biological sex. This equation of types of discrimination is not strictly based on logic or empirical investigation into which types of discrimination are “really” similar. For example, one could simply draw the line at biological gender, and decide that people have a right to be free of discrimination “based on sex” as long as every person acts according to mainstream expectations of how men and women should act and appear. No amount of empirical investigation could threaten the foundation of this rule, unless new facts cause society to make the normative choice of altering the relevant grouping. Similarly, no amount of formal logic short of a circular argument turning on *a priori* definitions could prove that transgendered persons suffering discrimination because of their gender performance are not victims of sex discrimination.<sup>291</sup>

The socially constructed nature of groups suggests that Congress should have a significant role in naming the discrimination experienced by transgendered persons.<sup>292</sup> As Justice Breyer noted in *Garrett*, Congress’s electoral legitimacy provides it with the authority to identify social understanding in a way that courts can do only hesitantly.<sup>293</sup> The case of transgender discrimination involves a fundamental question of social reality: the categorization of a species of discrimination. Transgendered plaintiffs force courts, legislatures and society to confront the question: what exactly *is* transgender discrimination? Is it akin to discrimination based on gender, disability, or sexual orientation, or is it a type of discrimination that is *sui generis*? Congress should enjoy significant authority to answer this question by including the transgendered in an existing protected category such as gender or disability or by creating a new protected category.

However, deference is not abdication. Any enforcement legislation, just like any legislation generally, must be reasonable. For example, hypothesize an enforcement statute that protects the transgendered by defining “race” in Title VII to include transgendered status. This statute would presumably raise judicial concern if that definition justified for transgender plaintiffs the same strict prohibitions the enforcement power authorizes Congress to impose to combat racial discrimination. The problem would arise because the grouping

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291. See *infra* note 301 (concluding that congressional overturning of the Court’s decision that pregnancy discrimination did not violate Title VII’s ban on sex discrimination reflected a dialogue between Congress and the Court over the social meaning of sex discrimination).

292. See *supra* note 289.

293. *Garrett*, 531 U.S. at 384-85 (Breyer, J., dissenting).

Congress codified would clash so severely with our general social understanding of which groups are relevantly similar that this hypothetical statute could not be upheld as an expression of Congress's superior perception of social reality. This hypothetical statute suggests that limitations should exist on congressional discretion to discern and give effect to such perceptions. Such limitations mark the outer boundaries of the deference courts should give to Congress, and thus help demarcate the line between congressional enforcement of judicially announced constitutional rules (e.g., that racial discrimination is a special concern of the Constitution) and congressional interpretation of the Constitution itself.

How should a court police those outer boundaries in the context of transgender discrimination? Begin with the Supreme Court's own jurisprudence. The Court has already travelled a significant distance toward embracing the view that requirements of certain types of gender performance can be understood as sex discrimination. In *Price Waterhouse v. Hopkins*,<sup>294</sup> the Court concluded (in a Title VII case) that Ann Hopkins suffered sex discrimination when her employer failed to promote her due to her failure to maintain a stereotypically feminine appearance.<sup>295</sup> *Hopkins's* equation of gender performance with sex would support a congressional decision taking the next step and equating transgender discrimination with gender performance discrimination.<sup>296</sup> *Hopkins* itself did not reach this issue, and, indeed, most (though not all) lower courts who have confronted it have failed to take that step. However, *Hopkins* should be understood as having engaged in the social analysis of what it means to discriminate "because of sex" in modern American society. Its answer to that question—that sex discrimination includes discrimination based on failure to maintain mainstream notions of how men and women act—is consistent with a congressional determination that transgender discrimination is a species of sex discrimination. Such a congressional determination would represent a step beyond the

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294. 490 U.S. 228 (1989).

295. *Id.* at 258. Courts are beginning to conclude that the *Hopkins* gender-performance analysis of sex discrimination originating in judicial interpretations of Title VII also applies as a matter of Fourteenth Amendment law. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); cf. *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*8, \*8 n.12 (D. Ariz. June 3, 2004) (concluding that the issue is still an open one).

296. Note that this is not the approach contemplated by those who wish to include protections for the transgendered in ENDA. See, e.g., Hendricks, *supra* note 290 (arguing for transgendered protection via amendment to Title VII rather than via ENDA). The point of this discussion is simply to illustrate how court opinions can influence the range of choices Congress can reasonably make when engaging in the sort of group identifying process that would be required should Congress choose to provide protections to the transgendered.



analysis in *Hopkins*. However, it follows from the Court's analysis, as recognized by the lower court opinions applying *Hopkins* to cases of transgender discrimination.<sup>297</sup>

Judicial precedent is not the only source the Court should consult when considering the constitutionality of a statute restricting transgender discrimination. Indeed, as discussed above the very task of naming or categorizing a particular discriminatory practice implicates the sort of social value judgments for which legislatures are better suited than courts. Thus, in considering ENDA or any statute that has the effect of categorizing or naming transgender discrimination, the Court should also examine how society characterizes transgendered status. Undoubtedly, such an inquiry is tricky for courts, which are ill-suited for this task. However, they should be able to perform this task if they accord the appropriate level of deference to Congress and uphold any reasonable legislative answer to the naming question. Moreover, it should never be forgotten that in the absence of enforcement legislation courts perform this same determination without any guidance from Congress.<sup>298</sup>

