

NOTES

TAKING CONGRUENCE AND PROPORTIONALITY SERIOUSLY

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Advocates are hoping that employment discrimination based on sexual orientation and gender identity will soon be outlawed under Title VII. To this end, the Supreme Court is currently considering whether Title VII already prohibits those forms of discrimination, and legislators have advanced the Equality Act, a new bill that would explicitly protect lesbian, gay, bisexual, and transgender employees. These debates, however, typically overlook a critical question: Does Congress actually have the authority to hold state governments accountable for discriminating against LGBT workers? This Note argues that Congress does. While Congress exercises its power to enforce the Fourteenth Amendment under the constraints of the Court's "congruence and proportionality" standard, none of the limitations set by the Court foreclose the Equality Act's provisions imposing liability on state employers. If the Court takes congruence and proportionality seriously, those provisions should stand. This Note thus challenges the conventional wisdom that LGBT individuals are beyond Congress's power to protect merely because the Court does not formally review anti-LGBT discrimination under heightened scrutiny. It seeks to account for the Court's clear concern with state action rooted in animus, which indicates that classifications targeting LGBT individuals are subject to careful judicial review. Moreover, it recasts the Court's precedents on congressional enforcement, emphasizing that the legislative record and statutory scope, rather than the applicable standard of review, determine the validity of the statute in question. Under these clarified standards, the Equality Act emerges as appropriate enforcement legislation.

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INTRODUCTION

Advocates have long sought to prohibit employers from discriminating against lesbian, gay, bisexual, and transgender (LGBT¹) employees. Today, these efforts proceed along two highly visible tracks. At the Supreme Court, litigants urge the Justices to hold that Title VII of the Civil Rights Act of 1964²—the nation’s premier civil rights statute—already bars sexual orientation and gender identity discrimination in employment.³ Across the street, legislators are considering the Equality Act,⁴ which would codify explicit protections for LGBT workers.⁵ But lost in the discussion over whether Congress *should* pass a new law to shield LGBT individuals from adverse treatment by their employers is the question of whether Congress *can*.

¹ Throughout this Note, I use “LGBT” as a shorthand meaning “lesbian, gay, bisexual, and transgender.” When discussing legislative efforts that excluded transgender individuals, or judicial opinions that focused solely on issues related to sexual orientation, I use “LGB” to refer to lesbian, gay, and bisexual people. In using “LGB” and “LGBT,” I in no way intend to exclude individuals who identify as queer, asexual, intersex, or nonbinary, who may face discrimination because of their sexual orientation or gender identity. For more information about advocacy specifically on behalf of nonbinary and intersex people, and its relationship to the LGBT rights movement, see Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 914–30 (2019).

² 42 U.S.C. § 2000e (2018).

³ Adam Liptak & Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html>.

⁴ H.R. 5, 116th Cong. (2019).

⁵ See Catie Edmondson, *House Equality Act Extends Civil Rights Protections to Gay and Transgender People*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/us/politics/equality-act.html>.

While Congress clearly has the power to prohibit private employers (and public employers at the federal level) from discriminating on the basis of sexual orientation and gender identity, its authority to impose liability on state employers remains far less certain.

To many observers, the most glaring obstacle to the realization of federal protections for LGBT state workers is political.⁶ The Equality Act passed the House of Representatives in May 2019,⁷ but opposition from President Donald Trump⁸ and the Republican-controlled Senate⁹ likely dooms its chances in the 116th Congress. The bill's short-term legislative prospects therefore seem dim. However, widespread support among the public at large suggests that the bill might fare better in the not-too-distant future.¹⁰ It may only be a matter of time before the Equality Act becomes law. If and when that day arrives, will the bill's protections for state employees withstand constitutional scrutiny?

The answer could have profound consequences for the estimated 333,000 LGBT individuals who are employed by States that lack protections against sexual orientation and gender identity discrimination in the workplace.¹¹ These employees staff state agencies, teach at public universities, and serve as police officers.¹² Yet the Equality Act might fail to reach them. Congress can draw on its power to regulate interstate commerce in order to protect the millions of LGBT individ-

⁶ See *id.* (“The response from the Republican-controlled Senate and White House, however, is likely to be a resounding no.”).

⁷ *Id.*

⁸ Tim Fitzsimons, *Trump Opposes Federal LGBTQ Nondiscrimination Bill, Citing ‘Poison Pills,’* NBC NEWS (May 14, 2019, 3:25 PM), <https://www.nbcnews.com/feature/nbc-out/trump-opposes-federal-lgbtq-nondiscrimination-bill-citing-poison-pills-n1005551>.

⁹ See Colby Itkowitz, *House Passes Bill to Ban Discrimination Based on Sexual Orientation and Gender Identity*, WASH. POST (May 17, 2019, 2:15 PM), https://www.washingtonpost.com/politics/house-passes-bill-to-ban-discrimination-based-on-sexual-orientation-and-gender-identity/2019/05/17/aed18a16-78a3-11e9-b3f5-5673edf2d127_story.html (predicting that the bill is unlikely to be voted upon in the Senate).

¹⁰ German Lopez, *The House Just Passed a Sweeping LGBTQ Rights Bill*, VOX (May 17, 2019, 12:14 PM), <https://www.vox.com/policy-and-politics/2019/5/17/18627771/equality-act-house-congress-lgbtq-rights-discrimination> (“The Equality Act and other proposals like it are very popular among the American public.”).

¹¹ See WILLIAMS INST., *LGBT PEOPLE IN THE U.S. NOT PROTECTED BY STATE NONDISCRIMINATION STATUTES* 4 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-April-2019.pdf>.

¹² See generally BRAD SEARS ET AL., WILLIAMS INST., *DOCUMENTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT* ch. 12 (2009), <https://williamsinstitute.law.ucla.edu/research/discrimination/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment> [hereinafter WILLIAMS INST. 2009] (describing the discrimination suffered by LGBT state employees in a range of occupations).

uals¹³ across the country who work for private entities.¹⁴ Likewise, Congress can outlaw discrimination by federal employers on the basis of sexual orientation and gender identity.¹⁵ However, the Court has circumscribed Congress's authority to impose liability on state governments that engage in unlawful discrimination. Congress can only do so by invoking its power to enforce constitutional rights protected by the Fourteenth Amendment—a power that the Court monitors carefully. This Note examines the constitutional questions raised by the Equality Act, seeking to identify the essential aspects of appropriate enforcement legislation. It concludes that, under the Court's own standards, the Equality Act's state employer provisions should withstand judicial review.

Part I sets the stage for this Note's discussion of congressional authority to enforce LGBT rights against the States. It explains how state sovereign immunity ordinarily denies federal courts the power to hear lawsuits seeking damages from state governments.¹⁶ Congress can choose to override this immunity, however, and empower state workers to sue their employers.¹⁷ This authority derives from Section Five of the Fourteenth Amendment, which allows Congress to enact legislation enforcing the Equal Protection and Due Process Clauses housed in Section One.¹⁸ Today, Congress exercises its Section Five power under increasingly close supervision. When reviewing enforcement legislation, the Supreme Court demands a tight fit—a “congruence and proportionality”—between the unconstitutional behavior of the States and the means by which Congress has chosen to eradicate it.¹⁹

These limitations on congressional authority to abrogate state sovereign immunity have become newly relevant as legislators inch

¹³ See WILLIAMS INST., *supra* note 11.

¹⁴ *Cf.* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000) (recognizing the Age Discrimination in Employment Act as valid Commerce Clause legislation); Coleman v. Court of Appeals of Md., 566 U.S. 30, 64 (2012) (Ginsburg, J., dissenting) (“The self-care provision [of the Family and Medical Leave Act] remains valid Commerce Clause legislation . . .”).

¹⁵ See Dexter Brooks, Barbara Dougherty & Jamie Price, *The Federal Government as a Model Employer and Its Impact on Employment Civil Rights in America*, 19 EMP. RTS. & EMP. POL'Y J. 151, 153 (2015) (listing statutes imposing nondiscrimination mandates on federal employers).

¹⁶ See *infra* Section I.A.

¹⁷ See *infra* note 37 and accompanying text.

¹⁸ Section One of the Fourteenth Amendment states that “[n]o State shall . . . 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, § 1. Section Five grants Congress the “power to enforce, by appropriate legislation, the provisions of this article.” *Id.* § 5.

¹⁹ See *infra* Section I.B.2.

closer to passing the Equality Act.²⁰ Part II situates these developments within the long history of congressional efforts to enact federal protections for LGBT state workers. It begins with Bella Abzug's original vision of a sweeping "gay civil rights bill" and culminates with the Equality Act's reemergence in recent sessions of Congress.

Against this backdrop, Part III examines why the Equality Act's state employer provisions may be in danger. Most damningly, the Court has never officially determined that anti-LGBT discrimination triggers heightened scrutiny under Section One of the Fourteenth Amendment.²¹ Traditionally, this would mean that classifications based on sexual orientation and gender identity are presumptively constitutional.²² But under the Court's modern equal protection jurisprudence, whether a classification formally draws heightened scrutiny appears essentially irrelevant to its ultimate constitutionality. Even where rational basis review nominally applies, the Court often seeks to uncover whether a government classification is motivated by animus, instead of just presuming that the classification furthers legitimate state interests.²³ And yet, the traditional tiers of scrutiny continue to play an outsized role in Section Five cases. There, the Court has typically refused to find enforcement legislation congruent and proportional unless it targets discriminatory state action subject to heightened scrutiny under Section One.²⁴

Part IV contests this cramped understanding of Congress's ability to vindicate constitutional rights. It argues that if the Court takes its command of "congruence and proportionality" seriously, the Equality Act should stand. Even assuming that the level of scrutiny triggered by a state classification wholly determines congressional authority to prohibit that classification through enforcement legislation, anti-LGBT discrimination demands a standard of review functionally indistinguishable from heightened scrutiny.²⁵ But the baseline assumption that heightened scrutiny serves as a necessary condition for congressional enforcement is itself flawed. None of the Court's Section Five precedents compel the conclusion that Congress lacks the power to enforce constitutional rights subject to rational basis review.²⁶ The factors that do emerge as critical components of the congruence and proportionality test—the record of state constitu-

²⁰ See *infra* Part II.

²¹ See *infra* Section III.A.

²² See *infra* Section III.A.

²³ See *infra* Section III.A.

²⁴ See *infra* Section III.B.

²⁵ See *infra* Section IV.A.

²⁶ See *infra* Section IV.B.

tional violations produced by Congress and the scope of the proposed statute—help establish the Equality Act as appropriate legislation.²⁷

This Note enters a discussion over LGBT rights in the workplace that is rapidly evolving. In October 2019, the Supreme Court heard consolidated cases presenting the question of whether discrimination on the basis of sexual orientation or gender identity constitutes discrimination “because of sex” under Title VII.²⁸ That argument has recently gained traction among some lower courts.²⁹ The trio of pending Title VII cases illuminates the stakes of the debate over the Equality Act. If the Court holds that Title VII does not protect employees from discrimination based on sexual orientation or gender identity, calls for the Equality Act will become all the more urgent.

Should the Court determine that Title VII *does* already prohibit sexual orientation and gender identity discrimination, many questions raised by this Note will linger. Such a ruling would be unlikely to address whether anti-LGBT discrimination violates the *constitutional* guarantee of sex equality (a matter of Section One doctrine), let alone whether the Equality Act’s state employer provisions appropriately enforce that constitutional right (a question under Section Five).³⁰ Moreover, a decision in favor of these plaintiffs would shed little light on the future of Congress’s enforcement power—among this Note’s central concerns.³¹

This Note also builds off of scholarship that has observed the threat state sovereign immunity defenses and a weakened enforcement power pose to congressional efforts to enforce LGBT rights.³² In

²⁷ See *infra* Section IV.C.

²⁸ Liptak & Peters, *supra* note 3.

²⁹ See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc) (holding that sexual orientation discrimination constituted sex discrimination under Title VII); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–81 (6th Cir. 2018) (holding that gender identity discrimination constituted sex discrimination under Title VII), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

³⁰ While this question lies beyond the scope of this Note, the answer should principally depend on the legislative record Congress has compiled. See *infra* Section IV.B.

