ARTICLES

Searching for the Structural Vision of *City of Boerne v. Flores*: Vertical and Horizontal Tensions in the New Constitutional Architecture

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I. Introduction

In a recent decision determining that section 13981 of the Violence Against Women Act[1] exceeds the authority of Congress under both the Commerce Clause and section 5 of the Fourteenth Amendment, J. Harvie Wilkinson III, Chief Judge of the Fourth Circuit Court of Appeals, filed a fascinating concurring opinion.[2] In it, he identified, and defended against the imperative of judicial restraint, a recent line of Supreme Court and lower court opinions that represent a self-described "third era" of twentieth-century judicial activism. The contemporary activism, as Wilkinson characterizes it, is informed by a desire to stringently enforce the structural mechanisms of dual sovereignty.[3] This structural end, in the view of its proponents, distinguishes the current wave of activism from that exhibited during the *Lochner* and Warren Court eras. In contrast to decisions typifying earlier jurisprudential shifts, Wilkinson does not see the current structural activism purposefully promoting the interests of any particular constituency.[4] Rather, the role of the judicial branch is that of a struc-

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1. 42 U.S.C.A. §13981 (West 1999).

2. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 889 (4th Cir. 1999) (Wilkinson, J., concurring).

3. *See id.* at 893 (enumerating the decisions representative of Court's activist stance).

4. *See id.* ("[T]he cases of the present era cannot be seen as single-mindedly promoting the interests of a particular constituency.") During the *Lochner* era, the Court em-

tural referee, arbitrating the proper allocation of power between the federal and state governments.[5]

While insisting that the contemporary activist judiciary does not play the role of "substantive adjudicators," Wilkinson nonetheless allows that the second-era activism of the Warren Court "presaged—and indeed guaranteed—a cyclical correction."[6] Wilkinson's use of the term "correction" in this context seems to belie the assertion that there is no substantive aspect to "ascendant federalism"[7]—and that no

ployed a constitutional theory that consistently favored the interests of business as against workers. *See e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (rejecting New York maximum hour law); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking congressional attempt to bar goods made by child labor from interstate commerce); Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923) (rejecting federal minimum wage law). The Warren Court, on the other hand, applied a theory of judicial review that self-consciously favored the interests of racial, religious, and other minorities against government-sanctioned discriminatory policies. *See e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (invalidating racial segregation in public schools); Sherbert v. Verner, 374 U.S. 398 (1963) (striking state refusal to grant unemployment benefits to individual who refused, due to religious convictions, to work on Saturdays). Both periods have been subject to substantial bodies of commentary and criticism. *See generally* THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., 1996) (examining the Warren Court's jurisprudence, the Justices, and the Court's impact on the nation); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *Lochner v. New York* (1990) (providing detailed historical, social and legal account of *Lochner* decision, its precursors and aftermath); PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969 (1972).

5. 169 F.3d at 895 (describing the jurisprudence of federalism as "purely allocative" and the courts as "structural referees").

6. *Id.* at 893.

7. I use the terms "ascendant" or "resurgent" federalism, rather than simply "federalism" or "new" (or even "new-new," *see* Symposium, *National Power and State Autonomy: Calibrating the New "New Federalism,"* 32 IND. L. REV. 1 (1998)) federalism in order to emphasize several features that differentiate the current model of federalism from that of earlier eras. The current devolution is driven by largely market-based considerations, *see generally* Symposium, *The Allocation of Government Authority*, 83 VA. L. REV. 1275 (1997) (exploring the economics of federalism); Symposium, *The Law & Economics of Federalism*, 82 MINN. L. REV. 249 (1998) (same), whereas the federalist arguments of earlier eras were characterized by a barely concealed racism, *see* Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1302-03 (1982) (noting that the early Republican strategy of appealing to black voters failed because "too few southerners could perceive any set of issues as more important than preventing Blacks from enjoying the advantages that would have come from full political participation"). Additionally, the choice of language is a modestly poetic attempt to suggest that the place of federalism in the new constitutional architecture transcends its place in earlier structural paradigms. Other commentators have also recognized that the trajectory of current judicial opinion supports this choice of modifiers. *See* H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 851 (1999) ("[The theory that our constitutional structure necessitates judicial intervention in order to ensure proper allocation between state and federal interests] had a brief run after *National League of Cities v. Usery*, [426 U.S. 833 (1976), *overruled* by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)] and now again is ascendant"). As Professor Jefferson Powell

particular constituency is consistently disserved by its application. And in fact, Wilkinson succinctly frames the subject matter of this Article by asserting that "[a]s states themselves began to respect the civil rights of all their citizens, however, the justification for additional [federal] restrictions began to wear thin."[8] In the view of Wilkinson, and presumably other proponents of ascendant federalism, the social realities that justified placing severe restrictions on state authority no longer exist to an extent that offsets the countervailing interest in cultivating the values of federalism. For Wilkinson, then, the agonizing question is whether the project of devolution of power to the states warrants activism in the service of federalism and a correlative rejection of judicial restraint.[9]

Judge Wilkinson's questioning of whether federalism is sufficiently valuable to warrant rejection of judicial restraint and the repeal of a popularly enacted piece of legislation is an interesting and difficult one.[10] This article does not question, however, whether judicial enforcement of federalism principles is a worthwhile,[11] or achieva-

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has noted, revolutionary-era political labels create terminological problems for the modern reader. *See* H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 955 n.30 (1993). While at one point in time, "federalist" connoted an advocate of strong central government, the term has generally referred to proponents of a balanced federal/state power structure, with a bias toward retention of state power. The simple version of the events that led to the confusion is that proponents of national government appropriated the term "federalist" in order to convince the public that the proposed form of government was not a break with the previous federalist system. *See* FEDERALISM: THE LEGACY OF GEORGE MASON 12 (Martin B. Cohen, ed. 1988). For a more elaborate explanation, see the sources cited *supra*.

8. 169 F.3d at 892.

9. *See id.* at 890 (submitting that the decision "pits the obligation to preserve the values of our federal system against the imperative of judicial restraint").

10. The counter-majoritarian problem referred to by Judge Wilkinson is frequently termed the "root difficulty" with judicial review. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962). How, the question goes, can an unelected, unaccountable institution overrule the will of the people as demonstrated through the actions of elected representatives and thus overturn legislation such as the Violence Against Women Act? My own answer is suggested by the theoretical premise underlying this article – that certain values are, in any system, analytically prior to others. In a democratic system, participation is a first principle. Thus, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954), a case said to pose serious counter-majoritarian problems, *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959), is supportable on the basis that it vindicated core democratic values. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-88 (1980) (arguing that judges should endorse democratic norms presumptively ratified by the American political community).

11. Only through experimentation will we gain any clear picture of how devolution impacts government. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1998); New State Ice v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). Professor Friedman suggests that what is lacking in the current debate is any empirical approach to the issue of whether increasing federalism-based restrictions on federal power

ble,[12] endeavor. It instead examines the implications of this development for congressional implementation of the Fourteenth Amendment. The Constitution instructs, in the form of the Civil War Amendments, that certain personal political protections,[13] embodied in the substantive and procedural guarantees of those amendments, outweigh the structural interests embodied in the Tenth and Eleventh Amendments.[14] In addition, conventional wisdom holds that the temporal order of constitutional amendments insulates rights enumerated in the Fourteenth Amendment from structural restrictions listed in

is warranted. While he suspects that federalism will ultimately vindicate values that most Americans hold dear, Friedman admits that more information is necessary. *See* Friedman, *supra* at 380.

12. On the limitations of judicially enforceable federalism, *see generally* Moulton, Jr., *supra* note 7 (contending that judicial enforcement of federalism principles is unsupported by constitutional text, structure, or history).

13. I use the terms protections rather than rights both because it is more apt as both a descriptive and a rhetorical matter and is responsive to the appropriation by conservatives of the term "rights." *See* Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564 (1998) (noting that conservative commentators, and even some courts, attempt to subvert the meaning of antidiscrimination law by characterizing protections as "special rights"); *see e.g.*, Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 458-59 (E.D.N.C. 1997) (finding that the Americans with Disabilities Act is not remedial legislation, but instead was designed to create special entitlements for the disabled). Resistance to and antipathy toward antidiscrimination law occurs in part because the erection of a barrier to discrimination does not eradicate the impulse to discriminate. An unintended consequence of this lag is that those predisposed to violate the rules may interpret the constraints on their behavior as a requirement that they treat others in a "special" manner. *See* Rubin, *supra* at 571. Rubin's definition of antidiscrimination law reflects my sense that "protections" is a superior term: "Antidiscrimination law is the primary means by which organized society protects individuals against disadvantageous treatment on the basis of their membership in certain groups, archetypally racial or ethnic minority groups." *Id.* at 568.

14. The Tenth Amendment restricts Congress from commandeering a state's legislative or executive functions through direct compulsion. See New York v. United States, 505 U.S. 144, 175 (1992); Printz v. United States, 521 U.S. 898, 934 (1997).

The Eleventh Amendment provides: "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. Though the text of the Constitution appears to delimit only Article III diversity jurisdiction, the Supreme Court has construed this language to bar citizens from bringing suit against their own state in federal court. *See* Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 (1985) (citing Hans v. Louisiana, 134 U.S. 1 (1890)). The Court has justified its expansive reading of the Eleventh Amendment by reference to the dual principles of federalism and sovereign immunity. *See id.*; *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (stating that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms") (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

earlier constitutional amendments.[15] The current string of federalism-based decisions, however, challenges these traditional notions.

One such decision, *City of Boerne v. Flores*[16] ("*Boerne*"), sits at the intersection of federal-state (vertical) and judicial-congressional (horizontal) tensions brought about by judicial enforcement of federalism principles. Specifically, it sets Congress' enforcement power under section 5 of the Fourteenth Amendment against both judicial responsibility for defining the contours of substantive constitutional law, and more importantly, the increasing judicial tendency to act as custodian of state sovereignty against an ostensibly overreaching Congress. In purporting to apply *Boerne*, lower courts have issued strikingly divergent opinions regarding the constitutional propriety of antidiscrimination legislation under Congress' section 5 power. Some courts view *Boerne* as a "landmark" decision announcing significant change in our constitutional architecture[17] and have accordingly interpreted it to substantially cabin congressional power.[18] Other courts have read *Boerne* primarily as a separation of powers decision by focusing on Congress' power to inform Fourteenth Amendment concerns in the absence of any judicial mandate.[19] With *Kimel v. Florida Board of Regents*,[20] the Supreme Court will presumably resolve some of the questions left over by *Boerne*.

15. *See Seminole Tribe*, 517 U.S. at 59 ("In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976), we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution.").

16. 521 U.S. 507 (1997).

17. *See* Condon v. Reno, 155 F.3d 453, 463 (4th Cir. 1998). Use of the architecture metaphor in describing the allocation of governmental power is not uncommon. *See, e.g.*, Harry N. Scheiber, *Redesigning the Architecture of Federalism–An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227 (1996); Paul M. Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L. J. 233 (1989) (advocating view that framers' article III design supports flexible institutional architecture).

18. *See* Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999); Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998).

19. These decisions have failed to yield consistent outcomes. *Compare* Kimel v. Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (rejecting ADEA as proper exercise of congressional enforcement power) *with* Goshtasby v. Bd. of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998) (upholding ADEA as proper exercise of congressional enforcement power) and Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998) (upholding ADA as proper exercise of Congress' section 5 enforcement power under the Fourteenth Amendment).

20. 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 901 (1999). Though *Kimel* addressed Congress' enforcement power in the context of both the ADA and the ADEA, the Supreme Court granted certiorari only on the ADEA issue. *See* ___ U.S. ___, 119 S.Ct. 901; Petition for Writ of Certiorari, No. 98-796 (stating questions

In anticipation of that decision, this Article, using recent decisions regarding the constitutional propriety under the Fourteenth Amendment of the Americans With Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") as vehicles, argues that *Boerne* is explainable solely on the basis of separation of powers grounds. In contrast to the preponderance of those decisions applying *Boerne*, however, this Article acknowledges that federalism is an important aspect of the Court's analysis. Nonetheless, it also contends that courts adopting a strong federalist interpretation of *Boerne* unnecessarily privilege structural concerns at the expense of analytically prior democratic principles.

Some of the seemingly irreconcilable tensions descended from *Boerne*'s simultaneous treatment of separation of powers and federalism considerations can be ameliorated by examining each plane separately. After encapsulating the decision and its antecedents in Part I, Part II situates *Boerne* comfortably within extant separation of powers doctrine. That section then evaluates two distinct problems posed by *Boerne*. The easier problem involves the question of whether Congress retains any role in enforcing equal protection after *Boerne*. After establishing that it does, the remainder of the section examines problems in defining the contours of this role, focusing particular attention on how the enterprise of judicial deference to congressional factfinding operates in the Fourteenth Amendment context. This section concludes that courts reading *Boerne* to signal a change in interbranch relations have adopted too narrow a stance toward the case.

Turning to the vertical plane, part III contends that courts have not properly dealt with the allusions to federalism contained in the *Boerne* decision. Properly understood, federalism analysis forms one component of judicial tests—refined, but not created, by *Boerne*—designed to check congressional overreaching under the Fourteenth Amendment power. However, the strong federalist reading of *Boerne*, in which federalism principles form a constraint on congressional power independent from separation of powers principles, not only misrepresents the Court's opinion, but also offends basic democratic norms that are analytically prior to the structural values vindicated through judicial federalism. Part III concludes by suggesting that the federalism principles subscribed to by Louis Brandeis—and

presented), <<http://www.usdoj.gov/osg/briefs/1998/2pet/7pet/98-0796.pet.aa.html>>; *infra* notes 145-54 and accompanying text (discussing issues posed by *Kimel* and proposing analysis).

often cited as authority by proponents of ascendant federalism[21]—support such a nuanced perspective. Because Brandeis embraced both centrifugal values in governmental authority and principles of equal citizenship, his social views afford a particularly rich ground for resolving the tension suggested by *Boerne*.

This Article concludes that *Boerne* is not a landmark decision, but rather an affirmation of *Marbury v. Madison*'s structural assignment to the Court of the decisive role in constitutional interpretation. In sustaining the Court's canonic role, *Boerne* clarified the relationship between the Court's definitional capacity and Congress' power to enforce the Civil War Amendments, but did not subvert congressional power to vindicate the political protection associated with democratic society.

II. *City of Boerne v. Flores*

A. Antecedent Cases Interpreting Scope of Congress' Section 5 Power

The Thirteenth, Fourteenth, and Fifteenth Amendments, known collectively as the Civil War Amendments, were added to the Constitution during Reconstruction and were designed, respectively, to prohibit slavery, protect individuals from state deprivation of privileges and immunities, due process of law, or equal protection, and accord all male citizens the right to vote.[22] Each Amendment contains an enforcement mechanism, granting Congress the power to enforce these substantive provisions.[23]

Relying at least in part on language in earlier decisions construing Congress' enforcement power under the Fourteenth Amendment,[24]

21. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 264 (1983) (Burger, J., dissenting); United States v. Virginia, 518 U.S. 515, 600-601 (1996) (Scalia, J., dissenting); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 777 (1995).

22. *See* U.S. CONST. amend. XIII, § 1; U.S. CONST. amend XIV, § 1; U.S. CONST. amend. XV, § 1. The right to vote was not conferred on women of any racial background until much later. *See* U.S. CONST. amend. XIX.

23. *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

24. In *Ex Parte* Virginia, 100 U.S. 339 (1879), an early decision construing the Civil War Amendments, the Court stated a broad interpretation of Congress' enforcement power. Taking as its premise that the amendments were intended to bring blacks into "[p]erfect equality of civil rights with all other persons within the jurisdiction of the States," the Court recognized that "some legislation is contemplated to make the Amendments fully effective." *Id.* at 345. To that end, the Court ruled that congressional power encompassed:

the Court in *Katzenbach v. Morgan*[25] determined that this power was coextensive with the broad power accorded to Congress under the Necessary and Proper Clause.[26] The Court had earlier made the same determination with respect to Congress' enforcement power under the Fifteenth Amendment.[27] Similarly, in the *Civil Rights Cases*, the Court had observed that section 2 of the Thirteenth Amendment conferred on Congress "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery."[28] That these formulations properly captured the relationship between Congress' express powers and those powers reserved to the states is reinforced by the history of the Fourteenth Amendment. An earlier version of section 1 read: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[29]

As Justice Brennan noted in the *Morgan* decision, the "substitution of the 'appropriate legislation' formula was never thought to have the effect of diminishing the scope of this congressional power."[30] *Morgan* involved a challenge to section 4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement.[31] Despite the Court's earlier determination, in *Lassiter v. Northampton County Bd. of Elections*,[32] that the literacy tests did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court upheld section 4(e) as a proper exercise of Congress' section 5 pow-

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

25. 384 U.S. 641, 650-51 (1966).

26. *See id.* at 650 (stating "classic formulation" of Necessary and Proper Clause). That formulation reads: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

27. *See* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (equating Congress' power under section 2 of the Fifteenth Amendment with that under the Necessary and Proper Clause).

28. 109 U.S. 3, 20 (1883).

29. H.R. Rep. No. 39-63 (1865).

30. *See* 384 U.S. at 650 n.9 (citation omitted).

31. *See* 384 U.S. at 646-47.

32. 360 U.S. 45 (1959).

ers.[33] In other words, the Court ruled that a law does not have to violate the Fourteenth Amendment in order for Congress to legislate on that topic under section 5.

The Court offered two distinct rationales. The first might be termed the "deference" rationale. This rationale was based on the observation that requiring a judicial determination of a constitutional violation as a condition of any congressional enactment under the Fourteenth Amendment would confine Congress to the role of scriveners codifying Supreme Court opinions.[34] In assessing whether a congressional enactment usurped the judicial role of defining equal protection, the Court stated that legislation is "appropriate" if it may be "regarded as an enactment to enforce the Equal Protection Clause, is 'plainly adapted to that end,' and whether it is not prohibited by but is consistent with the 'letter and spirit of the constitution.'"[35] The question, in turn, of whether the legislation was "plainly adapted" was to be assessed by reference to the factual predicate for congressional action.[36]

33. *See* 384 U.S. at 646-47. Previously, in United States v. Guest, 383 U.S. 745 (1966), the Court had intimated that it would accord a broad power to Congress under section 5. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 19.3 at 526-27 (2d ed. 1992) ("The Court held that the indictment [against private individuals for intimidating blacks from using facilities of interstate commerce] should not have been dismissed . . . because a conspiracy against the constitutional right to use the facilities of interstate commerce, 'whether or not motivated by racial discrimination [is] a proper object of the federal law.'"). While the *Guest* Court disavowed any intent to determine the breadth of Congress' power under section 5, *see* 383 U.S. at 755, six justices expressly repudiated the *Civil Rights Cases*' requirement of state action on the ground that such a rule reduced the legislative enforcement power, *see id.* at 782-83. This dicta framed the question at issue in *Morgan*.

