INCONGRUENT DISPROPORTIONALITY

by K. G. JAN PILLAI*

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I. INTRODUCTION

The Congress of the United States currently is subject to a restraining order against exercising the enforcement powers granted it under the Fourteenth Amendment except in compliance with the Supreme Court's novel doctrine of 'congruence and proportionality.' Asserting its exclusive prerogative to define the substance of rights guaranteed by section 1 of the Amendment, the Court, in a five-to-four opinion in *City of Boerne v. Flores*,[1] decreed that only remedial or prophylactic measures are "appropriate legislation" under Section 5.[2] Congress is no longer permitted to wander the judicial province hoping to alter the scope and meaning of judicially determined rights in the guise of enacting enforcement legislation. However, the Court acknowledges that "it is not easy to discern" the line that separates "substantive" legislation from what the Court might recognize as "remedial or preventive" measures.[3] The Court's newly-minted congruence and proportionality test is specifically designed to provide the needed certainty and precision to the task of line-drawing.

The Court has steadfastly adhered to the *City of Boerne* mandate that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such connection, legislation may become substantive in operation and effect."[4] But no congressional enforcement legislation that has come up for the Court's consideration since *City of Boerne* has survived the congruence and proportionality test.[5] Instead of

1. 521 U.S. 507 (1997).

2. The Enforcement Clause reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

3. *City of Boerne*, 521 U.S. at 519.

4. *Id.* at 520.

5. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999) (Patent and Plant Variety Protection Remedy Clarification Act); Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act of 1994); and Bd. of Trustees of the Univ. of Ala. v.

functioning as predicted, as a tool to aid the line-drawing, the test has become an impenetrable wall that separates Congress from the claimed province of the judiciary. The test is "inherently vague"[6] and is "clothed with all the menace of an essentially arbitrary standard."[7] Even though the lethality of the test to the enforcement powers of Congress has been amply demonstrated, the Court has neither defined the precise meaning and parameters of the test[8] nor cared to tell Congress the exact degree of congruence and proportionality that is constitutionally required to sustain an enforcement legislation.[9] Is there any reason for the Court to believe that the scope and meaning of the proportionality test are so self-evident that further clarification is unnecessary? If not, what could be the Court's rationale for leaving the test undefined and open-ended, keeping Congress wondering whether its next enforcement legislation comports with the stringent requirements of the test? Or, as many thoughtful commentators have come to suspect, is the proportionality test a custom-made device for invalidating national civil rights legislation that is unappealing to the Rehnquist majority of the Court? This article attempts to explore these questions in some detail.

Part II examines the meaning of the congruence and proportionality test as perceived by commentators and deciphered from judicial opinions. Part III is an assessment of the Rehnquist majority's opinion about the test as expressed in the context of its application to the Eighth Amendment, and concludes that these Justices never believed that proportionality could be an objective and viable constitutional standard. Part IV analyzes the Court's opinion in *University of Alabama v. Garrett* in which the Rehnquist majority

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Garrett, 531 U.S. 356 (2001) (Americans With Disabilities Act). The Court held that the congressional enforcement legislation involved in each of the above cases failed to meet the congruence and proportionality test.

6. Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 746 (1998); Note, *Section 5 and the Protection of Nonsuspect Classes After* City of Boerne v. Flores, 111 HARV. L. REV. 1542, 1558 (1998); Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645, 656 (1998) ("*Flores* settled on an extraordinarily amorphous standard . . . ."); Garrett Epps, Symposium, *The Wrong Vampire*, 21 CARDOZO L. REV. 455, 456 (1999) (quoting Dean Aviam Saifer that the *City of Boerne* opinion is a "poor piece of judicial craftsmanship").

7. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L. J. 441, 481 (2000).

8. *See, e.g.*, Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect*: 42 U.S.C. Section 1986, 56 WASH. & LEE L. REV. 461, 500 (1999) ("Nowhere does the Court elaborate on the meaning of the 'congruence and proportionality' standard.").

9. Laycock, *supra* note 6, at 746 ("[T]he litigation process is probably incapable of producing good data on the proportions the Court seems to require.").

used the proportionality standard to protect state sovereignty by invalidating the enforcement of the Americans with Disabilities Act against the states. Part IV demonstrates that this concern for state sovereignty is at its zenith when it pertains to state discrimination against the disabled and at its nadir when it comes to state commercial discrimination. Finally, the article reaches the unavoidable conclusion that the congruence and proportionality test is the most demanding test known to constitutional law - and the Court has never cared to articulate specifically what it demands. The test is so fundamentally elusive and nonviable that it can only serve as a convenient vehicle for promoting the subjective views and personal philosophies of the five adhering Justices.

II. Approximating the Meaning of Proportionality

The congruence and proportionality test is a judicial mirage, appearing to some scholars as strict scrutiny,[10] and to others as intermediate scrutiny[11] or something close to it.[12] In spite of their proclivity for comparing the proportionality test to the familiar standards of judicial scrutiny, the scholarly commentators fail to pinpoint the reach and parameters of the test.[13] And this failure is not without reason, for the *City of Boerne* proportionality test is a strange intruder in the equal protection household. It has neither referents in extant judicial precedents,[14] nor grounding in the text or history of the

10. Post & Siegal, *supra* note 7, (stating that the Court imposes on congressional enforcement power tight "restrictions that seem analogous to the narrow tailoring required by strict scrutiny.").

11. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 166 (1997) ("In effect, the Boerne Court replaced something akin to 'rational basis scrutiny' with a narrow tailoring requirement typical of intermediate scrutiny.").

12. Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After* Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 495 (1998) (The congruence and proportionality test "is more demanding than the rational basis test.").

13. *Id.* ("[T]he states must now meet this more demanding 'congruence and proportionality' test. The real challenge lies in determining what the Court meant by 'congruence and proportionality.'"); Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1648-49 (2000) ("This congruence and proportionality test appears to be something more than rational basis scrutiny, and the critical question is just how strictly the Court will apply the test.").

14. Fisher, *supra* note 8, at 500 ("Nowhere does the Court elaborate on the meaning of the 'congruence and proportionality' standard. Its purpose of protecting against congressional overreaching is apparent, but it lacks referents in existing caselaw, rendering it susceptible to a variety of interpretations.").

Fourteenth Amendment. The coupling of "congruence" with "proportionality" has rendered the meaning of the test even murkier.[15]

"Congruence" is not an uncommon word in the vocabulary of Supreme Court decisions. The word has been used to convey the idea of "similarity,"[16] "comparability,"[17] or "nexus."[18] But occasionally the Court has used congruence as a synonym for "identicalness" or "sameness."[19] In *Adarand Constructors v. Pena*,[20] the Court chose the

15. Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1373 (2000) ("I think the Court's stricter 'congruence and proportionality' test lacks solid constitutional grounding. Certainly Section 5's requirement of 'appropriate' legislation does not dictate uniquely heightened scrutiny; both the text of Section 5 and its drafting and legislative history strongly suggest that the Framers intended to incorporate the same means-end test that Chief Justice Marshall articulated when construing the Necessary and Proper Clause and implied Article I powers in *McCulloch v. Maryland*.").

16. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 533 (1986) (O'Connor, J., writing for the majority) ("As we explained more fully in *Carrier*, this congruence between the standards for appellate and trial default reflects our judgment that concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate . . . ."); Atascadero State Hospital v. Scanlan, 473 U.S. 234, 286-287 (1985) (Powell, J., writing for the majority) ("The congruence of language suggests that the Amendment was intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses."); Thigpen v. Roberts, 468 U.S. 27, 32 (1984) (White, J., writing for the majority) ("Whatever the congruence or lack thereof, of the offenses charged, the post-appeal felony indictment poses 'the danger that the State might be retaliating against the accused for lawfully attacking his conviction.'"); Smith v. Wade, 461 U. S. 30, 53 (1983) (Brennan, J., writing for the majority) ("Many other courts, not directly addressing the congruence of compensatory and punitive thresholds, have held that punitive damages are available on the same showing of fault as is required by the underlying tort . . .").

17. Carl Cleveland v. United States, 531 U.S. 12, 23 (2000) (Ginsburg, J., writing for the majority)("The Government compares the State's interest in video poker licenses to a patent holder's interest in a patent that she has not yet licensed. Although it is true that both involve the right to exclude, we think the congruence ends there.").

18. Craig v. Boren, 429 U.S. 190, 199 (1976) (Brennan, J., writing for the majority) ("In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislature choose either to realize their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact."); Iannelli v. United States, 420 U.S. 770, 782 (1975) ("The classic Wharton's Rule offenses - adultery, incest, bigamy, duelling - are crimes that are characterized by the general congruence of the agreement and the completed substantive offenses.").

19. Brecheen v. Oklahoma, 485 U.S. 909, 912 (1988) ("But the influences that might impair the truth-seeking function of the jury in guilt determinations are not identical to those that impinge on its responsibility to administer fairly the death penalty. This case demonstrates that lack of congruence."); United States v. New Mexico, 455 U.S. 720, 740-41 (1982) ("But the differences between an employee and one of these constractors are crucial. The congruence of professional interests between the contractors and the Federal Government . . . have been created for limited and carefully defined purposes.");

word "congruence" to express the key proposition that "Equal Protection analysis in the Fifth Amendment area is the *same* as that under the Fourteenth Amendment."[21] Two dissenting Justices in *Adarand* understood the "Court's concept of 'congruence'" as an assumption "that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative action program and such a decision by a State or municipality."[22] The *City of Boerne* Court declared that in order for it to treat preventive rules as "appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved,"[23] but it did not provide a clue as to the sense in which the word 'congruence' was used. The meaning of the word is rendered even less certain by the *City of Boerne* Court's earlier statement that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[24] The two statements read together call into question not only whether the means-end fit required by the Court is a component of 'proportionality,' 'congruence,' or both, but also whether the requirement is a condition for the appropriateness of 'preventive measures,' 'remedial measures,' or both.

This lack of specificity about the meaning and significance of 'congruence' has been a source of considerable confusion. While some commentators understand 'congruence' as requiring "a tight fit between the wrong to be prevented and the means to be adopted,"[25] some others think that "proportionality evidently relates means and

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Cunningham v. Hamilton County, 527 U.S. 198, 207 (1999) (Thomas, J., writing for the majority) ("First, it ignores the identity of interests between attorney and client. The effective congruence of those interests counsels against treating attorneys like other non-parties for the purpose of appeal.").

20. 515 U.S. 200 (1995).

21. *Id.* at 201. The Court stated that its prior cases had established three propositions. The first was "scepticism," the second was "consistency," "[a]nd third, congruence: 'Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" *Id.* at 223-24.

22. *Id.* at 249 (Stevens & Ginsburg, JJ., dissenting).

23. 521 U.S. at 530.

24. *Id.* at 520.

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

ends,"[26] or even that "the requirement of congruence does not add anything to the requirement of proportionality."[27] Viewed in the factual context of *City of Boerne*, congruence seems to require that congressional enforcement legislation be strictly targeted to remedy or prevent state conduct that the Court recognizes as constitutional wrongs.[28] Of course, such a rigid construction of 'congruence' facially contradicts the *City of Boerne* Court's statement that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power 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.'"[29]

In subsequent cases, the Court has apparently used 'congruence' and 'proportionality' as interchangeable terms without demarcating their respective spheres of operation, or simply used them as siamese twins—conjointly constituting the 'congruence and proportionality' test. This is how the Court applied the test in *Florida Prepaid*, in which it struck down the Patent Remedy Act as "inappropriate" legislation. The Patent Remedy Act was designed to prevent States from depriving patent owners of property without due process of law

26. Fisher, *supra* note 8, at 500-01 (1999) ("Notwithstanding the ambiguities, however, one may ascertain certain likely meanings of the standards. First, proportionality evidently relates means and ends, requiring an appropriate balance between the seriousness of the legislative goal and the intrusiveness and efficacy of the legislative means to accomplish that goal. The meaning of congruence is less clear; presumably it refers to the relationship between the class of potential defendants and the particular evil the legislation seeks to eradicate."); Cedric Merlin Powell, *The Scope of National Power and the Centrality of Religion*, 38 BRANDEIS L.J. 643, 711-12 (2000) ("While the Court offers no definition for the terms, 'proportionality' and 'congruence,' they appear to mean that Congress' legislation under Section 5, must be based on particularized findings of intentional discrimination so that the 'remedy' fits the constitutional violation (proportionality).").

27. Laycock, *supra* note 6, at 748 (arguing that the *City of Boerne* Court's recognition of the validity of the holding in *Katzenbach v. Morgan* (384 U.S. 641 (1966)), in which the Court accepted a voting rights remedy for a violation pertaining to the failure to provide a public service, suggests the redundancy of congruence in the 'congruence and proportionality' test). This is the grounds on which the circuit courts have upheld applicability to states of the Equal Pay Act, 29 U.S.C. § 206(d). *See, e.g.*, Siler-Khodr v. Univ. of Tex. Health Sci. Ctr., 261 F.3d 542 (5th Cir. 2001), *cert. denied*, 123 S.Ct. 694 (2002).

28. Thane Somerville, *The Equal Pay Act as Appropriate Legislation Under Section 5 of the Fourteenth Amendment: Can State Employees be Sued?*, 76 WASH. L. REV. 279, 287 (2001) (arguing that under the congruence and proportionality test, "the substantive rights Congress gives to litigants through section 5 legislation must be substantially similar to the rights litigants would have if they brought suit under the Constitution.").

29. 521 U.S. at 518 (acknowledging prior holding of the Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

by pleading sovereign immunity in federal court patent actions.[30] First, the Court claimed that congressional failure to identify a "pattern of patent infringement by the States"[31] or "widespread and persisting deprivation of constitutional rights"[32] rendered the provisions of the statute "out of proportion to [the] supposed remedial or preventive object."[33] The Court wasted no time in making the next fundamentally conflicting claim that "[a]n unlimited range of state conduct would expose a State to claims of direct, induced, or contributory patent infringement" under the statute because, as the congressional record showed, "'it[']s difficult to identify a patented product or process which might not be used by a state.'"[34] The Court then faulted Congress for subjecting the States, for an indefinite duration, to liability for unintentional violations regardless of the existence of state-court remedies.[35] The Court claimed that such "indiscriminate scope . . . is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy."[36]

Under the analysis of the *Florida Prepaid* Court, the lack of a pattern of constitutional violations causes the lack of proportionality and the indiscriminate scope of the statute is rendered "particularly incongruous" by this lack of proportionality. 'Congruence' and 'proportionality' serve as dependent and mutually nourishing

30. Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999). The Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. §§ 271(h), 296(a), Pub. L. 102-560, was designed "to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."

31. *Fla. Prepaid*, 527 U.S. at 630.

32. *Id.* at 645 (quoting *City of Boerne*, 521 U.S. at 532). The Court blamed Congress for enacting the legislation "in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution." *Id.* at 645-46. The Court gave no consideration to the congressional finding that state infringement of patents was likely to increase; instead, as Justice Stevens pointed out, the Court dismissed the findings as an effort "to head off this speculative harm." *Id.* at 641 (Stevens, J., dissenting). One can only wonder what happened to the Court's promise in *City of Boerne* that Congress' enforcement legislation could aim at remedying or preventing state conduct that itself might not be unconstitutional.

33. *Id.* at 646.

34. *Id.* (quoting H. R. Rep. at 38).

35. *Id.* at 647. The response of the dissenting Justices was that adjudication of infringement cases by state courts against state entities "would raise questions of impartiality." *Id.* at 660. (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting).

36. *Id.*

concepts even though proportionality is concerned primarily with discerning the pattern of constitutional violation while congruence is primarily concerned with the scope of the statute's coverage. However, the four dissenting Justices maintained that both the issues of 'pattern' and 'pervasiveness' belonged to the province of 'congruence.' Justice Stevens asserted, in dissent, that the *City of Boerne* Court found no congruence in the Religious Freedom Restoration Act "both because of the absence of evidence of widespread violations that were in need of redress *and* because the sweeping coverage of the statute ensured 'its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.'"[37]

The Court again applied the congruence and proportionality test when it invalidated the extension of the Age Discrimination in Employment Act (ADEA) to state agencies in *Kimel v. Florida Board of Regents*.[38] To achieve its desired outcome in the case, the Court first immunized the States from liability for most age discrimination by declaring that "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[39] This cleared the way for the Court to blame Congress for a "failure to uncover any significant pattern of unconstitutional discrimination"[40] and then condemn the extension of the ADEA "to the States [as] an unwarranted response to a perhaps inconsequential problem."[41] However, the Court's inability to delineate the roles of congruence and proportionality has lingered. While it adverted to the

37. *Fla. Prepaid*, 527 U.S. at 662 (quoting *City of Boerne*, 521 U.S. at 532) (emphasis added).

38. 528 U.S. 62 (2000).

39. *Id.* at 83. The Court stated that, under its precedents, "age classification is presumptively rational." *Id.* at 84.

40. *Id.* at 91.

41. *Id.* at 89. The regular four dissenting Justices, led by Justice Stevens, maintained that "[f]ederal rules outlawing discrimination in the workplace, like the regulation of wages and hours or health and safety standards, may be enforced against public as well as private employers." *Id.* at 93 (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting). In their opinion, Congress could extend the ADEA by virtue of its commerce power to regulate American economy, including the private and public sectors of the labor market. Therefore, the question of abrogation of state sovereign immunity by legislation enacted under section 5 of the Fourteenth Amendment is not even pertinent to the case. The dissenters refused to accept as binding precedent *Seminole Tribe v. Florida*, 517 U.S. 44 (in which the Rehnquist majority held that legislation enacted under Congress' Article I powers would not abrogate state sovereign immunity) because the case was "profoundly misguided." *Id.* at 97.

same congruence and proportionality test it applied in *Florida Prepaid* when it concluded that the ADEA was not "appropriate [enforcement] legislation,"[42] the Court did not elaborate on the 'congruence' concept. Instead, the Court emphasized that the "substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[43] Therefore, if the focus of 'congruence' is the fit between means and ends, as the Court originally envisioned in *City of Boerne*,[44] then the statement in *Kimel* simply means that the ADEA's congruence is disproportionate.

The role and significance of 'congruence' has become increasingly indistinct and amorphous with each successive application of the congruence and proportionality test by the Supreme Court. Since *City of Boerne*, the Court has not articulated the place of "congruence" in the test. The Court's wide-ranging proportionality inquiry seems to encompass congruence because without the requisite nexus between means and ends, the legislation will fail to satisfy the requirement of proportionality. Instead of excising the seemingly redundant 'congruence' from the equation, the Court seems to have consolidated congruence and proportionality into a single integrated requirement of proportionality without announcing that it was doing so. The Court's decision in *Garrett* is a telling illustration. While invalidating the applicability of the Americans with Disabilities Act to the States, the Court stated that "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[45] Recall that, in *Florida Prepaid*, the 'pattern' requirement belonged to proportionality[46] and that congruence, by definition, needed no assistance from proportionality to assess the means-end fit.

Whether seen as a yardstick to measure the scope of a statute or

42. *Id.* at 82-83.

43. *Id.* at 83. The Court's statement was a reversal of the role assigned to proportionality in *Florida Prepaid*, namely, the search for a pattern of constitutional violations.

44. The *City of Boerne* Court stated: "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved . . . ." 521 U.S. at 530.

45. *Garrett*, 531 U.S. at 374 (Rehnquist, C.J., writing for the majority).

46. *See supra* notes 32-37, *supra* and accompanying text.

a gauge of the degree of nexus between means and ends, proportionality has emerged as the dominant, if not the sole, criterion for the constitutionality of congressional enforcement legislation under the Fourteenth Amendment. While the Court has repeatedly struck down Congress' remedial legislation for lack of conformity with the proportionality test, it has conspicuously failed to articulate clearly the meaning of the test or to craft objective guidelines for Congress to follow in order to fulfill the test's requirements whatever they may be.