³¹ Fifteen States joined an amicus brief in the trio of Title VII cases in which they raised the issue of Congress’s power to enforce the Equality Act against state employers. The States urged the Supreme Court to reject the arguments of the Title VII plaintiffs in order to avoid the “serious constitutional question [that] exists as to whether Title VII could validly abrogate state sovereign immunity as to claims of discrimination based on sexual orientation or gender identity.” Brief for the States of Tennessee et al. as Amici Curiae in Support of the Employers at 28, *Bostock v. Clayton Cty.*, No. 17-1618 (argued Oct. 8, 2019), 2019 WL 4054623.

³² See, e.g., William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367 (2014) [hereinafter Araiza, *After the Tiers*]; William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C.

particular, Professor William Araiza has questioned the continued relevance of tiers of scrutiny to the Section Five inquiry. Araiza proposes that the Court adopt a new test focused instead on whether American society agrees that the limits Congress seeks to impose through enforcement legislation are warranted.³³ The Court does not have to reimagine its doctrinal standards, however, in order to find that the Equality Act constitutes appropriate legislation.

I

CONGRESS'S SHRINKING ENFORCEMENT POWER

As advocates in Congress have wrangled over how to best protect LGBT workers from discrimination by state employers, Congress's authority to do so has grown increasingly uncertain. In order to authorize suits against state governments, Congress must draw on powers that the Supreme Court has significantly constrained in recent years. This Part traces that contraction in congressional authority. From one side, the Court has depleted the arsenal of constitutional powers that Congress can rely on to impose meaningful costs on States that violate federal civil rights law. From the other flank, the Court has blunted Congress's only effective enforcement tool. Thus, at the same time the Court has fortified the States' sovereign immunity from suit, it has weakened Congress's power to suspend that immunity through legislation.

A. *The Shield of State Sovereign Immunity*

State employees who are discriminated against in violation of federal law face a formidable obstacle to holding their bosses accountable: An individual generally cannot sue a State for damages without the State's consent.³⁴ As distinct sovereigns in our federal system, the States can assert immunity as a bar to most claims brought by private parties in federal³⁵ or state court.³⁶ This sovereign immunity defense disappears if it is waived by the State itself or abrogated through an

THIRD WORLD L.J. 1 (2002); Craig Konnoth, Comment, *Section 5 Constraints on Congress Through the Lens of Article III and the Constitutionality of the Employment Non-Discrimination Act*, 120 YALE L.J. 1263 (2011).

³³ See Araiza, *After the Tiers*, *supra* note 32, at 408.

³⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Nor can a private party sue the federal government for damages unless the government has waived sovereign immunity. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

³⁵ See *Seminole Tribe*, 517 U.S. at 54.

³⁶ States are immune from suit in both their own courts, *Alden v. Maine*, 527 U.S. 706, 754 (1999), and in the courts of other States, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019).

act of Congress.³⁷ In a series of decisions toward the close of the last century, the Court recognized that, in the absence of waiver or abrogation, States enjoy an expansive immunity from suit.³⁸ Understanding the strength of this shield that protects States from most litigation is essential for those who contend that Congress is properly equipped to pierce it.

The U.S. Constitution as originally ratified by the States contained no express guarantee of state sovereign immunity.³⁹ This led the Supreme Court to conclude, in the early years of the republic, that citizens of one state could sue another State in federal court.⁴⁰ The States acted quickly to overrule this holding by approving the Eleventh Amendment, which removes federal court jurisdiction over suits brought against a State by a nonresident or a foreign citizen.⁴¹ The Court has since insisted that the true scope of state sovereign immunity extends far beyond the limited confines of the Amendment's reactionary language.⁴² The Eleventh Amendment, the Court reasons, reasserted the vision of sovereign immunity that the Constitution originally contemplated.⁴³ Some scholars have found this rationale for state sovereign immunity, prominently grounded in inferences about the Constitution's structure⁴⁴ and the inviolable "dignity"

³⁷ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987).

³⁸ See, e.g., *Alden*, 527 U.S. 706; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe*, 517 U.S. 44.

³⁹ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205 (2001).

⁴⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

⁴¹ U.S. CONST. amend. XI ("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.").

⁴² See *Alden*, 527 U.S. at 723–24; *Seminole Tribe*, 517 U.S. at 54 ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))).

⁴³ The modern Court believes that sovereign immunity preexisted—and was preserved by—the ratification of the Constitution. See *Alden*, 527 U.S. at 713 ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"); John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 393. The Court maintains that the principle of state sovereign immunity was so firmly rooted in the minds of the framers that they hardly thought it necessary to codify in the Constitution's text. *Alden*, 527 U.S. at 741.

⁴⁴ See Chemerinsky, *supra* note 39, at 1209 ("Justice Kennedy . . . can only defend sovereign immunity as implicit in the framers' silence.").

of the States,⁴⁵ too shaky to properly justify near-total immunity from suit.

Yet, pursuant to this original understanding, congressional authority to abrogate state sovereign immunity has been narrowly confined. The Court has held that Congress cannot draw on any of its Article I powers to subject nonconsenting States to suit in their own courts⁴⁶ or in federal court.⁴⁷ Even the Commerce Clause⁴⁸—the font of constitutional authority that Congress regularly cites to enact its most sweeping legislative programs⁴⁹—cannot be used to pierce the shield of state sovereign immunity.⁵⁰ Nor can Congress freely invoke its Spending Clause power to extract waivers of sovereign immunity from the States in exchange for federal financial assistance.⁵¹ If Congress hopes to abrogate state sovereign immunity, it must look beyond the Article I powers with which it was initially vested.⁵² The Court has located only one source of Congress's authority to abrogate: Section Five of the Fourteenth Amendment.⁵³

The Court has justified these strict limits on abrogation as essential to respecting the Constitution's structural constraints on federal power⁵⁴ and the dignity of the States as independent sovereigns.⁵⁵ But

⁴⁵ See Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 7–9 (2003). In fact, Justice Stevens has called this “state dignity” rationale “embarrassingly insufficient.” *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 151 (1993) (Stevens, J., dissenting).

⁴⁶ *Alden*, 527 U.S. at 743 (finding congressional power to abrogate immunity under Article I inconsistent with the “jealous care with which the founding generation sought to preserve the sovereign immunity of the States”).

⁴⁷ *Seminole Tribe*, 517 U.S. at 72–73.

⁴⁸ U.S. CONST. art. I, § 8, cl. 3.

⁴⁹ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts, C.J., concurring) (“Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time.”). Title VII of the Civil Rights Act of 1964 was enacted pursuant to Congress's expansive Commerce Clause power. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 n.6 (1979) (“Title VII . . . was enacted pursuant to the commerce power.”).

⁵⁰ See *Seminole Tribe*, 517 U.S. at 59–66 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

⁵¹ See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999) (holding that Congress cannot threaten States that fail to waive sovereign immunity with “exclusion . . . from otherwise permissible activity”).

⁵² *But see Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378–79 (2006) (upholding legislation subjecting States to suit under the Bankruptcy Clause of Article I under the theory that States agreed to limit their own immunity in the bankruptcy context when they ratified the Constitution).

⁵³ See Harrison, *supra* note 43, at 353 & n.3; see also *Seminole Tribe*, 517 U.S. at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976)).

⁵⁴ See *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

for the intended beneficiaries of antidiscrimination law, the increasingly impregnable immunity of the states reduces congressional enforcement attempts to mere empty promises.⁵⁶ While these rulings have provoked bitter dissents⁵⁷ and inspired doctrinal irredentism,⁵⁸ they remain an impediment to congressional action. Thus, Congress cannot authorize damages suits against nonconsenting States unless it properly invokes its power to enforce the Fourteenth Amendment. And this lone weapon in the fight against state sovereign immunity has been diminished over the past several decades.

B. *The Fourteenth Amendment Sword*

Section One of the Fourteenth Amendment declares that States may not “deprive any person of . . . liberty . . . without due process” nor deny them “the equal protection of the laws.”⁵⁹ It is through the Equal Protection and Due Process Clauses that individuals tend to seek judicial intervention when a State abridges their constitutional rights.⁶⁰ Courts, however, are not the only institutions capable of safeguarding the Constitution’s substantive guarantees: Section Five of the Fourteenth Amendment grants Congress the power to enforce the provisions of Section One “by appropriate legislation.”⁶¹ Despite this grant of legislative authority, Congress does not have free rein when it comes to enforcement. Rather, the Court has wielded the textual command that Section Five legislation be “appropriate” as an increasingly muscular constraint on congressional power.

⁵⁵ *Id.* at 749 (“Private suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, . . . regardless of the forum.” (citations omitted)).

⁵⁶ Professor Pamela Karlan calls this a “regulation-remedy gap.” Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 57 (2012) (“Congress can tell states to provide workers with job-protected medical leave—its commerce power gives it that authority—but it cannot enforce that regulation through private damages actions.”).

⁵⁷ Justice Souter accused the *Alden* majority of repeating the mistakes of the *Lochner* era. *Alden*, 527 U.S. at 814 (Souter, J., dissenting); see also *Seminole Tribe*, 517 U.S. at 78 (Stevens, J., dissenting) (noting the “shocking character of the majority’s affront to a coequal branch of our Government”).

⁵⁸ This stubbornness produced a striking display of exasperation from Justice O’Connor, who wrote in *Kimel v. Florida Board of Regents* that “the present dissenters’ refusal to accept the validity and natural import of decisions like *Hans* [*v. Louisiana*, 134 U.S. 1 (1890)] . . . makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution.” 528 U.S. 62, 79–80 (2000).

⁵⁹ U.S. CONST. amend. XIV, § 1.

⁶⁰ See WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW, at x (2015) (stressing the importance of these clauses for vindicating rights against States).

⁶¹ U.S. CONST. amend. XIV, § 5.

1. Section One: The Tiers of Scrutiny

While the Equal Protection Clause of Section One speaks in broad terms, the Court has not interpreted it as a mandate to intervene any time States threaten an individual's equality. The Court has instead found that, in most cases, state action is presumptively constitutional. Traditionally, the Court only abandons this hands-off approach when States classify people based on a "suspect" trait.⁶²

Thus, the canonical equal protection analysis under Section One follows a well-known pattern. Litigants allege that they are subject to unequal treatment by the State and the Court determines whether government interests sufficiently justify the challenged classification.⁶³ The State's burden of justification depends on where the classification at issue falls among the tiers of scrutiny the Court has erected under the Equal Protection Clause. Classifications based on race receive "strict scrutiny" and, accordingly, almost never survive.⁶⁴ The Court ostensibly gives States more leeway to classify based on sex,⁶⁵ but in practice, this intermediate form of scrutiny is hardly less demanding.⁶⁶ These forms of heightened scrutiny were born out of the Court's intuition that select traits—most notably race and sex, but also national origin, alienage, and nonmarital parentage⁶⁷—rarely form the basis of legitimate state action.⁶⁸

When the State classifies based on any other characteristic, its burden of justification traditionally disappears. The Court will uphold classifications that are rationally related to a legitimate government interest, whether that interest is put forward by the State or hypothesized by the Court itself.⁶⁹ Applying this rational basis standard, the Court has rejected calls to strike down classifications burdening the

⁶² See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 164 (2016) (explaining the importance the Court places on whether a law explicitly targets a class of people, as opposed to merely having a disparate impact on different groups).

⁶³ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40 (1985).

⁶⁴ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 & n.61 (2011).

⁶⁵ See *id.* at 756 n.66.

⁶⁶ *Id.* at 756 n.61 ("Intermediate scrutiny is quite close to strict scrutiny . . .").

⁶⁷ *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) ("[C]lassifications based on [nonmarital parentage] fall in a realm of less than strictest scrutiny . . ." (citations omitted)); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."); *Oyama v. California*, 332 U.S. 633, 646 (1948) ("[O]nly the most exceptional circumstances can excuse discrimination on [the basis of national origin] in the face of the equal protection clause . . .").

