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### Conflating Scope of Right with Standard of Review: The Supreme Court's Strict Scrutiny of Congressional Efforts to Enforce the Fourteenth Amendment

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CONFLATING SCOPE OF RIGHT WITH STANDARD OF REVIEW:  
THE SUPREME COURT'S "STRICT SCRUTINY" OF  
CONGRESSIONAL EFFORTS TO ENFORCE THE  
FOURTEENTH AMENDMENT

MELISSA HART\*

I. INTRODUCTION

NATIONAL laws prohibiting discrimination in employment appear to be among the primary victims of federalism's current ascendancy in the Supreme Court. On February 21, 2001, in *Board of Trustees of the University of Alabama v. Garrett*,<sup>1</sup> the Court concluded that Congress had acted beyond its power to enforce the Fourteenth Amendment's guarantee of equal protection of the laws when it passed the employment discrimination provisions of the Americans with Disabilities Act (ADA).<sup>2</sup> The decision marked the second time in as many terms that the Court has moved to redefine, and drastically limit, the federal legislature's authority to enact laws prohibiting discrimination in employment. Last term, in *Kimel v. Florida Board of Regents*,<sup>3</sup> the Court concluded that the Age Discrimination in Employment Act (ADEA) exceeded the scope of Congress' Fourteenth Amendment enforcement powers.<sup>4</sup> And, while these are the only two such employment cases to have yet reached the Supreme Court, similar challenges to other federal anti-discrimination laws have flooded the lower courts.<sup>5</sup> Whether these cases continue to be resolved in the lower courts

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\* Associate Professor, University of Colorado School of Law. Thanks to Kevin Traskos, Sam Kamin, Sarah Krakoff, Antony Ryan, Kristin Kilpela and the participants in the Villanova Law School Symposium for their helpful comments; and to the editors of the *Villanova Law Review* for their technical and editorial assistance.

1. 121 S. Ct. 955 (2001).

2. See *Garrett*, 121 S. Ct. at 968 (holding that "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment").

3. 528 U.S. 62 (2000).

4. See *Kimel*, 528 U.S. at 67 (holding that ADEA's abrogation of states' immunity "exceeded Congress' authority under § 5 of the Fourteenth Amendment").

5. See, e.g., *Varner v. Ill. State Univ.*, 150 F.3d 706, 709 (7th Cir. 1998) (challenging Equal Pay Act); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) (challenging Rehabilitation Act); *Sims v. Univ. of Cin.*, 46 F. Supp. 2d 736, 739 (S.D. Ohio 1999) (challenging Family Medical Leave Act); *Driesse v. Fla. Bd. of Regents*, 26 F. Supp. 2d 1328, 1333 (M.D. Fla. 1998) (same); *Carmen v. S.F. Unified Sch. Dist.*, 982 F. Supp. 1396, 1405 (N.D. Cal. 1997) (challenging Title VII of Civil Rights Act of 1964); *Larry v. Bd. of Trs. of Univ. of Ala.*, 975 F. Supp. 1447, 1448 (N.D. Ala. 1997) (challenging Equal Pay Act's abrogation of states' Eleventh Amendment immunity). In addition to these provisions, the Court's new approach is likely to engender challenges to the application of the Pregnancy Discrimination Act and the application of disparate impact analysis under Title VII to state employers. Indeed, courts have already considered such challenges to Title

or more of them reach the Supreme Court, the question remains how federal employment discrimination laws will fare in light of the Court's new approach to section 5 of the Fourteenth Amendment.

In its recent section 5 cases, the Court has suggested that the substance of the Fourteenth Amendment guarantee of "equal protection" is different for different classes of people. The consequence for federal employment legislation is that Congress may be limited to providing remedies only for race and gender discrimination. Indeed, given the Court's recent approach, even gender discrimination ultimately may be defined as an inappropriate target for Congress' section 5 enforcement authority. In both *Garrett* and *Kimel*, the Court treated the meaning of an equal protection right as a function of the standard of judicial review used to evaluate a potential encroachment on that right.<sup>6</sup> Because, under the Court's three-tiered system, different classifications are subject to different standards of judicial review,<sup>7</sup> conflating the standard of review with the substantive scope of a right will create a tiered system of equal protection guarantees. When a court reviews a challenged classification using the most deferential standard of review—that accorded to all classifications but race, national origin, gender and illegitimacy—it begins with a strong presumption of constitutionality and a plaintiff bears a heavy burden to overcome that presumption.<sup>8</sup> If Congress is similarly limited when it enacts legislation protecting certain groups from discrimination by the states, such legislation itself rarely will survive judicial review. In effect, the Court has declared that it will apply a kind of "strict scrutiny" to federal legislation that would receive only minimal scrutiny were a state to pass an identi-

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VII. See *Reynolds v. Ala. Dep't of Transp.*, 4 F. Supp. 2d 1092, 1094 (M.D. Ala. 1998) (challenging Title VII of Civil Rights Act of 1964). For both the Pregnancy Discrimination Act and disparate impact analysis, the Court has recognized that the statutory law provides a cause of action not available under the Fourteenth Amendment. Compare *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that disparate impact claims are not available under the Fourteenth Amendment), with *Connecticut v. Teal*, 457 U.S. 440, 446-51 (1982) (allowing disparate impact claim against state), and *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that Title VII does permit disparate impact claims). One may also compare *Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974), where the Court found that the Fourteenth Amendment does not prohibit pregnancy discrimination, with *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197-207 (1991), where the Court noted that the Pregnancy Discrimination Act, passed as part of Title VII, prohibits pregnancy discrimination. See also Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 175, 176-78 (1998) (surveying history of state inclusion in federal antidiscrimination law and predicting that, in light of recent Supreme Court decisions, "[m]ost of the federal antidiscrimination laws . . . may be . . . unenforceable in federal court"); Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After Boerne*, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 542 (1998) (discussing range of recent challenges to federal antidiscrimination laws).

6. See *Garrett*, 121 S. Ct. at 963-64; *Kimel*, 528 U.S. at 82-86.

7. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-42 (1985) (setting out three levels of judicial review).