34. 384 U.S. at 648-49 ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] 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 . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment.") (footnote and citation omitted).

35. *Id.* at 650-51.

36. The Court noted several potential factual predicates for the conclusion that Puerto Ricans in New York needed additional political protections in order to gain nondiscriminatory treatment. *See id.* at 652-53 (observing the Congress could have weighed considerations including the pervasiveness of discriminatory treatment, the efficacy of eliminating voting restrictions, the level of intrusiveness on state interests, and the adequacy or availability of alternative remedies). At root, congressional action was justified because access to the right to vote was preservative in gaining nondiscriminatory treatment in all arenas of life.

The second *Morgan* rationale came to be referred to as the "ratchet" theory. In reality, the rationale was one of congressional self-definition of its enforcement power; the ratchet theory – by which Congress could increase the degree of protection afforded by the Constitution's substantive provisions, but not decrease them[37]—simply made the broader rationale somewhat more palatable. Though the opinion is not entirely clear on this point, the Court intimated that Congress had an independent authority to define the scope of equal protection.[38]

The broad and opaque language of the majority opinion in *Morgan* caused concern that Congress' section 5 power, if it included the power of self-definition, was virtually unlimited, and that such a ruling would undermine the foundational principles of *Marbury v. Madison*.[39] Justice Harlan, in particular, worried that the decision conferred on Congress an unbridled independent authority to determine the substantive meaning of equal protection.[40] This fear was allayed by *Oregon v. Mitchell*,[41] in which seven justices indicated that

37. The basic statement of the ratchet theory is contained in a footnote responding to the dissent's concern that an independent congressional interpretive authority could be used to dilute or even eviscerate constitutional rights. *See id.* at 651-52 n.10. The argument that section 5 operates as a one-way ratchet, allowing Congress to expand but not contract rights, is premised on the notion that Supreme Court rulings limiting the meaning of a constitutional provision do not logically preclude legislation on the same subject. *See generally* Bonnie I. Robin-Vergeer, *Disposing of Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996) (defending the ratchet theory).

38. Not all commentators read *Morgan* exactly alike. *Compare* David P. Currie, *RFRA*, 39 WM. & MARY L. REV. 637, 642 (1998) (reading the *Morgan* Court's conclusion that restriction of literacy tests was necessary to ensure nondiscriminatory treatment as separate and distinct from deference to congressional findings that restriction of literacy tests was necessary to ensure nondiscriminatory treatment) *with* Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 610-12 (1998) (reading *Morgan* Court's deference to congressional findings to be tantamount to holding that Congress could independently *define* equal protection). This confusion is due to the vagueness of the opinion. *See* William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 410 (1998) (describing the paragraph in *Morgan* from which courts and commentators derived the ratchet theory as "bland and undifferentiated" and "not a model of clarity"). Analysis of the *Morgan* opinion is further complicated by subsequent developments. *See id.* at 410 n.110 (explaining that as voting rights jurisprudence developed, strict scrutiny would have been applied on the facts of *Morgan*).

39. 5 U.S. (1 Cranch) 137 (1803); *see also* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (noting objection that strong reading of *Morgan* would stand *Marbury* on its head).

40. *See Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

41. 400 U.S. 112 (1970).

section 5 does not confer on Congress such an unlimited power.[42] Though the various opinions in *Oregon v. Mitchell* failed to delineate the precise parameters of congressional power under section 5, the Court's decision indicated that while Congress may independently arrive at the conclusion that particular state action constitutes invidious discrimination in violation of Equal Protection, even if the judiciary has yet to reach such a conclusion, that power does not permit Congress to alter the substance of Fourteenth Amendment rights as previously defined by the Supreme Court.[43] With *Boerne*, the Court definitively laid to rest fears of too broad congressional power. The *Boerne* Court rejected the ratchet theory reading of *Morgan*, instead reading both rationales to countenance judicial deference while retaining final authority to define the amendment's substantive force.[44]

B. The Decision

Boerne addressed the issue of whether the Religious Freedom Reformation Act ("RFRA") was a proper exercise of Congress' section 5 power.[45] RFRA was enacted in response to the Court's ruling, in *Employment Div., Dep't of Human Services of Oregon v. Smith*,[46] that the Free Exercise Clause of the First Amendment[47] does not re-

42. *See* ROTUNDA & NOWAK, *supra* note 33, at 531 (discussing the fragmented opinions in *Oregon v. Mitchell*).

43. *See* Oregon v. Mitchell, 400 U.S. at 295-96 (Stewart, J., concurring); Cohen, *supra* note 39, at 610-12 (determining that *Mitchell* rejected broad reading of *Morgan*). In *Mitchell*, the Court by a 5-4 margin, (Justice Black providing the swing vote and announcing the judgment) held that a provision of the 1970 Voting Rights Act lowering the minimum voting age from 21 to 18 was valid as applied to general elections but not authorized by the Enforcement Clause of the Fourteenth Amendment as applied to state and local elections. A unanimous Court upheld the provision suspending use of literacy tests in all elections. The fragmented nature of the decision may have contributed to lower court confusion regarding the outer bounds of Congress' section 5 powers. *See* Ronald D. Rotunda, *The Power of Congress Under Section Five of the Fourteenth Amendment After* City of Boerne v. Flores, 32 IND. L. REV. 163, 177-78 (1998) (discussing significance of *Mitchell*). This partially explains the tendency of some courts to view the *Boerne* decision as a "landmark." *See, e.g.*, Condon v. Reno, 155 F.3d 453, 463 n.7 (4th Cir. 1998) (describing *Boerne* as both a "landmark" and a "ground breaking" decision). Of course, this reading of *Boerne* is also explained by an ideological propensity toward judicial enforcement of federalism. *See supra* notes 3-11 (discussing Fourth Circuit's federalism-based activism).

44. *See* City of Boerne v. Flores, 521 U.S. 507, 528 (1997).

45. The litigation arose out of a permit application by the Archbishop of San Antonio seeking to expand a church located in the city's historic preservation district in order to accommodate a growing parish. *See id.* at 512. Relying on the historic-district ordinance, the city denied the application. The Archbishop then brought an action claiming that denial of its permit application violated RFRA.

46. 494 U.S. 872 (1990).

47. *Id.* at 877. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." U.S. CONST., amend. I (emphasis added). The

quire neutral laws of general applicability to be justified by a compelling government interest even when such laws significantly burden religious practices.[48] RFRA stated that its purpose was "(1) 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; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[49] As that statement of purpose denotes, the *Smith* decision effected a dramatic change in Free Exercise jurisprudence.[50] The popular re-

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Free Exercise Clause is applicable to the states via incorporation through the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

48. *See* 521 U.S. at 515 (stating the holding of *Smith*). The *Smith* decision has been widely vilified, both by dissenting members of the Court and by academic, religious, and political commentators. *See Boerne*, 521 U.S. at 536 (O'Connor, J., dissenting); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 570-71 (1993) (Souter, J., concurring in part and concurring in judgment) (expressing doubt concerning precedential value of *Smith* rule); *Smith*, 494 U.S. at 894-901; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120-27 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259. *But see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

49. 42 U.S.C. § 2000bb(b) (1998).

50. *See generally* McConnell, *supra* note 48 at 1120-27 (describing conceptual division between *Smith* and prior Free Exercise cases). Prior to *Smith*, the Court when faced with a claim that a government regulation violated free exercise asked (1) whether the regulation was a substantial burden on religious practice; and (2) if so, whether the burden was justified by a compelling governmental interest. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); United States v. Lee, 455 U.S. 252, 257-58 (1982); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963). After *Smith*, generally applicable criminal laws cannot be challenged as a violation of free exercise so long as they are not motivated by a desire to punish religious practices and do not single out religious behavior for punishment. *See* 494 U.S. at 878. For example, the plaintiffs in *Smith* challenged the application of a general criminal law prohibiting the use of peyote to members of a Native American religion who ingested the drug for sacramental purposes. *See id.* at 876. The plaintiffs, two members of the Native American Church, were fired from their jobs with a private drug rehabilitation center because they used peyote at a religious ceremony. The Oregon Employment Division subsequently denied their application for unemployment benefits because of their misconduct and the Supreme Court upheld the state's decision, ruling that individuals could not challenge neutral laws of general applicability. *See id.* at 877-88. Though Oregon, like most states, defines it as a controlled substance, *see* Ore. Stat. Rev. § 475.005(6) (1987), peyote, along with other natural hallucinogenic substances, has long been used for religious ceremonial purposes, *see* OMER CALL STEWART, PEYOTE RELIGION: A HISTORY 17, 30 (1987) (dating religious use of peyote to 10,000 years before European discovery of America); *see also* People v. Woody, 394 P.2d 813, 817-18 (Cal.1964) (describing use of peyote in ceremonies); Rashelle Perry, Employment Division, Department of Human Resources v. Smith*: A Hallucinogenic Treatment of the Free Exercise Clause*, 17 J. CONTEMP. LAW 359 (1991) (detailing peyote ritual of Native American Church).

sponse to *Smith* was one of outrage and dismay.[51] Political support for a statutory solution to the perceived problem of judicial insensitivity to religious conviction was "so widespread as to indicate a national consensus."[52] Thus Congress set the groundwork for *Boerne* by explicitly and with great fanfare purporting to efface a Supreme Court decision regarding the meaning of the Free Exercise Clause.[53]

After an unusually concise statement of the facts informing the litigation, Justice Kennedy began the statutory background section with a sentence that provides the key to the opinion: "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)."[54] Given that purpose, it is not surprising that the Court felt compelled to respond to the challenge to its authority.[55] The response came in the form of a patent rebuke. Justice Kennedy opened the discussion by stating that "[u]nder our Constitution, the Federal government is one of enumerated powers,"[56] and both began and ended the discussion section of the opinion with allusions to *Marbury v. Madison*.[57] A basic principle of American law accords the role of deciding on the meaning of the Constitution to the judiciary, and Congress had openly flaunted that rule.[58]

After setting forth the constitutional provisions relevant to the case, Kennedy turned to the antecedent cases.[59] He began by reiterat-

51. The decision was termed "'disastrous,' 'dastardly and unprovoked,' [and] 'devastating'" by lawmakers. *See* Neal Devins, *How Not To Challenge the Court*, 39 WM. & MARY L. REV. 645, 645 (1998) (citations omitted).

52. Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995). The political consensus was stunning. Conservative Christian organizations and civil liberties concerns both supported RFRA and it passed through Congress with almost unanimous support. *See* Katherine A. Murphy, City of Boerne v. Flores: *Another Boost For Federalism*, 76 N.C. L. REV. 1424 (1998) (giving political background of RFRA).

53. 42 U.S.C. § 2000bb(b) (1998); Devins, *supra* note 51, at 645 ("Congress should have known better, so should the Clinton White House.").

54. City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

55. As Professor Gardbaum has observed, "in none of the handful of [other] modern Section 5 cases has the stated purpose of the challenged legislation been to overrule the Supreme Court's interpretation of the Constitution." Stephen Gardbaum, *The Federalism Implications of* Flores, 39 WM. & MARY L. REV. 699, 665 n.5 (1998).

56. 521 U.S. at 516 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 405 (1819)).

57. *See* 521 U.S. at 516, 536 (citing 5 U.S. (1 Cranch) 137 (1803)). As Professor Devins has wryly observed, in "critical respects, [*Boerne*] reads like a high school civics lesson." Devins, *supra* note 51, at 645.

58. This proposition, first established in *Marbury*, was subsequently reinforced in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) and *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

59. 521 U.S. at 517 (quoting text of Fourteenth Amendment).

ing the broad scope of Congress's section 5 powers as set forth in *Ex Parte Virginia* and *Katzenbach v. Morgan*.[60] Justice Kennedy took pains to describe section 5 power as both remedial and preventative, using those terms in tandem no less than ten times in the course of the opinion.[61] In this way, the Court reinforced the basic premise of *Morgan*—that Congress could pass legislation "which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'"[62]

Having reestablished the broad nature of Congress's section 5 power, the Court turned to the question of its limits.[63] The natural starting point for that inquiry is the question of what it means to have "the power to enforce, by appropriate legislation, the provisions of section 1."[64] The Court noted that the term "enforce" had earlier been characterized as "remedial."[65] The use of that term to characterize Congress's power suggested that the power to define the "provisions of section 1" lie elsewhere. That "elsewhere" was with the Court. The Court's role is to interpret. Congress's role is to enforce.

The distinction between "interpretation" on one hand and "enforcement" on the other is of course not so simple as this dichotomy suggests.[66] It is in fact difficult to say when one stops "enforcing" and begins "altering" the meaning of equal protection. Acknowledging that the line "is not easy to discern," the Court fashioned a test requir-

60. *See id.* at 517 (quoting *Ex Parte* Virginia, 100 U.S. 339, 345-46 (1879) (*quoted in* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966)) (stating Congress has the power under the Fourteenth Amendment to enact "[w]hatever legislation is appropriate" to carry out the objectives of that amendment); *supra* note 25 (quoting passage in full).

61. *See* 521 U.S. *passim.*

62. 384 U.S. at 650-51 (quoting *Morgan* Court's observation that "a construction of section 5 that would require a judicial determination of a constitutional violation would depreciate both congressional resourcefulness and congressional responsibility"). This point was illustrated by reference to *South Carolina v. Katzenbach. See* 384 U.S. at 518 (citing 383 U.S. 310, 308 (1966)). In that case, the Court upheld Congress' suspension of literacy tests through the Voting Rights Act, despite its previous decision, in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 49 (1959), that the tests did not violate equal protection. Congress had passed the Voting Rights Act under the Fifteenth Amendment. However, the Court stated that Congress' enforcement power under section 2 of that amendment was "parallel" to that of the Fourteenth Amendment. *See supra* note 27.

63. The Court cited Justice Black's statement that "'[a]s broad as the congressional enforcement power is, it is not unlimited.'" *Id.* (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).

64. U.S. CONST. amend. XIV § 5.

65. 521 U.S. at 519 (quoting South Carolina v. Katzenbach, 383 U.S. at 326).

66. Professor Buss refers to "the exaggerated contrast between remedial and substantive powers." Buss, *supra* note 38, at 425.

ing "congruence and proportionality." In essence, "congruence" requires a tight fit between the wrong to be prevented and the means to be adopted,[67] 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."[68] For example, a particularly virulent and pervasive instance of unconstitutional state action would support strong remedial and preventative measures. A less offensive degree of unconstitutional conduct would not warrant the same response. To make its point, the Court compared the social reality underlying the Voting Rights Act with that supporting RFRA.[69] In stark contrast to the pervasive incidents of racial discrimination and injustice that plagued (and continue to plague) our country and informed the earlier decisions of Congress and the Court, the legislative record of RFRA revealed a paucity of discriminatory actions targeting religion.[70]

Nonetheless, the Court diminished the importance of this legislative flaw somewhat by suggesting under the proportionality prong that deference to congressional judgment was not generally predicated on the state of the legislative record. Instead, it derives from "due regard for the decision of the body constitutionally appointed to decide."[71] In this case, Congress was not the body constitutionally appointed to decide the meaning of the Free Exercise Clause. Its role was not to define the provision's substantive content, but to remediate violations. Congress's obligation was to confine itself to redressing the wrongs that the Fourteenth Amendment was intended to prohibit. Absent such proportionality between the supposed remedial or preventive objective and the scope of the legislation, there is a danger that congressional action will cross the line and enact "substantive" laws.

The Court determined that RFRA was not confined to its supposed remedial objective. It again made the point by contrast with the Voting Rights cases. The legislative measures at issue in the Voting Rights cases were cabined in a variety of ways—by geography, class of

67. 521 U.S. at 520.

68. *See* 521 U.S. at 530 ("The appropriateness of remedial measures must be considered in light of the evil presented.") (citing South Carolina v. Katzenbach, 383 U.S. at 308).

69. *See id.*

70. *See id.* ("The absence of more recent episodes stems from the fact that, as one witness testified, 'deliberate persecution is not the usual problem in this country.'") (citation omitted).

71. *Id.* at 531 (quoting Oregon v. Mitchell, 400 U.S. at 207 (opinion of Harlan, J.)).

effected law, and time.[72] Moreover, RFRA explicitly rejected Supreme Court precedent by imposing the "compelling interest" test on challenged state laws.[73] This statutory usurpation ensured that state laws valid under *Smith* would be adjudged unconstitutional under RFRA. Rather than exhibiting the sort of measured encroachment that characterized the Voting Rights Cases, RFRA clumsily displaced state laws of "every description and regardless of subject matter."[74]

In conclusion, the Court reiterated that costs imposed by RFRA far exceeded any pattern or practice of unconstitutional conduct and in any event, the statute subverted the proper balance of competencies defined for the legislative and judicial branches. The Court's role is to define the Constitution, and RFRA tried to subvert that role by altering the meaning of one of the Court's decisions.

III. Applying *Boerne*'s Horizontal Vision: Civics 101

A. *City of Boerne* As a Separation of Powers Decision

Separation of powers is properly understood as a political concept rather than a technical rule of law.[75] As a general matter the Supreme Court has treated it as such,[76] with the result that there is no body of law or set of rules designated as "separation of powers" cases, but rather an imprecise vigilance regarding the impropriety of blend-

72. *See id.* (Describing limiting aspects of voting rights legislation: The laws challenged in those cases were confined to regions of the country that had proved most intractably racist, *see* South Carolina v. Katzenbach, 383 U.S. at 315, contained termination dates, *see id.* at 331, or were limited to attacking literacy tests – a particularly notorious means of abridging the right to vote, *see Morgan*, 384 U.S. 641; Oregon v. Mitchell, 400 U.S. 112).

73. *See Boerne*, 521 U.S. at 534.

74. *Id.* at 532. Importantly, the Court subsumed its concern for congressional intrusion on state prerogatives under its proportionality analysis. *See id.* at 532-36; *infra* part III.A. (discussing precedential importance of this analytic structure).

75. *See* 1 ROTUNDA & NOWAK, *supra* note 33, at § 3.12, 352 (noting that the concept of separation of powers is rooted in the political theory of Locke and Montesquieu and that even as applied does not yield clear solutions to intergovernmental disputes); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 55-93 (1967).

76. *But see* Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring) (arguing for a rule that would invalidate delegations of legislative authority if they assigned too much discretion, but noting that "[t]he rule against delegation of legislative power is not, however, so cardinal of principle as to allow for no exception"). "That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* (quoting Field v. Clark, 143 U.S. 649, 692 (1892)); The Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1812).

ing the branches' distinct functions.[77] The Court has granted to itself the role of referee in ensuring that the founders' system of checks and balances limits the overlap of governmental functions.[78] This role is exemplified by *Marbury v. Madison*,[79] in which the Court definitively stated as a first principle of constitutional law that our government is one of "defined and limited" powers and ruled that the Court was responsible for ensuring proper execution of this constitutional vision.

