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## CONGRESSIONAL POWER TO REQUIRE DNA TESTING

*Larry Yackle*<sup>\*\*</sup>

### I. INTRODUCTION

Many states fail to conduct, or even to permit, DNA testing of biological materials in circumstances in which the results might exonerate convicts under sentence of death.<sup>1</sup> Senator Patrick Leahy thinks that Congress should enact a statute requiring states to provide for testing when it promises to reveal the truth. Leahy's idea is sensible as a matter of policy. I mean in this Article to argue that it is also constitutionally feasible.

Senator Leahy's specific proposal is contained in section 104 of the Innocence Protection Act of 2001 ("IPA"):<sup>2</sup>

#### SEC. 104. PROHIBITION PURSUANT TO SECTION 5 OF THE 14TH AMENDMENT.

(a) *Application for DNA Testing.*—No State shall deny an application for DNA testing made by a prisoner in State custody who is under sentence of death, if the proposed DNA testing has the scientific

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\* Professor of Law, Boston University. I should disclose that while I did not draw the bill I examine in this Article, I consulted on occasion with those who did. Jack Beermann, Ward Farnsworth, Oona Hathaway, Avi Soifer, and Jeanette Yackle gave me helpful comments on an earlier draft. Barry Scheck and Vanessa Potkin at the Innocence Project gave me the benefits of their thinking and research. Stan Fisher, Doug Laycock, and David Rossman answered questions for me. Nicholas Vegliante helped with research.

Readers should not hold the editors of the *Hofstra Law Review* responsible for deviations from THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) on which I have insisted.

1. See JEREMY TRAVIS & CHRISTOPHER ASPLEN, U.S. DEP'T OF JUSTICE, POSTCONVICTION: DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 10 (1999) (reporting that it is unclear in many jurisdictions whether prisoners have any procedural means of demonstrating actual innocence on the basis of newly discovered evidence advanced after conviction); see *also infra* notes 123-24 and accompanying text.

2. S. 486, 107th Cong. § 104 (2001).

potential to produce new, noncumulative evidence material to the claim of the prisoner that the prisoner did not commit—

- 1) the offense for which the prisoner was sentenced to death; or
- 2) any other offense that a sentencing authority may have relied upon when it sentenced the prisoner to death.

(b) *Opportunity to Present Results of DNA Testing.*—No State shall rely upon a time limit or procedural default rule to deny a prisoner in State custody who is under sentence of death an opportunity to present in an appropriate State court new, noncumulative DNA results that establish a reasonable probability that the prisoner did not commit an offense described in subsection (a).

(c) *Remedy.*—A prisoner in State custody who is under sentence of death may enforce subsections (a) and (b) in a civil action for declaratory or injunctive relief, filed either in a State court of general jurisdiction or in a district court of the United States, naming an executive or judicial officer of the State as defendant.

(d) *Finality Rule Unaffected.*—An application under this section shall not be considered an application for a writ of habeas corpus under section 2254 of title 28, United States Code, for purposes of determining whether it or any other application is a second or successive application under section 2254.<sup>3</sup>

Most of the provisions in IPA can rest on congressional power to place conditions on disbursements of federal treasure.<sup>4</sup> This provision cannot. Section 104 would not merely encourage states to act by offering them monetary incentives.<sup>5</sup> It would *order* states to behave in a prescribed way and would recruit the courts to enforce its commands. Congressional power to regulate commerce among the states<sup>6</sup> might be the answer. Yet Senator Leahy has deliberately declined to lay the groundwork for an argument along those lines.<sup>7</sup> Moreover, he has consciously omitted any clear textual indication that section 104 is

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3. *Id.*

4. *See* U.S. CONST. art. I, § 8, cl. 1.

5. *See* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (explaining the “encouragement” theory and its limits).

6. *See* U.S. CONST., art. I § 8, cl. 3.

7. Nothing in section 104 or in its legislative history indicates any purpose to rely on the Commerce Clause. The Senate Judiciary Committee has taken no evidence tending to establish that a state’s refusal to provide for DNA testing in death penalty cases has a substantial effect on interstate commerce.

meant to achieve its goals by regulating things in commerce or, indeed, commercial arrangements of any kind.<sup>8</sup> In the current climate, that omission would undermine an argument based on the commerce power alone.<sup>9</sup> The reason that Senator Leahy has neglected the predicates for anchoring section 104 in the spending and commerce powers is apparent from the title line.<sup>10</sup> This provision of IPA is meant to be an exercise of the power conferred by Section 5 of the Fourteenth Amendment to enforce the provisions in Section 1 of that Amendment by “appropriate” legislation.<sup>11</sup> It is on that ground, and only on that ground, that I want to defend its constitutionality.

The enforcement measures that Congress has attempted to justify under Section 5 fall along a continuum. That continuum stretches from statutes that raise no serious constitutional concerns at all, at one end, to statutes that are invalid, at the other.<sup>12</sup> At the safe end of the spectrum lie statutes that establish procedural machinery for implementing interpretations that the Court itself has placed, or would place, on the Fourteenth Amendment. Those judicial interpretations may be limited to the explicit provisions in the Fourteenth Amendment: the Due Process,

8. Nothing in section 104 purports to reach state behavior indirectly by placing conditions on the use of things that move in interstate commerce.

9. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (explaining that a federal criminal statute will not be read to change the “federal-state balance” unless Congress conveys that purpose “clearly”); see also *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001) (invoking the *Bass* clear-statement rule in an environmental regulation setting).

10. See also S. 486 § 101(b)(2) (2001) (stating that “the purposes of this title are to . . . prevent the imposition of unconstitutional punishments through the exercise of power granted by . . . [S]ection 5 of the [Fourteenth Amendment] to the Constitution of the United States”).

11. U.S. CONST. amend. XIV, § 5.

12. I put aside the question whether Section 5 empowers Congress to reach private behavior not attributable to a state. During and immediately after Reconstruction, the Supreme Court was notoriously unsympathetic to federal civil rights legislation. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court struck down the Civil Rights Act of 1875 insofar as it purported to prohibit race discrimination by inns, theaters, and other establishments operating under private proprietorship. In *United States v. Harris*, 106 U.S. 629 (1883), the Court equally invalidated the Civil Rights Act of 1871 insofar as it attempted to punish private interference with Fourteenth Amendment rights. The Warren Court was infinitely more generous. In *United States v. Guest*, 383 U.S. 745 (1966), a majority of the Justices agreed that Congress could target private conduct after all. Nevertheless, the current Court has embraced the *Civil Rights Cases* and *Harris* and has explicitly declined to be impressed by the nose count in *Guest*. See *United States v. Morrison*, 529 U.S. 598, 624 (2000). Academics have mounted arguments that Section 5 empowers Congress to reach private behavior. See, e.g., Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1359-60 (2000) (contending that the text of Section 5 might easily be read that way); Gary C. Leedes, *State Action Limitations on Courts and Congressional Power*, 60 N.C. L. REV. 747, 796 (1982) (offering a more conservative thesis); see also Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1381 (1964) (contending that congressional power to regulate private behavior would comport with “original understanding”).

Equal Protection, and Privileges or Immunities Clauses.<sup>13</sup> They may also extend to other constitutional provisions that are “incorporated” by the Fourteenth Amendment.<sup>14</sup> For example, Congress can confer jurisdiction on federal courts to entertain suits arising under the Fourteenth Amendment and can authorize private litigants to invoke that jurisdiction. The common illustration is the Ku Klux Klan Act of 1871.<sup>15</sup> That statute contained both a section granting jurisdiction to federal courts, now codified at 28 U.S.C. § 1343(a)(3), and a section authorizing private suits relying on that jurisdiction, now codified at 42 U.S.C. § 1983.<sup>16</sup> Enactments at this end of the continuum may contain substantive standards of behavior. But those standards merely rehearse the content of judicially identified constitutional rights as the predicate for establishing procedures for ensuring compliance with the Court’s precedents. In *South Carolina v. Katzenbach*,<sup>17</sup> for example, the Court sustained a provision of the Voting Rights Act of 1965, which suspended literacy tests as a prerequisite for voting in certain southern states. That decision can rest on the theory that the states affected had used literacy tests to deny the franchise to African-Americans in violation of the Court’s account of the Fifteenth Amendment.<sup>18</sup>

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13. The Privileges or Immunities Clause has been largely neglected since the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). But in light of the Court’s reliance on that clause in *Saenz v. Roe*, 526 U.S. 489, 501-03 (1999), Section 5 presumably empowers Congress to enforce it along with its more familiar cousins.

14. See *City of Boerne v. Flores*, 521 U.S. 507, 517-19 (1997) (recognizing that Section 5 empowers Congress to enforce “incorporated” Bill of Rights safeguards).

15. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 28 and 42 U.S.C.).

16. The Court explained in *Monroe v. Pape*, 365 U.S. 167 (1961), that the title to the 1871 Act explicitly stated that its purpose was to “enforce the provisions of [the Fourteenth Amendment].” *Id.* at 171. The Court has assumed not only that § 1983 was meant as a Section 5 enactment, but also that § 1983 is a valid enactment under this heading. In *Quern v. Jordan*, 440 U.S. 332 (1979), the Court entertained the argument that § 1983 abrogates state sovereign immunity against suit by private litigants. See *id.* at 341. It was not so clear at that time, but it is quite clear now (according to a five-member majority of the Justices), that Congress can override state immunity only as a means of enforcing the Fourteenth Amendment via Section 5. In *Quern*, the underlying assumption was that if § 1983 were specific enough about it, it could eliminate state immunity in cases to which it applies. Cf. *Quern*, 440 U.S. at 351 n.3 (Brennan, J., concurring in the judgment) (stating that “[t]here is no question but that § 1983 was enacted by Congress under [Section] 5 of the Fourteenth Amendment”). Section 5 statutes like § 1343(a)(3) and § 1983 are uncontroversial. They might as easily rest on the power that Congress enjoys to establish inferior federal courts and prescribe the business they will do within the boundaries fixed by Article III.

17. 383 U.S. 301 (1966).

18. The enforcement authority conferred on Congress by Section 2 of the Fifteenth Amendment is understood to be coextensive with the power granted by Section 5 to enforce the Fourteenth. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 967 n.8 (2001) (explaining that the two enforcement clauses are “virtually identical”). The *South Carolina* case

At the other end of the continuum lie federal statutes that purport to diverge from the Court's interpretations of the Fourteenth Amendment. There was a time, not so long ago, when statutes of this second kind also counted as "appropriate" enforcement legislation. In *Katzenbach v. Morgan*,<sup>19</sup> the Court acknowledged that it had previously held that the Fourteenth Amendment allowed states to restrict the franchise to residents who spoke English.<sup>20</sup> Nevertheless, the Court sustained another feature of the Voting Rights Act, which required states to allow Spanish-speaking people to vote. Statutes that redefine the substantive content of Fourteenth Amendment rights have always troubled some members of the Court. Justice Harlan dissented from the decision in *Morgan*.<sup>21</sup> In a famous dissent in *City of Rome v. United States*,<sup>22</sup> then-Justice Rehnquist insisted that *Morgan* could not support congressional power actually to depart from the Court's interpretations.<sup>23</sup> Recently, the Chief Justice has prevailed. In *City of Boerne v. Flores*,<sup>24</sup> and again in *United States v. Morrison*,<sup>25</sup> *Kimel v. Florida Board of Regents*,<sup>26</sup> *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>27</sup> and *Board of Trustees of the University of Alabama v. Garrett*,<sup>28</sup> the Court denied that Section 5 grants Congress any power to determine that a

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may have embraced a more generous scope for Section 5 power. I take this limited (and thus safer) reading of the case from Justice Harlan. See *Katzenbach v. Morgan*, 384 U.S. 641, 667 (1966) (Harlan, J., dissenting).