8. See *id.* (explaining rational basis review).

cal law. What this approach will mean for classifications, such as gender, which receive an intermediate level of judicial scrutiny, is not yet entirely clear.

The Court has made a mistake in importing its multi-tiered structure of judicial review directly into the definition of "equal protection of the laws." The scope of an equal protection right should not be defined as identical with its corresponding standard of review. The reasons for judicial deference to legislative choices are grounded in notions of institutional competence and the relationship between democratic and undemocratic decision-makers. These principles cannot circumscribe the federal legislature in the same way. And there is not an alternative, principled support for the severe limits that the Court has imposed on congressional authority to prohibit employment discrimination by the states. Such support cannot come from the idea of federalism, as Congress' Fourteenth Amendment enforcement authority is itself a limit on federalism, and the background principle of limited federal power is not sufficient to define the precise limitations on Congress' section 5 authority. Nor does the notion that it is the Court, and not Congress, that is responsible for defining constitutional rights give content to those rights or provide a limit on their scope.

By aligning standards of judicial review with the definition of the rights Congress may enforce, the Court has essentially declared that Congress can act only to prohibit through legislation those precise state actions a court may prohibit in litigation. Limiting Congress' role as enforcer of the Fourteenth Amendment's substantive guarantees in this manner ignores the role a democratically elected legislature can and should play in implementing an evolving social understanding of what constitutes arbitrary, invidious and irrational discrimination.

## II. THE NEW FEDERALISM AND THE APPLICATION OF FEDERAL EMPLOYMENT LAWS TO THE STATES AS EMPLOYERS

The challenges being mounted against federal anti-discrimination legislation are the consequence of two strands of the Court's recent jurisprudence. First, until just five years ago, it was widely understood that Congress could charge the states with obeying federal anti-discrimination laws so long as those laws were validly passed pursuant to any of Congress' enumerated powers.<sup>9</sup> In 1996, however, the Court drastically altered that understanding, concluding that Congress could not abrogate the states' immunity from suit when it passed laws pursuant to the Commerce Clause.<sup>10</sup> The second important strand of the Court's constitutional reno-

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9. See *Brant*, *supra* note 5, at 177 (noting that prior to 1996, Congress could abrogate states' immunity pursuant to laws passed under any of Congress' enumerated powers).

10. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) (stating that Congress may not abrogate sovereign immunity of states when it legislates under Article I power).

vation has been the limitation of congressional authority under section 5 of the Fourteenth Amendment.

A. *The Restriction of the Commerce Clause Power*

Federal laws prohibiting discrimination in employment have generally been passed under both the Commerce Clause and section 5 of the Fourteenth Amendment.<sup>11</sup> At the moment, it remains well-settled that Congress can pass these laws pursuant to its Commerce Clause authority.<sup>12</sup> Nevertheless, for employees of the states, laws passed only under the Commerce Clause offer limited guarantees of protection. In 1996, the Court concluded that legislation passed under the Commerce Clause does not provide private citizens with the right to sue the states for money damages in federal court.<sup>13</sup> The Court asserted that the Eleventh Amendment and its judicially-created penumbra give the states a sovereign right to be free from suits by private citizens, and that nothing in Article I gives the federal government power to eliminate this right by forcing states into federal courts.<sup>14</sup> In 1998, the Court expanded this approach, concluding that a non-consenting state may also not be sued in a state court for violation of a federal law passed under the Commerce Clause.<sup>15</sup> Thus, if federal employment legislation is supported only by Congress' Commerce Clause au-

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11. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(4) (1994) (invoking "power to enforce the Fourteenth Amendment and to regulate commerce"); *see also* Heart of Atlanta Hotel, Inc. v. United States, 379 U.S. 241, 249 (1964) (noting that Civil Rights Act of 1964 was based on section 5 and Commerce Clause); EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (stating that ADA could be valid as either section 5 or Commerce Clause legislation).

12. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000) (reaffirming that ADEA is valid exercise of Congress' Commerce Clause power). Of course, if the Court decides to reconsider whether Congress can in fact pass employment discrimination laws under the Commerce Clause, the scope of congressional authority under section 5 will become even more important. *Cf.* United States v. Morrison, 529 U.S. 598 (2000) (holding that Violence Against Women Act, which gives victims of gender-motivated violence in the workplace and elsewhere a federal cause of action, is beyond Congress' section 5 enforcement power).

13. *See Seminole Tribe*, 517 U.S. at 72-73 (holding that Congress cannot abrogate states' sovereign immunity under Article I).

14. *See id.* at 73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

The Eleventh Amendment provides that: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. While the text of the amendment says absolutely nothing about suits by citizens of a State against that State, the Court has expanded the meaning of the words themselves so that "the Eleventh Amendment . . . stand[s] not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

15. *See Alden v. Maine*, 527 U.S. 706, 759 (1999) (holding that "states retain immunity from private suits in their own courts, an immunity beyond the Congressional power to abrogate by Article I legislation").

thority, a state employee may no longer sue her employer under that legislation for money damages in either state or federal court.<sup>16</sup>

B. *The Development of the "Congruence and Proportionality" Analysis*

This limitation on Commerce Clause power might not have had much impact on enforcement of federal anti-discrimination laws if those laws could also be supported by Congress' authority under section 5.<sup>17</sup> While the Court has now concluded that Congress cannot abrogate the states' immunity from suit when it legislates pursuant to its Article I powers, it remains possible for the federal legislature to abrogate the states' immunity when it legislates to enforce the substantive guarantees of the Fourteenth Amendment.<sup>18</sup> As the Court has explained it, the Fourteenth Amendment essentially shifts the state-federal balance by expanding federal power at the expense of state autonomy.<sup>19</sup> Thus, the federal legislature has greater power vis-à-vis the states when acting to enforce the Fourteenth Amendment than when exercising its earlier enumerated powers, and the question of the scope of Congress' power under section 5 is

