THE TROUBLE WITH *CITY OF BOERNE*, AND WHY IT MATTERS FOR THE FIFTEENTH AMENDMENT AS WELL

EVAN TSEN LEE[†]

ABSTRACT

The Supreme Court's test for the constitutionality of state action and its test for the constitutionality of congressional legislation enforcing the Fourteenth Amendment are out of synch with one another. When a plaintiff challenges state action under the Fourteenth Amendment, the degree of scrutiny varies with the type of claim. Racial classifications, for example, are examined under strict scrutiny. Most classifications, such as disability, age, or socioeconomic status, are examined on a rational basis. When Congress acts pursuant to its Section 5 powers under the Fourteenth Amendment to protect rights, however, the Court has no corresponding spectrum of degrees of scrutiny. In this Lecture, I argue that the Court should adopt the "mirror image" spectrum of scrutiny for congressional enactments pursuant to its Section 5 powers. For example, if Congress seeks to protect people from age discrimination or discrimination based on disability by permitting individuals to sue states without their consent in federal court, the plaintiff should have to show that he or she actually suffered a constitutional violation in the case at bar. If Congress seeks to protect people from race discrimination, the plaintiff should have to show only that there is a rational, means–end relationship between the congressional remedy and the targeted discrimination. Applying this test to the Fifteenth Amendment, which prohibits race discrimination in voting, the courts should apply rational, means–end scrutiny to statutes such as the Voting Rights Act, including the preclearance condition that is presently before the Court in *Shelby County v. Holder*.

TABLE OF CONTENTS

† Professor of Law and the Honorable Roger J. Traynor Director of Scholarly Programs, University of California, Hastings College of the Law; A.B., University of California, Berkeley; J.D., Yale University. This Lecture was delivered at the University of Denver Sturm College of Law on October 5, 2012, as part of the Constitutional Rights and Remedies Scholar-in-Residence program. I would like to thank Professor Sam Kamin for his hospitality and Dean Erwin Chemerinsky of the University of California, Irvine School of Law for his extremely insightful comments on an earlier draft. It should be emphasized that there is a great deal in this Lecture with which he disagrees, and that any remaining errors are mine. I would also like to thank the members of the editing team at the *Denver University Law Review* for their hard work.

I. INTRODUCTION

My topic today is how the federal courts should handle congressional enactments purporting to enforce two of the three Reconstruction Amendments—the Fourteenth and Fifteenth Amendments.[1] These issues have been important for fifty years now, and their importance has not diminished in the least. Last Term, the Supreme Court decided one such case under the Fourteenth Amendment, *Coleman v. Court of Appeals*,[2] and it seems likely that the Court will soon review a case involving preclearance under the Voting Rights Act,[3] which obviously grows out of the Fifteenth Amendment.[4]

The Supreme Court's current approach to judging congressional legislation meant to enforce the Fourteenth Amendment comes from a 1997 case called *City of Boerne v. Flores*,[5] which I believe to be correct in one important respect and seriously misguided in another. Today, I will call for the repudiation of that second aspect of *City of Boerne*, to be replaced by something I call the "mirror image" approach. Finally, I will say why I think this has implications for legislation, such as the Voting Rights Act, enacted pursuant to the Fifteenth Amendment.

1. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

Why have I not extended my approach to the Thirteenth Amendment? I have chosen to save this topic for another day because my instinct is that Congress should have the very broadest latitude when legislating under Section 2 of that Amendment, simply because there is no state action requirement, and therefore, there are little or no federalism costs involved in such legislation.

2. 132 S. Ct. 1327 (2012) (plurality opinion).

3. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

4. *See* Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *petition for cert. filed* 81 USLW 3064 (U.S. July 20, 2012) (No. 12-96).

5. 521 U.S. 507 (1997).

II. WHAT IS THE *CITY OF BOERNE* FRAMEWORK?

In *City of Boerne*, the question was whether the Religious Freedom Restoration Act (RFRA)[6] was an "appropriate exercise" of Congress's powers under Section 5 of the Fourteenth Amendment.[7] The relevant characteristic of RFRA was its attempt to legislatively overrule the Supreme Court's decision in the so-called peyote case, *Employment Division v. Smith*.[8] In *City of Boerne*, the Court ruled that in order for a congressional enactment under Section 5 of the Fourteenth Amendment to pass muster, it must "enforce" constitutional rights, and the remedy chosen for enforcement must be "congruen[t] and proportional[]" to those rights.[9]

The decision in *City of Boerne* answers three important questions related to the appropriateness of legislation under Section 5. The first question is whether the power to enforce constitutional rights includes only situations involving actual violations of constitutional rights or whether it also includes deterrence of potential constitutional violations. The second question is, for purposes of scrutinizing Section 5 enforcement legislation, Who decides what constitutional rights are cognizable? That is, who interprets Section 1 of the Fourteenth Amendment—Congress or the courts? The third question is, assuming at least some deterrence of potential constitutional violations is permissible, How should the courts decide how much deterrence is appropriate? This third question has the potential to overlap the first question.

On the first question, *City of Boerne* unambiguously held that some deterrence of constitutional violations is permissible. Today, all of the Justices adhere to that position except Justice Scalia, who argues that Congress may only legislate remedies for people who can demonstrate that their personal Fourteenth Amendment rights have been violated.[10]

On the second question, at least in theory, there are three possible answers. When it comes to who decides what constitutes a cognizable constitutional right for purposes of judging appropriateness under Section 5, (1) Congress itself could have the last word; (2) the Court could give some level of deference to Congress's interpretation of the Fourteenth Amendment; or (3) the Court could decide the meaning of the Fourteenth Amendment with no deference to Congress's interpretation. The *City of Boerne* Court chose the third—no deference.

---

6. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

7. *City of Boerne*, 521 U.S. at 517.

8. 494 U.S. 872 (1990).

