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THE "New Federalism's" most devastating effect is sure to be felt in the area of civil rights. This new jurisprudence has already struck down provisions of the Violence Against Women Act (VAWA),[1] the American with Disabilities Act (ADA)[2] and the lower courts have decided cases dealing with the Voting Rights Act (VRA).[3] In other decisions, the Court has struck down the provisions authorizing suits against states under the Age Discrimination in Employment Act (ADEA),[4] and lower courts have struck similar provisions in the Family and Medical Leave Act (FMLA).[5] Al-

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1. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1953 (1994). In *United States v. Morrison*, the Supreme Court held certain provisions of the VAWA, which allowed female victims of violent crimes to sue their attackers for damages in federal court, was not a valid exercise of authority under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment. *See* 529 U.S. 598, 627 (2000); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 903, 939-49 (2001) (discussing Supreme Court's ruling in *Morrison*).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). In *Garrett v. Board of Trustees of the University of Alabama*, the Court of Appeals addressed the issue of whether a state is immune from suits by state employees asserting rights under the ADA. 193 F.3d 1214, 1216 (11th Cir. 1999), *rev'd*, 121 S. Ct. 955 (2001). The Supreme Court reversed the Eleventh Circuit, holding that Congress did not validly abrogate the states' immunity. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955, 968 (2001); *see also* Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1093-1102 (2001) (addressing cases involving ADA claims against states).

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 439 (1965); *see* Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001) (discussing cases dealing with VRA violations).

4. Age Discrimination in Employment Act, Pub. L. No. 90-202, § 7, 81 Stat. 602 (1967). In *Kimel v. Florida Board of Regents*, the Supreme Court found that Congress overstepped its bounds when, with respect to the Eleventh Amendment and state sovereign immunity, it enacted the ADEA as it applies to state employers. 528 U.S. 62, 91 (2000). The Court found that because age is not a constitutionally protected class, it could not be given a stricter standard of review than race or sex. *See id.*

5. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993). In *Hale v. Mann*, the plaintiff alleged that the defendants violated his rights under the FMLA. 219 F.3d 61, 63 (2d Cir. 2000). The United States Court

though the New Federalism leaves the federal government able to regulate the states and thus able to sue the states,[6] and claims against private employers remain, the four-and-one-half million employees of state and local governments consistently have lost rights.[7]

As one statute after another falls, the civil rights community has taken some comfort in the thought that the "centerpiece of federal employment discrimination law,"[8] Title VII, is safe. Title VII is thought to be safe because, in prohibiting discrimination on the basis of race, color, sex, national origin and religion in employment, it closely mirrors the original purposes of the Fourteenth Amendment.[9] However, disparate impact claims under Title VII are in grave danger due to the interaction of the

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of Appeals for the Second Circuit held that Congress "did not have the authority to abrogate the sovereign immunity of the states on claims arising under the provisions [of the FMLA] at issue here." *Id.* at 69. Therefore, because the defendants were agencies of the State of New York, the court found that they had Eleventh Amendment sovereign immunity from suit under the FMLA. *See id.*

6. Under the Commerce Clause, the federal government is able to regulate the states and the Eleventh Amendment does not bar suits brought by the federal government against states. See *infra* notes 59-85 and accompanying text. The federal government, however, does not have the resources to litigate on behalf of every state employee. *See* Joanne Brant, Seminole Tribe, Flores *and State Employees: Reflections on a New Relationship*, 2 EMPL. RTS. & EMPLOY. POL'Y J. 175, 179 (1998) ("There is strong evidence that the systematic enforcement of [federal anti-discrimination laws] will be undermined by the loss of private claims against state actors."); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 708 n.42 (1979) (noting that Department of Health, Education, and Welfare (HEW) admits not having necessary resources to enforce Title IX in substantial number of circumstances). The *Cannon* Court stated that,

> "[a]s a practical matter, HEW cannot hope to police all federally funded education programs, and even if administrative enforcement were always feasible, it often might not redress individual injuries. An implied private right of action is necessary to ensure that the fundamental purpose of Title IX . . . is achieved."

Id. (quoting Reply Brief for Federal Respondents at 6, Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (No. 77-926)).

7. *See Hale*, 219 F.3d at 69 ("By making a 'substantive change' in state employees' rights, Congress has exceeded its power to 'remedy or prevent unconstitutional actions.'"); *see* Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955, 965 (2001) (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 338 (119th ed. 1999) (Table 534)).

8. *See* Brant, *supra* note 6, at 175 (providing history of act and effects of 1972 amendments).

9. *See* Edelmiro A. Salas Gonzalez, Comment, Alden v. Maine*: Expanding and Buttressing Eleventh Amendment Immunity*, 23 AM. J. TRIAL ADVOC. 681, 703 (2000) ("A disparate impact or disparate treatment claim under Title VII is 'safe' from an Eleventh Immunity defense of a state employer because of the strong correspondence between Title VII's substantive rights and those guaranteed by the Fourteenth Amendment."); Sarah E. Sutor & Susan Elizabeth Grant Hamilton, *The Constitutional Status of the ADA: An Examination of* Alsbrook v. City of Maumelle *in Light of Recent Supreme Court Decisions Concerning the 11th Amendment*, 19 REV. LITIG. 485, 489-503 (2000) (arguing that ADA is more vulnerable to attack than Title VII because Title VII's provisions are "closely aligned" to constitutional equal protection analysis).

"New Federalism" with *Washington v. Davis*[10] and its progeny that require proof of discriminatory intent.[11] The disparate impact claim is an important weapon in the fight against discrimination because it makes those practices that have a disproportionate impact on a protected class unlawful without regard to proof of discriminatory intent.[12] In the arena of employment discrimination, disparate impact litigation has successfully challenged non-job related practices that tended to screen people of color and white women, such as when an employer requires an employee to take a high school equivalency test, to pass generalized standardized tests, to undergo subjective interviews for promotions, or to complete employer-created written tests.[13] Building on the recognition of disparate impact claims under Title VII, other civil rights statutes either explicitly provide for disparate impact claims or courts have interpreted them to so provide.[14]

The danger to disparate impact claims comes from the interaction of three lines of cases.[15] The Court has restricted Congress' ability to abrogate states' sovereign immunity to congressional exercises of section 5 enforcement powers pursuant to the Fourteenth Amendment.[16] In a separate line of cases, the Court has limited Congress' section 5 powers to

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10. 426 U.S. 229 (1976).

11. For an excellent in-depth analysis of the effect of *Seminole Tribe of Florida v. Florida* and *City of Boerne v. Flores* on disparate impact claims against states, see generally Brant, *supra* note 6.

12. *See* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1840-41 (2000) ("Institutional racism necessitates disparate impact approaches; antidiscrimination laws or racial remediation strategies founded on models of intentional discrimination cannot and will not curtail institutional racism's harmful workings.").

13. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 977 (1988) (discussing promotion of white applicants over black plaintiff on basis of subjective interviews by white supervisors); Connecticut v. Teal, 457 U.S. 440, 443 (1982) (addressing administration of examination for promotion created by employer that whites passed at higher rate than blacks); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (dealing with employer's requirement that employees present high school diploma or pass intelligence test as condition of employment or transfer within company).

14. *See, e.g.*, 20 U.S.C. § 1681 (1994) (allowing disparate impact claim under Title IX of Education Amendments of 1972); 29 U.S.C. § 794 (1994) (allowing disparate impact claim under Rehabilitation Act of 1973); 42 U.S.C. § 1973 (1994) (allowing disparate impact claim under VRA of 1965); 42 U.S.C. § 2000(d) (1994) (allowing disparate impact claim under Title VI of Civil Rights Act of 1964); 42 U.S.C. § 12112 (1994) (allowing disparate impact claim under ADA).

15. *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality,' Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 639 n.226 (1999) ("*Flores* also has the potential to be considerably less than benign; a broad reading of its rationale could threaten the constitutionality of, for example, applying to the states Title VII's 'disparate impact' approach . . . which provide[s] for relief on a showing that would not necessarily meet the Supreme Court's standards for establishing violations of the Equal Protection Clause.").

16. See *infra* note 115 and accompanying text.

exercises that meet a mystical test of congruence and proportionality.[17] Congruence and proportionality limit Congress' ability to provide remedies to those violations of the Constitution that have already been delineated by the Court. Finally, the Court often has held that violations of the Equal Protection Clause require a showing of discriminatory intent.[18] Thus, disparate impact claims against states seem destined to fall.

A recent Eleventh Circuit case demonstrates the immediacy of this confluence.[19] The African-American employees of the State of Alabama sued the State and various state agencies alleging violations of Title VII.[20] The plaintiffs asserted discrimination against African-Americans in every employment practice from hiring to terminations, resulting in disparate treatment and disparate impact.[21] The State moved for dismissal based on its Eleventh Amendment sovereign immunity, but the district court denied the motion and the Eleventh Circuit affirmed.[22] The Eleventh Circuit applied the congruence and proportionality test of *City of Boerne v. Flores*[23] and found that the disparate impact provisions of Title VII met this test.[24] Although the Eleventh Circuit found disparate impact safe from Eleventh Amendment and section 5 attack, it is not clear what fate the claims will face in the Supreme Court.

There is, perhaps, another way to protect such claims. At present, federal legislation prohibits entities that receive federal funds from discriminating on the basis of race and, in the area of education, from discriminating on the basis of sex. These statutes, as interpreted by the federal agencies responsible for their implementation, provide for claims of disparate impact. The Court recently has decided a Title VI disparate impact case and has left intact the power of Congress to enact such statutes.[25]

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17. See *infra* notes 116-74 and accompanying text.

18. See *infra* notes 218-86 and accompanying text.

19. *See, e.g., In re* Employment Discrimination Litig. Against State of Ala., 198 F.3d 1305, 1308 (11th Cir. 1999).

20. *See id.* at 1309.

21. *See id.* According to the opinion,

> Plaintiffs claimed . . . discrimination against African-Americans in layoffs, recalls from layoffs, terminations, discipline, hiring, rehiring, evaluations, compensation, transfers, job duty assignments, recruitment, screening, selection procedures, denial of promotions, demotions, rollbacks, sick leave, subjective decision-making practices, and other terms and conditions of employment which have resulted in disparate impact and treatment of the plaintiff-intervenors and the plaintiff class.

Id.

22. *See id.*

23. 521 U.S. 507 (1997).

24. *See In re Employment Discrimination Litig.*, 198 F.3d at 1320-24.

25. As discussed *infra* notes 468-83, the Supreme Court recently decided a Title VI disparate impact case. *See* Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (challenging Alabama Department of Public Safety's official policy of administering its driver's license exam in English only).

In this Article, I examine the future of disparate impact claims against state actors by focusing on the centerpiece of federal anti-discrimination law, Title VII. After reviewing the history of the Eleventh Amendment and recent Court decisions, I turn to the Court's section 5 cases and the creation of the congruence and proportionality test.[26] I then examine the concept of disparate impact under the Constitution and Title VII.[27] After concluding that the future of disparate impact claims against states is in doubt, I examine possible solutions to save disparate impact claims.[28] I propose the use of congressional powers under the Spending Clause to preserve claims of disparate impact against the states.[29] As examples, I use Title IX and Title VI.[30] Finally, I conclude by proposing a model statute to allow Congress to condition receipt of funds on the protection of state employees from actions by the state that have a disparate impact. By utilizing the spending powers, Congress should retain the ability to protect state employees in the face of the Court's hostility.[31]

I. CONGRESSIONAL POWERS UNDER THE ELEVENTH AMENDMENT

The states' power to resist suits stems from the Eleventh Amendment—although this is not apparent from the language of the Amendment. The Court, throughout the years, has expanded the immunity available to states under the Amendment and, recently, restricted congressional powers to waive that immunity.

A. *History of the Amendment*

Shortly after the ratification of the Constitution, a debate broke out over the extent to which Article III abrogated the states' sovereign immunity. Specifically, the debate focused on the impact of the diversity clauses, which granted the judiciary the power to hear suits "between a State and Citizens of another state" and "between a State . . . and foreign Citizens."[32] The question was whether these clauses gave federal courts jurisdiction to hear cases against states. Many states owed debts incurred during the Revolutionary War. These states were nervous that the federal courts would entertain suits brought by creditors trying to make them pay their Revolutionary War debts.[33] Some federalists sought to soothe the states' fears by claiming that they would not be subject to federal jurisdic-

26. See *infra* notes 115-74 and accompanying text.
27. See *infra* notes 175-216 & 221-86 and accompanying text.
28. See *infra* notes 287-327 accompanying text.
29. See *infra* notes 328-450 and accompanying text.
30. See *infra* notes 451-501 and accompanying text.
31. See *infra* notes 502-52 and accompanying text.
32. U.S. CONST. art. III, § 2.
33. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 391 (3d ed. 1999) [hereinafter CHEMERINSKY, FEDERAL JURISDICTION] ("States had incurred substantial debts, especially during the Revolutionary War, and there was a great fear of suits being brought against the states in federal court to collect on these debts.").

tion. Others argued that Article III explicitly permitted litigation against the states.[34]

The dispute over the effect of Article III was resolved with the passage of the Judiciary Act of 1789, which provided the Supreme Court with diversity jurisdiction between states and citizens of another state or citizens of foreign states.[35] The Supreme Court first examined the sovereign immunity debate engendered by the Judiciary Act and Article III in *Chisholm v. Georgia*.[36] There, a citizen of South Carolina brought an action in assumpsit against the state of Georgia in the Supreme Court based on the alleged refusal by Georgia commissaries to pay for Revolutionary War supplies.[37] Despite the fact that Article III, section 2, clause 2 of the Constitution and the Judiciary Act appeared to give the Court original jurisdiction over the case, Georgia refused to appear, claiming that because of its sovereign status, the federal court did not have jurisdiction over it.[38] The Court disagreed and entered a default judgment for the plaintiffs.[39] The decision made clear that, under Article III and the Judiciary Act, citizens of another state could sue a sovereign state without its consent in a federal court.[40]

Chisholm prompted Congress to pass the Eleventh Amendment in the 1790s.[41] The decision caused outrage in the political and legal communities because many viewed the holding as an affront to the sovereignty of Georgia.[42] *Chisholm*, in fact, "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed."[43] This "first" meeting of Congress came just three weeks after the *Chisholm*

34. *See id.* at 393 (reviewing intent of Framers regarding Article III and Eleventh Amendment).

35. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 80, at § 13; *see also* CHEMERINKSY, FEDERAL JURISDICTION, *supra* note 33, at 394.

36. 2 U.S. (2 Dall.) 419 (1793).

37. *See Chisholm*, 2 U.S. (2 Dall.) at 430 (holding that state-citizen diversity clause contained in Article III and implementing Judiciary Act gave Court jurisdiction over state in action of assumpsit brought by citizen of another state); *see also* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1056 (1983) (noting same). The majority did not distinguish between actions brought under federal law and those brought under common law. *See id.* at 1057-58 (noting that because justices found liability under common law, they would have also found liability under federal law).

38. *See Chisholm*, 2 U.S. (2 Dall.) at 430.