Boerne reaffirms *Marbury*. The opinion opens and closes with quotations from *Marbury*, and the thought of Chief Justice Marshall imbues most of what is in between. *Marbury's* essential point is that the judicial branch retains the role of final arbiter as to the meaning of constitutional provisions.[80] Although the *Boerne* Court engaged in a false exegesis in suggesting that "the design of the Amendment and the text of section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States,"[81] it is nonetheless true that legislation which "alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[82]

77. *See* 1 ROTUNDA & NOWAK, *supra* note 33, at 353 (justifying decision not to present separation of powers cases as a unit in treatise on grounds that "there is no fruitful rule or test which governs decisions relating to separation of powers").

78. *See* Morrison v. Olson, 487 U.S. 654, 686-96 (1988) (summarizing judicial enforcement of separation of powers). *But see* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (advocating that separation of powers issues be deemed nonjusticiable).

79. 5 U.S. (1 Cranch) 137, 176 (1803).

80. *See* Texas Assoc. of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 165 (5th Cir. 1985) ("The judicial branch is, of course, the final arbiter of the constitutionality of a statute.").

81. *Boerne*, 521 U.S. at 519.

82. *Id.* at 519. The text of the Fourteenth Amendment says nothing, as a matter of logic, about whether Congress has the power to alter the meaning of the Free Exercise Clause. Based on nothing more than the language of the amendment, the Court could have decided that Congress, in addition to itself, has the authority to declare the meaning of due process, privileges and immunities, or equal protection. *See* Chemerinsky, *supra* note 38, at 607-08 (remarking that there is nothing intrinsic to the word "enforce" that would support the Court's interpretation); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377-78 n.80 (1997) (suggesting that there is no real structural reason that Congress or the executive cannot determine the contours of their own power). While the Court is obviously correct to state that defining the substantive meaning of the provisions contained in section 1 is distinct from enforcing those provisions, there is no logical reason that enforcement of those provisions precludes definition of them; the same party could do both, or two parties could divide the tasks. It was not the "design of the Amendment" that prohibited Congress from giving substance of the provisions of section 1, but rather the structure of our system of governance. The text of the amendment only seems inconsistent with congressional self-

Despite textual and historical arguments to the contrary, the Court was completely on target in asserting that, as a matter of mainstream constitutional jurisprudence, "Congress does not enforce a constitutional right by changing what the right is."[83] But that observation merely begs the same question left over after *Morgan* and *Mitchell*—how does one discern when Congress is changing a right, and thereby overstepping the limits of its power, and merely enforcing a right, albeit through prophylactic means?[84]

The test set forth in *Katzenbach v. Morgan* provided a formulation to be applied in assessing whether congressional exercise of its section 5 power is constitutionally propitious.[85] In *Boerne*, however, the Court did not mention this test.[86] Its predictable appearance in decisions interpreting *Boerne* makes the absence from the original case all the more conspicuous. At one extreme, the court in *Keeton v. Univ. of Nev. Sys.* resolved the question of whether the ADEA was a permissible exercise of Congress' Fourteenth Amendment enforcement power by subjecting it to the *Morgan* test with no mention of *Boerne*.[87] At the other extreme, the Fourth Circuit in *Brown v. North Carolina Division of Motor Vehicles* does not mention the *Morgan* test, but relies exclusively on *Boerne*, and primarily on the less signifi-

definition because familiarity has disposed us to reject that interpretation. *See* Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335, 345 (1994) (observing that 'the normative power of the factual' reinforces naturalness of existing state of affairs. Quoting from GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 338 (1922)).

83. *Boerne*, 521 U.S. at 520; *see also* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 219-25 (1995) (detailing revolutionary-era concerns about intermingling of judicial and legislative functions). An alternate way of thinking about *Boerne*'s holding has been suggested by Professor Jackson, who reads *Boerne* together with *Plaut* to establish the rule that Congress must afford weight to Article III determinations in the same manner that courts observe stare decisis. *See* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts-Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2469 (1998). On this view, Congress may have disagreed with *Smith*, but would have had to recognize its strong precedential force.

84. *See supra* notes 66-68 and accompanying text (commenting that distinction between "interpretation" and "enforcement" is not so obvious).

85. *See supra* note 34 (stating test).

86. The validity of test was impliedly called into question in *EEOC v. Wyoming*, 460 U.S. 226, 261-63 (1983) (Burger, C.J., dissenting) and *Gregory v. Ashcroft*, 501 U.S. 452, 466-69 (1991), in which members of the Court expressed uncertainty as to whether the ADEA could be considered a proper exercise of Congress' section 5 powers. *See infra* part III.B.1. However, the *Boerne* Court failed to reference either of these opinions.

87. *See* 150 F.3d 1055, 1057-58 (9th Cir. 1998) (finding that the ADEA was "aimed at ending the arbitrary, discriminatory government conduct that the Equal Protection Clause targets"); *see also* Jolliffe v. Mitchell, 986 F. Supp. 339 (W.D. Va. 1997) (finding that Family Medical Leave Act was proper enforcement of Equal Protection Clause and thus abrogated Eleventh Amendment immunity but failing to mention *Boerne*).

cant but more ideologically resonant federalism aspects of that opinion.[88] In any event, measuring the "appropriateness" of congressional power against the end of enforcing equal protection at worst derogates from traditional separation of powers between Congress and the courts by substituting the intuition of the courts for Congressional factfinding, and at best is vague.[89] This formulation does nothing to resolve the question of "enforcement" versus "interpretation." Although the congruence and proportionality test outlined in *Boerne* provided additional guidance to lower courts attempting to ascertain that line,[90] this test also failed to delineate the congressional role in identifying equal protection violations. This leaves two choices concerning the congressional role. Congress either does or does not have a role in ascertaining constitutional violations. Each possibility is considered in turn.

B. *City of Boerne* and Its Discontents: Problems in Application

1. *Simple Problems: The Difference Between Judicial Review and Congressional Power*

Reading *Boerne* in light of the Court's decision in *Seminole Tribe of Fla. v. Florida*,[91] states have asserted that claims may no longer be brought against them under antidiscrimination laws such as the Americans with Disabilities Act[92] and the Age Discrimination in Employment Act.[93] Their argument holds that because a group has not been accorded heightened scrutiny under Supreme Court equal protection jurisprudence, Congress is helpless to enact legislation to protect that group under the Fourteenth Amendment. Thus the challenged statutory schemes can only be a product of Congress' Commerce Clause powers. Under the holding of *Seminole Tribe of Fla.*, Congress may

88. *See* 166 F.3d 698, 705-08 (4th Cir. 1999) (Wilkinson, C.J.).

89. *Morgan*, 384 U.S. at 651.

90. *See supra* notes 67-74 (describing congruence and proportionality test).

91. 517 U.S. 43 (1996).

92. *See, e.g.*, Clark v. California, 123 F.3d 1267 (9th Cir. 1997).

93. *See, e.g.*, Humenansky v. University of Minnesota, 152 F.3d 822 (8th Cir. 1998) (rejecting claim of congressional power to abrogate state immunity); Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (same, but also affirming congressional power to abrogate state immunity via the ADA). States have raised similar claims with respect to the Fair Labor Standards Act, *see* Mills v. Maine, 118 F.3d 37 (1st Cir. 1997) (rejecting claim of congressional power to abrogate state immunity), the Equal Pay Act, *see* Larry v. Bd. of Trustees of the Univ. of Ala., 975 F. Supp. 1447 (N.D. Ala. 1997) (rejecting claim of congressional power to abrogate state immunity), and the Individuals With Disabilities in Education Act, *see* Bradley v. Arkansas Dep't of Educ., 1999 WL 673228, at *1 (August 31, 1999) (holding that Congress did not have authority to pass IDEA under Fourteenth Amendment).

not abrogate Eleventh Amendment immunity[94] pursuant to its Commerce Clause power,[95] but may do so only when exercising its enforcement power under section 5 of the Fourteenth Amendment.[96] The result is that plaintiffs cannot defeat a claim of state sovereign immunity unless the state has waived its sovereign immunity.[97]

Courts have not generally been receptive to this argument. With respect to the ADEA, six of the eight circuit courts which have addressed the issue in light of *Boerne* have found the statute a valid exercise of Congress' Fourteenth Amendment powers.[98] With respect to the ADA, three of five courts have reached the same conclusion.[99] Dissenting courts[100] have relied on the following straightforward syllo-

94. *See supra* note 14, referring to the 11th Amendment.

95. *See* 517 U.S. at 66-67 (overturning Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

96. *See id.* at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)). In *Union Gas*, a plurality of the Court concluded that Congress may abrogate states' immunity from suit when legislating pursuant to the plenary powers granted it by Article I the Constitution. *See* 491 U.S. at 19. In *Fitzpatrick*, the Court had reasoned that since the Fourteenth Amendment postdated the Eleventh Amendment and since it was specifically intended to limit state sovereignty, Congress could "provide for private suits against States or state officials" when it exercised legislative authority pursuant to section 5 of the Fourteenth Amendment. 427 U.S. at 456 (Rehnquist, J.) ("When Congress acts pursuant to section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."). In rejecting the reasoning of *Union Gas*, the Court noted that *Fitzpatrick* cannot be read to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution." 517 U.S. at 66 (citation omitted).

97. A state may waive its immunity and thereby subject itself to suit in federal court. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238. The restrictions in *Seminole Tribe* have precipitated interesting arguments concerning waiver. *See* Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793 (1998) (arguing that even after *Seminole Tribe* Congress can use its Article I powers to condition federal monies or state participation in a federal program on waiver of Eleventh Amendment immunity); Abril v. Virginia, 145 F.3d 182, 189 (4th Cir. 1998) (rejecting argument that Virginia waived Eleventh Amendment immunity by continuing to operate facilities after passage of FLSA).

98. *See* Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2nd Cir. 1998); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger v. Board of Regents, 154 F.3d 296 (6th Cir. 1998); Keeton v. University of Nevada System, 150 F.3d 1055 (9th Cir. 1998); Scott v. University of Mississippi, 148 F.3d 493 (5th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761 (1998); *but see* Humenansky v. Board of Regents, 152 F.3d 822 (8th Cir. 1998); Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998).

99. *See* Coolbaugh v. State of La., 136 F.3d 430 (5th Cir. 1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997); Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998); *but see* Alsbrook v. City of Maumelle, 1999WL 521709, at *1 (8th Cir. July 23, 1999); Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999).

100. *See Coolbaugh*, 136 F.3d at 439-40 (Smith, J., dissenting); Garrett v. Bd. of Trustees, 989 F.Supp. 1409, 1410 (N.D. Ala. 1998) ("Congress cannot stretch section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a state to provide alleg-

gism. Major premise: equal protection[101] only extends to suspect or quasi-suspect classes.[102] Minor premise: neither the disabled nor the aged are a suspect or quasi-suspect class under Supreme Court precedent.[103] Conclusion: equal protection cannot be the source of congressional power to pass legislation benefiting individuals who are members of those classes.[104]

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edly equal treatment by guaranteeing special treatment or accommodation for disabled persons. . . .").

101. The Equal Protection Clause of the Fourteenth Amendment provides that no state may deny any person within its jurisdiction the equal protection of the laws. *See* U.S. CONST. amend. XIV. This rule "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Of course, the government can treat persons differently if they are not "similarly situated." The equal protection guarantee only prohibits intentional governmental discrimination. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (explaining the state action is not unconstitutional solely because it has a racially disproportionate impact); United States v. Fisher, 58 F.3d 96, 99-100 (4th Cir.) *cert. denied*, 516 U.S. 927 (1995) (sustaining constitutionality of sentencing disparity between cocaine base and cocaine powder based on an equal protection challenge).

102. "Suspect" classifications receive strict, or very searching, judicial scrutiny. Under the strict scrutiny test the government must demonstrate a compelling need for the different treatment and show that the provision in question is narrowly tailored to achieve its objective. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964). Strict scrutiny is often said to be strict in theory, but fatal in fact, meaning that courts invariably strike legislation distinguishing between people on the basis of a suspect classification. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment). *But see* Adarand v. Pena, 500 U.S. 200, 237 (1995) (stating that government can satisfy compelling interest test, given persistence of race-based discrimination).

"Quasi-suspect" classifications receive intermediate, or moderately searching, judicial scrutiny. Under intermediate scrutiny, the government must at least demonstrate that the classification is substantially related to an important governmental objective. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

103. The suspect or quasi-suspect classes that are entitled to heightened scrutiny have been limited to groups generally defined by their status, such as race, national ancestry or ethnic origin, alienage, gender and illegitimacy. *See Cleburne*, 473 U.S. at 440. In addition, courts apply strict scrutiny if the challenged legislation infringes upon a fundamental right. *See id.*

104. As a general rule, the equal protection guarantee of the Constitution is satisfied when the government differentiates between persons for a reason that bears a rational relationship to an appropriate governmental interest. *See* Heller v. Doe, 509 U.S. 312, 320 (1993). The rational-basis standard is a very forgiving one. *See* Vance v. Bradley, 440 U.S. 93, 97 (1979) ("[C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws."). Due largely to the theoretical difficulties posed by the institution of judicial review over majoritarian legislative judgments, courts abjure from "sit[ting] as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). "[T]he Constitution presumes that, as long as the groups involved have a fair chance to fight in the political arena, the democratic process will right itself." Beach Communications, Inc. v. FCC, 959 F.2d 975, 390 (D.C. Cir. 1992) (Mikva, C.J., concurring). However, the govern-

For example, in *Brown v. North Carolina Division of Motor Vehicles*,[105] the district court stated that in ascertaining the limits of Congress' Fourteenth Amendment power, "[t]he question becomes whether Congress is legislating to protect a class cognizable under section 1 of the Fourteenth Amendment. If not, even if it explicitly invokes it, Congress may not ground its action on the Fourteenth Amendment."[106] Similarly, Judge Cox in *Kimel* would hold that because the disabled and aged are not a suspect class, congressional power to legislate on their behalf under the Fourteenth Amendment is severely circumscribed.[107] The analysis contained in these and similar decisions relies on two erroneous propositions. The first is that equal protection jurisprudence is confined to suspect or quasi-suspect classifications. The second assumption is that the *Boerne* test does not ask whether the legislative intent is remedial or preventative, but only whether the benefiting group is one subject to heightened scrutiny. Neither proposition finds support in *Boerne*.

A more faithful reading of *Boerne* suggests not that the Court will dismiss out of hand any legislation on behalf of non-suspect groups, but rather that Congress must establish the factual basis for its decisions. This model holds that Congress may legislate on behalf of groups subject to rational basis judicial review, since even under this less searching inquiry, the state may still be found to engage in unconstitutional conduct.[108] The Court has stated as much with respect to both the aged and disabled. In the case of each group, while heightened judicial scrutiny was determined not to be warranted, the Court stated that group members held the same right as all others to not be treated unequally—that is, in an arbitrary and irrational manner.[109]

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ment still may not discriminate on a basis that is invidious, arbitrary or irrational. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 176 (1980).

105. 987 F. Supp. 451 (E.D.N.C. 1997), *aff'd* 166 F.3d 698 (4th Cir. 1999). On appeal, the Fourth Circuit affirmed largely on federalism grounds. *See infra* part III.B.2 (discussing *Brown* decision). In so doing, it explicitly recognized that the heightened-scrutiny argument is based on an erroneous assumption. *See* 166 F.3d at 706 ("It is true, of course, that even rational basis review places limitations on states that Congress may seek to enforce.").

106. *Id.* at 457.

107. *See* 139 F.3d 1426, 1447, 1449 (11th Cir. 1998).

108. *See* Note, Elizabeth Welter, *The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress's Power to Enforce the Fourteenth Amendment*, 82 MINN. L. REV. 1139, 1161 (1998) (explaining difference between judicial and legislative practices under Fourteenth Amendment).

109. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) ("The state 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* Gregory v. Ashcroft, 501 U.S. 452, 471 (1979).

As Judge Posner artfully explained in an opinion addressing the issue, the scope of congressional power thus turns not on whether a classification is subject to heightened judicial scrutiny, but on whether, at least sometimes, state action based on such a classification results in unconstitutional conduct.[110] "Because the aged [and disabled] are not as vulnerable as certain other groups, such as blacks, they are not entitled to have their claims of discrimination evaluated under the generous (to plaintiffs) standard of 'strict scrutiny.'"[111] Nonetheless, Judge Posner explained, the Supreme Court had, in *City of Cleburne*, invalidated the denial of a permit for a home for mentally retarded persons as founded on "'irrational prejudice against the mentally retarded.'"[112] The Court's decision in *Cleburne* established that equal protection arguments are available not only to groups eligible for heightened protection under previous decisions, but also to groups, such as the aged and disabled, who are subjected to invidious discrimination.[113]

While the equation of heightened scrutiny with equal protection doctrine as a whole simply misreads applicable equal protection precedent, a second mistake conflates a level of judicial review with the scope of congressional power.[114] Heightened scrutiny is a judicial, not

110. *See* Velasquez v. Frapwell, 160 F.3d 389, 391-92 (7th Cir. 1998).

111. *Id.* at 392.

112. *Id.* (quoting 473 U.S. 432, 450 (1985)).

113. *See also* Goshtasby v. University of Ill., 141 F.3d 761, 771 (7th Cir. 1998) ("The Supreme Court's equal protection jurisprudence is not confined to traditional suspect or quasi-suspect classifications.") (citing Mills v. Maine, 118 F.3d 37, 43 (1st Cir. 1997)). Had the Court intended *Boerne* to stand for the proposition that Congress' section 5 power is limited to protecting only those classes of individuals entitled to heightened levels of judicial scrutiny, it would have been an odd choice to highlight *South Carolina v. Katzenbach*, a decision that upheld the suspension of literacy tests despite an earlier ruling validating such tests as constitutional. *See* 521 U.S. at 519 (citing 383 U.S. 301, 308 (1966)). Similarly, it is worth noting that at the time of the unanimous decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 445, permitting Congress to abrogate state immunity pursuant to the 1972 Amendments to Title VII of the Civil Rights Act of 1964, which subjected state governments to liability for discriminating in employment on the basis of race, color, religion, sex, or national origin, it was not at all clear that gender was subject to a heightened level of scrutiny. *Compare* Craig v. Boren, 429 U.S. 190 (1976) (applying "intermediate" scrutiny to gender claims in a case decided 6 months after *Fitzpatrick*) *with* Stanton v. Stanton, 421 U.S. 7, 13, 17 (1975) (striking statute under either rational basis or strict scrutiny on Equal Protection claim). It is evident from these decisions that the Supreme Court permits Congress to pass legislation under the Fourteenth Amendment even though the state action proscribed by the legislative enactment would not itself constitute a violation of Equal Protection. *See also* Fitzpatrick, 427 U.S. at 458 (Stevens, J., concurring) (stating that the plaintiffs had not "proved a violation of the Fourteenth Amendment").