9. *City of Boerne*, 521 U.S. at 519–20.

10. Importantly, however, he would make an exception in the race discrimination cases because of stare decisis. *See* Tennessee v. Lane, 541 U.S. 509, 557–65 (2004) (Scalia, J., dissenting).

On the third question, having already decided that Congress may act to prevent potential constitutional violations, the Court further decided that all remedial legislation must be congruent and proportional to such potential constitutional violations. A literary analysis of the phrase "congruent and proportional" suggests a fairly non-deferential standard of review, as in the requirement of a tight, if not perfect, fit between the remedy and the constitutional rights to be protected. We will see that subsequent cases confirm this literary analysis. We will also see that if one agrees with Justice Scalia on the first question—every plaintiff must show his or her own constitutional violation—that answers the third question about the relationship between right and remedy.

III. THE MERITS AND SHORTCOMINGS OF *CITY OF BOERNE*

Those were the answers provided by *City of Boerne*, and I will now examine those answers. I am going to take the questions out of order, because my views on questions two and three do, in fact, affect my view on question one.

A. Who Decides What the Constitution Means?

Let us start with question two—Who decides what counts as a violation of Section 1 of the Fourteenth Amendment for purposes of Section 5? I think we have to rule out Congress having the last word on the interpretation of "Equal Protection" or "Due Process." It is theoretically possible to have one interpretation of these grand phrases for purposes of scrutinizing remedial legislation and an entirely different interpretation for purposes of scrutinizing state action. But there is little to recommend such a schizoid system. Constitutional law is confusing enough.

The two remaining options, then, are to accord some deference to Congress's interpretation of the rights enumerated in Section 1 of the Fourteenth Amendment or to give them no deference whatsoever. Of the two, I think the more tenable view is for the courts to accord congressional interpretation no deference—but with an important asterisk. The reason not to accord congressional interpretation deference is the one I just gave—we ought not have two interpretations of "Equal Protection" or "Due Process" or "Privileges and Immunities" for one purpose and a different interpretation for another purpose. If the Court defers, even somewhat, for one purpose, it will potentially create that difference.

Here is the asterisk. The Court should be open to the persuasive force of Congress's interpretation of the Fourteenth Amendment. Consider the peyote case, in which the Court held that the Free Exercise Clause does not apply to any law of general applicability (i.e., so long as it does not single out any religion for negative treatment, a law cannot violate free exercise). In RFRA, Congress tried to reinstate the case law

overruled in *Smith*, which (at least in theory) had held that any law burdening the exercise of religion was subject to strict scrutiny.[11]

Deference to Congress's attempted reinstatement to the previous case law would have required the Court to accept Congress's interpretation unless it failed some kind of test, whether rationality or something else. I think the Court should have considered whether Congress's interpretation could have been folded into the Court's view without compromising the basic principle that the Court found in the Free Exercise Clause. The basic principle of *Smith* is that government cannot be prohibited from achieving legitimate, across-the-board legislative goals by claims that such enactments infringe on religious practices. But that principle could easily have been preserved if the Court had simply ruled that the Free Exercise Clause protected the ritual use of peyote by a group with a sincere, longstanding practice, that the ritual was central to the religion, and that the effects of ritual peyote use did not impact the performance of employees. The peyote law could have been held unconstitutional as applied to the type of usage in the case at bar. This is not anything close to the strict scrutiny that Congress had tried to impose through RFRA—yet at the same time it incorporates the values that Congress saw in the Free Exercise Clause into the Court's core interpretation of the Clause.

Thus, I agree with the general approach of *City of Boerne* on the matter of who finally decides what the Constitution means. It must be the courts. But the courts should take seriously what values Congress finds immanent in Section 1 of the Fourteenth Amendment, and they should try to accommodate those values in a manner not inconsistent with the principles that the Court itself finds in the Fourteenth Amendment. To reiterate, however, once the United States Supreme Court has completed that analysis—whether it finds anything in Congress's view persuasive or not—there remains only a single interpretation of the right involved, and that is the Court's.

B. What Relation Must There Be Between Rights and Remedies?

I now turn to the third question, which is what relationship congressional remedies must bear to the constitutional rights needing protection. *City of Boerne* held that such remedies must be congruent and proportional to the constitutional rights needing protection.[12] With one reluctant reservation, I reject that view.

The congruence and proportionality standard is poor judicial craftsmanship. It provides no real guidance to Congress, the lower courts, or lawyers as to what enforcement legislation will pass muster. In

11. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403–04 (1963) (applying strict scrutiny to a free exercise claim).

12. *City of Boerne*, 521 U.S. at 519–20 (1997).

the end, concluding that a remedy is not congruent and proportional to the record of constitutional violations before Congress amounts to little more than the statement, "These shoes don't feel good on me." If it takes twenty minutes with a shoehorn and pliers to get the shoes on, yes, they're too small. If you have to scrunch up your toes to keep them from flopping off every other step, they're too big. But in between those extremes, you can't just look at someone standing in a pair of shoes and tell whether they are a good fit. Only that person can really tell.

One might say that it does not matter because the Supreme Court is going to review all these statutes itself and the Nine will decide whether the shoes fit. But that is not a sufficient answer. Congress constantly amends and updates many of these statutes, such as the Voting Rights Act. Each time it amends, the contours of the shoe change. Moreover, feet change size over time too. The conditions in American society are constantly changing—in some ways for the better, in others for the worse. The Supreme Court cannot, and should not have to, grant review every time statutes are updated or conditions change. Never mind the expenditure of judicial resources—the sheer lag time will create injustices that ought not be tolerated.