39. *See id.* at 479 (construing Constitution to give federal court jurisdiction over State of Georgia).

40. *See* Fletcher, *supra* note 37 at 1033-34 (reviewing history of Eleventh Amendment).

41. *See generally id.* (discussing impact of holding in *Chisholm* and impact of Eleventh Amendment).

42. *See* Hans v. Louisiana, 134 U.S. 1, 12-14 (1890).

43. *Id.* at 11.

decision was announced.[44] Within one year, the necessary number of states ratified the Amendment.[45] Three years later, the President issued a proclamation declaring the Eleventh Amendment properly ratified.[46]

The text of the Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."[47] At the time of its passage, the Amendment was understood to mean that the federal courts were without jurisdiction to hear actions brought against a state by a citizen of another state or a citizen or subject of a foreign state.[48] In 1890, the Court decided a case that expanded the effect of the Amendment beyond its textual language. In *Hans v. Louisiana*,[49] the Court held that a state could not be sued in federal court by one of its own citizens even if the cause of action were brought under the Constitution or the laws of the United States.[50] The Court noted that, because the language of the Eleventh Amendment clearly forbade citizens of other states from suing a state in federal court, it would be "an absurdity on its face" to suppose that a state's own citizen could bring suit against it in the same federal forum.[51] The Court went on to note that "[t]he suability of a State without its consent [is] a thing unknown to the law."[52] Due to the inherent nature of state sovereignty, a state must consent to the (or any) suit and give valid permission for such an action.[53]

In short, *Hans* stands for the proposition that, unless waived by the state, a state's sovereign immunity precludes federal court jurisdiction over suits against the state by its own citizens, citizens of other states or

44. *See* CHEMERINKSY, FEDERAL JURISDICTION, *supra* note 33, at 395 (discussing reaction to *Chisholm* decision in Congress).

45. *See id.*

46. *See id.*

47. U.S. CONST. amend. XI. In *Alden v. Maine*, this standard was expanded when the Supreme Court held a citizen may not sue a state in one of its own state courts. 527 U.S. 706, 712 (1999) (holding that Article I of Constitution does not grant Congress power to abrogate states' sovereign immunity from suit in their own courts).

48. *See id.* at 723-24.

49. 134 U.S. 1, 10 (1890).

50. *See Hans*, 134 U.S. at 10 (citing as support Louisiana v. Jumel, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *In re Ayers*, 123 U.S. 443 (1887)). Hans, a citizen of Louisiana, brought the action to recover interest that had accrued on bonds issued by the state. *See id.* at 1. The Court declined to find that the judicial power of the United States extended to a case arising out of the Constitution or laws of the United States brought against a state by one of its own citizens. *See id.* at 21 (Harlan, J., concurring) (stating that "a suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends").

51. *See id.* at 15.

52. *See id.* at 16.

53. *See id.* at 16-17.

citizens of foreign states.[54] If the state does not consent, then the judicial power of the United States will not be used to assert jurisdiction over the state in a case brought by one of its own citizens.[55]

B. *"Exceptions" to Eleventh Amendment Rule*

The holding in *Hans* appears to be straightforward and easily applied: a state cannot be sued in the federal courts by one of its own citizens without its consent.[56] Nevertheless, several exceptions have been carved out of the rule over the years that have created some ambiguity as to the application of the Eleventh Amendment. For example, a state can be sued in federal court by the United States.[57] Also, a state may be sued in federal court by another state.[58] In addition, a governmental subdivision of a state may be sued in federal court by a citizen of that state.[59]

Under limited circumstances, a state can waive its immunity.[60] For instance, a state can waive its constitutional immunity through a state stat-

54. *See generally id.* (summarizing effect of *Hans* decision).

55. The decision has been subject to much criticism. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (citing *Hans* as appropriate law when faced with unconsenting state in lawsuit). For a discussion of the theories underlying the Eleventh Amendment and the *Hans* decision, see CHEMERINKSY, FEDERAL JURISDICTION, *supra* note 33, at 396-402.

56. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974) (discussing limited circumstances in which state may be sued by private party). The Court has based much of its Eleventh Amendment analysis on the fact that the applicability of the Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984).

57. *See* United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (permitting suit against Mississippi by United States in federal court); United States v. Texas, 143 U.S. 621, 637 (1892) (permitting suit against Texas by United States in federal court).

58. *See* Colorado v. New Mexico, 459 U.S. 176, 182 n.9 (1982) (allowing suit over water diversion rights between Colorado and New Mexico in federal court); Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (refusing Principality of Monaco's application for leave to sue Mississippi).

59. *See* Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401 (1978) (refusing Eleventh Amendment immunity to counties and municipalities). *But see Pennhurst*, 465 U.S. at 123-24 (holding that state's Eleventh Amendment immunity extends to local governments when state is involved in local governments' actions). *See generally* CHEMERINKSY, FEDERAL JURISDICTION, *supra* note 33, at 406 (discussing suits against cities).

60. *See* Parden v. Terminal Ry. of Ala. State Docks Dept., 377 U.S. 184, 197-98 (1964) (holding that Alabama waived immunity in action by Alabama railroad workers when it gave Congress power to regulate interstate commerce and began operating railroad after Federal Employers' Liability Act was already enacted); Clark v. Barnard, 108 U.S. 436, 447 (1883) (hearing case after Rhode Island waived immunity by voluntarily appearing as claimant in court); *see also* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 667 (1999) (holding that waiver of Eleventh Amendment immunity must be expressed clearly by state intending to submit itself to Supreme Court's jurisdiction).

ute or constitution.[61] In addition, by taking part in a federal program, the state can explicitly indicate plans to submit itself to federal jurisdiction that otherwise would be barred by the Eleventh Amendment.[62] If a state does waive its sovereign immunity in one of these ways, it must do so in a manner that is unambiguous, because the federal courts will generally not find constructive consent where there is a "surrender of constitutional rights."[63]

The Court carved out a more specific exception in *Ex parte Young*.[64] The *Ex parte Young* doctrine allows injunctive relief against a state official when the official acts contrary to federal law.[65] The Court reasoned that state officers have no authority to violate the Constitution or federal laws.[66] Therefore, a state official acting in violation of federal law will be stripped of state authority and may be sued in federal court.[67] The *Ex parte Young* doctrine is the vehicle most often used to get around the Eleventh Amendment prohibition against federal court jurisdiction over actions against states. The doctrine, however, is limited in that it only allows for injunctive relief. There are generally two ways in which this doctrine is applied.[68] The first occurs if there is no state forum available to try the federal case, and therefore it is up to the federal courts to enforce the supremacy of the federal law in question.[69] The second occurs if the case requires a special interpretation of the federal law.[70]

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61. *See* Atascedero v. Scanlon, 473 U.S. 234, 238 n.1 (1985) (requiring, in addition, "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred").

62. *See id.* (same).

63. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974) (holding that Court will find state waived immunity only when no other conclusion could be made from express language).

64. 209 U.S. 123 (1908). *See generally Pennhurst*, 465 U.S. at 89 (stating that "a suit challenging the federal constitutionality of a state official's action is not one against the State"); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (barring suit against state and Board of Corrections); *Edelman*, 415 U.S. at 663-67 (applying *Ex parte Young* exception to present case).

65. *See Ex parte Young*, 209 U.S. at 159-60 (explaining that state official loses immunity when official acts in contravention of "supreme authority" of constitution).

66. *See id.* (same).

67. *See id.* at 159-60, 167 (discussing foundation for *Ex Parte Young* doctrine). The rationale behind the doctrine is that, under the Supremacy Clause, a state has no authority to violate federal law and so it cannot confer such authority on its officials. A suit used to enjoin a state official from violating a federal law is not barred by the Eleventh Amendment under these circumstances.

68. The *Ex parte Young* doctrine is decided on a case-by-case basis. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 280 (1996) (recognizing importance of case-by-case analysis).

69. *See generally id.* at 271 (discussing *Ex parte Young*'s application when there is no state forum to try case).

70. *See id.* (noting that courts narrowly construe this aspect of doctrine lest it infringe on basic principles of federalism).

C. *Congressional Abrogations*

Another class of exceptions to the Eleventh Amendment is that, under certain circumstances, Congress may abrogate the states' sovereign immunity by statute.[71] Beginning in 1976, the Court held that in certain circumstances, Congress had the authority to abrogate the states' sovereign immunity.[72] In *Fitzpatrick v. Bitzer*,[73] the Court announced the existence of the congressional power to abrogate pursuant to section 5 enforcement powers.[74] In addition, the Court found an unequivocal statement of intent to subject the states to suit.[75] The statement came in the form of the addition in 1972 of "governments, governmental agencies [and] political subdivisions" to the definition of "person" in Title VII.[76] Although the original enactment of Title VII was pursuant to Congress' Commerce Clause powers, the provisions extending coverage to state and

71. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1995) (discussing that Congress may abrogate state's sovereign immunity if it "unequivocally expressed its intent" to do so and it "acted 'pursuant to a valid exercise of power'"); *see also* Atascedero v. Scanlon, 473 U.S. 234, 242 (1985) (same).

72. *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (allowing abrogation of Connecticut's immunity under Congress' enforcement powers under Civil Rights Act). Even though the Court has found that Congress has the authority to abrogate the Eleventh Amendment, the Court also has held that in order to find such an abrogation, an unequivocal statement of Congress' intent to abrogate must be present. In *Atascadero*, the Court found no such statement and, thus, held that the Rehabilitation Act of 1973, 29 U.S.C. § 794, did not abrogate the state's constitutional immunity under the Eleventh Amendment. *See* 473 U.S. at 246 (relying on need to maintain balance between federal and state power when it stated that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment"). The respondent argued that the state was subject to suit despite the bar of the Eleventh Amendment because the state had waived its immunity in its state constitution, that Congress had abrogated the state's immunity in enacting the Rehabilitation Act, and that the state had consented to suit by accepting funds from the federal government under the Rehabilitation Act. *See id.* at 241. The Court, however, stated that the state constitution did not waive immunity because it did not affirmatively and unequivocally waive immunity in a federal court. *See id.* The Court also stated that Congress may abrogate a state's immunity, but only if it explicitly states so in the language of the statute. *See id.* at 242.

73. 427 U.S. 445 (1976). In this case, the Court considered a Title VII discrimination action filed against the state on behalf of all active and retired male employees of the state of Connecticut. *See Fitzpatrick*, 427 U.S. at 445. The plaintiffs claimed that the state's statutory retirement program discriminated against them on the basis of sex. *See id.* State employees had been brought under the coverage of Title VII by the changes in the definitions in the 1972 amendments. *See id.*

74. *See id.* at 456 ("It is true that none of [our] previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment.").

75. *See id.* ("We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

76. *Id.* at 449 n.2.

local employees were enacted pursuant to section 5 of the Fourteenth Amendment.[77] The Court reasoned that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."[78] Thus, Congress can abrogate a state's sovereign immunity when enacting legislation under the Fourteenth Amendment.[79]

In 1988, the Court in *Pennsylvania v. Union Gas Co.*[80] held that, in addition to section 5 of the Fourteenth Amendment, the Commerce Clause also gives Congress the ability to abrogate the states' sovereign immunity.[81] After first determining that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[82] authorized suits against states, a plurality of the Court held that Congress could abrogate the states' sovereign immunity through a valid, unequivocal exercise of its commerce power.[83] The plurality reasoned that if Congress could subject a state to suit in federal court when legislating under section 5 of the Fourteenth Amendment, then surely Congress could utilize its plenary power under the Commerce Clause to do the same.[84] Thus, the plurality of *Union Gas* applied a now familiar two-part test: 1) whether Congress expressed a clear and unequivocal statement of intent to abrogate; and 2) whether Congress exercised appropriate power in abrogating the states'

77. *See id.* at 447-48.

78. *Id.* at 456.

79. *See id.* at 448 (noting effect of Edelman v. Jordan, 415 U.S. 651 (1974)). Today, use of section 5 of the Fourteenth Amendment is the only way in which Congress can unilaterally abrogate a state's Eleventh Amendment immunity. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1995) (noting that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment") (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

80. 491 U.S. 1 (1988).

81. *See Union Gas*, 491 U.S. at 3.

82. 42 U.S.C. § 9604 (1994).

83. *See Union Gas*, 491 U.S. at 15 ("[C]areful regard for precedent still would mandate the conclusion that Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce.").

84. *See id.* at 16. In this case, the respondent's predecessors owned a coal plant in Pennsylvania. *See id.* at 5. The state acquired easements on the plant's property in order to excavate to control flooding in the area. *See id.* During the excavations, the state caused coal tar to seep into a nearby river, which both the state and the federal governments paid to be cleaned as required by the EPA. *See id.* at 6. Later, the state sued respondent to recoup the costs and respondent filed a third-party suit against the state under CERCLA. *See id.*

immunity.[85] The dissenters asserted that the Commerce Clause did not give Congress the authority to override the Eleventh Amendment.[86]

Nevertheless, this power to abrogate under the Commerce Clause was short-lived. In 1995, Justice Thomas joined the dissenters from *Union Gas* and overruled that decision. In *Seminole Tribe of Florida v. Florida*,[87] the Court decided that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states in order to enforce the Indian Gaming Regulatory Act (IGRA), which was passed pursuant to the Indian Commerce Clause.[88] The Court noted that it previously had found that Congress had the unilateral power to abrogate the states' sovereign immunity from suit under two constitutional provisions: 1) the Fourteenth Amendment;[89] and 2) the Interstate Commerce Clause.[90] In *Seminole Tribe*, the Court reconsidered its decision to allow Congress to use its Article I power under the Commerce Clause to abrogate state immunity from suit.[91] Concluding that Article I could not be used to restrict Article III judicial power, the majority overruled *Union Gas* and held that Congress may abrogate a state's immunity only when acting pursuant to section 5 of the Fourteenth Amendment.[92] The majority found that Congress' section 5 powers are qualitatively different from other congressional powers because the Fourteenth Amendment was intended to restrict the powers of the states.[93] Additionally, the Fourteenth Amendment was enacted after the Eleventh Amendment and, thus, modified the Eleventh Amendment.[94] The Court concluded that the fundamental principles of federalism and separation of powers mandated that Congress could not expand the Court's power beyond what Article III allowed.[95] The Court acknowl-

85. *See id.* at 56-57 (White, O'Connor, and Kennedy, JJ., concurring in part and dissenting in part) (finding first that statute "plainly intended to abrogate the immunity of the States from suit" and then that Congress had authority and power under Article I to abrogate Eleventh Amendment immunity from states).

86. *Id.* at 42 (Scalia, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Scalia's opinion.

87. 517 U.S. 44 (1996).

88. *See Seminole Tribe*, 517 U.S. at 47 (explaining history of Act and denying that Act abrogates State's immunity rights); *see also* U.S. CONST. art. I, § 8, cl. 3; Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) (1999).

89. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (allowing Title VII action against Connecticut under Fourteenth Amendment).

90. *See, e.g., Union Gas*, 491 U.S. at 5 (1988) (finding that CERCLA permitted suit against state under Commerce Clause).