⁶⁸ See *Cleburne*, 473 U.S. at 440 (describing race, national origin, and alienage as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

⁶⁹ Yoshino, *supra* note 64, at 760 & n.89.

elderly⁷⁰ as well as individuals living in poverty.⁷¹ However, as Part III will examine in more detail, the Court has been increasingly comfortable finding that state classifications violate the Equal Protection Clause even where heightened scrutiny does not apply.⁷² In particular, the Court has intervened to prevent the State from discriminating on the basis of sexual orientation and disability, two classifications purportedly reviewed under the rational basis standard.⁷³ This approach is so antithetical to the Court's toothless treatment of other classifications receiving rational basis review that scholars have assigned it to a separate category altogether, deemed "rational basis with bite."⁷⁴

When the Court considers alleged Due Process Clause violations, it ordinarily allows state action to stand unless it infringes on a right that has been deemed "fundamental."⁷⁵ If state action implicates a fundamental right, it is subject to a more stringent form of scrutiny.⁷⁶ On the other hand, if no fundamental right is at stake, the Due Process Clause typically does not prohibit the State from curtailing individual liberty.⁷⁷ This Note focuses on the Equal Protection jurisprudence that is more obviously relevant to questions surrounding the constitutionality of the Equality Act.

2. Section Five: Appropriate Legislation

The Court's reluctance to hold that state action violates Section One of the Fourteenth Amendment hamstring congressional efforts to enforce constitutional rights under Section Five. The Court has become increasingly insistent that enforcement legislation closely track its own understanding of a constitutional right's scope, meaning Congress must design enforcement statutes based on the Court's crabbed reading of Section One. Because Congress cannot abrogate state sovereign immunity unless its legislation meets the stiff require-

⁷⁰ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam).

⁷¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

⁷² See *infra* Section III.A.

⁷³ See *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a sexual orientation classification); *Cleburne*, 473 U.S. 432 (striking down a disability classification).

⁷⁴ Yoshino, *supra* note 64, at 759–60 ("While the Court has not made this distinction, academic commentary has correctly observed that 'rational basis review' takes two forms: ordinary rational basis review and 'rational basis with bite review.'"); Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1362 n.79 (2013) (collecting commentary on "rational basis with bite" for sexual orientation classifications). *But see* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 548–54 (2014) (describing the failure of state and federal courts to review disability classifications under "rational basis with bite" after *Cleburne*).

⁷⁵ See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

⁷⁶ *Id.* at 722.

⁷⁷ *Id.* at 728.

ments of Section Five, few circumstances remain under which Congress can impose liability on the States. These developments imperil the Equality Act's provisions prohibiting sexual orientation and gender identity discrimination by state employers.

The Court has made clear that Congress cannot "enforce" Section One of the Fourteenth Amendment by substantively redefining its guarantee of equal protection.⁷⁸ But no institution can enforce a right without determining its contents and the penalty for noncompliance. Congress, therefore, must have some say in deciding what Section One protects and how best to impose costs on States that repudiate their constitutional obligations.

Half a century ago, the Justices were quite deferential toward Congress, unanimously deciding that the legislature could act under Section Five to enforce its own vision of equal protection.⁷⁹ In the intervening decades, however, the Court significantly tightened the congressional reins, reasserting the judiciary's exclusive authority to "say what the law is."⁸⁰ Today, Congress may only enforce Section One through laws designed to remedy or prevent behavior by the States that the Court has already ruled unconstitutional.⁸¹ Thus, in order for Congress to invoke its Section Five power, "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."⁸² A statute that fails this "congruence and proportionality" test is not "appropriate legislation" under Section Five.⁸³

The Court has wielded the congruence and proportionality test to invalidate provisions of landmark federal statutes meant to impose liability on state governments. The Religious Freedom Restoration Act,

⁷⁸ *City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997) (rejecting the notion that Section Five empowers Congress "to enact legislation that expands the rights contained in [Section One] of the Fourteenth Amendment").

⁷⁹ See *Katzenbach v. Morgan*, 384 U.S. 641, 649–56 (1966) (holding that Congress could prohibit state action under Section Five "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself" imposed the same limitations on the States).

⁸⁰ See *Boerne*, 521 U.S. at 535–36 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").

⁸¹ *Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

⁸² *Garrett*, 531 U.S. at 374 (emphasis added). This "congruence and proportionality" requirement first appeared in *Boerne*. 521 U.S. at 520.

⁸³ See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 36 (2012).

the Age Discrimination in Employment Act, the employment protections of the Americans with Disabilities Act, and the self-care provisions of the Family and Medical Leave Act all failed to meet the Court's Section Five standards.⁸⁴ In these cases, the Court insisted that the enforcement legislation at issue was overbroad—it captured too much state activity that did not actually violate the Equal Protection or Due Process Clauses of Section One.⁸⁵

Ostensibly, the burden Congress must meet to establish that its legislation is congruent and proportional is an evidentiary one. When Congress puts forward evidence that its legislation targets unconstitutional behavior by the States that is so rampant as to justify remedial action, the Court will uphold an enforcement statute as congruent and proportional.⁸⁶ Congress may also enact prophylactic legislation that aims to prevent constitutional violations by “proscrib[ing] facially constitutional conduct.”⁸⁷ Thus, as Congress compiles a record of state constitutional violations, it can buttress its findings by pointing to incidents that do not, on their own, infringe Section One.

In practice, however, the Court's assessment of congruence and proportionality appears to hinge on a factor entirely outside of Congress's control: whether the Section Five legislation bears on a classification to which the Court has attached heightened scrutiny. The Court reasons that, because state classifications that do not trigger heightened scrutiny are presumptively constitutional,⁸⁸ enforcement legislation targeting such classifications is virtually impossible for Congress to justify.⁸⁹ As this Note explains, the idea that Congress cannot prohibit classifications under Section Five unless they demand heightened scrutiny under Section One stands on

⁸⁴ *E.g.*, *Boerne*, 521 U.S. at 536 (striking down the Religious Freedom Restoration Act as applied to the States); *Kimel*, 528 U.S. at 91–92 (Age Discrimination in Employment Act); *Garrett*, 531 U.S. at 374 (Title I of the Americans with Disabilities Act); *Coleman*, 566 U.S. at 43–44 (Section 2612(a)(1)(D) of the Family and Medical Leave Act).

⁸⁵ *See, e.g.*, *Kimel*, 528 U.S. at 86 (“The [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”).

⁸⁶ *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729–32 (2003) (citing in its opinion the evidence and statistics contained in the legislative record employed to justify congressional enforcement).

⁸⁷ *Id.* at 728.

⁸⁸ *See supra* Section I.B.1.

⁸⁹ The Court emphasized this point in both *Kimel*, *see supra* note 85, and *Garrett*, 531 U.S. at 370; *cf. Hibbs*, 538 U.S. at 736 (“Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.”).

shakier ground than some observers admit.⁹⁰ But for now, these evidentiary and doctrinal roadblocks profoundly limit congressional power to abrogate state sovereign immunity.⁹¹ This gives Congress far less leeway to impose new antidiscrimination mandates upon the States.

II

CONGRESSIONAL ATTEMPTS TO ENFORCE LGBT RIGHTS

Enter the Equality Act of 2019,⁹² a bill that would prohibit anti-LGBT discrimination despite its uncertain status under Section One of the Fourteenth Amendment. By banning state employers from discriminating on the basis of sexual orientation and gender identity,⁹³ the Equality Act confronts the constraints on congressional power outlined in Part I. Still, advocates have long insisted that the Equal Protection Clause should offer LGBT employees some measure of security against workplace bias. The Equality Act's recent success in the House of Representatives marks the culmination of these efforts. This Part briefly describes the history of congressional attempts to outlaw discrimination against LGBT state employees in order to illuminate how such legislation might fare under the Court's Section Five inquiry.

In March 2019, the Equality Act was introduced with considerable fanfare.⁹⁴ Highlighting that many LGBT individuals lacked pro-

⁹⁰ See *infra* Section IV.B.

⁹¹ See ARAIZA, *supra* note 60, at 105–10 (discussing the impact of *Boerne* and the Court's curtailment of congressional power to abrogate state sovereign immunity); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 33 (2003) (describing the Court's aggressive efforts "to suppress [Congress] as potentially threatening to the Court's own monopoly on constitutional interpretation"); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 154–56 (1997) (arguing that *Boerne* was wrongly decided, that RFRA was a legitimate exercise of congressional enforcement power, and that Congress need not be constrained by the Court's interpretation).

⁹² H.R. 5, 116th Cong. (2019).

⁹³ See *id.* § 7.

⁹⁴ See Tim Fitzsimons, *Democrats Reintroduce Equality Act to Ban LGBTQ Discrimination*, NBC NEWS (Mar. 13, 2019, 4:48 PM), <https://www.nbcnews.com/feature/nbc-out/democrats-reintroduce-equality-act-ban-lgbtq-discrimination-n982771>. Supporters announced a multimillion-dollar ad campaign replete with celebrity sponsors to urge the bill's passage. Anna Tingley, *Sally Field and Son First to Support HRC's Star-Studded "Americans for the Equality Act" Campaign*, VARIETY (Mar. 26, 2019, 7:00 AM), <https://variety.com/2019/film/news/sally-field-son-human-rights-campaign-american-for-the-equality-act-1203172359>.

tection in their communities, jobs, and homes,⁹⁵ advocates impressed upon legislators that the time had come for “full federal equality.”⁹⁶ The Equality Act’s star-studded rollout belies its humble origins as a single sentence in Congress’s unperused index of proposed bills. Moreover, today’s legislation represents a significant break from the compromise and constraint that characterized the many iterations of the bill that languished in Congress for nearly half a century.

A. *The First Equality Act*

“Battling Bella” Abzug, a New York Congresswoman and pioneering feminist,⁹⁷ embarked on the first legislative effort to secure LGB employment protections in 1974.⁹⁸ Her proposed “Equality Act” went far beyond prohibiting employment discrimination against gay, lesbian, and bisexual workers⁹⁹—it also added sex, sexual orientation, and marital status to the list of protected classes already covered by civil rights statutes dealing with public accommodations, federally funded programs, and housing.¹⁰⁰ But Abzug’s vision failed to gain traction among her colleagues. No sizable constituency mobilized around this Equality Act or comparable bills she and her allies introduced in successive Congresses.¹⁰¹

⁹⁵ See Chris Johnson, *Equality Act Returns—with House Democrats in Majority*, WASH. BLADE (Mar. 13, 2019, 3:33 PM), <https://www.washingtonblade.com/2019/03/13/equality-act-returns-with-house-democrats-in-majority>.

⁹⁶ Noah Higgins-Dunn, *The LGBTQ Equality Act Heads Back to Capitol Hill, This Time with Massive Corporate Support*, CNBC (Mar. 8, 2019, 8:28 AM), <https://www.cnbc.com/2019/03/08/lgbt-equality-act-back-to-congress-with-massive-company-support.html> (quoting Human Rights Campaign President Chad Griffin).

⁹⁷ Laura Mansnerus, *Bella Abzug, 77, Congresswoman and a Founding Feminist, Is Dead*, N.Y. TIMES, Apr. 1, 1998, at A1, <https://www.nytimes.com/1998/04/01/nyregion/bella-abzug-77-congresswoman-and-a-founding-feminist-is-dead.html>.

⁹⁸ Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 152–53 (John D’Emilio et al. eds., 2000).

⁹⁹ See Equality Act of 1974, H.R. 14752, 93d Cong. § 6 (1974) (amending Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §§ 703, 704, 706, 78 Stat. 255). The employment provisions of the Civil Rights Act that the Equality Act sought to modify were made applicable to government entities, including state government employers, by the Equal Employment Opportunity Act of 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103; see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448–49, 448 n.2 (1976) (describing that before the 1972 Amendments, Title VII did not extend to state and local public employers).

¹⁰⁰ H.R. 14752, §§ 2, 5, 8.