But if not congruence and proportionality, then what? At one end of the spectrum lies a highly deferential rationality test. Dean Evan Caminker argued several years ago that the Court should judge all congressional legislation under the Fourteenth and Fifteenth Amendments by the same standard as analyses conducted under the Commerce Clause—the highly deferential *McCullough v. Maryland*[13] means–end test.[14] At the other end of the spectrum, Justice Scalia has taken the position that Congress may only provide remedies for actual violations of the Fourteenth Amendment—in other words, that Congress may only authorize people to sue if the plaintiff can prove a constitutional violation in the case at bar.[15] Under Justice Scalia's test, the relationship between remedy and right is always one to one.

IV. WHAT SHOULD REPLACE *CITY OF BOERNE*?

My position is that there should be no single test for the permissible relationship between right and remedy. The test should depend on the type of scrutiny the Court would employ when testing state action for constitutionality under the Fourteenth Amendment. The kind of scrutiny that the Court imposes on congressional remedies should mirror the

13. 17 U.S. (4 Wheat.) 316 (1819).

14. *Id.* at 421; *see also* Evan H. Caminker, *"Appropriate" Means–Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1133, 1161 (2001). This position once commanded a majority of the Court, at least with respect to the Fourteenth Amendment. *See* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

15. *Lane*, 541 U.S. at 558–61, 564 (Scalia, J., dissenting) (suggesting he would permit some prophylaxis in the race discrimination cases on the basis of stare decisis).

Court's well-established levels of scrutiny in examining the constitutionality of state action. As you all know, the level of scrutiny in examining state action depends on what kind of right is at stake. Classifications based on race, national origin, alienage, and a few other things trigger strict scrutiny.[16] A classification based on sex triggers intermediate scrutiny.[17] Almost all other kinds of state action are judged on a "rational basis"—if there is a rational relationship between the state action and a legitimate governmental purpose, the action is not unconstitutional.[18]

I will call my position the mirror image thesis. By that, I simply mean that the scrutiny the Court applies to congressional enactments under the enforcement provision of the Fourteenth Amendment should be the mirror image of the scrutiny that the Court already applies to judge the constitutionality of state action. Thus, under my argument, if the classification or right at stake triggers strict scrutiny, then Congress should be permitted to authorize broad prophylactic measures—anything that is rationally related to eradicating or preventing race discrimination by state actors. If the classification or right at stake triggers only rational basis review, then I will argue that Congress may authorize the courts to remedy only constitutional violations that have already occurred. For rights that trigger intermediate scrutiny, I will argue for something in the middle. Finally, I will urge that the Court apply the same rationale to the Fifteenth Amendment, which prohibits states from discriminating on the basis of race in voting.

No one should be astounded by my thesis. The tiers-of-scrutiny framework can ultimately be traced back to a source no less august than footnote four of *United States v. Carolene Products Co.*,[19] which suggested that the Court ought to have a narrower presumption of constitutionality for legislation aimed at discrete and insular minorities.[20] Nor am I the one who has tied Congress's enforcement powers under the Fourteenth Amendment to these tiers of scrutiny—the Court did that at least as far back as 2006.[21] In this Lecture, I am merely asking the Court to tie the review of Congress's legislation to the tiers of scrutiny in a precise manner, and to treat the Fifteenth Amendment as it treats the Fourteenth Amendment.

Why am I attracted to the mirror image thesis? Two reasons. First, it perfectly matches Congress's power to enforce the Fourteenth Amend-

16. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984).

17. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996); Orr v. Orr, 440 U.S. 268, 278–79 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976).

18. *See* Schweiker v. Wilson, 450 U.S. 221, 230 (1981); McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

19. 304 U.S. 144 (1938).

20. *Id.* at 152 n.4.

21. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365–75 (2001).

ment with the states' duties under the Fourteenth Amendment. The more fundamental and historically rooted the states' failures to perform their duties under the Fourteenth Amendment, the less the Judiciary should interfere with Congress's attempts to enforce those duties. The less profound that history of state failure, the less leeway Congress ought to have in legislating remedies.

A. Recent Case Law

A review of the Court's modern jurisprudence respecting congressional power to enforce the Fourteenth Amendment starts with the "new federalism" cases of the early 1990s. During the time the Court was pruning back the Commerce Clause in *United States v. Lopez*,[22] it was scaling back Section 5 of the Fourteenth Amendment in *City of Boerne*.

Not long thereafter, the Court handed down three more cases striking down statutes as improper under Section 5 of the Fourteenth Amendment. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[23] Congress had amended the patent laws to authorize private suits for damages against state governments for patent infringement.[24] The Court held that Section 5 of the Fourteenth Amendment did not provide Congress the power to enact such a law. True, patent law creates property interests, and the Due Process Clause as it applies against the states prohibits takings without due process. But the Court found that Congress had failed to identify any pattern of unconstitutional patent infringement by the states. Consequently, the Patent Remedy Act[25] was not congruent and proportional to any actual history of constitutional violations by the states.

In *Kimel v. Florida Board of Regents*,[26] some former employees of the Florida State University sued the school for money damages under the Age Discrimination in Employment Act (ADEA),[27] claiming that certain pay adjustments discriminated against older employees.[28] Whether or not states had a history of discriminating on the basis of age—Congress had neglected to document any such history—it was far from clear that such discrimination was *irrational*, said the majority. The absence of evidence of irrationality was critical because age is not a suspect classification and triggers no heightened scrutiny. Thus the rational basis test applies in judging the constitutionality of state-sponsored discrimina-

22. 514 U.S. 549, 559 (1995).
23. 527 U.S. 627 (1999).
24. *Id.* at 630.
25. Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 35 U.S.C. § 296 (2006)), *invalidated by* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).
26. 528 U.S. 62 (2000).
27. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2006).
28. *Kimel*, 528 U.S. at 66, 69–70.

tion on the basis of age. The Court concluded that Section 5 of the Fourteenth Amendment did not empower Congress to enact the ADEA.[29]

The next in the series was *Board of Trustees v. Garrett*.[30] This case was the consolidation of two suits against the University of Alabama by former employees who alleged that the school had violated a portion of the Americans with Disabilities Act of 1990 (ADA).[31] A majority of the Supreme Court held that Section 5 of the Fourteenth Amendment did not support enactment of the ADA any more than it did the enactment of the ADEA. The majority opinion in *Garrett* featured the same emphasis as in *Kimel* that the classification of disability does not trigger any heightened scrutiny under constitutional analysis. In enacting the ADA, Congress in fact had marshaled an impressive record of discrimination against disabled persons. But the majority rejected virtually all of the examples for various reasons.