91. *See Seminole Tribe*, 517 U.S. at 55.

92. *See id.* at 65 ("Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment.").

93. *See id.* at 59 (explaining extraordinary amount of power that Fourteenth Amendment gives Congress over states).

94. *See id.* at 65-66 (addressing idea in *Fitzpatrick* that Fourteenth Amendment altered "pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment").

95. *See id.*

edged this rationale again in *Idaho v. Coeur d'Alene Tribe*.[96] There, a tribe sought control over lands lying within the original boundaries of the Coeur d'Alene Reservation.[97] The Court held that the Eleventh Amendment barred the suit and the *Ex parte Young* exception doctrine did not apply.[98] The Court followed precedent and declared that the Eleventh Amendment protects a state's immunity from suit by an Indian tribe, which it defined as a sovereign entity.[99] Furthermore, the Court held that the *Ex parte Young* doctrine did not apply because the requested relief—an injunction against state officials—would "diminish, even extinguish, the State's control over vast reach of lands and waters."[100] The Court held that the bar of the Eleventh Amendment would not be removed because "the dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts."[101]

Thus, as the Court's jurisprudence stands today, Congress only has the authority to unilaterally abrogate a state's sovereign immunity under section 5 of the Fourteenth Amendment.[102] It is important to recall that the Court has left to Congress the ability to regulate the states pursuant to the Commerce Clause.[103]

II. CONGRESSIONAL POWERS UNDER THE FOURTEENTH AMENDMENT

As some commentators predicted, the *Seminole Tribe* decision refocused the debate about congressional power to the question of section

96. 521 U.S. 261 (1996).

97. *See Coeur d'Alene Tribe*, 521 U.S. at 264-65.

98. *See id.* at 266 (reversing Ninth Circuit's finding that Idaho's ongoing actions fit within *Ex parte Young* exception).

99. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("States entered the federal system with their sovereignty intact . . . [and] judicial authority in Article III is limited by this sovereignty[.] . . . [A] State will therefore not be subject to suit in federal court unless it has consented to suit").

100. *Coeur d'Alene Tribe*, 521 U.S. at 282.

101. *Id.* at 287-88.

102. This recent jurisprudence has created a number of problems for existing legislation. For example, one issue centers on the question of the ability to discern Congress' power to enact legislation. In other words, did Congress act pursuant to section 5 or pursuant to the Commerce Clause? Past legislation for which Congress has not specified the power exercised is subject to attack. *See id. See generally* Ernest A. Young, *Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 3 (discussing trend of Court granting states greater rights and resulting "misplaced and potentially counterproductive propensity toward immunity federalism").

103. Although once thought to be a broad, almost unrestricted power, the Commerce Clause power suffered crippling blows in the *Lopez* and *Morrison* decisions. *See* United States v. Morrison, 529 U.S. 598, 618-19 (2000) (holding that Commerce Clause does not give Congress power to enact civil remedy provision of VAWA); United States v. Lopez, 514 U.S. 549, 559-68 (1995) (finding Gun-Free School Zones Act to be unconstitutional because it did not substantially affect interstate commerce).

5 and turned the scope of Congress' section 5 enforcement powers into "the next target of the Court's conservative wing."[104] Section 5 of the Fourteenth Amendment states that Congress "may 'enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty or property' without due process of law nor deny any person 'equal protection of the laws.'"[105]

In early cases, the Court held that congressional authority pursuant to the section 5 enforcement power was broad.[106] In *Katzenbach v. Morgan*,[107] the Court explained that section 5 is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[108] In *Katzenbach*, the Court held that legislation is appropriate and legitimately falls within the powers set forth in section 5 of the Fourteenth Amendment if the legislation: 1) may be regarded as an enactment to enforce the Equal Protection Clause; 2) is plainly adapted to that end; and 3) is not prohibited by, but is consistent with, the letter and spirit of the Constitution.[109] To that end, Congress has the authority to enact legislation that deters and prevents conduct even if the targeted conduct includes behavior that in itself is constitutional.[110] Further, in *City of Rome v. United States*,[111] the Court allowed Congress, under the VRA, to declare actions to be a violation of the Fifteenth Amendment.[112] Specifically, the Court held that Congress could "prohibit changes that have a

104. *See* Andrew I. Gavil, *Interdisciplinary Aspects of* Seminole Tribe v. Florida*: State Sovereign Immunity in the Context of Antitrust, Bankruptcy, Civil Rights and Environmental Law*, 23 OHIO N.U. L. REV. 1393, 1399 (1997) (hypothesizing that scope of Fourteenth Amendment may be limited by conservative Court after Seminole Tribe decision).

105. *See* City of Boerne v. Flores, 521 U.S. 507, 517 (1997).

106. *See* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) ("Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.") (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1879)); *see id.* at 327 ("In the oft-repeated words of Chief Justice Marshall, referring to another legislative authorization in the Constitution, 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'") (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

107. 384 U.S. 641 (1966).

108. *Katzenbach*, 384 U.S. at 651.

109. *See id.* Thus, in *Katzenbach*, the Court upheld Congress' authority to enact section 4(e) of the VRA. *See id.* at 652-53.

110. *See Flores*, 521 U.S. at 518 (holding that Congress has authority to remedy and prevent constitutional violations "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States'"); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

111. 446 U.S. 156 (1980).

112. *See generally Rome*, 446 U.S. 156 (allowing Congress to outlaw voting practices that are discriminatory under Fifteenth Amendment).

discriminatory impact on voting rights."[113] Under the broadest reading of *Rome*, the Court "authoriz[ed] Congress independently to interpret the meaning of the Fifteenth Amendment and even to adopt a view contrary to that of the Supreme Court."[114]

Recently, however, the Court has moved to limit congressional power under section 5. Although the Court intimated limits in earlier cases,[115] the first case to substantively limit Congress' section 5 powers was *Flores*. In *Flores*, the Supreme Court struck down the Religious Freedom Restoration Act (RFRA).[116] The Court set forth a new test under which Congress may enact legislation in order to abrogate a state's immunity.[117] The Court held that Congress must identify the unconstitutional conduct protected by the Fourteenth Amendment, then tailor the legislation in question in a manner that will remedy or prevent the conduct.[118] The new test the *Flores* Court formulated requires that there be congruence and a proportionality between the injury to be prevented or remedied and the means adopted to that end.[119] Congress must demonstrate that it has met the test through legislative findings.

The *Flores* Court found that Congress exceeded its section 5 authority in enacting RFRA for two reasons. First, the Court found the legislative record contained insufficient evidence to demonstrate the remedial necessity of the federal statute. Specifically, the legislative findings did not contain examples of modern laws infringing on religious freedom or demonstrating religious bigotry.[120] The Court dismissed the evidence that Congress presented as largely "anecdotal" data that did not reveal a "widespread pattern of [unconstitutional] religious bigotry in this country."[121]

Second, the Court held that RFRA was "out of proportion to a supposed remedial or preventive object."[122] The Court found that RFRA instituted a compelling interest standard for assessing the validity of burdens on the free exercise of religion.[123] In attempting to implement this heightened scrutiny, Congress improperly crossed the line and enacted

113. *Id.* at 177.

114. *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 33, at 219.

115. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 128 (1970) ("[A]s broad as the congressional enforcement power is, it is not unlimited.").

116. *See* 521 U.S. 507, 536 (1997).

117. *See Flores*, 521 U.S. at 532.

118. *See id.*

119. *See id.* at 533-35. For a discussion of "congruence and proportionality," see *infra* notes 124-74 and accompanying text.

120. *See id.* at 530-31.

121. *Id.*

122. *Id.* at 532.

123. *See id.* at 533-34. The Supreme Court specifically rejected the compelling interest standard as applied to the free exercise of religion in *Employer's Division v. Smith*. *See* 494 U.S. 872, 885-86 (1990) (holding that making law contingent on coincidence with religious beliefs, except where state interest is compelling, is permitting someone by virtue of belief "to become law into himself" (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879))).

legislation that substantively altered the nature of a constitutional violation under the First Amendment. Thus, by invalidating this congressional action, the Court in *Flores* limited Congress' power under section 5 to situations where the Court already has found a violation.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[124] the Court struck down a provision in the Trademark Remedy Clarification Act[125] (TRCA) that permitted suits against states for misrepresentation under the Lanham Act.[126] College Savings argued that Florida Prepaid constructively waived its immunity by engaging in "interstate marketing and administration" of its program in commerce.[127] College Savings also argued that Congress validly abrogated Florida Prepaid's sovereign immunity because Congress enacted the TRCA to enforce the Due Process Clause of the Fourteenth Amendment.[128] The Court disagreed, holding that the State was entitled to immunity protection.[129] The Court reasoned that TRCA did not abrogate the state's immunity due to the lack of an express waiver of sovereign immunity by the state. Further, Congress enacted TRCA pursuant to Article I powers thereby limiting Congress' ability to waive the state's sovereign immunity and did not remedy any violation of the Fourteenth Amendment's Due Process Clause.[130]

Two Terms later, in *Kimel v. Florida Board of Regents*,[131] the Supreme Court held that application of the ADEA to the states violated Congress' section 5 enforcement power.[132] Again, the Court held that Congress exceeded its section 5 power to abrogate the states' sovereign immunity. The Court found that the evidence examined by Congress to support ab-

124. 527 U.S. 666 (1999).

125. Pub. L. No. 102-542, 106 Stat. 3567 (codified in various sections of 15 U.S.C.).

126. *See Coll. Sav. Bank*, 527 U.S. at 675 (holding no deprivation of property occurred). In this case, College Savings held a patent on the administration methodology of its certificates. *See id.* at 671. Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid), an arm of the State of Florida, also administered a tuition prepayment program. *See id.* College Savings Bank sued Florida Prepaid under the TRCA for alleged misstatements about its program and for patent infringement. *See id.* Florida Prepaid moved to dismiss the complaint claiming sovereign immunity. *See id.*

127. *See Coll. Sav. Bank*, 527 U.S. at 671.

128. *See id.* at 669.

129. *See id.* at 675.

130. *See id.* at 672-75.

131. 528 U.S. 62 (2000).

132. *See Kimel*, 528 U.S. at 67. The Court also noted that it must consider whether Congress "unequivocally expressed its intent" to abrogate the states' immunity when it made the ADEA applicable to the states. *See id.* at 71. The Court applied the following standard to decide the issue: "'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Id.* at 73 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)). Because Congress included state governments in the definitions within the statute, the Court found Congress clearly expressed its intent to subject states to suit under the ADEA. *See id.* at 67.

rogation of state sovereign immunity in the ADEA was insufficient.[133] Although Congress had floor debates on the topic, the Court stated that Congress never sufficiently identified evidence of widespread constitutional wrongs to make abrogation of a state's immunity acceptable.[134] Similar to the finding in *Flores*, the Court found the legislative record lacking in evidence supporting the need for the "prophylactic legislation" and "void of any concrete showing that states and local governments had been unconstitutionally discriminating against the elderly."[135]

The *Kimel* Court next turned to the question of whether Congress "acted pursuant to a valid grant of Constitutional authority."[136] The Court held that Congress has the power to determine whether legislation is needed to secure rights guaranteed by the Fourteenth Amendment.[137] This power includes the authority to remedy and deter violations of rights the Fourteenth Amendment guarantees.[138] The Court recognized that the line between enacting legislation to secure the Fourteenth Amendment's guarantees and determining the substance of the Fourteenth Amendment is hard to define.[139] The Court examined the ADEA to determine if "congruence and proportionality" existed between the injury to be prevented by the legislation and the means adopted, as set out in the *Flores* test.[140] The "congruence and proportionality" test required the Court to determine first if there was proof of a widespread pattern of constitutional violation by the states that the legislation could remedy.[141] If Congress identifies a problem in the legislative record, the court must then determine whether the legislation is the least burdensome way in

133. *See id.* at 87-91 ("Congress never identified any pattern of age discrimination by the states . . . that rose to the level of constitutional violation.").

134. *See id.* at 90-91.

135. *See id.* at 91.

136. *Id.* at 73. If Congress enacted the ADEA solely pursuant to its Commerce Clause power, the Court held it would not have been a valid exercise of power as Article I powers "do not include the power to subject States to suit at the hands of private individuals." *Id.* at 80. If the ADEA also was enacted pursuant to Congress' Fourteenth Amendment power to abrogate states' sovereign immunity, the question is whether the ADEA is appropriate legislation under the Fourteenth Amendment. *See id.* The Court examined only the Fourteenth Amendment power. *See id.*

137. *See id.* at 80-81.

138. *See id.* at 81.

139. *See id.* The Court stated:

> In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

140. *See id.* at 82-91.

141. *See id.* at 89.

which to remedy the problem.[142] The Court found that the remedy provided for in the ADEA was "disproportionate to any unconstitutional conduct" targeted by the ADEA.[143] Specifically, the elderly are not a suspect class and discrimination on the basis of age is subject to rational basis scrutiny under the Equal Protection Clause. The ADEA, however, effectively heightens the scrutiny. In so doing, Congress again substantively altered the nature of the constitutional violation under the Fourteenth Amendment.

A byproduct of the Court's new, more stringent test is that the Court now asks whether Congress validly abrogated the states' sovereign immunity under section 5. According to the Court in *United States v. Morrison*,[144] the state action requirement is another important limitation on the section 5 enforcement power.[145] In *Morrison*, the Court held that the Enforcement Clause did not provide Congress with the authority to enact the civil remedy provision of VAWA.[146] In VAWA, Congress created a civil rights action in federal court under which women who were the victims of crimes motivated by gender animus may sue their attackers for damages. In so holding, the Supreme Court relied on the fact that the Fourteenth Amendment only protects against state action.[147] Unlike the situations where Congress properly exercises its enforcement power,[148] VAWA is "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or

142. *See id.* at 82.

143. *Id.* at 83.

144. 529 U.S. 598 (2000).

145. *See Morrison*, 529 U.S. at 621. The *Morrison* Court quoted approvingly:

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Id. (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

146. 42 U.S.C. § 13981 (1994); *see also Morrison*, 529 U.S. at 627.

147. *See Morrison*, 529 U.S. at 621 (citing previous holdings requiring state action); The Civil Rights Cases, 109 U.S. 3, 23-25 (1883) (holding public accommodation provisions of Civil Rights Act of 1875, which applied to purely private conduct, were beyond scope of section 5 enforcement power); United States v. Harris, 106 U.S. 629, 640 (1883) (invalidating section 2 of Civil Rights Act of 1871 as exceeding Congress' section 5 power because law was "directed exclusively against action of private persons, without reference to the laws of the State, or their administration by her officers").