As a result, one of the most troubling challenges facing our elected national leaders in both political branches is how to solve the pressing problem of prejudice and discrimination against certain segments of the society through remedial legislation and get it past the Supreme Court's as-yet unarticulated test of proportionality. In the absence of a court-enunciated meaning for proportionality, Congress has no choice but to predicate future enforcement legislation on suppositions and surmises divined from the Court's various pronouncements pertaining to proportionality in multiple contexts.[47] But one thing Congress assuredly cannot assume is that it can overcome proportionality scrutiny by enacting remedial legislation that is unquestionably and demonstrably rational. Proportionality demands more than rationality. This is how the Court has described the scope of proportionality as applied to the Takings Clause of the Fifth Amendment.

A. Takings Clause Proportionality

There is no disagreement among the Justices that "concerns for proportionality animate the Takings Clause"[48] and that the applicable standard for review is "rough proportionality."[49] The Court explained the approximate scope of the rough proportionality standard in *Dolan v. City of Tigard*.[50] In *Dolan*, the owner of a plumbing and electric supply store challenged the city requirement that she dedicate approximately 15% of the property for public use as a condition for

47. For the Justices' views about the viability of proportionality as a constitutional test, expressed in the context of the Eighth Amendment, see Part II, *infra*.

48. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 702 (1999). The Justices were unanimous on this point.

49. *Id.* at 733 (Souter, J., joined by O'Connor, Ginsburg & Breyer, JJ., concurring in part and dissenting in part) (agreeing with the majority that the rough proportionality standard is applicable only to excessive exactions). *See id.* at 703.

50. 512 U.S. 374 (1994).

granting a permit to redevelop her store.[51] The property owner claimed that the conditions imposed by the city forced her to choose between a redevelopment permit and the right to just compensation for property taken from her for public use as guaranteed by the Constitution. The United States Supreme Court agreed with her contention.[52]

Writing for the majority, Chief Justice Rehnquist established a two-pronged test to decide constitutional challenges to regulatory takings of private property. First, the Court is to "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."[53] Second, if such a nexus is found to exist, the Court is to "decide the required degree of connection between the exactions and the projected impact of the proposed development."[54] The first part of the test can be satisfied by showing a connection between the adverse effect of the proposed land use on the public interest and the conditions attached to the approval of such use.[55] Apparently, the city's conditions for dedication in *Dolan* satisfied the 'essential nexus' prong because they served the city's "legitimate interests in minimizing floods and traffic congestions."[56]

The second prong of the test requires "individualized determination" not only "with respect to the nature and the extent of the relationship between the conditions and the impact," but also with respect to a demonstration of proportionality.[57] The City of Tigard failed this requirement. The Court was urged to adopt a "reasonable relationship" test, as formulated by the majority of state

51. The city claimed that the dedicated portion of the permit applicant's property should be used as a greenway and for the construction of a pedestrian/bicycle pathway. *Id.* at 379-80.

52. *See id.* at 385-86. The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

53. *Dolan*, 512 U.S. at 386 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

54. *Id.* The Court noted that the second inquiry was rendered unnecessary in *Nollan* because of the lack of nexus of any kind or degree.

55. Damon Christian Watson, *Dolan and the "Rough Proportionality" Standard: Taking Its Toll on Loretto's Bright Line:* Dolan v. City of Tigard, *114 S. Ct. 2309 (1994)*, 18 HARV. J.L. & PUB. POL'Y 591 (1995).

56. *Dolan*, 511 U.S. at 397 (Stevens, J., joined by Blackmun & Ginsburg, JJ., dissenting).

57. *Id.* at 403-04 (Stevens, J., dissenting).

courts, to establish the requisite degree of nexus. The Court declined to adopt the term "reasonable relationship," partly because it is "confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[58] Instead, the Court adopted the "rough proportionality" test, claiming that the term "best encapsulates" the requirements of the Fifth Amendment.[59] Five years after *Dolan*, the Court in a unanimous decision, strictly limited the "rough proportionality" part of the test to "excessive exactions."[60]

Although the rough proportionality test is designed to help determine the degree of correspondence between an exaction and the public harm attributable to a development, it fails to specify the ratio between exaction and harm that is constitutionally sufficient. Despite the ambiguity concerning the exact level of scrutiny contemplated, the Court candidly announced that rough proportionality requires more than rational basis review.[61] The Court confined the reach of the rough proportionality test to the limited category of land use regulations that generated claims of excessive exactions. Finally, in spite of the possibility of quantifying the respective costs of public harm and exaction in most cases, the Court told land use regulators that "[n]o precise mathematical calculation is required,"[62] only "some sort of individualized determination"[63] concerning the relationship between the exaction and the public harm is needed. Nevertheless, the test is more specific and has more clearly marked outer limits than the unqualified proportionality test the Court uses to scrutinize the constitutionality of congressional enforcement legislation under the Fourteenth Amendment.

The Court has crafted the 'rough proportionality' test with care and solicitude toward the police power of states and municipalities, a

58. *Id.* at 390-91.

59. *Id.*

60. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 703 (1999).

61. *See* John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ENVTL. L. REP. 10682, 10682 (1999) (stating that the Dolan test implies a "relatively demanding standard of review"); Christopher J. St. Jeanos, Note, *Dolan v. Tigard and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?*, 63 FORDHAM L. REV. 1883, 1896 (1995) (stating that the "rough proportionality test is more closely aligned with a 'strict scrutiny' standard.").

62. *Dolan*, 512 U.S. at 391.

63. *Id.* ("[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

level of concern that is lacking in the Court's rigorous application of the "polished proportionality" test to Fourteenth Amendment enforcement legislation. Even though it is not precisely defined, the rough proportionality test's boundaries are roughly marked out. Considering the fact that costs to the opposing interests in regulatory takings can, in most cases, be measured in dollars and cents, the Court could have required that the costs of exaction and public harm be somewhat equivalent to each other or that the exaction be directly proportional to the harm "specifically and uniquely attributable" to the development, as some state courts had done.[64] The Court ruled out such options, stating that "the Federal Constitution requires [no] such exacting scrutiny, given the nature of the interests involved"—a reference to the police powers of states and municipalities.[65]

The Court's lenient proportionality approach to the Takings Clause contrasts with the unforgiving application of its undefined and unqualified proportionality to Fourteenth Amendment enforcement legislation. If the Court's rough proportionality jurisprudence is any guide, no enforcement legislation can pass the proportionality test to qualify as "appropriate" legislation under the Fourteenth Amendment, even if it is rationally related to the remedial purpose of Congress. If rationality review is contrary to the principles of "rough proportionality," it must be more so under the "polished proportionality" test. Even though "rough proportionality" highlights some of the deficiencies of 'polished proportionality' it does not shed much additional light on the scope or meaning of Fourteenth Amendment proportionality. It also reminds us that the concerns of proportionality do not "animate" the Fourteenth Amendment as they do the Takings Clause.

III. PUNISHMENTS AND DAMAGES: EIGHTH AMENDMENT PROPORTIONALITY

The Court has often tried to provide historical legitimacy to the proportionality principle by asserting that it is "deeply rooted and frequently repeated in common-law jurisprudence."[66] As a constitutional standard, "proportionality has been recognized

64. *See, e.g.*, Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect, 176 N.E. 2d 799, 801 (Ill. 1961); Jordan v. Vill. of Menomonee Falls, 137 N.W. 2d 442, 447 (Wis. 1965).

65. *Dolan*, 512 U.S. at 390.

66. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478 (1993) (quoting Solem v. Helm, 463 U.S. 277, 284-85 (1983)).

explicitly [by the Supreme] Court for almost a century."[67] The standard has been conveniently used as a yardstick to measure the metes and bounds of the prohibitions embodied in the Eighth Amendment. Since it is essentially a mathematical principle, the proportionality standard naturally provides the appearance of objectivity and accuracy to the Court's determinations of the excessiveness of bails and fines under the Amendment.[68] However, the utility of the standard for expounding the non-quantifiable concept of "cruel and unusual punishment"[69] is highly questionable. Nevertheless, nowhere else has the Court used the principle of proportionality so consistently, and often improvidently, as in the context of the Cruel and Unusual Punishment Clause.

A. Cruel And Unusual Punishment Clause

1. The Evolution of Proportionality

For years, the Supreme Court adhered to an anti-torture interpretation of the Cruel and Unusual Punishment Clause ("the Clause"), which barred only "inhuman and barbarous" punishments involving "something more than the mere extinguishment of life."[70] The Court rejected the occasional entreaties of some eminent Justices that the Clause be interpreted to prohibit "all punishments which by their excessive length or severity are greatly disproportioned to offenses charged."[71] Presumably, by the force of its own intrinsic merit, the proportionality principle eventually gained recognition in the jurisprudence of the Clause. In *Weems v. United States*,[72] the Court abruptly changed its traditional anti-torture interpretation of the Clause to include a proportionality requirement,[73] making an

67. Solem v. Helm, 463 U.S. 277, 286 (1983).

68. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

69. *See id.*

70. In re Kemmler, 136 U.S. 436, 446-47 (1890) (Fuller, J., writing for the majority) (rejecting an Eighth Amendment challenge to imposition of the death penalty by electrocution).

71. O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). In *O'Neil*, Justices Field and Harlan objected to the imposition of long imprisonment for violation of Vermont's liquor laws. Justice Harlan maintained that the sentence was excessive. *Id.* at 370 (Harlan, J., dissenting).

72. 217 U.S. 349 (1910).

73. Justice McKenna, writing for the Court, acknowledged that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided. It has been said that

emphatic statement that "it is a precept of justice that punishment for crime should be graduated and proportional to offense."[74] By virtue of the new interpretation, the *Weems* Court ruled that a fifteen-year imprisonment including hard and painful labor for the crime of falsifying a public record was "cruel in its excessiveness and unusual in its character."[75]

Almost half a century later, the Court in *Trop v. Dulles*[76] relied on the *Weems* interpretation of the Clause to invalidate a statute that authorized a military court to revoke the citizenship of a soldier and render him stateless as a penalty for wartime desertion. The plurality opinion of Chief Justice Warren maintains that denationalization "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[77] The Chief Justice sought to ground the proportionality requirement on a solid philosophical justification, befitting the civility of our constitutional democracy, by declaring that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[78] The impact of this statement on judicial perspectives has been so profound that it has become part of the proportionality discourse in subsequent cases.[79]

The proportionality principle appeared to be established as an indispensable component of the Clause when seven Justices treated it as such in *Coker v. Georgia*.[80] In that case, the Court overturned the capital sentence of a serial rapist, imposed by the Georgia State

ordinarily the terms imply something inhuman and barbarous, torture and the like." *Id.* at 368 (citing McDonald v. Commonwealth, 53 N.E. 874, 875 (1899)). However, the Justice, emphasizing the evolving nature of the meaning of the Clause, stated: "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* at 373.

74. *Id.* at 367.

75. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (Warren, C.J., joined by Black, Douglas, & Wittaker, JJ.) (citing *Weems*, 217 U.S. at 349).

76. *Id.*

77. *Id.* at 101.

78. *Id.*

79. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (O'Connor, J., writing for the majority); Ford v. Wainwright, 477 U.S. 399, 406 (1986) (Marshall, J., writing for the majority); Rummel v. Estelle, 445 U.S. 263, 292 (1980) (Powell, J., dissenting); Coker v. Georgia, 433 U.S. 584, 603 (1977) (Powell, J., concurring); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, J., writing for the majority).

80. 433 U.S. 584 (1977).

courts, on the ground that death was a disproportionate punishment for the crime of raping an adult woman. This was despite the fact that the convict raped three separate women within the space of three years, killing one, attempting to kill another, and victimizing the third while he was on the run from the state prison where he was serving a sentence of several consecutive life-terms.[81] The Court embraced the holding of prior cases that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed,"[82] and established the rule that a punishment would be excessive if it "makes no measurable contribution to acceptable goals of punishment . . . or is grossly out of proportion to the severity of the crime."[83] In applying the standard, the Court sought guidance "from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman"[84] and found that only Georgia authorized such a sentence while two other jurisdictions provided for capital punishment when the victim is a child.[85] The plurality opinion of Justice White concedes that providing for the death penalty in murder cases is not necessarily cruel or excessive but maintains that rape, "in terms of moral depravity and of the injury to the person and to the public, does not compare with murder,"[86] and therefore "death is indeed a disproportionate penalty for the crime of raping an adult woman."[87]

Mirroring society's increasing concern over crime—a concern

81. *Id.* at 607 (Burger, C.J., joined by Rehnquist, J., dissenting).

82. 433 U.S. at 592 (plurality opinion)(White, J., joined by Stewart, Blackmun & Stevens, JJ.)(citing Trop v. Dulles, 356 U.S. 86 (1958); and Weems v. United States, 217 U.S. 349 (1910)).

83. *Coker*, 433 U.S. at 592.

84. *Id.* at 593.

85. *Id.* at 595-96. Emphasizing that, in *Trop v. Dulles*, the Court's plurality paid attention to the "climate of international opinion concerning the acceptability of a particular punishment," Justice White asserted that "[i]t is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." *Id.* at 596 n.10 (citing United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968)).

86. 433 U.S. at 598.

87. *Id.* at 597 (Powell, J., concurring in the judgment and dissenting in part). Justice Powell agreed with the plurality that "ordinarily death is disproportionate punishment for the crime of raping an adult woman." *Id.* at 601. Justices Brennan and Marshall maintained that the "death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." *Id.* at 600 (Brennan & Marshall, JJ., concurring in the judgment).

fueled by the "tough on crime" rhetoric of vote-seeking politicians[88]—the conservative Justices of the Supreme Court began to question the constitutional propriety of proportionality review of excessive criminal punishments. In *Rummel v. Estelle*,[89] the Court declined to invalidate a life sentence imposed on a recidivist who had been convicted of three non-violent property offenses involving a total of $229.11.[90] Writing for a bare majority of the Court, then Justice Rehnquist declared that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare"[91] and that for crimes "punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."[92] Justice Powell's dissenting opinion, after a lengthy analysis of the history and rationale of the Eighth Amendment and relevant precedent, concluded that a mandatory life sentence for defrauding persons of about $230 would be viewed as grossly unjust by lawyers and laymen alike and that it "crosse[d] any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment."[93]

The *Rummel* Court left the states free, without being constrained by any Eighth Amendment principle, to punish any offense with any

88. Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishment and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1253-54 (2000) (arguing that excessive and abusive sentences are not susceptible to legislative scrutiny and oversight because criminals are a reviled group in American politics who have no effective lobbyists and because legislators compete to be the toughest on crime).

89. 445 U.S. 263 (1980).

90. The crimes were (1) fraudulent use of a credit card to obtain $80.00 worth of goods or services; (2) passing a forged check for $28.36; and (3) obtaining $120.75 by false pretenses. *Id.* at 265-66.

91. *Id.* at 272. The conservative Justices Rehnquist, Stewart, White, and Chief Justice Burger were joined by Justice Blackmun.

92. *Id.* at 274. Justice Rehnquist's majority opinion practically ruled out proportionality review in all non-capital sentences. However, the Justice, in responses to Justice Powell's dissent, conceded that if a statute levied a mandatory life sentence for overtime parking, the proportionality principle would "come into play." *Id.* at 274 n.11. But such proportionality review in non-capital cases would occur, if at all, only in extreme cases. Justice Rehnquist claimed that *Weems* involved such an extreme case, one in which a twelve-year confinement in a penal institution, "with chain at the ankle and wrist of the offender, hard and painful labor" and other ancillary punishments was the sentence for the trivial offense of falsifying a public record. *Id.* at 273-74 (quoting Weems v. United States, 217 U.S. 349, 366 (1910)).

93. *Rummell*, 445 U.S. at 307 (Powell, J., joined by Brennan, Marshall & Stevens, JJ., dissenting).

non-capital sentence "as long as the punishment arguably promotes some penological purpose."[94] The Court seemed to adhere to and apply the new rule with merciless rigidity[95] until a new majority of the Court, led by Justice Powell, succeeded in rehabilitating the proportionality principle in *Solem v. Helm*,[96] a case involving a claim of an excessive prison sentence remarkably similar to that in *Rummel*.

In *Solem*, the defendant Helm was convicted in 1979 for writing a $100 bad check and sentenced to life imprisonment with no possibility of parole under South Dakota's felony recidivist statute.[97] By the time of the conviction, Helm, "a 36-year-old man . . . had spent a good part of the previous 15 years in the state penitentiary"[98] for committing an assortment of non-violent offenses such as burglary, grand larceny, obtaining money under false pretenses, and driving while intoxicated. Even though the offenses for which Helm was convicted included six felonies, "they were all non-violent, none was a crime against a person, and alcohol was a contributing factor in each case."[99] Justice Powell, writing for the majority, invalidated Helm's life sentence, holding that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted"[100] and that Helm's sentence was "significantly disproportionate to his crime and therefore prohibited by the Eighth Amendment."[101]

Emphasizing the need for objective criteria, Justice Powell mandated that a court analyzing a disproportionality claim should be guided by empirical factors, "including, (i) the gravity of the offense

94. Martin R. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After* Rummel v. Estelle, 1980 DUKE L.J. 1103, 1131 (1980).

95. Two years after *Rummel*, the Court, in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), refused a proportionality review of a forty-year prison sentence and $20,000 fine imposed on a defendant convicted of possession with intent to distribute of nine ounces of marijuana. In dissent, Justices Brennan, Marshall, and Stevens argued that the penalty was "grossly unjust" and excessive compared with penalties set for similar offenses in the very same state. *Id.* at 384-86.

96. *Solem*, 463 U.S. 277 (1983). The majority in *Solem* consisted of the four Justices who dissented in *Rummel* and Justice Blackmun, who voted with the Majority in *Rummel*, but changed his mind and voted for the proportionality principle as articulated by Justice Powell in *Solem*.

97. *Id.* at 281-82.

98. State v. Helm, 287 N.W. 2d 497, 499 (S.D. 1980) (Morgan, J., dissenting).

99. *Solem*, 463 U.S. at 280.

100. *Id.* at 290.

101. *Id.* at 303.

and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[102] Applying these objective criteria to Helm's sentence, the Justice concluded that it failed the proportionality test.[103] However, in an uncompromising dissent, Chief Justice Burger, joined by Justices Rehnquist and O'Connor, argued that Helm was an incorrigible criminal with a propensity to commit serious crimes against society and that the objective criteria the majority utilized to find disproportionality would inevitably force arbitrary line-drawing by appellate courts reviewing criminal sentences. The dissenters claimed that the *Solem* majority's expressed confidence in their own ability to grade offenses according to their relative "gravity" amounted to "nothing other than a bald substitution of individual subjective moral values for those of the legislature."[104] More fundamentally, the dissenters would strictly limit proportionality review to "extraordinary cases, *Weems* being one example and the line of capital cases another."[105] The majority responded, not only with an examination of the development of the proportionality requirement through a string of precedents, but also with the simple syllogism that "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[106]

2. Renouncing Proportionality

Even though Justice Powell's proportionality doctrine was well received and supported by "venerable"[107] precedents, it was swept aside by the new and resolute majority of the Rehnquist Court. The new majority achieved its goal in *Harmelin v. Michigan*[108] when it

102. *Id.* at 292.

103. Justice Powell found that "Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single state." *Id.* at 303.

104. *Id.* at 314 (Burger, C.J., joined by White, Rehnquist, & O'Connor, JJ., dissenting).

105. *Id.* at 313.

106. *Id.* at 289 (citing the parallel textual limitations on excessive bail and fines in the Eighth Amendment).

107. *See* Pressly Millen, *Interpretation of the Eighth Amendment* - Rummel, Solem *and the Venerable Case of* Weems v. United States, 1984 DUKE L.J. 789, 790.