19. 384 U.S. 641 (1966).

20. See *id.* at 649.

21. According to Justice Harlan, *Morgan* confused a decision about the meaning of the Constitution (which Harlan regarded as for the Court to address) with a decision about an appropriate remedial measure to "redress and prevent" a judicially-determined violation of the Constitution (which he conceded to Congress). *Id.* at 666 (Harlan, J., dissenting). Harlan charged the Court with reaching an appealing result in *Morgan* at the cost of sacrificing fundamental structural arrangements—both the "separation between the legislative and judicial function and the boundaries between federal and state political authority." *Id.* at 659. Archibald Cox read (one "branch" of) the *Morgan* opinion to adopt the same "strikingly novel" rationale: "Congress can invalidate state legislation upon the ground that it denies equal protection where the Court would uphold, or even has upheld, the constitutionality of the same state statute." Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 (1966). By contrast to Harlan, Professor Cox regarded the idea that Congress could reach its own independent interpretations of the Fourteenth Amendment as "a happy innovation." *Id.*

22. 446 U.S. 156 (1980).

23. See *id.* at 220 n.8 (Rehnquist, J., dissenting).

24. 521 U.S. 507 (1997).

25. 529 U.S. 598 (2000).

26. 528 U.S. 62 (2000).

27. 527 U.S. 666 (1999).

28. 121 S. Ct. 955 (2001).

state policy or activity is unconstitutional when the Court has concluded, or would conclude, otherwise.<sup>29</sup>

Scattered along the continuum lie statutes that are remedial in a substantive rather than in a procedural way. They do not merely establish processes for vindicating judicially determined Fourteenth Amendment rights; they prohibit local policies or activities, whatever procedural arrangements are made to ensure that state authorities comply. At the same time, these measures make no claim that the behavior they prohibit violates the Fourteenth Amendment—as conceived by Congress, if not the Court. They leave the content of constitutional rights to the Court and proscribe ostensibly valid policies or activities as a prophylactic means of forestalling behavior that *does* offend the Court's account of the Fourteenth Amendment. In decisions beginning with *City of Boerne*, the Court has held that Congress can prohibit conduct that is not itself unconstitutional, so long as there is a "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end."<sup>30</sup>

There is a case to be made that section 104 of IPA would fit neatly at the safe end of the Section 5 spectrum. Arguably at least, this provision would merely establish a procedural mechanism for ensuring that states respect Fourteenth Amendment rights that the Supreme Court

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29. See *Garrett*, 121 S. Ct. at 962; *Morrison*, 529 U.S. at 627; *Kimel*, 528 U.S. at 67; *Coll. Sav. Bank*, 527 U.S. at 691; *City of Boerne*, 521 U.S. at 519. These decisions should come as no surprise. The five Justices who formed the majority in each instance plainly think that the Court should aggressively enforce federalism limits on congressional power. They also recognize that the state "sovereignty" limits they have identified do not control when Congress proceeds on the authority provided by Section 5. Compare *Alden v. Maine*, 527 U.S. 706, 754 (1999) (refusing to give effect to a federal statute purporting to subject the states to suits for damages as an exercise of the commerce power), with *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (permitting Congress to abrogate state sovereign immunity as an exercise of Section 5 power). It follows that those Justices are likely to be careful about the Section 5 legislation they approve, lest they undermine their larger campaign to maintain (better said, construct) federal/state arrangements they find satisfying. It may even be true that the Justices in the majority are moved to take a restrictive view of Section 5 power simply to fortify their related gambit in the immunity cases. *But see infra* Part III. If the majority Justices allow a commitment to immunity decisions, already insecure in their own right, to skew the treatment of Section 5 power, they may precipitate repeated confrontations with the four dissenters, who flatly refuse to accept the immunity decisions as valid precedent. See, e.g., *Kimel*, 528 U.S. at 97-98 (Stevens, J., dissenting). It is hard to think that the majority Justices, finding themselves in a hole, will do their cause any good by digging deeper. On the general point that federalism can be protected sufficiently through political means, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); HERBERT WECHSLER, *The Political Safeguards of Federalism, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* (1961); cf. Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 341 (1982) (contending that political safeguards should suffice to limit congressional power under Section 5 but anticipating the Court's resistance).

30. *City of Boerne*, 521 U.S. at 520.

would recognize. That case is not impregnable, I confess. Yet at the very least, it lays the groundwork for a stronger argument—namely, that section 104 can be justified as a substantive remedial measure. My primary objective is to show that if this provision targets conduct that does not itself violate the Fourteenth Amendment, it can constitutionally do so in order to forestall behavior that does. Section 104 would not breach the limits on congressional Section 5 power by attempting to substitute a legislative interpretation of the Fourteenth Amendment for an interpretation that the Supreme Court has announced or would adopt in an appropriate setting.

## II. SECTION 104 AS A PROCEDURAL DEVICE FOR ENFORCING JUDICIALLY DECLARED RIGHTS

If section 104 is to be justified as a purely procedural device for vindicating judicially articulated Fourteenth Amendment rights, two things must be true. First, the substantive directions that subsections (a) and (b) address to the states must track the Court's estimates of constitutional meaning. Second, the lawsuits that subsection (c) authorizes must redress only state conduct that violates the Court's account of Fourteenth Amendment rights. Arguably at least, both those things *are* true.

### A. Subsection (a)

Subsection (a) would bar a state from denying a death row convict's request for DNA testing, provided the laboratory analysis promises to "produce new, noncumulative evidence material to the claim" that the prisoner "did not commit [the offense]."<sup>31</sup> The Supreme Court has never held that the Fourteenth Amendment of its own force imposes that limit on state prerogatives. Nor, I hasten to add, has the Court ever held that a state can disallow postconviction DNA testing in capital cases when it appears that a prisoner may well be innocent. Nobody knows what the Court will say to the point in the future. Congress must make a reasonable prediction on the basis of what the Court has said in related contexts to date.

The precedents recognize that a state has constitutional obligations to cooperate with convicts seeking to challenge their convictions. The Court held in *Ex parte Hull*<sup>32</sup> that a state cannot interfere with a

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31. Innocence Protection Act of 2001, S. 486, 107th Cong. § 104(a) (2001).

32. 312 U.S. 546 (1941).



prisoner's attempt to file a postconviction petition in court and, in *Bounds v. Smith*,<sup>33</sup> that a state cannot deny a convict who has a plausible claim access to a library or the services of someone trained in law. In the main, the Court has recognized state constitutional duties of assistance at antecedent stages of the criminal process. In the line of decisions beginning with *Brady v. Maryland*,<sup>34</sup> for example, the Court has held that a state must disclose evidence helpful to the defense when it appears that the evidence "is material in the sense that its suppression undermines confidence in the outcome of the trial."<sup>35</sup> Evidence meets the test of "materiality" if it establishes a "reasonable probability" of acquittal.<sup>36</sup>

None of these cases conclusively answers the question whether the Constitution requires a state to allow postconviction DNA testing. The *Brady* rule governs state behavior before a conviction is obtained (not after) and obligates a state to disclose evidence that is by nature "favorable" to the defense (not materials that *may* be exculpatory depending on the results of laboratory tests).<sup>37</sup> Nevertheless, once it is conceded that, prior to trial, a state must disclose evidence that would probably produce an acquittal, it is no long step to the proposition that, after conviction, a state must permit a prisoner to test objects for DNA evidence that may disprove his guilt altogether.<sup>38</sup>

Subsection (a) is extremely limited.<sup>39</sup> This provision would not require a state itself to conduct DNA tests. It would not require a state to make the results of any tests it chooses to conduct available to the prisoner, and it would not require a state to pay for tests that the prisoner arranges for himself. Read literally, subsection (a) would not even require a state to preserve items for the purpose of testing.<sup>40</sup> This provision would merely require a state to give a prisoner the opportunity to secure DNA testing of available objects at his or her own expense.

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33. 430 U.S. 817 (1977).

34. 373 U.S. 83 (1963).

35. *United States v. Bagley*, 473 U.S. 667, 678 (1985).

36. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

37. *See id.* at 281-82.

38. *See Dabbs v. Vergari*, 570 N.Y.S.2d 765, 768 (Sup. Ct. 1990) (reasoning that *Brady* and other Supreme Court decisions invite the understanding that due process requires a state to permit postconviction DNA testing in at least some circumstances). In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court disclaimed anything in *Bounds* suggesting that a state has a duty to help a prisoner "discover" a claim for postconviction relief of which the prisoner is not already aware. *See id.* at 354. In that case, however, the Court was plainly attempting to circumscribe a state's responsibility to supply prison inmates with law libraries. It may be that most prisoners can make little use of professional books. The same cannot be said of DNA evidence.

39. *See Innocence Protection Act of 2001*, S. 486, 107th Cong. § 104(a) (2001).

40. *But see infra* note 118.

Importantly, subsection (a) would only require a state to allow testing that has the “potential” to produce new evidence “material” to a prisoner’s claim of innocence. That test of “materiality” incorporates the corresponding element of the Court’s *Brady* doctrine. To be sure, subsection (a) does not simply reiterate *Brady*, which requires a state to cooperate only if evidence actually *is* material.<sup>41</sup> Yet by conditioning the state’s obligation to allow testing on the prospect that testing will generate material evidence, subsection (a) comes as close as it can to *Brady* in these circumstances. In actual *Brady* cases, courts are presented with the very evidence that the prosecution failed to disclose and are thus in a position to decide whether it is material. In the cases to which subsection (a) is addressed, courts must necessarily determine only the *potential* that DNA testing will produce evidence that is material in the *Brady* sense that it establishes a reasonable probability that the prisoner is innocent.<sup>42</sup> This provision would require a prisoner to lay a foundation for his or her request. There would have to be tangible objects to test, and those objects would have to bear genuine “exculpatory potential.”<sup>43</sup>

Ordinarily, it is no great imposition to give a prisoner access to things in the state’s possession. I have to think that most states would probably do so if they paused to consider the matter seriously. If a state declines to cooperate, the most likely explanation is not that the state has deliberated the pros and cons and reached a decision that testing is generally a bad idea, but rather that the state has simply failed to formulate a procedure for processing requests.<sup>44</sup> That is what stands in

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41. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

42. Subsection (a) does not explicitly define “material” evidence as evidence that creates a “reasonable probability” that the prisoner is innocent. That is inconsequential. The Court itself has given “materiality” that meaning, and a new statute can simply incorporate the same definition by using the term to which it is attached. Moreover, the omission of any reference to “reasonable probability” from subsection (a) is a product of stylistic drafting changes. A previous version of subsection (a), included in the Innocence Protection Act of 2000, S. 2690, 106th Cong. § 104 (2000), would have required a state to allow testing of *anything* in its possession related to a prisoner’s case, but then would have permitted a state to refuse to allow testing that a judge determined could not produce evidence establishing a “reasonable probability” that the prisoner was innocent. In its current form, subsection (a) merges the two ideas that its predecessor treated separately. It abandons any blanket requirement that testing always be allowed and thus dispenses with any need to qualify such a blanket requirement. Instead, subsection (a) makes the state’s initial obligation turn on the potential that testing will produce material evidence, which is to say, evidence establishing a reasonable probability that the prisoner is innocent. In addition, subsection (b) explicitly prescribes a “reasonable probability” standard to govern a prisoner’s entitlement to present favorable test results to a state court. That, too, is perfectly consistent with the policy of adhering to the Court’s extant doctrines as closely as possible.

43. *Dabbs*, 570 N.Y.S.2d at 768.