148. *See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding legislation directed at New York officials who administered New York's election law which imposed literacy tests as prerequisite to voting and effectively disenfranchised thousands of Puerto Rican immigrants); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding congressionally imposed voting requirements directed at states with history of discriminating based on race in voting); *Ex parte* Virginia, 100 U.S. 339 (1879) (upholding congressional remedy that criminally punished state officials who intentionally discriminated in jury selection).

state actor, but at individuals who have committed criminal acts motivated by gender bias."[149]

In addition, without much analysis, the Court held that VAWA lacked "congruence and proportionality" because it was not directed "at any State or state actor."[150] The Court mentioned that Congress' findings regarding gender-motivated crimes were insufficiently widespread because evidence of discrimination against victims of gender-motivated crimes was not present in all states.[151] The breadth of VAWA's reach, therefore, served to undermine the congruence and proportionality of VAWA.[152] Congressional enactment of VAWA, according to the Court, exceeded its section 5 enforcement authority because it reached private individuals, was not directed solely at state action and was not remedial due to the lack of evidence of gender-motivated crimes supplied by Congress.[153]

Although Justice Breyer argued in dissent that VAWA fell squarely within Congress' Commerce Clause authority, he also commented on the majority's reasoning as to Congress' section 5 enforcement power.[154] Justice Breyer acknowledged that the Fourteenth Amendment does not reach private persons.[155] However, he accepted the Government's argument that "Congress used § 5 to remedy the actions of *state actors*, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth."[156] In accepting this argument, Justice Breyer argued that VAWA was not primarily or exclusively directed at private persons "without reference to the laws of the State, or their administration by her officers."[157]

According to Justice Breyer, the majority improperly found that VAWA lacked "congruence and proportionality" because it was indeed directed at states and state actors.[158] In addition, Breyer argued that VAWA

149. *Morrison*, 529 U.S. at 626.

150. *See id.* at 625-26 (holding that, unlike *Katzenbach*, Congress in instant case did not tailor remedy to counteract violations by one state or remedy violation found in all states).

151. *See id.* at 625-27 (deciding lack of congruence and proportionality with one sentence).

152. *See id.* at 625.

153. *See id.* at 627.

154. *See id.* at 664-66 (Breyer, J., dissenting). Justice Breyer specifically stated that he did not seek to answer the section 5 question and left it "for a more thorough analysis if necessary on another occasion." *Id.* at 666.

155. *See id.* at 664 (Breyer, J., dissenting).

156. *Id.*

157. *See id.* (quoting United States v. Harris, 106 U.S. 629, 640 (1883)). The majority relied on these cases to find that VAWA was directed exclusively against the action of private persons. *See id.* at 620-25.

158. *See id.* at 665 (Breyer, J., dissenting). Breyer summarized the majority holding that VAWA, unlike "federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally

passes the congruence and proportionality test because it does not substantively determine a constitutional violation.[159] Breyer asserted that Congress acted within its section 5 authority even if a remedy against private actors is "not in itself unconstitutional,"[160] and the relation between the remedy and the violation is congruent.[161]

Most recently, the Court disallowed employment discrimination claims by private individuals against states under the ADA.[162] In an opinion written by Chief Justice Rehnquist, the Court noted the "now familiar" test of defining the constitutional right at issue to ensure that Congress has not exceeded its section 5 powers.[163] Rehnquist discussed precedent as limiting review of legislation based on disabilities to rational-basis review. Therefore, requiring states to provide accommodations to individuals with disabilities, as the ADA does, goes beyond the requirements of the Fourteenth Amendment. The Court then turned to the question of whether Congress "identified a history and pattern of unconstitutional employment discrimination by the States against the disabled" and concluded that Congress had failed to establish such a record.[164] Finally, the majority opinion held that, even if Congress had established the necessary legislative findings, the ADA as applied to states fails the congruence and proportionality test. Notably, the reasonable accommodations requirements of the ADA "far exceed[ ] what is constitutionally required."[165]

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discriminated in jury selection," was not directed at "any State or state actor." *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); *Ex parte* Virginia, 100 U.S. 339 (1879)).

159. *See id.* (Breyer, J., dissenting) (arguing that VAWA "intrudes little upon either States or private parties" and "restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law").

160. *Id.* Breyer argued that even if VAWA also provided a remedy against private actors, Congress acted within its authority because section 5 permits Congress to enact legislation that "prohibits conduct which is not in itself unconstitutional." *Id.* Congress may enact remedial legislation that also reaches conduct that does not violate the Constitution. *See id.* (noting that such legislation "at least sometimes" can be passed).

161. *See id.* Breyer also rejected the majority's argument that VAWA was overbroad in that gender-motivated violence "does not exist in all States, or even most States." *Id.* at 665-66. Breyer accepted congressional findings "of at least 21 States documenting constitutional violations" and stated that more pervasive evidence of a national problem should not be required to find a statute remedial. *See id.* at 666 ("This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution.").

162. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (limiting decision to Title I of ADA).

163. *See id.* 963 (stating that this is "first step" in deciding congruence and proportionality).

164. *Id.* at 963-64.

165. *Id.* at 967. For a discussion of Title II of the ADA, see generally Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000). Written prior to the *Garrett* decision, Professor Colker discussed the future of claims against public entities as provided by Title II of the ADA. Colker offers a four-part frame work for examining and upholding Title II.

Thus, under the Court's "New Federalism" decisions, Congress must clear several hurdles to abrogate the states' sovereign immunity validly. First, Congress cannot substantively change the nature of a Fourteenth Amendment constitutional violation. *Flores* and *Kimel* indicate that any change to the constitutional scrutiny applied in determining a Fourteenth Amendment violation exceeds congressional authority under the section 5 enforcement power.[166] Under the guise of the congruence and proportionality test, the Supreme Court has invalidated several federal statutes as exceeding Congress' authority under section 5.[167] Second, the Court has held that to demonstrate both the constitutional threat at issue and that the remedy is appropriately tailored to solve the violation at issue, Congress must develop a legislative record with substantial evidence. In *Morrison, Flores, Kimel* and *Garrett,* the Court invalidated the statutes at issue because Congress failed to establish the necessary legislative record.[168] Third, *Morrison* requires that legislation be directed at remedying state action that violates the Fourteenth Amendment.[169] Thus, as all of these

166. *See supra* notes 17-24 and accompanying text.

167. *See Garrett,* 121 S. Ct. at 968 (holding application of Title I of ADA is beyond Congress' section 5 enforcement power); United States v. Morrison, 529 U.S. 598, 627 (2000) (holding civil remedy provision in VAWA exceeds Congress' section 5 enforcement power). *See generally* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding application of ADEA to states is beyond Congress' section 5 enforcement power); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding application of Patent Remedy Act to states beyond Congress' section 5 enforcement power); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that RFRA exceeds Congress' section 5 enforcement power).

168. See *supra* notes 12-24 and accompanying text.

169. *See Morrison,* 529 U.S. at 621-27. Applying the new limitations on congressional authority to enact federal legislation, the circuit courts have issued several decisions adding to the section 5 jurisprudence. Overwhelmingly, the circuit courts have upheld the Equal Pay Act (EPA) as a valid exercise of congressional authority under section 5. *See, e.g.,* Varner v. Ill. State Univ., 226 F.3d 927, 932-36 (7th Cir. 2000) (holding EPA proper abrogation of Eleventh Amendment immunity); Kovacevich v. Kent State Univ., 224 F.3d 806, 816-21 (6th Cir. 2000) (same); Hundermark v. Fla. Dep't of Transp., 205 F.3d 1272, 1275 (11th Cir. 2000) (finding Congress' failure to state power used not fatal to EPA); O'Sullivan v. Minnesota, 191 F.3d 965, 967 (8th Cir. 1999) (joining "every court of appeals that has decided the issue"); Ussery v. Louisiana *ex rel.* La. Dep't of Health & Hosps. 150 F.3d 431, 435 (5th Cir. 1998) (same); Mills v. Maine, 118 F.3d 37, 48 (1st Cir. 1997) (reiterating validity of EPA); Timmer v. Mich. Dep't of Commerce, 104 F.3d 833, 838 (6th Cir. 1997) (finding intent and power of Congress to abrogate immunity with EPA). However, the Sixth Circuit held the application of the FMLA, 29 U.S.C. § 2601 et seq., to states exceeded Congress' section 5 enforcement power. Thomson v. Ohio State Univ. Hosp., No. 98-3613, 2000 U.S. App. LEXIS 29206, at *12 (6th Cir. 2000). The Sixth Circuit addressed Congress' section 5 enforcement power in order to determine whether Congress had properly abrogated a state's Eleventh Amendment immunity. The court found that Congress did not properly abrogate a state's immunity under section 5 of the Fourteenth Amendment because "the legislative record of the FMLA discloses no pattern of discrimination by the States, let alone a pattern of constitutional violation." *Id.* at *10 (quoting Sims v. Univ. of Cincinnati, 219 F.3d 559, 564 (6th Cir. 2000). In addition, the Sixth Circuit found that Congress, in enacting the FMLA, crafted a "piece of social legis-

cases show, Congress may only enact remedial legislation and may not enact legislation that substantively determines a constitutional violation.[170]

The Court acknowledged that a clear line distinguishing between remedial and substantive legislation is "not easy to discern."[171] In making that distinction, Congress should have "wide latitude" to determine on which side of the line the legislation at issue falls.[172] Nevertheless, Congress must ensure "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[173] In addition, Congress must "identify the conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[174] Thus, with congressional authority to abrogate limited to section 5 enforcement powers and the section 5 powers limited to that which would be congruent and proportional, the question turns to the scope of section 1 violations of the Equal Protection Clause.

III. DISPARATE IMPACT

The collision caused by the intersection of the Court's recent jurisprudence in the context of the Eleventh Amendment and section 5 of the Fourteenth Amendment becomes striking when focused on disparate impact. In considering the scope of section 1 of the Equal Protection Clause, the Court has often ruled that only intentional discrimination violates the Constitution. In contrast, in Title VII, Congress provided a claim for actions that have a disparate impact on a protected class.

A. *Disparate Impact Provisions of Title VII*

Title VII prohibits employers from discriminating against their employees in the terms, conditions and privileges of employment on the basis of race, color, sex, religion and national origin.[175] Although the original

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lation rather than a remedy for ongoing state violations of the Equal Protection Clause." *Id.* (quoting *Sims*, 219 F.3d at 564). In as much, Congress had again crossed the line from enacting remedial legislation to enacting substantive legislation.

170. *See Flores*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

171. *Id.*

172. *See id.* at 520.

173. *Id.* at 519.

174. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999).

175. 42 U.S.C. § 2000e-2 (1991). As originally enacted, Title VII did not apply to the states and local governments. In 1972, Congress amended the definition of employer to include governments and governmental entities.

statutory language did not explicitly authorize disparate impact suits, such claims were first recognized by the courts and then codified in 1991.[176]

The disparate impact claim was first recognized by the Court in *Griggs v. Duke Power Co.*[177] In *Griggs*, the district court found that the employer previously discriminated against African-Americans in hiring and assigning of employees.[178] Upon passage of Title VII, the employer ended its facially discriminatory hiring policies, but required a high school diploma and a passing score on two professionally-developed aptitude tests to qualify for placement in the higher paying areas of the company.[179] The district court rejected the plaintiff's challenge to the employer's requirements due to lack of proof of intent to discriminate.[180] On appeal, the court of appeals held that "in the absence of a discriminatory purpose,

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176. *See* 42 U.S.C. § 2000e-2. Section 703 of the Civil Rights Act of 1964 was amended by adding at the end the following new subsection:

> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if:
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
>
> (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 2000e-2).

177. 401 U.S. 424, 431 (1971) (holding Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

178. *Griggs*, 401 U.S. at 426-27.

179. *See id.* at 427-28. "Neither [test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs." *Id.* at 428.

180. *See id.* (discussing district court's findings). The court concluded that "Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act." *Id.* Thus, because there was no overt racial discrimination, petitioner's claim was denied.

use of such requirements was permitted by the Act."[181] The Supreme Court reversed.[182]

The Court found that Title VII prohibits not only intentional discrimination but practices "discriminatory in operation."[183] "Absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[184] Thus, to meet a prima facie case under disparate impact, the plaintiffs must show that a neutral practice operates to impact disproportionately against a minority group.[185] If the plaintiffs accomplish that task, the employer must, in turn, prove "business necessity."[186] "If an employment practice which operates to exclude [the minority group] cannot be shown to be related to job performance, the practice is prohibited."[187]

After many twists and turns, Congress codified the disparate impact concept in 1991.[188] Under the Act, an unlawful employment practice based on disparate impact is established if "a complaining party demonstrates that a[n] [employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin."[189] The Act further defines "demonstrate" to mean carrying the burdens of production and persuasion.[190] Thus, the plaintiff carries the burden of identifying the specific employment practice that acts to significantly exclude members of the protected class.[191] A disparate impact claim may challenge both objective and subjective practices.[192] In

181. *Id.* at 429. The Court notes that the district court "was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike." *Id.*

182. *See id.* at 436.

183. *Id.* at 431.

184. *Id.* at 431-32. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432.

185. *See id.* at 430.

186. *See id.* at 431.

187. *Id.* Section 703(h) "authorizes the use of 'any professionally developed ability test' that is not 'designed, intended or *used* to discriminate because of race'. . . . [G]uidelines [issued by the Equal Employment Opportunity Commission] interpret[ed] § 703(h) to permit only the use of job-related tests." *Id.* at 433.

188. *See* 42 U.S.C. § 2000e-2(k) (1991). For discussion of the amendment, see *supra* notes 175-76.

189. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991).

190. *See id.* § 2000e(m).

191. *See id.* § 2000e-2(k)(1)(A)(i). The Uniform Guidelines on Employee Selection Procedures created a standard of the impact necessary to trigger enforcement efforts: "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4D (1993).

192. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989-91 (1988) (holding subjective or discretionary employment practices may be analyzed under disparate impact approach). In *Watson*, an African-American woman was repeat-

general, the plaintiff meets her burden by showing a significant disparity of representation between the members of the protected class in the appropriate labor market and those in the particular employment position in the employer's workforce.[193]

The biggest hurdle for the plaintiff is correctly identifying the relevant comparison groups.[194] First, the Supreme Court has indicated the labor market must be appropriate in time, space and skill.[195] Thus, the labor market must be restricted to the geographic area from which the employer draws its labor pool. Further, if a particular skill is necessary for the position at issue, the plaintiff must only include those persons within the geographic area who possess that skill.[196] For example, if the position at issue is a high school teacher, the population of the labor market should only include those in the area with a teacher's certification from the state.[197]

Often, the early stages of disparate impact litigation center on defining who is "qualified" and thus who can be used as part of a comparison group. Some cases indicate that when the qualified applicant pool is readily identifiable, such a group should be used instead of part of the labor market as a whole.[198] The Supreme Court, however, also has approved

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edly denied promotions. *See id.* at 982-83. Petitioner challenged respondent's use of subjective procedures as having a disparate impact against [her] in violation of Title VII. *See id.* The Supreme Court remanded the case for further consideration in light of its decision. *See id.* at 1000.

193. *See In re* Employment Discrimination Litig. Against State of Ala., 198 F.3d 1305, 1312 (11th Cir. 1999).

194. *See id.* ("The focus during this first stage of the inquiry, and indeed during the whole of the disparate impact analysis, is on defining the qualified applicant pool.").