¹⁰¹ See Feldblum, *supra* note 98, at 153–54 (noting that the successor bill introduced by then-Congressman Ed Koch “had little momentum behind it”). Though similar bills were the subject of hearings in the late 1970s and early 1980s, progress on gay civil rights legislation had stalled by 1992. *Id.* at 158–74 (detailing legislative efforts, including committee hearings, throughout this period and the impact the AIDS epidemic had on directing advocacy efforts away from the LGB civil rights bill).

None of these early bills explicitly grappled with the question of Congress's constitutional authority to enforce LGB rights against the States.¹⁰² However, Abzug made clear that her mission was to secure "equal protection of the laws" for lesbian, gay, and bisexual people.¹⁰³ While this legislation did not specify a constitutional basis, it proposed to amend Title VII.¹⁰⁴ The bills' framers may have found it unnecessary to further explicate the constitutional justifications for Title VII, which the Court contemporaneously upheld under the Commerce Clause¹⁰⁵ and Section Five of the Fourteenth Amendment.¹⁰⁶ Since 1972, Title VII has also contained an express waiver of state sovereign immunity,¹⁰⁷ further indicating congressional power to hold States accountable for the discrimination Title VII prohibits.¹⁰⁸ Lastly, it was not until 1996 that the Court began evaluating Section Five legislation under the demanding congruence and proportionality standard.¹⁰⁹ Thus, Abzug and her allies may have had little reason to fear that the Court would invalidate their efforts to protect LGB state workers.

B. *The ENDA Interlude*

In 1993, a coalition of gay rights organizations made the "painful decision" to abandon the push for a comprehensive statute like the one Abzug and her successors had envisioned.¹¹⁰ The focus shifted to a much narrower piece of legislation, called the Employment Non-Discrimination Act (ENDA), which would prohibit sexual orientation discrimination in the employment context alone.¹¹¹ The advocates who drafted the original ENDA hoped that the streamlined bill would reinvigorate a faltering drive toward federal gay rights legislation.¹¹² Early enthusiasm over ENDA's prospects, however, was quashed

¹⁰² See H.R. 14752; see also, e.g., Civil Rights Amendments Act of 1975, H.R. 5452, 94th Cong. § 6 (1975); Civil Rights Amendments Act of 1979, H.R. 2074, 96th Cong. (1979); Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong. (1991); Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong. (1993).

¹⁰³ See 121 CONG. REC. 8581 (1975) (statement of Rep. Abzug).

¹⁰⁴ See *id.* (citing Civil Rights Amendments Act of 1975, H.R. 5452, 94th Cong. § 6 (1975)).

¹⁰⁵ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 n.6 (1979).

¹⁰⁶ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976) ("There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under [Section Five] of the Fourteenth Amendment.").

¹⁰⁷ *Id.* at 447-49, 448 n.2 (citing Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 109).

¹⁰⁸ *Id.* at 456.

¹⁰⁹ See *supra* note 82 and accompanying text.

¹¹⁰ Feldblum, *supra* note 98, at 178.

¹¹¹ *Id.* at 178-79.

¹¹² *Id.* (noting that as of 1993, "[p]olls had consistently indicated the highest level of public support for employment nondiscrimination").

almost immediately when Democrats lost control of Congress just months after the bill was introduced.¹¹³ Over the next two decades, ENDA stalled in Congress.¹¹⁴ Legislators seeking to bring LGBT individuals within the ambit of Title VII continually scaled back their ambitions in the hopes of making progress.¹¹⁵ But federal employment protections remained elusive.

As advocates of an LGBT civil rights bill turned to standalone legislation, they addressed the issue of congressional power more directly. Beginning in the late 1990s, ENDA invoked the Commerce Clause and the Spending Clause, as well as Section Five of the Fourteenth Amendment.¹¹⁶ ENDA's champions showed they were taking the Court-imposed limits on congressional enforcement seriously. To help legislators meet the evidentiary burden necessary to validate enforcement legislation,¹¹⁷ the Williams Institute, a research institution housed at UCLA School of Law, provided the 110th Congress with an exhaustive record of discrimination against LGBT state workers.¹¹⁸ ENDA even purported to expressly abrogate the States' Eleventh Amendment immunity from suit—though it sought to do so via the Spending Clause,¹¹⁹ a route that the Supreme Court has likely foreclosed.¹²⁰

¹¹³ *Id.* at 182; see also Michael Paulson & Ed Penhale, *Republicans Sweep into House Seats*, SEATTLE POST-INTELLIGENCER, Nov. 9, 1994, at A1. Newt Gingrich, the incoming Speaker of the House, opposed ENDA. Jerry Gray, *Gingrich Criticized for Opposing Job Protection for Homosexuals*, N.Y. TIMES, Mar. 8, 1995, at A19.

¹¹⁴ ENDA was introduced in nearly every Congress during that period, but never passed both the House and Senate. Michelle Garcia, *House Committee Shuts Down ENDA for 2014*, ADVOCATE (Dec. 4, 2014, 3:46 PM), <https://www.advocate.com/politics/2014/12/04/house-committee-shuts-down-enda-2014>.

¹¹⁵ See, e.g., David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES (Nov. 8, 2007), <https://www.nytimes.com/2007/11/08/washington/08employ.html> (describing how sponsors of the 2007 ENDA stripped the bill of protections for transgender individuals in an effort to gain broader support).

¹¹⁶ See, e.g., Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. § 2 (1997) (referring to the Commerce Clause and Section Five); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. § 2 (1999) (referencing the Spending Clause as well as the Commerce Clause and Section Five).

¹¹⁷ See *supra* Section I.B.2.

¹¹⁸ WILLIAMS INST. 2009, *supra* note 12.

¹¹⁹ See, e.g., Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 11(b)(1)(A) (2007) (“A State’s receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity under this Act . . .”).

¹²⁰ See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999).

C. *A New Equality Act*

Pledging a renewed commitment to enacting the type of sweeping civil rights bill that Bella Abzug first proposed in 1974, Representative David Cicilline introduced a new Equality Act in 2015.¹²¹ The modern Equality Act outlined expansive protections for LGBT people in employment, public accommodations, housing, credit lending, and jury service.¹²² Cicilline hoped that a bill adding LGBT individuals to the “well-accepted civil rights construct” covering race and sex discrimination would be less controversial than a standalone piece of legislation that opponents could claim conferred special rights.¹²³ While the 2015 and 2017 bills failed to advance in the GOP-controlled House of Representatives, Democrats seeking to regain control of Congress in the 2018 midterms identified the Equality Act as a key component of their agenda.¹²⁴ When Cicilline reintroduced the Equality Act in March 2019, a majority of his colleagues in the House signed on as cosponsors.¹²⁵ And in May 2019, for the first time in history, a comprehensive LGBT civil rights bill passed the House.¹²⁶

Today’s Equality Act does not reference any source of constitutional authority.¹²⁷ Nor does it mention state sovereign immunity directly, piggybacking instead off of Title VII’s express abrogation of state immunity.¹²⁸ The Constitutional Authority Statement that Representative Cicilline entered into the Congressional Record¹²⁹ alongside his proposed bill does not even mention the Section Five power to enforce the Fourteenth Amendment. Despite the doctrinal roadblocks identified in Section I.B.2, Cicilline’s statement identifies Article I as the source of Congress’s authority to enact the bill.¹³⁰ While Congress is generally not required to invoke a constitutional

¹²¹ See Dominic Holden, *Democrats Plan to Introduce Sweeping LGBT Rights Bill in Congress This Week*, BUZZFEED NEWS (July 21, 2015, 6:18 PM), <https://www.buzzfeednews.com/article/dominicholden/democrats-plan-to-introduce-sweeping-lgbt-rights-bill-in-con#.gsGrXL5bj>.

¹²² Equality Act of 2015, H.R. 3185, 114th Cong. (2015).

¹²³ See Katy Steinmetz, *Lawmakers to Introduce Historic LGBT Non-Discrimination Bills*, TIME (July 23, 2015), <http://time.com/3968995/equality-act-congress-lgbt>.

¹²⁴ See Tim Fitzsimons, *Democrats Double Down on Equality Act Ahead of Midterm Elections*, NBC NEWS (Oct. 24, 2018, 12:20 PM), <https://www.nbcnews.com/feature/nbc-out/democrats-double-down-equality-act-ahead-midterm-elections-n923846>.

¹²⁵ See 165 CONG. REC. H2714 (daily ed. Mar. 13, 2019).

¹²⁶ Edmondson, *supra* note 5.

¹²⁷ See Equality Act of 2019, H.R. 5, 116th Cong. (2019).

¹²⁸ See *supra* text accompanying notes 104–08.

¹²⁹ 165 CONG. REC. H2717 (daily ed. Mar. 13, 2019) (statement of Rep. Cicilline).

¹³⁰ *Id.*

power by name in order to exercise it,¹³¹ the Equality Act's sponsors have thus shown little engagement with the question of where their authority to protect LGBT workers against state discrimination lies. As Part III attests, however, Congress cannot be complacent about the highly policed limits of its power to enforce LGBT rights.

III

A BROKEN TEST FOR CONGRUENCE AND PROPORTIONALITY

A growing chorus warns that, because LGBT individuals failed to obtain heightened scrutiny under the Equal Protection Clause when such treatment was on offer,¹³² Congress may not be able to vindicate their rights through enforcement legislation.¹³³ Under this view, whether the Equality Act can stand as appropriate legislation principally hinges on how carefully the Supreme Court evaluates the constitutionality of sexual orientation and gender identity classifications. To the credit of these scholars, when Congress acts pursuant to Section Five, the Court has insisted that it hew closely to the judicially declared substance of Section One.¹³⁴

But this conception of “congruence and proportionality”—one that limits enforcement authority to classifications that trigger heightened scrutiny—is fundamentally broken. The congruence and proportionality test demands a tight fit between the States’ unconstitutional behavior and Congress’s legislative response.¹³⁵ It underscores that Section One and Section Five are inextricably linked. And yet, the analysis actually performed by the Court in Section One cases has drifted considerably from the standards it applies under Section Five. The hierarchy of suspect classifications that seems to play a dispositive role in the Court’s Section Five inquiry has all but disappeared from its evaluation of whether state action violates the rights recognized by Section One. When state classifications can be struck down as uncon-

¹³¹ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 569 (2012) (rejecting the notion that an otherwise valid law “must be struck down because Congress used the wrong labels”).

¹³² See Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CALIF. L. REV. CIR. 137, 138 (2015) (“[D]espite having the opportunity in each of the . . . gay rights cases, Justice Kennedy declined to declare sexual orientation a suspect or quasi-suspect classification.”); cf. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551 (2016) (“[T]ransgender classifications warrant heightened scrutiny . . . based on the Supreme Court’s four-factor test . . .”).

¹³³ Araiza, *After the Tiers*, *supra* note 32, at 397–99; Post & Siegel, *supra* note 91, at 7 n.42; Yoshino, *supra* note 64, at 761 & n.100.

¹³⁴ See *supra* Section I.B.

¹³⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Congress does not enforce a constitutional right by changing what the right is.”).

stitutional regardless of the standard of review they formally receive, the tiers of scrutiny under Section One no longer serve as a useful indicator of the scope of congressional power under Section Five.

The stubborn relevance of heightened scrutiny poses a problem for those in Congress who seek to enforce the rights of LGBT individuals. Even as the Court has shown increased solicitude for the rights of gay, lesbian, and bisexual litigants, it has never officially attached heightened scrutiny to sexual orientation or gender identity classifications. Under the impoverished account of congruence and proportionality described in this Part, the Court has cast considerable doubt on Congress's ability to protect LGBT people by resolving their allegations of invidious discrimination outside of the suspect class framework.

A. *The Retreat from Formalism Under Section One*

The formalism that characterizes the Court's Section Five jurisprudence¹³⁶ was once a mainstay of its Section One analysis as well. After first recognizing that government classifications targeting "discrete and insular minorities" might require special attention from the judiciary,¹³⁷ the Court spent decades fine-tuning its system for determining how closely to review state action against a particular group.¹³⁸ Two key principles came to define the Court's equal protection doctrine. First, government-drawn classifications were presumed constitutional and almost invariably upheld unless they targeted "suspect" classes.¹³⁹ Second, the set of classifications that demanded heightened scrutiny was open to expansion.¹⁴⁰ Neither of these principles, however, convincingly capture the state of equal protection law today. The Court's pivot from a rigid measure of means-end tailoring to a more contextual analysis of alleged discrimination under Section One has undermined the doctrinal justifications for its reliance on tiers of scrutiny under Section Five.