44. Some state forensic laboratories are overwhelmed by requests for DNA testing from prosecutors who want to use the results as evidence against criminal defendants. See Ralph Ramalli,

the way of postconviction DNA testing that could correct a monstrous injustice. As a practical matter, subsection (a) would not force a state to abandon a reasoned policy of resistance to DNA testing, but would only require the state to focus on these problems. I would not argue that the Supreme Court is especially sensitive to prisoners' claims that they did not commit the dreadful crimes of which they were convicted. But I would not want to think that the Court would allow a state's oversight or bureaucratic indifference to keep a death row prisoner from testing objects on the state's storage shelves for DNA evidence that could prove that the prisoner was not the perpetrator (and help identify the person who was).<sup>45</sup> Ordinarily, the Court may doubt the value of asking a state to indulge a prisoner's attempts to reexamine evidence that has already led to a valid conviction. But a request for DNA testing that was not previously available is another matter entirely. The great dispositive power of DNA evidence is unique and warrants a special response.<sup>46</sup>

### B. Subsection (b)

Subsection (b) bars a state from relying on a "time limit" or other "procedural default rule" to deny a prisoner's request to present exculpatory DNA test results to a state court.<sup>47</sup> The Supreme Court has never held that the Fourteenth Amendment itself disallows procedural bar rules of that order. Nor has the Court held that a state can close its courts to a powerful showing of innocence, thus leaving a prisoner to the

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*DNA Labs Swamped in Backlog of Tests*, BOSTON GLOBE, Mar. 28, 2001, at B4. Presumably, then, it would be hard for some state labs also to run tests at the request of prisoners who have already been convicted. But subsection (a) would not make that demand of public facilities. This provision would only require state authorities to establish procedures for making objects available to private labs for testing arranged by prisoners themselves. Certainly, subsection (a) would permit a state to insist on reasonable precautions for ensuring the integrity of anything released for testing.

45. The prisoner in *Dabbs* asked only that a rape victim's clothing, a gauze pad, and "rape test slides" containing semen be subjected to DNA testing to determine whether the prisoner was the donor. See *Dabbs*, 570 N.Y.S.2d at 768. The court ordered that testing despite the prisoner's otherwise unchallenged conviction. The tests showed that the prisoner's DNA did not match the DNA on the victim's clothing. See *People v. Dabbs*, 587 N.Y.S.2d 90, 92 (Sup. Ct. 1991). On that basis, the court vacated the conviction. See *id.* at 93; cf. *Watkins v. Miller*, 92 F. Supp. 2d 824, 828 (S.D. Ind. 2000) (pointing out that DNA test results obliterated the prosecution's theory of the case against the prisoner). If by contrast, DNA evidence could not undermine a prisoner's guilt, testing would not be required. See *Lyon v. Senkowski*, 109 F. Supp. 2d 125, 142 (W.D.N.Y. 2000) (explaining that a federal habeas petitioner's conviction for felony murder would not be affected by DNA test results showing that he had not physically assaulted the victim).

46. See *Harvey v. Horan*, 119 F. Supp. 2d 581, 584 (E.D. Va. 2000) (holding that a state's refusal to give a convict "access to possibly exculpatory [DNA] evidence states a claim of denial of due process").

47. Innocence Protection Act of 2001, S. 486, 107th Cong. § 104(b) (2001).

mercies of executive clemency. Here again, Congress must anticipate the Court's views in light of the relevant precedents now in place.

The Fourteenth Amendment obviously is concerned with actual innocence. The principal purpose of most federal procedural safeguards in criminal cases is to ensure that "guilt shall not escape or innocence suffer."<sup>48</sup> The Due Process Clause of the Fourteenth Amendment insists upon a fair trial not as an end in itself, but as a means to an end—the end of sorting the innocent from the guilty.<sup>49</sup> Most of the "incorporated" safeguards in the Bill of Rights similarly serve the basic truth-seeking function.<sup>50</sup> A federal statute requiring state courts to consider exonerating DNA test results would thus be in tune with the underlying objectives of the federal constitutional procedural standards the Court has elaborated for criminal cases.

In this instance, subsection (b), like subsection (a), consciously follows the *Brady* doctrine as nearly as possible. Subsection (b) comes into play after DNA testing has been performed and a prisoner contends that the results are favorable. At that point, a state procedural rule may formally bar access to state court. Importantly, subsection (b) does not set aside rules of that kind *en masse*, but creates only a modest and sensible exception: A prisoner must be permitted access to a state court to advance new evidence establishing a reasonable probability that he or she is innocent. That "reasonable probability" standard comes directly from the *Brady* line of decisions. Accordingly, subsection (b) would merely require a state to relax its normal procedural requirements enough to allow a prisoner to present to a state court the very kind of evidence that the Fourteenth Amendment bars the state from withholding from such a court. A statutory requirement of that sort arguably operates merely as a procedural device for implementing the Supreme Court's principles, albeit in a different context.

Nevertheless, most precedents understand the Constitution chiefly to protect innocent people indirectly—by demanding that criminal prosecutions adhere to federal procedural safeguards meant to avoid erroneous convictions in the first place. The Court made this point in *Herrera v. Collins*.<sup>51</sup> The prisoner in that case sought federal habeas

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48. *Berger v. United States*, 295 U.S. 78, 88 (1935).

49. *See Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (explaining that the point of a trial is to determine whether the prosecution can overcome the presumption that a defendant is innocent).

50. *See generally* OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS: "TRUTH IN CRIMINAL JUSTICE" REPORT NO. 7 (1988) (discussing the debate over the investigative stages of the criminal justice process), reprinted in 22 U. MICH. J.L. REFORM 901 (1989).

51. 506 U.S. 390 (1993).

corpus relief on the ground that new evidence demonstrated his innocence. Writing for the Court, Chief Justice Rehnquist explained that a claim of actual innocence advanced after a defendant has been convicted ordinarily alleges no constitutional violation.<sup>52</sup> Concomitantly, the Chief Justice explained that a state ordinarily can refuse to consider newly discovered evidence related to innocence after a fixed period of time following trial. Once convicted, a prisoner is no longer presumed innocent, but rather is deemed to be guilty. By hypothesis, society has marshaled considerable resources at trial in an effort to achieve an accurate verdict. That verdict is entitled to respect, unless the prisoner can demonstrate some procedural irregularity that undermines confidence in the outcome.<sup>53</sup> It is disruptive and inefficient to countenance a belated post-trial attempt essentially to revisit the very question the trial was conducted to decide. In *Herrera* itself, the prisoner offered affidavits indicating that another man had committed the murders for which the prisoner had been convicted. Chief Justice Rehnquist explained that if evidence of that kind were entertained in a federal habeas corpus proceeding long after trial, the federal court would be forced both to determine the reliability and weight of the new evidence and to compare that evidence to the proof at trial.<sup>54</sup> That enterprise, in turn, might require the court to call the trial witnesses back for a hearing and, in the end, to reproduce the fact-finding function of the original prosecution in state court—at a time when much of the information to be digested might be stale and memories dim.<sup>55</sup>

If Chief Justice Rehnquist had stopped after providing this explanation of the way the Fourteenth Amendment works, the outlook for subsection (b) would obviously be open to question. But the Chief Justice did not stop. Having laid out the way in which the Constitution deals with ordinary cases, he explicitly acknowledged the possibility that a showing of actual innocence might implicate the Fourteenth Amendment in an extraordinary case, even if unaccompanied by any claim of procedural irregularity. Specifically, he said:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant

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52. *See id.* at 404.

53. *See id.* at 399-411.

54. *See id.* at 396, 402.

55. *See id.* at 402-03, 416-18.

unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.<sup>56</sup>

A federal court can issue habeas corpus relief only if a prisoner is in custody in violation of federal law, typically the Fourteenth Amendment.<sup>57</sup> Accordingly, this statement in *Herrera* must have contemplated one or more propositions of federal constitutional law. I count at least three possibilities. First, it may be unconstitutional for a state to execute an innocent person. Second, it may be unconstitutional for a state to execute a person who was validly convicted but demonstrates thereafter that he is innocent. Third, it may be unconstitutional for a state to refuse to open its courts to a convincing “actual innocence” showing, made after the time for post-trial motions has expired.

The Chief Justice did not formally take a position on any of these propositions. I want to be clear about that. It is possible to argue that he only meant to say that he would have reached the same conclusion in *Herrera*, even accepting the prisoner’s doubtful premise that a “truly persuasive” demonstration of “actual innocence” would state a Fourteenth Amendment violation. If that is what he meant, then the assumption he adopted for purposes of argument may have been a “feel good” concluding remark calculated to reassure the rest of us that the petitioner had not been treated unjustly.<sup>58</sup> That, however, is not the only interpretation that the statement I have quoted can bear.

All the Justices in *Herrera* took Chief Justice Rehnquist’s assumption *arguendo* very seriously.<sup>59</sup> Justices Blackmun, Stevens, and Souter dissented from the judgment turning the prisoner away.<sup>60</sup> They insisted that Rehnquist’s explanation of why “innocence” claims are usually insufficient was “dictum” in light of his stated assumption that a “truly persuasive” showing would state a Fourteenth Amendment violation.<sup>61</sup> Justice White concurred only in the judgment. He endorsed the assumption that the Chief Justice articulated and explained his position entirely on the ground that the prisoner in *Herrera* had not offered sufficient proof that he was actually innocent.<sup>62</sup> Justices

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56. *Id.* at 417.

57. See 28 U.S.C. § 2241(c)(3) (1994).

58. Ward Farnsworth suggested this reading to me.

59. See Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1003-09 (1994) (noting that only Justices Scalia and Thomas were “cavalier” regarding “actual innocence” claims).

60. See *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting, joined by Stevens & Souter, J.J.).

61. See *id.*

62. See *id.* at 429 (White, J., concurring in the judgment).

O'Connor and Kennedy concurred in everything the Chief Justice said regarding most "actual innocence" claims. Yet they devoted the lion's share of their opinion to an argument that the prisoner in *Herrera* was guilty and thus did not present for decision the question whether a powerful demonstration of actual innocence, advanced after trial, would state a Fourteenth Amendment violation.<sup>63</sup> O'Connor and Kennedy concluded that discussion with a warning that federal courts might be deluged by "actual innocence" claims "[u]nless federal proceedings and relief—if they are to be had at all—are reserved for 'extraordinarily high' and 'truly persuasive demonstration[s] of 'actual innocence'" that the state courts will not consider.<sup>64</sup> That suggested both that O'Connor and Kennedy were nervous about "actual innocence" cases and that they were unwilling to disclaim them altogether. Justices Scalia and Thomas, who *did* renounce "actual innocence" claims entirely, insisted that it was unlikely that "evidence . . . as convincing as today's opinion *requires* would fail to produce an executive pardon."<sup>65</sup> That, too, indicated that Chief Justice Rehnquist's assumption *arguendo* was a serious part of the analysis in *Herrera*.

Taken together, the opinions filed in *Herrera* make the Justices' thinking regarding the first proposition pretty clear. The Court *would* interpret the Fourteenth Amendment to bar a state from executing an innocent person. Chief Justice Rehnquist's assumption *arguendo* lends support to this conclusion, as does Justice White's endorsement. Beyond that, five other Justices made more decisive statements in their own separate opinions. Justices Blackmun, Stevens, and Souter said forthrightly that it would violate both the Fourteenth Amendment and the Eighth Amendment to "execute a person who is actually innocent."<sup>66</sup> Justices O'Connor and Kennedy said that they could not "disagree" that "the execution of a legally and factually innocent person would be a constitutionally intolerable event."<sup>67</sup> Only Justices Scalia and Thomas

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63. *See id.* at 421-26 (O'Connor, J., concurring, joined by Kennedy, J.).