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16. Of course, this restriction does not mean that federal laws passed under the Commerce Clause are not applicable to the states. *See id.* at 754-55 (explaining that states cannot "disregard the Constitution or valid federal law"). Further, private citizens are still able to sue the states for injunctive or declaratory relief. *See id.* at 756 (explaining legal redress permitted against state officials). Moreover, even the broad state sovereign immunity that the Court reads into the Eleventh Amendment does not bar suits brought by the United States, nor does it bar suit against a state that consents to be sued. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 968-69 (2001) (Kennedy, J., concurring) (noting that private citizens may bring constitutional claims against consenting states); *Alden*, 527 U.S. at 755 (observing that "sovereign immunity bars suits [against states] only in the absence of consent" and that suits brought by the United States, even against a non-consenting state, are permissible). Since the Court's decision in *Garrett*, several state legislatures have considered whether to waive sovereign immunity from suits under the ADA, or from federal employment discrimination suits more generally. *See States Respond to Supreme Court's Garrett Decision with Bills That Would Waive Immunity to ADA Lawsuits*, 70 U.S.L.W. 2003, at 2003-05 (July 3, 2001).

17. The Fourteenth Amendment provides in relevant part:

Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

18. *See Alden*, 527 U.S. at 756 ("[I]n adopting the Fourteenth Amendment, the people required the States to surrender a portion of [their] sovereignty . . . so that Congress may authorize private suits against nonconsenting states pursuant to its Section 5 enforcement power."); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that "Congress may . . . provide for private suits against States or state officials [under Fourteenth Amendment]").

19. *See Fitzpatrick*, 427 U.S. at 456 (stating that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

consequently one of tremendous importance for the full enforcement of federal anti-discrimination laws.

Like congressional authority under the Commerce Clause, the scope of section 5 authority has been the subject of considerable activity by the Court in the past few years. Five different congressional enactments have come before the Court, and not a single one has been found to be within the scope of Congress' section 5 authority.<sup>20</sup> While there are a number of possible explanations for the Court's hostility towards these laws, one of the central aspects of the repeated dismissal of Congress' efforts is the Court's limited conception of the scope of the constitutional right that Congress could protect in each instance.

The first of the Court's recent section 5 cases dealt not with equal protection, but with the First Amendment's guarantee of religious freedom. In *City of Boerne v. Flores*,<sup>21</sup> the Court struck down those portions of the Religious Freedom Restoration Act (RFRA) that applied to the states.<sup>22</sup> The Court concluded that the law was not responsive to state violations of the Constitution and therefore could not be "appropriate legislation" to enforce the Fourteenth Amendment.<sup>23</sup> In so doing, the Court set out a new framework for evaluating the appropriateness of legislation enacted pursuant to section 5. When Congress acts to enforce the guarantees of the Fourteenth Amendment, it must be legislating to remedy a demonstrated constitutional violation, and "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>24</sup>

While the precise meaning of and relationship between congruence and proportionality in the Court's section 5 jurisprudence remains somewhat opaque, it seems that when the Court evaluates "congruence," it focuses on whether the law is directed at preventing an identified constitutional harm.<sup>25</sup> The element of "proportionality" requires that the

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20. See *Garrett*, 121 S. Ct. at 955 (2001) (holding that ADA is not valid section 5 enactment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that ADEA is not valid section 5 enactment); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Violence Against Women Act is beyond Congress' section 5 enforcement power); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646-47 (1999) (holding that Patent and Plant Variety Protection Remedy Clarification Act, which subjected states to suit for patent infringement, was not valid section 5 enactment); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Religious Freedom Restoration Act is not authorized by enforcement powers of Fourteenth Amendment).

21. 521 U.S. 507 (1997).

22. See *City of Boerne*, 521 U.S. at 511 (concluding that RFRA's application to the states was beyond Congress' power).

23. See *id.* at 530-31 (noting that "the appropriateness of remedial measures must be considered in light of the evil presented," and observing that record showed no significant state violations of right to free exercise of religion).

24. *Id.* at 520.

25. See, e.g., Hartley, *supra* note 5, at 509 (stating that "congruence plumbs the legislative process for evidence that a statute's purpose is to prevent or remedy constitutional violations"); see also Thomas W. Biemers, *Searching for the Structural*



remedy created by the law have a reasonable relationship to the harm the law seeks to prevent.<sup>26</sup> Thus, it is essential for the test developed in *City of Boerne*, and elaborated in the cases that followed, that the Court start by identifying and defining the constitutional right at issue—first to assess whether Congress was in fact legislating in order to prevent or remedy a violation of that right, and second to assess whether the legislature's chosen approach is proportional to the violation.<sup>27</sup>

In considering whether RFRA was "congruent" to violations of the First Amendment's guarantee of free exercise of religion, the *City of Boerne* Court looked at the legislative record for some suggestion that Congress, before legislating had gathered evidence that the states were violating the rights of individuals to religious freedom.<sup>28</sup> The Court concluded that the legislative record included almost no evidence of a constitutional violation and certainly not sufficient evidence to reveal a "widespread pattern of religious discrimination in this country."<sup>29</sup> As to proportionality, the Court concluded that RFRA was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."<sup>30</sup>

*City of Boerne* is unique among the Court's recent section 5 cases because when Congress enacted RFRA it was explicitly legislating to reverse the Supreme Court's earlier interpretation of the Free Exercise Clause, and to prohibit substantially more state conduct than the Court had concluded only a few years earlier would actually be prohibited by the First Amendment.<sup>31</sup> Thus, it was clear in *City of Boerne* that the legislature's intention was not to prevent or remedy violations of a constitutional right recognized by the Supreme Court, but instead to reject the Court's recent definition of a particular constitutional right and to supplant it with an alternative definition.<sup>32</sup> RFRA was a defiant and unambiguous rejection

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*Vision of City of Boerne v. Flores: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L.Q. 789, 803 (1999) ("In essence, 'congruence' requires a tight fit between the wrong to be prevented and the means to be adopted, while 'proportionality' requires that the invasive degree or scope of legislation correspond to the degree or scope of the constitutional harm between the wrong to be prevented or remedied and the means adopted.").