The formal divide between groups that receive heightened scrutiny and those that do not no longer drives the Court's approach to Section One cases. While suspect classifications, such as those based on race or sex, continue to receive careful attention,¹⁴¹ the Court has

¹³⁶ See *infra* Section III.B.

¹³⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

¹³⁸ See Yoshino, *supra* note 64, at 755–58 (describing the tiers of scrutiny under the Equal Protection Clause).

¹³⁹ See *id.* at 755–56 & n.62.

¹⁴⁰ See *id.* at 755–56 & nn.63–67 (noting that the Court granted heightened scrutiny to five suspect classifications between 1948 and 1977).

¹⁴¹ See, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (striking down sex-specific criteria governing naturalization of children born abroad to one U.S. citizen

grown more willing to find equal protection violations under the rubric of rational basis review. In a number of cases, the Court has departed from its usual presumption of constitutionality for government classifications and has instead evaluated state action for signs that it was motivated by animus toward the group that it affects.

The principle that state classifications rooted in prejudice may violate the Equal Protection Clause is hardly new. In *USDA v. Moreno*,¹⁴² the Court invalidated provisions of a federal bill that aimed to disadvantage hippies, holding that classifications made pursuant to a “bare . . . desire to harm a politically unpopular group” could not—in the familiar language of rational basis review—serve a legitimate state interest.¹⁴³ Twelve years later, the Court found in *City of Cleburne v. Cleburne Living Center, Inc.* that individuals living with intellectual disabilities were subject to state action improperly based on “mere negative attitudes, or fear.”¹⁴⁴ The notion that state officials cannot constitutionally draw classifications intended to disadvantage a certain group was perhaps most clearly expressed in *Romer v. Evans*.¹⁴⁵ In *Romer*, the Court struck down a state enactment that it found “inexplicable by anything but animus” toward lesbian, gay, and bisexual people.¹⁴⁶

Taken together, *Moreno*, *Cleburne*, and *Romer* complicate the idea that state action is entitled to a presumption of rationality—and thus constitutionality under Section One—where a suspect classification is not at issue.¹⁴⁷ In each of these cases, the Court declined to hold that the classifications identified by the plaintiffs demanded heightened scrutiny,¹⁴⁸ even as it refused to credit state justifications that would easily clear the traditionally low bar of rational basis

parent); *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2207–08 (2016) (applying strict scrutiny to racial preferences in college admissions).

¹⁴² 413 U.S. 528 (1973).

¹⁴³ *Id.* at 534.

¹⁴⁴ 473 U.S. 432, 448 (1985).

¹⁴⁵ 517 U.S. 620 (1996).

¹⁴⁶ *Id.* at 632.

¹⁴⁷ *Moreno* was decided under the Equal Protection Clause incorporated into the Fifth Amendment. *Moreno*, 413 U.S. at 533 & n.5. Still, the Court rehearses the reasoning of *Moreno* in its later decisions under the Fourteenth Amendment. See *Romer*, 517 U.S. at 634–35; *Cleburne*, 473 U.S. at 446–47.

¹⁴⁸ See Heather K. Gerken, *Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 590 (2015) (noting that Justice Kennedy “managed to condemn the state initiative as discriminatory even without designating the LGBT community as a protected class”); see also *Cleburne*, 473 U.S. at 442 (declining to grant disability classifications “a more exacting standard of judicial review than is normally accorded economic and social legislation”).

review.¹⁴⁹ This form of analysis has since become known as “rational basis with bite.”¹⁵⁰ By sidelining the traditional tiers of scrutiny, the Court hinted at a far more expansive universe of constitutional challenges. After all, as Professor Dale Carpenter notes, “[a]ll citizens are protected against animus-based government action.”¹⁵¹ The Court thus appeared to invite *any* group with convincing proof of state-sponsored animus to come forward and allege an equal protection violation.¹⁵²

The Court’s willingness to sharpen the sting of rational basis review has not been the only sign that its heightened scrutiny analysis under Section One has faded into obsolescence. In fact, the Court has accelerated the collapse of its tiers of scrutiny by gradually but unmistakably closing the door to new groups petitioning for suspect class treatment.¹⁵³ Under the traditional model of equal protection, the Court purported to apply clear and consistent standards when determining whether a classification should receive heightened scrutiny. Groups were led to believe that they could win protection as a suspect class by demonstrating a history of discrimination, political powerlessness, and immutable characteristics marking their members as minorities.¹⁵⁴ To this day, some lower courts treat these conditions as core components of a doctrinal test that they are bound to apply.¹⁵⁵ However, the Court has not recognized a new suspect classification in

¹⁴⁹ See *Romer*, 517 U.S. at 635 (finding the State’s justifications for sexual orientation classifications “impossible to credit”); *Cleburne*, 473 U.S. at 448–50 (rejecting four reasons put forward by the City Council for denying a permit to a group home for intellectually disabled residents as “rest[ing] on an irrational prejudice”); *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (“The challenged classification clearly cannot be sustained by reference to this congressional purpose.”).

¹⁵⁰ See *supra* note 74 and accompanying text.

¹⁵¹ Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 186.

¹⁵² In this vein, Professor Suzanne Goldberg proposed replacing the tiers of scrutiny with a “single standard” under the Equal Protection Clause aimed at “capturing impermissible class legislation while leaving in place the bulk of legitimate, permissible government classifications.” Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 532 (2004).

¹⁵³ *Araiza, After the Tiers, supra* note 32, at 385 (“If not already dead, suspect class analysis is in deep senescence.”); *Yoshino, supra* note 64, at 757 (“At least with respect to federal equal protection jurisprudence, this canon has closed.”).

¹⁵⁴ See *Yoshino, supra* note 64, at 762 n.104 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

¹⁵⁵ See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (rejecting heightened scrutiny for sexual orientation classifications); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015) (granting heightened scrutiny for gender identity classifications); see also *Araiza, After the Tiers, supra* note 32, at 371 n.21 (noting that, despite the Supreme Court’s move away from its traditional equal protection jurisprudence, “lower courts may feel themselves more constrained to apply standard suspect class doctrine”).

more than four decades.¹⁵⁶ The Supreme Court has therefore made clear that the tiers of scrutiny are increasingly irrelevant to its Section One jurisprudence.

B. The Entrenchment of Structure Under Section Five

The Court has moved away from the formal heuristics that once guided its application of heightened scrutiny to suspect classifications. And yet, the freewheeling, contextual inquiry that the Court has embraced under Section One of the Fourteenth Amendment¹⁵⁷ has not migrated to Section Five. Rather, the Court has continually reaffirmed the relevance of heightened scrutiny classes in its assessment of appropriate enforcement legislation. It seems that Congress cannot invoke Section Five to prohibit classifications that, in the Court's judgment, typically have a rational basis.¹⁵⁸ This restriction pertains even though the Court may have identified particular cases where this rational basis was lacking, and the classification at issue was instead motivated by unconstitutional animus.

When the Court determines that a state classification is subject to only rational basis review under the Equal Protection Clause, Congress traditionally has no power to prohibit those state classifications through Section Five enforcement legislation. The Court's treatment of age discrimination claims illustrates this limit on congressional authority. In *Massachusetts Board of Retirement v. Murgia*¹⁵⁹ the Court ruled that government classifications based on age are presumptively constitutional. Decades later, the Court struck down portions of the Age Discrimination in Employment Act (ADEA) in *Kimel v. Florida Board of Regents*.¹⁶⁰ The *Kimel* Court reasoned that, since *Murgia* had established that age often serves as a legitimate basis for state regulation, the kind of discrimination that the ADEA sought to prohibit was not actually unconstitutional under Section One of the Fourteenth Amendment.¹⁶¹ Thus, the provisions of the ADEA subjecting States to suit for age discrimination were not appropriate enforcement legislation under Section Five.¹⁶²

¹⁵⁶ See Yoshino, *supra* note 64, 757 & n.72 (citing *Trimble v. Gordon*, 430 U.S. 762, 766–67 (1977)).

¹⁵⁷ See Robinson, *supra* note 62, at 185–89 (describing confusion in how the Court defines unconstitutional animus).

¹⁵⁸ *But see infra* Section IV.B.

¹⁵⁹ 427 U.S. 307 (1976) (per curiam).

¹⁶⁰ 528 U.S. 62, 86 (2000).

¹⁶¹ *Id.* at 86 (holding that the ADEA “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard”).

¹⁶² *Id.* at 91.

While the Court's handling of age classifications illustrates Section One and Section Five working in tandem, its analysis of discrimination against individuals with disabilities highlights how these two sections have diverged. Under Section One, the Court has deemed it necessary to invalidate some government-drawn classifications based on disability even while insisting that such classifications are usually justified by legitimate state interests. Thus, commentators have noted that the Court reviews disability classifications, like sexual orientation cases, under "rational basis with bite."¹⁶³ The Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*¹⁶⁴ typifies this approach. In *Cleburne*, the Court evaluated the Cleburne City Council's decision to deny a zoning permit to a group home for residents with intellectual disabilities. Rejecting the lower court's conclusion that disability classifications should draw heightened scrutiny, the Court nonetheless held that the permit denial violated the Equal Protection Clause.¹⁶⁵ State actors like the Cleburne City Council, the Court determined, need the flexibility to classify based on disability because disabilities are often relevant to government decision-making.¹⁶⁶ The permit denial in *Cleburne* was rooted in unconstitutional animus toward people with intellectual disabilities,¹⁶⁷ but the Court believed that the illegitimate motives on display in that case represented the exception, not the rule.¹⁶⁸

While the *Cleburne* Court acknowledged that government-drawn disability classifications may violate Section One of the Fourteenth Amendment when born out of obvious prejudice, "*Cleburne* still casts a large shadow."¹⁶⁹ The exclusion of individuals with disabilities from Section One's formal heightened scrutiny framework becomes especially significant in the context of Section Five, where the Court uses the level of scrutiny attending a particular state classification as a proxy for the frequency with which those classifications violate Section One. These consequences were apparent in *Board of Trustees of the University of Alabama v. Garrett*,¹⁷⁰ where the Court considered whether Title I of the Americans with Disabilities Act (ADA) consti-

¹⁶³ Goldberg, *supra* note 152 at 535–36 (describing the Court's use of "strong rational basis" in *Cleburne*); Waterstone, *supra* note 74, at 540; Yoshino, *supra* note 64, at 760.

¹⁶⁴ 473 U.S. 432 (1985).

¹⁶⁵ *See id.* at 435.

¹⁶⁶ *Id.* at 446 (calling intellectual disability "a characteristic that the government may legitimately take into account in a wide range of decisions").

¹⁶⁷ *Id.* at 450 ("The short of it is that [the state classification] in this case appears to us to rest on an irrational prejudice . . .").

¹⁶⁸ *See id.* at 443–46 (rationalizing classifications based on intellectual disability).

¹⁶⁹ Waterstone, *supra* note 74, at 548.

¹⁷⁰ 531 U.S. 356, 365 (2001).

tuted appropriate Section Five legislation. Title I authorizes suits against employers that “discriminate . . . on the basis of disability,” including by failing to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”¹⁷¹ The *Garrett* Court cited *Cleburne*’s logic as evidence that state discrimination on the basis of *any* disability—intellectual or otherwise—rarely implicates the Equal Protection Clause.¹⁷² Therefore, under the “congruence and proportionality” standard, Congress lacked the authority to subject state employers to suits under Title I of the ADA.¹⁷³

This adherence to the rigid structure of heightened scrutiny under Section Five bodes poorly for proponents of the Equality Act. The Court’s finding in *Garrett* that disability discrimination was just another state classification tested for minimal rationality would seem to doom legislation aimed at enforcing another set of classifications that nominally fail to trigger heightened scrutiny. But if the Court truly views its role as ensuring a “congruence and proportionality” between congressional enforcement legislation and the unconstitutional state action it targets, its Section Five inquiry must adapt to the new reality under Section One. It can and should find that Congress has the authority to prohibit state classifications based on sexual orientation and gender identity.