195. *See generally* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308-13 (1977) (discussing usefulness of statistical evidence); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337-43 (1977) (same). The Court noted that the use of statistics is accepted to prove a prima facie case of intent to discriminate, but the statistics must be correct in time, space and skill. The statistics must reflect the labor market after Title VII applied to the defendant, they must be compared to the geographic area where the defendant would be likely to draw employees from, and they must be used to compare the plaintiff to people who have the right skills to apply for the particular job in question. *See Hazelwood*, 433 U.S. at 308-13 (setting forth scope of inquiry).

196. *See id.* at 308 n.13.

197. *See id.* The third requirement of time is less important. In the cases brought close in time to the passage of Title VII, the Court warned plaintiffs not to include numbers reflective of pre-Act discrimination. Because it is almost forty years since the states became subject to Title VII, the concern over population statistics, including pre-Act discrimination, is minimal. *See id.* at 309-10.

198. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989) (discussing use of qualified applicant pool in place of labor market). Respondents, nonwhite cannery workers at petitioners' facilities, filed suit alleging that petitioners' hiring and promotion practices were responsible for the work force's racial stratification and had denied them employment as non-cannery workers on the basis of race in violation of Title VII. *See id.* at 646-48. The Supreme Court held that the "'proper comparison [is] between the racial composition of [the at-issue

the use of general population statistics as the "qualified applicant pool."[199] In *Griggs*, the plaintiffs proved the disparate impact by showing that the percentage of black males in North Carolina who possessed diplomas (12%) was significantly lower than the percentage of white males who possessed diplomas (34%).[200] In *Dothard v. Rawlinson*,[201] the plaintiff proved the disparate impact on women of height and weight requirements for a prison guard position by using the national statistics of height and weight for women and men.[202] The more nuanced the skills for an employment position, the less relevant national population statistics. To correct this problem, some courts require comparison with the actual applicant pool.[203]

Finally, the plaintiff must measure the impact at the appropriate point. The Court has referred to the appropriate point as the point of exclusion.[204] The plaintiff must identify each practice that causes an impact.[205] A plaintiff may refer to the "bottom line"—that is, the number of

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jobs] and the racial composition of the qualified . . . population in the relevant labor market.'" *Id.* at 650 (citing *Hazelwood*, 433 U.S. at 308). "It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms proper basis for the initial inquiry in a disparate-impact [Title VII] case." *Id.* at 650-51.

The Supreme Court also addressed use of the applicant pool over the labor market in *New York City Transit Authority v. Beazer*. *See* 440 U.S. 568, 586 n.29 (1979). In *Beazer*, respondents alleged that New York City Transit Authority's refusal to employ persons who used methadone violates Title VII. *See id.* at 576-77. The Supreme Court held, that although statistics need not always be based on the actual applicant pool, "'evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants' undermines the significance of such figures." *Id.* at 586 n.29 (citing *Teamsters*, 431 U.S. at 340 n.20).

199. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

200. *See id.* at 430 n.6 (resorting to North Carolina census).

201. 433 U.S. 321 (1977).

202. *See Dothard*, 433 U.S. at 337-38 (Rehnquist, J., concurring) (stating that national statistics are sufficient for disparate impact claims after considering all relevant facts). *But see id.* at 348 (White, J., dissenting) (noting dissatisfaction with use of national population statistics to determine "qualified applicant pool"). Justice White remarked, "I am unwilling to believe that the percentage of women applying or interested in applying for jobs as prison guards in Alabama approximates the percentage of women either in the national or state population." *Id.*

203. *See* Connecticut v. Teal, 457 U.S. 440, 443 (1982) (comparing pass rate of African Americans who took test with pass rate of whites who took test).

204. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (stating that "[o]nce the employment practice at issue has been identified, causation must proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions").

205. *See id.* (stating "plaintiff . . . is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities"); *see also* Wards Cove Packing Co. v. Atonia, 490 U.S. 642, 657 (1989) ("As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

the protected class hired in the end—if "the elements of a respondent's decisionmaking process are not capable of separation for analysis."[206] Similarly, a defendant may not defend actions by pointing to the bottom line if an earlier employment device eliminates members of the protected class disproportionately.[207] As the Court in *Dothard* noted, however, the actual applicant pool may be skewed "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as discriminatory."[208]

If the plaintiff succeeds in proving the above,[209] the burden shifts to the defendant to prove that the challenged practice is "job related for the position in question and consistent with business necessity."[210] This statutory language is in keeping with the holding in *Griggs*.[211] The Eleventh Circuit explained the effect of this showing: "If the employer is successful in demonstrating that [the challenged practice] is a job related business necessity for the job at issue, then what the employer has done, in effect, is to demonstrate that the requirement does not actually cause a disparate impact."[212]

A plaintiff must then prove that there is an "alternative employment practice" that meets the employer's business needs, but does not cause the disparate impact, and that the employer refuses to adopt this alternative practice.[213] Such a refusal establishes an unlawful practice under the Civil Rights Act of 1991.[214] Although in the past this step was considered a

206. 42 U.S.C. § 2000e-2(k)(1)(B) (1991).

207. *See Teal*, 457 U.S. at 452-56.

208. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365-67 (1977).

209. *See Dothard*, 433 U.S. at 330. Defendants, of course, may attack the plaintiff's definition of qualified applicant pool and the plaintiff's statistical proof. *See generally*, Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975) (discussing methods of discrediting plaintiff's evidence).

210. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991).

211. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (requiring employers to show challenged practice was manifestly related to job in question and was consistent with business necessity). In *Wards Cove Packing Co. v. Atonio*, the Court changed the standard from one of proof on the defendant to one of production, placing the burden of proving that the employment practice was not business necessity on the plaintiff. *See* 490 U.S. 642, 659-60 (1989). In addition, the Court weakened the test of "manifestly related to a business necessity" to "manifestly related to a legitimate goal of the employer." *Id.* at 659. The Civil Rights Act of 1991 overturned *Wards Cove* by placing the burden of proof back on the defendant and by seeking to change the definition of "business necessity." First, Congress described the defendant's burden as one to "demonstrate that the challenged practice is job related . . . and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Second, Congress indicated that business necessity is to be defined by cases decided prior to *Wards Cove*. *See id.* § 2000e-2(k)(c).

212. *In re* Employment Discrimination Litig. Against State of Ala., 198 F.3d 1305, 1315 (11th Cir. 1999).

213. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

214. *See id.*

rebuttal by the plaintiff of the defendant's showing of business necessity, the 1991 Amendments seem to allow this showing as an alternative method to prove disparate impact.[215] The Court has described the presence of a less discriminatory alternative as evidence that the challenged practice was a "pretext" for improper motivation.[216]

In summary, at no point in litigating a disparate impact claim must a plaintiff provide evidence of the employer's intent to discriminate.

B. *Disparate Impact Under the Constitution*

The Fourteenth Amendment provides, in section 1, that no state shall deny anyone equal protection of the laws.[217] In the landmark case of *Washington v. Davis*, the Court made clear that the Equal Protection Clause is violated only by an act that harms someone and was performed with discriminatory intent.[218] In *Davis*, two African-American police officers filed suit against the Commissioner of the District of Columbia and others, alleging the promotion policies of the police department were racially discriminatory.[219] Additional plaintiffs joined the action challenging the recruiting procedures used by the department including, but not limited to, a written personnel test.[220] The plaintiffs claimed that these practices violated the Due Process Clause of the Fifth Amendment, 42 U.S.C. § 1981 and two sections of the District of Columbia law.[221]

The sole issue before the district court on motions for summary judgment was the validity of the personnel test, Test 21.[222] In holding for the petitioners, the district court noted that the plaintiffs asserted no claim of "intentional discrimination or purposeful discriminatory acts."[223] Rather, the plaintiffs had shown only that Test 21 "bore no relationship to job performance and has a highly discriminatory impact in screening out black candidates."[224] On appeal, the defendants raised the constitutional

215. *See generally* Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473 (1998) (suggesting that 1991 Amendments create new right of action to establish disparate impact).

216. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Pretext is a concept generally used with disparate treatment cases. Some have suggested that the Court's use of pretext in this discussion is evidence that the disparate impact claim is actually a search for intent. *See In re Employment Discrimination Litig.*, 198 F.3d at 1322 (describing Supreme Court's characterization as ambiguous).

217. U.S. CONST. amend. XIV.

218. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding law is not unconstitutional solely because it has racially disproportionate impact).

219. *See id.* at 232.

220. *See id.*

221. *See id.* (alleging violations of D.C. CODE ANN. § 1-320 (2000) and D.C. CODE ANN. § 4-103 (2000)).

222. *See id.* at 235.

223. *Id.*

224. *Id.* (quoting Washington v. Davis, 348 F. Supp. 15, 16 (D.D.C. 1972)). The district court concluded: "(a) The number of black police officers, while sub-

issue of "whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process."[225] The Court of Appeals stated that it would be guided by the principles set forth in *Griggs* and that statutory standards established in Title VII litigation were to govern the due process issue before the Court.[226] The Court of Appeals held that the "disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation."[227]

The Supreme Court began its analysis by stating: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[228] Furthermore, the Court stated, "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially discriminatory impact."[229] The Court reviewed its holdings in jury selection, school desegregation and redistricting cases, discussing "the basic equal protection principle

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stantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." *Id.* Nonetheless, the district court held that respondents were not entitled to relief because Test 21 is not "designed nor operates to discriminate against otherwise qualified blacks." *Id.* at 235-36.

225. *Id.* at 236.

226. *See id.* at 236-37. In *Griggs v. Duke Power Co.*, a group of African-American employees brought suit against their employer alleging certain employment practices had a disparate impact against them in violation of Title VII of the Civil Rights Act of 1964. 401 U.S. 424, 431 (1971). This Court held Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*

227. *Davis*, 426 U.S. at 237. Like the Court held in *Griggs*, the *Davis* court of appeals held that absent a showing of job relatedness, the employment practice, although without discriminatory intent, is prohibited. *See id.* (discussing lower court's decision). Petitioners failed to prove that the test measured job performance or was a good indicator of probable success in the training program. Thus, the court of appeals reversed the district court and granted respondent's motion for partial summary judgment. *See id.* (same).

228. *Id.* at 239. Although petitioners did not dispute the use of *Griggs* and Title VII standards in this case, the Court, invoking Rule 40(1)(d)(2), "notice[d] a plain error not presented" and ruled against applying Title VII standards to constitutional issues. *Id.* at 238. "While ordinarily we do not take note of errors not called to the attention . . . nor properly raised here, that rule is not without exception. The Court has 'the power to notice a 'plain error' though it is not assigned or specified' . . . ." *Id.* (citing Silber v. United States, 370 U.S. 717, 717-18 (1962) (applying 28 U.S.C. § 40(1)(d)(2) (1994))).

229. *Id.* at 239. The Court discussed the purpose of the Equal Protection Clause of the Fourteenth Amendment as the prevention of "official conduct discriminating on the basis of race" and the Fifth Amendment equal protection component as "prohibiting the United States from invidiously discriminating between individuals or groups." *Id.* The Court, however, made clear that common law has not permitted disparate impact claims based on race. *See id.*

that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[230]

Giving some hope to plaintiffs in disparate impact cases, the Court went on to state:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.[231]

The Court also stated that, "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[232]

One year later, the Court further elaborated on the interaction of disproportionate impact and discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[233] A non-profit real estate developer sought to build racially-integrated, low-to-middle income housing subsidized by the government.[234] In order to build the housing, the developer sought re-zoning of the land from a single-family to a multiple-family classification.[235] The request for re-zoning was denied.[236] The developer and three African-Americans brought suit challenging the denial of re-zoning as racially discriminatory in violation of the Fourteenth Amendment and the Fair Housing Act of 1968.[237]

The district court held for the defendants, finding the motivation behind the denial of re-zoning focused not on discriminatory intent but rather a desire to protect property values and the integrity of the village's

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230. *Id.* at 240. For a discussion of jury selection, redistricting and school desegregation cases involving failed disparate impact claims, see *Wright v. Rockefeller*, 376 U.S. 52 (1964) (striking challenge to district lines alleged to be racially motivated); Strauder v. West Virginia, 100 U.S. 303 (1879) (holding racial makeup of jury need not match makeup of community).

231. *Davis*, 426 U.S. at 241; *see also id.* at 242 (discussing that discriminatory intent may be inferred from totality of all relevant facts).

232. *Id.* at 242 (stating that "standing alone [disproportionate impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny"). Upholding the constitutionality of Test 21 through rational basis review, the Court said it was neutral on its face and "rationally may be said to serve a purpose the Government is constitutionally empowered to pursue." *Id.* at 246.

233. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding *Davis* in requiring discriminatory intent or purpose to show Equal Protection Clause violation).

234. *See id.* at 254-56.

235. *See id.* at 254.

236. *See id.*

237. Fair Housing Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 81 (1968).

zoning plan.[238] On appeal, the Seventh Circuit reversed; holding the denial of re-zoning violated the Fourteenth Amendment because it had a racially discriminatory effect with a disproportionate impact on African-Americans and did not serve a compelling state interest.[239]

The Supreme Court reversed.[240] The opinion begins with a reminder of the decision in *Davis*: "Our decision last Term . . . made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[241] Rather, challengers to official action on racial grounds must demonstrate a racial discriminatory purpose, although that purpose need only be a "motivating factor" in the decision.[242] To determine whether invidious intent was a motivating factor behind the decision requires an examination of circumstantial and direct evidence of intent.[243] "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[244] The Court

238. *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208, 211 (M.D. Ill. 1974).

239. *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975).

240. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 423 U.S. 1030 (1975) (certifying questions to Court).

241. *Arlington Heights*, 429 U.S. at 264-65.

242. *See Arlington Heights*, 429 U.S. at 265-66 (noting legislators rarely make decisions motivated by single or dominant purpose, thus not requiring discriminatory intent to be primary concern). Generally, the Court gives deference to legislators because of their need to balance competing considerations. *See id.* However, "when there is . . . proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Id.*

243. *See id.* at 266.