114. *See, e.g.*, *Kimel*, 139 F.3d at 1447 (Cox, J.).

a legislative, framework.[115] Though courts apply heightened scrutiny only when certain circumstances prevail,[116] Congress is free to scrutinize a problem as carefully as it wishes. In determining whether an enactment is remedial or preventative in nature, Congress has virtually unlimited discretion to investigate facts. This distinction is crucial in the context of antidiscrimination statutes such as the ADEA and ADA, since Congress' ability to identify unconstitutional state action permits it to act where rational basis review would prohibit a court from identifying a violation. The *Boerne* Court recognized this congressional role, reaffirming the *Morgan* Court's observation that broad congressional power permits Congress to do more than codify the Court's earlier decisions.[117] Thus our first possibility — that of Congress playing no role in redressing equal protection violations — is supported neither by equal protection doctrine nor *Boerne* itself.

2. *Advanced Problems: The Difference Between Constitutional Interpretation and Factfinding*

An alternative reading of *Boerne* is that Congress does play a role in redressing violations of equal protection. The question then becomes how to determine the boundaries of its power within that role? There are a number of possible answers. The first possibility, rejected above, is that Congress must restrict itself to legislating on behalf of judicially protected classes. A second possibility, rejected by *Boerne*, is that Congress has free reign to alter the constitutional standard of review under the Fourteenth Amendment.[118] A third possibility is that Congress cannot redefine judicial standards of review, yet retains some capacity to legislate on behalf of protected classes. The question begged by this third possibility is how to devise a limiting principle so that Congress may recognize and redress widespread discrimination against the aged and disabled, yet not have free reign to simply conclude that any particular perceived problem warrants remedial legislation that can be enforced against the states.

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115. *See* Welter, *supra* note 108 at 1161.

116. *See supra* notes 101-107 and accompanying text (stating equal protection doctrine). That doctrine stems from the Court's recognition, in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), that the presence of certain circumstances creates a presumption that liberal democratic norms are being violated.

117. *See Boerne*, 521 U.S. at 518-19 (noting that congressional power extends beyond violations already identified by the Court); *supra* note 33 and accompanying text (discussing this aspect of *Morgan*).

118. For example, Congress could not apply strict scrutiny where the Court has determined only rational-basis should apply.

Boerne itself suggests one such check. The congruence prong requires a tight fit between the alleged social misconduct and the proposed remedy. Using this analysis, the judiciary can ensure that an intractable or renegade Congress does not overstep the boundaries of permissible legislative action. To apply the congruence test, the Court checks the factual basis for Congress' actions. If, as with *Boerne*, the factual predicates for action are unsupported or suspect, the Court might rightfully conclude that Congress is simply attempting to alter the level of judicial review. If, on the other hand, the verisimilitude of Congress' factfinding is satisfactory, the Court should uphold the resultant legislation, so long as it is proportional to the problem to be redressed. This is not to say that courts should be credulous; rather, that in assessing congressional factfinding, the judiciary should keep in mind relative institutional competencies.

Courts traditionally accord a great deal of deference to congressional determinations based on the unique capacity to find facts.[119] On an intuitive level, this makes sense. While judges live removed from the concerns that animate life in the more democratic branches, Congress and the Executive are exquisitely responsive institutions.[120] Moreover, characteristics of institutional structure allow Congress to allocate significant time and resources to the evaluation of problems that come to its attention, presumptively at the behest of its constituents. Thus, Professor Cox has argued that due to Congress' superior factfinding capacity, its interpretation of what constitutes equal protection should not be second guessed.[121] *Boerne* supports this view, in a modified form. Justice Kennedy rescued *Morgan*'s second rationale from appearing as an unconstitutional "ratchet theory" by reading it as a factual conclusion on the part of Congress that the situation with respect to literacy tests did fall within the rubric of equal protection

119. The "uniqueness" of this institutional capacity has been challenged. *See* Saul Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer To Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 362 (1984) ("[B]ased on currently available procedures for finding and evaluating facts, neither branch of government has an absolute claim to factfinding superiority."). Pilchen argues that while Congress does possess unique mechanisms for development of substantial factual expertise (e.g., the committee system), it also has institutional incentives to "ignore and distort" facts (e.g., electoral accountability). *See id.* at 364-69.

120. *See* Amity Shales, *Voucher Program Passes a Test*, WALL ST. J., Oct. 30, 1998, at A18 (noting addition of phrase "the permanent campaign"—denoting increasing reliance by elected officials on public opinion polls—to the political lexicon).

121. *See* Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 104-05 (1966)).

jurisprudence extant at the time of *Morgan*.[122] Of course, Justice Kennedy suggested, the Court retained the power to check Congress' conclusions.[123] This model finds considerable support in the relevant equal protection case law.

a. Factfinding: The Political Check

It is in part due to Congress' superior capacity to investigate complex questions of social relations that the Court has declined to extend heightened judicial protection to the aged and disabled. While the Court accorded increased judicial scrutiny to discrete and insular minorities who were historic victims of state sponsored prejudice, it eventually limited application of that doctrine on the notion that more diffuse groups should be able to utilize the political branches in order to vindicate rights.[124] This is not to say that the disabled and aged do not share key attributes with traditional "suspect" classifications. As Professor Tribe has stated, the move away from near-complete deference of rational-basis review is a judicial response to statutes that create "suspect" distinctions but, due to formal aspects of equal protection analysis, cannot be labeled as such.[125] Traditionally, suspect groups faced obstacles to participation in the very same political process that produced the laws they challenged.[126] Later cases, such as *City of Cleburne*, involved classes of people facing a similar challenge.[127]

While the Court refused to accord heightened scrutiny to the aged or the disabled, in each instance it gave dual assurances that the groups would not be deprived of equal protection. First, the Court

122. *See* 521 U.S. at 528 (acknowledging that *Morgan* could be read to support ratchet theory but stating "[t]his is not a necessary interpretation, however, or even the best one.").

123. *See id.* (stating that the *Morgan* Court perceived a factual basis upon which Congress could find invidious discrimination). The importance of the judicial role in checking congressional passage of unconstitutional laws stems from the instrumental nature of congressional deliberation: Congress is interested in finding the best policy, not the most constitutional one. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 94 (discussing epiphenomenal nature of constitutional considerations in congressional decision-making).

124. *See supra* note 101 (stating relevant equal protection doctrine).

125. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3 at 1445 (2d ed. 1988).

126. *See id.*

127. *See* Beach Communications, Inc. v. FCC, 959 F.2d 975, 988 (D.C. Cir. 1992) (Mikva, J., concurring) (explaining *Cleburne* and similar rational-basis decisions on incongruity between the Court's desire to protect participation interests and jurisprudential limitations imposed by the tier approach).

deferred to congressional factfinding in determining whether an empirical predicate existed such that discrimination against the aged or disabled rose to a constitutional dimension. The Court in *Cleburne* stated that the question of how the disabled should be treated under the law is a difficult and technical matter, "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[128] Similarly, the Court in a decision challenging age-based discrimination stated that the "drawing of lines that create distinctions is a peculiarly legislative task."[129] If the standards of scrutiny applied in equal protection cases were arrived at "absent controlling congressional direction," the ADEA and ADA provide that direction.[130]

b. Invidiousness: The Linguistic Check

Second, the Court assured the disabled and the aged that meaningful judicial review of invidious (arbitrary or irrational) state decisions would be sufficient to protect them from unjustified unequal treatment. The term "invidious" simply refers to discrimination that is offensive.[131] In *City of Cleburne*, the Court defined "invidious" by reference to the terms "arbitrary" and "irrational."[132] 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. The lower courts are participating, then, in a continuing conversation concerning what our society denominates "invidious."[133] Importantly — for this ameliorates the tautology — the majoritarian nature of the conversation is tempered by the rules and values of the liberal democratic system within which it operates.[134] The linguistic check implicit in the Court's

128. *City of Cleburne*, 473 U.S. at 443.

129. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam).

130. *City of Cleburne*, 473 U.S. at 439. The same argument holds for the ADEA. *See infra* note 129 (discussing parallels between *Cleburne* and *Murgia* opinions).

131. "Invidious" is defined as "discrimination that is offensive or provokes resentment or ill will." THE AMERICAN HERITAGE DICTIONARY (New College ed. 1976).

132. *See City of Cleburne*, 473 U.S. at 446.

133. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2315 n.2 (1998) ("Constitutional doctrine is both a reflection of the demand for social equality and a means of blunting or avoiding the dismantling of status hierarchies.").

134. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 154 (1976) (describing how tension between counter-majoritarian nature of judicial review and the necessity of ensuring that government did not undermine basic tenets of philosophical lib-

definition is reinforced by a normative check based on the values underlying our collective political philosophy.

An example illustrates the importance of these checks. Suppose a renegade Congress decides to impose strict equality on participants in collegiate athletics at public universities.[135] After holding hearings on the matter, Congress decides that the bias in athletics toward physically skilled persons constitutes invidious discrimination, and accordingly passes legislation requiring public universities to offer athletic scholarships in equal numbers to physically diminutive students. The example suggests that judges should not trust Congress to limit application of the term invidious to conduct conventionally deemed offensive.[136]

Due to the stated checks, such an event would never come to pass. The first line of defense to renegade legislation of this type is linguistic. Participation in athletics requires a particular set of characteristics and skills, including size, speed, agility, and a tolerance for pain. Providing hockey or football scholarships on the basis of such skills is hardly arbitrary or irrational. More important, however, is the political check. Denial of the opportunity to attend school free of charge on the basis of athletic skill is not deemed "invidious" because we have collectively determined that there is nothing unjust about it. That is, the awarding of athletic scholarships is not the type of irrational or arbitrary prejudice deemed incompatible with a democratic system.

Of course, invidiousness is a highly subjective concept. What one person deems offensive another will term merely harmless or humorous.[137] The linguistic and philosophical checks combine to cabin this

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eralism yielded an equal protection jurisprudence that carefully reviewed for infringement of liberal democratic values).

135. This example is taken from a question posed at oral argument in the en banc rehearing of *Autio v. Minnesota*, 157 F.3d 1141 (1998).

136. The example also represents a strong version of the notion that antidiscrimination law requires equality of result, as opposed to equality of opportunity. *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 158-59 (1991) (suggesting that Supreme Court decisions favoring equality of opportunity at the expense of equality of result are consistent with American ideology). The prevailing perspective refuses to see the political playing field as anything but level for all would-be participants. *See* Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1151 (1993) (book review) (observing that "equality of opportunity" builds in a background of unstated assumptions that confer a consistent advantage in "all the competitions that matter").

137. *See, e.g.*, Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805, 815-16 (1992) (noting and dismissing argument that hate speech is not really harmful, but merely offensive); *see also* Andrews v. City of Philadelphia, 895 F.2d 1469,

variability in definition. While individual members of Congress might assert that a particular form of invidious behavior warrants passage of legislation designed to prevent or remediate the discrimination, the majoritarian nature of that institution acts as a check on members who may be apologists for a position that falls outside mainstream (social and philosophical) definitions of offensiveness.[138] Despite the presence of these checks on congressional power, recent decisions have called into question the entire enterprise of judicial deference to congressional factfinding.

C. Does *Boerne* Mean That *Kimel* Is Like *Lopez*?

The recent line of federalism-based decisions suggests that the Court's project of enforcing its conception of a limited role for federal government has superceded the traditional judicial deference to congressional factfinding. While *Boerne's* "congruence and proportionality" test ostensibly concerns the requisite nexus between factual predicates and the scope of congressional action, the Fourth Circuit in *Brzonkala*[139] recognized that *Boerne* also implicitly operates as a Fourteenth Amendment analogue to *United States v. Lopez*.[140] In each case the Court concerned itself with devising a test to ensure against congressional overreaching into arenas not described by the relevant constitutional text.[141] Neither the Commerce Clause nor the Fourteenth Amendment, the court implied, serves as a general police power permitting Congress to remedy all and sundry social problems.[142] At a slightly higher level of abstraction, in each case the Court implied that it would use its role as final arbiter of all matters constitutional to curtail what it viewed as congressional intrusion into

1486 (3rd Cir. 1990) (noting that although men might find obscenity and pornography in the workplace harmless, women might find it highly offensive, thereby creating a hostile work environment).

138. That is to say, at any point in time there will be a generally accepted, or mainstream, consensus about the parameters of disability, within which differences will exist. The *reductio ad absurdum* argument fails then, because the overlapping assumptions shared throughout interpretive communities will ensure that extreme positions fail. *See* Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2544, 2548 (1992) (discussing how perspectives common to those of similar backgrounds and circumstances shape interpretations and moral conclusions).

139. Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 92-93 (4th Cir. 1999).

140. 514 U.S. 549 (1994).

141. *See Boerne*, 521 U.S. at 518-19; *see also, Lopez*, 514 U.S. at 559.

142. *See Boerne*, 521 U.S. at 519; *see also, Lopez*, 514 U.S. at 556-57.

matters better left to the states.[143] It is a substantial understatement to say that this strong judicial enforcement of limited federal government represents a jurisprudential shift.

Congress has often relied on strong factual predicates to support controversial enactments. At the dawn of the New Deal, the Court refused to enact Roosevelt's programs on the ground that the legislation overstepped the bounds of congressional power.[144] Later, however, a more compliant Court acceded in *NLRB v. Jones & Laughlin Steel Corp.*,[145] upholding the National Labor Relations Act of 1935 as a valid exercise of Congress' commerce power. The Court later reaffirmed and expanded this power in *United States v. Darby*,[146] upholding the Fair Labor Standards Act of 1938. In each instance, the Court relied heavily on legislative histories that took pains to establish a nexus—termed a "substantial relation"—between the legislation and interstate commerce.[147] While not simply deferring to congressional findings, the Court in each case "seemed satisfied that Congress had developed adequate factual support for the linkage between the statutory scheme and interstate commerce."[148] As the type of legislation validated under the Commerce Clause became less "unprecedented,"[149] the Court by degree abandoned any pretense of scrutinizing legislation passed under the Commerce Clause, upholding against constitutional challenge an array of enactments supported by "congressional fact-findings stress[ing] that the regulation . . . was necessary to abate a cumulative evil affecting national commerce."[150] Conventional wisdom places the logical extreme of this free pass approach to judicial review in *Wickard v. Filburne*,[151] in which the Court ruled that private use of wheat sufficiently affects interstate commerce

143. *See Boerne*, 521 U.S. at 529, 536; *see also*, *Lopez*, 514 U.S. at 552, 564.

144. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

145. *See* 301 U.S. 1, 37 (1936).

146. *See* 312 U.S. 100 (1941).

147. *See* NRLB, 301 U.S. at 37.

148. Phillip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE WEST. RES. L. REV. 695, 699 (1995).

149. Pilchen, *supra* note 119, at 341.

150. TRIBE, *supra* note 125, § 5-5 (2d ed. 1988). Professor Frickey notes that the judiciary abandoned strict review of Commerce Clause legislation to the extent that "it would have been a waste of public resources to assign a . . . government attorney [the task of writing a brief in support of the legislation]." Frickey, *supra* note 148, at 699.

151. 317 U.S. 111, 127-28 (1942).

in the aggregate to support regulation of wheat crops under the Agriculture Adjustment Act of 1938.[152]

More recently, however, the Court has reversed course. In *Lopez*,[153] the Supreme Court indicated that it would no longer blithely assume that an enactment was supportable as an exercise of the commerce power. At least one court has identified *Boerne* as a Fourteenth Amendment analogue to *Lopez*.[154] And it is true that the Court's new hands-off attitude highlights a longstanding tension that

152. *See Lopez*, 514 U.S. at 556 (stating that "*Jones & Laughlin Steel, Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."); Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) (stating that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"), *overruled on other grounds by* National League of Cities v. Usery, 426 U.S. 833 (1976) (5-4 decision), *overruled by* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Professor Chen characterizes the view of *Wickard* as "the high-water mark of the New Deal's constitutional revolution" and "the great Satan" of "radical federalism's jihad" as a "myth." Jim Chen, Filburn*'s Forgotten Footnote – Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 277, 279 (1998) (noting that "[l]aw can turn even outrageous myth into history through a sufficiently persistent pattern of citations"). Professor Chen notes that even by its own terms, *Wickard* added little to Commerce Clause jurisprudence; the "aggregation" argument for expatiating a bushel of wheat into incidence of interstate commerce had originated the previous Term in *Darby*. *See id.* at 280 & n.213 (quoting *Darby*, 312 U.S. at 123 ("[I]n present day industry, competition by a small part may affect the whole and . . . the total effect of the competition of many small producers may be great.")).

153. At the margins, responses have suggested that *Lopez* was merely a judicial reprimand to a Congress grown complacent due to indifferent judicial review of legislation, *see* Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 677, 677 (1996) (comparing *Lopez* to a dog that must occasionally bite someone in order to be taken seriously); Deborah Jones Merritt, *Reflections on* United States v. Lopez: *Commerce!*, 94 MICH. L. REV. 674, 712 (1995) (expressing view that Court merely intended to encourage Congress to take federalism more seriously, not significantly alter degree of deference afforded congressional legislative judgments), or that it represented a harbinger of an activist Court determined to return federal-state relations to a pre-New Deal equilibrium, Mark Tushnet, *Living in a Constitutional Moment?:* Lopez *and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 869-75 (1995) (suggesting that *Lopez* may be precursor to significant change in doctrine of governmental structure); Calabresi, *supra* note 21, at 752 (describing *Lopez* as "revolutionary"); *see also* Larry Kramer, *What's a Constitution For Anyway: Of History and Theory, Bruce Ackerman, and the New Deal*, 46 CASE W. RES. L. REV. 885, 885 (1996) ("So which is it? Is *Lopez* a sport, a judicial shot across the bow to remind Congress to take its responsibilities seriously? Or have the ghosts of Sutherland, Butler, Van Devanter, and McReynolds returned to haunt us after all?"). Though it is difficult to tease apart the degree to which the trend was supported by assumptions regarding institutional competence or by structural separation-of-powers considerations, it is clear that to some degree the Court relied on Congress's fact-finding role as at least a rhetorical justification for an almost complete abandonment of searching review.