108. 501 U.S. 957 (1991).

concluded that a mandatory life sentence without possibility of parole for possession of 672 grams of cocaine, imposed on a person with no prior felony convictions, was not unconstitutionally cruel and unusual. Justice Scalia, joined by Chief Justice Rehnquist, concluded categorically that "the Eighth Amendment contains no proportionality guarantee" and that the Court's "5 to 4 decision [in] *Solem* was simply wrong."[109] To bolster his conclusion, Scalia traced the origin of the Amendment to a parallel provision in the 1689 English Declaration of Rights,[110] examined the evidence available from the state conventions that ratified the Bill of Rights,[111] and cited actions of the First Congress that "belie any doctrine of proportionality."[112]

Justice Scalia asserted that the Eighth Amendment was designed to focus exclusively on the methods of punishment, not on excessive or disproportionate punishments.[113] In his reading, the Amendment would not prohibit a punishment for its cruelty unless it is also "as the text... requires... unusual."[114] Nevertheless, Scalia, responding to the forceful arguments of seven concurring and dissenting Justices, conceded that the language of the Amendment "bears the construction" that would "make the provision a form of proportionality guarantee."[115] That was precisely the point of Justice Powell's majority opinion in *Solem*. Despite his strident rejection of *Solem*, Scalia shied away from confronting Powell's argument that it

109. *Id.* at 965. Justice Scalia announced the judgment of the Court, but the part of his opinion that totally rejected the proportionality principle was joined only by Chief Justice Rehnquist. Justice Kennedy, joined by Justices O'Connor and Souter, wrote an opinion concurring in part and concurring in the judgment. Justices White, Blackmun, Stevens and Marshall dissented.

110. *Id.* at 966.

111. *Id.* at 979.

112. *Id.* at 980.

113. *Id.* at 973-74.

114. *Harmelin*, 501 U.S. at 967. The textual analysis of Justice Scalia's opinion reveals more of his penological disposition than his reasoned method for constitutional interpretation. According to his logic, if an American citizen's face were disfigured by acid, on charges of immorality of some kind brought by an adherent of the Taliban in Afghanistan and the individual responsible for the disfigurement were brought to justice in the U.S. courts, he could argue that his crime may be disproportionately cruel, but not unusual in Afghanistan now nor was it unusual at the time of the adoption of our Bill of Rights.

115. *Id.* at 976. Justice Scalia was also forced to concede that proportionality may be a concern for capital punishment, which he said: "differs from all other forms of criminal punishment, not in degree but in kind." *Id.* at 995 (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972)(Stewart, J., concurring)).

would be absurd to construe the Eighth Amendment to bar the greater punishment of death and the lesser punishments of excessive fines and bail but not the intermediate category of an excessive and disproportionate sentence of imprisonment.

The concurring Justices carefully distanced themselves from the radical views of the Chief Justice and Justice Scalia.[116] Justice Kennedy's concurring opinion, joined by Justices O'Connor and Souter, fashions a "narrow proportionality principle"[117] for the Eighth Amendment that "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[118] Claiming that the precise contours of proportionality recognized by prior decisions remained unclear, Justice Kennedy discerned "some common principles"[119] that guide proportionality review. These principles recognize, inter alia, the prerogative of legislatures to make a variety of penological judgments, the value of the federal system, and the need to guide proportionality review by objective factors.[120] Justice Kennedy's lean proportionality principle "does not require strict proportionality between crime and sentence,"[121] but only a threshold determination of whether a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality"[122] warranting further inter-jurisdictional or intra-jurisdictional comparative analysis. The primary function of such a rare comparative analysis is to validate a conclusion of gross disproportionality that has already been reached.[123]

116. By not espousing Justice Scalia's absolute rejection of the Eighth Amendment proportionality guarantee, the concurring Justices not only escaped self-inflicted embarrassment for the unjustified rejection of a long-standing constitutional principle but also did a great service to the cause of conservatism and the prestige of the Supreme Court. *See* Bruce Campbell, *Proportionality and the Eighth Amendment:* Harmelin v. Michigan, *111 S. Ct. 2680 (1991)*, 15 HARV. J.L. & PUB. POL'Y 284 (1992) (surmising that Scalia's failure to fully explain the seriousness of the crime involved in Harmelin "is likely to erode popular support for a Supreme Court already under scrutiny for its firm conservative commitment" and that the "recent manifestation of a 'conservative counterrevolution' may also offend the sensibilities of more 'traditional' judicial conservatives who believe that the Court should give some deference to precedents that have recognized a narrow proportionality guarantee." *Id.* at 295).

117. 501 U. S. at 996 (Kennedy, J., concurring).

118. *Id.* at 1001.

119. *Id.* at 998.

120. *Id.* at 998-1001.

121. *Id.* at 1001.

122. *Id.* at 1005.

123. Justice Kennedy asserted that "[t]he proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly

Justice Kennedy's gross disproportionality principle does not appear to be substantively different from Justice Scalia's anti-proportionality principle. Despite their seemingly divergent constitutional interpretations, both Justices arrived at the same conclusion—that Harmelin's life sentence without parole did not constitute cruel and unusual punishment. Justice Kennedy's "standardless test"[124] may not be appropriate for producing objective outcomes because at the center of his review methodology is the subjective judicial determination of gross disproportionality, and because most of the so-called objective factors he mentioned come into play only after that critical threshold determination has been made. This methodological flaw permitted Justice Kennedy to make his own subjective judgment in the case, even though, as Justice White stated eloquently in dissent, Harmelin's sentence was grossly out of proportion to sentences for any other comparable crime in Michigan[125] and "only Alabama provides a mandatory sentence of life imprisonment without the possibility of parole for a first-time offender, and then only when a defendant possesses 10 kilograms or more of cocaine."[126]

Four dissenters, led by Justice White, castigated the theories of Justices Scalia and Kennedy alike. The dissenters dismissed Justice Scalia's assertion that "the Eighth Amendment contains no proportionality guarantee."[127] They arrayed an impressive list of established precedents, from *Weems* to *Solem*, in which the Court had recognized the general principle that a punishment may offend the Eighth Amendment at any given time if it is contrary to the standards of decency of contemporary American society—standards to be measured by objective factors, rather than by the judiciary's

disproportionate to a crime," which he predicted would occur only in "rare cases." *Id.* at 1005. Astonishingly, he calls this review "objective." *Id.* at 1000-01.

124. G. David Hackney, *A Trunk Full of Trouble:* Harmelin v. Michigan, *111 S. Ct. 2680 (1991)*, 27 HARV. C.R.-C.L.L. REV. 262, 274 (1992).

125. 501 U.S. at 1023-25 (White, J., joined by Blackmun & Stevens, JJ., dissenting) Justice Marshall joined the dissent with a caveat that, in his opinion, a death sentence is per se unconstitutional.

126. *Id.* at 1026 (emphasis omitted). Justice Kennedy, in the concluding paragraph of his opinion, accepted the reality that "[a] penalty as severe and unforgiving as the one imposed here would make this a most difficult and troubling case for any judicial officer." *Id.* However, he concluded that "[t]he dangers flowing from drug offenses and the circumstances of the crime committed here demonstrate that the Michigan penalty scheme does not surpass constitutional bounds." *Id.* at 1008-09 (Kennedy, J., concurring).

127. *Id.* at 1009 (White, J., dissenting).

subjective conceptions of decency.[128] The dissenters argued that the tripartite proportionality analysis set forth in *Solem* assesses objectively "a given sentence's constitutional proportionality, giving due deference to 'public attitudes concerning a particular sentence.'"[129] They blamed the majority for unjustifiably discarding the sound analytical framework of *Solem*. In the words of Justice White, Justice Scalia delivered "a swift death sentence to *Solem* [while] Justice Kennedy prefer[red] to eviscerate it, leaving only an empty shell."[130]

3. Offering An Alternative Rationale

Justice Scalia's failure to gain support from more than one of the Justices who constituted the razor-thin majority in *Harmelin* demonstrates the absurdity of his non-proportionality theory. The historical evidence he marshaled in support of his theory is utterly lopsided. Realizing this obvious evidentiary weakness, Justice Scalia offered an alternative and, in some respects, far more convincing justification for ridding the Amendment of the proportionality component. He argued that the proportionality principle, as a constitutional review standard, is so inadequate that it "enable[s] judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not" and it "becomes an invitation to imposition of subjective values."[131]

Justice Scalia's disdain for the subjectivity of the proportionality principle was shared by Chief Justice Rehnquist. In fact, Justice Scalia was echoing the similar sentiment passionately and eloquently expressed by the Chief Justice in prior cases. In his majority opinion in *Rummel v. Estelle*,[132] Justice Rehnquist dismissed Rummel's "proportionality attack"[133] by claiming that any constitutional distinction drawn by the Court on the basis of the length of the legislatively-mandated terms of imprisonment would be, "or appear to be, merely the subjective views of individual Justices."[134] In *Solem*, Justice Rehnquist joined the dissenters who chastised the majority of

128. *Id.* at 1015 (citing Stanford v. Kentucky, 492 U.S. 361, 369 (1989); and Coker v. Georgia, 433 U.S. 584, 592 (1977)).

129. *Id.* at 1021 (quoting *Coker*, 433 U.S. at 592).

130. *Harmelin*, 501 U.S. at 1018.

131. *Id.* at 986 (emphasis in the original).

132. 445 U.S. 263 (1980).

133. *Id.* at 277.

134. *Id.* at 274 (citing *Coker*, 433 U.S. at 592).

the Court for assuming "Solomonic wisdom"[135] in judging the proportionality of prison sentences. The dissenters emphatically characterized the majority opinion as one in which the "conclusion by five Justices that they are able to say that one offense has less 'gravity' than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature."[136]

Justice Scalia's observation that subjectivity is an inherent attribute of the proportionality principle cannot be seriously challenged. What is questionable is his effort to elevate the subjectivity rationale to such doctrinal heights as to fortify his fragile no-proportionality theory. The Justice maintained that the proportionality standard cannot be rendered less subjective by means of objective factors. To demonstrate his hypothesis, Justice Scalia took apart the tripartite proportionality analysis of *Solem* and discredited each of the objective factors[137] delineated therein as illustrative of subjective decisionmaking. What is most remarkable about Justice Scalia's assessment of the proportionality principle is not so much the assertion that the principle is inherently subjective as it is the conclusion that it is an incorrigible constitutional standard, not easily amenable to redemption with the aid of objective factors. If the proportionality principle is so intrinsically nebulous and indeterminate as Justice Scalia and the Chief Justice claim, then it should not be an acceptable standard for constitutional adjudication in any context.

B. Excessive Fines Clause

For more than two centuries, the Supreme Court assigned virtually no constitutional role to the Excessive Fines Clause. When the Court finally decided to resuscitate the moribund Clause, it had difficulty in determining the meaning of the excessiveness that the provision was designed to prohibit. Thus, in two 1993 decisions,

135. 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting).

136. *Id.*

137. *Harmelin*, 501 U.S. 957, 986-89 (1991). Justice Scalia asserted that the unconfined subjectivity of the proportionality principle was evident from the subjectivity of the *Solem* objective factors: 1) the inherent gravity of the offense, 2) intra-jurisdictional comparison with sentences imposed for similar offenses, and 3) inter-jurisdictional comparison with sentences imposed for the same crime. *Id.* at 986-87. He found no "objective standard" or criteria for deciding the "gravity" of an offense under the first and second *Solem* factors. *Id.* at 988-89. The Justice claimed that the third *Solem* factor was subjective and even inappropriate because diversity in criminal law enforcement is a virtuous hallmark or "the very *raison d'etre* of our federal system." *Id.* at 990.

Austin v. United States[138] and *Alexander v. United States*,[139] the Court declared that punitive in rem forfeitures and criminal forfeitures are subject to the constraints of the Excessive Fines Clause. However, the Court expressly left the task of determining the scope of the excessiveness prohibited by the Clause to the lower courts.[140] Not surprisingly, the circuit courts came up with divergent tests to assess constitutional excessiveness under the Clause.[141] Apparently finding the emerging disagreement among the circuit courts disconcerting, the Supreme Court in *United States v. Bajakajian*, decided to adopt "gross disproportionality" as the optimal yardstick for measuring excessiveness.[142]

At issue in *Bajakajian* was the applicability of the Excessive Fines Clause to a government forfeiture of U.S. currency that was about to be transported out of the country in violation of a criminal reporting statute. Bajakajian tried to board a flight from the U.S. to Italy without disclosing that he was carrying more than $357,000 in his luggage.[143] He did this after he was informed by customs officials of his obligation to report cash in amounts equal to or in excess of $10,000.[144] When the officials discovered the concealed amount, they seized the cash and took Bajakajian into custody. Even though Bajakajian subsequently pled guilty to willfully violating the reporting statute,[145] the government sought forfeiture of the entire unreported amount as mandated by the statute.[146] The Supreme Court, in a five-

138. 509 U.S. 602 (1993) (holding that the Clause barred excessive punitive in rem forfeiture).

139. 509 U.S. 544 (1993) (holding that the Excessive Fines Clause applied to criminal forfeitures).

140. *Austin*, 509 U.S. at 622-23 ("Prudence dictates that we allow the lower courts to consider [the appropriate standard for excessiveness] in the first instance."); *Alexander*, 509 U.S. at 559 ("We think it preferable that this question [of excessiveness] be addressed by the Court of Appeals in the first instance.").

141. *See, e.g.*, United States v. Chandler, 36 F.3d 358 (4th Cir. 1994) (applying an "instrumentality test"); United States v. 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994) (adopting the "proportionality test"); United States v. 6380 Little Canyon Road, 59 F.3d 974 (9th Cir. 1995) (adopting a "hybrid test"). For a discussion of these tests, see Melissa A. Rolland, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371, 1385-88 (1999).

142. 524 U.S. 321, 338 (1998).

143. *Id.* at 324-25.

144. *Id.* at 324 (charging violation of 31 U.S.C. § 5316(a)(1)(A) (1994) (requiring the reporting of the export or import of currency in the amount of $10,000 or more)).

145. 524 U.S. at 325. Bajakajian sought a bench trial on the issue of forfeiture.

146. 18 U.S.C. § 982 mandates forfeiture of the currency involved in a § 5316 reporting violation. "The court, in imposing sentence on a person convicted of an offense in

to-four decision, found that the punitive forfeiture constituted a "fine" that failed to measure up to the requirements of the Excessive Fine Clause.[147]

The Court's majority concluded instinctively that the forfeiture of Bajakajian's legally earned money for a "mere" reporting violation[148] that caused "minimal" harm[149] was excessive, especially when the money was not related to any illegal activities.[150] However, the majority acknowledged the absence of an articulated standard for determining the constitutional excessiveness of a punitive forfeiture.[151] Even though the Court was certain that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality," which requires "some relationship" between the amount of the forfeiture and "the gravity of the offense that it is designed to punish,"[152] the Court found no guidance from the text and history of the Clause on "how disproportional to the gravity of an offense a fine must be in order to be constitutionally excessive."[153] Nevertheless, Justice Thomas, writing for the majority, curtly declared "that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[154]

Justice Thomas explicitly rejected the standard of "strict proportionality" and, instead, adopted the "standard of gross disproportionality" as articulated in the Court's Cruel and Unusual Punishment Clause precedents[155] for two crucial and pragmatic policy

violation of [§ 5316] shall order that the person forfeit to the United States any property, real or personal, involved in such an offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1994).

147. *Bajakajian*, 524 U.S. at 344.

148. *Id.* at 337.

149. *Id.* at 339 ("The harm that respondent caused was also minimal.").

150. *Id.* at 338 ("Whatever his other vices, [Bajakajian] does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader."). Justice Kennedy raised the possibility that Bajakajian's "confused stories" about the source of the money and his purpose in transporting it raised suspicions of his linkage to more serious, but unproven, offenses. *Id.* at 352 (Kennedy, J., dissenting).

151. *See id.* at 334.

152. *Id.*

153. *Id.* at 336.

154. *Id.* at 334.

155. *Id.* at 336 (citing as examples *Solem v. Helm*, 463 U.S. 227, 288 (1983), and *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)). Significantly, the Court has not cited or acknowledged Justice Scalia's views on proportionality expressed in *Harmelin v. Michigan*, 501 U.S. 957 (1991).

considerations: respect for legislative judgments on crimes and punishments and the inherent fallibility of judicial determinations regarding the gravity of a particular criminal offense.[156] The standard of gross disproportionality is ambiguous and devoid of any determinate bench marks on how much an offense's gravity in a particular penological context should be proportionate to a particular fine in order to be within constitutional parameters. But it is clear that the gross disproportionality standard, at least in theory, is not as demanding or rigorous as the rejected strict proportionality standard.[157] Certainly, the review of excessive fines under the gross disproportionality standard cannot be much different from the "exceedingly restrictive proportionality review" under its counterpart, the Cruel and Unusual Punishment Clause.[158]

Justice Thomas adopted "gross proportionality" because he reasonably construed the Excessive Punishments Clause by equating "excessiveness" with "disproportionality."[159] However, there is "[n]othing inherent in the ordinary meaning of the term 'excessive' [that] necessarily requires reference to *gross* disproportionality."[160] Additionally, Justice Kennedy, writing in dissent and in his familiar style, endorsed the gross disproportionality standard, but disagreed with its application.[161] Justice Kennedy and his three supporting

156. *Bajakajian*, 524 U.S. at 336.

157. Rolland, *supra* note 141, at 1399 (stating that the gross proportionality standard is a much lower standard than strict proportionality).

158. Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and the Desert-Based Constitutional Limits on Forfeiture after* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 465.

159. The Justice derived the meaning of excessiveness from eighteenth and early nineteenth century dictionaries. 524 U.S. at 335 ("Excessive means surpassing the usual, the proper, or the normal measure of proportion."). *See* WEBSTER AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining excessive as beyond the common measure or proportion); S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 680 (4th ed. 1773) ("beyond the common proportion").

160. Barry L. Johnson, 2000 ILL. U. L. REV. at 512 (emphasis added). Professor Johnson also points out, citing Justice Scalia's opinion in *Harmelin*, 501 U.S. 957, that a separate prohibition of grossly disproportionate punitive fines is superfluous because the Cruel and Unusual Punishments Clause already prohibits grossly disproportionate punishment. Johnson, *supra* at 512.

161. Justice Kennedy is the original architect of the now prolific proportionality doctrine. He crafted the doctrine in *City of Boerne v. Flores*, 521 U.S. 507 (1997), to cripple the enforcement powers of Congress under the Fourteenth Amendment. In *Harmelin*, he wrote a concurring opinion stating that "[t]he Eighth Amendment does not require strict proportionality between crimes and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring). The Justice seems to have the habit of agreeing with

dissenters charged the majority with unfaithfulness in implementing a constitutional test that they think is sound and proper.[162] The dissenters were upset that the majority "accord[ed] no deference, let alone substantial deference, to the judgment of Congress."[163] To the dissenters, this disregard for Congress' assessment of the seriousness of the crime at issue is "disrespectful of the separation of powers."[164]

The dissenters' homage to the sanctity of legislative judgments about crime and respect for the doctrine of separation of powers amounts to nothing more than meaningless encomium.[165] It should not have been difficult for them to realize that giving deference to congressional judgments on crime and punishment undercuts the utility of the proportionality principle that they ardently promote as a viable constitutional standard. On the one hand, the proportionality principle mandates judicial evaluation of congressionally set penalties that are impugned as excessive. If penalties are immune from judicial scrutiny, Congress could legislatively eliminate the protections embodied in the Excessive Fines Clause.[166] On the other hand, it is impossible for the judiciary to accord deference to legislative penal decisions as contemplated by the gross disproportionality principle. The decision of the district court in the *Bajakajian* litigation illustrates the point. The district court substituted its own judgment for that of Congress, both as to the seriousness of Bajakajian's crime and the appropriateness of the penalty that the crime warranted.[167] Finding

moderate positions and then turning around to disagree on some point to achieve his desired outcome.

162. *Bajakajian*, 524 U.S. at 348 ("This test would be a proper way to apply the Clause, if only the majority were faithful in applying it.") (Kennedy, J., joined by Rehnquist, C.J., O'Connor & Scalia, JJ., dissenting).

163. *Id.* ("Congress deems the crime serious, but the Court does not."). *Id.* at 354 ("Congress made a considered judgment in setting the penalty, and the Court is in serious error to set it aside.").

164. *Id.* at 344.

165. Recall the dissenters respect for congressional judgments on crime and punishment, in *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating a federal statute that made it a crime to possess handguns in a school zone); and *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the violence Against Women Act, which provided a federal damages remedy to victims of violence motivated by gender bias).