244. *Id.* For example, in *Yick Wo v. Hopkins*, petitioners challenged a California ordinance prescribing the kind of buildings where laundries may be located and the requirement of Board consent before operating such a facility. *See* 118 U.S. 356, 358 (1885). The Court held that these ordinances would be valid and there would be no proof of invidious discrimination if all persons engaged in the same business were treated alike, subject to the same restrictions and entitled to the same privileges under similar conditions. *See id.* at 367. These ordinances, however, did not provide equal rules and privileges to all similarly situated individuals. *See id.* at 374. Rather, the petitioner and 200 others, all whom were Chinese, were denied consent to run their laundry facilities, a business petitioner had engaged in for the previous twenty-two years. *See id.* at 358-59. Furthermore, eighty others, whom were not Chinese, were permitted to run the same laundry business under similar conditions as requested by petitioner. *See id.* at 359, 374. "[N]o reason for [discrimination] exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified." *Id.* at 374. The [intentional] discrimination is therefore illegal and a denial of the equal protection of the laws under the Fourteenth Amendment. *See id.* In *Gomillion v. Lightfoot*, petitioners alleged that Local Act No. 140, passed by the Alabama Legislature, altered the shape of the city from a square to a twenty-eight sided figure in violation of the Constitution. 364 U.S. 339, 341 (1960). The Act had the effect of removing from the city all but four or five of its 400 African-American voters, but it did not remove any white voters. *See id.* at 341. The petitioners claimed a violation of their due process and equal protection rights under the

indicated that the effect alone may be enough to prove discriminatory intent, but only in rare cases.[245] Given the rare nature of such cases, the Court offered a number of other factors to use in the search for a discriminatory purpose.[246] After applying these factors to the denial of the rezoning request, the Court found that the developer failed to prove that discriminatory purpose was a motivating factor in the decision to deny rezoning.[247]

In the third case of this trilogy, the Court reaffirmed its position that only discriminatory intent violates the Equal Protection Clause. In *Personnel Administrator of Massachusetts v. Feeney*,[248] the female plaintiff challenged a state veterans' preference statute on the ground that it had a disproportionate impact on females, thus denying females equal protection of the laws in violation of the Fourteenth Amendment.[249] Under the statute, veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying non-veterans.[250]

The district court found that the preference has "a devastating impact" on the employment opportunities of women.[251] The court found

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Fourteenth Amendment and a violation of their Fifteenth Amendment right to vote. *See id.* The Supreme Court, noting the disproportionate impact the Act had upon African Americans, said that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end." *Id.* at 347 (quoting United States v. Reading Co., 226 U.S. 324, 357 (1911) (holding petitioners were entitled to prove their allegations at trial, reversing court of appeals and district court decisions)). "Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence." *Arlington Heights*, 429 U.S. at 266.

245. *See id.* (noting that in some rare cases clear pattern of disparate impact, unexplained except for racial discrimination, may be sufficient to show liability, even if legislation is facially neutral).

246. *See id.* at 267. Although this list is not exhaustive, factors that should be considered in determining the existence of discriminatory purpose include the historical background of the decision, the specific sequence of events leading up to the decision, departures from the normal procedural or substantive sequence, and the legislative or administrative history of the decision. *See id.* The historical background is important, "particularly if it reveals a series of official actions taken for invidious purposes." *Id.* Substantive departures from the normal procedure are relevant, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* The legislative or administrative history may be relevant, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268.

247. *See id.* at 270-71 (reversing court of appeals, holding proof of discriminatory intent or purpose is necessary to prove violation of Equal Protection Clause).

248. 442 U.S. 256 (1979).

249. *See Feeney*, 442 U.S. at 259.

250. *See id.* The Court discusses the method for choosing candidates for appointment to an official civil service position. *See id.* The Court noted, "Although the veterans' preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a wellnigh absolute advantage." *Id.* at 264.

251. *Id.* at 260 (stating district court's finding).

that the goals of the preference were non-discriminatory and legitimate, although the exclusionary impact on women was "so severe as to require the State to further its goals through a more limited form of preference."[252] The district court therefore ruled in favor of the plaintiff and found the statute unconstitutional.[253] On appeal, the Supreme Court vacated the judgment and remanded the case in light of the *Davis* decision.[254] On remand, the district court concluded that a veterans' hiring preference is "inherently non-neutral because . . . the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been 'unintended.'"[255]

In 1979, the case returned to the Supreme Court.[256] The Court set forth a two-part inquiry to review a gender-neutral statute challenged on the ground that it has a disproportionate impact on a protected class: "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination."[257]

The Court noted that the statute gives a preference on a gender-neutral basis; women who served as nurses in the military (or in unofficial auxiliary women's units) were entitled to the preference.[258] The Court therefore concluded that the veterans' preference is neutral on its face. Further, the Court suggested that a discriminatory purpose could not be inferred from the impact because the impact "could . . . be plausibly explained on a neutral ground" rewarding veterans for their service.[259]

Consequently, the only avenue remaining for the plaintiff was to prove a discriminatory purpose behind the enactment of the statute. The plaintiff's argument, at bottom, was that the Massachusetts legislature must have intended the impact on women.[260] Given the structure of the military and the fact that over 98% of veterans in Massachusetts were male, the legislature should be held to the natural and foreseeable conse-

252. *Id.*

253. *See id.* (summarizing lower court's declaration).

254. *See* Massachusetts v. Feeney, 434 U.S. 884, 884 (1977).

255. *See Feeney*, 442 U.S. at 260-61. *Washington v. Davis* held that a facially neutral law having a disparate impact on a certain race does not violate the Equal Protection Clause per se. *See* 426 U.S. 229, 239 (1976). In order for a violation to be found, the disparate impact must be the result of a racially discriminatory intent or purpose. *See id.*

256. *See Feeney*, 442 U.S. at 259-61.

257. *Id.* at 274. The Court, citing its discussion in *Arlington Heights*, noted that impact provides an "important starting point" in the second part of the inquiry, but "purposeful discrimination is the 'condition that offends the Constitution.'" *Id.* (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

258. *See id.* (noting "the definition of 'veterans' in the statute . . . has consistently . . . been inclusive of women").

259. *Id.* at 275.

260. *See id.* at 276.

quences of its actions.[261] The Court rejected this configuration of "purpose."[262] Discriminatory purpose, according to the Court, "implies more than intent as volition or intent as awareness of consequences."[263] The Court phrased the standard of intent as requiring a showing that the legislature took its action "because of, not merely in spite of" the impact on women.[264] Because the plaintiff advanced no evidence that the legislature adopted the veterans' preference with the "collateral goal" of keeping women in stereotypical positions in the Massachusetts Civil Service, she failed to prove discriminatory intent under the Constitution.[265]

Although *Davis, Arlington Heights* and *Feeney* are the leading cases on the issue of discriminatory intent, the Court has applied its reasoning in a number of other cases. In *Crawford v. Board of Education*,[266] the Court upheld a California constitutional amendment, Proposition I, limiting busing for desegregation purposes to that required by the Fourteenth Amendment.[267] Plaintiffs challenged Proposition I as creating a disparate impact on minority students.[268] The Court held that the Fourteenth Amendment does not preclude a state, once it has chosen to do more than the Fourteenth Amendment requires, from later receding from that action.[269] If, however, the purpose of the repeal was to discriminate or disadvantage a racial minority, then the repeal would be unconstitutional.[270] However, the Court relied on the Court of Appeal's finding that Proposition I was not adopted with a discriminatory purpose.[271] Thus, because there was no discriminatory intent or purpose motivating the action, there was no equal protection violation.[272]

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261. *See id.* at 278.

262. *See id.* at 278-79.

263. *Id.* at 279.

264. *Id.*

265. *Id.* at 279-80.

266. 458 U.S. 527 (1982).

267. *See Crawford*, 458 U.S. at 535.

268. *See id.* at 536.

269. *Id.* at 535 (rejecting interpretation of Fourteenth Amendment that would not allow state to experiment within bounds of Constitution).

270. *See id.* at 538 (holding that "Equal Protection Clause is not violated by the mere repeal of race-related legislation . . . that [is] not required by the Federal Constitution"). *See also* Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (holding repeal of state law unconstitutional because new law intended to further authorize racial discrimination).

271. *See Crawford*, 458 U.S. at 545 (noting that "[e]ven if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose").

272. *See id.* at 537-38. In other cases, however, where a law is neutral on its face, the Court has found a violation of the Equal Protection Clause. In *Washington v. Seattle School District No. 1*, plaintiffs challenged the constitutionality of a statue prohibiting mandatory busing for purposes of racial integration. 458 U.S. 457, 464 (1982). The Supreme Court held the statute invalid as violative of the Equal Protection Clause. The Court stated that "when facially neutral legislation is

In *Hernandez v. New York*,[273] petitioner challenged the state court's rejection of his *Batson* claim.[274] In *Batson v. Kentucky*,[275] the Court recognized discriminatory use of peremptory challenges as a violation of the Fourteenth Amendment. The Supreme Court held that "[e]qual protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality."[276] The Court stated that if peremptory challenges result in disproportionately excluding members of a certain race, a trial court may consider a prosecutor's reason for peremptory challenges as pretext for racial discrimination.[277] The Court, however, again noted that disparate impact would not be conclusive evidence of an equal protection violation.[278]

Several cases also discussed the constitutionality of election and redistricting methods, alleging the methods disproportionately impacted a certain protected class. For example, in *City of Mobile v. Bolden*,[279] African-American citizens of Mobile, Alabama, challenged the constitutionality of the city's at-large method of electing its commissioners.[280] The Supreme Court held that the Equal Protection Clause is violated solely in cases of discriminatory intent.[281] Similarly, in *Wright v. Rockefeller*,[282] the Court upheld a New York congressional apportionment statute against claims that district lines were racially gerrymandered.[283] The challenged districts were comprised predominantly of whites, or of minority races, and their boundaries were irregularly drawn.[284] The challengers did not prevail because they failed to prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial

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subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." *Id.* at 484-85.

273. 500 U.S. 352 (1991).

274. *See Hernandez*, 500 U.S. at 360 (alleging violation of Equal Protection Clause to strike potential Latino jurors based on their ability to speak Spanish because language "bears a close relation to ethnicity").

275. 476 U.S. 79 (1986).

276. *Batson*, 476 U.S. at 362. The petitioner could not prove that a prosecutor intended to "exclude jurors who hesitated in answering questions about following the interpreter because [the prosecutor] wanted to prevent bilingual Latinos from serving on the jury." *Id.* Thus, the Supreme Court affirmed the lower court's holding that petitioner failed to prove an intent to discriminate and the prosecutor's race-neutral explanation for peremptory challenges was upheld. *Id.* at 372.

277. *See id.* at 362.

278. *See id.*

279. 446 U.S. 55 (1980).

280. *See Bolden*, 446 U.S. at 58.

281. *See id.* at 62-67.

282. 376 U.S. 52 (1964).

283. *See Wright*, 376 U.S. at 53-58 (discussing complaint and affirming lower court's ruling).

284. *See id.* at 54-55.

lines."[285] In all such cases, the Court held that a plaintiff attacking facially neutral policies must prove that a discriminatory purpose motivated the policies in order to obtain strict scrutiny review.[286]

IV. THE FUTURE OF DISPARATE IMPACT CLAIMS

Thus, Title VII explicitly allows disparate impact claims against parties although the Court has ruled that the Fourteenth Amendment does not. Claims of disparate impact against private parties are within Congress' Commerce Clause powers. However, such claims against states are vulnerable to constitutional challenges.

A. *Congruence and Proportionality*

As mentioned above, the Eleventh Circuit has addressed the issue of disparate impact claims against a state. In *In re Employment Discrimination*,[287] the Court was faced with the direct question of whether the recent Supreme Court decisions mandated a holding that the disparate impact provisions of Title VII must fall as against the states.[288] The Eleventh Circuit upheld these provisions.[289]

After setting forth the disparate impact provisions of Title VII, including the order and method of proof in such cases, the court turned to the issue of the Eleventh Amendment.[290] The Eleventh Circuit began with the first question from the *Seminole Tribe* two-part test.[291] The court rejected the argument that Congress had not expressed a clear legislative statement of intent to abrogate the state's immunity.[292] First, the court relied on the Supreme Court's decision in *Fitzpatrick v. Bitzer*.[293] In *Fitzpat-*

285. *See id.* at 56.

286. *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (stating strict scrutiny is only warranted in cases involving racially discriminatory motivation or purpose); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481-82 (1997) (same); Shaw v. Hunt, 517 U.S. 899, 905 (1996) (same); Miller v. Johnson, 515 U.S. 900, 905 (1995) (same). These voting decisions reinforce the tenuous nature of disparate impact claims under section 2 of the VRA. For a persuasive argument that section 2 of the VRA survives the congruence and proportionality test, see Katz, *supra* note 3.

287. 198 F.3d 1305 (11th Cir. 1999).

288. *See In re Employment Discrimination Litig.*, 198 F.3d at 1309-10.

289. *See id.* at 1324 ("Congress has unequivocally expressed its intent to abrogate the states' Eleventh Amendment sovereign immunity").

290. *See id.* at 1316.

291. *See id.* (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996) (internal citations omitted) ("Congress may abrogate a state's sovereign immunity, but it can only do so if: (a) Congress 'unequivocally expressed its intent to abrogate the immunity,' through a 'clear legislative statement;' and (b) Congress has acted 'pursuant to a valid exercise of power.'").

292. *See id.* Defendants argued that there was no congressional intent to abrogate in 1972 as evidenced by the codification of disparate impact in 1991. *See id.* The court rejected this argument. *See id.* ("We need address this contention only briefly.").

293. *See id.* at 1317 (relying on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976)).

rick, the Supreme Court referred to the addition in 1972 of "governments, governmental agencies, [and] political subdivisions" to the definition of "persons" in Title VII.[294] Twice in *Fitzpatrick*, the Supreme Court noted the exercise of Congress' section 5 powers:

> Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government. . . . There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.[295]

The Court then turned to the defendant's arguments that Congress, in attempting to abrogate the state's immunity, had not "acted pursuant to a valid exercise of power."[296] Relying on precedent from the former Fifth Circuit, the Eleventh Circuit seemed to consider the question decided.[297] In *Scott v. City of Anniston*,[298] the Fifth Circuit held that "Title VII is unquestionably appropriate legislation to enforce the equal protection clause" and that "the 'disproportionate impact' standard was an appropriate means of fulfilling those objectives."[299] However, the Eleventh Circuit recognized the defendant's argument that *Flores* so altered the "constitutional landscape" that the decision in *Scott* has been effectively overturned.[300]

Analyzing *Flores*, the court examined the contours of the Equal Protection Clause under the Supreme Court's decisions in *Davis*, *Feeney* and *Arlington Heights*.[301] The court then recognized the requirement in *Flores* that Congress, in acting pursuant to its section 5 powers, does not have the power to alter "the substance of the Fourteenth Amendment's restrictions on states" but rather "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[302] The court stated:

> In the equal protection context, this means that the core congressional motivation must remain consistent with the notion that what the Constitution prohibits is intentional discrimination

294. 427 U.S. 445, 449 n.2 (1975).

295. *Fitzpatrick*, 427 U.S. at 447-48, 453 n.9.

296. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).

297. *See In re Employment Discrimination Litig.*, 198 F.3d at 1318-19 (relying on Fifth Circuit decision in *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979)). In 1981, the Fifth Circuit split into the Fifth and Eleventh Circuits and the decisions of the former Fifth Circuit are binding precedent. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

298. 597 F.2d 897 (5th Cir. 1979).

299. *See Scott*, 597 F.2d at 900.

300. *See In re Employment Discrimination Litig.*, 198 F.3d at 1319.

301. *See id.* at 1318-19.