154. *See* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 826 (4th Cir. 1999). A simple response to this argument is that the Fourteenth Amendment is qualitatively different from the Commerce Clause because its purpose was to vindicate specific societal norms that require enforcement. *See infra* part III.

seemed to reach full-blown paradox in *Boerne*. On the one hand, the Court repeatedly intones rhetoric suggesting that Congress need not "make particularized findings in order to legislate."[155] On the other, the Court appears to require facts, or at least the appearance of facts, in order to support Congressional determinations, a position perhaps best reflected in the "rational basis" test sometimes invoked by the Court.[156] Courts have selectively read this jurisprudential shift to indicate that the judiciary may properly second guess Congress, even when Congress is acting "within its sphere of power and responsibilities."[157]

Kimel v. Florida Board of Regents represents one such decision.[158] In that case, a badly divided panel of the Eleventh Circuit determined that state-government defendants are immune from suit under the ADEA, but not immune from suit under the ADA. Judge Edmondson, writing for the court, held only that the ADEA did not evince the necessary "unmistakable" clarity of intent to abrogate state immunity, while the ADA did express such congressional intent.[159] Judge Cox additionally reached the question of congressional power

155. Perez v. United States, 402 U.S. 146, 156 (1971). *See also Lopez*, 514 U.S. at 562 ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); Katzenbach v. McClung, 379 U.S. 294, 299 (1964) ("[N]o formal findings were made, which of course are not necessary.").

156. *See McClung*, 379 U.S. at 303 ("Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

157. *Boerne*, 521 U.S. at 529.

158. 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 901 (1999) (granting certiorari only as to questions concerning constitutionality of ADEA as against states).

159. *See* 139 F.3d at 1430, 1432-33 n.14. Based on the Supreme Court's decision in *Dellmuth v. Muth*, 491 U.S. 223 (1989), Judge Edmundson's conclusion appears correct. The *Dellmuth* Court required total absence of ambiguity. Because the language of the ADEA is susceptible to more than one inference, it would not meet the "unmistakably clear" test as applied in *Dellmuth*. 491 U.S. at 226-27. However, the correctness of Judge Edmundson's conclusion as a technical matter only highlights the incorrigible nature of the Court's super clear-statement requirement. Congress found, on a separate inquiry, that the arbitrary usage of age as a proxy for ability prevalent in the private sector also posed problems in the public sector. *See* EEOC v. Elrod, 674 F.2d 601, 605-06 (7th Cir. 1982) (explaining that when Congress passed the ADEA in 1967, it only applied to private employers; in 1974, after hearings, Congress amended the ADEA to apply to public employers). Given the clarity of congressional purpose, for the Court to insist that Congress continually revisit such decisions in order to contemplate yet again their effect on state sovereignty is "exceptionally countermajoritarian" and somewhat condescending. *See* William N. Eskridge & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 595, 639 (1992).

and concluded that Congress lacked the ability to enact the ADEA pursuant to its section 5 enforcement powers. Judge Hatchett dissented from this view, opining that both the ADEA and ADA not only expressed the requisite intent, but were permissible enactments under the Fourteenth Amendment.[160] Thus, the court split on the issue of the respective statutes' applicability vis-a-vis the states, deciding that the ADA does apply, while the ADEA does not. In subjecting the statutes to analysis under *Boerne*, both Judges Cox and Hatchett read that decision's congruence and proportionality test as a gloss on *Morgan*. Nonetheless, the judges reached very different conclusions concerning the extent of Congress' enforcement powers.

The contrast between Judge Cox's and Judge Hatchett's opinions is instructive for present purposes. Judge Cox states the *Boerne* analysis correctly, but when applying the facts to the law, simply reads "preventative" out of Congress' "preventative and remedial" power. Additionally, Judge Cox ignores the *Boerne* Court's clear recognition that prophylactic legislation will on occasion sweep up into its purview otherwise constitutional behavior. The *Boerne* Court repeatedly described Congress' power as *both* remedial and preventative[161] and suggested that in some instances otherwise constitutional conduct may be swept up by a valid piece of legislation due to the prophylactic nature of congressional power.[162] Were this not the case, the role of Congress would be limited to codifying existing decisions.[163] This is the role Judge Cox apparently envisions for Congress. Relying on a series of Supreme Court decisions upholding state mandatory retirement laws against equal protection challenge, he determined that the ADEA impermissibly diverged from the Court's exposition of equal protection rights.[164] On this view, the ADEA is nothing more than a scrivener's error. Such a conclusion ignores, however, the Court's

160. *See Kimel*, 139 F.3d at 1436.

161. *See supra* text accompanying note 61 (noting repeated recitation of these terms in tandem).

162. *See supra* note 62.

163. *See also supra* note 34 (quoting language from *Morgan* to similar effect); *see also* 139 F.3d at 1446 (Hatchett, J., dissenting in part) (stating that *Boerne* and the Voting Rights Cases permit Congress, "if circumstances warrant, [to] tweak procedures, find certain facts to be presumptively true, and deem certain conduct presumptively unconstitutional").

164. *See* 139 F.3d at 1447 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)).

clear admonition that line-drawing in creating political protections for the aged and disabled is a peculiarly legislative task.[165]

In order for its vision to have any significance, it is necessary that the Court afford Congress some degree of autonomy in determining how best to implement the promise of freedom from arbitrary, irrational, or invidious discrimination. Prior to *Kimel*, Congress has enjoyed freedom from intensive oversight in fashioning remedial legislation under the Fourteenth Amendment. In *South Carolina v. Katzenbach*,[166] the Court stated that Congress is chiefly responsible for implementing the rights created under the Civil War Amendments. The *Boerne* Court reinforced this view, stating that when Congress acts within its sphere of power and responsibility, it has the right to make its own informed judgments as to the meaning of the Constitution.[167]

Congress' longstanding freedom from intensive oversight comports with the *Cleburne* (and *Boerne*) Courts' vision of a relationship in which Congress and the Court complement each other, rather than fighting over contested constitutional ground. In *Boerne*, Congress was not merely disagreeing with the Court's application of the facts to the law, but was disagreeing with the law itself. It altered the constitutional standard to be applied. By contrast, the situation with the ADEA is analogous to the voting rights issue posed by *City of Rome v. United States*, the last in the line of Voting Rights Act cases including *Morgan* and *South Carolina*.[168] In *City of Rome*, the Court upheld against constitutional challenge a provision of the Voting Rights Act that prohibited jurisdictions from changing electoral rules in a manner that would have a discriminatory impact on a class protected by the statute, regardless of the motivation animating the changes. As with the earlier cases, there was a strong argument that, since the Supreme Court had previously ruled that the Fifteenth Amendment prohibits only intentional discrimination, the legislation exceeded Congress' enforcement power.[169] Nonetheless, the Court upheld the provisions on the ground that the egregious history of voting discrimination sup-

165. *See supra* part II.B.2.a. (discussing judicial deference to congressional judgments in line-drawing).

166. 383 U.S. 301, 326 (1966). Congress' enforcement power is the same under the Fourteenth and Fifteenth Amendments. *See supra* note 26.

167. *See* 521 U.S. at 534.

168. 446 U.S. 156 (1980).

169. *See supra* notes 25-26, 62 and accompanying text (describing parallel situations in *Morgan* and *South Carolina*).

ported over-inclusive legislation designed to remediate and prevent ongoing intentional discrimination.

City of Rome suggests an analytical model appropriate to the *Kimel* decision. First, the judicial branch articulates the legal constitutional standard. When legislating, Congress must as an initial matter establish that it is attempting to enforce that standard. Under the Equal Protection Clause, for example, Congress is required to show that it was attempting to remedy or prevent discrimination. Based on that standard, Congress may rely on its fact-finding capacity in order to provide a detailed empirical justification for the proposed legislation. Congress is then accorded substantial deference in its application of the facts to the law. The judicial review for "congruence and proportionality" is, on this view, essentially a review for proximate cause[170] for a heuristic relation between the underlying facts and the end result of discrimination.

Application of the above analysis to the ADEA militates in favor of the Supreme Court upholding Congress' legislative judgment. As Judge Hatchett argues in his *Kimel* dissent, the ADEA represents an appropriate, proportional, remedial and preventative measure to combat age discrimination.[171] The Act tracks the analysis set forth above almost precisely. The Supreme Court in a line of decisions has refused to find age discrimination presumptively unconstitutional, but nonetheless has stated that the aged are free from arbitrary and irrational discrimination.[172] The ADEA's preamble states the law correctly, noting that the Act was intended to redress "arbitrary discrimination" in employment due to irrational stereotypes.[173] Next, Congress demonstrated that it was attempting to enforce the correct standard. The legislative scheme, unlike that in *Boerne*, was the product of a deliberate and considered legislative process, as demonstrated by the legislative history.[174] Beginning in the 1950s, Congress devoted significant resources to inquire into the degree and frequency of age-

170. *See* Merritt, *supra* note 153, at 679 (suggesting that "substantial effects" test stated by *Lopez* Court for determining whether an activity is related to commerce is equivalent to "proximate cause" test in tort law).

171. *See* 139 F.3d at 1439-40.

172. *See* Gregory v. Ashcroft, 501 U.S. 452, 471-72 (1991).

173. *See* 29 U.S.C. § 621 (1998).

174. *See Kimel*, 139 F.3d at 1439; EEOC v. Wyoming, 460 U.S. 226 (1983). The same analysis applied to the ADA. On the factual predicate for the ADA, *see* S. Elizabeth Silborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45, 56-58 (1998) (pointing out fourteen congressional hearings, sixty-three field hearings, and hundreds of discrimination diaries submitted in congressional record, along with findings that much of the discrimination experienced by the forty-three million Americans with disabilities was intentional).

based discrimination. Only after engaging in substantial research and debate did Congress enact the legislation.[175] Rather than responding to what it perceived as a misguided Supreme Court decision, Congress was responding to a demonstrated need. Finally, the Act is no more intrusive of state governmental functions than necessary to accomplish the purpose of redressing discrimination based on age. Given the empirical foundation for the act and the minimal degree of intrusiveness, congruence and proportionality are satisfied.

This model also explains the "presumption of validity" that the judiciary accords to congressional judgments.[176] The requirement that Congress acknowledge the prevailing judicial standard and hew closely to that standard ensures that it will be acting within its sphere of power and responsibility, thereby avoiding the type of interbranch conflict that occurs when one institution usurps a role constitutionally allocated to another.[177] Additionally, the model promotes dialogue between Congress and the judiciary.[178] Congress may inform judicial determinations as to the meaning of equal protection, but it cannot substitute its interpretation of the Constitution for that of the Court. Thus, the Court may agree with Congress' assessment that social real-

175. *See Wyoming*, 460 U.S. at 229-31 (describing legislative process).

176. *See supra* note 143 (questioning *Boerne*'s bipolar references to standard for deference).

177. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."). *See* Mark A. Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 948 (1998) (stating that when Congress makes decisions about scope of its power, the presumption of validity does not apply).

178. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). *See also* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998) (advocating increased dialogue between legislative and judicial branches and espousing judicial use of "constitutional flares" to advise Congress of potential constitutional infirmities in course of legislative conduct); ROBERT A. KATZMANN, COURTS AND CONGRESS 1 (1997) ("Governance . . . is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity."); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 1-2 (1990) (noting that while conventional scholarly wisdom posits control of federal jurisdiction with Congress, the case law suggests that in fact the boundaries of federal jurisdiction evolve through a "dialogic process of congressional enactment and judicial response"). On resolution of constitutional meaning through interbranch dialogue, *see generally* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

ity supports the legislation, as it did in *Morgan* and *City of Rome*,[179] or it can rule that Congress' conclusions are not sufficiently congruent or proportional to an underlying evil to support the challenged legislative scheme. In either event, this model's more nuanced approach avoids the ratchet theory's problem of simply reformulating "interpretation" as "fact-finding."[180]

Another way of looking at the model is to posit that Congress may properly exercise some discretion when it formulates law or policy relating to the enforcement of rights under the Civil War Amendments in response to "legislative," as opposed to "adjudicative," facts. First drawn by Kenneth Culp Davis,[181] the distinction between legislative and adjudicative facts suggests both analytic and institutional claims about the role of facts in constitutional law.[182] The analytic claim is that facts are relevant to questions of constitutionality.[183] The institutional claim is that "constitutional courts were poorly placed, epistemically, to determine the truth about relevant legislative facts."[184] On this view, Congress performs an auxiliary function of supplementing the adjudicative record in support of its legislative

179. *Cf.* Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986) (stating that the *Morgan* ratchet theory is "best understood as a tool that permits Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about fundamental rights.").

180. *See* Frickey, *supra* note 148, at 715-16 (criticizing Cox's institutional competencies argument for a ratchet theory of congressional enforcement power) ("In the final analysis, merely calling a question one of fact, and therefore for the legislature, or one of law, and therefore for courts, substitutes result-oriented labeling for careful institutional analysis.").

181. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

182. *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 882 (1997) (summarizing Professor Davis' distinctions). Adjudicative facts are those specific to the litigants in a particular case — what the parties did, what the circumstances and background conditions were. Legislative facts, on the other hand, "do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion." 2 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3, at 413 (2d ed. 1979). On the role of facts in constitutional law, *see generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Archibald Cox, *The Supreme Court, 1979 Term Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980).

183. *See also* Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 85 (observing that "a court normally examines legislative facts not to determine their 'truth,' but to determine whether a reasonable legislative judgment could have been made supporting the statute in its enacted form. In this context, 'reasonable' is only a synonym for 'constitutional.'").

184. Adler, *supra* note 182, at 883.

judgment.[185] By substantiating legislation historically and socially, Congress facilitates the policy facet of the Court's decision-making process. This model of judicial/congressional interaction comports with the *Boerne* Court's recognition that Congress must have wide latitude in determining whether remedial legislation is, in fact, remedial. There is no point in according wide latitude if in every instance the Court plans to second guess congressional judgment. And in fact, as the history of the voting rights cases suggests, the Court is willing to give Congress substantial leeway, so long as its judgments are supported by demonstrated social realities.[186]

Justice Harlan's *Morgan* dissent contains an excellent example of this dialogue.[187] Harlan recognized that empirical foundation, rather than abstract logic, was the proper basis for determining the scope of congressional power. Moreover, he recognized that the judiciary was not as well equipped as Congress to find the "legislative" facts relevant to the constitutional inquiry. Thus, he welcomed the "voluminous testimony" which had assisted the Court in upholding Title II of the Civil Rights Act of 1964[188] and the Voting Rights Act.[189] He found such persuasive empirical evidence to be lacking, however, in *Morgan*, and thus could not join the majority's decision to defer to a

185. Because law requires finality, the conditions under which the judicial/congressional dialogue operate are less than ideal. *See* SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA 285 (1986) (translating and stating ideal conditions for dialogue devised by democratic theorist Jurgen Habermas). The Court's response to RFRA, for example, was appropriate considering rules precluding legislative usurpation of the Court's definitional role. *See* Devins, *supra* note 51, at 663 (noting that Congress and the White House sought "to beat the Court into submission," not engage it in a dialogue about religious liberty protections). *But see* Michael W. McConnell, *Institutions and Interpretation: A Critique of* Boerne v. Flores, 111 HARV. L. REV. 153, 172 (1997) (arguing that Justice O'Connor was attempting to engage in a "dialogic" approach to section 5 power, which "assumes that Congress and the Court are engaged in a mutually productive dialogue over the meaning of the Constitution").

186. *See* Devins, *supra* note 51, at 656 n.77 (detailing give and take on voting rights legislation). This tendency may also explain the Court's Thirteenth Amendment jurisprudence. In contrast to the Fourteenth and Fifteenth Amendment cases, the Court seems more comfortable ascribing to Congress a largely unconstrained power to define the "badges and the incidents of slavery." *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (overturning the Thirteenth Amendment holding of *The Civil Rights Cases*). However, the Court itself gave the Thirteenth Amendment a very limited scope in *Palmer v. Thompson*, 403 U.S. 217, 226 (1971) (ruling that city's decision to close public pool rather than desegregate could not be construed as "badge or incident" of slavery), and there is little reason to suspect that the Court would countenance congressional departure from that view.

187. *See Morgan*, 384 U.S. at 668-69 (Harlan, J., dissenting).

188. *Id.* at 669 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).

189. *See id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

congressional "announcement," as opposed to a congressional finding of fact.[190] Harlan may have undersold the state of the congressional record with reference to the literacy provisions,[191] but his distinction is important. It demonstrates the difference, for purposes of according deference, between formal findings and documented and supportable empirical findings.

Applying some variant of the analysis presented above, most courts to have addressed the issue have concluded that the ADA and ADEA represent appropriate exercises of Congress' section 5 power.[192] That some courts have rejected this analysis is more a function of antipathy toward antidiscrimination law than faithful application of the *Boerne* analysis.[193] In other cases, however, the decision is explicable not by a particular dislike of the statutes at issue, but rather a predilection for situating *Boerne* within the recent line of federalism decisions issued by the Court.[194]

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190. *Id.*

191. *See id.* at 663-64 (detailing congressional findings).

192. *See supra* notes 127-130 (listing decisions concerning constitutionality of ADEA and ADA as against state claims of immunity).

193. *See supra* note 13 (discussing "special rights" approach to antidiscrimination decisions).

194. Two recent such decisions have implications for the issues under examination in this article. In *Alden v. Maine*, 527 U.S. 706, ___, 119 S.Ct. 2240, 2267 (1999), the Court determined that in general Congress does not have the power to subject states to suit in state court anymore than it may subject states to suit in federal court, except where it acts pursuant to its Fourteenth Amendment powers. If the Court determines in *Kimel* that the ADEA is not a proper exercise of Congress' Fourteenth Amendment power, then citizens subject to age discrimination would thus have recourse only to various state human rights acts that contain provisions proscribing age discrimination.