64. *Id.* at 426 (alteration in original) (emphasis added).

65. *Id.* at 428 (Scalia, J., concurring, joined by Thomas, J.) (emphasis added).

66. *Id.* at 430 (Blackmun, J., dissenting, joined by Stevens & Souter, JJ.). Susan Bandes has developed the substantive due process and cruel-and-unusual-punishment arguments. *See Susan Bandes, Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 503 (1996).

67. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring, joined by Kennedy, J.); *see Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (concluding that this resulting majority of the Justices "would have" held "explicitly" that the "execution of an innocent person would violate the Constitution").

declared that the Constitution would permit a state to put a person to death despite powerful evidence that the prisoner is innocent.<sup>65</sup>

This result may seem unsurprising. Yet it does represent an advancement beyond the conventional story that the Constitution ordinarily protects the innocent by establishing procedures for obtaining accurate judgments. The understanding that the Court interprets the Fourteenth Amendment to accommodate demonstrations of “actual innocence” (albeit in exceptional circumstances) bears on the argument I am now making—namely, that section 104 is a valid procedural remedy for judicially identified Fourteenth Amendment rights. This account of the Court’s views is more telling with respect to the argument I will make later—namely, that section 104 is a valid substantive prophylactic mechanism for preventing Fourteenth Amendment violations.<sup>69</sup>

The record is less clear regarding the second proposition I have identified. Chief Justice Rehnquist’s assumption *arguendo* explicitly refers to the possibility that a showing of innocence “made after trial” would render an execution unconstitutional. Justice White contemplated the same idea.<sup>70</sup> For their part, Justices Blackmun, Stevens, and Souter embraced the proposition that “the Constitution forbids the execution of a person who has been validly convicted” but nonetheless “can prove his innocence with newly discovered evidence.”<sup>71</sup> Justices O’Connor and Kennedy were comparatively reserved. They insisted that the evidence was so weak in *Herrera* that there was no need to decide whether a “fairly convicted and therefore legally guilty person” is constitutionally entitled to a hearing on the basis of persuasive new evidence.<sup>72</sup> Justices Scalia and Thomas declared that, after a valid conviction has been obtained, a state can rely entirely on clemency to avoid an erroneous execution.<sup>73</sup>

Notwithstanding the resulting ambiguity, there is a basis for predicting that, if pressed, a majority of the Justices would say that a valid conviction does not always satisfy the Constitution. Justices O’Connor and Kennedy scarcely dismissed this second proposition.

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68. See *Herrera*, 506 U.S. at 427-28 (Scalia, J., concurring, joined by Thomas, J.). Scalia and Thomas noted that prisoners who prove their innocence will typically receive a pardon. See *id.* at 428. A denial of executive clemency ordinarily does not implicate the Due Process Clause and thus is not subject to judicial review. See *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (holding that convicts have no liberty interest in the commutation of a sentence).

69. See *infra* Part III.

70. See *Herrera*, 506 U.S. at 429 (White, J., concurring in the judgment).

71. *Id.* at 431 (Blackmun, J., dissenting, joined by Stevens & Souter, JJ.).

72. *Id.* at 420 (O’Connor, J., concurring, joined by Kennedy, J.).

73. See *id.* at 427-28 (Scalia, J., concurring, joined by Thomas, J.).



They described it as “sensitive” and “troubling” and thus recognized that it warrants serious attention in a proper case.<sup>74</sup> Moreover, it’s difficult in all candor to fathom how O’Connor and Kennedy could subscribe to the first proposition (that the Constitution does not permit a state to execute a “legally and factually” innocent person) without also conceding the second.<sup>75</sup> It is possible (just possible) that when they agreed that a “legally and factually” innocent person cannot be put to death, they were thinking of a person who has not received a trial at all or even a person who has been tried and acquitted. But if that is the kind of person they had in mind, query why they were so cautious. Recall that they said that they could “not disagree” that the Constitution would bar an execution in those circumstances. Nobody should have to dig very deep into his professional (not to say moral) reserves to conclude that the Constitution prohibits the execution of someone whose legal guilt has not been established. Since Justices O’Connor and Kennedy were so tentative with respect to a proposition that should have engaged no controversy at all, it may be that, even then, they were looking ahead to the next proposition, which in their minds raised a more troubling issue. When those two key members of the Court ultimately face the question whether the Fourteenth Amendment allows a state to execute a convict who proves his actual innocence, I have to think that they will hold that it does not.

The record is less clear still regarding the third proposition: It would be unconstitutional for a state to close its courts’ doors to a post-trial showing of actual innocence after a filing deadline has passed. There are circumstances in which the Fourteenth Amendment obligates a state court to entertain a federal claim.<sup>76</sup> Yet in a series of other cases, the Court has said that the Constitution typically does not require a state to provide either appellate or postconviction avenues for attacking criminal convictions.<sup>77</sup> Those cases suggest that a state might refuse to give a convict any post-trial opportunity at all to proffer new evidence going to

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74. *Id.* at 421 (O’Connor, J., concurring, joined by Kennedy, J.).

75. As Vivian Berger has pointed out, “[t]he abstract substantive right to avoid execution if innocent means nothing in concrete terms . . . unless there exists a correlative right to establish innocence before a court at a requisite level of probability—and to do so *after* judgment.” Berger, *supra* note 59, at 1012.

76. *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 393-94 (1964) (holding that the Fourteenth Amendment requires a state court hearing on the voluntariness of a confession).

77. *See* McKane v. Durston, 153 U.S. 684, 687 (1894) (declaring that a state has no constitutional obligation to offer convicts an opportunity to seek appellate review of criminal judgments); *see also* Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987) (indicating that state postconviction procedures are also discretionary).

innocence and *a fortiori* that a state could open its courts only for a fixed period of time. Then again, to judge from still other reports, Congress has no constitutional obligation to maintain postconviction federal habeas, either.<sup>78</sup> Nevertheless, Chief Justice Rehnquist's assumption *arguendo* in *Herrera* contemplates that a federal court can grant "relief" if a state court is unavailable.<sup>79</sup> That, in turn, must conceive some basis for a federal court judgment that a prisoner is in custody in violation of federal law. The most likely basis for such a judgment is that the state concerned violates the Fourteenth Amendment if its courts decline to look at a convincing showing of actual innocence at the postconviction stage.<sup>80</sup>

The separate opinions in *Herrera* are of limited help regarding the third proposition. Justice White did not specify the court that he assumed would entertain a post-trial demonstration of innocence.<sup>81</sup> Justices Blackmun, Stevens, and Souter focused on access to federal habeas corpus and did not discuss the possibility that the states might have a constitutional duty to open their own courts.<sup>82</sup> Justices Scalia and Thomas also conceived that "actual innocence" claims would reach (and swamp) federal habeas courts.<sup>83</sup> Justices O'Connor and Kennedy expressed the same concern.<sup>84</sup> Yet they also provided some support for the view that state courts must be open. Specifically, they explained that the Texas courts "would not be free to turn petitioner away if the Constitution required otherwise."<sup>85</sup> In *Herrera* itself, the Constitution did *not* require otherwise. But that was because the petitioner sought relief a

78. See *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring). This point noted, I hasten to say that there are arguments to the effect that federal habeas corpus is constitutionally obligatory in some instances. See LARRY W. YACKLE, *FEDERAL COURTS* 419-22 (1999).

79. See *supra* text accompanying notes 56-58.

80. Judge Jolly properly notes that Chief Justice Rehnquist assumed *arguendo* that a showing of innocence may state a constitutional violation only if there is no "state avenue" for processing the claim. See *Lucas v. Johnson*, 132 F.3d 1069, 1075 (5th Cir. 1998) (Jolly, J.). Yet Judge Jolly is wrong to think that executive clemency can supply such a "state avenue." The other Justices in *Herrera* plainly understood the Chief Justice to contemplate a state judicial proceeding. See *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring, joined by Kennedy, J.); see *id.* at 428 (Scalia, J., concurring, joined by Thomas, J.); see *id.* at 439-40 (Blackmun, J., dissenting, joined by Stevens & Souter, JJ.).

81. See *Herrera*, 506 U.S. at 429 (White, J., concurring in the judgment).

82. See *id.* at 441 (Blackmun, J., dissenting, joined by Stevens & Souter, JJ.) (referring to state courts only to acknowledge that state processes ordinarily must be exhausted before adjudication in federal court can begin).

83. See *id.* at 428 (Scalia, J., concurring, joined by Thomas, J.).

84. See *id.* at 426 (O'Connor, J., concurring, joined by Kennedy, J.).

85. *Id.* at 425.

full eight years after the state deadline and, at that point, offered evidence that O'Connor and Kennedy regarded as weak.<sup>86</sup>

In the absence of more guidance from the Court, I think Congress may sensibly conclude that a state court cannot disregard a "truly persuasive" demonstration of innocence simply because it is advanced after conviction. If the Court holds that the Fourteenth Amendment entitles a prisoner to *some* postconviction judicial opportunity to make that kind of showing, it is hard to think the Court would hold that a state court can box him or her off on procedural grounds and leave the matter entirely to federal habeas corpus. A demonstration of innocence based on new evidence is quintessentially the kind of thing that must be addressed after a valid conviction is in place. When a prisoner develops evidence of that caliber, it makes sense to say that a state court must be willing to examine it.<sup>87</sup>

A DNA case may be the "actual innocence" paradigm. A convict who virtually eliminates the possibility that he or she was the perpetrator makes a "truly persuasive" demonstration of innocence about as well as anyone could. Moreover, a case in which a prisoner can show actual innocence on the basis of DNA evidence is easier to manage than a case like *Herrera*, in which the prisoner relied on traditional evidence in the form of affidavits that might be countered. The standard that subsection (b) requires prisoners to meet tracks neatly with the Court's precedents. Recall that a prisoner is entitled to present to a state court only test results that satisfy the *Brady* test for materiality, that is, results that establish a "reasonable probability" that the prisoner is innocent. That "reasonable probability" test, in turn, is a fair approximation of the

86. *See id.* at 423.

87. In this vein, consider that Chief Justice Rehnquist declined Justice Blackmun's invitation to treat the petitioner's claim under the heading of substantive due process. *See id.* at 407 n.6. Instead, the Chief Justice insisted that the question was not whether the Due Process Clause bars the execution of an innocent person, "but rather whether it entitles petitioner to judicial review of his 'actual innocence' claim." *Id.* Vivian Berger has argued that the Court should hold that a death-sentenced prisoner who asserts his or her innocence on the basis of newly discovered evidence is constitutionally entitled to file a postconviction motion in state court at any time, notwithstanding any filing deadline governing ordinary post-trial motions. *See Berger, supra* note 59, at 949.

There is, of course, the possibility that defense counsel may have "sandbagged" the state trial court. If the prosecution did not arrange for DNA testing, if there was a chance that the jury would acquit without DNA evidence against the defendant, and if there was a risk that testing would actually produce unfavorable results, defense counsel may have waited to request testing until after a conviction was returned, when the risk of generating damning evidence was mooted. Stories of defense counsel manipulating events for strategic advantage are hard to believe in any context, fanciful in this one. Sensible defense attorneys try their level best to avoid convictions, knowing full well that if their clients are found guilty the chances of changing that result are remote for a host of reasons, known and unforeseeable.

standard to which Chief Justice Rehnquist referred in *Herrera*. There is little to choose between “a truly persuasive demonstration of ‘actual innocence,’”<sup>88</sup> on the one hand, and evidence that establishes a “reasonable probability” of actual innocence, on the other. Congress can hardly be faulted for choosing the latter phraseology and thus capturing the working ideas in both *Brady* and the *Herrera* assumption *arguendo*.<sup>87</sup> Accordingly, section 104 can be defended as a procedural device for enforcing a Fourteenth Amendment right that the Justices have not yet acknowledged, but would recognize in a proper setting.