IV TAKING CONGRUENCE AND PROPORTIONALITY SERIOUSLY

Two conceptual obstacles thus obscure the Equality Act’s status as appropriate legislation: the Supreme Court’s failure to grant heightened scrutiny to sexual orientation and gender identity classifications¹⁷⁴ and its treatment of heightened scrutiny as a prerequisite to congressional enforcement.¹⁷⁵ As this Part argues, however, neither of these hurdles hold up on closer review. Section IV.A confronts the first obstacle, noting that the Court’s willingness to invalidate state

¹⁷¹ See Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(a), (b)(5)(A) (2018).

¹⁷² *Garrett*, 531 U.S. at 367; Waterstone, *supra* note 74, at 543 (“[W]ithout explanation or elaboration, the Court moved from *Cleburne*’s holding on [intellectual disability] to the more general category of ‘the disabled.’”). Waterstone also notes that, by the time of *Garrett*, intervening case law had signaled that classifications based on intellectual disability would draw traditional rational basis review (without “bite”). See *id.* at 542 (citing *Heller v. Doe*, 509 U.S. 312, 314, 319–21 (1993)).

¹⁷³ *Garrett*, 531 U.S. at 374.

¹⁷⁴ See *supra* Section III.A.

¹⁷⁵ See *supra* Section III.B.

policies founded on irrational dislike of marginalized groups belies the claim that sexual orientation and gender identity classifications rarely violate the Constitution. Section IV.B then tackles the second challenge. It argues that, despite the Court's frequent references to a link between heightened scrutiny and Congress's enforcement power, this connection is not a necessary outgrowth of the congruence and proportionality test. Finally, Section IV.C examines how the Equality Act might fare under a more sensible approach to congruence and proportionality—one that, drawing from the Court's own analysis in Section Five cases, focuses on the record of unconstitutional state action and the breadth of the enforcement legislation in question. This Part demonstrates that, if the Court takes "congruence and proportionality" seriously, it must find that the Equality Act constitutes appropriate legislation.

A. *Reconsidering the Applicable Standard of Review*

The Court has indicated that the standard of review attending a constitutional right may itself determine whether legislation designed to enforce that right is congruent and proportional. This poses a threat to the Equality Act, since the sexual orientation and gender identity discrimination the bill seeks to eradicate formally fails to trigger heightened scrutiny.¹⁷⁶ The Court's disability rights precedents aggravate this concern; while the Court departed from ordinary rational basis review to hold that state action premised on animus toward the intellectually disabled can violate the Equal Protection Clause,¹⁷⁷ it has refused to let this functionally more demanding form of scrutiny change its calculus under Section Five.¹⁷⁸ And to the extent that the Court has invalidated classifications targeting LGBT people, it has done so under the same interstitial standard of review that disability classifications supposedly receive: "rational basis with bite."¹⁷⁹

This Section argues that the Equality Act should nonetheless meet the Court's congruence and proportionality standard because the rights that it seeks to vindicate are, in practice, subject to careful judicial scrutiny. The constitutional protections that have accreted to LGBT litigants as a result of court intervention to halt official discrimination undermine the notion that States may freely classify based on

¹⁷⁶ See *supra* note 132 and accompanying text.

¹⁷⁷ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

¹⁷⁸ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001); see Robinson, *supra* note 62, at 192 ("Although many scholars had read *Cleburne* . . . to apply more than minimum rationality review, the *Garrett* Court recast it as a routine case declining to scrutinize government action burdening people with disabilities.").

¹⁷⁹ See *supra* notes 147–52 and accompanying text.

sexual orientation or gender identity. State action targeting LGBT people thus cannot be understood as presumptively valid under the Equal Protection Clause.

The Supreme Court's canon of sexual orientation cases indicates that when the rights of lesbian, gay, and bisexual individuals are at stake, the usual rules do not apply. Even while purporting to employ rational basis review, the Court has found the illegitimacy of state action predicated on sexual orientation relatively easy to spot. This has led the Court to constitutionalize an individual's right to marry,¹⁸⁰ engage in sexual intimacy,¹⁸¹ and "seek specific protection from the law"¹⁸² without regard to sexual orientation.

While the Court has never directly addressed the constitutionality of a government-drawn gender identity classification,¹⁸³ every indication suggests that the Court would review them at least as carefully as sexual orientation classifications. In fact, recent years have seen a growing consensus among lower courts that gender identity classifications should draw heightened scrutiny. The Seventh, Ninth, and Eleventh Circuits have each concluded that at least certain gender identity classifications "constitute[] sex-based discrimination under the Equal Protection Clause," making the use of heightened scrutiny appropriate.¹⁸⁴ Thus, to the extent that sexual orientation discrimination demands special attention under Section One of the Fourteenth Amendment, gender identity discrimination should as well.

Scholars have labeled the anomalous intensity with which the Court reviews state action based on sexual orientation "rational basis with bite."¹⁸⁵ But this nomenclature obscures the reality that the Court's handling of sexual orientation classifications has far more in common with its application of heightened scrutiny than its use of

¹⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

¹⁸¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁸² *Romer v. Evans*, 517 U.S. 620, 633 (1996).

¹⁸³ In 2016, the Court granted certiorari to review the Department of Education's guidance identifying gender identity discrimination as prohibited under Title IX's bar on sex discrimination. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.). However, after the Trump Administration rescinded this guidance in 2017, the Court ultimately vacated the lower court's ruling and remanded the case for further consideration. See Shannon Price Minter, "Déjà Vu All Over Again": *The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1169 (2017).

¹⁸⁴ *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (holding that gender identity discrimination constituted sex discrimination under Title VII); *accord* *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

¹⁸⁵ See *supra* note 74.

traditional rational basis review.¹⁸⁶ In sharp contrast to its handling of age discrimination claims, for instance, the Court neither defers to the stated objectives of government actors seeking to classify on the basis of sexual orientation nor invents its own justifications to legitimize the decisions of state officials.¹⁸⁷ Instead, it evaluates the state action in question for signs that it was motivated by anti-gay animus.¹⁸⁸

As several observers point out, the Court's findings of state-sponsored animus are not even limited to situations in which plaintiffs can prove that public officials acted out of hatred towards LGB people *instead of* a legitimate governmental interest.¹⁸⁹ Rather, the Court has imputed animus to state actions that single out LGB people for "disfavored legal status,"¹⁹⁰ and has used that finding of animus to rebut state attempts to invoke a legitimate objective.¹⁹¹ Both apparent supporters and clear opponents of the Court's sexual orientation jurisprudence have recognized that this analysis hardly resembles rational basis review.¹⁹² It does, however, instantiate the Court's concern, noted in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,

¹⁸⁶ See Robinson, *supra* note 62, at 165 ("[A]lthough *Moreno* and *Cleburne* helped to give birth to *Romer*, the former precedents have receded while *Romer* helped to generate *Lawrence v. Texas*, *Windsor*, and *Obergefell*.").

¹⁸⁷ See Yoshino, *supra* note 64, at 760 ("Such applications depart from the usual deference associated with rational basis review."). Compare *Romer*, 517 U.S. at 635 (finding the State's justifications for sexual orientation classifications "impossible to credit"), with *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976) (per curiam) (upholding the State's age classification even while acknowledging that "the State perhaps has not chosen the best means to accomplish [its] purpose").

¹⁸⁸ See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 137–38 (2018).

¹⁸⁹ See, e.g., Carpenter, *supra* note 151, at 247 ("If a mere 'rational' relationship to a 'legitimate' purpose were all that was required in animus cases, each . . . would have come out the other way because the government's act . . . could be justified on some far-fetched and hypothetical ground."); Robinson, *supra* note 62, at 191–92 (describing how the Court found the federal ban on same-sex marriage motivated by animus despite the "purportedly neutral or at least non-hateful rationales" proffered by Congress).

¹⁹⁰ See *Romer*, 517 U.S. at 633.

¹⁹¹ See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 930 (2012) ("[W]hen the Court identifies evidence of animus, it discredits the other purported state interests, regardless of whether they are legitimate on a superficial level."); Robinson, *supra* note 62, at 189 (arguing that the Court "fleetingly note[s] the existence of the asserted state interests and fail[s] to recognize how invidious motives are often interwoven with more legitimate interests").

¹⁹² See, e.g., *Romer*, 517 U.S. at 640 (Scalia, J., dissenting) (arguing that the Court's conclusion "cannot be justified by normal 'rational basis' analysis"); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (arguing that the Court in *Lawrence* "appl[ie]d an unheard-of form of rational-basis review"); *id.* at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review under the Equal Protection Clause.").

that judges give “great weight and respect” to attempts by LGB individuals to “exercise . . . their freedom on terms equal to others.”¹⁹³

Some lower courts have sought to fit this “unheard-of form of rational basis review”¹⁹⁴ into the traditional structures of Section One, holding that sexual orientation classifications demand heightened scrutiny under the Equal Protection Clause. The Second Circuit acted despite the Court’s silence as to the proper standard of review, formally bestowing heightened scrutiny on sexual orientation classifications in 2012.¹⁹⁵ The Ninth Circuit took a different route to the same conclusion, finding in 2014 that the Supreme Court itself had adopted heightened scrutiny for sexual orientation classifications in *United States v. Windsor*,¹⁹⁶ requiring lower courts to follow suit.¹⁹⁷ Thus, under the Supreme Court’s own framework for determining when heightened scrutiny ought to be applied, States may walk a perilously tight path when they draw distinctions on the basis of sexual orientation.

Despite the particularities of the Court’s sexual orientation jurisprudence, the Court may simply follow its precedents related to disability classifications when it sets the bounds of congressional power to enforce prohibitions on sexual orientation and gender identity discrimination. A consistent approach to disability rights and LGBT rights in Section Five cases would vindicate the scholars who have grouped sexual orientation and disability classifications together under the label of “rational basis with bite.”¹⁹⁸ But should observers of the Court, who have seen the Justices reconsider and even disregard doctrines that threaten to impede the realization of LGBT equality, expect such consistency? The Court could instead use the context of a Section Five challenge to confirm that classifications based on sexual orientation receive closer scrutiny than classifications based on disability.¹⁹⁹ After all, even if sexual orientation and disa-

¹⁹³ 138 S. Ct. 1719, 1727 (2018).

¹⁹⁴ *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

¹⁹⁵ *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

¹⁹⁶ 133 S. Ct. 2675 (2013) (striking down the federal Defense of Marriage Act).

¹⁹⁷ *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (“In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review.”); see also Max C. Isaacs, Note, *LGBT Rights and the Administrative State*, 92 N.Y.U. L. REV. 2012, 2021–22 (2017).

¹⁹⁸ See *supra* notes 147–52 and accompanying text.

¹⁹⁹ Professor Robinson argues that the Court has adopted an outlook of “LGBT exceptionalism” that may allow it to distinguish between discrimination against LGBT state employees on the one hand and workers with disabilities on the other hand. Robinson, *supra* note 62, at 172, 192–95.

bility each live somewhere on the ladder between rational basis review and heightened scrutiny, they may not occupy the same rung.