In *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999), decided the same day as *Alden*, the Court held that Congress could not under the Due Process Clause of the Fourteenth Amendment pass amendments to federal patent laws designed to abrogate state sovereign immunity against patent infringement actions where the underlying problem — unremedied state infringement of private patents — did not transgress the substantive provisions of the Fourteenth Amendment. That is, the Court held that in order to support the legislative action in question — subjecting states to suit for patent infringement — Congress would have had to identify a widespread pattern of states infringing patents without providing due process to the aggrieved parties. While Congress did identify instances of states subjected to suit for infringement, the Court observed that Congress' primary motivation in passing the legislation was not to provide a singular remedy, but rather to provide uniformity and convenience in patent actions. Because such considerations were not predicated on constitutional (i.e., procedural due process) violations, the Court ruled that the patent amendments were not proportionate to a supposed remedial or preventative objective and thus ran afoul of *Boerne*. Relying on this decision, an Eighth Circuit panel ruled that the Individuals with Disabilities in Education Act (IDEA) did not state adequate "constitutional transgressions" to support that legislative scheme. Bradley v. Arkansas Dept. of Educ., No. 98-1010, at 9 (8th Cir. Aug. 31, 1999), overruling Mauney v. Arkansas Dept. of Educ., No. 98-1721, 1999 WL 407763 (8th

IV. Applying *Boerne*'s Vertical Structure

A. Proportionality or Federalism?

Separation of powers principles operate to preclude congressional overreaching of state interests. *Boerne*'s discussion of the degree to which RFRA intruded on traditional state prerogatives paralleled the *Morgan* Court's earlier recognition that intrusiveness is properly a consideration for the Court when evaluating the factual predicate for congressional enforcement actions.[195] That is, federalism concerns[196] are an aspect of the Court's proportionality analysis, rather than a separate and independent constraint on congressional power. In *Morgan*, the Court observed that in assessing congressional authority under section 5 of the Fourteenth Amendment, it was necessary to balance the state interest served by the challenged practice against the interest promoted by the federal intrusion.[197] Using similar language, *Boerne* decried the unnecessary intrusion engendered by the sweeping scope of RFRA.[198] Like *Morgan*, this analysis was not based on abstract concern for state sovereignty, but rather on concrete observations concerning shortcomings in statutory construction. In comparing RFRA to statutes upheld in prior section 5 cases, the *Boerne* Court distinguished that legislation on the basis of the virulence and persistence of the evil to be redressed, the careful delineation of geographic scope, and temporal limitations, among other grounds.[199] In general, the Court concluded that the burden placed on the states in defending against claims brought under RFRA far outweighed the incidences of discriminatory treatment based on religion. As with the *Morgan* Court, this balancing was simply another

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Cir. June 14, 1999). One might respond, of course, that the IDEA was predicated on precisely the type of facts absent in *Boerne* and *Florida Prepaid*. The court disagreed with this assessment, however, stating that congressional findings regarding the disparate treatment received by disabled children did not indicate that such treatment of disabled children did not indicate that such treatment was the result of unconstitutional state action. See id. at 10 (citing *Florida Prepaid*, 527 U.S. ___, 119 S.Ct. at 2207).

195. *See supra* note 30 and text accompanying note (noting that the level of intrusiveness of state interests is a factor in evaluation of congressionally-fashioned remedies).

196. "Federalism" is a vague term, but generally refers to a political system in which subordinate units retain areas of jurisdiction that cannot be invaded by the central authority. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911 (1994) (defining federalism in contrast to decentralization); *see also supra* note 10 (referring to federalism as a balanced federal/state power structure, with a philosophical bias toward state power).

197. *Morgan*, 384 U.S. at 653 (requiring examination of the "nature and significance" of the state interests that would be affected by federal intrusion).

198. 521 U.S. at 533.

199. *See id.* (comparing RFRA to other section 5 legislation).

factor to consider in assessing the constitutional propriety of congressional action.

Despite *Boerne*'s comfortable location within separation of powers doctrine, some courts and commentators have insisted on reading the opinion to establish federalism as an independent ground for judicial review of congressional enforcement action under the Civil War Amendments. The *Boerne* Court's failure to explicitly state that considerations of intrusiveness were an aspect of separation of powers has contributed to this misreading. While most courts have simply ignored the allusions to federalism, the decisions in *Brown v. North Carolina Division of Motor Vehicles*[200] and *Humenansky v. Regents of the Univ. of Minnesota*[201] indicate that some judges have read the *Boerne* decision to impose strict federalism restrictions on Congress' power to enforce equal protection. Since *Boerne*'s central holding—that Congress may not fix the meaning of the Constitution—is explainable solely by recourse to separation of powers principles, the federalism discussion seems extraneous. Why, then, the allusions to federalism? And, given the traditional argument that federalism restrictions do not reach the Civil War Amendments, one might ask on what grounds federalism appears at all in analyzing section 5 power?

B. What's Federalism Got To Do With It?

The short answer is nothing. *Boerne* cannot be read as identifying federalism as an independent ground for limiting congressional power. In addition to the decision's strong separation of powers bias, there are two additional reasons for this conclusion. The first is that precedent does not support application of historically anterior federalism principles in the Fourteenth Amendment context. The second is that such a reading would undermine democratic norms embodied in the equal protection doctrine. Any structural concerns are displaced to the extent that they impede achievement and implementation of democratic norms that form the basis for legitimizing constitutional governance in a democratic, pluralist society.

Despite these strong arguments, the *Boerne* Court encouraged misinterpretation by citing to no authority in support of its application of federalism principles.[202] Nonetheless, courts giving *Boerne* a strong federalism bias must be required to locate the case within a larger doctrinal framework. The most obvious sources for such a reading,

200. 166 F.3d 698, 704-06 (4th Cir. 1999).
201. 152 F.3d 822, 826-28 (8th Cir. 1998).
202. 521 U.S. at 533.

aside from the *Morgan* analysis mentioned above, are the opinions of Justice Harlan in *Morgan* and *Mitchell*, Chief Justice Burger's dissent in *EEOC v. Wyoming*, and the Court's hint in *Gregory v. Ashcroft* that federalism principles have some application even when Congress legislates under the Fourteenth Amendment. It is thus worthwhile to evaluate the level of support in these decisions for a strong federalism reading of *Boerne*.

1. Potential Authority For Boerne's Invocation of Federalism

a. Justice Harlan's Dissents in *Morgan* and *Mitchell*.

At the outset of his *Morgan* dissent, Justice Harlan identified the intersecting vertical and horizontal difficulties posed by the issue of section 5 power. As argued in part II, Harlan's dissent established a makeshift congruence and proportionality test and found the literacy-test provision of the Voting Rights Act to be lacking. In asserting judicial supremacy in determining the scope of equal protection, Harlan allowed that "[d]ecisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations."[203] As such, his vision presaged *Boerne*'s support for judicial and congressional dialogue, with the Court as final arbiter. This is hardly the stuff that states' rights manifestos are made of.

Justice Harlan's dissent in *Mitchell* argued that "the Fourteenth Amendment was never intended to restrict the states' authority to allocate their political power as they see fit" and thus cannot be said to support congressional intrusion on their decision as to the appropriate voting age for state officials.[204] Harlan proceeds, however, to make a lengthy historical argument regarding "the purpose and effect of the Fourteenth Amendment with respect to suffrage,"[205] concluding that the 39th Congress did not intend the Fourteenth Amendment to extend the franchise to blacks.[206] It is difficult, from this argument, to draw the more general inference that Justice Harlan would have supported application of federalism principles where the Fourteenth Amendment is in conflict with the Eleventh. While each dissent contains rhetoric to the effect that federalism concerns are paramount even when reviewing congressional enforcement under the Fourteenth Amendment, Harlan's bark is worse than his bite. Both dissents, for

203. Katzenbach v. Morgan, 384 U.S. 641, 668 (1966).
204. Oregon v. Mitchell, 400 U.S. 112, 154 (1970).
205. *Id.* at 200.
206. *See id.* at 152-219.

all their rhetorical flourish, are tightly reasoned and fit completely within the separation of powers framework set forth in *Boerne*.

b. Justice Burger's Dissent in *EEOC v. Wyoming*.[207]

A more plausible source for the proposition that federalism principles are applicable against equal protection is Chief Justice Burger's dissent in *EEOC v. Wyoming*. At least one court has identified that decision as an antecedent to *Boerne*; in a decision finding that the ADEA does not represent a valid exercise of Congress' Fourteenth Amendment power, a divided Eighth Circuit panel asserted that "Chief Justice Burger's dissent in *Wyoming* reads like a preview of the Court's opinion in *City of Boerne*."[208] This is correct only insofar as the panel's decision replicates Burger's mistaken reasoning and projects that analysis onto *Boerne*.

Burger's opinion appears to take the position that Congress is not limited to legislating on behalf of groups adjudged by the Supreme Court to warrant heightened scrutiny, but may identify violations against individual members of a class that the Court has determined warrant no more than rational basis scrutiny.[209] In addition to this more traditional approach to the question of section 5 power, the dissent contains explicit references to federalism-based restrictions on congressional power. Justice Burger argued that Congress does not have much flexibility when its judgments intrude upon "sovereign [state] powers not expressly surrendered."[210] Although he treated the issue of the ADEA's validity under the Fourteenth Amendment separately from the issue of its validity under the Commerce Clause, it is evident that Burger was influenced by similar Tenth Amendment considerations in each analysis.[211] Burger began his examination of the

207. 460 U.S. 226 (1983).

208. Humenansky v. Univ. of Minn., 152 F.3d 822, 828 (8th Cir. 1998).

209. *See* 460 U.S. at 260 (recognizing that application of strict scrutiny is not necessary to a finding of unconstitutional discrimination). Unfortunately, the dissent presents an early instance of conflating judicial review and congressional power, concluding that Congress may not legislate on behalf of the aged because the Court had decided that factually similar cases did not violate equal protection. This may be the right result, but it is the wrong question. *See supra* notes 25-36 and accompanying text (discussing distinction between judicial standards and congressional power).

210. 460 U.S. at 263.

211. At the time of the *Wyoming* decision, *Usery* was still good law. Thus, Burger purported to apply the three-prong test devised for determining whether legislation enacted under the Commerce Clause intruded upon Tenth Amendment rights, and ultimately concluded that Congress' authority as limited by the protections of the Tenth Amendment prohibit application of the ADEA to the states. *See Wyoming*, 460 U.S. at 252. Under that test, the Court struck down attempted congressional regulation if it found that it 1) regu-

ADEA's validity under the Fourteenth Amendment by expressly stating the inapplicability of his Commerce Clause analysis.[212] He then went on to invoke the very same considerations in finding that the ADEA cannot be a valid enactment under the Fourteenth Amendment. While purporting to recognize that the Fourteenth Amendment's temporal relation to the Tenth and Eleventh Amendments significantly limited applicability of the latter amendments, Burger nonetheless insisted that Congress does not have "a 'blank check' to intrude into details of states' governments at will."[213] Though as a doctrinal matter this statement represents nothing more than the truism that Congress must be acting within its enforcement powers when it intrudes—a constraint already built into separation of powers analysis—its rhetorical strength fuels states' rights arguments.

c. *Gregory v. Ashcroft*[214]

The doctrine/rhetoric dichotomy is similar in *Gregory*. On the surface, the case involved a straightforward question of statutory construction: the issue of whether the ADEA permitted Missouri state court judges to challenge a provision of the Missouri Constitution imposing mandatory retirement at age 70.[215] The state of Missouri argued that it did not, relying on a 1974 amendment which defined "employee" to exclude from the act's protections "any person elected to public office in any State . . . or an appointee on the policymaking level."[216] The question was whether judges fell within that exclusion.[217] The majority, however, used the case as a vehicle to create a

lated the states as states; 2) addressed matters that were indisputably attributes of state sovereignty; and 3) directly impaired the states' ability to structure integral operations in areas of traditional functions. *See id.* (citing Hodel v. Virginia Surface and Mining Reclamation Assoc., Inc., 452 U.S. 264, 287-88 (1981)).

212. *See id.* at 259.

213. *Id.*

214. 501 U.S. 452 (1991).

215. *See Gregory*, 501 U.S. at 455 (citing Mo. Const. art. V, § 26).

216. *Id.* at 464-65 (quoting 29 U.S.C. § 630(f)). Missouri judges are appointed by the governor, *see* Mo. Const., art. V, §§ 25(a)-(g), and subsequently are subject to election, *see id.* at § 25(c)(1).

217. In dissent, Justice White (joined by Justice Stevens) observed that the Court granted certiorari on the question of "[w]hether appointed Missouri state court judges are 'appointee[s] on the policymaking level' within the meaning of the Age Discrimination in Employment Act . . . and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution." 501 U.S. at 474 (citations omitted).

"clear statement rule"[218] that imported Tenth Amendment considerations into statutory construction.

By construing the statute to exclude judges, the Court avoided a reevaluation of the recently decided *Garcia*. Instead, it created a clear statement rule requiring Congress to plainly indicate its intent to abrogate a state's Tenth Amendment freedom from intrusive federal law.[219] Congress had failed to explicitly indicate such intent with respect to the Missouri judges.[220] A potential objection to this holding was that the ADEA was passed pursuant to Congress' Fourteenth Amendment, as opposed to Commerce Clause, power.[221] Though the question of the ADEA's propriety under section 5 had been reserved in *Wyoming*, it seemed clear that federalism principles were inapposite in examining legislation enacted under the Fourteenth Amendment.[222] *Gregory* altered that conception.

Rather than viewing federalism principles as entirely out of place, the Court characterized their force as "attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments."[223] That this failed to comport with precedent was made clear by Justice White in dissent. Both *Fitzpatrick* and *City of Rome* established 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 . . . ."[224] Moreover, the clear statement rule, imported from the Eleventh Amendment decision of

218. *See* WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 698 (2nd ed. 1994) (explaining clear statement rules).

219. *See* 501 U.S. at 464. Resolution of the case as a matter of statutory interpretation would have been all the more appropriate considering the avoidance of deciding unnecessary constitutional questions remains. *But cf.* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1965 n.100 (1997) (arguing that courts seem in some instances to adopt an aggressive "non-avoidance" stance in which they either select a reading of the statute that, while "better," does not avoid the constitutional question, or actually affirmatively court the question). In a crowning irony, the Court asserted that it did in fact construe the ADEA to exempt state judges from its protections in order to "avoid a potential constitutional problem." 501 U.S. at 464. The constitutional question avoided was illusory. *See* Vermeule, *supra* at 1977 n.84 (describing clear-statement rule as blunt-force alternative to unworkable *National League of Cities* test). As Justice White stated in dissent, "[i]t is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decision [ ] in *Garcia*." 501 U.S. at 479.

220. *See* 501 U.S. at 467.

221. *See id.* at 467-68.

222. The Court admitted as much: "One might argue . . . that if Congress passed the ADEA extension under its section 5 powers, the concerns about federal intrusion into state government that compel the result in this case might carry less weight." *Id.* at 468.

223. *Id.* at 468 (citing *Wyoming*, 460 U.S. at 243).

224. *Id.* at 480 (quoting *City of Rome*, 446 U.S. at 179).

Pennhurst State School & Hospital v. Halderman,[225] merely insisted that Congress be clear that it intended to exercise its Fourteenth Amendment power, as opposed to some other power. It did not place limitations on the power itself.[226]

For the proposition that Congress' Fourteenth Amendment Power is limited, the Court turned to a line of decisions holding that even though aliens are a suspect class whose equal protection claims receive close judicial scrutiny, their claims will receive only minimal review when the state excludes them from political functions within the system of state governance.[227] In *Sugarman v. Dougal*,[228] the Court had identified aliens as "a prime example of a 'discrete and insular' minority" whose claims receive generous judicial attention. Nonetheless, the Court carved out a "political function" exception to the rule of heightened scrutiny and applied that rule in upholding state laws that excluded aliens from working as state troopers,[229] public school teachers,[230] and deputy probation officers.[231] The exception—which is suggestive of limitations on congressional power—is essentially federalism-based, in that it excepts core state functions from close scrutiny under the federal Constitution.

Justice White argued that reliance on the *Sugarman* line of cases was misplaced. He noted that while that line of cases did indicate that the Court permitted federalism concerns to limit its application of equal protection law, it did not support the proposition that the same considerations should limit Congress' ability to legislate under the Fourteenth Amendment. However, since it is the role of the Court to determine the scope of Congress' authority under the Fourteenth Amendment, this objection is not persuasive. The problem with the Court's decision in *Gregory* is not that it does not have the power to determine that federalism principles apply when Congress legislates pursuant to its Fourteenth Amendment powers. It does. The problem is that the Court does not provide any justification for imposing those limitations, other than its contention that the states should remain largely free from federal intrusion. This assertion may be valid in

225. 451 U.S. 1 (1981)

226. *See id.* at 480-81 (citing *Halderman*, 451 U.S. at 16).

227. *See id.* at 468-69.

228. 413 U.S. 634, 642 (1973).

229. *See* Foley v. Connelie, 435 U.S. 291, 295-300 (1978).

230. *See* Ambach v. Norwick, 441 U.S. 68, 75-81 (1979).

231. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 444-48 (1982). The Court also ruled, however, that exclusion of aliens from the position of notary public was not supported by the political function exception. *See* Bernal v. Fainter, 467 U.S. 216, 221-27 (1984).

some spheres, particularly where reserved powers are at issue. It places the constitutional cart before the horse, however, when the political protections embodied in the Civil War Amendments are at issue.

In one sense, *Gregory* should not matter. Its central holding was to create a rule of statutory construction that applies only where Congress fails to clearly state its intent to abrogate federalism barriers to its enforcement powers.[232] Its limited utility, as precedent, was to reflect the states'-rights bias of the Rehnquist Court by forcing Congress to share the Court's concerns — ultimately resulting in better constructed and more nuanced statutes, if not finally in abdication to the Court's vision of federalism.[233] Moreover, *Morgan*, though rhetorically in a separate dimension, had much earlier acknowledged the propriety of federalism-based constraints on congressional power.[234] In another sense, however, *Gregory* clearly tips the hand of the Supreme Court. It informs litigants and the federal judiciary that the Court is willing to go out of its way to vindicate what it deems to be states' rights. Despite Supreme Court admonitions against lower courts activism,[235] some courts have viewed *Gregory* as an invitation to undertake a revisionist interpretation of congressional power.

One such decision is *Brown v. North Carolina Department of Motor Vehicles*.[236] In that case, a panel of the Fourth Circuit ruled that a

232. *See* Matt Pawa, Note, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1084 (1993).

233. Professor Frickey has succinctly captured the salient effects of *Gregory*:

> The clear-statement requirement adopted in *Gregory* is a forthright judicial effort to influence congressional processes. Most obviously, the approach attempts to force Congress to draft statutes clearly. More subtly, it essentially seeks not just to force the objection based on the invasion of state sovereignty onto the congressional agenda, but also to highlight it. The assumption must be that the *Gregory* canon of interpretation will lead to more thorough and thoughtful congressional deliberations concerning whether invasions of state sovereignty are justified, and is not simply a way to prevent wholly inadvertent intrusions on state authority.

Frickey, *supra* note 148, at 722. This reading of Gregory comports with concerns expressed by members of the current Court at oral argument in *Kimel*. *See supra* note 194.

234. *See supra* note 197.

235. *See* Agostini v. Felton, 521 U.S. 203, 236 (1997) (reaffirming that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989)); West v. Anne Arundel County, 137 F.3d 752, 760 (4th Cir. 1998) ("Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent.").