There is a way, moreover, in which section 104 requires a state to act in far fewer instances than the Court arguably assumed the Constitution demands. Both subsection (a) and subsection (b) are limited to cases in which the prisoner seeking DNA testing is under sentence of death. The petitioner in *Herrera* was also condemned to die. For that reason, the Court focused its attention on demonstrations of innocence offered by prisoners on death row. Nevertheless, the Court recognized that if an extremely strong showing of actual innocence states a Fourteenth Amendment violation in a capital case, it also must do so in a non-capital case.<sup>89</sup> Section 104 would therefore consciously under-enforce the constitutional right that the Court arguably assumed to exist

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88. *Herrera*, 506 U.S. at 417.

89. Nor can Congress be faulted for declining to lift a standard from one of the separate opinions in *Herrera*. Justice White proposed that the Court should borrow the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). According to White, a prisoner in these circumstances should “at the very least be required to show that based on proffered newly discovered evidence and the entire record . . . ‘no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.’” *Herrera*, 506 U.S. at 429 (White, J., concurring in the judgment) (alteration in original) (quoting *Jackson*, 443 U.S. at 324). If a majority of the Justices had thought that *Jackson* was apt, Chief Justice Rehnquist presumably would have employed that familiar standard in his assumption *arguendo*. He did not, and Justice White had to interject *Jackson* for himself. Justice Blackmun, for his part, explicitly disclaimed the *Jackson* standard. *See id.* at 443 (Blackmun, J., dissenting, joined by Stevens & Souter, JJ.). Blackmun proposed, instead, that a prisoner should be required to show that he “probably is innocent.” *Id.* at 442. He explained that a simple “probability” standard would occupy a happy middle ground between *Jackson* and the standard the Court has employed in its decisions on procedural default. According to Blackmun, a prisoner should not be required to prove his innocence beyond a reasonable doubt, but should be required to do more than merely raise doubts about his guilt. A requirement that he or she prove probable innocence fits that bill. *See id.* at 442-43 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986) and *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)). Just as the Chief Justice failed to endorse Justice White’s proposal, he equally failed to embrace Justice Blackmun’s alternative. If, then, Congress were simply to codify Blackmun’s view in *Herrera*, it would risk a conflict with the Justices who did not join his opinion—Justices who, after all, form the majority. By insisting that a prisoner prove a “reasonable probability” of innocence (rather than simply a “probability”), subsection (b) hopes to avoid that eventuality.

90. *See Herrera*, 506 U.S. at 405 (explaining that “[i]t would be a rather strange jurisprudence . . . which held that under our Constitution [a death row convict] could not be executed, but that he could spend the rest of his life in prison”).

for purposes of deciding *Herrera*. This provision would impose obligations on a state only in death penalty cases, when it appears that the Fourteenth Amendment itself may impose those same obligations in capital and non-capital cases alike.

Subsection (b) is not vulnerable to constitutional attack simply because *Herrera* rejected a single prisoner's claim and upheld filing deadlines generally. By contrast, there is a good argument that subsection (b) is peculiarly appropriate as a legislative attempt to grapple with a constitutional problem that current law does not handle well. The *Herrera* opinion described the difficulties that "actual innocence" claims present in federal habeas corpus and relied in some measure on those difficulties for its statement that only a strong demonstration of innocence could be cognizable. Still, the Justices acknowledged that cases raising a sufficiently powerful showing may come along. Having been warned by the Court that "actual innocence" cases will arise and present difficulties if they must be adjudicated in federal habeas corpus, Congress may enact a statute that anticipates those cases and provides for addressing them in state court.<sup>91</sup>

### C. Subsection (c)

Finally, subsection (c) is a straightforward right-of-action provision authorizing prisoners to sue in either state or federal court for declaratory or injunctive relief from a state's failure to comply with subsections (a) and (b).<sup>92</sup> Federal district courts would have jurisdiction to entertain those suits either under 28 U.S.C. § 1343(a)(3) or under the general federal question jurisdiction statute, 28 U.S.C. § 1331. If subsections (a) and (b) would be appropriate remedial measures under Section 5, it must follow that subsection (c) would also be valid. It would authorize the most traditional means by which legal standards may be implemented—private lawsuits seeking orders requiring state officers to conform their behavior to law. Subsection (c) would only

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91. Vivian Berger has developed the case for preferring the state courts for handling cases of this kind. See Berger, *supra* note 59, at 1009-22. Susan Bandes insists that it is not crucial whether a hearing on newly discovered evidence going to innocence is held in federal or state court, so long as it is held "in some court." Bandes, *supra* note 66, at 522. But she admits a preference for the federal forum. See *id.* at 523-25. For illustrations of the difficulties that beset federal court attempts to grapple with DNA cases, see *Cherix v. Braxton*, 131 F. Supp. 2d 756, 770-74 (E.D. Va. 2000) (explaining an injunction requiring state authorities to make physical items available for testing at a private laboratory), *appeal dismissed*, 258 F.3d 250 (4th Cir. 2001); *Payne v. Bell*, 89 F. Supp. 2d 967, 970-71 (W.D. Tenn. 2000) (explaining a decision to grant a prisoner's request for testing pursuant to the discovery rules governing habeas corpus proceedings).

92. See Innocence Protection Act of 2001, S. 486, 107th Cong. § 104(c) (2001).

accomplish in this particular context what § 1983 achieves for Fourteenth Amendment claims generally.<sup>93</sup> Importantly, subsection (c) would not empower a federal court itself to entertain a showing of actual innocence based on DNA testing results. This provision would only authorize a prisoner to file a lawsuit in federal court (or state court), seeking an order enforcing subsections (a) and (b)—that is, the requirements that the state must allow testing and an opportunity to present favorable results to a state court. Subsection (c) would leave it to that state court both to determine the merits of an “actual innocence” claim and to fashion appropriate relief, if warranted.<sup>94</sup>

If section 104 is properly anchored in Section 5, Congress would have power to subject a state itself to suit.<sup>95</sup> Subsection (c) takes the more familiar route of authorizing officer suits against state agents.<sup>96</sup> There is something important in that. The Court’s recent decisions regarding the scope of Section 5 place limits on various kinds of federal legislation. Yet Justice Kennedy, who made the difference in most of those cases, is primarily concerned with statutes that authorize private claims against state treasuries. It is when Congress purports to abrogate state sovereign immunity from private suits for compensatory damages that Justice Kennedy sits up and takes notice.<sup>97</sup> Why this should be so is puzzling, to be sure.<sup>98</sup> For present purposes, it is enough simply to say

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93. Subsection (c) specifies that either an executive or a judicial officer may be named as defendant. That marks a minor difference between the civil actions this subsection would authorize and the suits that § 1983 makes possible. Pursuant to an amendment to § 1983 in 1996, state judicial officers are immune from § 1983 suits for injunctive relief unless they first violate a declaratory judgment or declaratory relief is unavailable. *Cf. Pulliam v. Allen*, 466 U.S. 522, 527 (1984) (superseded in this respect by the 1996 amendment). The immunity granted to state judicial officers in § 1983 actions is entirely a matter of nonconstitutional law and can be abandoned in this context, where it makes sense to authorize prisoners seeking to enforce subsections (a) and (b) to pursue immediate coercive orders addressed to recalcitrant state judges.

94. Subject, of course, to direct review in the United States Supreme Court if a federal issue proves decisive.

95. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

96. See generally *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963 n.9 (2001) (explaining that officer suits can be maintained even when Congress has not successfully abrogated a state’s sovereign immunity); *Ex parte Young*, 209 U.S. 123, 166 (1903) (explaining that private litigants can sue state officers for injunctive orders requiring officers to take action on behalf of the states they serve).

97. See, e.g., *Garrett*, 121 S. Ct. at 969 (Kennedy, J., concurring) (explaining that the Court’s decision invalidating a congressional attempt to abrogate sovereign immunity against private damages actions to enforce the Americans with Disabilities Act (“ADA”) did not affect a state’s threshold obligation to comply with the Act insofar as its substantive standards could be sustained under the Commerce Clause).

98. It passes understanding why anyone would think that the Constitution is perfectly content when private litigants summon judicial power to coerce state officers into compliance with federal statutory standards or when the United States itself makes claims on a state’s treasury, but that

that subsection (c) would not expose state budgets to private lawsuits. This provision would authorize only suits naming state officers as defendants and seeking only forward-looking declaratory or injunctive remedies.<sup>99</sup> By implication, subsection (c) would foreclose suits for backward-looking compensatory relief.

### III. SECTION 104 AS A PROPHYLACTIC MEASURE FOR PREVENTING VIOLATIONS OF FOURTEENTH AMENDMENT RIGHTS

If section 104 does not simply provide a procedural mechanism for implementing judicially articulated Fourteenth Amendment rights, this provision is still valid as a substantive prophylactic measure. A state's denial of DNA testing or an opportunity to present favorable testing results to a state tribunal need not violate the Fourteenth Amendment. Congress can require states to allow both testing and a chance to present the results as a means of forestalling what *would* violate the Fourteenth Amendment—either foreclosing extremely strong demonstrations of innocence on the ground that they are out of time or, certainly, actually executing innocent people. To withstand challenge on this ground, section 104 must be “congruent” and “proportional” within the meaning of the Court's recent decisions.

#### A. *The “Congruence and Proportionality” Test*

The Court has yet to develop a full account of “congruence” and “proportionality.” Robert Post and Reva Siegel take the two

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federalism is fundamentally upset when private parties seek even modest compensation for admitted state violations of federal law. See *Alden v. Maine*, 527 U.S. 706, 757 (1999) (Kennedy, J.) (declaring that a state is constitutionally immune from a private suit for damages but not from a private suit for another form of relief or from a suit by the United States). Yet that is precisely what Justice Kennedy *does* think and, for the moment, he is in a position to make his view the constitutional law of the land. Of course, the concern that legislation enacted by Congress may interfere with state budgetary decisions runs through the Court's federalism decisions from *Edelman v. Jordan*, 415 U.S. 651, 676 (1974), through *National League of Cities v. Usery*, 426 U.S. 833, 846 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *Printz v. United States*, 521 U.S. 898, 935 (1997), to *Alden* and other more recent immunity cases. See *Alden*, 527 U.S. at 713. That thread has drawn its share of academic attention and criticism. It is bad economics at best. There is no serious argument that the forward-looking injunctive relief the Court (routinely) permits interferes with a state's capacity to make budgetary decisions any less than does the backward-looking compensatory relief the Court (sometimes) forbids. For my own part, I see no constitutional warrant for the Court's efforts to spare the states the costs of defying federal law, far less a workable doctrinal basis for protecting state assets in some contexts and not in others.

99. For this same reason, subsection (b) would raise no immunity problem simply because it contemplates a state court duty to entertain a strong showing of actual innocence.

requirements in combination to establish a single “test” for judging the constitutionality of legislation under Section 5.<sup>100</sup> They assimilate that test, in turn, to the Court’s familiar “narrow tailoring” technique for discovering constitutionally impermissible governmental objectives in equal protection cases.<sup>101</sup> Post and Siegel are right that the “congruence and proportionality” test readily maps onto the familiar formulation for “strict scrutiny” review.<sup>102</sup> Certainly, if a statute is “congruent” with a judicially identified violation of the Fourteenth Amendment, it would seem that it serves a “compelling” objective. And if a statute is “proportional” to the rate at which that violation occurs, it would seem that it is “narrowly tailored” to achieving its remedial objective.<sup>103</sup> Moreover, when Congress has identified “a history and pattern of unconstitutional” state activities sufficient to justify prophylactic legislation,<sup>104</sup> it would seem that Congress has made the findings that a

100. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE LJ. 441, 508 (2000).