26. See *Biemers*, *supra* note 25, at 803 (explaining proportionality).

27. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963 (2000) ("The first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue.").

28. See *City of Boerne*, 521 U.S. at 530 (searching RFRA's legislative record for "examples of modern instances of generally applicable laws passed because of religious bigotry").

29. *Id.* at 531.

30. *Id.* at 532.

31. See *id.* at 512-16 (discussing Congress' rationale for passing RFRA).

32. See *id.* at 515 (noting Act's stated purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

of the Court's judgment about the meaning and scope of the First Amendment.<sup>33</sup> Responding to this act of defiance, the Court asserted its role as the arbiter of constitutional meaning and cautioned that "[w]hile the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed."<sup>34</sup>

In many ways, *City of Boerne* was not a surprising decision. The clear congressional disregard of the Court's authority to "say what the law is" posed a threat to the balance between the legislative and judicial branches. In the cases that followed *City of Boerne*, however, the Court went beyond simply protecting its role as constitutional interpreter, moving to drastically circumscribe the federal legislature's role as enforcer of the substantive guarantees of the Fourteenth Amendment.

### C. "Congruence and Proportionality" in Federal Employment Legislation

Like most of the Court's recent section 5 cases, *Kimel* emphasizes the breadth of Congress' section 5 enforcement power. For instance, the Court observed that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment and its conclusions are entitled to much deference."<sup>35</sup> Further, the Court stated that in enacting legislation under section 5, Congress is not "confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."<sup>36</sup> Instead, the Court found that the legislature's power "includes the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."<sup>37</sup>

Despite this expansive rhetoric, the Court concluded in *Kimel* that Congress was not enforcing the Equal Protection Clause when it legislated to prohibit the states, acting as employers, from discriminating against individuals because of their age.<sup>38</sup> The ADEA prohibits employers, including states, from taking adverse employment action against an individual over the age of forty solely on the basis of that individual's age. The Court concluded that "the substantive requirements the ADEA imposes on state

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33. See *id.* at 514-16 (discussing prior Court holdings including Court's decision in *Smith*, and pointing out that Congress' objections to *Smith* holding led to RFRA's enactment).

34. *Id.* at 519-20.

35. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (quoting *City of Boerne*, 521 U.S. at 536).

36. *Id.* at 81.

37. *Id.*

38. See *id.* at 88 (concluding that "ADEA's protection extends beyond the requirements of the Equal Protection Clause").

and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."<sup>39</sup>

The Court began its "congruence and proportionality" analysis by defining what types of state action "conceivably could be targeted by the Act."<sup>40</sup> It did so by looking to its own previous age-related cases and noting that age-based classifications have been subjected to "rational basis review" by courts evaluating the legality of state laws.<sup>41</sup> Under rational basis review, a court will not overturn a government action "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."<sup>42</sup> From this statement of judicial restraint, the Court concluded, without ever stating it explicitly, that the full scope of the equal protection right at issue in age-based classifications is merely the right not to have the state act in a wholly irrational fashion. Using this definition of constitutional right, the Court concluded that the ADEA was neither congruent nor proportional to the right it sought to protect because the ADEA makes illegal "substantially more state employment decisions than would likely be held unconstitutional under the applicable equal protection, rational basis standard."<sup>43</sup>

After *Kimel*, it appears that all Congress is empowered to do under section 5, if it wishes to deter age discrimination by the states as employers, is to prohibit discrimination for which the employing state can provide no plausible, rational explanation. The Court's approach leaves no room for legislative recognition that some apparently "rational" explanations in fact mask unexplored, arbitrary prejudices and assumptions whose indulgence ultimately denies their victims of the law's equal protection.

In *Garrett*, the Court took the same approach in considering whether the ADA was validly enacted pursuant to section 5.<sup>44</sup> Enacted in 1990, the ADA prohibits employers from discriminating against "a qualified individual with a disability."<sup>45</sup> Discrimination under the ADA includes "limiting,

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39. *Id.* at 83.

40. *Id.*

41. *See id.* (explaining that state age-based classifications have been subject to rational basis review). In discussing *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *Vance v. Bradley*, 440 U.S. 93 (1979), and *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), the Court explained that "[i]n all three cases, we held that the age classifications at issue did not violate the Equal Protection Clause." *Id.*

42. *Id.* at 84 (quoting *Bradley*, 440 U.S. at 97).

43. *Id.* at 86.

44. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963 (2000) ("As we did last Term in [*Kimel*], we look to our prior decisions under the Equal Protection Clause dealing with this issue.").

45. 42 U.S.C. § 12,112(a) (1994). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12,111(8) (1994). State and local governments are included as covered entities. *See* 42 U.S.C. § 12,132 (1994) ("No qualified individual with a disability shall, by reason of such disability, be excluded from partici-

segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [a] disability," using criteria that are not job-related to screen out persons with disabilities, and failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."<sup>46</sup> In *Garrett*, the Court concluded that these prohibitions were disproportionate to any state violation of constitutional rights, and therefore a state employee could not recover money damages when a state failed to comply with these anti-discrimination mandates.<sup>47</sup>

In drawing this conclusion, the Court started with the premise that it must "identify with some precision the scope of the constitutional right at issue," which requires examination of "the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled."<sup>48</sup> It went on to look to its own prior decisions reviewing state classifications of individuals based on disability, and observed that such classifications have been subject only to "the minimum 'rational-basis' review applicable to general social and economic legislation."<sup>49</sup> The Court again asserted that "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."<sup>50</sup> Despite this reference to a legislative scope of authority distinct from that of the courts, the Court went on to define a very limited scope of federal legislative authority as to individuals, like the disabled, whose classification the courts have found subject to rational basis review. "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."<sup>51</sup> Instead, the states "could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled."<sup>52</sup> Accord-

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pation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); 42 U.S.C. § 12,131(1)(A) (1994) (defining "public entity" as "any State or local government"). Congress also explicitly abrogated state sovereign immunity, as required by the Court's earlier articulated clear statement rules. *See* 42 U.S.C. § 12,202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."); *see also* *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

46. 42 U.S.C. § 12,112(b)(1), (3), (5)(A) (1994).