In the case of a statute that names transgender discrimination, courts should recognize the close social tie between sexual orientation discrimination and transgender discrimination. Regardless of whatever opposition may exist to embracing such a relationship,<sup>299</sup>

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297. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Kastl*, 2004 WL 2008954, at \* 2; *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Serv.*, No. 1:01 CV 1112, 2001 WL 34350174, \*2 (N.D. Ohio Nov. 9, 2001). Of course other cases refuse to apply *Hopkins*. See *Chow*, *supra* note 145 at 210 (citing cases). Ultimately, the exact balance of the tally is irrelevant. As explained in Part III, congressional power to enforce the Fourteenth Amendment is not limited to following Supreme Court precedent as a lower court would. Instead, congressional authority should extend to making determinations about the social status of groups and conduct. *Hopkins* is relevant to that authority because it provides evidence that Congress would be acting reasonably in determining that sex discrimination includes discrimination on account of gender performance. See *infra* text accompanying note 344 (suggesting a reasonableness standard of review). With *Hopkins*'s relevance so understood, what is notable about lower court interpretations of that case is not that that courts have not been unanimous in extending it to include transgender discrimination, but that some courts have.

298. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (deciding that Mexican-Americans constituted a cognizable social group in Texas); *id.* at 478 ("Throughout our history differences in race and color have defined easily identifiable groups . . . . But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact."); see also *id.* at 479 (noting that "one method" by which the existence of a separate class may be determined is "by showing the attitude of the community").

299. See, e.g., Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589 (2000).

the fact remains that the two communities, and the discrimination they experience, are closely linked in the public mind. If confirmation is needed beyond the close historical connections between the two groups and the very term “LGBT” to denote the overall group, one need only cite the fact that activists have tussled hard over whether ENDA should include protection for the transgendered. The fact that sexual orientation discrimination and transgender discrimination remain so closely connected that proponents have struggled to keep the latter in the bill despite warnings that it would destroy chances for passage reflects, if nothing else, the close connection many in the group itself feel toward a unified identity. That close identification, both in the public’s mind and in the minds of group members, demonstrates the reasonableness of grouping them together.

For our purpose, what matters is not so much whether ENDA should include protection for the transgendered, or even whether gay, transgendered, and other people connect the groups as a coherent social unit. As suggested by lower courts and by transgender advocates themselves, alternative understandings of transgender identity exist. Rather, what matters here is that courts should take these social perceptions into account when deciding the appropriateness of Congress’s grouping decision.<sup>300</sup> Those perceptions may be conflicting; indeed, this is hardly surprising given the ambivalence courts themselves have shown on this issue. This ambivalence simply suggests that a variety of naming approaches should be open to Congress as reasonable alternatives.

Judicial review of any congressional choice should also examine the sources set forth in the previous section’s discussion of ENDA. Thus, the actions of state and local governments and significant private institutions should be relevant. As applied to enforcement legislation dealing with transgender discrimination, those actions should be examined in particular for their decisions about the naming issue. Those decisions are relevant because they can shed light on social attitudes toward transgender identity.<sup>301</sup>

Much of this argument is similar to the one made in the discussion of ENDA. However, a congressional response to

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300. Of course, the grouping decision matters not just as a matter of legislative drafting or form, but also because it links the groups when the Court performs its enforcement power analysis. It would be utterly empty for the Court to defer to Congress’s decision to include gender identity discrimination as part of sex discrimination, but then to analyze the enforcement power validity of such a statute as applied to the transgendered, with the result that the Court would fail to use its more generous enforcement power approach from *Hibbs* in favor of a more skeptical approach tailored to a statute targeting transgender discrimination.

301. See, e.g., Hendricks, *supra* note 290, at 211-12 (arguing that Congress’s recognition of pregnancy discrimination as sex discrimination reflected a societal understanding of the meaning of sex equality).

transgender discrimination adds a level of complexity to the analysis, given the ambiguity about the very concept of transgender identity. That ambiguity argues in favor of congressional authority, given the fundamentally normative nature of the question and its imperviousness to judicially accessible tools to resolve it. If, instead, the Court purported to decide conclusively the true essence of transgender identity, it would be arrogating to itself exclusive responsibility for naming social phenomena whose social meanings are heavily contested. To make matters worse, that naming would likely heavily influence how skeptically the Court examines the legislation under review.<sup>302</sup> If the Court were to make such a high-stakes decision for which it is fundamentally ill-suited, especially in the face of a contrary congressional determination, it would deny Congress the power to participate in the project of enforcing constitutional rights at exactly the point where congressional input would be most legitimate and helpful. Properly understood, the congruence and proportionality standard does not require such a counterintuitive result.

#### 4. *Genetics*

Genetic discrimination protection presents two conceptual challenges of its own. They combine to make GINA a complex case for congressional enforcement authority. The issues raised by GINA—(1) whether Congress's enforcement power prevents it from addressing speculative harms and (2) whether genetic discrimination raises a serious constitutional problem—build upon the discussion of sexual orientation and transgender status. Thus GINA reveals important lessons about the appropriate scope of the enforcement power.