166. Charmin B. Shiely, United States v. Bajakajian: *Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?*, 77 N.C. L. REV. 1595, 1631 (1999) (stating that if a congressionally set "penalty is automatically viewed as proportional because Congress selected it, then any protection provided by the Excessive Fines Clause could be legislated out of existence").

167. The district court belittled Bajakajian's crime by attributing his failure to report the intended transportation of currency to his "distrust for the Government . . . stemming

the statutory forfeiture "extraordinarily harsh," and the maximum fine set by the Sentencing Guidelines "too little," the court ordered the forfeiture of an amount that "would 'make up for what I think a reasonable fine should be.'"[168] The Supreme Court's majority expressed no qualms about the district court's arbitrary forfeiture amount or its rationale.

If what transpired in *Bajakajian* represents "substantial deference" to Congress, then the deference prong of the Court's proportionality doctrine may mean very little. However, the thought of paying respect to legislative autonomy in fashioning criminal legislation is, itself, eminently admirable. It shows that the Court is indeed sensitive to the structural principle of the separation of powers. Justice Kennedy and his co-dissenters are right in their observation that the majority decision in *Bajakajian* made the legislative judgment concerning the seriousness of the crime practically nugatory or irrelevant. The problem with the dissenters' position is much more serious. In their conception, the proportionality standard begins and ends with the Justices' threshold policy judgment as to the seriousness of the crime and the propriety of the statutorily fixed punishment—a judgment that is likely to favor even stricter punishment. Considering Justice Kennedy's tendency to couch harsh outcomes in palatable judicial artifice, the principle of legislative deference in *Bajakajian* serves as a convenient smoke screen.

C. The Due Process Clause

Troubled by the inadequacy of judicial and legislative control at the State level,[169] the Supreme Court has been yearning to rein in "monstrous"[170] punitive damage awards. But the Court has had difficulty finding the requisite constitutional footing for federal intervention. The Court has long conceded that punitive damages

from cultural differences" - referring to his national heritage as a member of the Armenian minority in Syria. 524 U.S. at 326.

168. *Id.* (quoting Tr. of Oral Arg. 63).

169. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting) ("States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told any thing more specific than 'do what you think best.'").

170. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473 (1993) (O'Connor, J., joined by White, J., dissenting) (denouncing the $10 million punitive award in the case as "526 times actual damages and over 20 times greater than any punitive award in West Virginia history").

assessment "has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."[171] As recently as 1991, the Court made it clear that "[n]othing in [the Fourteenth] Amendment's text or history indicates an intention on the part of its drafters to overturn the [then] prevailing method" of punitive damages assessment.[172] However, the Court expressed its continuing "concern about punitive damages that 'run wild.'"[173] At last, after much hesitation, the Court discovered a wide-open constitutional avenue to reach the problem.[174]

Thus, in *BMW of North America, Inc. v. Gore*,[175] the Court, for the first time, "invalidated a state court punitive damage assessment solely because of its excessive amount."[176] In the case, the purchaser of a new car sued the seller, a BMW distributor, for not disclosing that the car was damaged in transit and repainted prior to the sale. The jury awarded the defrauded buyer $4,000 in compensatory damages and $4 million in punitive damages[177] which was later reduced to $2 million by the State Supreme Court.[178] The United States Supreme Court found the punitive damages award against BMW so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment.[179]

The due process constraints on punitive damages awards stem from the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" which dictate fair notice of punishable

171. Day v. Woodworth, 54 U.S. 363, 371 (1851).

172. *Haslip*, 499 U.S. at 17-18 (Blackmun, J., joined by Rehnquist, C.J., and White, Marshall, & Stevens, JJ., writing for the majority.)

173. *Id.* at 18 ("We note once again our concern about punitive damages that 'run wild.'").

174. In both *Haslip* and *TXO Production Corp.*, the Court evaluated the constitutionality of punitive damages awards under the Due Process Clause of the Fourteenth Amendment. In *Haslip*, the Court found no violation, even though the punitive damages award of 4 times the amount of compensatory damages, "may be close to the line" of unconstitutionality. 499 U.S. at 24. In *TXO Production Corp.*, the Court was "not persuaded" that the punitive damages award of 526 times the actual damages "was so 'grossly excessive' as to be beyond the power of the State to allow." 509 U.S. at 462.

175. 517 U.S. 559 (1996).

176. Glen R. Whitehead, BMW of North America v. Gore: *Is the Supreme Court Initiating Judicial Tort Reform?*, 16 QUINNIPIAC L. REV. 533, 559 (1997).

177. *BMW*, 517 U.S. at 565.

178. *Id.* at 567.

179. *Id.* at 575.

conduct and the severity of the state-imposed penalty.[180] Aided by its newly erected "[t]hree guideposts"—the reprehensibility of the defendant's conduct, the ratio between the punitive award and the harm suffered by the plaintiff, and the civil penalties provided in comparable cases—the Court concluded that BMW was not given fair notice and, therefore the $2 million punitive damages award was "grossly excessive."[181] As it did in the two prior cases, the Court declined to provide any "simple mathematical formula"[182] or "draw a bright line marking the limits of a constitutionally acceptable punitive damages award."[183] Additionally, the Court made it clear that restrictions on awards may sometimes constitute an arbitrary violation of the State's legitimate interest in punishment and deterrence.[184] Nevertheless, the Court recognized that the ratio between a punitive damages award and the actual harm to a plaintiff is the "most commonly cited indicium" of excessiveness. [185] Thus, the gross excessiveness requirement could be satisfied by proof of "gross disproportionality." The majority opinion indeed validates Justice O'Connor's argument in *TXO Production Corp.* that "the requirement of proportionality is implicit in the notion of due process."[186]

One mysterious aspect of the majority opinion is that it was made possible by the support of Justice Kennedy. In *TXO Production Corp.*, Justice Kennedy rejected the "grossly excessive" formulation as standardless[187] and insisted that the Constitution "does

180. *Id.* at 574.

181. *Id.* at 574-75.

182. *Id.* at 582.

183. *BMW*, 517 U.S. at 585. The Court repeated its statement in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 18 (1991), as it did in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. at 458 (1993), that "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *BMW*, 517 U.S. at 583.

184. *BMW,* 517 U.S. at 568. *See also id.* at 586. (Burger, C.J., joined by O'Connor & Souter, JJ., concurring) ("We have concluded that this award, in this case, was 'grossly excessive' in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause.").

185. *Id.* at 580.

186. *TXO Prod. Corp.*, 509 U.S. at 479.

187. *Id.* at 466. Justice Kennedy asks the rhetorical question: "excessive in relation to what?" and then states the answer, "excessive in relation to the conduct of the tort feasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award

not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions" but rather with "arbitrary or irrational deprivations of property."[188] According to the Justice, such deprivation occurs, regardless of "the absolute or relative size of the award," "[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than rational concern for deterrence and retribution . . . ."[189] That sounds like a categorical repudiation of the very idea of gross proportionality. However, Justice Kennedy did not give any explanation for his change of heart in the *BMW* case.

In her dissent in *BMW*, Justice Ginsburg, joined by Chief Justice Rehnquist, accused the majority of intruding "into territory traditionally within the State's domain,"[190] embracing a "vague concept of substantive due process, a 'raised eyebrow' test, as its ultimate guide."[191] In an uncommonly bitter dissent in the same case, Justice Scalia, joined by Justice Thomas, not only denounced the majority's reading of the Due Process Clause "as a secret repository of substantive guarantees against [the] 'unfairness . . . of an 'unreasonable' punitive award,"[192] but also vowed not to be "bound to give . . . *stare decisis* effect" to the Court's constitutional doctrine which is "not only mistaken but also insusceptible of principled application."[193] Justice Scalia characterized the majority decision as not merely "a judgment about a matter of degree, but a judgment about the appropriate degree of indignation or outrage . . . ."[194]

The majority decision in the *BMW* case generated more issues than the dissenters articulated. First, the decision was in obvious tension with the Seventh Amendment right to have an untarnished jury decision in a civil litigation.[195] Second, the objectives of

violates the Constitution." *Id.* at 466-67 (Kennedy, J., concurring). Justice Kennedy concurred in the opinion because the Court ultimately found the punitive award involved in *TXO* constitutional.

188. *Id.* at 467.

189. *Id.*

190. 517 U.S. at 612 (Ginsburg, J., joined by Rehnquist, C.J., dissenting).

191. *Id.*

192. *Id.* at 598-99 (Scalia, J., joined by Thomas, J., dissenting).

193. *Id.* at 599.

194. *Id.* at 600.

195. The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tied to a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

reasonableness and proportionality in punitive damages awards are not always achievable under the rational basis standard that is customarily used in reviewing economic matters. Finally, as the dissenters variously argued, the "grossly excessive" or "grossly disproportionate" formula was so vague that it gave no meaningful guidance to legislatures and the state and federal courts. The Court addressed most of these issues in its landmark decision *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[196]

Cooper Industries introduced a multi-function pocket tool that had the basic features of a virtually identical tool designed and marketed by Leatherman Tool Group.[197] In a suit in federal court claiming trade-dress infringement, unfair competition and false advertising under the Lanham Trademark Act of 1946,[198] a jury awarded Leatherman Tool $50,000 in compensatory and $4.5 million in punitive damages.[199] Cooper Industries challenged the verdict, claiming that the punitive damages award was "grossly excessive" under the *BMW of North America v. Gore* decision.[200] The district court dismissed Cooper's challenge, and the Ninth Circuit affirmed, concluding that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages."[201] The United States Supreme Court, finding error in the circuit court's use of the abuse of discretion review standard, vacated the judgment and remanded.[202]

The Court's seven to two opinion, written by Justice Stevens,[203] established several trail-blazing rules for the review of punitive damages awards. First, it took punitive awards from the pale of the Seventh Amendment by classifying them as "quasi-criminal" punishments which constitute no factual determination by the jury but only expressions of its moral condemnation.[204] Since "the jury's award of punitive damages does not constitute a finding of 'fact,'" appellate review of such awards under the Due Process Clause "does

196. 532 U.S. 424 (2001).

197. 532 U.S. at 427-28.

198. Trademark Act of 1946 (Lanham Act), Pub. L. No. 79-489, 60 Stat. 441 (codified at 15 U.S.C. § 1125(a) (1994 & Supp. V. 1999)).

199. *Cooper Indus.*, 532 U.S. at 429.

200. *Id.*

201. *Id.* at 431.

202. *Id.* at 443.

203. Justice Stevens' majority opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas and Breyer.

204. *Cooper Indus.*, 532 U.S. at 432.

not implicate . . . Seventh Amendment concerns."[205] Second, the Court ruled that the circuit courts should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.[206] The Court's espousal of the *de novo* review standard has fueled speculation that "litigants no longer have a right to have a jury determine the amount of punitive damages."[207] Finally, the Court recast the gross disproportionality principle as an extant and familiar concept that pervades its criminal law jurisprudence. The Court asserted that its cases under the Eighth Amendment and Due Process Clause have already imposed substantive limits on the States' discretion to mete out criminal penalties and punitive damages.[208] The Court cited five cases in which violations of the Eighth Amendment or due process were "predicated on judicial determinations that the punishment[s] were 'grossly disproportional to the gravity of . . . defendant[s'] offenses.'"[209]

In addition to making a single unified principle of gross disproportionality applicable to all criminal punishments, punitive forfeitures, and damages across the board, the majority opinion identified significant markers to help draw the line that would separate the constitutional from the unconstitutional. These markers—now designated as "general criteria"—are: "the degree of the defendant's reprehensibility or culpability, the relationship between the penalty and the harm to the victim caused by the defendant's actions, and the sanctions imposed in other cases for comparable misconduct."[210] The three general criteria, which are remarkably identical to the trio of guideposts specified in the *BMW* decision, are culled from the same quintet of cases which the Court

205. *Id.* at 437.

206. *Id.* at 436.

207. Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 411 (2002).

208. *See Cooper Indus.*, 532 U.S. at 433.

209. *Id.* at 434 (citing *Enmund v. Florida*, 458 U.S. 782 (1982), involving excessiveness of applying death penalty to a person who did not take or attempted to take life; *Coker v. Georgia*, 433 U.S. 584 (1977), stating death sentence is "grossly disproportionate" and excessive punishment for the crime of rape; *Solem v. Helm*, 463 U.S. 277 (1983), holding imprisonment without the possibility of parole for non-violent felonies to be "significantly disproportionate"; *United States v. Bajakajian*, 524 US. 321 (1998), finding punitive forfeiture for reporting violation to was "grossly disproportional"; and *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), finding punitive damage award "grossly excessive").

210. *Cooper Indus.*, 532 U.S. at 435.

identified as the wellspring of the gross proportionality standard.[211] The Court emphasized the need for "independent examination of the relevant criteria" by the judiciary because gross proportionality is as "fluid" or imprecise a concept as "reasonable suspicion" and "probable cause."[212]

Justice Ginsburg was not impressed with the majority's earnest effort to synthesize divergent cases, that were decided under disparate constitutional provisions, in order to formulate a uniform standard for criminal punishment, punitive forfeitures, and damages. Even Justices Scalia and Thomas, who saw no constitutional constraint against excessive punitive damages, wrote single paragraph concurrences agreeing with the Court that the trial court decision should be reviewed *de novo* by the appellate court.[213] In her solitary dissent, Justice Ginsburg maintained that the standard of review for punitive awards should not be *de novo*, but only "abuse of discretion."[214] Disagreeing with the majority's view that jury verdicts on punitive damages are not fact-dependent, Justice Ginsburg asserted that punitive damages are "not 'unlike the measure of actual damages suffered' in cases of intangible, noneconomic injury"[215] and are therefore, "fundamentally dependent" on fact finding.[216] In her view "[o]ne million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage."[217] Clearly, Justice Ginsburg, with Justices Scalia and Thomas, is dead against any constitutional control of punitive damages awards.[218]

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211. *See id.* After stating each of the criteria, the Court cited the same five cases: *Bajakajian,* 524 U.S. 321 (1998)*; Gore,* 517 U.S. 559 (1996)*; Solem,* 463 U.S. 277 (1983)*; Enmund*; 458 U.S. 782 (1982); and *Coker*, 433 U.S. 584 (1977).

212. *Cooper Indus.*, 532 U.S. at 435-36.

213. *Id.* at 443 (Thomas, J., concurring) ("I continue to believe that the Constitution does not constrain the size of punitive damages awards"); *Id.* at 443-44 (Scalia, J., concurring in the judgment) ("I was (and remain) of the view that excessive punitive damages do not violate Due Process Clause.").

214. *Id.* at 444 (Ginsburg, J., dissenting).

215. *Id.* at 446.

216. *Id.*

217. *Id.*

218. *See id.* at 444-50. Justice Ginsburg objected to gross disproportionality review because of the use of the de novo review standard. *Id.* The Justice's opposition to gross disproportionatility review was based on her hesitation to intrude "into an area dominantly of state concern." *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting). It is reasonable to conclude that Justice Ginsburg not only is against constitutional control of punitive damages, but against the idea of gross disproportionality review as well.

IV. JUDICIAL APATHY TOWARD THE DISABLED

In the context of review of congressional legislation to enforce the Equal Protection Clause, the congruence and proportionality test has functioned as a doctrinal twin to the Court's established standards of constitutional scrutiny. The test and the standards work in tandem to completely insulate state governments from the reach of federal anti-discrimination laws. The congruence and proportionality test has been decisive in safeguarding discriminatory state practices that stood no chance of surviving even the lowest rationality standard of review. Thus, with the Court's current majority ideologically committed to protect "state sovereignty" from federal intrusion at any cost, the congruence and proportionality test operates as an indispensable fourth standard of constitutional scrutiny that could appropriately be called "the standard of no rationality." This is exactly how the test appeared to work in the Court's analysis of the constitutionality of the Americans with Disabilities Act (ADA) in *University of Alabama v. Garrett*.[219]

The ADA prohibits employers, including the States, from "discriminating against a qualified individual with a disability because of the disability of such an individual"[220] in matters of employment and requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business."[221] In *Garrett*, the Court held that victims of employment discrimination are barred from suing their state employers for money damages as authorized by the ADA because the ADA does not constitute "appropriate" enforcement legislation that validly abrogates the sovereign immunity enjoyed by the States under the Eleventh Amendment.[222] According to the prevailing interpretation

219. 531 U.S. 356 (2001) (citing Americans with Disabilities Act of 1990, Tit. I(Employment) [42 U.S.C. §§ 12111-12117 (2003)]).

220. 42 U.S.C. §§ 12112(a), 12111(2), (5), (7).

221. 42 U.S.C. § 12112(b)(5)(A).

222. *Univ. of Ala.*, 531 U.S. at 363 (*citing* U.S. CONST. amend. XI, which 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.") The Court has extended the Amendment's applicability to suits by citizens against their own States. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). The Court also has construed Eleventh Amendment immunity as barring congressionally authorized suits against non-consenting

of the Fourteenth Amendment, enforcement legislation is not considered "appropriate"[223] unless it is "corrective in its character [and] adapted to counteract and redress the operation" of state laws or policies that run counter to the rights guaranteed by the Amendment.[224] Only legislation that is designed to remedy or redress state transgressions qualifies as "appropriate."[225] Therefore, in order to condemn the ADA as inappropriate enforcement legislation, the Court had to conclude that the state employers were not unconstitutionally discriminating against disabled individuals..

A. Rationality Review

As the first step to reaching the conclusion that states are not discriminating against the disabled, the Court downgraded disability discrimination to a constitutional status that deserves no more than the lowest standard of review. The Court simply claimed that a state classification based on disability "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose"[226] and that the states can deny special accommodations to the disabled, and do so "quite hardheartedly and perhaps hardheadedly" so long as their actions toward such individuals are rational.[227] The Court's claim is entirely based on its 1985 decision in *Cleburne v. Cleburne Living Center, Inc.* that held that a classification based on mental retardation was not "quasi-suspect."[228]

The *Cleburne* Court offered no textual or historical support for relegating disability discrimination to the rationality standard of review. Nevertheless, it found the discrimination at issue in the case was irrational and unconstitutional. Therefore, the *Cleburne* Court's discussion of the standard of review is at best tangential to its decision.[229] Moreover, in *Garrett*, the Court should not have given

States in State courts. *See* Alden v. Maine, 527 U.S. 706 (1999).

223. *See* U.S. CONST. amend. XIV, § 5 (authorizing Congress to "enforce" the rights guaranteed by the Amendment by "appropriate" legislation).

224. *See* Civil Rights Cases, 109 U.S. 3, 18 (1883); *see also* City of Boerne v. Flores, 521 U.S. 507, 520-25 (1997).

225. *City of Boerne*, 521 U.S. at 525.

226. *Univ. of Ala.*, 531 U.S. at 367.

227. *Id.* at 367-68.

228. *Id.* at 357 (citing *Cleburne*, 473 U.S. at 435).

229. *Cleburne*, 473 U.S. at 445-50 (The *Cleburne* Court was prodded to discuss the review standard by the holding of the lower court that disability classification was "quasi-suspect.").

such decisive weight to the *Cleburne* decision - which, after all, involved only a city ordinance that required a special use permit for the operation of a group home for the mentally retarded. It is easy to presume that the *Cleburne* Court would have ruled differently had it been considering the constitutionality of the ADA - national legislation of enormous scope and vital significance to millions of disabled individuals. Even if the *Cleburne* decision is an accurate depiction of the law of disability discrimination a decade and a half ago, there can still be questions concerning the continuing vitality of the decision's underlying reasoning and its applicability to national disability legislation. However, the *Garrett* Court largely ignored the reasoning of the *Cleburne* decision.