The Court has hinted that it views sexual orientation and disability classifications differently. For one, the Court has not identified any justification allowing a State to draw distinctions on the basis of sexual orientation.²⁰⁰ By contrast, the Court declined to give heightened scrutiny to disability classifications precisely because it wanted to preserve space for government classifications that, in its estimation, serve legitimate state objectives. In *Cleburne*, the Court protested that it was ill-equipped to second-guess the legislature's judgment about which forms of disability discrimination were acceptable.²⁰¹ Even as it decried the prejudicial use of a zoning ordinance to harm individuals with intellectual disabilities, the Court clung to the conviction that many disability classifications are necessary and reasonable.²⁰² When it comes to sexual orientation, however, the Court has expressed no such modesty about its institutional role.²⁰³ Many of the Court's gay rights cases reduce the state action in question to a type of subjective intent, purportedly invalidating policies because their defenders could not cough up a plausible justification other than "a bare . . . desire to

²⁰⁰ See *id.* at 188–94 (describing the Court's rejection of legitimate state interests in classifying based on sexual orientation). In *Bowers v. Hardwick*, the Court initially recognized that anti-sodomy statutes were rationally related to a legitimate state interest in promoting society's vision of morality. 478 U.S. 186, 196 (1986). The *Lawrence* Court overturned this holding, 539 U.S. 558, 571, 577–78 (2003), with Justice O'Connor writing separately to clarify her view that anti-sodomy statutes only violate the Constitution when they discriminate between heterosexual and homosexual sodomy. See *id.* at 582 (O'Connor, J., concurring).

²⁰¹ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–43 (1985) (describing the need to account for individuals with intellectual disabilities in society as "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary").

²⁰² *Id.* at 442–46. The Court has also declined to weigh in on the wisdom of state policies that disadvantage the elderly. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 317 (1976) (per curiam) ("[W]e do not decide today that the Massachusetts statute is wise [or] that it best fulfills the relevant social and economic objectives that Massachusetts might ideally espouse" (second alteration in original)).

²⁰³ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (justifying intervention based on "the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury"); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (departing from the presumption of constitutionality of state laws because "Amendment 2 confounds this normal process of judicial review"); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting) ("The role of the Court envisioned by the majority today . . . is anything but humble or restrained."); *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (accusing the Court of "departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed").

harm a politically unpopular group.”²⁰⁴ Therefore, it may be that the supposedly monolithic category of “rational basis with bite” has its own internal tiers.

In any case, the standard of review that the Court applies to sexual orientation classifications cannot be squared with the empty restraints of rational basis review. As the practical distinction between the anti-animus review of sexual orientation discrimination and the heightened scrutiny reserved for formally suspect classifications fades from view, the logic of forbidding Congress from exercising its Section Five authority to pass the Equality Act becomes harder to defend.

B. *Decoupling Heightened Scrutiny from Congressional Enforcement*

Scholars commonly observe that the fate of Congress’s enforcement legislation appears to be sealed as soon as the Court determines that the state action it seeks to prohibit is only subject to rational basis review.²⁰⁵ In such cases, the Court seems to assume that the statute at issue is overbroad instead of crediting evidence of state constitutional violations compiled by Congress.²⁰⁶ This Section challenges that assumption, arguing that heightened scrutiny should not be—and traditionally has not been—considered a necessary condition for congressional enforcement.

1. *Historical Context*

Tellingly, history suggests that heightened scrutiny under Section One was not always so important to the Section Five analysis. In *Fitzpatrick v. Bitzer*, decided in June 1976, the Court recognized that Title VII’s prohibition on sex discrimination had properly abrogated

²⁰⁴ See, e.g., *Windsor*, 133 S. Ct. at 2706 (quoting *USDA v. Moreno*, 413 U.S. 528, 534); *Romer*, 517 U.S. at 634–35 (same); see also *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) (same).

²⁰⁵ See *supra* note 133.

²⁰⁶ Justice Breyer faulted the Court for discounting evidence compiled by Congress to support its attempted abrogation of state sovereign immunity through Title I of the ADA. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 377 (2001) (Breyer, J., dissenting) (“The Court says that its primary problem with this statutory provision is one of legislative evidence. . . . In fact, Congress compiled a vast legislative record documenting ‘massive, society-wide discrimination’ against persons with disabilities.” (quoting S. REP. NO. 101-116, at 8–9 (1989))). Justice Ginsburg similarly criticized a plurality of the Court for holding that Congress had failed to show that the Family and Medical Leave Act’s self-care provisions aimed to remedy state classifications that were subject to heightened scrutiny. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 51 (2012) (Ginsburg, J., dissenting) (“Beyond question, Congress had evidence of a well-documented pattern of workplace discrimination against pregnant women.”).

state sovereign immunity pursuant to Section Five.²⁰⁷ However, at the time *Fitzpatrick* was handed down, state action based on sex was formally governed under the rubric of rational basis review, albeit rational basis “with bite.”²⁰⁸ It was only six months later that the Court decided *Craig v. Boren*, holding that sex classifications triggered heightened scrutiny.²⁰⁹

Though these developments precede the revolution in Section Five doctrine wrought by *Boerne* and its progeny, the Court has yet to disavow them. In fact, the Court drew a parallel between its recognition of Title VII as valid enforcement legislation in *Fitzpatrick* and its decision to uphold provisions of the Family and Medical Leave Act (FMLA) nearly thirty years later.²¹⁰ In *Nevada Department of Human Resources v. Hibbs*, the Court noted that Congress extended Title VII to the States based on a compelling record of unconstitutional sex discrimination.²¹¹ The *Hibbs* Court failed to mention, however, that under the constitutional theory in operation at the time of *Fitzpatrick*, only irrational sex classifications violated Section One.

Congresswoman Abzug acted against this backdrop when she introduced the original Equality Act in 1974. Her legislation sought to add protections based on sexual orientation to each provision of Title VII that already applied to sex.²¹² When she introduced a nearly identical bill in 1975, Abzug argued that “sexual orientation should be no barrier to equal protection under the law.”²¹³ Abzug evidently believed that Title VII was a solid foundation upon which to build additional civil rights protections for state employees. Yet, if Section Five of the Fourteenth Amendment left Congress no room to prohibit classifications triggering rational basis review in 1974, Abzug’s

²⁰⁷ 427 U.S. 445, 453 n.9 (“There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under [Section Five] of the Fourteenth Amendment.”).

²⁰⁸ At the time of *Fitzpatrick*, the Court’s opinion in *Reed v. Reed* was controlling. See *Craig v. Boren*, 429 U.S. 190, 197–99 (1976) (citing *Reed v. Reed*, 404 U.S. 71 (1971)). While *Craig* described *Reed* as imposing a standard of review associated with heightened scrutiny, *id.* at 197, scholars have argued that *Reed* is more properly understood as a “rational basis with bite” case. See Araiza, *After the Tiers*, *supra* note 32, at 390 (“The *Reed* Court concluded that the state law . . . failed traditional rational basis review.”); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1326–29 (2018).

²⁰⁹ *Craig*, 429 U.S. at 197.

²¹⁰ 538 U.S. 721, 729–30 (2003) (“Congress responded to this history of [sex] discrimination by abrogating States’ sovereign immunity in Title VII [H]ere, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress’s passage of prophylactic [Section Five] legislation.”).

²¹¹ *Id.*

²¹² See *supra* notes 99–100 and accompanying text.

²¹³ 121 CONG. REC. 8581 (1975) (statement of Rep. Abzug).

Equality Act would have been a distant dream. Not only her proposed provisions targeting sexual orientation discrimination but also the very protections against sex discrimination at the heart of Title VII would have been beyond the scope of congressional authority to enforce against the States.

2. *Modern Roots of the Heightened Scrutiny Requirement*

The idea that Congress lacks the authority to prohibit state classifications that do not draw heightened scrutiny under the Equal Protection Clause first arose when the Court considered the Age Discrimination in Employment Act. The *Kimel* Court invalidated portions of the ADEA because they “prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”²¹⁴ The ADEA’s broad bar on age discrimination, in fact, placed its “substantive requirements . . . at a level akin to [the Court’s] heightened scrutiny cases under the Equal Protection Clause.”²¹⁵ The *Kimel* Court, however, did not rest its assessment of congruence and proportionality entirely upon this observation. Instead, the Court asked whether, despite the presumptive rationality of state classifications based on age, the ADEA represented “reasonably prophylactic legislation” aimed at rooting out the kind of “[d]ifficult and intractable problems [that] often require powerful remedies.”²¹⁶ What doomed the ADEA at this crucial step of the Court’s analysis was the paltry evidence that Congress had put forth of age discrimination in state employment.²¹⁷

The *Garrett* Court similarly invalidated the employment protections of the Americans with Disabilities Act.²¹⁸ The majority appeared to base its holding on two distinct concerns: First, it noted that Congress had “assembled only . . . minimal evidence of unconstitutional state discrimination in employment against the disabled.”²¹⁹ This echoes the *Kimel* Court’s fixation with the legislative record, and does not flow directly from the applicable standard of review. However, the Court then declared that, even if Congress had mustered widespread evidence, the legislation at issue would fail Section Five review because “the rights and remedies created by the ADA against

²¹⁴ 528 U.S. 62, 64 (2000).

²¹⁵ *Id.*

²¹⁶ *Id.* at 88.

²¹⁷ *Id.* at 89–91.

²¹⁸ 531 U.S. 356, 374 (2001).

²¹⁹ *Id.*

the States” far outweighed the obligations imposed by Section One.²²⁰ Here, the standard of review seemed to matter greatly—the ADA proscribed too much legitimate state action given that “adverse, disparate treatment often does not amount to a constitutional violation where rational-basis scrutiny applies.”²²¹ Does *Garrett* thus stand for the proposition that legislation designed to enforce a rational-basis classification is never congruent and proportional?

Perhaps not. According to the *Garrett* Court, the ADA’s overbreadth was rooted in the accommodation mandate it imposed on state employers.²²² While Justice Breyer insisted in dissent that Congress could ensure state compliance with the constitutional command of fair treatment by requiring States to reasonably accommodate employees with disabilities,²²³ the majority found such a requirement of “favorable” treatment foreign to rational basis review.²²⁴ In contrast, the Court upheld Section Five legislation in *Tennessee v. Lane* despite its accommodation mandate.²²⁵ Because state action abridging an individual’s access to the courts triggered heightened scrutiny under the Due Process Clause, the *Lane* Court judged that the “affirmative obligation to accommodate persons with disabilities in the administration of justice” was reasonable in light of the States’ duties under Section One.²²⁶ *Garrett* may thus prohibit enforcement legislation against rational-basis classifications only when an accommodation mandate applies.

In *Hibbs*, the Court further contextualized the relevance of heightened scrutiny to the Section Five inquiry. When enforcement legislation tackles a classification subject to heightened scrutiny, *Hibbs* explained, it becomes “easier for Congress to show a pattern of state constitutional violations.”²²⁷ The Court in no way intimated that legislation aimed at rational-basis classifications automatically fails the congruence and proportionality test. If anything, the *Hibbs* Court confirmed that Congress *could* prohibit age or disability classifications if it showed that States have engaged in “a widespread pattern of irrational reliance” on those traits.²²⁸

²²⁰ *Id.* at 372.

²²¹ *Id.* at 370 (internal quotation marks omitted).

²²² *Id.* at 372.

²²³ *Id.* at 385–86 (Breyer, J., dissenting).

²²⁴ *Id.* at 367–68 (majority opinion).

²²⁵ 541 U.S. 509, 533–34 (2004).

²²⁶ *Id.*

²²⁷ *Ne v. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (emphasis added).

²²⁸ *See id.* at 735.

The Court most recently addressed enforcement legislation in *Coleman v. Court of Appeals of Maryland*.²²⁹ The *Coleman* Court considered Congress's attempt to authorize suits against States for denying employees self-care leave under the FMLA, a separate component of the same statute at issue in *Hibbs*.²³⁰ Advocates sought to take advantage of that earlier success and argued that the self-care provisions of the FMLA, just like the family-care provisions deemed congruent and proportional in *Hibbs*, were intended to remedy or prevent unconstitutional sex discrimination.²³¹ This strategy failed, as the *Coleman* Court found "scant evidence in the legislative history" that the self-care provisions targeted sex classifications.²³² In dissent, Justice Ginsburg strenuously contested that point, explaining that self-care benefits were a critical component of Congress's mission to enforce sex equality in employment.²³³ To all involved—the majority, the dissenting Justices, and the litigants—congruence and proportionality seemed to rest on whether the self-care provisions could be cast as a response to state classifications that triggered heightened scrutiny.²³⁴

In the end, however, it is not so clear that the FMLA's proponents needed to reframe state denial of self-care leave as unconstitutional sex discrimination. The *Coleman* Court hinted that the result may have been different had Congress "document[ed] any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies."²³⁵ And yet, the Court has explicitly held that pregnancy discrimination does not necessarily constitute sex discrimination subject to heightened scrutiny under Section One of the Fourteenth Amendment.²³⁶ *Coleman* may therefore offer yet another signal that the tiers of scrutiny do not define the content of appropriate legislation. Rather, the key factor influencing congruence and proportionality is the evidence of illicit state action compiled by Congress.