First, genetic discrimination is apparently still quite rare. Anecdotal evidence of employers acting based on genetic information exists but is sketchy.<sup>303</sup> The apparent rarity of genetic discrimination directly challenges the way the current Court applies the requirement that enforcement legislation address a serious constitutional issue. In its post-*Boerne* cases the Court has applied this element of the test by searching for litigation that resulted in a finding of unconstitutional discrimination.<sup>304</sup> Given this approach, the novelty of genetic discrimination cuts against GINA's constitutionality. Indeed, one

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302. See, e.g., *Hendricks*, *supra* note 290, at 214-15 (arguing that grouping transgender discrimination as gender discrimination would make it more likely that the Court would uphold the statute as congruent and proportional enforcement power).

303. See *supra* Part III(B)(2).

304. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-32 (2003); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-72 (2001); *id.* at 374-76 (Kennedy, J., concurring) (noting the lack of constitutional challenges to disability discrimination and concluding that that absence suggests that the ADA did not address a serious constitutional problem); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-88 (2000).

commentator cites this hurdle as a major reason for questioning GINA's constitutionality as enforcement legislation.<sup>305</sup>

This issue illustrates in sharp tones the institutional differences between Congress and courts. By definition, courts look backward: their purpose is to correct existing harms, or, at most, forestall imminent ones.<sup>306</sup> Their remedial power, even to issue injunctive and other forward-looking relief, is triggered by the proof of such harms. By contrast, Congress, and legislatures generally, have a much broader brief: to remedy past harms but also to prevent future ones. It is no criticism of legislative action that it seeks to deter a problem that has not yet occurred; indeed, such action is often praised as forward looking.<sup>307</sup>

The first question, then, is whether Congress's enforcement power is different from its other powers in that it requires Congress to stay its hand until such harms occur. In theory there is no reason to believe it is. As a matter of original meaning, it appears as though Section 5 of the Fourteenth Amendment was generally understood to grant Congress the same type of plenary power as the Necessary and Proper Clause of Article I.<sup>308</sup> Of course *Boerne* makes clear that the Court's authoritative interpretation of the Constitution is supreme and cannot be second-guessed by Congress. Taking *Boerne* seriously may entail some restrictions on congressional discretion regarding how to use its enforcement power.<sup>309</sup> But judicial interpretive supremacy does not mean that a lack of court cases dealing with a certain type of discrimination—or even a lack of empirical examples entirely—means that the Constitution is silent as to that issue. It bears repeating that Section 5 authorizes Congress to enforce the Fourteenth Amendment, and not the Court's own institutionally limited understanding of it, including its track record of finding constitutional violations.

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305. See Roberts, *supra* note 31, at 484. Professor Roberts does argue that GINA is constitutional under the Commerce Power, with all the remedial constraints that grant of authority carries with it. *Id.* at 484-85.

306. This concern animates, among other doctrines, the Court's standing, mootness and ripeness doctrines. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 54 (Aspen Publishers 2006) (explaining the rationale for the rule against advisory opinions).

307. Indeed, opponents of GINA did not fault the bill simply because it acted before any discrimination was established, but rather because, they claimed, the possibility of future discrimination arising was too speculative to justify its costs. See Roberts, *supra* note 31, at 468-70.

308. See Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 311-12 n.189 (1993). But see *supra* note 181 (suggesting that modern doctrine yields a divergence between the scope of congressional powers under the Necessary and Proper Clause and the Enforcement Clause).

309. See *supra* note 181.

In fact, it is quite possible that the Court would agree with this analysis, at least in theory. In *Kimel*, the Court conceded that constitutional problems might exist that have thus far eluded the Court.<sup>310</sup> *Kimel* thus suggests that the Court would be willing to concede, at least in theory, that discrimination that had not yet appeared might nevertheless present such a serious threat as to warrant enforcement legislation.<sup>311</sup>

The real difficulty would come when the Court considered the level of proof the Court would demand from Congress that such a threat existed. *Kimel's* dismissal Congress's record of state-sponsored age discrimination set the stage for its rejection, one year later in *Garrett*, of a far more extensive record of state-sponsored disability discrimination.<sup>312</sup> Troublingly for GINA, both age and disability discrimination had been extensively litigated in the courts, including the Supreme Court; moreover, both types of discrimination were recognized as extensively present in American society more generally. Yet in both cases the Court's review of the congressional record was highly skeptical. The lack of any appreciable genetic discrimination litigation, and indeed, the conceded lack of a record of such discrimination in American society generally, suggests that, however receptive in theory the Court might be to a congressional finding of an imminent constitutional threat, its factual review would be highly skeptical.

But how skeptical *should* that review be? Simple rationality review of a predictive judgment by Congress may not be appropriate. Such deferential review would effectively convert the congruence and proportionality standard into a formality that is automatically satisfied whenever Congress makes the requisite predictive judgment. It is difficult to square such deference with the judicial interpretive supremacy to which the Court has adhered since *Boerne*.<sup>313</sup> Such deference to a purely predictive judgment, unsupported by any actual instances of the conduct, would presumably allow Congress to write any enforcement legislation it wished, on any topic, as long as the statute included a finding that the discrimination targeted, while not currently extant, posed a risk.