47. *See Garrett*, 121 S. Ct. at 966-68 (concluding that Congress did not validly abrogate state's sovereign immunity from suit by private individuals for money damages under Title I).

48. *Id.* at 963.

49. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)).

50. *Id.*

51. *Id.* at 964.

52. *Id.*

ingly, to be appropriate section 5 legislation, federal legislation protecting the disabled from employment discrimination must be targeted to "irrational" discrimination by the states and must be proportional to the amount of harm caused by such irrational discrimination.<sup>53</sup>

Applying this standard, the Court then reviewed the legislative record for the ADA, dismissing the included examples of disability discrimination by the states as inconsequential in number and severity.<sup>54</sup> Reexamining and reweighing congressional findings, the majority concluded that, while the record included a number of instances of discrimination by the states, it was not clear that any of the discrimination was "irrational—particularly when the incident is described out of context."<sup>55</sup> Because, in the Court's view, Congress had failed to document an extensive record of clearly irrational discrimination by the states, the majority concluded that the ADA could not possibly be congruent to any constitutional harm.<sup>56</sup> The Court further concluded that the provisions of the ADA that were designed to require only "reasonable" accommodation and to allow an employer to avoid liability if it showed that accommodation would pose an "undue hardship," were not sufficient to make the law proportional to any violation of constitutional right.<sup>57</sup> "Even with this exception," concluded the majority, the ADA "far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' on the employer."<sup>58</sup>

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53. *See id.* at 967-68.

54. In so doing, the Court disregarded all evidence of constitutional violations by local government entities, concluding that, while these local entities are appropriate targets of Fourteenth Amendment legislation, evidence of their violations should not be considered here because they are not beneficiaries of Eleventh Amendment sovereign immunity. *See id.* at 965. This move inappropriately gave the Eleventh Amendment an influence on Fourteenth Amendment analysis that the Court has itself said is not legitimate. *See infra* notes 80-91; *see also* Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming a Coordinate Branch*, 4 GREEN BAG 2D 351, 355 (2001) ("[O]nce the Court acknowledges that the Fourteenth Amendment power trumps the Eleventh Amendment, *Garrett* becomes a case about — and should be resolved under the terms of — the Fourteenth Amendment.").

55. *See Garrett*, 121 S. Ct. at 965 (reviewing ADA's legislative history and determining it did not support conclusion that states had irrationally discriminated against disabled). The Court's aggressive re-evaluation of the legislative record is remarkable. By discounting the legislative fact-finding and by calling it "out-of-context," the Court seems to suggest that even the institutional benefits of Congress as a fact-finder are irrelevant to its analysis.

56. *See id.* at 964-65 (concluding that requirement that there be pattern of discrimination by states has not been met). Justice Breyer's strikingly different reading of the congressional record demonstrates how central to the Court's ultimate conclusion was the dismissal of nearly all the legislative evidence presented in support of the ADA. *See id.* at 969-72 (Breyer, J., dissenting) (reviewing legislative history and finding sufficient evidence of "a widespread problem of unconstitutional discrimination").

57. *See id.* at 966-67.

58. *Id.* at 967.

With *Garrett*, it seems apparent that the Court has chosen to directly align the contours of an equal protection right with the standard of judicial review associated with that right. It further seems evident that, despite the Court's repeated statements that Congress has power when legislating under section 5 to prohibit conduct not itself forbidden by the Amendment's text in order to prevent constitutional violation, congressional enactments that forbid more than what the Court itself would invalidate on review are unlikely to survive. In taking this course, with very little thoughtful analysis, the Court has unduly restricted congressional ability to protect individuals from invidious discrimination by state employers.

III. IMPORTING A PRINCIPLE OF JUDICIAL RESTRAINT INTO A THEORY OF LEGISLATIVE AUTHORITY INAPPROPRIATELY RESTRICTS CONGRESS' ABILITY TO ENFORCE THE SUBSTANTIVE GUARANTEES OF THE FOURTEENTH AMENDMENT

A. *The Need for Judicial Restraint Has No Parallel Institutional Justification for Legislative Restraint*

The principle of judicial restraint counsels that only very clear constitutional violations by democratically-elected legislators should be found unconstitutional by the courts.<sup>59</sup> By exercising restraint in assessing the appropriateness of legislative enactments, unelected judges avoid encroaching onto legitimate determinations of democratically-elected legislators.<sup>60</sup> In order to avoid that kind of encroachment, the Court has established a three-tiered structure for reviewing the constitutionality of state laws that draw distinctions among citizens.<sup>61</sup> Laws that classify based on race or national origin are presumptively unconstitutional given the general irrelevance of these characteristics to "the achievement of any legitimate state interest," and can only survive a court's "strict scrutiny" if they can be justified by a compelling state interest.<sup>62</sup> Other classifications—gender and illegitimacy—receive a slightly lower, but still heightened, level of judicial scrutiny. This intermediate level of scrutiny is

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59. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1222-23 (1978) ("An Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.").

60. See *id.* at 1223 (illustrating James Bradley Thayer's argument that "the legislature is charged with the responsibility of measuring its own conduct against the Constitution and that the judiciary should therefore not lightly reach a judgment on the constitutionality of a legislative act contrary to the prior constitutional judgment of the legislature").

61. See Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 315-16 (1987) (cataloguing classifications associated with three tiers of judicial scrutiny).

62. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (noting that reason for presumption against race-based classifications is that race is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

justified by the now widely accepted view that gender and illegitimacy "generally provide [ ] no sensible ground for differential treatment."<sup>63</sup> And finally, all other classifications—including those based on age or disability—are reviewed by the courts under the deferential "rational basis" standard of review.<sup>64</sup>

When a classification is reviewed under the rational basis standard, it may be used "as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," and "that [it] proves to be an inaccurate proxy in any individual case is irrelevant."<sup>65</sup> Rational basis review generally applies to classifications of individuals who possess "distinguishing characteristics relevant to interests the State has the authority to implement."<sup>66</sup> Thus, because most state laws drawing distinctions based on age or disability would be permitted under the Constitution, the Court is very hesitant, without extremely persuasive evidence of arbitrariness or irrationality, to strike down any state law drawing such a distinction. Despite this standard, classifications that are "arbitrary," "invidious," or "irrational" will not survive rational basis review.<sup>67</sup>

The rationale for applying the deferential rational basis standard of review is grounded in concerns about the limitations of judicial competence and the appropriate relationship between democratic and anti-democratic institutions.<sup>68</sup> The fact that this principle underlies rational basis

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63. *Id.* at 440-41. As discussed *infra* at notes 97-102 and accompanying text, these classifications were not always subject to heightened scrutiny. Instead, the Court's greater care in evaluating these classifications came only after Congress articulated, through new law, a social understanding of the irrelevance of these characteristics to most rational policy determinations.

64. *See id.* at 441, 446-47 (noting that Court has "declined . . . to extend heightened review to differential treatment based on age" and concluding that ordinance requiring special use permit for operation of group home for mentally retarded was only subject to rational basis review).

65. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000).

66. *Cleburne*, 473 U.S. at 441.

67. *See id.* (observing that Court will overturn government action if "the unvarying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational"); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) ("The Equal Protection Clause is offended only by laws that are invidiously discriminatory and classifications that are wholly arbitrary or capricious."). Thus, in *Cleburne*, the Court struck down a zoning provision that required special permits for group homes for the mentally disabled, but did not require such permits for other types of group homes, such as multi-family dwellings, fraternities and nursing homes. *See Cleburne*, 473 U.S. at 436 n.3 (describing provision). The Court found no rational basis for the distinction drawn between the disabled and other groups. *See id.* at 447-50 (concluding ordinance was based on irrational prejudice against mentally retarded).

68. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.").

review has been emphasized repeatedly throughout the Court's equal protection jurisprudence. The Court has explained that rational basis review is "a paradigm of judicial restraint," premised on the notion that courts do not have "license . . . to judge the wisdom, fairness or logic of legislative choices."<sup>69</sup> Moreover, the Court has stated that courts should not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."<sup>70</sup> As a consequence of this judgment about the appropriate relationship between elected officials and unelected judges, a classification subject to rational basis review by the courts is "virtually unreviewable."<sup>71</sup> The burden is on the challenging party to "negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'"<sup>72</sup> The Court certainly has never articulated as a justification for this extreme deference a belief that certain groups of individuals simply have less entitlement to equal protection of the laws than others. Instead, the Justices have explained that:

[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.<sup>73</sup>

But the concerns that motivate these restrictions on the courts' authority to review state laws do not apply to the federal legislature and should therefore not be used to limit congressional authority.<sup>74</sup> As already noted, the Court explicitly distinguishes the institutional capabilities of the courts from those of a legislature in explaining its use of rational basis review.<sup>75</sup> Unlike a court, Congress is capable of considering the reasons for and effects of drawing certain classifications and generalizations

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69. *Id.* at 313, 315.

70. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see also Rodriguez*, 411 U.S. at 31 (judicial restraint is important so that courts avoid "a legislative role . . . for which [they lack] both authority and competence").

71. *See Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (describing extreme deference courts accord legislative classifications subject to rational basis review).

72. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 995, 964 (2001) (citing *Heller*, 509 U.S. at 320).

73. *Cleburne*, 473 U.S. at 441-42; *see id.* at 442-43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals.").

74. *See Sager*, *supra* note 59, at 1221 (arguing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm").

75. For the reasoning behind the Court's creation of this distinction, *see supra* notes 66-73 and accompanying text.



well beyond any particular case presented for review. Congress is presumed to have expansive ability to find facts and gather expert advice that will lead to precisely the kinds of decisions that courts should not second-guess.<sup>76</sup> Moreover, unlike a federal court, Congress is itself a democratic institution.<sup>77</sup> Given the absence of institutional constraints on Congress that parallel those applicable to courts, there is no justification for importing wholesale the limitations of judicial restraint into any theory of the boundaries of federal legislative authority.

Indeed, "[t]o apply a rule designed to restrict courts as if it restricted Congress' legislative power is to stand the underlying principle—a principle of judicial restraint—on its head."<sup>78</sup> That is, by restraining Congress' authority, the Court has given itself an unrestrained role, in which legislation whose subject would receive limited judicial review were it passed by a state, will receive the strictest scrutiny when passed by the federal government. If courts are to hold Congress to this standard in considering whether to enact laws that protect the elderly or the disabled as part of the Fourteenth Amendment's guarantee of equal protection, there must be some principle other than the institutional competence of the courts that would justify this limitation. As yet, however, the Court has failed to articulate any such principle.

B. *Federalism Does Not Justify the Court's Drastic Limitation on Congress' Section 5 Enforcement Authority*

It seems that the Court's aggressive limitation of federal legislative power must stem from its current, equally aggressive, commitment to the concept of federalism. But federalism does not supply a logical, principled justification for the Court's approach in these cases.

The Court cannot use the same federalist justification to limit section 5 authority that it used to limit the federal legislature's Commerce Clause authority.<sup>79</sup> The Court's refusal to allow Congress to abrogate the states' immunity through Commerce Clause legislation rests on its conclusion that "[t]he Eleventh Amendment restricts the judicial power under Article

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76. See *Garrett*, 121 S. Ct. at 973 (Breyer, J., dissenting) ("Unlike Courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification."); see also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 464 (2000) ("Nothing in the justification of rational basis review constrains Congress from exercising its own institutional prerogatives to undertake legislative factfinding to determine whether there is invidious discrimination in any given area of national life."); Ross, *supra* note 61, at 322-23 (discussing institutional arguments for judicial restraint).

77. See *Garrett*, 121 S. Ct. at 973 (Breyer, J., dissenting); Ross, *supra* note 61, at 323 (distinguishing nature of Congress from that of courts).