As the four dissenting Justices in *Garrett* pointed out, the *Cleburne* Court's decision not to subject disability discrimination to heightened scrutiny reflected its reluctance "to closely scrutinize legislative choices" due to "respect for the separation of powers." [230] Recognizing the inherent difficulty in deciding how to treat the "large diversified group" of disabled people, the *Cleburne* Court decided that it should be "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[231] Additionally, the *Cleburne* Court noted the three existing federal statutes that were designed to provide assistance to the disabled,[232] and expressed satisfaction over the commitment of federal and state governments to assist the disabled.[233]

The ADA represents the fulfillment of the need identified in *Cleburne*—a comprehensive legislative determination of how to treat the disabled. Congress spent years on studies, hearings, and reporting to identify the multiple dimensions of the problem of prejudice and discrimination that the disabled encounter in every walk of life, including employment. The ADA embodies the carefully crafted legislative solution to that national problem. The *Garrett* Court did not identify the constitutional footing for the rationality standard nor did it give any sound justification for using that standard to override the groundbreaking national antidiscrimination legislation.

230. 531 U.S. at 383 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (quoting *Cleburne*, 473 U.S. at 441).

231. 473 U.S. at 443.

232. Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6060(1), (2) (2002); Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B) (2002); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2002).

233. *Cleburne*, 473 U.S. at 443-44.

The Court has not yet offered any doctrinally consistent justification for the application of rationality review to state discriminatory practices that defy federal prohibition. Consider the Court's justification for holding, in *Kimel v. Florida Board of Regents*,[234] that the federal Age Discrimination in Employment Act of 1967 (ADEA)[235] does not validly abrogate the State's Eleventh Amendment immunity and, therefore, that the states are not bound by the ADEA's prohibitions. The essential predicate for the holding was the Court's conclusion that a "State may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[236] The Court gave two key reasons for reviewing age discrimination under the rationality standard. First, "age is not a suspect classification under the Equal Protection Clause" because older people are not a discrete and insular minority and they have not been subjected to a history of purposeful unequal treatment.[237] Second, "[u]nder the Fourteenth Amendment, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the state's legitimate interests. That age proves to be an inaccurate proxy in any individual case is irrelevant."[238] If these reasons are sound and objective, they were not repeated or relied on by the Court to support its determination to review disability discrimination under the rationality standard. Instead, Chief Justice Rehnquist's majority opinion tries to insinuate that no more justification for rationality review is needed than what is contained in the elusive *Cleburne* decision.

Nevertheless, the *Kimel* justifications are absurd in the context of disability discrimination. Congress has already designated the disabled a discrete and insular minority "subjected to a history of purposeful unequal treatment and relegated to a position of [powerlessness] in our society."[239] As *Cleburne* contemplated, our national legislature is the appropriate and competent body to make such a designation. More importantly, the States cannot rely on disability "as a proxy for other qualities, abilities or characteristics that are relevant to the State's legitimate interests." One of the

234. 528 U.S. 62, 91 (2000).

235. 29 U.S.C. § 621 et. seq. (1994 ed. and Supp. III); 81 Stat. 602, as amended.

236. *Kimel*, 528 U.S. at 83.

237. *Id.*

238. *Id.* at 84.

239. 42 U.S.C. § 12101(a)(7) (1995).

fundamental objectives of the ADA is to prohibit employers from judging the disabled on the basis of "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[240]

B. Congruence and Proportionality

By removing most of the blemishes of unconstitutionality from State discriminatory practices, the Court has created the necessary condition for the application of the "congruence and proportionality" test. Without the test, the States would have remained vulnerable to liability for "irrational discrimination" against the disabled, such as occurred in the *Cleburne* case. The only way to shield the States from exposure to liability for damages was to find that the ADA failed the congruence and proportionality test.

The test requires more than proof of irrational discrimination. In order for enforcement legislation to survive the test, the Court insisted, "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[241] The Court offered no objective yardstick or guideline to measure incongruity or disproportionality. Justice Breyer and his three co-dissenters were satisfied that Congress had "compiled a vast legislative record documenting 'massive, society-wide discrimination' against the disabled."[242] They specifically culled from the legislative record "roughly 300 examples of discrimination by state governments themselves."[243] However, the Court's majority found the evidence faulty and inadequate. The majority opinion by Chief Justice Rehnquist discards most evidence cited by the dissent as indicative of discrimination by local governments or by society in general. He recognized only "half a dozen examples from the record that did involve States."[244] The Chief Justice concluded that "[t]he legislative

240. *Id.* The ADA prohibits discrimination against individuals who are actually disabled, and also against those who have a history of disability or who are simply regarded as disabled.

241. *Univ. of Ala.*, 531 U.S. at 374.

242. *Id.* at 377 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting) (quoting S. REP. NO. 101-116, at 8-9 (1989)).

243. *Univ. of Ala.*, 531 U.S. at 379.

244. *Id.* at 369. The court already is set to decide if Congress identified a pattern of irrational state discrimination against the disabled in access to public accommodations sufficient to validate enforcement of Title II of the ADA against the states. Med. Bd. of Cal. v. Hason, 123 S.Ct. 561 (2002), case below 279 F. 3d 1167 (2002).

record of the ADA, however, simply failed to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[245]

Even if Congress had demonstrated a pattern of unconstitutional state discrimination, the ADA requirement of "reasonable accommodation" for the disabled would still fail the congruence and proportionality test. The ADA exempts employers from the accommodation duty if they "can demonstrate that the accommodation would impose an undue hardship on the operation of the[ir] business."[246] Nevertheless, the Court found that "even with this exception the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."[247]

Without the congruence and proportionality test, the States would remain liable for discriminatory employment practices that are not shielded by the standard of rationality review. In such a case, requiring reasonable accommodation that causes no undue burden on the employer would be a viable remedial response to unconstitutional discrimination. In fact, accommodation requirements and antidiscrimination laws are constitutional equivalents; in some cases they are inseparable.[248]

The requirement that Congress should identify a pattern of unconstitutional discrimination and then establish this pattern with evidence satisfactory to the Court is patently inconsistent with the Court's past interpretation of Congress' enforcement powers under the Fourteenth Amendment.[249] By imposing such a seemingly impossible burden on Congress, the Court, as the dissenting Justices stated, is simply treating Congress as an administrative agency or a

245. *Univ. of Ala.*, 531 U.S. at 368.

246. 42 U.S.C. § 12112(b)(5)(A).

247. 531 U.S. at 372.

248. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651 (2001) ("This argument is normative in any sense; it is simply that there is no way, as a factual matter, to distinguish the specified aspects of antidiscrimination law [in particular its disparate impact branch] from [the] requirement of accommodation.").

249. The Court has stated in the past that "the Fourteenth Amendment . . . [ ] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), and that "Congress may use any rational means" to prevent the States from discriminating. South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966). The Court never overruled these precedents, but rather frequently pays lip service to them.

lower court.[250] Justice Kennedy's concurring opinion supports the dissenters' accusation. Weighing in against the disabled in his customary style,[251] Justice Kennedy claimed that the lack of "confirming judicial documentation" from litigation by the disabled in state and federal courts was evidence of the absence of State constitutional transgressions.[252]

According to the Court's own characterization, state disability laws are in the category of "general social and economic legislation" deserving review under the rational basis standard.[253] The ADA belongs to the same category and, therefore, it also merits rationality review. However, the Court subjected the ADA to a stricter standard of review. The *Garrett* Court requires Congress to prune antidiscrimination legislation in a manner reminiscent of the narrow tailoring requirement of strict scrutiny. Congressional findings relating to the persistence of societal discrimination are not relevant to the question of discrimination by a State under *Garrett*.[254] The Court even discounted the probative value of evidence of discrimination collected by a congressionally appointed Task Force.[255] Further, the Court limited the ADA exclusively to "irrational state discrimination," thereby excluding the bulk of covert and overt discriminatory behavior against the disabled.[256] It was suggested that the "shortcomings" of the ADA would be lessened if its application were strictly limited to identified discriminating States and then only after determining that "litigation had proved ineffective" to tame them.[257] Congress is admonished in unequivocal terms not to

250. *Univ. of Ala.*, 531 U.S. at 376.

251. Justice Kennedy, before voting for the majority, made the platitudinal statement: "There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will." *Id.* at 375 (Kennedy, J., joined by O'Connor, J., concurring).

252. *Id.* at 375-376.

253. *Id.* at 366.

254. *See id.* at 371.

255. *See id.* at 370.

256. *Id.* at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination against the disabled").

257. Congress is advised to do what it did in fashioning the Voting Rights Act of 1965. The Court recounted the factors that it considered in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which approved the Act. In addition to geographical limitation, in enacting the Voting Rights Act "Congress also determined that litigation [which provided remedies for proven violations of the Equal Protection Clause] had proved ineffective." *Univ. of Alab.*, 531 U.S. at 373.

prescribe a remedy that "exceeds what is constitutionally required."[258] All of these requirements, imposed on Congress under the aegis of the congruence and proportionality test,[259] partake of the nature of narrow tailoring. *Garrett* and the two other antidiscrimination cases that preceded it[260] lead to only one conclusion: that the congruence and proportionality test is an unstructured and open-ended form of strict scrutiny.[261] The Court's approach to antidiscrimination legislation mystified the four dissenting Justices who expressed "difficult[y] [in] understanding why the Court, which applies 'minimum "rational basis" review' to statutes that burden persons with disabilities . . . subjects to far stricter scrutiny a statute that seeks to help those same individuals."[262]

C. Suggested Alternatives

As if trying to cushion the heavy impact of its harsh decision on

258. *Id.* at 372.

259. *Id.* at 374. To authorize a private damages remedy "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."

260. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529, U.S. 598 (2000).

261. *See* Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L. J. 441, 511 (2000) ("Both *Morrison* and *Kimel* have displayed the tendency to allow the [*City of Boerne v. Flores's* congruence and proportionality] test to slide into a kind of narrow tailoring, as if even Section 5 legislation enacted for a proper purpose must nevertheless be shown to be a 'carefully delimited' remediation of an appropriate constitutional violation."). *See also id.* at 477 ("Yet *Morrison* uses the congruence and proportionality test to fasten tight restrictions on the exercise of otherwise legitimate Section 5 legislation, restrictions that seem analogous to the narrow tailoring required by strict scrutiny.").

For a similar understanding of the scope of the congruence and proportionality test, see Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 165 (1997) ("The 'congruence and proportionality' standard appears to be more rigorous than the standard of review applied in earlier section five cases, such as *Katzenbach v. Morgan* . . . in effect, the *Boerne* Court replaced something akin to 'rational basis scrutiny' with a narrow tailoring requirement typical of intermediate scrutiny"); Thomas W. Beimers, *Searching for the Structural Vision of* City of Boerne v. Flores*: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L. Q. 789, 802 (1999) ("In essence, congruence requires a tight fit between the wrong to be prevented and the means to be adopted. . .").

In fact, the Court acknowledged that the congruence and proportionality test demands narrow tailoring when it restated the *Boerne* test in *Florida Prepaid.* 527 U.S. 627, 639 (1999) ("We thus held that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.").

262. *Univ. of Ala.*, 531 U.S. at 387-388 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting).

the disabled of this nation, the *Garrett* Court offered some soothing alternatives. In the final footnote to his opinion, the Chief Justice reminds disabled persons that, in spite of the Court's decision, they still have "federal recourse against [state] discrimination"[263] in the form of suits for damages by the United States against state violators of ADA standards and private individual suits for injunctive relief under *Ex parte Young*.[264] But these alternatives "are inadequate to protect the rights of state employees."[265] Consider the plight of the plaintiff in *Garrett*. The University of Alabama Hospital demoted Patricia Garrett, its Director of Nursing, on her return from treatment for breast cancer and then forced her to take a lower paying position.[266] Although Garrett is a victim of discrimination and is entitled to recover money damages under the ADA, she is barred from enforcing her *federal* rights in *federal* courts. She is also barred from suing in state courts by state-law doctrines of sovereign immunity.[267] Therefore, in the end "[s]he has a legal right, but she has no legal right."[268] Because of the built-in limitations stemming from policy and budgetary considerations, federal enforcement action seeking money damages from the State of Alabama can only be a rare occurrence.[269] Even if an *Ex parte Young* action is feasible,[270] it would

263. *Id.* at 374 n.9 ("Title I of the ADA still prescribes standards applicable to the States.").

264. *Ex parte* Young, 209 U.S. 123, 166 (1908).

265. Brent W. Landau, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 170 (2002).

266. *Univ. of Ala.*, 531 U.S. at 362.

267. Article I, Section 14 of the Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." The Alabama Supreme Court held that "Section 14 prohibits the State from being made a defendant in any court of this state and neither the State nor any individual can consent to a suit against the State." Williams v. Hank's Ambulance Serv., 699 So. 2d 1230, 1232 (Ala. 1997) (quoting Gunter v. Beasley, 414 So.2d 41, 48 (Ala. 1982)). For a good description of the absolute nature of the state sovereign immunity, see Evelyn Corwin McCafferty, *Age Discrimination and Sovereign Immunity: Does Kimel signal the End of the Line for Alabama's State Employees?*, 52 ALA. L. REV. 1057 (2001).

268. Jed Rubenfeld, *The Anti-Discrimination Agenda,* 111 YALE L. J. 1141, 1149 (2002).

269. Apart from the constraints of scarce employee resources, the federal government would be hesitant to take up the interests of a few discriminated against state employees to seek money damages from a "sovereign" State and run the political risk of alienating voters and state politicians.

270. *Ex parte Young* doctrine has a checkered history. Even though the doctrine has been reaffirmed recently in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Court restricted its scope by holding that "where Congress has prescribed a detailed

not provide an aggrieved state employee any monetary relief.[271] Therefore, federal enforcement and private injunctive actions are not viable substitutes for private suits for damages under the ADA.

But the *Garrett* footnote also referred to state disability laws as alternative "independent avenues of redress."[272] An objective analysis of the State disability statutes shows that they are either inadequate or ineffective substitutes for the right to sue for damages that is granted by the ADA to state employees. The disability statutes of thirty-eight States do not provide a damages remedy beyond an award of back pay to discriminated state employees in civil actions.[273] Rights to sue for what relief is available are hedged with substantive and procedural restrictions by the disability statutes of forty-eight States.[274] Therefore, while the fact that all of the States have enacted

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remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996). Also, a suit against a state official under the *Young* doctrine is barred when "the state is the real, substantial party in interest." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984). The Chief Justice is not unaware of these restrictions because he was part of the Court's majority decisions in both *Seminole Tribe* and *Pennhurst*.

271. The *Ex parte Young* suits allow only injunctive relief to prevent continuing violations of federal law by state officials. *Ex parte Young*, 209 U.S. at 166.

272. 531 U.S. at 374 n.9, *citing id.* at 368 n.5 ("It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted [disability statutes].").

273. Only twelve states, Alaska, California, Hawaii, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Vermont, and Washington, have statutes explicitly allowing for damages in civil rights actions. Courts have found implied authority to award damages in such actions in an additional five states, Kansas, Louisiana, Maine, Michigan, and West Virginia. Annotation, *Recovery of Damages as Remedy for Wrongful Discrimination Under State or Local Civil Rights Provisions*, 85 A.L.R.3d 351, §§ 3-4, (1978 & Supp. 2000).

274. Only Tennessee and Vermont allow state employees to sue for disability discrimination in state court without restriction. Twelve more states allow, with minimal restrictions, state employees to privately bring civil actions for disability discrimination in state courts with a right to a jury trial: Alaska, Idaho, Louisiana, Maine, Michigan, New Jersey, North Carolina, Ohio, Oregon, South Dakota, Washington, and West Virginia. Another five states allow such actions with minimal restrictions, but do not provide for jury trials: Kentucky, Minnesota, New York, North Dakota, and Texas. Charles R. Richey, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS, APP A-3, (1994 & rev. 2001). Of the remaining states, eight do not allow state employees to file private lawsuits for disability discrimination: Alabama, Delaware, Illinois, Maryland, Mississippi, Utah, Wisconsin, and Wyoming. Brent W. Landau, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 190 n.193 (2002). The remaining 23 states require state employees to bring their disability discrimination claims before an administrative hearing with limited rights of appeal to the state courts. Richey,

disability laws is extremely significant, it is inappropriate to overstate their role as available substitutes for the ADA.

Instead of giving false hope to the disabled, the Court easily could have found a silver lining in the legislative judgments of the States concerning the disabled. Each of the state disability statutes, regardless of its scope, represents an expression of public sentiment against discriminatory treatment of disabled citizens.[275] Four of the Court's conservative Justices have long maintained that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[276] In the context of assessing the constitutionality of the death sentence, the Court readily found a "broad societal consensus"[277] in favor of the death penalty in state legislatures' judgment as manifested in "roughly 20 states."[278] And most recently, when six Justices of the Court ruled against the execution of mentally retarded persons,[279] they relied on "the evolving standards of decency that mark the progress of a maturing society"[280] as drawn from eighteen state statutes banning such executions. Only Chief Justice Rehnquist and Justices Scalia and Thomas thought that "agreement among forty-seven percent of the death penalty jurisdictions" did not amount to a "national consensus."[281] But even these Justices should have no difficulty in discerning from all the state antidiscrimination statutes a

supra APP A-3.

275. If a particular state disability law, such as the law of Alabama, fails to provide full protections to the disabled against employment discrimination, it reflects the State's long standing attitude toward discrimination not only against the disabled, but against its minority population in general. What is significant is that even Alabama has a disability law. Ala. Code § 21-7-1 (1975). One of the major objectives of the ADA is to provide a federal remedy to make up for the deficiencies that exist in various state disability laws. *See supra*, notes 242-43 and accompanying text.

276. Perry v. Lynaugh, 492 U.S. 302, 331 (1989) (O'Connor, J., joined by Rehnquist, C.J., Scalia, Kennedy, & White, JJ.)

277. Tison v. Arizona, 481 U.S. 137, 147 (1987) (citing Enmund v. Florida, 458 U.S. 782, 788 (1982) (holding that the death penalty was proportional to the crime of robbery-felony murder)). The Court's opinion in *Tison* was written by Justice O'Connor, and joined, among others, by Chief Justice Rehnquist and Justice Scalia.

278. *Tison*, 481 U.S. at 178 (Brennan, J., dissenting).

279. Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 2252 (2002). (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg and Breyer, JJ).

280. *Id.* at 2261 (Scalia, J., dissenting). Justice Scalia accused the majority of engaging in a "feeble effort to fabricate a 'national consensus.'" *Id.* at 2264. The Chief Justice blamed the majority for interpreting the Cruel and Unusual Punishment Clause to bar execution of the retarded, based on eighteen state laws, despite the fact that twenty other states continue to adhere to the death penalty. *Id.* at 2252 (Rehnquist, C.J., dissenting).

281. *Id.* at 2261 (Scalia, J., dissenting).

standard of decency and a national consensus against mistreatment of the disabled in all walks of life, including public employment. The ADA, enacted with near unanimity in both chambers of our national legislature and signed by a conservative president, is certainly the embodiment of the prevailing national consensus. Five Justices of the Supreme Court have lost sight of that stark reality.

D. The Extra-Constitutional Factor

Chief Justice Rehnquist's majority opinion in *Garrett* raises more constitutional and moral questions than it resolves. It substantially undermines the enforcement power of Congress by declaring state discrimination against the disabled presumptively valid and requires Congress to prove that its legislation banning even the most egregious and irrational state discrimination is tailored to meet the test of "congruence and proportionality."[282] The *Garrett* decision abruptly impeded, if not reversed, progress toward the integration of competent and qualified disabled individuals into the mainstream workforce of the nation. Therefore, the decision is morally inexplicable except on sound constitutional principles.

The *Garrett* decision has severe constitutional flaws. To begin with, review of state discrimination against the disabled under the minimum rationality standard has no constitutional mooring. As fully articulated in the next segment of this article, the arbitrariness of such low level review is highlighted by the Court's use of strict scrutiny review against interstate commercial discrimination - even at the expense of the core aspects of state sovereignty. Moreover, the Court downgrades disability discrimination on the scale of constitutional values protected by the Equal Protection Clause. By doing so, the Court defies the declaration of Thaddeus Stevens—the chief architect of the Clause, who was himself a victim of disability discrimination—that under the Clause "no distinction would be tolerated in this purified Republic but what arose from merit and conduct."[283] It is indeed "a cruel irony [that] the clause [Thaddeus Stevens] loved was interpreted so that the very discrimination that motivated it would continue to be tolerated."[284] To make matters even worse, as

282. Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

283. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR REBEL ON THE BENCH 27 (rev. ed. 1994).