101. See *id.* at 511. Post and Siegel cite JOHN HART ELY, *DEMOCRACY AND DISTRUST* 145-48 (1980) for this idea. But it is now familiar in the Supreme Court’s decisions. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (explaining that “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool”).

102. See Post & Siegel, *supra* note 100, at 477.

103. I don’t mean to quarrel with the thesis that “congruence and proportionality” state a single doctrinal standard. Nor do I think it really matters. After all, the “compelling interest” and “narrowly tailored means” parts of “upper tier” equal protection doctrine also occupy much the same space. When the Court insists that it takes a “compelling” interest to justify a racially discriminatory rule, it is not saying that the general objective or objectives that a state is pursuing must be especially good. The Court is saying that the state must have an especially good reason for employing a racially discriminatory means. If it appears that there is some alternative, nondiscriminatory means available, the state has no “compelling” explanation for its decision to classify according to race. Then again, the availability of some equally satisfying alternative is also the question to which the “narrowly tailored means” requirement is addressed. Probably the best way to understand all this is to take the “compelling interest” idea not as a test that the Court brings to bear on asserted state objectives, but rather as a label the Court places on an interest that really does explain why only a racially discriminatory rule will suffice. The Court doesn’t (really) begin its analysis asking whether a state interest is “compelling”; it concludes its analysis by applying the “compelling” label to an interest that genuinely explains the troubling means the state has selected.

104. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 964 (2001). The fit between the “congruence and proportionality” test in Section 5 cases and the “compelling interest/narrowly tailored means” test in equal protection cases is far from logically perfect. In *Garrett*, the Court insisted that Congress had failed to marshal sufficient evidence showing that the states were engaged in a pattern of intentional discrimination on the basis of physical disabilities. Accordingly, the Court refused to sustain ADA (which bars state policies that have a disparate impact on the disabled), which had been defended as a Section 5 remedial means of preventing or discouraging unconstitutional state discrimination. See *id.* at 967-68. In *Croson*, the Court declared that the City of Richmond had failed to establish a “strong basis in evidence” approaching a “prima facie case” that the City either had itself practiced unlawful race discrimination or had been a “passive participant” in unlawful race discrimination by private industry. See *Croson*, 488 U.S. at 492.



state must offer to “define both the scope of [an] injury and the extent of [a valid race-conscious] remedy.”<sup>105</sup> Post and Siegel are also right that an especially demanding standard of review seems inappropriate in Section 5 cases. Congress is most unlikely to be concealing an illegitimate objective that “strict scrutiny” is needed to “flush out.”<sup>106</sup>

I am not inclined to charge the Court with routinely subjecting Section 5 legislation to the demanding standard of review that the Court ordinarily reserves for state policies that explicitly discriminate on the basis of race. If the Court meant to do that, it would employ the very terms of art it uses in race cases (i.e., the need for “compelling” ends and “narrowly tailored” means). The choice of different terminology (“congruence and proportionality”) may connote a different and, I should have thought, more generous approach.<sup>107</sup> As the Court has

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499-500. Accordingly, the Court declined to sustain a local race-conscious set-aside program, which had been defended as a “benign” remedial device for vindicating the City’s compelling interest in correcting the lingering effects of past discrimination. *See id.* at 495-96, 511. In point of fact, there is a way to read *Garrett* to demand more of Congress than *Croson* required of Richmond. In *Garrett*, the Court faulted Congress for failing to develop an adequate record *before* enacting ADA. *See Garrett*, 121 S. Ct. at 965. In *Croson*, the Court arguably would have been satisfied if Richmond had developed a sufficient record for purposes of defending its race conscious scheme in litigation. *See* Justice Department Memorandum on Supreme Court’s *Adarand* Decision from Walter Dellinger, Assistant Attorney General, to General Counsels 7 (June 28, 1995) (noting this ambiguity), available at WL 1995 DLR 125 d33. It is possible to read *Garrett* to mean that while it is extremely hard for a city or state to discriminate for the benefit of the members of a racial group that suffered mistreatment in the past (and thus necessarily to discriminate to the detriment of the members of other racial groups), it is still easier for a city or state to do that than it is for Congress to bar state activities not themselves unconstitutional in order to forestall Fourteenth Amendment violations (even though Congress does not employ race discrimination to do so). I suppose there is a world view that would accommodate that result, but I doubt that five Justices think that way. The similarity between the Court’s doctrinal formulations in *Garrett* and *Croson* seems to me more beguiling than real. We are witnessing the development of Section 5 analysis on a case-by-case basis, and we do not yet know for sure where that analysis is going. Nor, I dare say, do the Justices themselves. So it would be a mistake to assume that the Court means either to borrow wholesale from its “strict scrutiny” equal protection cases or, certainly, to assume that the Justices will ultimately hold Congress to an even higher standard and thus frustrate preventive legislation in effect, if not in form. In time, Justice Breyer’s dissent in *Garrett* may capture the single vote needed to slow this train down or even to turn it around. *See Garrett*, 121 S. Ct. at 975 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.); cf. J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CAL. L. REV. 523, 533 (2001) (describing the Court’s recent sovereign immunity cases as “more the opening salvos of a battle than the concluding exercises of a war”).

105. *Croson*, 488 U.S. at 510.

106. *See* Post & Siegel, *supra* note 100, at 511.

107. So far as I have been able to discover, the Court did not borrow the “congruence” and “proportionality” nomenclature from any party, *amici*, or other source, but coined those terms of art itself. Then again, the terms themselves are fairly commonplace. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (using the term “congruence” to explain that the same standard of review governs affirmative action schemes established either by the individual states or by the Federal Government); cf. CONSTITUTIONAL LAW 638 (G. Gunther & K. Sullivan

applied the “congruence and proportionality” analysis, moreover, it has insisted that its work comports with an important premise in *Katzenbach v. Morgan*: “It is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.”<sup>103</sup> That articulated predisposition to accept congressional judgment defies any suggestion that the Court considers all Section 5 legislation to be presumptively invalid—which, of course, is the Court’s wont with respect to racially discriminatory laws.<sup>109</sup> It may be that the Rehnquist Court is harder to please than was the Court in *Morgan*.<sup>110</sup> But it is too early to conclude that the Court has taken the extreme position that Post and Siegel identify. Certainly, it is too early to conclude that the Court means to be so grudging with respect to a federal statute like section 104, which entails no significant risk to the constitutional values that lie behind the “congruence and proportionality” formulation.

The “congruence and proportionality” test performs three functions. First, it maintains the separation of powers.<sup>111</sup> Any attempt by Congress to arrive at its own interpretations of the Fourteenth Amendment is a threat to the Court’s dominant role in announcing constitutional

eds., 1997) (using “congruence” in a discussion of overinclusive and underinclusive classifications for equal protection purposes).

108. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (alteration in original) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

109. According to the standard account, most statutes are presumptively constitutional. See, e.g., *Crosan*, 488 U.S. at 500. That is, most statutes are presumed to serve a legitimate purpose, and the Court must be persuaded otherwise. Some statutes, by contrast, are presumptively unconstitutional. They appear to have an impermissible purpose, and the Court must be persuaded that they actually further legitimate ends. The Court’s technique in the latter cases is to demand that presumptively invalid statutes be “narrowly tailored” to achieving a “compelling” (and facially legitimate) objective. When that test is met, the Court is satisfied that the statute is not, after all, explained by some illicit purpose and, accordingly, that it can be sustained. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

110. Justice Brennan’s opinion for the Court in *Morgan* relied on the expansive account of congressional power associated with John Marshall’s opinion in *McCulloch v. Maryland*. See *Morgan*, 384 U.S. at 650-51 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Professor Cox observed that “qualifying phrases like ‘reasonable relation’ and ‘rational’ [were] notably absent,” replaced by the declaration that the Court would sustain Section 5 legislation if it could “perceive a basis” on which Congress might “predicate its judgment” that a statute would secure Fourteenth Amendment rights. Cox, *supra* note 21, at 104 (insisting that Justice Brennan’s “choice of words cannot have been casual”). Justice Kennedy’s opinion for the Court in *City of Boerne*, 521 U.S. at 511, was conservative by comparison, the majority opinions in *Morrison*, *Kimel*, *Florida Prepaid*, and *Garrett* even more so. That and the result in *Garrett* led Justice Breyer to lament that the Court “sounds the word of promise to the ear but breaks it to the hope.” *Garrett*, 121 S. Ct. at 975 (Breyer, J., dissenting).

111. See Post & Siegel, *supra* note 100, at 513 (distilling these rationales from the Court’s opinions).

meaning. Second, it preserves federalism. A federal statute that bars state policies or activities that do not themselves violate the Fourteenth Amendment substitutes national political judgment for that of the states. Third, the “congruence and proportionality” test protects individual constitutional rights. A federal statute that departs from the Court’s account of Fourteenth Amendment rights may deny those rights the full measure of constitutional protection to which they are entitled and thus jeopardize the very freedoms that Congress is authorized to enforce.

According to the Court, the notion that Congress may come to its own conclusions regarding Fourteenth Amendment rights is nothing less than a challenge to *Marbury v. Madison*.<sup>112</sup> This is insufficient for familiar reasons that Post and Siegel elaborate.<sup>113</sup> Yet the Court’s

112. 5 U.S. (1 Cranch) 137 (1803). Quoting John Marshall directly, the Court has declared that if Congress had the power to reach its own interpretations of the Fourteenth Amendment, the Constitution would no longer be the “superior paramount law,” but would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” *City of Boerne*, 521 U.S. at 529 (alteration in original) (quoting *Marbury*, 5 U.S. at 177). In this, of course, the Rehnquist Court adopts the very circular reasoning that embarrassed Marshall’s analysis in *Marbury*. The Court proceeds from the premise that its understanding of the Constitution is correct and then turns to the effect of a conflicting legislative pronouncement. The Court goes so far in this direction in *City of Boerne* as to protest that if Congress were allowed more flexibility under Section 5, then “[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.” *City of Boerne*, 521 U.S. at 529; see also *City of Rome v. United States*, 446 U.S. 156, 210 (1980) (Rehnquist, J., dissenting) (complaining that congressional power to give Fourteenth Amendment rights a more expansive interpretation would allow Congress to enact a statute that would “effectively amend the Constitution”).

113. See Post & Siegel, *supra* note 100, at 525. When the Court itself determines whether a state policy or activity violates the Fourteenth Amendment, the Court does not pretend that it genuinely seeks (far less locates) the very best result, pristine in content and form, unaffected by the institutional arrangements that produced it. By contrast, the Court readily defers to state officials, who are not only politically accountable but also may be aware of relevant facts and circumstances that the Justices cannot glean from an appellate record. The Court’s self-restraint typically produces a holding that the state has not committed a constitutional violation, unless the Justices are convinced that a violation is clear and, accordingly, that the risk of reaching an erroneous judgment is minimal. Congress does not labor under the same institutional constraints. Its members are elected, and its committees can gather the evidence needed for more precise constitutional calculations. That being so, it would make sense to permit Congress to give Fourteenth Amendment rights a more expansive scope than would the Court. Certainly, it would be perfectly consistent with the Court’s umpire role to recognize that, in some instances at least, Congress may have a better angle on the play. When that is true, the Court can sustain the call that Congress makes, so long as that call does not compromise the right in question or others that may be implicated. In so doing, the Court can fulfill its own function to give the Constitution authoritative meaning. See also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 155-56 (1997) (offering similar views). Larry Sager pioneered the argument that institutional considerations cause the Court to give constitutional rights a comparatively narrow scope. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214-15 (1978). Sager has not abandoned that position and argues

vigorous defense of its own turf is neither novel nor limited to Section 5 cases. The Rehnquist Court is notorious for insisting that it, and it alone, is entitled to exercise independent judgment on the meaning of the Constitution.<sup>114</sup> I have to think that the Court was moved to declare that Section 5 statutes must be “congruent” with judicially identified constitutional principles when the Court faced an unvarnished challenge to its authority in the first of the recent cases, *City of Boerne*. It was perfectly clear that Congress had enacted the Religious Freedom Restoration Act (“RFRA”) in an attempt simply to overrule a constitutional precedent.<sup>115</sup> With the benefit of hindsight, it now seems small wonder that the Court reacted as it did. When Congress respects the Court’s previous articulations of constitutional meaning, the Justices may be more receptive.