The first reason, following *Kimel*, was that not all acts of discrimination against the disabled are irrational. There are jobs that able-bodied people can do that disabled persons cannot do without something more than what the Court has determined to constitute "reasonable accommodation."[32] So again, the lack of heightened scrutiny played a major factor in *Garrett*. But the Court did not stop there. The Court also brushed aside acts of discrimination against the disabled by local governments. True, local governments are instrumentalities of the state. But because the ADA authorized private suits for money damages against the state, *all* of the acts of discrimination against disabled persons had to be by state employees because local governments are not covered by the Eleventh Amendment. That, of course, meant that private acts of discrimination against the disabled—no matter how cruel, animus-based, or utterly irrational—were also irrelevant to the analysis. In the end, the Court concluded that Congress had identified only six scattered acts of irrational discrimination against disabled persons by various states over the years. The provision of a private cause of action for money damages against states in federal court was not a congruent and proportional remedy for those six scattered acts of irrational state discrimination.

Thus the Court had established a two-step process for determining whether Congress had properly used its Section 5 powers to authorize private suits for damages against states in federal court. The first was to scour the congressional record for findings of sufficiently widespread

29. The Commerce Clause almost certainly empowers Congress to enact the ADEA, but because of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), Congress may not authorize private suits for money damages against the states under the ADEA. *Id.* at 72–73 (holding that Congress's powers to subject unconsenting states to suit for money damages do not extend to either the Interstate Commerce Clause or the Indian Commerce Clause).

30. 531 U.S. 356 (2001).

31. 42 U.S.C. §§ 12101–12213 (2006).

32. *Garrett*, 531 U.S. at 385–86.

actual constitutional violations by states. If that prong were satisfied, the Court would proceed to whether the legislative remedy was congruent and proportional to this history of constitutional violations.

In three cases since *Garrett*, the Court has upheld laws under Section 5 of the Fourteenth Amendment, permitting private suits for damages against states in federal court. The first of those, *Nevada Department of Human Services v. Hibbs*,[33] concerned the family-care leave provision in the Family and Medical Leave Act of 1993 (FMLA).[34] When it enacted the FMLA, Congress documented a sufficiently widespread history of gender-based discrimination in the dispensation of family and medical leave. Congress found that states had perpetuated the stereotype of women as family caretakers and men as breadwinners by giving women leave to rear children but denying such leave to men. And, because gender discrimination triggers some form of heightened scrutiny, the majority, led by Chief Justice Rehnquist, was satisfied that the first prong was met. The Court did not flyspeck the congressional findings on prior discrimination as it had done in *Garrett* and *Kimel*, but it nonetheless found that there was a sufficient history of constitutional violations. It then went on to find that the family-care provision of the FMLA was a congruent and proportional response to the history of violations.

In *Tennessee v. Lane*,[35] the Court took up the validity of a different portion of the ADA than it had reviewed in *Garrett*. *Lane* involved a case where a criminal defendant literally had to crawl up the stairs on his hands and knees to a court proceeding because the local courthouse had no elevator to accommodate his wheelchair. The Court held that this portion of the ADA was supported by Section 5 on the ground that Lane had been denied a fundamental right—access to court—which, in turn, triggered heightened scrutiny under constitutional analysis. Then, in *United States v. Georgia*,[36] the Court had no trouble finding that a paraplegic inmate in a state prison could sue under the same provision of the ADA involved in *Lane*.[37] The state had failed to provide him with a toilet that he could use without assistance, which squarely violated his Eighth Amendment rights.

Last Term, the Court, having zigged for several years, zagged again. In *Coleman*, the Court reviewed the self-care provision in the FMLA. Although it had upheld the *family-care* provision of the FMLA in *Hibbs* nine years earlier, the Court now held that the *self-care* provision could not be justified by Section 5. The majority, led by Justice Kennedy, found that there was no real connection between the states' history of

33. 538 U.S. 721 (2003).
34. 29 U.S.C. §§ 2601–2654 (2006).
35. 541 U.S. 509 (2004).
36. 546 U.S. 151 (2006).
37. *Id.* at 159.

gender discrimination and the self-care provision. Congress created the self-care provision not to remedy any past gender discrimination but simply to provide employees with the flexibility in work arrangements necessary to care for themselves. Thus there was really no question of whether the self-care provision was congruent and proportional to the history of constitutional violations; the Court had found that there was no relationship at all between the two.

In dissent, Justice Ginsburg laid out a powerful historical rebuttal. She explained that the self-care provision was part of a holistic remedy for gender discrimination in employment and in leave policies. Without the self-care provision, the statute as a whole was greatly hampered in its effectiveness. But it is not my current purpose here to assess who has the better statutory construction argument. I wish to look at the Court's modes of review in these Section 5 cases and attempt to gauge what aspects appear settled and what aspects appear unsettled.

Erwin Chemerinsky (among others) has argued that the following approach can be deduced from the cases.[38] If the right at stake is one that triggers some kind of heightened scrutiny, then it does not matter whether or to what extent Congress has documented a history of constitutional violations. As a practical matter, that is the end of the inquiry; the legislation will be found constitutional. If the right at stake is one that generally triggers only rational basis review, then Congress must document a sufficiently widespread history of constitutional violations by the states. This is a difficult project because discriminatory acts by local officials or private actors do not count; only those of state officials count. Furthermore, the discrimination must be irrational because no heightened level of scrutiny has been triggered. Even if plaintiffs can surmount this test, they must then convince the court that Congress's chosen remedy is congruent and proportional to the history of discrimination.