However, harsh scrutiny of the type performed in *Garrett* may not be appropriate, either. After all, predictive judgments underlie nearly every policy decision Congress makes; indeed, it is not an

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310. See 528 U.S. 62, 91 (2000) (finding Congress's lack of evidence of state-sponsored discrimination to confirm its lack of authority to abrogate states' sovereign immunity in the ADEA).

311. But see *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375-76 (2001) (Kennedy, J., concurring).

312. See *id.* at app. C (Breyer, J., dissenting).

313. See *supra* note 181.

exaggeration to say that such predictions are Congress's stock in trade. When the issue arose in the context of the interstate commerce power, even the post-*Lopez* Court did not hesitate to credit a congressional prediction that the local possession of a good under strict state law restrictions on its transfer presented the risk of the item leaking into interstate commerce in substantial quantities.<sup>314</sup> The difference between this deference and the relatively stricter review of congressional predictive judgments in the enforcement power context may ultimately lie in the fact that the Court is responsible for much—indeed, most—of the lawmaking in the Fourteenth Amendment context. If that lawmaking is to be supreme, at least in so far as it announces actual constitutional principles, then the types of predictive judgments present in GINA must be subject to review that is at least somewhat stricter than when Congress makes analogous predictions when legislating under Article I. Balanced against that judicial supremacy is the congressional capacity for making these kinds of judgments. A rough attempt at honoring both of these principles leads to the conclusion that something more than mere rationality review, but less than skeptical, *Garrett*-style review, ought to be appropriate when Congress bases an enforcement law on a purely predictive judgment.

But even this difficult, nuanced review does not end the story. Even assuming that the Court credits Congress's predictions that genetic discrimination may come to pass, there remains an additional question: whether such discrimination raises a serious constitutional problem. This is a distinct question, which requires both a distinct congressional reasoning process and proof proffer, and a distinct type of judicial review. Here, Congress must take off its empirical predictor hat and instead utilize its capacity to make value judgments about fundamental fairness. Just as with ENDA, here too Congress must determine whether a consensus exists condemning the (predicted) genetic discrimination as fundamentally unfair and thus violative of a core equal protection principle announced by the Court.

But how is Congress to make this determination, given the still hypothetical nature of the discrimination? At first glance, one might be tempted to reject GINA's constitutionality at this point, on the simple ground that this final determination would require Congress to "pile inference upon inference"<sup>315</sup> in a way that undermines any real limit on congressional power. But if Congress's initial predictive determination survives meaningful judicial review then this objection loses much of its force.

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314. *Gonzales v. Raich*, 545 U.S. 1, 23-33 (2005); *id.* at 35-41 (Scalia, J., concurring); see also *supra* note 181.

315. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

Still, the fact remains that the Court would be left reviewing a determination about the fundamental unfairness of a type of discrimination that had not yet occurred. On reflection, though, there is no reason Congress should not be able make such judgments in the absence of actual examples, given that the issue requires a normative rather than an empirical judgment. It may be appropriate for courts to make such judgments only on the basis of a set of empirical facts presented by litigants; by contrast, however, legislatures' focus on broad social facts means that much legislative debate and decision—even about value choices—involves predictions. In fact, GINA's legislative history reveals policymakers' concern that discrimination based on what is perhaps the most immutable characteristic possible—our genes—is antithetical to basic constitutional principles.<sup>316</sup>

This is not to say that standard congruence and proportionality analysis would be easy in a case like GINA. For example, to the extent that such discrimination is still merely potential, how can a court accurately calibrate the size of the constitutional problem to which the statute must be proportional?<sup>317</sup> While a legislature might be able to judge the invidiousness of such a classification in the abstract, can a court be expected to do so when reviewing an enforcement statute targeting so-far nonexistent discrimination? Such difficult questions will undoubtedly confront the Court if and when it deals with an enforcement power challenge to GINA. This Article does not purport to provide a comprehensive answer to them or to the others that will undoubtedly arise. It simply presents the basics of the issue and explains how a proper conception of the congruence and proportionality standard does not require the automatic rejection of GINA.

This analysis of GINA can be illuminated by way of contrast with an enforcement power analysis of hypothetical legislation restricting obesity discrimination. Scholars have noted the prevalence of obesity discrimination and raised questions about its legitimacy.<sup>318</sup> Nevertheless, no such federal legislation exists or is pending, and as of now, most obesity discrimination is not prohibited by federal law, including the ADA.<sup>319</sup> Part of the reason for courts' refusal to interpret the ADA to include obesity lies in the relatively technical difficulty of determining the cause of obesity. This constitutes a hurdle for ADA coverage given the requirement that the impairment

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316. See Roberts, *supra* note 305 at 41-45.

317. This issue is discussed more generally in the following Part. See *infra* Part V(D).

318. E.g., KIRKLAND, *supra* note 253; Jane Byeff Korn, *Too Fat* (Ariz. Legal Studies Research Paper Series, Paper No. 09-27, 2009), available at <http://ssrn.com/abstract=1428935>.

319. See Korn, *supra* note 318, at 24-53 (noting that the ADA defines disability as, in relevant part, a "physiological disorder," and explaining that most obese ADA plaintiffs are unable to satisfy this requirement).

be “physiological,”<sup>320</sup> which may be difficult to determine in particular cases.