### B. *The “Congruence and Proportionality” of Section 104*

In the case of section 104, Congress can hardly be charged with an attempt to overturn Supreme Court precedents. The *Brady* doctrine may not firmly establish that a death row prisoner is entitled to test biological materials for DNA evidence. But no case holds that a state may blithely deny such a request. Nor does *Herrera* flatly hold that a demonstration of actual innocence falls outside the Fourteenth Amendment’s purview. Congress can sensibly probe the various opinions filed in *Herrera* to extract the best available indication of what the Justices will ultimately interpret the Fourteenth Amendment to mean. At this juncture, it is crucial to recall that most of the Justices expressed a position on the first proposition that I identified earlier. Five Justices squarely stated that, in their view, it would be unconstitutional for a state to execute an innocent person. Whatever doubts there may be with respect to the second and third propositions, this much, at least, is clear. A demonstration of actual

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that it may justify judicial deference to Congress in some Section 5 cases. See Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 94-95. Nevertheless, he largely endorses the Court’s analysis and result in *City of Boerne*. See *id.* at 95, 98.

114. Recall in this vein the Court’s refusal to permit other courts to decide when one of the Court’s constitutional precedents has been eroded and should no longer be followed. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 436, 443-44 (1998) (criticizing *Rodriguez de Quijas*).

115. The precedent was *Employment Division v. Smith*, 494 U.S. 872 (1990). See Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 153 (1995) (acknowledging that the point of the Religious Freedom Restoration Act (“RFRA”) was to get right what *Smith* had contrived to get “wrong”).

innocence thus implicates some judicially identified Fourteenth Amendment violation in the offing—a potential violation that can warrant at least some form of preventive legislation.

The formal findings listed in section 101 of IPA explicitly treat the opinions in *Herrera* as the best evidence of the Court's views.<sup>116</sup> Those findings reflect a genuine attempt by Congress to follow (rather than lead) the Court regarding the meaning of the Fourteenth Amendment.<sup>117</sup> Congress appreciates that the square holding in *Herrera* was that an "actual innocence" claim usually does not state a Fourteenth Amendment violation and that ordinary time limits for new-trial motions generally are valid. By enacting section 104, Congress would make no effort to supplant an authoritative judicial judgment. Instead, Congress would act on what most of the Justices themselves recognized in *Herrera*—namely, that the Fourteenth Amendment does prohibit the execution of an innocent person.

Subsection (a) would prevent a state from executing an innocent death row inmate by ensuring that he or she has the data needed to prove actual innocence. Subsection (b) would add to that measure of enforcement only the additional requirement that a prisoner be given a chance to present his proof to a state court. To be sure, subsection (b) introduces ideas associated with the second and third propositions I identified in *Herrera*—propositions that were not plainly endorsed by a majority of the Justices in that case. Yet, in the context of prophylactic legislation, it is not essential either that a demonstration of innocence after conviction must state a constitutional violation or that a state has a constitutional obligation to open its courts to such a showing. Even if the

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116. (a) Findings.—Congress makes the following findings:

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(13) In *Herrera v. Collins* . . . a majority of the members of the Court suggested that a persuasive showing of innocence made after trial would render the execution of an inmate unconstitutional.

(14) It shocks the conscience and offends social standards of fairness and decency to execute innocent persons or to deny inmates the opportunity to present persuasive evidence of their innocence.

117. (a) Findings.—Congress makes the following findings:

....

(15) If biological material is not subjected to DNA testing in appropriate cases, there is a significant risk that persuasive evidence of innocence will not be detected and, accordingly, that innocent persons will be unconstitutionally executed.

(16) Given the irremediable constitutional harm that would result from the execution of an innocent person and the failure of many States to ensure that innocent persons are not sentenced to death, a Federal statute assuring the availability of DNA testing and a chance to present the results of testing in court is a congruent and proportional prophylactic measure to prevent constitutional injuries from occurring.

Court has left those questions open, Congress can nonetheless enact a statute that requires a state to make its courts available to powerful post-trial evidence as a means of ensuring that innocent people are not put to death by mistake.<sup>118</sup>

The concern that prophylactic measures may endanger federalism is real enough. It would not do to permit Congress to enact grossly overinclusive statutes condemning policies that states are constitutionally entitled to adopt or activities in which the states are constitutionally entitled to engage. At some point, Congress would simply be substituting its own judgment for that of the states with respect to whole fields of governmental operations. This is not simply to repeat the thread bare argument that congressional power of that scope and magnitude would constitute the very police power that Congress does not enjoy. Even those of us who generally think that federal legislative power is a good thing can appreciate the problems with inviting Congress to preempt state labor and environmental legislation in the name of forestalling violations of economic due process or the “incorporated” Takings Clause.<sup>119</sup>

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118. I should add this reservation: Section 104 should be read to require states to preserve biological materials long enough to permit DNA testing. It would make little sense to demand that the states allow testing if they are free to avoid that obligation simply by destroying any material on hand. The Supreme Court held in *Arizona v. Youngblood*, 488 U.S. 51 (1988), that the Fourteenth Amendment itself imposes no blanket requirement that evidence be preserved. Prisoners ordinarily can establish a constitutional violation in an evidence-preservation case only by showing that state officers acted in “bad faith.” *Id.* at 58. If section 104 is read to bar the disposal of materials in “good faith,” it still is a valid preventive measure in light of other Section 5 precedents. When the Constitution itself is violated only by behavior accompanied by a particular mental state, Congress can prevent constitutional violations by enacting statutes that condemn the behavior *without* proof of the mental state. In *City of Rome*, for example, the Court acknowledged that voting regulations would be unconstitutional only if state officers acted with a “purpose” to frustrate minority voters. See *City of Rome v. United States*, 446 U.S. 156, 172 (1980). The Court also recognized that the Voting Rights Act authorized the Attorney General to disapprove voting rules on the basis of “discriminatory effect” alone. It is difficult to demonstrate a purposeful mental state. Accordingly, the Court held that Congress could authorize disapproval of rules with a disproportionate *effect* as a means of preventing the adoption and enforcement of rules with an invalid *purpose*. True, the Court disapproved RFRA in *City of Boerne* in part on the ground that Congress had barred state policies having only the effect, but not the purpose, of punishing religious groups. See *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997). But, again, in that case Congress had plainly attempted to make burdensome effects the test of a state statute’s constitutionality in the first instance. The argument that RFRA merely established a federal statutory right did not succeed. Cf. David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 41 (arguing that it should have). If Congress concedes that only intentional state conduct violates the Fourteenth Amendment and reaches a larger body of state activity as an authentic prophylactic, there is every reason to think that the Court will find *City of Rome* to be the more persuasive precedent.

119. See Eisgruber & Sager, *supra* note 113, at 89-90 (suggesting a “liberty of contract” hypothetical); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MICH. L.

The “congruence and proportionality” requirement supplies a limiting principle for keeping Congress within bounds. The best precedent under this heading may be *Kimel v. Florida Board of Regents*,<sup>120</sup> in which the Court held that the Age Discrimination in Employment Act (“ADEA”) cannot be justified on the basis of Section 5. The Court’s decisions establish that age is not an especially suspicious basis of classification and that the states can use age as a proxy for “other qualities.”<sup>121</sup> ADEA, on the other hand, bars age discrimination in most employment situations. It thus outlaws state policies and activities that are not unconstitutional in themselves to an extent that is out of proportion to the form of state-sponsored age discrimination that *would* violate the Fourteenth Amendment.

By contrast to ADEA, section 104 would confine itself to the judicially articulated constitutional evil that Congress seeks to prevent. Subsection (a) would reach only state refusals to allow DNA testing and, at that, only refusals to permit testing in circumstances that promise valuable results. That would cut close to the constitutional bone, restricting state prerogatives only when a refusal to permit testing would genuinely threaten the execution of an innocent person. Subsection (b) similarly would affect only time limits or procedural rules that might frustrate “actual innocence” showings. Moreover, both subsections (a) and (b) are also limited to prisoners who are already in custody on the basis of a state court judgment. Section 104 is not addressed to current and future prosecutions. This provision in IPA implicitly assumes that the states are now familiar with DNA evidence, that they have their own reasons for testing, and that they will not arbitrarily refuse to conduct tests before trial in pending cases. Section 104 recognizes, however, that many prisoners were convicted and sentenced before DNA testing became available and routine. The idea, then, is only to ensure that prisoners are not foreclosed on the basis of filing deadlines and other procedural rules enacted at a time when no one anticipated that this kind of probative scientific evidence might become accessible well after

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REV. 311, 343-44 (1987) (suggesting a federal statute protecting equal protection rights in an economic setting). Congress has considered bills purporting to define what constitutes a “taking” for constitutional purposes and the compensation that counts as “just.” See, e.g., Omnibus Property Rights Act of 1995, S. 605, 104th Cong. § 204(a) (1995) (purporting to specify that government owes an individual “just compensation” whenever its actions diminish the “fair market value” of property by thirty-three percent); see also Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 17-18 (1999) (recalling S. 605 and similar bills).

120. 528 U.S. 62 (2000).

121. See *id.* at 84.

conviction. Recall, too, that both subsections (a) and (b) restrict their reach to cases involving applicants under sentence of death.

In both *City of Boerne* and *Kimel*, the Court faulted Congress for rushing to bar state policies and activities before ascertaining that an overinclusive prophylactic statute was needed to prevent unconstitutional state behavior. There was no evidence in *City of Boerne* that states often adopt policies that deliberately target religious practices for penalties. Accordingly, there was no basis for concluding that Congress needed to ban neutral policies that have the effect of burdening religious activities as a blunt means of reaching policies that intentionally discourage religious customs. Nor was there evidence in *Kimel* that states often adopt policies that discriminate on the basis of age in a way that violates the Equal Protection Clause. Accordingly, there was no basis for concluding that Congress needed to ban age discrimination across the board as a means of reaching policies that arbitrarily penalize people on the basis of age.<sup>122</sup> In the case of section 104, however, the record is quite different.

More findings listed in section 101 of IPA explain the factual premises for section 104:<sup>123</sup> DNA testing was unavailable when many

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122. There was a better argument in *Garrett* that states had discriminated on the basis of disabilities and thus a better case for administering strong medicine in the form of ADA. Yet the Court emphasized in that case that most of the evidence in the record showed only that states had failed to take affirmative steps to accommodate disabled people—a failure that, while lamentable, was not unconstitutional. *See* Bd. of Trs. of the Univ. of Ala. v. *Garrett*, 121 S. Ct. 955, 966 (2001). Justice Breyer thought the Court was too picky. *See id.* at 973 (Breyer, J., dissenting). Many of us would agree. But since the Court in *Garrett* proceeded from the premise that ADA would have been justified under Section 5 if more evidence of intentional discrimination had been developed, the holding in that case did not alter the doctrine the Court has developed for Section 5 cases generally.