Thus, the invalidity of enforcement legislation addressing rational-basis classifications may not be a foregone conclusion. *Kimel*,

²²⁹ 566 U.S. 30 (2012).

²³⁰ *Id.* at 33.

²³¹ *Id.* at 37.

²³² *Id.* at 38.

²³³ *Id.* at 46 (Ginsburg, J., dissenting).

²³⁴ *See id.* at 36–37 (majority opinion) (contrasting the case at hand with *Hibbs*); *id.* at 64 (Ginsburg, J., dissenting).

²³⁵ *Id.* at 39.

²³⁶ *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification.").

Garrett, *Hibbs*, and *Coleman* indicate that the legislative record and the scope of the statute in question, rather than the level of scrutiny that attaches to the classification, separate an “appropriate remedy” from an “unwarranted response to a perhaps inconsequential problem.”²³⁷

Araiza similarly concludes that suspect classes may no longer control the Section Five inquiry, but he takes a different view of the reasons why and the way forward. Whereas this Note argues that heightened scrutiny was never a necessary condition for congressional enforcement, Araiza suggests that the Court has begun to consider heightened scrutiny vital but insufficient.²³⁸ Araiza notes how inconsistent these proliferating obstacles to congressional enforcement of constitutional rights are with the Court’s demonstrated concern with classifications based on animus.²³⁹ He therefore offers a new approach under Section Five that accounts for the Court’s anti-animus review, notwithstanding its distance from the tiers of scrutiny under Section One. Araiza proposes that, because Congress best represents the nation’s collective understanding of fairness, the Court should defer to Congress’s determinations as to when state conduct reflects unconstitutional animus warranting a legislative response.²⁴⁰

Seeking to deemphasize the importance of heightened scrutiny, Araiza prescribes an entirely new test for appropriate legislation under Section Five. This Note offers something considerably less bold. It argues that the existing congruence and proportionality standard requires the Court to look beyond the suspect class framework in assessing whether Congress has properly invoked its enforcement power. The following Section explores what such an inquiry might look like.

C. *Establishing Congruence and Proportionality*

It cannot be that the level of scrutiny triggered by a state classification is the only measure of congruence and proportionality relevant to the Section Five inquiry. In his *Garrett* dissent, Justice Breyer helped explain why. Rational basis review, he argued, was developed to restrain *courts*, not Congress; a standard originally intended to free legislatures from second-guessing by judges should not be repurposed

²³⁷ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000).

²³⁸ Araiza, *After the Tiers*, *supra* note 32, at 371.

²³⁹ *See id.* at 399–400.

²⁴⁰ *Id.* at 401–04.

as a judicial tool to bind legislators' hands.²⁴¹ The divergence between Section One and Section Five recounted in Part III offers further support for Breyer's position. If the Court cannot faithfully adhere to its own Section One framework, why should Congress?

Placing too great a premium on the applicable standard of review also ignores two salient factors that the Court continually references throughout its Section Five cases: the evidence of unconstitutional state action compiled by Congress and the scope of the legislation at issue.²⁴² With these more meaningful signifiers of congruence and proportionality in mind, the Court should validate the Equality Act as appropriate legislation. The record of state behavior justifies congressional enforcement of LGBT rights, and the Equality Act does so without imposing an accommodation mandate.

How exactly Congress must prove that sufficient state violations exist to justify enforcement legislation remains somewhat uncertain. The *Garrett* Court aggressively narrowed the field of evidence that Congress can use to establish a pattern of constitutional violations by the States.²⁴³ But soon after, the *Hibbs* Court cast doubt on the grip of those same constraints,²⁴⁴ and the *Lane* Court all but abandoned them.²⁴⁵ In *Coleman*, the Court shed little light on the evidentiary requirements of appropriate legislation. However, the *Coleman* Court did recast *Hibbs* as a less dramatic departure from the strict standards articulated in *Garrett*, downplaying the extensive deference to congressional factfinders on display in *Lane*.²⁴⁶

Especially if the looser requirements of *Hibbs* and *Lane* apply, Congress should have little trouble documenting discrimination against LGBT workers at the hands of state employers. In fact, an exhaustive record has already been compiled for them. The Williams Institute has identified hundreds of acts of discrimination against state

²⁴¹ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 383 (2001) (Breyer, J., dissenting) (“Rational-basis review—with its presumptions favoring constitutionality—is a paradigm of *judicial* restraint.” (citation omitted)).

²⁴² *See supra* Section IV.B.2.

²⁴³ *See Garrett*, 531 U.S. at 368–69, 372–73 (declaring that evidence of discrimination by private actors or local government actors, or of state policies that disparately impact marginalized groups cannot support enforcement under Section Five).

²⁴⁴ *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731, 735 (2003).

²⁴⁵ *See Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004). The *Lane* Court emphasized the extent to which *Hibbs* flouted the inflexible evidentiary standards referenced in earlier cases. *See id.* at 528.

²⁴⁶ *See Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 34 (2012) (“[*Hibbs*] rested on evidence that States had family-leave policies that differentiated on the basis of sex and that States administered even neutral family-leave policies in ways that discriminated on the basis of sex.”).

employees due to sexual orientation or gender identity.²⁴⁷ Many of these instances appear to satisfy the *Kimel* and *Garrett* standard of “irrational reliance” on sexual orientation or gender identity,²⁴⁸ justifying enforcement legislation. Moreover, such stories are corroborated by widespread reports of discrimination against LGBT employees in the private sector.²⁴⁹ These data, which show that LGBT individuals experience employment discrimination at far higher rates than their cisgender and heterosexual peers,²⁵⁰ demonstrate a nationwide, cross-sector, and intractable problem.

The Court would not be justified in following *Garrett* and finding, despite ample evidence of illicit state behavior, that the Equality Act is overbroad in relation to the constitutional violations that it targets. Like the ADEA and Title I of the ADA, both of which failed the congruence and proportionality test, the Equality Act “applie[s] broadly to every aspect of state employers’ operations.”²⁵¹ However, the argument that the Equality Act places uncommonly onerous obligations on state employers falters once one recalls that the bill simply adds sexual orientation and gender identity as protected classes under Title VII²⁵²—legislation that the Court has already found congruent and proportional despite its broad application.²⁵³

Nor does the Equality Act require States to make the type of accommodations that the *Garrett* Court found constitutionally problematic.²⁵⁴ At first glance, the Equality Act might appear to force state employers to provide transgender workers with *more* than their cisgender colleagues.²⁵⁵ But, upon closer review, the bill does not

²⁴⁷ See WILLIAMS INST. 2009, *supra* note 12, at ch. 12; BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., WRITTEN TESTIMONY IN SUPPORT OF THE EQUALITY ACT app. 6 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Williams-Institute-Equality-Act-Testimony.pdf>.

²⁴⁸ See, e.g., SEARS & MALLORY, *supra* note 247, at 12 (discussing the case of a professor who was fired after her supervisor was “disgust[ed]” to learn of her transgender status); *id.* at 13 (discussing the case of a state university employee whose supervisor “regularly addressed him with derogatory language associated with gay men”).

²⁴⁹ Cf. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 371 (2001) (“It is telling, we think, that given these large numbers [of disabled state workers], Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.”).

²⁵⁰ See ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY, AND BISEXUAL PEOPLE IN THE U.S. 1 (2019); S.E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 12–13 (2016).

²⁵¹ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003).

²⁵² See *supra* note 99 and accompanying text.

²⁵³ See *supra* note 106 and accompanying text.

²⁵⁴ See *supra* notes 222–26 and accompanying text.

²⁵⁵ Cf. Alok K. Nadig, Note, *Ably Queer: The ADA as a Tool in LGBT Discrimination Law*, 91 N.Y.U. L. REV. 1316, 1347–48 (2016) (noting that a traditional antidiscrimination

seem to require accommodations at all.²⁵⁶ What some may paint as “accommodations”—from appropriate restroom access to transition-related care—can alternatively be understood as critical components of an antidiscrimination mandate. These necessities must be provided to transgender workers in order to place them on equal footing with all other employees.²⁵⁷ By contrast, an “accommodation” that assumes transgender workers have unique needs might actually reveal the State’s design to offer them something less than equal treatment.²⁵⁸

Throughout its Section Five jurisprudence, the Court consistently grounds its evaluation of congruence and proportionality in the evidence of state constitutional violations put forward by Congress and the breadth of the statutory provisions at hand. The standard of review triggered by the constitutional entitlement that Congress seeks to enforce makes a lot of noise in Section Five cases, but ultimately gives way to these more relevant considerations. The Court should therefore not discard the Equality Act’s state employer provisions merely because their intended beneficiaries lack formal protections under Section One. Backed by an extensive record of state discrimination, and designed to impose obligations on state employers that are commensurate with their preexisting constitutional duties, the Equality Act fulfills the Court’s essential requirements for appropriate legislation.

framework “would not help a transwoman attempting to secure medical coverage for a trachea shave if the health insurer did not cover trachea shaves for anyone else”).

²⁵⁶ Unlike the Americans with Disabilities Act, the language of Title VII incorporated by the Equality Act does not mention accommodations. *Compare* 42 U.S.C. § 12112(b)(5)(A) (2018) (requiring that employers “mak[e] reasonable accommodations” to avoid discrimination under the ADA), *with* 42 U.S.C. 2000e-2 (2018) (not imposing an accommodation requirement on employers). For a proposed statute that would seek to invoke Section Five to require that state employers accommodate pregnant workers, see Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 2(1) (2019).

²⁵⁷ *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017) (finding that a policy prohibiting a transgender student from using a restroom that aligned with his gender identity constituted sex discrimination under Title IX because it subjected him to “different rules, sanctions, and treatment than non-transgender students”); Samuel Rosh, Note, *Beyond Categorical Exclusions: Access to Transgender Healthcare in State Medicaid Programs*, 51 COLUM. J.L. & SOC. PROBS. 1, 6–7 (2017) (describing the medical necessity of treatment for gender dysphoria).

²⁵⁸ Transgender people who above all want equal access to public places, restrooms, or locker rooms may be excluded from those spaces and “accommodated” by being forced to use designated facilities out of sight from their cisgender peers. *See, e.g.,* Minter, *supra* note 183, at 1190–91 (“[A] transgender student who is constantly ‘outed’ as such by being forced to use a separate bathroom is likely to be targeted for harassment, and, at a minimum, will be negatively affected by the constant stigma of being treated differently than other students.”).

CONCLUSION

The Equality Act's protections for LGBT state employees are forty-five years in the making. Even if the current bill does not become law, it seems likely to reappear in future legislative sessions. In order to impose liability on state employers for anti-LGBT discrimination, however, Congress must draw on its diminished power to enforce the Fourteenth Amendment.

Since state classifications based on sexual orientation and gender identity trigger a standard of review nominally distinct from formal heightened scrutiny, the Court is likely to view any attempt by Congress to prohibit them with skepticism. However, the polestar of the Court's test for appropriate enforcement legislation is its "congruence and proportionality" to the unconstitutional behavior of the States. Such a standard cannot remain bound to tiers of scrutiny that fundamentally represent yesterday's jurisprudence. If the Court continues to insist that the standard of review triggered by a classification determines the scope of Congress's enforcement power, it must recognize the uncommon care with which the Justices review state action targeting LGBT individuals. Better still, the Court should dial back its focus on the tiers of scrutiny altogether when assessing enforcement legislation. By paying greater attention to more reasonable indicators of congruence and proportionality, such as the legislative record and the scope of the statute in question, the Court should have little trouble finding that the Equality Act constitutes appropriate legislation.