As I have said, the intellectual origins of the tiers-of-scrutiny approach trace back in large part to footnote four of *Carolene Products*. Discrete and insular minorities are less able to obtain relief from discrimination through the political process. But there is another reason to vary the level of scrutiny based on the type of claim involved. It is a plain fact that some constitutional violations are more stubbornly rooted in our nation's history than others are. Yes, we have discriminated against heavy people and short people and, in a more serious vein, against people with learning disabilities and treatable mental health issues. But it simply blinks reality to say that America has discriminated against those groups as consistently and seriously as it has against such groups as African-Americans, Mexican-Americans, Native Americans, and women. There are certain social cleavages around which our political, economic, and

38. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 477 (5th ed. 2007).

cultural structures have been built, and they are familiar—race, national origin, religion, and sex. There are other traits that society has irrationally made points of distinction, but not in nearly as profound a manner.

B. Why "Rational Basis" Review Should Not Govern Scrutiny of All Fourteenth Amendment Legislation

But if any form of state-sponsored discrimination is irrational, Why not give Congress broad authority to legislate against them? My answer is trite, but nonetheless true: because the federal government is still a government of enumerated powers. Suppose Congress were to permit private suits in federal court against states for having levied irrational regulatory burdens on failed businesses? Or private suits in federal court against states that place irrational restrictions on the possession of concealed handguns? Or that discriminate irrationally against cigarette smokers? Every conceivable legislative objective can be couched as "discrimination" against somebody, or as the deprivation of someone's right to substantive due process.

You may not think my parade of horribles very realistic, and indeed, you may think it more likely that Congress would do "good" and "progressive" things with near plenary powers. Even so, that would not change my mind. Giving Congress the power to legislate about virtually anything would throw off our existing balance of powers, with unknown and unknowable systemic consequences. If we were to start from scratch and redraft the Constitution, I do not know whether I would choose a federated system where the states are "sovereign." I might opt in favor of a centralized government. But we are not going to start from scratch, and realistically, we cannot.

To me, that is one of the attractions of the mirror image thesis—it puts some meaningful limits on congressional power under the Fourteenth Amendment. That raises the next question, which is, What relationship between right and remedy should the Court require with respect to each tier of scrutiny? On the strict scrutiny end, the answer must be something highly deferential. Here, I would use the simple means–end test of *McCullough*, which I do not view as meaningfully different from the rational basis test used to judge the constitutionality of most state action. The remedy must enforce constitutional rights recognized by the Court, but the relationship between the remedy and the right merely has to be one of plausible justification.

At the other end, What relationship must there be between legislative remedies and rights that trigger only rational basis scrutiny? I have just explained why I oppose a highly deferential standard of reviewing such legislation—it turns Section 5 into a near plenary grant of power to legislate against the states on almost any subject matter. Perhaps the Court could adopt a standard permitting legislation to enforce rights that trigger rational basis review only when the legislation is essential to the

preservation of such rights. My reservation about such a standard, however, comes from the same place that makes me uncomfortable with congruence and proportionality. There is too much room for argument about what legislation is essential and what is merely desirable.

At this end of the spectrum, I find myself alone with Justice Scalia, calling for an actual constitutional violation in the case at bar. In other words, when Congress legislates to enforce rights that trigger only rational basis review, the legislation should be held valid as applied only to cases where the plaintiff can demonstrate an actual constitutional violation in his or her case. To put it yet another way, when it comes to rights triggering rational basis review, Congress should not be permitted any prophylaxis or deterrence. It should be able to provide a remedy only in cases where the right has, in fact, been violated. Characteristic of Justice Scalia, this is a readily administrable, bright-line rule.

Although only Justice Scalia has, to date, openly advocated such a standard, it is consistent with the Court's actual cases scrutinizing legislation to enforce rights that trigger only rational basis review. *Kimel* was actually the consolidation of three cases. In one, Daniel Kimel and other faculty members of a Florida state university sued to challenge the university's failure to implement a previously announced pay increase. Their argument was that the failure to follow through with the pay raise had a disparate impact on older employees because they tended to have higher base salaries. Even if Kimel and his colleagues' allegations were true, however, the Court has held that disparate impact by itself never makes out a constitutional violation, so my proposal is consistent with the Court's treatment of Mr. Kimel's claim.

In the second consolidated case, Wellington Dickson sued his employer, the Florida Department of Corrections, alleging that the department had passed him over for promotion because of his age and then retaliated against him for filing a grievance. In the third consolidated case, Roderick MacPherson and Marvin Narz were associate professors at a state-run business college. They alleged that the college used an evaluation system that had a disparate impact on older faculty members, and that the college retaliated against them for filing grievances with the Equal Employment Opportunity Commission.

Under my thesis, whether the Court decided these cases correctly depends on whether one takes the retaliation charges seriously. Again, the disparate-impact claim does not state a constitutional violation. The department passing Mr. Dickson over for a promotion because of his age does not violate the Constitution because a rational basis can be articulated for encouraging old professors to retire.[39] Not every professor beyond a certain age has "lost it," but it is not irrational to think that com-

39. I resemble that remark.

petence generally diminishes beyond a point, and it is administratively costly to engage in case-by-case evaluations. On the other hand, retaliation for filing a grievance clearly constitutes a First Amendment violation. If the retaliation claims in these cases were not merely plaintiff's-lawyer-boilerplate tack-ons—and they usually are—then the Court was wrong to find that they could not sue in federal court.