302. *See id.* at 1320 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

> on the part of state actors (and not state action that leads to a merely discriminatory result).[303]

The argument, of course, is that under Title VII, a plaintiff need not show that a discriminatory purpose motivated the employer, whereas under the Equal Protection Clause, a plaintiff must prove discriminatory intent. However, the Eleventh Circuit found the necessary congruence and proportionality by examining a number of Supreme Court decisions in the area of disparate impact:

> It is true that the disparate impact analysis does not require plaintiffs to demonstrate a subjective discriminatory motive on the part of the decisionmaker; but neither this court, nor the Supreme Court, has ever held that the issue of intent is wholly irrelevant to a claim of disparate impact.[304]

The court referred back to the early disparate impact cases that held that disparate impact was a prophylactic measure to get at the sophisticated discriminator—the discrimination that could actually exist under the guise of compliance with Title VII.[305] Echoing the *Arlington Heights* decision, the Eleventh Circuit noted that a finding of disparate impact can be telling evidence of the employer's motive:

> If, after a prima facie demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than some invidious purpose is probably at work?[306]

Further, the court noted that the Supreme Court has characterized the "employer's refusal to adopt the alternative practice [offered by the plaintiff] as 'evidence that the employer was using its tests merely as a "pretext" for discrimination.'"[307]

The Eleventh Circuit therefore concluded that although the plaintiff is not required to prove discriminatory intent, "the disparate impact provisions of Title VII can reasonably be characterized as 'preventive rules' that evidence a 'congruence between the means used and the ends to be achieved.'"[308]

> Our analysis of the mechanics of a disparate impact claim has led us unavoidably to the conclusion that although the form of the

303. *Id.* at 1319-20.

304. *Id.* at 1321.

305. *See id.* (reviewing prior precedent) (citing Connecticut v. Teal, 457 U.S. 440 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

306. *Id.* at 1321-22.

307. *Id.* at 1322 (quoting *Moody*, 422 U.S. at 425).

308. *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

> disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination.[309]

Additionally, the court found further support in one sentence from *Flores*, wherein the Supreme Court disapprovingly referred to RFRA's substantial burden as "not even a discriminatory effects or disparate impact test."[310] Finally, the court summoned up the history of racial discrimination, the motivation behind the enactment of the Fourteenth Amendment and the findings of discrimination against state employees, all of which supported the extension of Title VII to state employees. Therefore, the Eleventh Circuit found that the disparate impact provisions of Title VII met the congruence and proportionality test of *Flores*. Accordingly, Congress had the power to abrogate the state's immunity.[311]

Thus, the Eleventh Circuit provides one solution to the disparate impact problem. However, as Professor Brant explained prior to the Eleventh Circuit's ruling, this result is not a definite one under *Flores*:

> At least in disparate impact cases, I predict that the federal court will find that Title VII exceeds the scope of congressional power to enforce the Fourteenth Amendment, under *Flores*. However, I would expect the federal court to conclude that Title VII can be applied constitutionally to the state based on Congress' power to enforce the commerce clause. At that point, *Seminole Tribe* enters the picture. *Seminole Tribe* holds that a federal statute predicated upon an Article I power cannot abrogate the state's sovereign immunity. Accordingly, the state should prevail on its sovereign immunity defense, and be immune from damages in federal court on the Title VII claim.[312]

Brant also rejects the possibility that the lower courts will find the disparate impact provisions to be congruent and proportional to the Equal Protection Clause: "It is at least arguable that the disparate impact provisions of Title VII may be ruled insufficiently 'proportionate and congruent' to the Court's equal protection jurisprudence, and may, like *Flores*, be deemed a congressional effort to 'change the substantive scope of the law' rather than remedy likely constitutional violations."[313]

Finally, Brant rejects the argument that in *Fitzpatrick* the Court implicitly approved the disparate impact provisions of Title VII as a legitimate exercise of Congress' section 5 powers.[314] Brant points out that Congress

309. *Id.*
310. *See id.* (quoting *Flores*, 521 U.S. at 535).
311. *See id.* at 1324.
312. Brant, *supra* note 6, at 203-04.
313. *Id.* at 195.
314. *See id.* at 196-98.

in 1991 codified disparate impact theory and, in so doing, changed the proof requirements previously approved by the Court.[315]

Although the Court has not yet addressed the disparate impact provisions of Title VII, Professor Brant is surely correct: Title VII disparate impact claims against states will fall. In the three years since Professor Brant made her prediction, the Court has found provisions of the ADA,[316] the ADEA[317] and the VAWA unconstitutional.[318] These decisions rested, at least in part, on a failure to meet the congruence and proportionality test. In *Kimel* and *Garrett* specifically, the Court held that discrimination against the elderly and the disabled would be subject to rational basis scrutiny under the Equal Protection Clause. The insistence of the Court that congressional exercises of section 5 enforcement powers remain within previously determined parameter (set by the Court) supports the argument that Title VII disparate impact claims will fail the congruence and proportionality test. Further support may be found in the Court's recent decision in *Alexander v. Sandoval*,[319] where the Court failed to recognize the importance of disparate impact claims to combating discrimination.[320]

B. *Other Solutions*

In addition to asserting that the disparate impact provisions of Title VII meet the congruence and proportionality test, commentators have suggested a number of solutions. One solution, of course, is the reversal of *Seminole Tribe* or *Flores*, or both, and a return to the test of *Katzenbach* and *Rome*.[321] Although these arguments are well-reasoned and have merit, this Article looks for solutions under the existing state of the law. In the present legal reality, what other avenues are open?

A particularly creative solution suggests the creation of an action similar to a qui tam action.[322] Siegel suggests that the congressional power to abrogate lies in the "uncontroversial yet generally overlooked" power of the United States to sue the states.[323] Under this theory, Congress could authorize individuals to bring actions against states in the name of the

315. *See id.* at 197.

316. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955, 960 (2001).

317. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66-67 (2000).

318. *See* United States v. Morrison, 529 U.S. 598, 601-02 (2000).

319. 121 S. Ct. 448 (2001).

320. For a discussion of *Sandoval*, see *infra* notes 528-50 and accompanying text.

321. *See* Michael Daly, *Foolish Consistency and the Fourteenth Amendment: Vexing Question of Federalism, State Action and Discriminatory Intent* (April 2000) (on file with author) (suggesting most desirable option to cure disparate impact problem is for Court to revisit *Seminole Tribe* and allow congressional waiver of state immunity under Commerce Clause).

322. *See generally* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995) (suggesting authorization of suits against states in name of United States).

323. *See id.* at 541.

United States. "By doing so, Congress could authorize civil actions that in function would allow private parties to sue states for retroactive monetary damages for violation of any duty that Congress may constitutionally place upon the states."[324] The proceeds of the suit would be paid into the Treasury of the United States with an amount equal to the proceeds appropriated from the Treasury and paid to the private individual who brought suit.[325] According to Siegel, these suits rest on the "unsurprising proposition" that the United States may hire a private attorney to represent its interests in court.[326] Further, the device of allowing a private attorney to represent the interests of the United States is the same as a qui tam action.[327] Although an interesting theory, Siegel's suggestion was offered prior to the Court's decision in *Flores* and thus does not address the Court's recent jurisprudence restricting the power of Congress to ratchet up rights under the Constitution.

C. *The Spending Clause*

1. *The Scope of Congressional Spending Powers*

Under current jurisprudence, disparate impact claims will fall. In order to retain this powerful civil rights tool, we must look to other congressional powers. I suggest resort to the Spending Clause.

One of the many enumerated powers provided to Congress by Article I is the power "to lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the Common Defense and general Welfare of the United States."[328] Over the years, the Supreme Court has upheld congressional use of the Spending Clause to raise the drinking age, provide relief to farmers and provide for the disposal of nuclear waste.[329] Based on current precedent, Congress should be able to protect state employees from disparate impact discrimination by using its power under the Spending Clause.

In *United States v. Butler*,[330] the Court addressed the question of whether Congress had exceeded its power in enacting the Agricultural Ad-

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324. *Id.* at 551.

325. *See id.* at 553.

326. *See id.* at 556.

327. *See id.* at 557 ("The First Congress and other early Congresses employed this device frequently."). A qui tam action allows a private individual to sue in his or her own name and the United States for a violation of federal law and then share the proceeds of the suit with the United States.

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

329. The broad array of these decisions has led one commentator to declare that "[t]he greatest threat to state autonomy is, and has long been, Congress's spending power." Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001). Professor Baker asserts that the Court "simply has not appreciated . . . the threat posed to state autonomy by an unfettered congressional spending power." *Id.* at 230.

330. 297 U.S. 1 (1936).

justment Act.[331] In its analysis, the Court necessarily had to answer the historic debate over the scope of the Spending Clause.[332] Madison asserted that Congress' use of the Spending Clause is restricted to effectuating the other powers enumerated in the subsequent clauses of the same section.[333] In contrast, Hamilton argued that the clause "confers a power separate and distinct from those later enumerated . . . limited only by the requirement that it shall be exercised to provide for the general welfare of the United States."[334] The *Butler* Court sided with Hamilton, holding that Congress' exercise of this power is not restricted to one of the enumerated powers in Article I: "It results that the power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[335] Rather, "Congress may spend in any way it believes would serve the general welfare, so long as it does not violate another constitutional provision."[336] The Court defined the "general welfare" as matters of national, not local welfare.[337]

One year later, the Court heard two cases challenging separate titles of the Social Security Act of 1935.[338] In *Steward Machine Co. v. Davis*,[339] the plaintiff challenged the constitutionality of the tax imposed on employers of eight or more people, arguing that Congress had invaded the power of the states in violation of the Tenth Amendment.[340] The Court noted that Congress may validly induce states to participate in a federal program but may not force them to participate under duress.[341] The *Steward* Court carefully considered the question of duress. "To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment."[342] Thus, the Court examined the scope of the problem Congress sought to remedy. "[T]he use of the moneys of the nation to relieve the unemployed and their de-

331. *Butler*, 297 U.S. at 14. The Agricultural Adjustment Act provided the Secretary of Agriculture with the power to levy taxes on agricultural products so as to respond to an economic emergency. *See id.* at 53. In addition, the Secretary was authorized to regulate farm production prices so as to achieve parity of prices and purchasing power. *See id.* at 54.

332. *See id.* at 64-67.

333. *See id.* at 65.

334. *Id.* at 65-66.

335. *Id.* at 66.

336. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 202 (1997).

337. *See Butler*, 297 U.S. at 67.

338. *See generally* Helvering v. Davis, 301 U.S. 619 (1937) (challenging Titles VIII and II of Social Security Act of August 14, 1935); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (challenging Title IX of Social Security Act of August 14, 1935).

339. 301 U.S. 548 (1937).

340. *See Steward*, 301 U.S. at 585.

341. *See id.* at 586-89.

342. *Id.* at 586.

pendents is a use for . . . the promotion of the general welfare."[343] Recognizing the power of the states to enter contracts, the Court stated that states may contract with Congress.[344] Further, the Court noted that nothing prohibits states from "assenting to conditions that will assure a fair and just requital for benefits received."[345]

In *Helvering v. Davis*,[346] the Court again upheld provisions of the Social Security Act of 1935.[347] After reaffirming that Congress may spend money in aid of the general welfare, the Court turned to the definition of "general welfare" as opposed to "particular welfare."[348] The Court left the line-drawing to Congress, stating:

> Where this [line] shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.[349]

Further, the Court recognized the evolving concept of general welfare: "what is critical or urgent changes with the times."[350] The Court discussed the national crisis of unemployment and the purpose of the Social Security Act to "save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."[351] Finding that the problem of unemployment is national in scope and that the states cannot deal with the problem effectively, the Court determined that the statute fell within the general welfare and therefore is constitutional.[352] Thus, the Court had several times reaffirmed the broad Spending Clause powers Congress possesses.[353]

Ten years later, the Court turned to the question of Congress' ability to place conditions on grants issued under its Spending Clause powers. In *Oklahoma v. Civil Service Commission*,[354] the State of Oklahoma challenged

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343. *Id.* at 586-87.

344. *See id.* at 597.

345. *Id.* at 598.

346. 301 U.S. 619 (1937).

347. *See Helvering*, 301 U.S. at 646 (upholding provisions of Social Security Act that provided for old age pension program).

348. *See id.* at 640.

349. *Id.*

350. *Id.* at 641.

351. *Id.*

352. *See id.* at 641-42 (describing reports that concluded unemployment among older citizens is national problem).

353. *See, e.g.*, United States v. Butler, 297 U.S. 1, 78 (1936) (holding that Congress is not limited to specific powers in Article I of Constitution when exercising spending power).

354. 330 U.S. 127 (1947).

provisions of the Hatch Act.[355] The section at issue prohibited employees of any State or local agency "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States" from taking part in political management or political campaigns.[356] A member of the Oklahoma State Highway Commission participated in a fundraiser for the Democratic National Committee, and the Civil Service Commission (CSC) determined that his activities warranted his removal from office.[357] In the alternative, the CSC recommended that certain highway grants to Oklahoma be withheld "in an amount equal to two years compensation [of the state employee]."[358] The State of Oklahoma argued, inter alia, that the Hatch Act violated the Tenth Amendment.[359] The State argued that the coercive effect of the statute (forcing the state to fire the employee or lose funds) acts as an interference with the reserved powers of the state.[360]

The Court found section 12 of the Hatch Act constitutional.[361] Congress has the power "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[362] The fact that Congress' action affects activities within a state does not "[make] the federal act invalid."[363] The Court specifically held that the "Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case."[364] The end sought by Congress was "better public service," and although the action taken by Congress affects activities within the State of Oklahoma, the in-state effect does not render the federal act invalid.[365]

In *Pennhurst State School & Hospital v. Halderman*,[366] the plaintiffs sued the State of Pennsylvania under numerous federal statutes, alleging inhumane, dangerous and unsanitary conditions in a state-owned and operated home for mentally and physically disabled residents.[367] The primary federal statute at issue, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, is part of a federal-state grant program wherein the

355. *See Civil Serv. Comm'n*, 330 U.S. at 129-33.

356. *See id.* at 129 n.1 (quoting Hatch Act, ch. 410, § 9(a), 53 Stat. 1147, 1148 (1939), *amended by* Act of July 19, 1940, ch. 640, § 12(a), 54 Stat. 767 (1940) (codified as amended at 18 U.S.C. § 595 (1994))).

357. *See id.* at 130-33 (stating that Highway Commissioner was also chairman of Democratic State Central Committee for Oklahoma and involved in political fundraising).

358. *Id.* at 133.

359. *See id.* at 142.

360. *See id.*

361. *See id.* at 146.

362. *Id.* at 143 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

363. *Id.*

364. *Id.*

365. *Id.*

366. 451 U.S. 1 (1981).

367. *See Pennhurst*, 451 U.S. at 6.

federal government provides financial assistance to participating states to aid them in creating programs to care for and treat the developmentally disabled.[368] The State argued that the Act did not impose affirmative obligations on the State and if it did, Congress is not authorized to do so under either its Spending Clause power or section 5 of the Fourteenth Amendment.[369] The Court ultimately agreed with the State and held that the Act does not impose any affirmative obligations on the states.[370]

In the course of its analysis, the Court stated that "our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."[371] The Court distinguished Congress' powers under the Spending Clause from those under section 5 and likened spending powers to a contract: "[L]egislation enacted pursuant to the spending power is much more in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[372] The "contract" is formed and becomes legitimate when the State "voluntarily and knowingly" accepts the terms of the "contract."[373] Thus, Congress is required to impose any conditions unambiguously and explicitly.