284. Aaron J. Walker, *"No Distinction Would be Tolerated": Thaddeus Stevens, Disability, and the Original Intent of the Equal Protection Clause*, 19 YALE L. & POL'Y REV. 265, 301 (2000).

explained in detail later, the brand new "congruence and proportionality" test is an unbridled judicial construct that has no basis in the text or history of the Fourteenth Amendment.

V. THE INVERTED DOCTRINE OF STATE SOVEREIGNTY

The Supreme Court's willingness to tolerate state discrimination against the disabled to safeguard state sovereignty calls for comparison with its absolute intolerance of state discrimination against corporate and business interests without showing any discernible concern for state sovereignty. In effect, under the self-assumed oversight authority created by its Dormant (negative) Commerce Clause jurisprudence, the Court has fashioned a theory of commercial discrimination that cuts into the core of the state sovereignty.

An analytical comparison between the theories of discrimination developed under the Dormant Commerce Clause and the Equal Protection Clause is appropriate and enlightening in several respects. First, there are striking similarities between the two constitutional provisions. Just as the Fourteenth Amendment has twin aspects—a grant of legislative power to Congress and a limitation on state sovereignty—the Commerce Clause "has long been seen as a limitation on state regulatory powers, as well as an affirmative grant of congressional authority."[285] In its negative aspect, "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of States."[286]

Second, the Court's lopsided antidiscrimination rules under the two constitutional provisions demonstrate that it is disposed to disregard the interests of state sovereignty to protect commercial values, and not to protect the human values enshrined in civil rights statutes such as the ADA.

Third, the antidiscrimination rules of the Dormant Commerce Clause clearly undercut the Court's assertion that the proportionality standard of the Fourteenth Amendment is indispensable to prevent congressional antidiscrimination laws under the Fourteenth Amendment from intruding into the states' legislative domain. In enforcing its strict rules against state commercial discrimination as the

285. Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996).

286. Camps Newfound/Owatonna, Inc. v. Harrison, 520 U. S. 564, 571 (1997) (citing Southern Pacific Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761 (1945); Morgan v. Virginia, 328 U.S. 373 (1945); Freeman v. Hearst, 329 U.S. 249, 252 (1946)).

surrogate of Congress under the Dormant Commerce Clause, the Court never considered it necessary to restrain itself from overstepping its authority by means of a proportionality standard. If a proportionality standard is appropriate for gauging the limits of federal authority under the Fourteenth Amendment, it should be equally appropriate to use it as a gauge of the limits of the Dormant Commerce Clause authority to achieve the same enforcement goal. Under such a parallel proportionality standard, the Court may arguably be better able to determine whether the state interest advanced in support of commercial discrimination in any given case is disproportionate to the national interest in protecting interstate commerce. However, the Court recently asserted, without offering any persuasive reasoning, that the proportionality standard is applicable only to Fourteenth Amendment enforcement legislation, and not suitable for review of legislation enacted pursuant to Article I authorization.[287]

287. In *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), the Court declined to apply the "congruence and proportionality" standard to determine whether the 1998 Copyright Term Extension Act (CTEA) exceeded Congress' power under the Copyright Clause of the Constitution. *See* U.S. CONST. art. 1, § 8, cl. 8. The Court simply stated that it had "never applied that standard outside the § 5 [of the Fourteenth Amendment] context; it does not hold sway for judicial review of legislation enacted, as copyright laws are, pursuant to Article I authorization." *Eldred,* 123 S. Ct. at 788. The Court added that Congress has only the power to "enforce" under § 5, but it possessed the power to "define the scope of the substantive right" under the Copyright Clause and that congressional definition deserves judicial deference. *Id.* This is hardly a persuasive justification for not applying the proportionality standard to copyright laws. First, the Court has always accorded "judicial deference" to Congress' determination as to what is enforceable under the Fourteenth Amendment. Second, the distinction between "enforce" and "define" has no bearing on the plaintiff's argument in the case that the congruence and proportionality standard is appropriate to determine whether Congress has transgressed its power to define the scope of the Copyright Clause in enacting CTEA. Whether the standard is used to review enforcement legislation or defining legislation, the focus of the review is the same: whether Congress has exceeded its constitutionally assigned powers.

At any rate, enforcement-definition dichotomy is not entirely pertinent to review under the Dormant Commerce Clause for two specific reasons. First, review under Dormant Commerce Clause entails no congressional legislation. What is involved in such review is judicial "enforcement" of Congress' powers under the Commerce Clause. Second, the Rehnquist conservative majority of the Court has insisted since 1995 that Congress' authority under the Commerce Clause is "limited" and that it will be "interpreted as having judicially enforceable outer limits." United States v. Morrison, 529 U.S. 598, 610 (2001); *see also* United States v. Lopez, 514 U.S. 549, 566 (1995). One can only wonder what the Court's justification for not applying the proportionality standard in *Eldred* really is. The answer may be implicit in the Court's curt statement: "It would be no more appropriate for us to subject the CTEA to 'congruence and proportionality' review under the Copyright Clause than it would be for us to hold the Act unconstitutional *per se*." *Eldred,* 123 S. Ct. at 788. The Court here seems to admit that review under the

A. Discriminatory State Taxes

Negative commerce clause jurisprudence is a composite of intricate and far-reaching restrictions on the States' power to regulate their own economic and commercial affairs. In general, state laws that evince simple economic protectionism or impose an undue burden on interstate commerce are subject to judicial scrutiny of varying intensity and possible invalidation under the Dormant Commerce Clause.[288] The jurisprudence comes down hardest on the States' authority to formulate tax policies that the States deem appropriate for the welfare of their citizens. The Court's unanimous decision in *Fulton Corp. v. Faulkner*[289] fully articulates the Dormant Commerce Clause restrictions on the States' taxing power.

In *Fulton*, the Court invalidated a North Carolina "intangibles tax" on corporate stock owned by North Carolina residents. The tax was assessed at a rate of one quarter of one percent of the fair market value of the stock held; but the taxpayer was allowed to take a deduction equal to the percentage of the issuing corporation's income taxed in North Carolina. For example, if a corporation's entire income was taxed in North Carolina, a taxpayer would get a corresponding 100% deduction from the intangibles tax. Thus, the tax deduction was tied to the extent of the issuing corporation's business in North Carolina. The Court found the intangibles tax facially discriminatory because a scheme "that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce."[290]

Under the established rules of the Dormant Commerce Clause, the North Carolina intangibles tax was destined for automatic condemnation.[291] These rules are reasonably clear as to what

proportionality standard is truly lethal to any congressional legislation.

288. Economic protectionism is discrimination against other states engaged in interstate commerce, and therefore, it is a *per se* violation of the Dormant Commerce Clause. Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978). A state law which imposes undue burden on interstate commerce will be subject to a balancing test to determine whether a legitimate state purpose that would outweigh the burden on interstate commerce. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

289. 516 U.S. 325 (1996). (Souter, J.) Chief Justice Rehnquist filed a single paragraph concurring opinion. *Id.* at 348.

290. *Id.* at 333.

291. North Carolina conceded that its intangibles tax was facially discriminatory. *Id.*

constitutes discrimination and what defenses are available, which are not many. "[D]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[292] In *Fulton*, the Court further defined the meaning of discrimination in the context of state taxation by vowing that it would treat a state law as discriminatory if it "'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'"[293] Though it is clear that "[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated,"[294] the question as to whether the objects are identically situated can be so murky as to necessitate an extensive fact-specific inquiry.[295]

The standards of review applied to the state laws that interfere with interstate commerce have become relatively constant. Discriminatory state law restrictions on interstate commerce are "virtually *per se* invalid"[296] and subject to the "strictest scrutiny."[297]

That admission called for strict scrutiny of the intangibles tax scheme.

292. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994); *see* Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344 n.6. (1992).

293. 516 U.S. at 331. The statement was attributed to Armco, Inc. v. Hardesty, 467 U.S. 638, 642 (1984), and repeated in *Chemical Waste Mgmt,* 504 U.S. at 342.

294. Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564, 601 (Scalia, J., dissenting); *Id.* at 583 n.16 (Stevens, J.).

295. This question was the focus of Justice Scalia's dissenting opinion in the *Camps Newfound* case, which involved the constitutionality of a Maine property tax exemption statute. The law gave a tax exemption to charitable institutions which served mostly state residents and withheld the same exemption from charitable institutions which served out-of-state customers. The Court found the statute facially discriminatory because "it disparately treats identically situated Maine non-profit camps depending on whether they favor in-state, as opposed to out-of-state campers." *Id.* at 583 n.16. The Court further explained: "Ninety-five percent of petitioner's campers come from out of state. Insofar as Maine's discriminatory tax has increased tuition, that burden is felt almost entirely by out-of-staters, deterring them from enjoying the benefits of camping in Maine. In sum, the Maine statute facially discriminates against interstate commerce, and is all but *per se* invalid." *Id.* at 581.

In contrast, Justice Scalia, joined by Chief Justice Rehnquist and Justices Thomas and Ginsburg, wrote a vigorous dissent. Justice Scalia, claiming that the tax exemption's serving the town's interest in relieving its social service burden validated the statute, asserted that because the resident-benefiting charities were not 'similarly situated' to the non-resident benefiting charities, the statute was not discriminatory. *Id.* at 603 (Scalia, J., dissenting).

296. *Or. Waste Sys.*, 511 U.S. at 99. The Court applies the same rule to a law discriminatory "on its face." *See Fulton*, 516 U.S. at 344; *Camps Newfound*, 520 U.S. at 581.

297. *Camps Newfound*, 520 U.S. at 581 (citing Hughes v. Oklahoma, 441 U.S. 322, 337

But "nondiscriminatory [state] regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"[298] To save a law under the strictest scrutiny test, the discriminating state has to demonstrate that the law "'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'"[299] The state's burden under strictest scrutiny is "extremely difficult" to discharge, and for that reason the Court cautioned that "'facial discrimination by itself may be a fatal defect.'"[300]

Strictest scrutiny, as applied to discriminatory tax laws, is equally harsh if not harsher. In 1992, the Court bluntly declared that "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."[301] However, in later cases, the Court seemed to relent when it recognized that a facially discriminating tax may have a chance to survive "strictest scrutiny" if it is shown to be "a valid 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce."[302] Nevertheless, the Court's compensatory tax doctrine is so front-loaded with insurmountable conditions that showing a discriminatory tax to be truly a compensatory tax is almost impossible. The tax claimed to be compensatory has to meet three requirements: the State must identify the intrastate tax burden that it is attempting to compensate; the tax on interstate commerce must be roughly equal to or below the amount of the tax on intrastate commerce; and the interstate and intrastate taxes must be imposed on "substantially equivalent" events.[303] The Court itself doubted that the tripartite showing required by its compensatory tax doctrine "[could] ever be made outside the limited confines of sales and use taxes."[304]

The commerce clause review formula is *sui generis* and it bears no resemblance to the rationality standard that the Court customarily

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(1979)); *see also Fulton,* 516 U.S. at 333.

298. *Or. Waste Sys.,* 511 U.S. at 99 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

299. *Camps Newfound,* 520 U.S. at 581 (citing *Or. Waste Sys.*, 511 U.S. at 101 [quoting New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)]).

300. *Camps Newfound*, 520 U.S. at 582 (quoting *Or. Waste Sys.*, 511 U.S. at 101).

301. Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342 (1992); *see also Camps Newfound*, 520 U.S. at 582.

302. Assoc. Indus. v. Lohman, 511 U.S. 641, 647 (1994), *accord, Fulton*, 516 U.S. at 331.

303. *Fulton*, 516 U.S. at 332-333.

304. *Id.* at 334.

uses to review economic and social legislation. The formula, *sui generis*, flourishes in a carefully built fortress, increasingly insulated from conflicting anti-discrimination precedents and principles of review such as those developed under the Equal Protection Clause. The Court has been making a gradual but sustained effort to free the issues of commercial discrimination from the grips of established equal protection principles. As a unanimous Court declared a quarter century ago, "it has long been settled that a [tax] classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause . . . if any state of facts reasonably can be conceived that would sustain it."[305] In *Fulton*, the State tried to demonstrate that the Court "settled" the equal protection issue almost a century ago. It cited *Kidd v. Alabama*[306] and *Darnell v. Indiana*[307] in support of its tax law. But the Court came up with a cryptic response:

> To the extent that Darnell evaluated a discriminatory state tax under the Equal Protection Clause, time simply has passed it. While we continue to measure the equal protection of economic legislation by a "rational basis" test . . . , we now understand the [D]ormant Commerce Clause to require justifications for discriminatory restrictions on commerce [to] pass the "strictest scrutiny" . . . . Hence, while cases like *Kidd* and *Darnell* may still be authorities under the Equal Protection Clause, they are no longer good law under the Commerce Clause.[308]

It is hardly a convincing rationale to reject settled precedents rooted in the only provision of the Constitution that embodies "the idea of constitutionally protected equality"[309] by offering a substitute rooted in the "incoherent" Dormant Commerce Clause doctrine that, according to some critics, "has been an open scandal for

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305. Allied Stores v. Bowers, 358 U.S. 522, 528 (1959). The case involved a challenge to an Ohio *ad valorem* tax charged against an Ohio resident based on the average value of merchandise held in Ohio warehouses for storage only, while the law exempted identical property of non-Ohio corporations. This merchandise was presumed to have been in interstate transit.

306. 188 U.S. 730 (1903). In *Kidd*, the Court sustained a tax classification emphasizing that the equal protection clause allowed "large latitude . . . to the States for classification[s] upon any reasonable basis." *Id.* at 733.

307. 226 U.S. 390 (1912). In *Darnell*, the State taxed the property of domestic corporations and the stock of foreign corporations in similar cases. Writing for the Court, Justice Holmes found the arrangement was "consistent with substantial equality, notwithstanding the technical differences." *Id.* at 398. He said that the discrimination issue "was decided in *Kidd v. Alabama*." *Id.* (citing 1881 U.S. 730).

308. *Fulton*, 516 U.S. at 345-46.

309. Zobel v. Williams, 457 U.S. 55, 68 (1982) (Brennan, J., concurring).

generations."[310] Only Chief Justice Rehnquist expressed any disagreement with the Court's new thinking. He wrote a one paragraph concurrence to register his belief that the "substantial equality" requirement of *Darnell* would be a "more 'realistic'" measure of the constitutionality of state taxation of interstate transactions than the "Court's more recent requirement" of strictest scrutiny. Nevertheless, he decided to join the Court's opinion because his "view has not prevailed."[311] The cases decided by the Court after *Fulton* seem to guarantee that the view of the Chief Justice is not likely to prevail in the future.[312]

B. Commerce Clause as a Surrogate for the Equal Protection Clause

The Court's refusal to entertain equal protection challenges to state taxes that discriminate against out-of-state interests marks an

310. Lynn A. Baker & Earnest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 96 (2001).

311. *Fulton*, 516 U.S. at 348 (Rehnquist, C.J., concurring). The Chief Justice noted that he had stated his views in dissent in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 647 (1984) (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963)), that "the 'substantial equivalence' test deviates from the principle articulated in earlier cases that 'equality for the purpose of competition and for the plans of commerce' should be 'measured in dollars and cents, not legal abstractions.'" *Fulton*, 516 U.S. at 348.

312. In *Camps Newfound/Owatonna, Inc. v. Harrison*, the Maine Supreme Judicial Court found the challenged tax exemption statute not to be violative of the Equal Protection Clause. 520 U.S. at 570. The State Supreme Court held the exemption statute "treats all Maine charities alike" - given the fact that "all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally," and it "regulates evenhandedly with only incidental effect on interstate commerce." *Id.* at 570 (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 655 A.2d 876, 879 (1995)). The U.S. Supreme Court simply refused to consider the Equal Protection claim, and defined the issue before the Court as follows: "This case involves an issue that we have not previously addressed - the disparate real estate tax treatment of a nonprofit service provider based on the residence of the consumers that it serves." *Camps Newfound,* 520 U.S. at 572.

Similarly, in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), a foreign corporation sued Alabama alleging that a franchise tax assessed on foreign corporations violates the Commerce Clause and the Equal Protection Clause. The U.S. Supreme Court granted certiorari on the question of whether the Alabama tax violated the Commerce Clause. The Court ultimately found the statute "facially discriminatory" and therefore unconstitutional for failure to justify the tax as a "compensatory tax" as required by *Fulton*, 516 U.S. 325. *So. Cent. Bell*, 526 U.S. at 169-70. The Court stated that "[o]ur cases hold that a discriminatory tax cannot be upheld as 'compensatory' unless the State proves that the special burden that the franchise tax imposes upon foreign corporations is 'roughly . . . approximate' to the special burden on domestic corporations, and that the taxes are similar enough 'in substance' to serve as 'mutually exclusive' proxies for one another." *Id.* at 170 (citing *Or. Waste Sys. v. Dep't of Envtl. Quality,* 511 U.S. 93, 103 (1994), *accord, Fulton*, 516 U.S. at 332-33).

unexplained departure from several well-seasoned precedents. Claims based on the Commerce Clause and the Equal Protection Clause are not mutually exclusive for the simple reason that the constitutional values protected by the two clauses are distinctly different. The respective spheres in which the Commerce Clause and the Equal Protection Clause operate in the context of state taxation are graphically outlined by Justice Powell in *Metropolitan Life Insurance Co. v. Ward*.[313]

The case involved an equal protection challenge to Alabama's domestic preference tax statute,[314] which imposed a substantially higher 'gross premiums tax' on out-of-state insurance companies than on domestic insurance companies.[315] The statute would have certainly violated the Commerce Clause[316] but for a federal statute that specifically immunized State laws which discriminate against out-of-state insurance companies from Commerce Clause challenges.[317] Alabama argued that the same federal statute should be construed to immunize its discriminatory tax scheme from equal protection challenges as well. The state asserted that a contrary approach would "amount[] to no more than 'Commerce Clause rhetoric in equal protection clothing'"[318] because the federal statute was "intended to authorize States to impose taxes that burden interstate commerce in the insurance field."[319] Thus, the essence of the State's contention was

313. 470 U.S. 869 (1985).

314. ALA. CODE §§ 27-4-4, 27-4-5 (1975).

315. Under the domestic preference statute, "a foreign insurance company doing the same type and volume of business in Alabama as a domestic company generally will pay three to four times as much in gross premiums taxes as its domestic competitor." *Metro. Life Ins.*, 470 U.S. at 871-72.

316. Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 948 (1986) ("The Alabama statute's discrimination against out-of-state businesses clearly violates the commerce clause. The McCarren-Ferguson Act, however, removed the commerce clause barrier to state taxation of the insurance industry." *Id.* at 948.)

317. The Court had already ruled, in 1981, that the federal statute, McCarren Ferguson Act, 59 Stat. 33, as amended 15 U.S.C. § 1011 *et. seq.*, "explicitly suspended Commerce Clause restraints on state taxation of insurance and placed insurance regulation firmly within the purview of the several States." *Metro. Life Ins.*, 470 U.S. at 884 (O'Connor, J., dissenting) (citing *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655 (1981)).

318. *Metro. Life Ins.*, 470 U.S. at 880 (quoting Brief for Appellee Ward).

319. *Id.* at 880. In support of its argument, Alabama invoked the Court's decision in *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), in which the Court held that the federal statute immunized from Commerce Clause challenge the so-called "California retaliatory insurance tax" that discriminated against out-of-state insurance companies whose home states imposed higher taxes on insurance

that a valid state purpose which would sustain a discriminatory tax under the Commerce Clause would be adequate to sustain it under the Equal Protection Clause.