236. 166 F.3d 698, 705 (4th Cir. 1999).

regulation, promulgated under the ADA, prohibiting public entities from charging a fee to beneficiaries of programs designed to ensure accessibility for the disabled in order to cover the cost of such programs, exceeded the remedial scope of Congress' section 5 enforcement power. At the outset of the opinion's discussion section, Judge Wilkinson, writing for the Court, noted disagreement over the sort of review envisioned by *Boerne*.[237] The government urged, citing other decisions, that the constitutionality of the ADA should be decided on the basis of the entire statutory framework.[238] This argument was supportable by convention: each court to examine the ADA upon an Eleventh Amendment challenge had looked to the statute *in toto*, rather than evaluate a discrete regulation. Nonetheless, the court disagreed, invoking the canon of avoiding constitutional questions and assuming problems of administrability in order to justify piecemeal examination of regulations promulgated under the statute.[239]

More to the point, however, the Court suggested that broad-based review of a statutory scheme would "leave under protected . . . important state interests in immunity."[240] The court supposed that because abrogation of sovereign immunity upsets a fundamental constitutional balance between the state and federal governments, courts must exercise great caution in finding abrogation.[241] The court expressed concern that ratification of an entire statute — and the attendant finding of abrogation — without assessing the constitutionality on equal protection grounds of the particular statutory or regulatory basis for suit might result in the subjection of a state to suit based on "an unconstitutional provision buried in the midst of an otherwise constitutional statutory scheme."[242]

This approach exhibits the same flaw that undermines Judge Cox's opinion in *Kimel* — it defies the language of *Boerne*.[243] Like

237. *See id.* at 703.
238. *See id.* (citing Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1998)).
239. *See id.* at 703-04.
240. *Id.* at 704.
241. *See id.* (citing Dellmuth v. Muth, 491 U.S. 223, 227 (1989)).
242. *Id.*
243. *See supra* notes 158-165 and accompanying text (discussing failure of *Kimel* plurality to give effect to language in *Boerne* supporting broad congressional enforcement power). An additional problem is the case cited in support of piecemeal review does not in reality support it. *Dellmuth v. Muth*, 491 U.S. 223 (1989), did not concern review of the constitutional propriety of substantive law, but rather the level of clarity necessary to draw an inference of congressional intent. In that case, the Court ruled that an intent to abrogate Eleventh Amendment immunity would not be assumed, but rather must be accompanied by a clear statement of intent to abrogate. *See id.* at 227-32. The case thus involved only the Court's insistence that Congress exercise care in abrogating immunity, as opposed

Judge Cox, the *Brown* Court ignores language in *Boerne* explaining that Congress' enforcement power is preventative, as well as remedial, and that some otherwise constitutional behavior may permissibly be swept up in otherwise reasonable regulation. By subjecting the regulatory scheme to piecemeal analysis, the *Brown* court negates this language. But unlike the court in *Kimel*, it appears to do so on a principled basis — the basis that states should be free from overly intrusive regulation. The question is whether this principle trumps the principles vindicated by enforcement of the Fourteenth Amendment.

2. *Is Federalism Really the First Principle?*[244]

Of the considerable claims made on behalf of federalism,[245] two have particular relevance to the question of whether federalism should be permitted to act as an independent constraint on congressional enforcement of equal protection. These are the assertions that federalism promotes participation in democratic institutions and safeguards political liberties. The crux of such claims is that political participation increases in inverse proportion to centralization, thereby checking potential abuse of governmental authority.[246] In abbreviated form, the argument runs as follows: because elected representatives are more accountable to a constituency that is small and more fully apprised of their actions, democratic ideals are thought to be more fully realized.[247] Decentralized governments also foster provident decision-making because greater popular involvement heightens awareness of the costs of a given policy choice. Congruence of mores between citizens and political representatives at the state and local level, as well as improved efficiencies due to scale, facilitate this pro-

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to authority for the proposition that the judiciary should micro-manage the enforcement power.

244. *Cf. Lopez*, 511 U.S. at 1031 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

245. *See* Calabresi, *supra* note 21, at 777-78 (stating economic and political science arguments in favor of federalism).

246. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (stating that "the principal benefit of the federalist system is a check on abuses of government power").

247. DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 92, n.124 (1995) (tracing argument to political theory of Montesquieu, Plato, and Aristotle). *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1498 (1994). The question of whether democracy will be better promoted on the state level may depend on the size and structure of the state. *See* Friedman, *supra* note 11, at 390 n.309 (noting that the criticisms of the assumption that federalism will yield greater participation fail to account for local differences). *But see* Rubin & Feeley, *supra* note 196, at 915-16 (arguing that devolution of power to states does not foster participation as most participation occurs at the local level).

cess.[248] Finally, the right of exit permitted by multiple jurisdictions allows those who "fall out of sympathy with the orthodoxy that may predominate in one state to seek refuge in another."[249] In sum, devolution is viewed as a panacea for democratic governance.

While this view has considerable persuasive force, the notion that participation and liberty are best promoted by a centrifugal power structure is subject to a fatal flaw when taken to an extreme position. The primacy of the democratic norms realized through the Fourteenth Amendment over those inherent in the federalist structure derives not simply from that amendment's ordinal superiority, but also from the historically-based notion that a strong central government is necessary to protect individuals and groups against state repression.[250] Other empirically testable arguments that may undermine the necessity of judicial enforced federalism do not rely on the history of state discrimination against racial and other minorities.[251] If the interests of all citizens are considered, the argument that devolution fosters citizen participation is historically counterfactual. Political participation, at any level, is likely to favor elites.[252] Unfortunately, devolution does not offer a palliative to problems associated with political exclusion.[253]

This flaw in enforcing federalism as an independent constraint on Congress' section 5 power provides a more structurally compelling argument for undermining the attempted reading of *Boerne* as a Fourteenth Amendment analogue to *Lopez* than the deference model

248. *See* Calabresi, *supra* note 21, at 777-78.

249. Shapiro, *supra* note 247, at 95.

250. This perspective situates the tension between individual rights and states' rights perspectives as descending from the tendentious arguments advanced by John Calhoun, who used states' rights as an apology for slavery. *See id.* at 53 n.138 (citing THE PAPERS OF JOHN C. CALHOUN (R. Meriwether ed. 1959)). The location of the abolitionist movement in the North and the defiance of federal authority with respect to fugitive slaves by some Northern states may have also contributed to the tension. *See id.* at 53.

251. *See* Herbert Wecshler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selections of the National Government*, 54 COLUM. L. REV. 543, 546-58 (1954) (asserting the judicial enforcement of federalism is rendered unnecessary by the fact that members of Congress represent the interests of states and will thus guard against federal expansion at states' expense); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) (adopting Wecshler's argument in overturning *National League of Cities v. Usery*); Kramer, *supra* note 247, at 1522-23 (arguing that judicial enforcement of federalism is unnecessary because the culture of political parties precludes politicians on the federal level from intruding on their state counterparts' issue turf).

252. *See* Rubin & Feeley, *supra* note 196, at 915 (arguing that less fortunate citizens will as likely be excluded and disadvantaged at the local as at the national level).

253. This is the central assertion in Madison's Federalist No. 10. Madison believed that in a small republic, certain passions could induce the majority to approve violations of minority or individual rights. *See* The Federalist No. 10 (James Madison).

outlined above.[254] Because it charts the political shift toward an inclusive democracy, the Fourteenth Amendment is different from the Commerce Clause. As Professor Blumstein has stated, part of the federalism "deal"—devolution of power to local governments in areas where local interests are reserved or the national interest is attenuated—is strong national authority in the area of antidiscrimination law.[255] Unrestrained judicial enforcement of federalism subverts the values of democracy and undermines the legitimacy of the law.[256] For example, the Court has reduced or eliminated minority political protections in areas as diverse as voting rights,[257] school desegregation,[258] and housing discrimination,[259] all in the name of states' rights and local control.[260]

254. *See supra* notes 25-45; 154-57 and accompanying text (suggesting analytical model to explain judicial deference to exercise of Fourteenth Amendment enforcement power).

255. James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1253 (1994).

256. *See infra* notes 278-80 and accompanying text (explaining how unrestrained judicial enforcement of federalism undermines legitimacy and subverts democratic norms).

257. *See* Miller v. Johnson, 515 U.S. 900 (1995) (rejecting interpretation of Voting Rights Act that would grant Justice Department power to require states to create legislative districts that maximize minority-voting strength absent showing of identifiable, intentional acts of discrimination against minority voters); Shaw v. Reno, 509 U.S. 630 (1993) (holding that odd-shaped legislative district designed by North Carolina legislature constituted racial segregation without sufficiently compelling justification). *Cf.* City of Rome v. United States, 446 U.S. 156, 176 (1980). Justice Powell argued that our "federal system allocates primary control over elections to state and local officials." 446 U.S. at 201 n.12 (Powell, J., dissenting). Justice Powell found federal encroachment troubling because it "destroys local control of the means of self-government, one of the central values of our polity." *Id.* at 201 (footnote omitted).

258. *See* Missouri v. Jenkins, 515 U.S. 70, 99 (1995) (invoking "vital national tradition" of local autonomy over schools in ruling that district court desegregation plan exceeded constitutional propriety); Freeman v. Pitts, 503 U.S. 467, 489 (1992) (stating that restoration of local control must be an aspect of remedial plan in desegregation cases).

259. *See* Spallone v. United States, 493 U.S. 265 (1990) (ruling that contempt sanction imposed on city council members in their individual capacity for refusal to comply with consent decree was inconsistent with notion that they should be able to represent their constituents views, no matter how retrograde).

260. By contrast, in the arena of affirmative action, the Court has ruled that no local interest short of remedying past intentional discriminatory conduct was sufficient to justify preferences designed to equalize the playing field for victims of pervasive societal racism. *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 516 (1989). The Court has, in fact, been more consistent in opposing legislative efforts to benefit minorities than it has in protecting states' rights. This inconsistency has given rise to claims that invocations of federalism are little more than rhetorical embellishments designed to lend further credence to a particular normative position. *See* Rubin & Feeley, *supra* note 196, at 948 (describing federalism as "often nothing more than strategies to advance substantive positions"); Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1273, 1279-80 (1997) (citing instances in which shifting invocations belie principled allegiance to federalism); FEDERALISM: THE LEGACY OF GEORGE MASON, *supra* note 8, at

In order to ameliorate this troubling reality, proponents of ascendant federalism present two counterarguments. First, they posit that the discrimination-based barriers to the achievement of full participation are largely a thing of the past.[261] Second, they hearken back to an originalist perspective emphasizing the eighteenth-century certitude that accountability and trustworthiness of elected representatives would dissipate in direct proportion to the size of the republic.[262] Unfortunately, this description of our progress in the civil rights arena bears little resemblance to the lived reality of minority populations.[263] While ascendant federalists insist on a color-blind constitution — thereby envisioning a land where race does not matter because it should not matter[264] — color is all too real an indicator for all manner of social anomie.[265] Yet at the intersection of federalism and equal protection, the former predominates because the messiness of dealing with the aftermath of an apartheid system is made to evaporate as the function of a calculus that substitutes the normative for the descriptive.

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21. Given the pattern in civil rights decisions – states' rights are minimized only when states attempt to protect minority political interests – Professor Nowak's fear that the current Supreme Court's effort to "reverse" the Civil War Amendments is founded on racism is understandable. *See* John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U.L. REV. 1209, 1211, 1215-17, 1236 (1997) (arguing that Rehnquist Court invokes arguments similar in tone and result to those of the *Plessy* Court); *cf.* WILLIAM RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964) (stating that "[i]f in the United States one disapproves of racism, one should disapprove of federalism").

261. *See supra* note 5 (discussing Fourth Circuit's *Brzonkala* decision).

262. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1381-82 (1997) (discussing anti-federalist objections to centralized power); *supra* notes 237-40 (stating this argument).

263. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (illustrating ways in which legal narrative departs from racial reality); Richard Delgado, *Critical Legal Studies and the Realities of Race*, 23 HARV. C.R.-C.L. L. REV. 407 (1988) (discussing how differences in the experience of race colors political and legal theory).

264. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 47-52 (1991) (arguing that formal legal definitions of race misconceive the nature of race in America); T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1121-25 (1991) (arguing that race-consciousness is a prerequisite to meaningful equal protection).

265. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (examining how race and poverty intersect to perpetuate black poverty, crime, and social disorder); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 58-61 (1987) (describing "concentration effects," in which the lack of access to job networks, quality schools, and other opportunity structures places entire urban ecological niches at enormous social disadvantage).

Aside from persistent issues of racial inequality, ascendant judicial federalism implicates the participation interests of women, the disabled, and the aged, and other groups. In these contexts as well, the originalist argument devalues changes wrought by the Civil War Amendments and elevates historical privilege over equality and participation in constitutional interpretation.[266] The original understanding contributes little, however, to the debate over the extent to which federalism values should give way to equality-based considerations.[267] The framers of the Constitution did not intend to create a democratic system and gave little thought to vindicating democratic values.[268] Only with the twentieth century were the nascent democratic leanings in the American experience realized in any meaningful way.[269] Passage of the Civil War Amendments reflected a transition from a purely republican form of government to a more democratic system and a concomitant shift away from an exclusive preoccupation with liberty and toward an additional concern with equality.[270] Because it is predicated on superceded assumptions, the participation-based argument for devolution is incomplete. It fails to comprehend the initial issue of access to political institutions as prior to any argument regarding conservation and expansion of local control.[271] If some citizens

266. The purpose of the Civil War Amendments was to clarify the role of equality in the Constitution. *See* Nowak, *supra* note 260, at 1211; *see also* Steven L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 433-34 (1988) (remarking that the Civil War Amendments were intended to redress oppression, not categorization); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1315 n.72 (1994) (remarking that purpose of Civil War Amendments was to affirm citizenship).

267. Professor Calabresi, *supra* note 21, at 787, states that Rubin and Feeley, in terming federalism a historical artifact, ignore the constitutional imperative of maintaining a federalist structure. *See also* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1348 n.161 (1994) (asserting that federalism is indispensable to our governmental structure). One might counter, however, that super-enforcement of federalism principles ignores the constitutional imperative of enforcing democratic norms.

268. *See* MORTIMER J. ADLER, WE HOLD THESE TRUTHS 140 (1987) (commenting that the Founders either gave no thought to equality or if they did, had "obstinate prejudices" against the concept). The founders did not intend to create a representative democracy, but rather a republic. *See* Arthur S. Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181, 189 (1984) (book review) (explaining that democracy was "abhorrent" to Founders, who intended a republican system).

269. Adler maintains that "[a]ll constitutional democracies are republics, but not all republics are constitutional democracies." ADLER, *supra* note 268, at 138. The latter only begin to exist upon institution of universal suffrage; the former only requires that some members of society enjoy political liberty by virtue of suffrage.

270. *See id.* at 139.

271. *But see* Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009 (1997) (suggesting that federalism is anterior to democracy).

are not able to participate in the first place, local control actually offends the principle of participation, rather than enhancing it.

3. *The Democratic Foundations of Equal Protection are Antecedent to Federalism*

Professor Karst has argued that the judicial meaning of the Civil War Amendments is grounded in a right to belong to and participate fully in society.[272] This somewhat amorphous right changes along with society's conception of what it means to be a fully participating member of society. At one point, political equality was deemed sufficient to satisfy the requisites of the Civil War Amendments.[273] Later, however, it became apparent that political and social equality are inextricably interrelated.[274] In order for equality to be meaningful, it must allow for participation in the common life of society.[275] It must recognize that only through a sense of belonging and membership do the values of society take on meaning.[276]

That the democratic ideal of meaningful participation has been operationalized through the vehicle of the Fourteenth Amendment finds support in the case law.[277] When the Court in *Plyler v. Doe*[278] ruled unconstitutional a Texas law denying the children of illegal aliens access to public education, it recognized that the state may not deprive them of full membership in their society.[279] In *Cleburne Living Center v. City of Cleburne*,[280] the Court operationalized this concept, ruling that all citizens, and not just members of certain groups, have the right to be free from arbitrary and irrational discrimina-

272. KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 54-56 (1989).

273. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

274. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

275. *See* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE xv (1984). *But see* Mark Tushnet, *Darkness at the Edge of Town*, 89 YALE L.J. 1037, 1047 (1980) (arguing that it is unclear whether participation is a value that Americans universally embrace).

276. *See* MICHAEL WALZER, SPHERES OF JUSTICE 31-35 (1983).

277. Justice Harlan is of course correct in stating that whenever "the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers." Plyler v. Doe, 457 U.S. 202, 202-03 (1980). But it is also indisputable that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966).

278. 457 U.S. 202, 223 (1980).

279. The Court also explained that when some members of society are excluded as a class, the entire nation suffers from the ensuing social and economic problems. *See id.*

280. 473 U.S. 432, 447 (1984).

tion.[281] As we saw above, the meaning of "invidious" will differ from one interpretive community to another.[282] In a democratic community, however, offensive discrimination will be at least that which inhibits participatory access in a manner that undermines membership in society.[283]

This definition finds support in *Romer v. Evans*.[284] In that case the Court held that Amendment 2 — a Colorado constitutional amendment that forbade the enactment of any legislation, regulation, ordinance, or policy forbidding discrimination against homosexuals — violated federal equal protection guarantees. Justice Kennedy opened the discussion by defining equal protection as barring only formal impediments to political access based on group membership.[285] However, the Courts' rejection of Colorado's rationale for a law that stripped gays and lesbians of political protections belies any pure distinction between "formal" and "substantive" equal protection. Colorado argued that Amendment 2 simply placed gays and lesbians in the same position as all other persons.[286] The Court rejected this rationale, however, at least in part because the amendment had the effect of diminishing gay and lesbian membership in society.[287] The impermissible motive rationale for the decision is far broader than the Court's other stated basis for its decision. That reason is the "peculiar prop-

281. The *Cleburne* Court described arbitrary and irrational discrimination as "invidious," or offensive discrimination. *See id.*; *supra* note 131 (defining term).

282. *See supra* note 131 and accompanying text. When Michael Klarman states that he does not see why, in attempting to develop a "neutral" theory of judicial review, John Hart Ely thought equal concern and respect were "neutral" values, he fails to apprehend the basic premise of interpretive communities. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 785-86 (1991). Ely thought these values neutral because, from within the perspective of a democratic system, they are fundamental. Thus commitment to those values is at least ostensibly shared by all members of our society. *See infra* note 294 (elaborating on concept of baseline democratic values).

283. *See id.*

284. 517 U.S. 620 (1996).

285. *See id.* at 623.

286. *See id.* at 624.

287. The Court stated two distinct rationales for its decision. First is the impermissible motive rationale. The Court intimated that it is not a legitimate government interest to direct animus toward a particular group. This leaves the question whether moral disapproval is a "legitimate" state interest under equal protection analysis. *See* Barbara J. Flagg, Essay, *"Animus" & Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833, 836 (1998). The Court suggested a congruence test. Because there was no congruence between the state's asserted purposes—respect for freedom of association and conservation of resources—and the means chosen to achieve that end, the Court could identify no purpose other than animus. This presumption appears to be a stronger version of the statement in *Cleburne* that the state's desire to harm a particular group is never a legitimate governmental interest. *See* 473 U.S. 432, 448 (1985).

erty" of Amendment 2 of "imposing a broad and undifferentiated disability on a single named group."[288] Because legislation that explicitly limits the rights of an identifiable group is quite rare, the "outlaw" rationale is ultimately a narrow ground for decision.[289] However, there is also a point of elision between the two grounds for decision, and it is possible that the Court would choose to follow the "outlaw" principle in a subsequent decision rather than apply the "impermissible motive" rationale. This is because the bad-motive presumption can only operate in obvious situations where no other explanation has any persuasive force. Thus, the Court has left itself an "out," perhaps with homosexual marriage specifically in mind. As Justice Scalia's dissent emphasized, the decision was ultimately about power: whether we as a society want to uphold the right of the majority to exclude certain members on the basis of group affiliation, or want to aspire to the democratic ideals of equality.[290] Not surprisingly, the Court chose to vindicate the latter concept.[291] Amendment 2 thus nicely captures the relationship between participation at the state level and the need for judicial enforcement of democratic norms. Devotion to purely popular mechanisms for resolving disputes, absent situation within any larger political context, will sometimes result in open hostility toward sexual or other minorities.[292] Recourse to basic democratic principles is necessary to bridge the gulf between the rhetoric of

288. *Romer*, 517 U.S. at 630.