78. *Garrett*, 121 S. Ct. at 973 (Breyer, J., dissenting).

79. For a discussion of the limitations on Congress' Commerce Clause power, see *supra* notes 8-15 and accompanying text.

III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."<sup>80</sup> But, as the Court has repeatedly acknowledged, the Fourteenth Amendment's relationship to the Eleventh Amendment is fundamentally different from that of Article I. "[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy, ha[s] fundamentally altered the balance of state and federal power struck by the Constitution."<sup>81</sup> Consequently, "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"<sup>82</sup> so that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments."<sup>83</sup>

Despite the Court's explicit restatement of this relationship between the Eleventh and Fourteenth Amendments,<sup>84</sup> the Court in *Garrett* went on to stand that relationship on its head in at least one significant way. The Court's "congruence and proportionality" test places considerable importance on the facts found by Congress to justify the need for federal legislation.<sup>85</sup> Congress is required to demonstrate, in the statutory record, a clear Fourteenth Amendment violation and then to show that the federal remedy authorized is proportional to that violation.<sup>86</sup> In *Garrett*, the Court concluded that the only relevant portion of the congressional record to

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80. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996).

81. *Id.* at 59 (citation omitted); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (stating that under Fifteenth Amendment, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting"); *Ex parte State of Virginia*, 100 U.S. 339, 345 (1880) (stating that Civil War Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress").

82. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 445 (1976) (citations omitted).

83. *City of Rome v. United States*, 446 U.S. 156, 179 (1980); see also *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1981) (noting that federalism concerns are "attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments") (citation omitted); Biemers, *supra* note 25, at 792 ("The Constitution instructs, in the form of the Civil War Amendments, that certain personal political protections, embodied in the substantive and procedural guarantees of those amendments, outweigh the structural interests embodied in the Tenth and Eleventh Amendments."); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 169 (1998) ("A major purpose of the Fourteenth Amendment was to give Congress the power to restrict state power, so the fact that the Fourteenth Amendment amends the earlier-enacted Eleventh Amendment is not surprising."); Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 300 (1982) (noting that "the Court has . . . unequivocally established that when Congress acts pursuant to the Civil War amendments . . . state sovereignty limitation[s] ha[ve] no force").

84. See *Garrett*, 121 S. Ct. at 962.

85. See *id.* at 964-65; *Kimel*, 531 U.S. at 88-89 (noting significance of legislative record to congruence and proportionality analysis); *City of Boerne*, 521 U.S. at 530-31 (same).

86. See discussion *supra* notes 24-28 and accompanying text.

the "congruence and proportionality" analysis was that part of the record that detailed equal protection violations by the states themselves.<sup>87</sup> While the Court acknowledged that local governments are also "state actors" whose conduct is subject to the commands of the Fourteenth Amendment, it declined to consider any legislative evidence concerning local government violations of the Fourteenth Amendment that might have gone to support passage of the ADA.<sup>88</sup> The Court's rationale for this exclusion was that local governments are not entitled to Eleventh Amendment immunity.<sup>89</sup> By eliminating this category of evidence from the congressional record, the Court put the Eleventh Amendment where it is not supposed to go—in front of the Fourteenth Amendment. Rather than the Fourteenth Amendment being a limitation on the Eleventh Amendment, Congress' section 5 authority was cut back by the Court's exclusive focus on the beneficiaries of sovereign immunity.

This example of the Court's inappropriate use of the Eleventh Amendment's federalist limitations is at least some evidence of the unstated, but powerful, federalist commitment that is pushing the Court in these cases.<sup>90</sup> Perhaps it is merely a strong sense of the background principle that the federal government should be one of limited powers that is motivating the Court to drastically curtail Congress' section 5 authority. But, as the Court has itself said, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments."<sup>91</sup> The federalist current running through the Court's new section 5 jurisprudence is in uncomfortable tension with this prior understanding of Congress' power to enforce the substantive guarantees of the Fourteenth Amendment.

C. *The Courts and Congress Should Cooperate in Interpreting and Enforcing the Substantive Guarantees of the Fourteenth Amendment*

In addition to lacking a strong justification, the Court's use of standards of judicial review to limit congressional authority to protect constitutional rights misses the important role that Congress can play, has played and should continue to play in enforcing the guarantees of the Fourteenth Amendment in the face of outdated "notions of . . . relative capabilities."<sup>92</sup> Even those individuals not part of a class subject to some higher level of judicial scrutiny are entitled to at least a level of constitutional

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87. See *Garrett*, 121 S. Ct. at 965.

88. See *id.*

89. See *id.*

90. See, e.g., *City of Boerne*, 521 U.S. at 536 ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.") (emphasis added); Post & Siegel, *supra*, note 76, at 443 (noting strong federalism evident in Court's recent Section 5 cases); Biemers, *supra* note 25, at 828 (observing that "federalism concerns are an aspect of the Court's proportionality analysis").

91. *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

92. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

protection that disallows state actions that are arbitrary, invidious or otherwise irrational.<sup>93</sup> The concepts of arbitrariness and irrationality themselves imply a norm against which the conduct will be judged, and that norm is, as history demonstrates, capable of change.<sup>94</sup> The democratically-elected legislature is in a significantly better position than are the nine Justices of the Supreme Court to respond to changing social understanding of what might constitute arbitrary or invidious classification and limitation of individuals.

Even while the rights guaranteed by the Constitution may not change (and, as *City of Boerne* teaches, Congress may not itself change them), our society's understanding of how a class of citizens is situated can develop over time, and old stereotypes can become "outdated."<sup>95</sup> If federal legislation directed at protecting classes of people previously perceived as needing no heightened protection is always reviewed with the kind of "strict scrutiny" the Court now seems to require, there will be no room for recognition of these changes.<sup>96</sup> Indeed, it is not clear how Congress could ever satisfy the Court's current standards if it sought to pass anti-discrimination laws directed at protection of classes that have not yet achieved some heightened level of judicial review. Classifications subject to rational basis review are always—or almost always—permissible bases for broad generalizations on the part of the states, but laws prohibiting discrimination in employment against otherwise-qualified individuals require states acting as employers to make individualized determinations about particular employees. The Court's current approach would seem to prohibit Congress from ever pushing states to rethink outdated stereotypes about particular classes and evaluate people on an individualized basis. Eliminating the federal legislature's role in this kind of active enforcement of equal pro-

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93. *See id.* at 446 (stating that equal protection requires that "[s]tate may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); *see also* *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (finding that state constitutional provision that denies gays and lesbians full political access could not be justified under rational review because it lacked connection to any legitimate state goal and was born of animosity toward affected classes).