The Court rejected Alabama's contention by articulating the divergent scope of the two constitutional provisions:

> The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory, whether the discrimination involves local or other interests are not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under the equal protection analysis.[320]

The Court further emphasized that any analysis of the permissible scope of a State's power should take into account the different functions the two constitutional provisions are designed to perform—"one protects interstate commerce, and the other protects persons from unconstitutional discrimination . . . ."[321] Therefore, two different constitutional standards are used to scrutinize the validity of a discriminatory state tax.

Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.[322]

Alabama tried to justify the discriminatory tax, asserting that it served to promote a legitimate state interest in promoting domestic

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companies than California. In the case, the Court also rejected an equal protection challenge holding that the retaliatory tax law was a rational means to achieve the legitimate state purpose of promoting the interstate business of domestic insurance carriers, reasoning that the California tax would discourage other states from imposing excessive taxes for fear of retribution. *Id.* at 674. Despite the holding in *Western and Southern Life Insurance*, the Court emphasized the "established" constitutional principle applicable to discriminatory state taxes, thus: "[w]hatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.* at 667 (quoting *Metro. Life Ins.*, 470 U.S. at 875).

320. *Metro. Life Ins.*, 470 U.S. at 878.

321. *Id.* at 881.

322. *Id.*

insurance companies and encouraging foreign insurance companies to invest in Alabama.[323] The Court found the proffered justification insufficient to withstand the equal protection challenge because the "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose."[324]

In a scathing dissent, Justice O'Connor, joined by three other Justices, denounced Justice Powell's majority opinion.[325] However, the dissent did not dispute the applicability of the Equal Protection Clause to discriminatory state taxes. Rather, the dissenting opinion focused exclusively on the majority's conclusion that the State's goal of promoting the domestic insurance industry by using discriminatory taxes against foreign competitors is not a legitimate purpose that satisfies the "rational basis test" of the Equal Protection Clause.[326] Emphasizing that Congress, by deciding to "elevate local concerns over interstate competition"[327] in the insurance industry, had already exempted state insurance regulations from Commerce Clause restrictions, Justice O'Connor derided the majority's suggestion "that a state purpose might be legitimate for purposes of the Commerce Clause but somehow illegitimate for purposes of the Equal Protection Clause" and "that the purpose's legitimacy, chameleon-like, changes according to the constitutional clause cited in the complaint."[328] She accused the majority of "fashion[ing] its own brand of economic equal protection"[329] that accords little deference to the economic policies formulated by federal and state legislatures.[330]

It did not take too long for the Justices to iron out their differences over what would constitute a legitimate state purpose that can survive rational basis scrutiny. In *Northeast Bancorp., Inc. v. Board of Governors*,[331] decided the same Term as *Metropolitan Life*, the Court unanimously upheld statutes of Massachusetts and

323. *Id.* at 882.

324. *Id.* at 882.

325. *Id.* at 883-903. (O'Connor, J., joined by Rehnquist, C.J., Brennan & Marshall, JJ., dissenting)

326. *Metro. Life Ins.*, 470 U.S. at 886, 901.

327. *Id.* at 900.

328. *Id.* at 895.

329. *Id.* at 900. The dissenters asserted that with the "new brand," the Court "supplants a legislative policy endorsed by both Congress and the individual states that explicitly sanctioned the very parochialism in regulation and taxation of insurance that the Court's decision holds illegitimate." *Id.*

330. *Id.* at 901.

331. 472 U.S. 159 (1985).

Connecticut that barred acquisition of in-state banks by bank holding companies from outside the New England region. The statutes were enacted pursuant to a federal law that lifted all federal restrictions on interstate bank acquisitions while permitting states to regulate acquisition of local banks by out-of-state holding companies. The Court rejected challenges to the state statutes made under both the Commerce Clause and the Equal Protection Clause. Writing for the Court, then Justice Rehnquist, after finding that the state statutes were expressly authorized by the federal law, emphatically declared: "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."[332]

More complex and somewhat convoluted was the Court's reason to validate the state statutes under the Equal Protection Clause. The Court concluded "that the concerns which spurred Massachusetts and Connecticut to enact the statutes here challenged, different as they are from those which motivated the enactment of the Alabama statute in *Metropolitan Life*, meet the traditional rational basis for judging equal protection claims under the Fourteenth Amendment."[333] But, as Justice O'Connor asserted in her concurring opinion, there is "no meaningful distinction for Equal Protection purposes"[334] between the Alabama statute and the two pertinent statutes. The Court accomplished the remarkable feat of drawing this distinction without linking the equal protection issue to the congressional authorizations of the state regulations. It did so in part by according overriding significance to the fact that "banking and related activities are of profound local concern,"[335] requiring state regulation to preserve the independence of local banking institutions that foster the traditional "close relationship between those in the community who need credit and those who provide credit."[336]

Indicative of its sensitivity to the closeness of the case to *Metropolitan Life*, the Court came up with another distinguishing feature of the Massachusetts and Connecticut statutes. It asserted that the two statutes, unlike the Alabama statute in *Metropolitan*, "are not favoring local corporations at the expense of out-of-state corporations. They are favoring out-of-state corporations domiciled

332. *Id.* at 174.

333. *Id.* at 178.

334. *Id.* at 178 (O'Connor, J., concurring).

335. *Id.* at 177 (quoting Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 38 (1980)).

336. *N.E. Bancorp.*, 472 U.S. at 178.

within the New England region over out-of-state corporations from other parts of the country . . . ."[337] This asserted distinction makes no difference from the equal protection perspective. The Court certainly failed to convince Justice O'Connor "why completely barring the banks of 44 states from doing business is less discriminatory than Alabama's scheme of taxing the insurance companies from 49 states at a slightly higher rate."[338]

The unanimous decision of the Court in *Northeast Bancorp.* vindicates Justice Powell's use of an equal protection analysis in *Metropolitan Life.* But the most redeeming feature of Justice Rehnquist's opinion for the Court in *Northeast Bancorp.* is its dissociation from Justice O'Connor's singular view that "where Congress has sanctioned the barriers to commerce that fostering of local industries might engender, this Court has no authority under the Equal Protection Clause to invalidate classifications designed to encourage local businesses because of their special contributions."[339] Justice O'Connor's proposition simply amounts to judicial acquiescence to a partial repeal of the Equal Protection Clause by congressional legislation under the Commerce Clause—a proposition that is likely to encounter several troublesome doctrinal and practical problems.

As Justice O'Connor correctly stated, "[t]he Commerce Clause is a flexible tool of economic policy that Congress may use as it sees fit . . . [while d]octrines of equal protection are constitutional limits that constrains the acts of federal and state legislature alike."[340] That Congress cannot use the equal protection clause as it sees fit was asserted as an immutable constitutional maxim by none other than Justice O'Connor. In *Mississippi University for Women v. Hogan*,[341] the Court, in an opinion by Justice O'Connor, held that it was unconstitutional for the State of Mississippi to operate a nursing school that admitted only women. Summarily dismissing the State's argument that it was in compliance with Title IX of the Education Amendments of 1972[342]—which excluded single-sex institutions like the nursing school from the statute's general prohibition against sex

337. *Id.* at 177.

338. 472 U.S. at 179 (O'Connor, J., concurring).

339. *Id.* at 180.

340. 470 U.S. at 901 (citing, as example, California v. Webster, 430 U.S. 313 (1977)).

341. 458 U.S. 718 (1982).

342. *See* 20 U.S.C. § 1681 (2003). Title IX prohibits discrimination on grounds of sex by educational institutions that receive federal funds.

discrimination—the Justice stated that "Congress apparently intended, at most, to exempt MUW from the requirements of Title IX" because Congress has "no power to restrict, abridge, or dilute"[343] the equal protection guarantees of the Fourteenth Amendment. Justice O'Connor has never deviated from her view of limited congressional power under the Equal Protection Clause.[344]

It is axiomatic that the Commerce Clause protects interstate commerce from all forms of protectionist and parochial state policies, including those manifest in "discriminating State legislation."[345] The Clause prohibits even seemingly nondiscriminatory state regulations that impose substantial burdens on out-of-state commercial interests. But not all such regulations are unconstitutional under the Equal Protection Clause if, and to the extent, they serve some legitimate state interest. For instance, a state requirement that a locally grown fruit be packed in state-approved cartons when the producer could have packed them in its out-of-state facility at a cheaper cost was struck down by the Supreme Court, despite a showing that the State had a legitimate interest in having the high-quality fruit packed under a label bearing the State's name.[346] In an unanimous decision, the Court held: "Even where the state is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal."[347]

Conversely, there can be instances in which the Equal Protection Clause provides protection against commercial discrimination that may not be banned by the Commerce Clause. *Williams v. Vermont*[348] is an example. Vermont required automobile owners to register their cars in Vermont and pay the appropriate sales or use tax when they, or their cars, become residents of Vermont. The registrants were eligible for a credit for out-of-state sales or use tax payments, but only if they were residents of Vermont at the time they made such out-of-state payments. Vermont claimed that the credit exemption was

343. *Hogan*, 458 U.S. at 732-33 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651, n.10 (1996)).

344. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (O'Connor, J., writing for the majority).

345. *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280 (1875).

346. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Fulfilling Arizona's requirement that cantaloupes grown in Arizona also be crated in Arizona, would cost Bruce Church, Inc. $200,000 more than packing the fruit at crating facilities outside Arizona. Cantaloupe crates normally show the names of the state in which the fruit is being packed.

347. *Id.* at 145.

348. 472 U.S. 14 (1985).

that a valid state purpose which would sustain a discriminatory tax under the Commerce Clause would be adequate to sustain it under the Equal Protection Clause.

The Court rejected Alabama's contention by articulating the divergent scope of the two constitutional provisions:

> The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory, whether the discrimination involves local or other interests are not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under the equal protection analysis.[320]

The Court further emphasized that any analysis of the permissible scope of a State's power should take into account the different functions the two constitutional provisions are designed to perform—"one protects interstate commerce, and the other protects persons from unconstitutional discrimination . . . ."[321] Therefore, two different constitutional standards are used to scrutinize the validity of a discriminatory state tax.

Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.[322]

Alabama tried to justify the discriminatory tax, asserting that it served to promote a legitimate state interest in promoting domestic

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companies than California. In the case, the Court also rejected an equal protection challenge holding that the retaliatory tax law was a rational means to achieve the legitimate state purpose of promoting the interstate business of domestic insurance carriers, reasoning that the California tax would discourage other states from imposing excessive taxes for fear of retribution. *Id.* at 674. Despite the holding in *Western and Southern Life Insurance*, the Court emphasized the "established" constitutional principle applicable to discriminatory state taxes, thus: "[w]hatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.* at 667 (quoting *Metro. Life Ins.*, 470 U.S. at 875).

320. *Metro. Life Ins.*, 470 U.S. at 878.

321. *Id.* at 881.

322. *Id.*

restrict interstate commerce. Under the Court fashioned "dormant" Commerce Clause, congressional legislation has never been a prerequisite for judicial enforcement. The Court reasoned that "[a]lthough the language of th[e] Clause speaks only of Congress' power over commerce, the Court long has recognized that it also *limits the power of the States to erect barriers against interstate trade.*"[356]

The *râison d'etre* of the dormant Commerce Clause doctrine is the need for prompt judicial action to remove state barriers against interstate trade. State barriers that restrict or burden interstate commerce can manifest themselves in different forms and varying intensities. Some of them may be in the form of discrimination. The dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[357] "Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred."[358] Nevertheless, under the dormant Commerce Clause regime, the Court singles out discriminatory state laws for special scrutiny. If what the Court looks for in the review of state laws are barriers to interstate commerce, it should not make any difference whether such barriers are erected through discriminatory or nondiscriminatory laws. This difference is intriguing in light of the Court's entire anti-discrimination apparatus. After decades of collaborative co-existence, the dormant Commerce Clause is now completely separated from the Equal Protection Clause. Why does the Court want to keep the dormant Commerce Clause equal protection-free? The reason is not apparent. But on closer examination, it is not difficult to identify several likely reasons.

356. Dennis v. Higgins, 498 U.S. 439, 446 (1991) (internal quotation omitted) (emphasis added).

357. New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988) (citing Bachus Imps., Ltd. v. Dias, 468 U.S. 263, 270-273 (1984); Guy v. Baltimore, 100 U.S. 434, 443 (1880); etc.).

358. C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 405 (1994) (O'Connor, J., concurring). In *Carbone*, for instance, the town required all solid waste to be processed at a designated transfer station before leaving the town. The purpose of the requirement was "to retain the processing fees charged at the transfer station to amortize the cost of the facility." *Id.* at 386. Justice O'Connor found no "facial or effective discrimination against interstate commerce," contrary to what Justice Kennedy found, but she maintained that the law was invalid "because it imposes an excessive burden on interstate commerce." *Id.* at 401. But Justice Souter, joined Chief Justice Rehnquist and Justice Blackmun, dissented, maintaining that through the requirement the town was trying to solve its garbage problem, that it did not discriminate between local and out-of-town participants in the private market for trash disposal services, and that it was not protectionist in its purpose or effect. *Id.* at 411-30.

What fuels the drive to extricate the Equal Protection Clause from the dormant Commerce Clause is the Court's desire to develop two distinct sets of anti-discrimination principles - one suitable mostly for people and the other for commercial interests. Saddled with inflexible review standards and overly-narrow parameters of discrimination, the Equal Protection Clause has become increasingly unpalatable to the Court for use in resolving disputes involving interstate commercial interests. It is this judicially created impotency of modern equal protection jurisprudence that prompted the Court to devise a parallel set of more effective anti-discrimination rules under the dormant Commerce Clause.

1. Standard of Review

Under the Equal Protection Clause, a state law can be subjected to "strict scrutiny" only if it restricts "fundamental rights" or it contains "suspect classifications" based on race, ethnicity, alienage or national origin.[359] A state law subject to strict scrutiny will not be sustained unless the state demonstrates that its restrictions or classifications are "narrowly tailored to further [a compelling state] interest."[360] Social and economic legislation that does not contain "suspect [classifications or] infringe fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[361] Highly deferential to state objectives, rational basis review accords state laws a strong presumption of constitutionality.[362] Reviewed under the rationality test, economic classifications in state laws that discriminated against interstate commerce were upheld on the mere showing that the classifications rested "upon a state of fact that reasonably can be conceived to constitute a distinction or difference in state policy . . . ."[363] Realizing that the acceptance of state law discrimination on such flimsy grounds had not always adequately served the interests of interstate commerce, the Court seemed to search for viable alternatives. At

359. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (race); Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (fundamental rights).

360. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

361. Fed. Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

362. *Id.* at 314.

363. Allied Stores v. Bowers, 358 U.S. 522, 530 (1959).

times, the Court used "a covertly tightened variety of minimum rationality, in order to avoid expressly deciding whether heightened scrutiny was warranted."[364]

It was clear that the addition of commercial discrimination to the categories of classifications that trigger strict scrutiny under the Equal Protection Clause was not a practical and feasible option. Any expansion of the strict scrutiny categories would be an unstoppable catalyst for the revival of claims by women and the disabled that discrimination against them should be subjected to heightened or strict scrutiny. The Court had rejected such claims in the past. For instance, in *Frontiero v. Richardson*,[365] the Court declined to decide whether sex was a "suspect" criterion for legislative classification that warrants strict scrutiny, even though a plurality of four Justices endorsed strict scrutiny, reasoning that "throughout much of the nineteenth century the position of women in our society was in many respects comparable to that of blacks under the pre-Civil War slave codes."[366] Likewise, the Court has consistently refused to apply heightened or strict scrutiny to classifications based on disability,[367] even after the Congress designated disabled persons as "a discrete and insular minority."[368] Given the potential problems associated with widening strict scrutiny categories, it made sense to find a separate strict scrutiny home for commercial discrimination outside the limited confines of the Equal Protection Clause. Nevertheless, it

364. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1442, n.16 (2d ed. 1978) (citing Zobel v. Williams, 457 U.S. 55 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)). Tribe states that review under the rational basis test "took on a new, more penetrating character" when the Court, in *Zobel* and *Hooper*, "struck down economic legislation while purporting to employ only rational basis review." TRIBE, *supra* at 1444.

365. 411 U.S. 677 (1973).

366. *Id.* at 685. (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment). Powell found a determination about strict scrutiny unnecessary in light of the Equal Rights Amendment that was up for ratification at the time of the Court's decision. *Id.* at 692. Currently, sex classifications are subject to "intermediate scrutiny." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 722 (1982). Even the ardent and consistent proponent of gender equality, Justice Ginsburg, stopped short of pressing for strict scrutiny, settling instead for "skeptical scrutiny," in her own opinion for the Court in *United States v. Virginia*, 518 U.S. 515, 531 (1996).

367. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

368. *See* Americans with Disabilities Act of 1990, 42 USCA § 12101(a)(7)(2003). Status as a "discrete and insular minority" has been considered as a qualifying criterion for strict scrutiny. The criterion originated from the famous footnote 4 of the decision in *United States v. Caroline Products, Co.*, 304 U.S. 144, 153 n.4 (1938).

remains an anomaly that commercial discrimination is subject to *strictest scrutiny* while discriminations on the basis of sex and disability are not.

2. Discrimination Criteria

In an Equal Protection-free dormant Commerce Clause, discrimination is a free-wheeling idea. There are no set rules or analytical framework to determine whether a state statute is discriminatory. The Court's controversial determination that the Maine statute involved in *Camps Newfound/Owatonna, Inc. v. Town of Harrison* was facially discriminatory is an appropriate illustration.[369] The statute gave a full property tax exemption to benevolent and charitable institutions incorporated in Maine and operated principally for the benefit of Maine residents. Institutions that were operated principally for non-residents were given a partial exemption under specified conditions. Defending the legality of the statute, the State argued that the exemption was designed to compensate private charities for helping to relieve the State of its burden of caring for its residents. The Maine Supreme Judicial Court upheld the statute under an equal protection analysis[370] on the ground that "the exemption statute 'treats all Maine charities alike' - given the fact that 'all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally.'"[371] The state court also reasoned that the exemption was the equivalent of a purchase of the exempt charity's services by the State—a perfectly legal undertaking under the dormant Commerce Clause[372]—and that the statute regulated "evenhandedly with only incidental effects on interstate commerce."[373]

The Supreme Court, in a five to four decision, found that "the Maine statute facially discriminates against interstate commerce"[374] because "[a]s a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the

369. *See* 520 U.S. 564 (1997).

370. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 655 A.2d 876, 879-80 (Me. 1995) (citing Green Acre Baha'i Inst. v. Town of Eliot, 193 A.2d 564 (1963)).

371. *Id.* at 879 (quoted in *Camps Newfound/Owatonna*, 520 U.S. at 570).

372. When a state is in the interstate market as a purchaser of services rather than as a regulator, the transaction would be exempted from commerce clause restrictions under the "market participant exemption" to the dormant Commerce Cause. *See* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

373. *Camps Newfound*, 655 A.2d. at 879.

374. *Camps Newfound*, 520 U.S. at 581.

principally nonresident customers of businesses catering to a primarily interstate market."[375] Four dissenting Justices vehemently disagreed. In his dissenting opinion, joined by Chief Justice Rehnquist and Justices Thomas and Ginsburg, Justice Scalia made a persuasive argument that the disparate treatment of the resident-benefiting and non-resident-benefiting charities did not constitute discrimination—and certainly not facial discrimination—for the simple reason that they were not similarly situated.[376]

The Court's discrimination analysis is faulty for additional reasons. First, what the Court condemns as discriminatory here is a generally applicable neutral statute—neutral in the sense that any charitable organization incorporated in the State of Maine could seek and receive the property tax exemption provided it meets the criteria for receiving the exemption. The relevant criterion for denial of the exemption is service "principally for the benefit of persons who are not Maine residents."[377] If the statute produced a disparate impact on non-residents or non-resident benefiting charities, the Court should have evaluated its constitutionality under a test similar to the one it uses under the Equal Protection Clause in like situations. Under the Equal Protection standard, a generally applicable neutral statute that produces disparate impact would not be treated as discriminatory absent proof of discriminatory "purpose or intent."[378] Discriminatory purpose implies that the legislature or decisionmaker had "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect upon an identifiable group."[379] If claims of discriminatory effect or disparate impact from the Maine statute are evaluated under the purpose test, the claims would fail because the obvious purpose of the statute is to facilitate the rendering of charitable services to Maine residents and not to penalize non-residents or non-resident-benefitting charities.[380]

375. *Id.* at 576.