289. See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 266-67 (1996) (stating that as a matter of equal protection the government cannot create or sanction the creation of the outcast groups).

290. 517 U.S. at 636-53.

291. Professor Michel Rosenfeld has argued that abstract notions of equality are not only the foundation of our society, but at the most abstract level, of all political liberalism. *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE 20, 254 (1991). This observation neutralizes a subtext of Scalia's argument: that those with the most power should prevail. As Julian Eule has put it, "[d]emocracy is a slippery term." Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1531 (1990). What is clear is that democracy is not synonymous with majoritarianism. It is a complex concept imbued with particular substantive values that each member of society presumptively adopts and thus cannot be reduced merely to "a show of hands." *Id.* (arguing that Alexander Bickel unwittingly confused the issue through negative implication—"the counter-majoritarian difficulty" of judicial review implied that democracy is majoritarian); Frank Michelman, *"Protecting the People from Themselves," or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1733 (noting that democracy connotes not only a joint decision-making procedure, but also a normative commitment to certain socially constituted relationships among participants); *see also* Ely, *supra* note 10 (suggesting that equal concern and respect are baseline democratic values).

292. *See* Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1685 (1988).

democratic self-determination and the lived reality of the culturally stratified.[293]

The general rule yielded by aggregating these equal protection decisions tracks closely with Professor Karst's "equal citizenship" principle, which holds that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."[294] Translated into a rule of law, this principle forbids political institutions to treat members of society as non-participants. Professor Balkin, in an article identifying equal protection with the eradication of social status, suggests that invidiousness occurs where a law denies members of a particular class the dignitary and material benefits associated with access to critical institutions.[295]

Legislation such as the ADEA and ADA vindicates these basic democratic values by speaking to a first principle of participation in a manner that equalizes opportunity to enjoy society's dignitary and material benefits. Because the legislation enforces the participation interests of groups subject to exclusion through discrimination, it logically precedes a democratic vision of a federalism that fosters greater citizen involvement.[296] A judiciary that repels popular attempts to valorize equality principles subverts the law's legitimacy. As Professor Michel Rosenfeld has put it, in a pluralist system, "legitimate contemporary law must emerge for all free and equal legal actors as both self-imposed and binding."[297] Or as Julian Eule has it, devolution only affords the opportunity for state experimentation because the

293. *See id.*; Balkin, *supra* note 133 at 2365.

294. KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3 (1989).

295. *See* Balkin, *supra* note 133, at 2314, 2361; *see also* White, *supra* note 134 (discussing philosophical tension underlying equal protection review).

296. *See also* Davis v. Monroe City Bd. of Educ., ___ U.S. ___, ___, 119 S.Ct. 1661, 1674 (1999) (ruling that schools may be held liable under Title IX for pervasive student-on-student sexual harassment, despite vehement federalism-based dissent). Justice O'Connor, in announcing the *Davis* decision from the bench, succinctly summarized the argument of this section: the dissenters' suggested holding — that federalism principles preclude federal intrusion in local matters—would "teach little Johnny a perverse lesson in federalism" rather than "assure that little Mary may attend class,"—i.e. participate fully in critical institutions. *Schools Liable for Harassment: Teachers, Officials Must Stop Children Who Impair Learning*, STAR-TRIBUNE, May 25, 1999, at A1. The claim of logical priority is at root a claim about law's legitimacy. In order for law followers to comply with law for reasons other than fear of sanction, they must feel that they, along with the lawmakers, are stakeholders in the system. *See* Frank A. Michelman, *Forward: "Racialism" and Reason*, 95 MICH. L. REV. 723, 739 & n.62 (1997) (discussing possible legitimizing function of democratic governance).

297. Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1170-71 (1995) (book review).

Federal Constitution provides a safety net.[298] Judicial decisions that privilege a sacrosanct federalism over participation interests suggest that the states may "work without a net."

C. Reconciling *City of Boerne*'s Conflicted Impulses: Brandeis and Participation

The reading of equal protection offered in the previous section attempts to reconcile and strengthen basic structural and democratic principles that already command a consensus by virtue of their foundational character. The thought of Justice Brandeis embodies this reconciliation, as his jurisprudence encompassed both a strong belief in the importance of state experimentation and aspiration toward the achievement of democratic ideals. This section suggests that examination of Brandeisian virtues resolves the tensions between federalism and equal protection.[299]

Brandeis did not advocate a purely structural notion of federalism. A contextualized examination of his philosophy suggests that the doctrine was not to be applied indiscriminately, but rather as a check against the concentration of unaccountable power in the federal government.[300] As with his thought generally, application of federalism principles was governed by a thorough understanding of the factual context and the resulting implications for human dignity.[301]

Though an advocate of judicial restraint, Brandeis' adherence to the doctrine did not extend to situations in which the rights of a political minority were threatened.[302] Brandeis feared bigness in all manifestations, predicated on the belief that centralization of power bred

298. *See* Eule, *supra* note 291, at 1539.

299. The more immediate impetus for the choice of using Brandeis as a vehicle for supporting the prioritization of equal protection principles over federalism principles is the use by proponents of ascendent federalism of Brandeis' famous prescription of looking to the states as laboratories of experimentation. *See New State Ice. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

300. *See* PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 73 (1993) (recounting that Brandeis' vote against the National Industrial Recovery Act was explicable on the basis of his fear of concentrated power).

301. Brandeis' arguments in support of federalism were an outgrowth of his legal philosophy. He came to the Court with a fully developed jurisprudence, characterized by a fear of bigness, an emphasis on facts and context as a precursor to effective decision-making, a belief in experimentation as a catalyst for progress, and a correlative adherence to limited judicial review, so as to best facilitate experimentation. *See* BRANDEIS ON DEMOCRACY 15 (Philippa Strum ed. 1995) [hereinafter STRUM, DEMOCRACY].

302. *See id.* at 16.

corruption and inefficiency, and limited the opportunity for participation. While this concern, coupled with his conviction that experimentation was the proper approach to resolving social problems, militated strongly in favor of devolving power to the states, these beliefs did not support a theory of constitutional interpretation that would grant to a state the power to limit the political rights of its citizens. In fact, his concern for political participation would have outweighed the other considerations that informed his thought on the issue of federalism.

1. Brandeis on Federalism

Brandeis' suspicion of size in organizations of all kinds is well documented. As an antitrust crusader, he argued that at some point business reached a size at which it became inefficient and unaccountable in how it treated its workers and customers.[303] Bigness in government was every bit as dangerous as bigness in business. A notable example of this belief was his vote in *A.L.A. Schechter Poultry Corp. v. United States* to strike down the National Industrial Recovery Act of 1933 as delegating excessive power to the executive.[304] This vote against a piece of New Deal legislation was a manifestation of his belief that the proper program for recovery from the Depression would involve not only creative programs on the part of the federal government, but also creative responses on the part of the states, facilitated by federal grants.[305] His rationale thus reflected two of Brandeis' abiding, and related, concerns: the size of an organization and its capacity to facilitate participation.[306]

303. *See id.* at 127-38 (collecting articles in which Brandeis advocated extending antitrust law to limit the size a business might attain). In today's world of weekly mega-mergers, Brandeis' arguments sound antiquated. However, advances in technology, rather than mistaken assumption on his part, have largely addressed Brandeis' concerns that an enterprise may become so large that a manager could not know all the details of operation, resulting in waste and inefficiency. Moreover, the introduction of far more legal controls on corporations (e.g., the National Labor Relations Act, the Securities Exchange Act, and Title VII) have in some measure addressed his concerns regarding concentrated and unaccountable power.

304. *See* 295 U.S. at 537-42; *see also* Aranson, et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 10 n.35 (1982) (relating that after the *Schechter* decision Brandeis told a member of Roosevelt's administration that the Court was not going to allow the federal government to centralize everything).

305. *See* STRUM, DEMOCRACY, *supra* note 301, at 195 (reprinting a conversation between Brandeis and Harry Shulman, a clerk during the 1929-1930 term, concerning Brandeis's "program for recovery").

306. *See* Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 67 (1931) ("[Mr. Justice Brandeis] believes in decentralization not because of any persisting habit of political allegiance or through loyalty to an anachronistic theory of states' rights. His views are founded on deep convictions regarding the manageable size for the effective

Brandeis believed that democracy rests on twin pillars: first, the principle that all persons are equally entitled to life, liberty, and the pursuit of happiness; second, that such equal opportunity will most advance civilization.[307] At root, however, was Brandeis' belief in the dignity of all human beings. Democracy was for him the best system for protecting this dignity. In Brandeis' formulation, democracy was "impossible unless citizens possessed and acted upon a sense of civic responsibility."[308] To that end, he defined liberty as "the right to enjoy life, to acquire property, to pursue happiness in such manner and to such extent only as the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow citizens."[309]

As Professor Farber has demonstrated, Brandeis' protection of libertarian interests in the area of free speech was motivated not by a devotion to individual rights divorced from societal context, but rather to an appreciation of how political liberty is necessary to the healthy functioning of democracy.[310] In Brandeis' view, individual freedoms were not an end in themselves, but rather an instrument of the greater public good; people should be free to develop their capacities in order to ensure the betterment of society.[311] Brandeis' version of federalism was not informed by his commitment to antiquated structural principles, but rather his belief, with John Dewey, that democracy was not merely a form of social life, but rather "the precondition for the full application of intelligence to the solution of social problems."[312] Likewise, federalism was not an end in itself, but rather a method of ensuring the type of "robust and free-wheeling inquiry" associated with Dewey's version of democratic governance.[313] Brandeis shared

conduct of human affairs and the most favorable conditions for the exercise of wise judgment.")

307. STRUM, DEMOCRACY, *supra* note 301, at 29.

308. *Id.* at 25.

309. *Id.* at 29.

310. *See* Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 182-83; *cf.* Cover, *supra* note 7, at 1288 (commenting that Brandeis understood free speech and education as "more fundamental" than various property interests protected under the due process clause).

311. *See* Farber, *supra* note 310, at 185; *see also* CORNELL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 3 (1989) (stating a Brandeisian reconciliation of individualism and community-mindedness).

312. *See* Farber, *supra* note 310, at 186 (quoting Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1671 (1990) (explaining Dewey's theory of the relationship between individual and democracy)).

313. *See* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 466 (1990) (stating basic premises of philosophical pragmatism, many of which are derived from Dewey's philosophy); Farber, *supra* note 310, at 185 (noting Brandeis's commitment to "an openness to

Dewey's belief that experimentation was necessary to the facilitation of both a sense of belonging and of individual liberty.[314]

Viewed through the prism of Brandeis' positions on democracy and equality before the law, the meaning of his advocacy of devolution of power to the states becomes clearer. Because he feared corruption and centralized power on one hand and on the other insisted that each individual should have the opportunity to participate in the political process, Brandeis saw in the states an opportunity to check the size and power of federal government and provide a forum for full participation. Under such a formulation, the exclusion of a group from the opportunity to participate would actually undermine one of the rationales supporting Brandeis' advocacy of greater state autonomy and power. His purpose is assigning power to the states was not to preclude disfavored minorities from participating in their communities, but rather to ensure that they could participate.

2. *Reading New State Ice in Context*

Brandeis' commitment to participation necessarily informed his view of federalism. State experimentation is simultaneously facilitated and limited by the requisites of participatory democracy. The safety net provided by the Fourteenth Amendment ensures that Congress or the judiciary can redress instances where state action impinges upon political rights.[315]

As Professor Friedman has observed, Brandeis' use of the term experimentation is somewhat misleading.[316] He might more properly have used the term "innovation" to capture his sense that states must have the capacity to respond to the exigencies of economic and social upheaval.[317] Brandeis' *New State Ice* dissent illustrates this expediency. The case involved an Oklahoma statute that transformed the

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experimentation and the courage to live without the comfort of unquestioned dogma"); *see also* WEST, *supra* note 311 (explaining philosophical commitments of pragmatism, the school of thought with which Dewey was associated).

314. *Compare* JOHN DEWEY, PHILOSOPHY AND CIVILIZATION 24 (1922) ("An empiricism which is content with repeating facts already past has no place for possibility and for liberty") with *infra* notes 318-20 and accompanying text.

315. *See* Eule, *supra* note 291.

316. *See* Friedman, *supra* note 11, at 399 (discussing the role of states in political experimentation).

317. *See id.* (citing Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 551 (1995)). Friedman recognizes that state legislative action is more reactive than deliberative. *See id.* at 398 ("[T]he spirit of state experimentation is one of creative response to immediate necessity."). That Brandeis shared this view is borne out by his response to the Great Depression. *See supra* note 299.

manufacture of ice into a utility, secure in its monopoly status by the requirement that would-be competitors obtain a license upon demonstrating "the necessity for the manufacture, sale or distribution of ice."[318] The majority determined that the manufacture and sale of ice was properly characterized as a private business and therefore not subject to intrusive state regulation.[319]

Brandeis emphasized in dissent that the United States was mired in economic crisis, "confronted with emergency more serious than war."[320] With liberal citation to secondary and statistical sources, Brandeis demonstrated rather convincingly that in the context of Depression-era Oklahoma, it may be quite reasonable to consider the manufacture of ice as having sufficient public importance to support the imposition of utility status.[321] He bolstered this argument with citations to precedent and historical practice showing the non-static nature of the public utility.[322]

Despite this display of empirical support for Oklahoma's decision, Brandeis' primary concern was with the role of the Court in assessing legislative judgment. While allowing that "nobody knows" whether prevailing economic and social views stated an appropriate remedy to the ills visited upon the country, he thought it irresponsible of the Court to erect barriers to attempts at recovery.[323] This view was not a function of Brandeis' commitment to federalism principles, but rather the more pragmatic view that the Court should not impede a program of recovery. Brandeis did not reprove the majority for intruding on state judgment so much as legislative judgment generally:

318. *See* 285 U.S. 262, 271 (1932).

319. *See id.* at 272-73. The majority reached this conclusion under the Fourteenth Amendment, ruling that regulation of ice manufacture transcended the extent to which the Constitution permits the regulation of business. *See id.* at 280.

320. *See id.* at 306.

321. For example, Brandeis noted that the "mean normal temperature in [Oklahoma] from May to September is 76.4 degrees," *id.* at 287 n.8, that radical developments had occurred in the ice manufacturing industry, *id.* at 287 n.9, that the import of ice for household and commercial purposes could not be overstated, *id.* at 287-89 nn.10-14, that most Oklahomans could not practically aspire to privately produce ice, *id.* at 289-90 nn.15-17, and that ice manufacture lends itself to utility status, *id.* at 291-93 nn.18-23.

322. *See id.* at 284, 294. Records of the Oklahoma Corporation Commission and proceedings before Oklahoma courts and regulatory bodies indicated that the state had admirably overseen the manufacture and sale of ice. *See id.* at 294-97 nn.26-34; *see also id.* at 306 (noting historical precedent for common callings being subject to regulation).

323. *Id.* at 309. Immediately on the heels of the felicitous phrase for which the opinion is known, Brandeis wrote that "This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *Id.* at 311.

There must be power in the states *and the nation* to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs.[324] Brandeis saw the danger posed by the Court's decision not in terms of federal intrusion on state prerogatives, but rather in judicial overreaching. The structure at issue in *New State Ice* was horizontal, not vertical.[325]

Brandeis understood the importance of separation of powers principles as a check on unaccountable and concentrated government power.[326] This check not only renders tractable congressional impulses to overrule the Court, but also places limitations, including the interest of states in remaining free from unnecessary federal intrusion, on congressional judgment. As demonstrated in the common conclusion yielded by the distinct approaches of the *Kimel* and *Brown* courts, federalism untethered by separation of powers doctrine is extraneous to the question of whether the ADEA and ADA are permissible exercises of section 5 enforcement power. While not inapposite, federalism principles are unnecessary to resolution of the question faced in *Kimel.* For much of our nation's history, states played the primary role in developing economic programs.[327] There is no foundational reason that states cannot continue to play the lead role in public-minded experimentation. This role must not, however, consign significant portions of society to the part of permanent understudies.

V. Conclusion

Despite wishful thinking on the part of some courts and commentators, *Boerne* is not a landmark decision. It is instead an affirmation of the traditional separation of powers between Congress and the judiciary. A non-activist reading of the decision yields the conclusion that the separation of powers and federalism components of the decision are not in tension, but rather that federalism only seems like an independent ground for decision due to the unprecedented intrusiveness of the legislation at issue. Moreover, judicial enforcement of federalism principles should be tempered by recognition that federal antidiscrimination law serves to ensure full participatory access for all the citizens of a state. The traditional argument of the federal govern-

324. *Id.* at 311.

325. Nonetheless, the dissent is most frequently invoked as justifying federalism. *See* James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 483 (1996).

326. *See* STRUM, DEMOCRACY, *supra* note 301, at 95; Frankfurter, *supra* note 306, at 97-98 (explaining Brandeis's views on separation of powers).

327. *See* Yoo, *supra* note 262, at 1403.

ment as a superior guardian of rights is bolstered when one recognizes meaningful participatory access as a precondition to healthy state autonomy. To the extent that federal antidiscrimination legislation favoring the disabled and the aged can be understood as ensuring participatory access for these groups, such laws should be understood as promoting, not intruding upon, state autonomy.

Our system of governance is a gamble that democratic values are superior. But superiority is not the same thing as inevitability. Democratic values are emulated not because of a teleological inclination toward liberal democracy,[328] but because they maximize happiness. Because those who have already reaped the benefits of this system may wish to opt out, on the ground that their own privileged position in society is a function of merit, rather than historical accident, democratic values must be enforced to ensure that all members of society have an opportunity to enjoy the fruits of those values. As Justice Brandeis recognized, the purpose behind federalism is to implement a shared set of beliefs about what small, engaged groups of individuals can accomplish. A system of federalism that precludes participation by large segments of society offends this basic principle.

328. *But see* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (reviving Hegel's view of history as teleologically-inclined but with the twist that it inclines toward liberal democracy).