Garrett also involved consolidated cases. In one, Patricia Garrett was a registered nurse in the University of Alabama's Birmingham hospital. She was diagnosed with breast cancer and underwent treatment, including chemotherapy. When she came back, she was told that she could not have her old position back, but rather would be relegated to a lower-paying position as a nurse manager. In the other case, Milton Ash was a security officer for the Alabama Department of Youth Services. He was diagnosed with chronic asthma and sleep apnea and asked for different assignments that would accommodate these conditions. The department did not accommodate him to his satisfaction. Both Garrett and Ash sued the State of Alabama in federal court for money damages pursuant to Title I of the ADA.

Under rational basis review, neither of these plaintiffs stated a constitutional violation. It is certainly possible that the hospital had promoted someone else to a position in Garrett's absence such that it could not afford to pay Garrett her old salary any longer. That would have been a rational reason for acting as the hospital did. If that was the case, it was stupid management and poor employee relations, but those things are not unconstitutional. In Ash's case, perhaps there were no other open shifts. Or perhaps the department had a strict rule not to accommodate health conditions because then everyone would want to move their schedules around for allergies, sleep patterns, and so on. Don't get me wrong—what Garrett and Ash alleged clearly violated Title I of the ADA. I merely note that neither of those allegations amounts to a violation of the Fourteenth Amendment. Therefore, under my thesis, the Court was right not to permit Congress to authorize these plaintiffs to sue the state for money damages in federal court.[40]

That leaves the intermediate scrutiny cases. What relationship must exist between congressional remedies and rights triggering intermediate scrutiny? If you put a gun to my head, I suppose I am stuck with congruence and proportionality. I just lack the imagination to articulate a test in between strict scrutiny and rational basis review that does not require some assessment of fit. I would need to invent a metric by which inter-

40. I would like to register my reservations about the Court's Eleventh Amendment jurisprudence. I agree that permitting private suits for money damages against unconsenting states in federal courts is a significant federalism cost, but I do not necessarily agree with the Court's holding in *Hans v. Louisiana*, 134 U.S. 1, 10 (1890), that the Eleventh Amendment applies in a case where the cause of action arises under federal law and where the plaintiff is a resident of the state.

mediate scrutiny of legislation could be exercised without reference to the relationship between means and ends. Yet the notion of intermediacy seems to denote that very relationship. Perhaps the Court should simply abandon the category of intermediate scrutiny. Sex as a classification could be moved to strict scrutiny and commercial speech could be moved to rational basis review. That would be my gut suggestion, but a defense of those views will have to await another day.

C. The "Distribution and Currency of Violations" Issues

Two important issues remain, which I shall treat together because I believe they are related. One is whether a pattern of violations in a few states justifies legislation that applies in all states. The other is whether Congress's power to legislate may only be based on current violations, or whether a history of violations triggers the Section 5 power.

Under my proposal, neither of these issues arises when the claimed right triggers only rational basis review because my proposal would require an actual constitutional violation in the case at bar. If a plaintiff can demonstrate that his or her constitutional rights were violated by the state, then that state was obviously among the offenders, and the violation is current.

But what if the claimed right would be reviewed under some form of heightened scrutiny? I believe the Court should ignore the distribution of violations among states for three reasons. One is that the types of constitutional rights that trigger strict scrutiny have almost certainly been violated in all the states at one time or another. Slavery and Jim Crow may have been limited to the states of the former Confederacy, but at one point or another, facially neutral laws in almost every state have been enacted with the intent to disadvantage certain racial groups. It would be hard to think of a single state that has not, at one time or another, discriminated on the basis of religion, if even only against atheists. All states at one time discriminated against women in their marital or criminal (rape) laws, to say nothing of their own employment policies.

Another reason to disregard the distribution of violations among states is that when the states joined to create "a more perfect Union,"[41] they surrendered some aspects of their sovereignty. One of them, in my estimation, was the privilege of having national legislation tailored to their idiosyncrasies. This is especially true when the problems spawning the legislation have broad and deep roots.

The third reason to disregard the distribution of violations among states is also the reason why Congress need not rely on current violations to justify legislation. The framers of the Reconstruction Amendments desperately would have wanted to avoid new forms of state-sponsored

41. U.S. CONST. pmbl.

discrimination based on race. It is beyond cavil that they saw slavery and any version of systematic racial oppression as a moral and practical failing of the nation. Did they succeed in eliminating all such oppression? For a few years, they came close, but that brief period of near formal equality proved all too transient. Jim Crow soon took hold and recreated the formal system of racial subordination.

That is why the courts must not insist upon current violations to uphold legislation enforcing rights that trigger strict scrutiny. There are certain social dynamics that do not change over time. The players may change, but the dynamics remain the same. It is not only the United States. Look around the world. Most societies can absorb a small number of people who are not of the dominant race without much trouble. But let the number swell to significant proportions and the dominant group feels threatened. The dominant group then is tempted to use the law to reinforce its dominance. Religions say they are in favor of freedom of worship until they have enough power to seize the state apparatus and enforce their beliefs on everyone. If your version of the Supreme Deity and holy scripture are right, then anyone who disagrees *must* be wrong—and their souls must be saved by whatever means necessary. The racial and religious targets change over the generations, but the human story remains the same. That is why, when it comes to discrimination on the basis of race or religion, it is both foolish and dangerous to say, "Oh, that was then, this is now."

One last loose end. It is true that the Court has defined "race discrimination" under the Equal Protection Clause to mean only "intentional" discrimination, eschewing "disparate impact" as sufficient proof of a constitutional violation.[42] Thus, one might argue against my proposal on the ground that remedial legislation based on race where no intentional discrimination can be proved would be struck down. One possible illustration would be the proposed North Carolina Racial Justice Act,[43] which would have dealt with racially disproportionate capital sentencing. With respect to this example, I simply disagree with the Court's conclusion that there is not intentional race discrimination involved in disproportionate capital sentencing. In the study involved in *McCleskey v. Kemp*,[44] and in subsequent studies, the late David Baldus and his colleagues offered statistical evidence from which intentional race discrimination not only could have been inferred, but also should have been inferred.[45] In some studies it was based on the race of the victim and in others on the

42. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989), *superseded by statute*, Civil Rights Act of 1991, § 105, Pub. L. No. 102-166, 105 Stat. 1074, 42 U.S.C. § 2000e–2(k) (1994) *as recognized in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

43. N.C. GEN. STAT. § 15A-2010 (2011).

44. 481 U.S. 279 (1987).

45. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS *passim* (1990).

race of the defendant, but I believe it is inconsistent with the purpose of the Fourteenth Amendment to deny an inference of intentional discrimination in capital sentencing.

In general, my response regarding disparate impact is this: in true cases where no inference of even partial racial motivation is warranted, the plaintiff should not win on a claim of race discrimination. But I believe both the Supreme Court and lower courts have been too quick to accept "plausibly neutral" explanations that were quite possibly pretextual. The attitude that "we decline to assume that what is unexplained is invidious"[46] is, at least in some contexts, simply not a faithful application of existing doctrine. It is significant that Justice Powell, who wrote those words, later admitted that he had come to regard the *McCleskey* decision as a mistake.[47]

V. HOW DOES MY THESIS AFFECT THE FIFTEENTH AMENDMENT?

So much for legislation enacted to enforce the Fourteenth Amendment. What are the implications for the Fifteenth Amendment?

As some of you may know, a D.C. Circuit panel in May handed down an opinion in a case called *Shelby County v. Holder*,[48] in which Shelby County, Alabama, claimed that the preclearance provision of the Voting Rights Act of 1965, as reenacted for a period of twenty-five years in 2006, exceeds Congress's enforcement powers under the Fifteenth Amendment.[49] The panel voted 2–1 to uphold the preclearance provision, and most observers expect the Supreme Court to take the case.[50]

The Court will not be writing on a blank slate. In 1966, the Court decided a case called *South Carolina v. Katzenbach*,[51] which made it clear that the federal courts were to review Congress's enforcement choices under the Fifteenth Amendment in the most deferential manner.[52] But in 2009, the Supreme Court handed down an opinion whose tenor can best be characterized as, "It's not 1965 anymore, and all bets are off."

The 2009 case is called *Northwest Austin Municipal Utility District No. 1 v. Holder*.[53] A utility district in Texas challenged the constitution-

46. *McCleskey*, 481 U.S. at 313.
47. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).
48. 679 F.3d 848 (D.C. Cir. 2012).
49. *Id.* at 856–57, 863–64.
50. The Court did grant certiorari in *Shelby County* on November 9, 2012. The grant is limited to the following question: "Whether Congress'[s] decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution." Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) (No. 12-96).
51. 383 U.S. 301 (1966).
52. *Id.* at 325–27.
53. 557 U.S. 193 (2009).

ality of § 5 of the Voting Rights Act, which requires some states and localities to obtain preclearance for certain types of changes to their voting systems. Congress first enacted the Voting Rights Act in 1957 pursuant to its enforcement authority under the Fifteenth Amendment and has reenacted it numerous times, most recently in 2006, finding that it is still necessary to combat race discrimination in voting. The utility district had never itself discriminated in its elections, and requiring it to engage in the preclearance procedure exceeded Congress's Fifteenth Amendment powers, the district argued.

The Supreme Court held in favor of the utility district, but not on the constitutional question. The Court found that the utility district was entitled to a statutory exemption from the preclearance procedure—known in the Voting Rights Act lexicon as a bailout—and therefore the constitutional question was avoided. But the Court, speaking through Chief Justice Roberts, stated that the preclearance provision was constitutionally suspect: "§ 5, 'which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.' These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5."[54]

Translation: Preclearance is strong prophylactic medicine. Chief Justice Roberts, writing for all the Justices save Justice Thomas (who would have struck down § 5 on the spot), then engaged in what might fairly be characterized as a congruence and proportionality analysis:

> Some of the conditions that we relied upon in upholding this statutory scheme [in the past] have unquestionably improved. Things have changed in the South. . . .
>
> . . . It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.[55]

The Court then hinted at its concerns about the fact that preclearance is required of certain states and not of others—and that the basis for singling out the states required to engage in preclearance may not be up-to-date.

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.[56]

54. *Id.* at 202 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).
55. *Id.* at 202–03.
56. *Id.* at 203.

Despite extensive briefing on the question, the Court declined to decide whether congruence and proportionality was required or whether the proper test was one of rationality.[57]

Thus, the *Northwest Austin* Court expressed strong disapproval for the notion that Congress can base current and continuing remedies on conditions that may have been eliminated decades ago. Such remedies impose serious federalism costs, and such costs can only be justified by roughly commensurate current needs in enforcing Fifteenth Amendment rights.

I am no expert on the Voting Rights Act, but clearly not everyone who supports the preclearance provision thinks it is perfect as it is currently written. In particular, there seems to be too much emphasis on statewide redistricting, where discriminatory behavior is pretty transparent, and where the Justice Department has the greatest potential to engage in partisan abuse of its preclearance powers. The current real needs lie more in *local* elections and their attendant conditions, which are not highly transparent, where it takes only a few bad actors to shut down groups of minority voters, and where the Attorney General of the United States has little incentive to game the system through his or her preclearance powers. Professors Samuel Issacharoff and Michael Pitts have debated the matter, and despite their divergent conclusions regarding the overall desirability of the preclearance provision, they agree on the point just mentioned.