123. (a) Findings.—Congress makes the following findings:

(1) Over the past decade, deoxyribonucleic acid testing (referred to in this section as “DNA testing”) has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene.

(2) Because of its scientific precision, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant. In other cases, DNA testing may not conclusively establish guilt or innocence, but may have significant probative value to a finder of fact.

(3) While DNA testing is increasingly commonplace in pretrial investigations today, it was not widely available in cases tried prior to 1994. Moreover, new forensic DNA testing procedures have made it possible to get results from minute samples that could not previously be tested, and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce. Consequently, in some cases convicted inmates have been exonerated by new DNA tests after earlier tests had [sic] failed to produce definitive results.

(4) Since DNA testing is often feasible on relevant biological material that is decades old, it can, in some circumstances, prove that a conviction that predated the development of DNA testing was based upon incorrect factual findings. Uniquely, DNA



prisoners now on death row were convicted and sentenced. A few states have enacted statutes making testing available for older cases. But most states refuse to allow testing in closed cases on the ground that the time for filing post-trial motions has expired. Time limits may make some (arguable) sense when applied to newly discovered evidence that has deteriorated with age. They make no sense at all when applied to DNA evidence, which remains intact and testable for decades. In this instance, Congress has done its homework, identified the real likelihood that states are punishing innocent people, and offered a remedy aimed only at state behavior that presents potential constitutional difficulty.<sup>124</sup>

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evidence showing innocence, produced decades after a conviction, provides a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing, therefore, can and has resulted [sic] in the post-conviction exoneration of innocent men and women.

(5) In more than 80 cases in the United States, DNA evidence has led to the exoneration of innocent men and women who were wrongfully convicted. This number includes at least 10 individuals sentenced to death, some of whom came within days of being executed.

(6) In more than a dozen cases, post-conviction DNA testing that has exonerated an innocent person has also enhanced public safety by providing evidence that led to the identification of the actual perpetrator.

....

(8) Under current Federal and State law, it is difficult to obtain post-conviction DNA testing because of time limits on introducing newly discovered evidence . . . In most States, those motions must be made not later than 2 years after conviction, and sometimes much sooner. The result is that laws intended to prevent the use of evidence that has become less reliable over time have been used to preclude the use of DNA evidence that remains highly reliable even decades after trial.

....

(10) [O]nly a few States have adopted post-conviction DNA testing procedures, and some of these procedures are unduly restrictive. Moreover, only a handful of States have [sic] passed legislation requiring that biological evidence be adequately preserved . . . Innocence Protection Act of 2001, S. 486, 107th Cong. §101(a) (2001).

124. There is no serious argument that relaxing time limits would invite a prisoner to sandbag state trial courts, foregoing a pre-trial request for DNA testing on the chance that he may be acquitted and "saving" a DNA testing strategy until after conviction when it is worth the risk that the results will actually confirm his guilt. Even the short time limits established by most states permit a motion after a conviction has been obtained. In any case, the cases to which section 104 is addressed typically were tried before DNA testing was perfected. A prisoner who did not foresee a rapid technological development of this kind can hardly be charged with manipulation. *See State v. Thomas*, 586 A.2d 250, 253 (N.J. Super. Ct. App. Div. 1991) (declining to hold a prisoner responsible for failing to "anticipate a scientific/judicial revolution" with respect to DNA testing). The National Institute of Justice treats *Thomas* and *Dabbs v. Vergari*, 570 N.Y.S.2d 765 (Sup. Ct. 1990), as (refreshing) evidence that at least some state courts have acknowledged the genuine need for conducting DNA tests after conviction and, when necessary, relaxing procedural rules to permit the results to be examined in court. Unfortunately, too few state courts have followed their lead. *See TRAVIS & ASPLEN, supra* note 1, at 15-17.

The concern that Congress may enfeeble Fourteenth Amendment rights in the guise of enforcement is also real, though not especially serious in the run of cases. Federal statutes that throw a broad net over state policies and activities that are not themselves unconstitutional may place Congress in conflict with the Court and may deprive the states of authority to adopt programs they think proper. Those consequences of Section 5 legislation drive the Court's concerns about the separation of powers and federalism, and, by extension, local self-government. But Section 5 statutes that condemn state behavior that the Court would sustain do not ordinarily jeopardize any individual's Fourteenth Amendment rights. When, for example, ADEA bars age discrimination that would be valid if examined under the Fourteenth Amendment itself, no one proposes that anyone's constitutional rights are somehow compromised. Nobody has a Fourteenth Amendment right to discriminate on the basis of age in the public employment context.

Still, there are cases in which adjustments in the content of Fourteenth Amendment rights can raise additional Fourteenth Amendment problems. Two kinds of cases come to mind. First, Congress might be more miserly than the Court in its account of constitutional rights. Take, for example, the so-called Human Life Bill that was debated in Congress twenty years ago.<sup>125</sup> That bill hoped to override the Court's holding in *Roe v. Wade*<sup>126</sup> that a woman has a Fourteenth Amendment right to terminate a pregnancy prior to viability.<sup>127</sup> The Court anticipated initiatives like the Human Life Bill in

125. See S. 158, 97th Cong. §§ 1-3 (1981).

126. 410 U.S. 113 (1973).

127. See generally SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., THE HUMAN LIFE BILL S. 158: REPORT TOGETHER WITH ADDITIONAL AND MINORITY VIEWS TO THE COMMITTEE ON THE JUDICIARY 6-7 (Comm. Print 1981). There are other illustrations. Consider, for example, 18 U.S.C. § 3501, struck down in *Dickerson v. United States*, 530 U.S. 428 (2000). By all accounts, that statute had been enacted for the purpose of supplanting *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Dickerson*, 530 U.S. at 432. It purported to discard the *Miranda* warnings as a necessary prerequisite for admitting confessions in federal criminal trials and to revive the pre-*Miranda* rule that voluntary confessions could be introduced. Inasmuch as § 3501 addressed only federal criminal trials, it did not rest formally on Section 5 power, but rather on congressional authority under Article III to create rules of procedure for proceedings in federal court. See *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959) (explaining that Congress can displace nonconstitutional rules established by the Court in the exercise of its supervisory power). Nevertheless, the attempt to dispatch *Miranda* at all raised the fundamental question whether Congress could make its own determination of the meaning of the Constitution and insist that that determination should prevail. One can easily imagine a Section 5 version of § 3501 that would purport to supplant *Miranda* in cases tried in state court. See William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292-99 (1996) (suggesting a similar Fourth Amendment hypothetical). The legislative history indicates that the proponents of § 3501 meant to capitalize on

*Katzenbach v. Morgan*.<sup>128</sup> Dissenting in that case, Justice Harlan argued that if Congress had substantive power to depart from the Court's interpretations of the Fourteenth Amendment, it must follow that Congress was free to make adjustments in either direction.<sup>129</sup> The Court responded in a famous footnote: Section 5 may empower Congress to expand the Fourteenth Amendment rights recognized in the Court's decisions, but does not authorize Congress to "dilute" those rights.<sup>130</sup>

The "ratchet theory"<sup>131</sup> in *Morgan* is problematic. On the one hand, it seems sensible to say that congressional power to "enforce" Fourteenth Amendment rights does not equally constitute a power to weaken them—as judged against standards established by the Court. Moreover, a power to "enforce" rights does not translate easily into a power to authorize policies and activities that states may wish to pursue. On the other hand, there is a certain logic in Harlan's position. The very idea that Congress can validly disagree with the Court undermines the notion that the Court's interpretations are formally infallible and thus establish standards against which congressional judgments must be measured. If the Court's decisions about the meaning of the Fourteenth Amendment are no longer sacrosanct, it is hard to say that an independent judgment by Congress necessarily compromises a right simply by giving it a more limited scope.

The Court's recent Section 5 cases defuse the controversy over *Morgan's* "ratchet" by declaring that Congress cannot depart from the Court's account of the Fourteenth Amendment at all. This does not mean, however, that Congress cannot enact statutes that prevent constitutional violations. It means that the constitutional violations that Congress seeks to prevent are violations that the Court would acknowledge. For present purposes, it is only important to say that section 104 would pose no risk of diluting anyone's constitutional rights. Prisoners who would be entitled to DNA testing and an opportunity to present the results to a state court would enjoy precious little more

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the congressional authority recognized in *Katzenbach v. Morgan* to arrive at an independent judgment regarding the constitutional requirements that station house confessions must meet. See Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 123-26. When, in *Dickerson*, the Court held that *Miranda* announced an interpretation of the Fifth Amendment and that Congress could not supersede that interpretation, the Court cited *City of Boerne*. See *Dickerson*, 530 U.S. at 437.

128. 384 U.S. 641 (1966).

129. See *id.* at 668 (Harlan, J., dissenting).

130. See *id.* at 646 n.5.

131. Professor Cohen coined this useful metaphor for capturing the idea that Congress can only enhance, and cannot dilute, Fourteenth Amendment rights. See William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

protection from erroneous execution, but scarcely any less, than the Justices would recognize as a constitutional mandate.

In a second class of cases, Congress might enact legislation that enhances one constitutional right, but imperils another. The best illustration in the books is RFRA, the statute the Court struck down in *City of Boerne*.<sup>132</sup> Congress evidently meant to give individual rights under the Free Exercise Clause a more expansive interpretation than the Court had previously allowed. Yet as Christopher Eisgruber and Larry Sager have explained, RFRA also pressed states to make special provision for religious groups, which implicated Establishment Clause concerns.<sup>133</sup> Of course, a federal statute that actually conflicts with the Fourteenth Amendment (or any other provision of the Constitution) is scarcely insulated from attack merely because it purports to rest on Section 5. If RFRA had violated the Establishment Clause on the facts in *City of Boerne*, the Court would presumably have struck it down on that basis.<sup>134</sup> Still, constitutional rights need breathing space. The Court should not have to address and decide a close Establishment Clause question in order to fault a statute that raises serious Establishment Clause concerns as the by-product of an overzealous attempt to prevent violations of the Free Exercise Clause.

There is no possibility that by preventing violations of some prisoners' rights, section 104 might compromise the rights of others. There are no other individual constitutional rights in the mix. The only countervailing value is the desirability of respecting a state's prerogative to chart a different course, provided that course is not foreclosed constitutionally. That value, in turn, sounds in concerns about federalism, not in concerns about the dilution of Fourteenth Amendment rights *against* state authority.

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132. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

133. See Eisgruber & Sager, *supra* note 113, at 98. There are other possible illustrations. It has been suggested, for example, that a federal statute purporting to change the standard of review for "benign" race classification cases might affect the equal protection rights of individuals who are denied the benefits of a race-conscious scheme. See PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 498-99 (Paul Brest et al. eds., 4th ed. 2000). Consider as well that a federal statute purporting to ensure criminal defendants a fair trial by an unbiased jury might restrict press accounts of the proceedings in violation of the First Amendment. See Cohen, *supra* note 131, at 607.

134. Justice Stevens *did* say that RFRA violated the Establishment Clause. See *City of Boerne*, 521 U.S. at 536 (Stevens, J., concurring). No one else took that position squarely. Then again, no one else may have thought it was necessary to reach the question. See Eisgruber & Sager, *supra* note 113, at 98.

#### IV. CONCLUSION

Congress can enact section 104 of the Innocence Protection Act. The Supreme Court has been surprisingly strict with Section 5 power of late. Yet the Court's announced doctrinal guidelines for Section 5 legislation, demanding as they are, plainly accommodate a statute of this kind, enacted to prevent Fourteenth Amendment violations that most of the Justices have acknowledged.