More fundamentally, however, scholars have speculated that part of the reason for the obesity exclusion lies in public perceptions that obesity reflects a moral failing (an occurrence caused by a lack of self-control over lifestyle choices) rather than an accident of birth or circumstance.<sup>321</sup> Thus, obesity presents the opposite situation from genetics, where the social understanding of genetic discrimination focuses on the lack of individual responsibility for one’s genetic makeup.<sup>322</sup> As a result, genetic discrimination appears to the public to constitute arbitrary discrimination, while obesity discrimination reflects a legitimate favoring of morally worthy individuals over those less worthy.<sup>323</sup> This understanding is reflected in the legal landscape, which features widespread state law protections against genetics discrimination but essentially no protections against obesity discrimination.<sup>324</sup>

Given such a social and legal landscape, under this Article’s analysis federal restriction on states’ latitude to engage in obesity discrimination would probably not constitute appropriate enforcement legislation. Such (hypothetical) legislation would face a landscape in which Congress had essentially acted alone, taking a view inconsistent with that of American society generally,<sup>325</sup> and as expressed most particularly by the absence of state law protections.<sup>326</sup> Given that equal protection law on obesity amounts to nothing more than the most general prohibitions on arbitrary classifications, this lack of social consensus about the unfairness of obesity discrimination would probably doom federal legislation as a matter of the enforcement power, at least until social attitudes changed.<sup>327</sup> Congressional fact findings could conceivably change this result. However, the weight of the social consensus against condemning obesity discrimination means that those facts would have to be compelling: either Congress would have to uncover instances of

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320. *See id.*

321. *E.g., id.* at 29 (suggesting that the rejection of obesity as a disability “may be a reflection of non-medical, societal views of obesity.”).

322. *See Roberts, supra* note 305 at 41-45.

323. *See Korn, supra* note 318, at 12-16, 21, 30 (noting and discussing social perceptions of obesity).

324. *See Roberts, supra* note 305, at 6-7 (noting the widespread prevalence of state restrictions on genetics discrimination).

325. *See Korn, supra* note 326.

326. *See Korn, supra* note 318.

327. Of course, other federal powers, most notably the commerce power, may authorize such legislation. As noted earlier, however, the Commerce power has important limitations with regard to remedies. *See supra* note 40.



discrimination that a court itself would consider unconstitutional,<sup>328</sup> or it would have to prove that social condemnation of obesity was objectively irrational.<sup>329</sup>

More importantly, though, note the lessons taught by this comparison between genetics and obesity. First, the current existence of discrimination is not determinative of congressional authority. Indeed, under this analysis GINA would have an easier time being upheld as compared with a restriction on obesity discrimination, despite the lack of genetic discrimination<sup>330</sup> and prevalence of obesity discrimination.<sup>331</sup> This is a counterintuitive result, given the stress modern enforcement power cases have laid on congressional fact finding.<sup>332</sup> But requiring Congress to find current relevant discrimination inappropriately ignores Congress's authority to act preemptively, to forestall discrimination that has not yet occurred. There is no reason in law or logic to deny Congress this preemptive authority when enforcing the Fourteenth Amendment when it possesses it while utilizing its Article I powers. To be sure, denying it this authority has the effect of restricting its enforcement power, a fact that might be considered favorably given the need to prevent that power from overwhelming both judicial supremacy and an appropriate realm of state sovereignty. However, the distinction between preemptive and corrective power is unprincipled, given Congress's authority to enforce the Fourteenth Amendment rather than the Court's institutionally-limited reading of that provision and the general appropriateness of purely forward-looking legislation.

By contrast, this Article's approach to genetic and obesity discrimination illustrates principled limits on congressional enforcement power. Fundamentally, the difference between genetics discrimination and obesity discrimination lies in the difference between arbitrary and nonarbitrary classification.<sup>333</sup> In these two contexts, judicial doctrine does not precisely decide the arbitrariness

328. This high standard, reminiscent of the Court's own stringent review in *Garrett*, is necessary because in the face of no precise equal protection rule condemning the discrimination and a social consensus validating it, Congress would need to show that, in essence, an equal protection rule did in fact exist at the level of specificity necessary for a court to conclude that Congress had uncovered unconstitutional conduct.

329. See *supra* Part V(B)(3) (explaining the constitutional requirement that government classifications exhibit at least minimum rationality).

330. See *Roberts, supra* note 305, at 30 (noting the lack of discrimination).

331. See *Korn, supra* note 318, at 17-23.

332. This prevalence extends across cases that both strike down and uphold enforcement legislation. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-72 (2001) (noting the lack of relevant examples of disability discrimination); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003) (concluding that the heightened scrutiny accorded gender discrimination made it easier for Congress to demonstrate the existence of unconstitutional discrimination the FMLA sought to combat).

333. Cf., e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (noting the inherent likelihood that racial classifications are arbitrary).

issue. However, examination of the social understanding of these phenomena yield very different results. In turn, these different social understandings suggest different answers to the question of federal enforcement power. Thus, this Article's approach does contemplate real limits on congressional authority. But it does so in a way that properly respects Congress's political legitimacy and moral authority to speak for the nation.