94. *See* *Biemers*, *supra* note 25, at 815 ("The term 'invidious' simply refers to discrimination that is offensive. . . . By operationalizing the equal protection standard in this manner, the Court implicitly recognized that the question of equal protection has a tautological character: discrimination will be deemed offensive if society views the attribute upon which the disparate treatment is predicated as a largely illegitimate criterion for drawing distinctions.").

95. Indeed, in *Cleburne* the Court noted that "absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation that is challenged as denying equal protection." *Cleburne*, 473 U.S. at 439-40. This certainly suggests that Congress would have had authority to provide "direction."

96. Moreover, as Justice Kennedy has noted, "it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989).

tection is not a necessary consequence of respecting the Supreme Court's "responsibility . . . to define the substance of constitutional guarantees."<sup>97</sup> The Court certainly can retain and protect its role as the ultimate arbiter of what the law is without defining the full scope of equal protection as simply a function of the associated standard of judicial review. Instead, the Court could, and should, identify the scope of a constitutional right that Congress has the authority to protect independent of the particular standard of review.<sup>98</sup> This would leave authority to define the rights situated in the Supreme Court, but would avoid the problem of limiting congressional authority to enforce the constitution's guarantees and to do so in light of evolving social norms.<sup>99</sup>

The history of the cooperative relationship between Congress and the Court in the development of gender discrimination standards suggests the kind of responsibility that Congress can, and should, have as part of its section 5 enforcement authority.<sup>100</sup> In 1972, Congress extended Title VII's antidiscrimination mandate—including its prohibition against discrimination based on gender—to protect state employees.<sup>101</sup> At that time, gender classifications were still subject to rational basis review.<sup>102</sup> When, a year later, the Court first acknowledged a heightened standard of judicial review for gender-based classifications, the Court explicitly looked to Congress' "increasing sensitivity to sex-based classifications," manifested in the substantive provisions of Title VII, to support its new level of judicial scrutiny.<sup>103</sup> As the Court explained at that time, "Congress itself has concluded that classifications based upon sex are inherently invidious, and

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97. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 958 (2001); *see also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); *City of Boerne v. Flores*, 521 U.S. 507, 519-24 (1997) (noting Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation").

98. *See Sager, supra* note 59, at 1221 ("Where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm[s] in question.")

99. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional. . . .").

100. *See* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 845-47 (1999) (discussing Court's evaluation of gender-based classifications).

101. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976) (noting that states were covered by Title VII as of 1972 amendments to that law).

102. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (applying heightened scrutiny, under the Fifth Amendment's due process clause, to gender classifications for first time).

103. *Id.* at 687.

this conclusion of a co-equal branch of government is not without significance.”<sup>104</sup> When the Court considered whether Congress could validly subject a state to suit for gender discrimination, the fact that gender claims had received only rational basis review at the time of Title VII’s extension to the states was not an issue—indeed, it was not even mentioned.<sup>105</sup> The relationship between the Court and the democratically-elected federal legislature was fundamentally different in the context of gender than it is in the story unfolding now in the contexts of age and disability. Rather than holding Congress to an outdated standard that had been defined by reference to institutional competence and judicial deference to legislative judgment, the Court instead relied on Congress’ recognition that gender classifications were, by-and-large, arbitrary and invidious, and determined that courts too should take greater care in evaluating such classifications when made by the states.<sup>106</sup>

In enacting the ADEA and the ADA, Congress again sought to push the states as employers to think twice before making broad generalizations about individuals based on classifications and discrimination that had, in the past, been regarded as entirely rational. In so doing, Congress was—as it had years before with gender—suggesting that certain types of discrimination once thought to be appropriate have come to be recognized as in fact the kind of arbitrary and invidious discrimination forbidden by the Equal Protection Clause. By refusing to permit Congress to afford federal recognition to a changing social understanding of what constitutes “arbitrary” discrimination, the Court has frozen “equal” protection in a manner sure to perpetuate unequal treatment.

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104. *Id.* at 687-88.

105. *See generally Fitzpatrick*, 427 U.S. at 445 (1976) (finding that Fourteenth Amendment grants Congress authority to provide for private gender discrimination suits against states as employers). Moreover, the first case applying heightened scrutiny to a gender classification in the context of an Equal Protection Clause challenge was not decided until after *Fitzpatrick*, *see Craig v. Boren*, 429 U.S. 190 (1976) (first applying heightened scrutiny to equal protection gender claim), thus further demonstrating the novelty of the Court’s conflating the scope of a right with its corresponding standard of review.

106. Of course, it is not entirely clear what fate awaits federal legislation prohibiting states to discriminate on the basis of gender. The majority opinion in *Kimel*, authored by Justice O’Connor, did go out of its way to note that gender claims received a higher level of equal protection scrutiny than claims based on age or disability. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (noting repeatedly that race and gender claims receive higher scrutiny than age claims). And, under the Court’s reasoning in *Garrett* and *Kimel*, Congress presumably can protect against a broader swath of state-perpetrated gender discrimination than against age or disability discrimination by the states, as gender receives an intermediate level of scrutiny and thus the equal protection right for those classified based on gender is apparently correspondingly higher. However, for much the same reason, it also seems that gender discrimination cannot receive the same congressional protection as race discrimination, which receives the highest level of judicial scrutiny. What this will mean for the validity of specific anti-discrimination laws will almost certainly be the subject of future litigation.