376. *Id.* at 601-03.

377. ME. REV. STAT. ANN., tit. 36, § 652 (1)(A) (Supp. 1996); *Camps Newfound*, 520 U.S. at 569 n.2.

378. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

379. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). It should be noted that the Court requires proof of motive or purpose to judge the constitutionality of a neutral statute of general applicability that produces a discriminatory effect or disparate impact "under the Free Exercise Clause of the First Amendment." *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990); City of Boerne v. Flores, 521 U.S. 507 (1997).

380. As Justice Scalia stated in his dissent, limiting state-provided social services to its own citizens would not constitute discrimination violative of the Equal Protection Clause.

Second, the Court's failure to assess the burden that the statute is claimed to have imposed on non-residents or non-resident-catering charities is totally inconsistent with the very rationale of the dormant Commerce Clause. Instead of conjuring up the imaginary discrimination, the Court should have focused its inquiry on the extent to which the tax exemption statute burdens or restricts interstate commerce. The Town of Harrison challenged the premise of the Court's decision that the denial of the tax exemption to non-resident-benefiting charities would force them to charge such high fees as to deter out-of-staters from utilizing their high-cost services. The challenger of the statute presented no evidence to show that any non-resident was so deterred. But the Court maintained that a "particularized showing of the sort [the town] seeks is not required"[381] because under the dormant Commerce Clause "actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred."[382] But the Court seems to ignore the fact that the pertinent inquiry here is to ascertain whether discrimination has occurred.

To assign such decisive and unexcepted significance to discrimination is to elevate form over substance. Irrespective of the form in which it may manifest, a state action should be considered violative of the Commerce Clause if, and only if, it constitutes a restriction or burden on interstate commerce. The blindly formulaic condemnation of a state law on the basis of actual or suspected discrimination, regardless of its adverse effect on interstate commerce, would be an affront to state sovereignty and a disservice to the dormant Commerce Clause doctrine *itself.*

3. Hypocritical Extremism

The Court's hypersensitivity to commercial discrimination is truly paradoxical in several respects. First, the hypersensitivity shown in the majority opinion in *Camps Newfound* was that of Justice Stevens, who, in a different context, had emphasized the truism that

Therefore, it should also be legal to arrange for the rendering of such services by state-subsidized charities. *Camps Newfound*, 520 U.S. at 605-06 (Scalia, J., dissenting)(citing Bd. of Educ. v. Illinois, 203 U.S. 553 (1906)).

381. *Camps Newfound*, 520 U.S. at 581 n.15.

382. *Id.* at 581 n.15 (quoting Assoc. Indus. v. Lohman, 511 U.S. 641, 650 (1994)). The Court also repeated the court-made maxim that "there is no '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause." *Camps Newfound*, 520 U.S. at 581 n.15 (citing Fulton Corp. v. Faulkner, 516 U.S. 325, 333 n.3 (1996)).

"[t]he Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce."[383] Moreover, in *Fulton*, three of the Justices subscribed to the idea that the Court "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"[384] despite believing that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[385] They despised the negative Commerce Clause jurisprudence which took the Court "well beyond the invalidation of obviously discriminatory taxes on interstate commerce"[386] and challenged the rationale for its continued existence.[387]

Second, the Court's discrimination theory of the dormant Commerce Clause has become a doctrinal anomaly in its emerging federalism jurisprudence. In obeisance to state sovereignty, the Court has condoned inordinate amounts of state discrimination in non-commercial contexts, even in defiance of federal anti-discrimination laws. In *University of Alabama v. Garrett*,[388] for example, the Court, with no compunction, utilized a variety of ostentatious techniques to let the States discriminate against disabled persons. It ruled that state laws that discriminate against the disabled "incur[] only the minimum 'rational-basis' review applicable to general social and economic legislation,"[389] and therefore could be justified by "any reasonably conceivable state of facts that could provide a rational basis" for the disparate treatment.[390] The Court insisted that Congress cannot ban state discrimination that would not even survive rational basis review unless there is proof of a pattern of such unconstitutional discrimination. Finally, the Court found the congressional record that contained "roughly 300 examples of

383. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 797 n.12 (1995) (Stevens, J., joined by Kennedy, Souter, Ginsburg and Breyer, JJ., writing for the majority.).

384. *Fulton.*, 516 U.S. at 334 n.3 (quoting Maryland v. Louisiana, 451 U.S. 725, 760 (1981)).

385. *Camps Newfound*, 520 U.S. at 610 (Thomas, J., joined by Scalia, J., & Rehnquist, C.J., dissenting).

386. *Id.* at 618.

387. *Id.* at 612 (stating that it is "worth revisiting the underlying justifications for our involvement in the negative aspects of the Commerce Clause, and the compelling arguments demonstrating why those justifications are illusory").

388. 531 U.S. 356 (2001).

389. *Id.* at 366.

390. *Id.* at 367.

discrimination by state governments"[391] against the disabled "[fell] far short of even suggesting the pattern of unconstitutional discrimination"[392] that was required to sustain the federal legislation banning state employment discrimination against the disabled. Using exactly the same synthetic review formula, the Court had previously invalidated the Age Discrimination in Employment Act to free the States from the shackles of federal restrictions on discrimination against the elderly.[393]

It is ironic that the Supreme Court rejected the federal statutes banning state discrimination against the disabled and the elderly for the avowed purpose of protecting state sovereignty while it shows no similar concern or respect for state sovereignty as it ruthlessly applies court-made anti-discrimination rules under the dormant Commerce Clause. The austerely lethal strictest scrutiny is applied to guillotine even marginally discriminatory tax policies of the States without giving due regard to the fact that "[t]he power of taxation is indispensable to their existence."[394] The Court's utter disregard of the allegedly discriminatory state tax law's impact on interstate commerce is even more appalling. The Court not only refuses to quantify the burden or restraint that a discriminatory state law might impose on interstate commerce,[395] but it flatly declares that there is no "'*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause."[396]

The Court's zealous adherence to strictest scrutiny inevitably shines the spotlight on its persistent efforts to undermine the effectiveness of the equal protection principles of the Fourteenth Amendment. Of course, the Court's determination to prevent "even the smallest scale discrimination [that] can interfere with the project of our Federal Union"[397] may be justified by the lessons of history.

391. *Id.* at 379 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

392. *Id.* at 370. ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." *Id.* at 368).

393. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

394. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 199 (1824). Chief Justice Marshall made this observation in the course of his discussion of the powers of Congress (in relation to state sovereignty) under the Commerce Clause.

395. Assoc. Indus. v. Lohman, 511 U.S. 641, 649 (1994) (8-1 decision)(Thomas, J., writing for the majority) ("[o]n the contrary, as a general matter we have rejected reliance on any calculus that requires quantification of discrimination as a preliminary step to determining whether the discrimination is valid").

396. *Camps Newfound*, 520 U.S. at 581 n.15 (quoting *Fulton*, 516 U.S. at 333 n.3).

397. *Camps Newfound*, 520 U.S. at 595 ("The history of our Commerce Clause

One need not oppose the strict anti-discrimination principles of the dormant Commerce Clause to support the argument that the Court's interpretation of the anti-discrimination principles of the Fourteenth Amendment should be more fair and humane. The Court cannot correct the moral compass of its equal protection jurisprudence by the simple expedient of declaring it inoperative in the field of interstate commercial discrimination.

4. The Extra Legal Factor

Most critics who are troubled by the string of decisions invalidating federal anti-discrimination laws tend to attribute perceived constitutional improprieties to the Rehnquist Court's dogmatic adherence to federalism and state sovereignty.[398] As explained in the last segment of this article, the Court's fervor for state sovereignty has unconditionally yielded to commercial and corporate interests, at least in the area of interstate commercial discrimination. Even some staunch defenders of federalism principles think that "[t]he Rehnquist Court lacks a coherent federalism philosophy."[399] It is significant that not everyone is buying the federalism rationale. Professor Jed Rubenfeld, for instance, pierced the federalism veil and found, in the Court's escapades, "an underlying agenda, founded on a deeply held but as yet poorly theorized sense that anti-discrimination law in this country has taken a very wrong turn."[400] However, this agenda turns ugly, and even un-American, when the Rehnquist Court pushes it at the expense of "the disabled individuals Congress sought to protect."[401] That is what the Court did in *Garrett*. What impelled the Chief Justice of the United

jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our Federal Union").

398. *See, e.g.*, Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

399. Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 518 (2002). Professor Massey defends federalism thus: "There are good reasons to maintain federalism and sound reasons that the judiciary should be involved in the effort. Federalism promotes individual liberty, collective autonomy, and political responsibility through citizen involvement and accountability to citizens." *Id.* at 516.

400. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1177 (2002).

401. *Leading Cases*, 115 HARV. L. REV. 306, 316 (2001) ("The Garrett Court overrode [Congress'] power in the name of sovereign immunity. In so doing, it was not so much protecting the States against federal encroachment, as protecting one federal power at the expense of another, the judiciary at the expense of the legislature. In the end, the price will be paid not just by Congress, but by the disabled individuals Congress sought to protect.")

States to give the green light to the States to drive their so-called rational employment policies over the disabled "quite hardheadedly—and perhaps hardheartedly" without pausing to "make allowance for the disabled"[402] as desired by Congress? It is impossible to pinpoint the precise reason.

In four cases, besides *Garrett*, Chief Justice Rehnquist has had occasion to express his own views on the rights or interests of the disabled as embodied in the ADA and the Rehabilitation Act.[403] In each of them, the position taken by the Chief Justice, either in support of the Court's decision or in opposition to it, has not been favorable to the disabled.[404] The overall profile of thirty-three disability cases brought under the ADA and the Rehabilitation Act decided during the Chief Justice's tenure on the Court presents a disturbing picture. While in twenty-five of these cases the Justice has participated in decisions going against the interests of the disabled, [405]

402. Bd. of Trs. v. Garrett, 531 U.S. 356, 367-68 (2001).

403. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598 (2001); Bragdon v. Abbott, 524 U.S. 624 (1998); Sch. Bd. v. Arline, 480 U.S. 273 (1987); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

404. *See Buckhannon Bd. & Care*, 532 U.S. at 602-605 (Rehnquist, C.J., writing for the majority) (interpretting the fee-shifting provisions of the ADA which allow attorney's fees to a prevailing party, as not encompassing the "catalyst theory" which generally "allows courts to award attorney's fees to civil rights plaintiffs who catalyze a defendant's change of conduct, even if litigation does not reach a final judgment"); *Bragdon*, 524 U.S. at 647 (Rehnquist, C.J. dissenting) (disagreeing with the part of the Justice Kennedy's majority opinion which held that asymptomatic HIV infection "is an impairment that substantially limits the major life activity of reproduction" and therefore it fits the ADA's definition of disability); *Arline,* 480 U.S. at 289 (Rehnquist, C.J. dissenting) (writing against the majority opinion, supported by seven Justices, that the discharge of a school teacher with a history of infectious tuberculosis solely by reason of her illness, violated the federal Rehabilitation Act because the teacher was a "handicapped person" within the meaning of the Act); *Pennhurst State Sch. & Hosp*, 451 U.S. at 10-11, 22 (Rehnquist, J., writing for the majority) (reversing the decision of the Third Circuit which held that, under the federal Developmentally Disabled Assistance Act of 1975, and the Rehabilitation Act of 1973, mentally retarded persons in a state-run, federally-assisted rehabilitation facility had a judicially enforceable substantive right to "appropriate treatment, services, and rehabilitation").

405. There are twenty-seven cases in which Rehnquist has participated in deciding against the interests of the disabled. A further breakdown of these cases is as follows: Rehnquist participated seven times in unanimous decisions going against the interests of the disabled. *See* Barnes v. Gorman, 536 U.S. 181 (2002); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); Alexander v. Choate, 469 U.S. 287 (1985); *and* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979). Five times as part of a seven Justice majority. *See* U.S. Airways v Barnett, 535 U.S 391 (2002); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Lane v. Pena, 518 U.S. 187

he has joined decisions in favor of the disabled in only six cases.[406] Noticeably, the Chief Justice has never dissented from a decision going against the disabled.

Seen from the backdrop of the pattern of disability decisions in which he has participated, Chief Justice Rehnquist's opinion in *Garrett* is not out of the ordinary. It is perfectly in line with the tenor of his views expressed in, or fairly inferrable from, the scores of the Court's decisions that are adverse to the interests of the disabled. The positions taken by the Chief Justice in disability cases prior to *Garrett* may exude less than ideal sympathy to the plight of the disabled, but they do not necessarily imply that he is inflexibly predisposed to rule indiscriminately against the disabled. His views on disability may well be animated by his philosophical leanings or be the product of pure rational thinking. However, the Chief Justice's anti-disability positions in prior cases are seldom claimed to have been impelled by his overwhelming concern for state sovereignty or dictated by the doctrinal imperatives of the proportionality standard.

VI. CONCLUSION

The five Justices who are hell-bent on engrafting the standard of strict proportionality to the Fourteenth Amendment have consistently found the standard non-viable under the Eighth

(1996); *and* Cmty. Television v. Gottfried, 459 U.S. 498 (1983). Six times as part of a six Justice majority. *See* Traynor v. Turnage, 485 U.S. 535 (1988); U.S. Dept. of Trans. v. Paralyzed Veterans, 477 U.S. 597 (1986); Los Angeles v. Kling, 474 U.S. 936 (1985); Smith v. Robinson, 468 U.S. 992 (1984); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981); *and* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979). Four times as part of a five Justice majority. *See* Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598 (2001); Bd. of Trs. of Univ. of Ala. v. Garnett, 531 U.S. 356 (2001); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); *and* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984). On three occasions, Chief Justice Rehnquist has dissented from decisions favoring the disabled. Once as part of a two Justice minority. *See* Sch. Bd.. v. Arline, 480 U.S. 273 (1987), and twice as part of a three Justice minority. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) *and* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

406. In six cases, Rehnquist has joined decisions in favor of the disabled, five times as part of a unanimous court. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999); Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998); Penn. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998); Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984); *and* Univ. of Tex. v. Camenisch; 451 U.S. 390 (1981). Once (in favor of the famous golfer, Casey Martin) as part of a seven Justice majority. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001). Finally, the unanimous outcome in *Campbell v. Kruse*, 434 U.S. 808 (1977), is difficult to characterize as favorable or unfavorable. The Chief Justice did not participate in *Bowen v. American Hospital Assoc.*, 476 U.S. 610 (1986).

Amendment.[407] As we see in Part III, even those among them who espouse the standard in some attenuated form[408] apply it "only [to] extreme sentences that are 'grossly disproportionate' to the crime."[409] The inherent subjectivity of the strict proportionality standard is blamed for its unsuitability in judging claims of unconstitutionality under the Eighth Amendment. The opponents of strict proportionality, including Justices Rehnquist and O'Connor, believe that a "conclusion by five Justices that . . . one offense has less 'gravity' than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature."[410] Justice O'Connor is particularly emphatic that "[w]ithout objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference."[411]

None of these obvious and glaring flaws in the concept of strict proportionality were explained or even acknowledged when the Justices decided to make it the touchstone for the constitutionality of enforcement legislation under the Fourteenth Amendment. If there is a natural home for the principle of strict proportionality in the Constitution, it *is* the Eighth Amendment. If the principle is inappropriate for the Eighth Amendment, it should be more so for the Fourteenth Amendment. There is nothing in the Fourteenth Amendment's text or history that even remotely suggests its framers ever envisioned the prospect of latching a proportionality standard onto the Amendment.

At its core, the proportionality standard is inherently amorphous and undefinable. The Court has not proffered any objective and determinate criteria or guideline that the Congress can depend on with a sense of certainty and confidence. The Court seems to make up, on an *ad hoc* basis, a series of "narrow tailoring" requirements that are difficult for Congress to follow. For instance, the

407. The Chief Justice and Justice Scalia flatly rejected the proportionality principle in any kind or form, by stating that the "Eighth Amendment contains no proportionality guarantee." Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

408. Justices O'Connor and Kennedy subscribed to the idea of "narrow proportionality." *Id.* at 966. All five Justices, including Justice Thomas, adopted the "gross proportionality" standard, and rejected "strict proportionality" in the context of the Excessive Fines Clause. *See* Bajakajian v. United States, 524 U.S. 321, 336 (1998).

409. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., joined by O'Connor and Souter, J.J., concurring).

410. Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, C.J., joined by Justices Rehnquist, O'Connor, & White, JJ., dissenting).

411. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 480-81 (1993) (O'Connor, J., joined by White & Souter, JJ., dissenting).

requirement that Congress establish a "pattern" of unconstitutional conduct to justify enforcement of civil rights legislation against the States conspicuously fails to specify what would constitute an acceptable "pattern." Even more onerous is the requirement that Congress compile and present evidence of unspecified quantity and quality before a federal judge to establish the elusive 'pattern.' Underlying this requirement are the naive assumptions that all the multifarious concerns and considerations that motivate our elected representatives in Congress to make legislative decisions can be neatly recorded in legislative documents *and* that the legislators' accumulated experience and expertise, gained through constant communications and interaction with their constituents, can be condensed easily in court briefs which are read by judges who have virtually no interaction with the public at large. Not long ago, a well-respected and sensible conservative Justice reminded the Court that the constitutional role of Congress, in contradistinction to that of the judiciary, "is to be representative rather than impartial, to make policy rather than to apply settled principles of law"[412] and that to require Congress to make specific factual findings would be "an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government."[413]

The proportionality standard remains an incoherent barrier to effective enforcement of prophylactic anti-discrimination measures because they are rendered unenforceable against the States until the discriminatory practices of the States become so widespread and pervasive as to ripen into an imaginary 'pattern.' The Supreme Court, by imposing such artificial constraints on Congress, seems to ignore the fundamental truism "that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."[414] The Court's intimation that the 'proportionality' constraint on Congress is compelled by concern for state sovereignty belies the Court's long-standing practice of disregarding such concern in the interest of protecting interstate commerce from State discrimination.[415] Moreover, concern for state sovereignty cannot

412. Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) (Powell, J., concurring).

413. *Id.* at 503.

414. *Id.* at 483-84 (Burger, C.J., plurality opinion).

415. The Court's professed concern for state sovereignty was rendered even less credible when it utilized the proportionality standard to invalidate the Violence Against

stultify or subordinate the powers of Congress under the Fourteenth Amendment, because as the Court in *City of Boerne* acknowledged, congressional enforcement has always been expected to "intrude[] into 'legislative spheres of autonomy previously reserved to the States.'"[416]

The standard of strict proportionality is irreconcilably at odds with the fundamental premise of the Fourteenth Amendment. The Amendment embodies the "'central idea' of the Republic," that all men are created equal, and it incorporates "equality as an independent right" into the Constitution.[417] The Court has consciously or inadvertently belittled and undervalued the central idea of the Republic by adopting an indeterminate and amorphous standard that has no grounding in the Constitution. By doing so, the Court, to paraphrase Justice Frankfurter,[418] is sliding from the narrow confines of its Article III authority into the more spacious domain of policy exclusively entrusted by the Constitution to our national legislature. Since the five "proportionality Justices" are not accountable to, or concerned with, the will of the nation's electorate, the best that the minorities and the disabled who are victims of State discrimination can hope for is a remission in dogmatic conservatism at the Supreme Court during which the Justices could lucidly consider removing the blemish of proportionality from the Fourteenth Amendment.

Women Act in spite of the pleas of thirty-six States and the Commonwealth of Puerto Rico to not protect their sovereignty at the expense of the victims of gender-motivated violence for whose protection the Act was enacted by the Congress. *See* United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). The dissenters also noted that, apart from the States, the National Association of Attorneys General unanimously supported the enforcement of the Act. *Id.* at 653. The record in the case left no doubt that many states maintain gender-biased systems of criminal enforcement.

416. City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

417. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMPLE L. REV. 361, 409-10 (1993).

418. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).