#### *D. A Word About Statutory Breadth*

The approach proposed in this Article requires that we consider a specific question that has not been yet fully addressed: the question of how broad enforcement legislation can be. It is one thing for Congress to possess the power to answer the questions left unanswered by the Court's equal protection doctrine, and for the Court to review those answers under a real, but nevertheless deferential, standard.<sup>334</sup> But since the very idea of congruence and proportionality requires some sort of relationship between an enforcement statute and the relevant underlying constitutional guarantee, the proper test must be more precise. In particular, it must provide a method for determining how broadly Congress can legislate in a given situation.

The Court's current approach relies heavily on judicial doctrine to determine the appropriate breadth of enforcement legislation. In *Kimel*, for example, the Court concluded that the Age Discrimination in Employment Act failed the congruence and proportionality test because its provisions were overly broad when compared with the slight constitutional protection provided by the Court's age discrimination doctrine.<sup>335</sup> *Kimel*'s conclusion (and the similar conclusions reached in other post-*Boerne* cases) simply makes more precise the general implication of the Court's doctrine-centric approach to congruence and proportionality: the ultimate result is that enforcement legislation protecting nonsuspect classes must be very narrowly drawn if it is to have any hope of surviving.<sup>336</sup>

This Article's approach to the statutory breadth issue similarly flows from its more general approach to the enforcement power. It starts from the insight that Congress can often instantiate a true constitutional rule more precisely than can the Court, with all its institutional limitations. This implementation of constitutional principle entails both identifying situations where constitutional principles, such as the public purpose requirement, are likely being

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334. See *supra* text accompanying note 278; *infra* text accompanying note 344.

335. *Kimel v. Bd. of Regents*, 528 U.S. 62, 86-88 (2000).

336. Cf. *United States v. Georgia*, 546 U.S. 151, 162-63 (2006) (upholding the ADA to the extent it provides a cause of action for actual constitutional violations).

violated, and also determining the most appropriate remedies for such violations. To take ENDA as an example, this approach recognizes congressional power to identify both the social context (here, employment) where sexual orientation discrimination is likely to violate the constitutional rule and the appropriateness of remedies to prevent and deter such violations. The power over remedies derives from congressional control over the means of effectuating the powers it possesses. Once a court reviews and upholds a congressional determination that discrimination in a particular context violates a court-announced constitutional principle, its decisions on remedies should be largely left to it, unless those remedies themselves contravene the Constitution.<sup>337</sup>

## VI. TOWARD A NEW APPROACH TO CONGRUENCE AND PROPORTIONALITY

ENDA, transgender protection, and GINA pose different challenges to current enforcement power doctrine. Each of these challenges calls forth its own unique responses, as described in Part V. However, those answers share certain characteristics. This final Part considers how those common characteristics form the basis of a new approach to congruence and proportionality, one that respects both judicial supremacy and the unique institutional capacities that justify a significant congressional role in the protection of equality rights.<sup>338</sup>

Most fundamentally, this Article's analysis turns on the proper understanding of what courts do when they decide equal protection cases. Equal protection decisions, like all constitutional decisions, are ultimately rooted in the Constitution and interpreted through whatever tools the court chooses to employ—original meaning, text, moral philosophy, and so on. However, a careful reading reveals that a substantial part of judicial reasoning takes the form of a search for decision rules amenable to judicial application. Whatever we might think about the theoretical soundness of distinguishing between such decision rules and true constitutional law principles, a fair reading of the cases suggests that constitutional decisions, especially equal protection decisions, include both.<sup>339</sup>

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337. In this sense the enforcement power may well resemble congressional power under Article I. *Cf. supra* note 181; *see also* *Gibbons v. Ogden*, 22 U.S. 1, 76 (1824) (noting that the decision how to use the power to regulate interstate commerce is solely rested in Congress, with the political process furnishing the sole check).

338. It also gives due regard to federalism via the requirement that normative judgments made by Congress be supported by a broad social consensus that presumably would be reflected in state and local law.

339. This is also undoubtedly true with regard to other Fourteenth Amendment rights. Indeed, it bears remembering that *Carolene's* explanation of a political process-based approach to judicial review occurred in a due process case. Moreover, other constitutional rights incorporated via the Fourteenth Amendment—most notably the exclusionary rule

This conclusion matters because a doctrine that is partially composed of decision rules should be thought of as leaving a space open for congressional action under the enforcement clause. Section 5 gives Congress the authority to enforce the Fourteenth Amendment. In determining what that amendment means one may appropriately look first to judicial decisions, especially in light of the *Boerne* Court's insistence that the Supreme Court is the supreme and authoritative arbiter of constitutional meaning. However, when that arbiter itself confesses an inability to give a comprehensive account of that meaning a space is opened for congressional action that may differ from the Court's statements or even holdings.

Of course, a judicial decision is never exclusively based on pure decision rules. Therefore, the challenge for enforcement power is to identify the constitutional principles that the Court has in fact identified that are relevant to a particular enforcement statute. Following *Boerne*, those principles do indeed cabin congressional enforcement power. However, to the extent the principles relevant to a particular enforcement statute are vague, they serve less to cabin congressional enforcement power than to channel it by suggesting the follow-on inquiries that Congress may be especially adept at answering, given its unique institutional capacities.