In his *Shelby County* opinion upholding the preclearance provision, Judge David Tatel of the D.C. Circuit dutifully followed *Northwest Austin* dicta on the standard of review. Because *Northwest Austin* stated that the preclearance provision raises serious constitutional questions under either the congruence and proportionality test used in cases like *City of Boerne*, *Kimel*, and *Garrett* or under the rational basis test used in cases like *Hibbs* and *Lane*, Judge Tatel logically assumed for the sake of argument that the congruence and proportionality standard applied—yet he found that the preclearance provision satisfied even that demanding test.[58]

Why? Because the congressional record contained sufficient evidence from which Congress could reasonably conclude that racial discrimination in covered jurisdictions remains so serious and pervasive that individual litigation (as opposed to the systematic, prophylactic preclearance system) is insufficient to enforce the Fifteenth Amendment. As recounted in Judge Tatel's opinion, the town of Kilmichael, Mississippi, cancelled a 2001 election when there was "an unprecedented number" of

57. *Id.* at 204.
58. Shelby Cnty. v. Holder, 679 F.3d 848, 859 (D.C. Cir. 2012).

African-American candidates.[59] In 1998, Webster County, Georgia, proposed to reduce the black population in three of the school board's districts after the electorate voted in a majority of black board members for the first time in history. In 1993, Washington Parish, Louisiana, created a new at-large seat "to ensure that no white incumbent would lose his seat."[60] In the early 1990s, Mississippi legislators opposed a "redistricting plan that would have increased the number of black majority districts, referring to the plan publicly as the 'black plan' and privately as the 'nigger plan.'"[61] Georgia's state House Reapportionment Committee Chairman "told his colleagues on numerous occasions, 'I don't want to draw nigger districts.'"[62]

No. It's not 1965 anymore. But these incidents from the early 1990s to the early 2000s demonstrate that the states of the former Confederacy still have powerful forces whose clear intention is to minimize the electoral impact of African-Americans. Would I limit the preclearance requirement to the states of the former Confederacy? No, I would not. I will come out and say that I think it's probably needed in parts of Arizona, parts of Texas, and parts of my home state of California. Should preclearance continue to be required at the statewide level of every single Southern state? Maybe not. Maybe preclearance ought to be concentrated at the level of local government.

But here is my point, and it is as unoriginal as any point can be: decisions about what governmental entities should be subject to preclearance are for Congress to decide, not the Court. As Judge Tatel said of the 2006 renewal of the preclearance provision, "Congress found that serious and widespread intentional discrimination persisted in covered jurisdictions and that 'case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy.'"[63] That conclusion is hardly irrational, considering the evidence that faced Congress in 2006, and that ought to be the end of the inquiry. Race discrimination, no less under the Fifteenth Amendment than under the Fourteenth, is the most suspect kind of state action. When Congress acts pursuant to its Fourteenth or Fifteenth Amendment enforcement powers to combat such action, those enactments must be given the widest berth possible. Any plausible justification that can be articulated in favor of the legislation—whether or not Congress was actually motivated by it—must be permitted to sanction the enforcement scheme. The Court would clearly stray beyond its proper boundaries in our constitutional system if it were to put the magnify-

59. *Id.* at 865 (quoting H.R. Rep. No. 109-478, at 36–37 (2006) (Jud. Comm. Rep.) (internal quotation marks omitted)).

60. *Id.* (quoting H.R. Rep. No. 109-478, at 38 (2006) (Jud. Comm. Rep.) (internal quotation mark omitted)).

61. *Id.* at 866 (quoting *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22 (2006)).

62. *Id.* (quoting H.R. Rep. No. 109-478, at 67 (2006) (Jud. Comm. Rep.)).

63. *Id.* at 872 (alterations in original) (quoting H.R. Rep. No. 109-478, at 57 (2006)).

ing glass on the congressional record and insist upon the tightest possible fit between remedy and malady in every single situation. The generic cry of "federalism costs" does not, and cannot, change that boundary.

Judge Tatel's masterful opinion for the panel in *Shelby County* provides a wonderful blueprint for the Court to uphold the preclearance provision, while expressing a desire for Congress to rework the provision to make it more focused on local practices than on statewide redistricting. The only disagreement I have with Judge Tatel stems from the fact that he is a judge deciding a real case and I am a commentator. The difference is in the standard of review. He apparently felt compelled to apply the congruence and proportionality standard. As I mentioned earlier, even in the cases where the rights trigger heightened scrutiny, the Court insists that it still does perform some kind of congruence and proportionality review, although it is questionable whether the legislative facts support that conclusion. I would make it clear right now, just as I have made clear with respect to those Fourteenth Amendment cases involving rights that trigger strict scrutiny, that the congruence and proportionality test should not apply. The only question should be whether Congress had any conceivable rational basis to enact the remedial legislation—and, in the spirit of true rational basis review, the facts supporting that rational basis need not appear in the congressional record at the time of enactment. That is the only way for the Court to square its standards of reviewing state action for constitutionality with its standards for reviewing congressional acts enforcing constitutional rights, both with respect to the Fourteenth and Fifteenth Amendments.

No way, you say? *Northwestern Austin* portends nothing but a batting down of the preclearance provision *in toto*? That certainly could happen, but don't bet the rent money just yet. Consider the following quote:

> In assessing those questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it.[64]

Those words are straight from the Chief Justice's opinion in *Northwest Austin*. And don't think for a minute that they are just window dressing. Every one of those nine Justices takes both federalism and sep-

64. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204–06 (2009) (quoting Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring) and Rostker v. Goldberg, 453 U.S. 57, 64 (1981), respectively).

aration of powers seriously. Every one of them is keenly aware that the Court must stay within its proper role when reviewing legislation. Each of them sees things differently at the margins, and from different perspectives—that's why there are nine of them, not just one. But don't assume that any of them are going to vote to chuck the preclearance provision without a good long look, just as none of them is going to vote to rubber-stamp it. The Justices are like your family members. At times they make you crazy, you want to strangle them, you wonder how you could really be related to them. There are days when you disagree on everything. But at the end of the day, you know they really want to do the right thing, and in this case, that would be to apply rational basis review to all congressional enactments enforcing the right not to be discriminated against on the basis of one's race.