This summary outlines an approach to the congruence and proportionality standard that seeks to harmonize judicial supremacy with congressional authority. Of course, difficult issues remain in its application. The Article's focus on three instances of current or potential enforcement legislation illustrates different issues that may arise when applying this standard. In all three instances, judicial doctrine falls short of conclusively stating a constitutional principle at a precise enough level to decide the case. In the case of ENDA, courts' use of the rational basis standard fails to reflect the actual constitutional issue sexual orientation discrimination poses in a given context. Transgender discrimination doctrine is even less precise, as it has so far failed to answer even the preliminary question of how to name the phenomenon at issue. Finally, GINA confronts a complete lack of doctrine, given the absence not just of

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and the police warnings set forth in *Miranda v. Arizona*—have also been thought at various times to reflect judicially created enforcement mechanisms for the underlying constitutional right, rather than statements of constitutional principle. *E.g.*, compare *Dickerson v. United States*, 530 U.S. 428 (2000), with *id.* at 444 (Scalia, J., dissenting). The question of how this Article's approach to congressional enforcement power applies to nonequal protection rights is not addressed here. Of course, one cannot have one enforcement power doctrine for equal protection and another for every other right. However, given this Article's argument that equal protection is unique in its paucity of determinate judicially accessible meaning, it is appropriate to focus on equal protection when applying this proposal. Acceptance of this proposal would require serious work in applying it to congressional enforcement of other Fourteenth Amendment rights.

genetic discrimination litigation, but even of significant historical examples of genetic discrimination.

Congress can resolve each of these issues by using its distinct institutional capabilities and authority while remaining consistent with the constitutional principles stated by the Court. ENDA implicates Congress's ability to draw lines that separate some species of sexual orientation discrimination from others, unencumbered by the formal rigidity of the rational basis standard. Congressional authority to do this rests on its ability to make normative judgments about whether a broad consensus condemns as fundamentally unfair sexual orientation discrimination in a particular social context, for example, employment. Such congressional judgments are uniquely legitimate, given Congress's status as the national representative of the people. That same status authorizes Congress to categorize transgender discrimination based on how American society perceives the group's identity, as one defined by gender, sexual orientation, or its own *sui generis* character. Finally, Congress should be able to rely on its factfinding capabilities to determine that a particular type of discrimination, while not currently extant, poses a real risk of fundamentally unfair discrimination warranting deterrence via an enforcement statute.

Each of these determinations stays within the channels cut by judicial statements of equal protection principles. Thus, they remain consistent with *Boerne's* notion of judicial supremacy. Without doubt, this Article's conception of judicial supremacy is narrower than that implied by the Court's post-*Boerne* jurisprudence, which appeared to identify all judicial doctrine as enjoying supreme status. But it is consistent with *Boerne* itself, which struck down a congressional attempt to reinstate a rule the Court had rejected as fundamentally incompatible with a basic constitutional principle.<sup>340</sup> In this Article's terms, *Boerne* asserted the supremacy of a true constitutional principle. Thus, *Boerne*, the only significant modern enforcement power case to enjoy broad support on the Court,<sup>341</sup> is compatible with this Article's analysis.

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340. See *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) (allowing exemptions from generally-applicable laws that clashed with one's religious beliefs would allow each citizen to become "a law unto himself") (quotation omitted). Concededly, the status of the *Smith* rule—and thus, the constitutionality of RFRA—was and is heavily contested. Compare, e.g., Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996), with Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). However, what is important for current purposes is that the Court identified the *Smith* rule as such, with the result that it was defective in light of *Boerne's* embrace of judicial supremacy.

341. In *United States v. Virginia*, a unanimous Court recognized that the Enforcement Clause gave Congress the power to enact statutes that provided remedies for actual violations of the Fourteenth Amendment. Because that case implicated the remedial facet

Concededly, this more limited understanding of judicial supremacy—"interpretive," rather than "doctrinal," supremacy—imposes only modest restrictions on congressional power. But those restrictions may have more bite than might be supposed at first glance. For example, to the extent the Court's race jurisprudence is properly understood as resting primarily on true constitutional principle, this approach may limit congressional attempts to allow or mandate more affirmative action or general race consciousness than what the Court itself has allowed. Other instances where the Court can be fairly read as having established true constitutional principles would similarly impose significant limits on congressional enforcement discretion.<sup>342</sup> In all cases the key question will be the Court's own conclusion about the extent to which its own doctrine states constitutional principles or constitutes a judicial decision rule that, at best, merely approximates such principles.<sup>343</sup>

Moreover, even where the Court's doctrine reflects constitutional principle only at the most general level, thus presumably allowing Congress the greatest amount of enforcement power leeway, congressional discretion is still subject to limits. In such cases, Congress is not free to enact its own constitutional understandings and insert them into the lacunae left by the Court. Thus, this proposed approach is not a veiled form of popular constitutionalism. Rather, in such cases Congress should have the discretion to answer the questions and make the determinations that the Court-announced constitutional principles require in order for those principles to be fully and effectively applied. Those questions usually take the form of empirical and normative judgments about the presence and the invidiousness of classifications. In the case of transgender discrimination, they also take the form of identifying and categorizing the group that is targeted for protection. These types of decisions play to Congress's strength as the representative organ of the American people, a status that gives it the expertise to make the requisite empirical judgments and the legitimacy to speak for the nation when making normative judgments.

Still, the very generality of the supreme, court-announced principles cabining and channeling congressional action requires real judicial review if this approach is not to degenerate into a veiled prescription for unbridled congressional power. The Court should examine only the reasonableness of the congressional choice, but should do so without the evidentiary and other presumptions that

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of the enforcement power in the purest way possible, it does not play a major role in this Article's analysis. 518 U.S. 515, 547 (1996).

342. See, e.g., *id.* at 532-33 (1996) (indicating that gender classifications that deprive women of opportunity are presumptively unconstitutional).

343. The Court remains the final arbiter of the status of its own doctrine.

mark standard rational basis review. Perhaps the best model is Justice Souter's reasonableness review under substantive due process in *Washington v. Glucksberg*.<sup>344</sup> His approach to substantive due process review recognizes that interests exist on both sides of the issue and attempts to judge whether the legislature made a reasonable choice when it limited the individual right in pursuit of the public interest. It thus fits enforcement power review, where judicial supremacy and states' legitimate prerogatives must be accommodated to a nontrivial congressional role in enforcing the rights authoritatively announced by the Court. Just as Justice Souter's due process review balanced government interests and individual rights to ensure that the legislature's choice fell within a band of reasonable choices, giving due regard to the interests on both sides, so too a court here should balance the choices Congress made to protect individual rights against the states' autonomy interests. For empirical determinations the ultimate question reduces to a simple one of whether Congress acted pursuant to sufficient evidence to warrant the conclusion that the statute was an appropriate intrusion into state autonomy. For normative judgments, the question should be whether Congress was reasonable in concluding that a social consensus had arisen condemning the discrimination as fundamentally unfair.

Concededly, these inquiries are subjective. But, as Justice Scalia has pointed out, the underlying congruence and proportionality test is similarly subjective in requiring the Court to compare the size of the constitutional problem targeted by Congress with the breadth of the statutory remedy.<sup>345</sup> Any approach to the enforcement power that seeks to harmonize judicial interpretive supremacy with appropriate respect for congressional power will encounter this subjectivity.<sup>346</sup>

Despite this ambiguity, it is crucial to attempt such a harmonization. Judicial interpretive supremacy is critical to preserving the fundamental principles of equal protection law. Indeed, the hopes of the 39th Congress to constitutionalize the principles animating Reconstruction would be frustrated were Congress able to second guess the Court when the latter announced a true constitutional principle. In *Morgan*, Justice Brennan attempted to harmonize judicial supremacy with congressional interpretive

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344. *Washington v. Glucksberg*, 521 U.S. 702, 752-59 (1997) (Souter, J., concurring in judgment).

345. *Tennessee v. Lane*, 541 U.S. 509, 555-56 (2004) (Scalia, J., dissenting).

346. Indeed, Justice Scalia's response to his objection to the current doctrine's subjectivity—to allow essentially any congressional enforcement legislation pertaining to racial discrimination but with regard to other groups nothing but legislation establishing pure remedies—essentially concedes the inherent subjectivity of any approach that seeks to find a position between complete deference to Congress and strict limits on its authority. *See id.*

power by suggesting that Congress had power to expand but not contract constitutional rights.<sup>347</sup> This approach, the famous “one-way ratchet,” has been criticized as unworkable and unprincipled.<sup>348</sup> More generally, the countermajoritarian nature of courts risks being nullified if, at some point, the courts do not have the final say on the constitutionality of government actions, at least with regard to justiciable cases. In a time of national security anxiety and latent unease about the nation’s increasing diversity, it is crucial to maintain the ultimate authority of a countermajoritarian constitutional court.

It is equally crucial to give Congress its due. Because of its unique institutional role, Congress is uniquely suited to make both the empirical and normative judgments that often have to be made to give full life to the equal protection principles the Court announces. Privileging judicial doctrine as supreme law without inquiring into its status as constitutional principle denigrates congressional expertise, legitimacy, and moral authority to make the difficult judgments that are required to animate equal protection’s stirring, but vague promise. Congress’s institutional advantages will become more and more important over the coming years, as increasingly diverse, pluralistic, and rights-conscious groups make demands for recognition of equality claims that are far removed from those we are accustomed to dealing with. Courts will, of course, have to do their best in answering these claims, to the extent they arise in the context of normal constitutional litigation. But to the extent Congress shows itself receptive to such claims, the legislation it enacts will naturally reflect that institution’s particular talents and expertise.

It would be both ironic and tragic if such increased consciousness of equality on the part of the nation’s most representative governmental institution were thwarted by the Court’s unwillingness to share, even to this modest degree, in the project of constitutional construction. This Article has proposed a way of avoiding that result while still respecting *Boerne*’s consensus that the Court is the final arbiter of constitutional meaning. The hope is that this proposal can generate a new consensus on the Court, building on *Boerne*’s first principles. Such a consensus may yet avoid the collision between the Court and, on the other side, Congress and the American people it represents, that will inevitably follow from continued adherence to the current path of enforcement power doctrine.

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

348. See Robin-Vergeer, *supra* note 340, at 696-97 n.438 (citing critiques and defenses of the ratchet theory).