Six years after *Pennhurst*, the Court again turned to the question of highway funding. In *South Dakota v. Dole*,[374] the Court upheld a federal statute that premised full highway funding on a state-mandated drinking age of twenty-one.[375] The State of South Dakota allowed persons nineteen years of age to drink 3.2% alcohol.[376] Pursuant to a 1984 statute, the Secretary of Transportation withheld 5% of the highway funding for South Dakota.[377] The State of South Dakota argued that the Act interfered with the states' rights under the Twenty-First Amendment.[378] The Court held that Congress' indirect regulation of the drinking age is a constitutional exercise of Spending Clause power even though Congress could not regulate the same issue directly.[379]

The Court reiterated that Congress may attach conditions to the receipt of federal funds and may use its power to further broad policy objectives.[380] However, the conditions attached must refer to the material

368. *See id.* at 11-12.
369. *See id.* at 10.
370. *See id.*
371. *Id.* at 17.
372. *Id.*
373. *See id.*
374. 483 U.S. 203 (1987).
375. *See Dole*, 483 U.S. at 211-12.
376. *See id.* at 205.
377. *See id.*
378. *See id.*
379. *See id.* at 207.
380. *See id.*

substance of the funds. The Court specifically mentioned Congress requiring compliance with federal statutory and administrative directives.[381]

The Court set out a four-part test to judge whether Congress has acted within the bounds of its Spending Clause powers. Despite the creation of seemingly rigid "test," in the past the Court has reviewed exercises of the spending power with deference to Congress.[382] First, the spending power must be in pursuit of the general welfare.[383] In determining whether a particular expenditure is in pursuit of the general welfare, "courts should defer substantially to the judgment of Congress."[384] Second, Congress must state any condition unambiguously "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[385] Third, the Court stated that conditions may be unlawful if such conditions are unrelated "to the federal interest in particular national projects or programs."[386] Finally, Congress may not be able to exercise its Spending Clause powers if there is an independent bar based on some other constitutional provisions.[387]

In application, the Court found the test easily met.[388] The Court held that the desire of Congress to reduce the combination of drinking and driving in young persons was "reasonably calculated to advance the general welfare."[389] Further, the conditions upon which States receive the funds "could not be more clearly stated."[390] The State admitted that the condition (twenty-one year old drinking age) was related to a national concern "in the absence of the Twenty-First Amendment."[391] As the Court found, the condition imposed is "directly related to one of the main purposes for which highway funds are expended-safe interstate travel."[392] The Court rejected a request by amici to limit the spending powers to conditions that relate directly to the purpose of the expenditure to which it is attached.[393] The Court sidestepped defining the exact boundaries of this requirement: "Our cases have not required that we define the outer

381. *See id.* at 207-08 (describing scope of spending power and conditional grants).

382. *See* MICHAEL SELMI, REMEDYING SOCIETAL DISCRIMINATION THROUGH THE GOVERNMENT'S SPENDING POWERS 51 (George Washington Univ. School of Law, Pub. Law & Legal Theory, Working Paper No. 10, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=266481.

383. *See Dole*, 483 U.S. at 207-08.

384. *Id.* at 207.

385. *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)).

386. *Id.* at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

387. *See id.* at 208.

388. *See id.* at 211-12.

389. *Id.* at 208.

390. *Id.*

391. *Id.*

392. *Id.*

393. *See id.* at 208 n.3.

bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power."[394]

The Court then turned to the remaining prong—the independent constitutional bar. The Court rejected the State's argument that the Twenty-First Amendment, by placing the power to regulate alcohol in the States, formed an independent bar to attaching such conditions on federal grants.[395] The independent constitutional bar is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[396] As the Court noted, "[i]nstead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[397] In other words, "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power."[398]

Given the current make-up and disposition of the Court, Justice O'Connor's dissent deserves some attention. She disagreed not in the test set forth, but in the application of that test. She focused on the requirement that the condition imposed be reasonably related to the purpose of the federal program. O'Connor quoted with approval a statement from a brief by one of the amici:

> Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.[399]

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394. *Id.*

395. *See id.* at 209.

396. *Id.* at 210.

397. *Id.*

398. *Id.* at 210-11. The Court has, in other contexts, upheld funding decisions against constitutional attack. For example, in *Rust v. Sullivan*, the Court upheld the "gag rule" under which certain grantees under provisions of the Public Health Service Act were prohibited from counseling about referrals for, or activities advocating, abortion. 500 U.S. 173, 177-78 (1991). Physicians and other grantees challenged the rule as violative of the First and Fifth Amendments. The Court held:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time, funding an alternative program which seeks to deal with the problem in another way.

Rust, 500 U.S. at 193.

Further, in *NEA v. Finley*, the Court upheld funding decisions by the NEA that relied on "general standards of decency." 524 U.S. 569, 572 (1998). Against a First Amendment claim, the Court reiterated that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake." *Finley*, 524 U.S. at 587.

399. *See Dole*, 483 U.S. at 216 (O'Connor, J., dissenting).

Additionally, O'Connor discussed prior decisions and noted that all cases in which the Court approved the imposition of conditions on the states involved either conditions directly related to the expenditure of those funds or justified under some other regulatory power of Congress.[400] In the case of the minimum drinking age, O'Connor found no alternative regulatory power—the Commerce Clause authority was barred under the Twenty-First Amendment.[401] In addition, she found that raising the drinking age to twenty-one was not reasonably related to the expenditure of funds for highway construction.[402] If the primary concern of Congress was highway safety, then the Act is both over- and under-inclusive. To the extent Congress was concerned with young people drinking and driving, decreasing drinking and driving on interstate highways would not address the problem of young people drinking and driving on state roads, nor the problem of those over twenty-one drinking and driving on any road. Further, the Act deters those under twenty-one from drinking even when they are not able to drive on interstate highways.[403] Thus, under O'Connor's formulation, the third requirement in *Dole* requires a strong and direct connection between the condition imposed and the use of the funds or the exercise of regulatory power.

Almost ten years ago, the Court again faced a line-drawing problem between coercion and proper Spending Clause conditions. In *New York v. United States*,[404] the Court examined the Low-Level Radioactive Waste Policy Amendments Act of 1985.[405] Congress enacted the statute when faced with a shortage of disposal sites for low level radioactive waste.[406] The Act requires states to provide for the disposal of waste generated within their borders and sets forth incentives for states to comply with that obligation.[407]

The first set of incentives, monetary incentives, requires states to make payments into an escrow account maintained by the Secretary of Energy.[408] The Secretary then makes payments to those states that have complied with a series of deadlines. States unable to comply with the deadlines must either take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it has received.[409]

400. *See id.* at 217 (O'Connor, J., dissenting) (citing Oklahoma v. CSC, 330 U.S. 127 (1947), as example of condition directly related to how funds are expended and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as example of otherwise valid regulation under both Commerce Clause and section 5 of Fourteenth Amendment).

401. *See id.* at 218 (O'Connor, J., dissenting).

402. *See id.*

403. *Id.* at 214-15 (O'Connor, J., dissenting).

404. 505 U.S. 144 (1992).

405. *See New York*, 505 U.S. at 149.

406. *See id.* at 150.

407. *See id.* at 150-51.

408. *See id.* at 151-54.

409. *See id.* at 153.

Through the second set of incentives, states failing to meet the deadline may be charged twice the ordinary charge and may be denied access to the disposal facilities thereafter.[410] Finally, the third type of incentive requires, in part, any state unable to provide for the disposal of all low-level radioactive waste to take title to the waste at the request of the generator or owner of the waste.[411]

The State of New York challenged these "incentives" as violative of the Tenth Amendment.[412] The Court noted that if Congress acts properly under one of its Article I powers, then it has not invaded the state's sovereignty under the Tenth Amendment.[413] Thus, the Court turned to the question of whether Congress acted properly under its Spending Clause powers.

The Court rejected the arguments as to the first two incentives, finding the creation of an escrow account and the access incentives to be within the commerce and spending powers and thus not a violation of the Tenth Amendment.[414] Congress, although it has no power to directly compel state action, can induce behavior by placing conditions on grants.[415] However, the Court found the "take title" provisions to be unconstitutional as outside the scope of enumerated powers.[416] Congress has no power to force the states to take title nor to provide a direct order to regulate. Necessarily, therefore, Congress does not have the authority to offer the states a choice between the two.[417] However, where Congress has the authority to regulate private activity under the Commerce Clause, "we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."[418] Thus, the current law on Spending

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410. *See id.*

411. *See id.* at 153-54. The statute provides:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C) (1994).

412. *See New York*, 505 U.S. at 154.

413. *See id.* at 155-56.

414. *See id.* at 171-74.

415. *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 33, at 204 (stating that Congress can constitutionally place conditions on federal grants).

416. *See New York*, 505 U.S. at 174-77.

417. *See id.*

418. *Id.* at 167.

Clause legislation requires Congress to avoid "commandeering" the states by requiring the states to legislate and to meet the four part *Dole* test.

2. *Waiver of Immunity As a Condition of Receipt of Funds Under the Spending Clause*

Finally, the Supreme Court has addressed the specific question of state waiver of immunity as a condition to federal funds.[419] Though the Court in these cases found that the necessary conditions for waiver had not been met, it left open the possibility that a future enactment of Congress would meet such conditions.[420] In *Edelman v. Jordan*,[421] the plaintiff alleged that state officials had administered funds under the federal Aid to the Aged, Blind, or Disabled program in a manner inconsistent with the program and the Fourteenth Amendment.[422] The district court found for the plaintiff and ordered retroactive relief paid to the plaintiff.[423] On appeal, the State raised the Eleventh Amendment as a bar to the district court's decision.[424] The Court of Appeals found that the State had constructively consented to the suit by participating in the federal program and agreeing to administer the program in compliance with federal law.[425] The Supreme Court reversed.[426] The Court found constructive consent and constructive waivers inapplicable to state constitutional rights: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."[427] The Court specifically found that mere participation in a federal program does not constitute consent on the part of a state to be sued in federal court.[428] Further, the provisions in federal programs that provide for the sanction of fund termination if a recipient violates the program guidelines do not, "by its terms . . . authorize suit against anyone, and standing alone, fell far short of a waiver by a participating State of its Eleventh Amendment immunity."[429] Rather, the Court required a clear statement of Congress' intent to waive state's immunity by participation in a program.[430]

419. For a discussion of these cases, see *infra* notes 421-50 and accompanying text.

420. *See generally* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (recognizing Congress' discretion to create different conditions and encourage specific goals under Spending Clause); South Dakota v. Dole, 483 U.S. 203 (1987) (same).

421. 415 U.S. 651 (1974).

422. *See Edelman*, 415 U.S. at 653.

423. *See id.* at 656 (stating that state officials were required to release wrongfully withheld benefits).

424. *See id.* at 657-58.

425. *See id.* at 673.

426. *See id.* at 678.

427. *Id.* at 673.

428. *See id.*

429. *Id.* at 674.

430. *See id.* at 673 (requiring "express language" or "overwhelming implication" of waiver). The Court also determined that the court of appeals erred in

Eleven years later, the Court reiterated this test. In *Atascadero State Hospital v. Scanlon*,[431] the plaintiff alleged that the state-owned and state-operated hospital denied him employment based on his disability and sought retroactive relief against the state.[432] The plaintiff relied on section 505 of the Rehabilitation Act, which makes recipients of federal funds subject to sanctions.[433] The State asserted Eleventh Amendment immunity.[434] The Court rejected the plaintiff's arguments that the State had waived its immunity under part of the California Constitution or by the acceptance of the federal funds under the program.[435]

The Court termed the test for voluntary waiver of immunity "a stringent one."[436] A general waiver of immunity by a state is not sufficient to meet this test; rather, the state must clearly indicate that it is waiving its immunity to suit in federal court.[437] Turning to the question of the State's waiver based on its acceptance of funds, the Court again imposed a "clear statement" test.[438] The Court stated that the "mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[439] In interpreting the Rehabilitation Act itself, the Court found that the Act "falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."[440]

These cases provide important precedent to the continued vitality of Spending Clause legislation to carry out the purposes of anti-discrimination laws. First, although the Court found that neither the Rehabilitation Act nor the Aid to the Aged, Blind and Disabled Act evinced a clear intent to condition participation on state's consent to waive immunity, the Court left open the possibility that other congressional enactments will do so. Second, in *Atascadero*, the Court addressed the question of the State's con-

awarding retroactive payments. *See id.* at 678. The Court held that where a monetary award will be paid from the state treasury, even if technically an award against a state official, the Eleventh Amendment bars the award. *See id.* at 663-72.

431. 473 U.S. 234 (1985).

432. *See Atascadero*, 473 U.S. at 236. The respondent suffered from diabetes mellitus and had no sight in one eye. *See id.*

433. *See id.*

434. *See id.*

435. *See id.* at 243, 246-47 (stating that Congress must express its intention in "unmistakable language" to abrogate Eleventh Amendment immunity and "mere receipt of federal funds" does not establish consent to suit by state).

436. *Id.* at 241.

437. *See id.* at 243 (stating that consent must be through "unmistakable language"). The Court found that Article III, § 5 of the California Constitution did not meet this test. *See id.* at 241 (stating that section 5 did not constitute waiver). Section 5 states: "'Suits may be brought against the State in such manner and in such courts as shall be directed by law.'" *Id.* (quoting CAL. CONST., art. III, § 5). Because this waiver does not "specify the State's intention to subject itself to suit in federal court," it does not waive the State's immunity from such suits. *See id.*

438. *See id.* at 243.

439. *Id.* at 246-47.

440. *Id.* at 247.

sent to suit as a separate analytical question from congressional waiver pursuant to section 5. Because the Court treated these possibilities as separate avenues to the ability to sue states in federal courts, there is a strong argument that the recent section 5 cases should be considered to have no bearing on Spending Clause legislation.

The most recent decision in this area provides further support for this argument. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court found that Florida had not voluntarily waived its immunity.[441] First, the Court reiterated the "stringent" test of an unequivocal waiver. The Court found no such express waiver.[442] Second, the Court rejected the argument that Florida, by choosing to engage in interstate commerce, constructively waived its immunity.[443] The Court stated that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."[444] Perhaps the most troubling comment for a Spending Clause solution is Justice Scalia's statement that "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin."[445] Upon closer inspection, *Florida Prepaid* is not an obstacle to the Spending Clause solution.[446]

First, in *Florida Prepaid*, Congress attempted to waive states' immunity for false and misleading advertising when states choose to engage in certain interstate commerce.[447] Because Congress' attempted waiver occurred when states engaged in otherwise lawful behavior, the Court found no authority to waive.[448] In contrast, the Court has often recognized the ability of Congress to place conditions, including waiver of immunity, on the receipt of federal funds.[449] The attempted waiver in *Florida Prepaid* did not come from the receipt of federal funds, but rather the state's involve-

441. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999).

442. *See id.* at 675-76.

443. *See id.* at 680-83.

444. *Id.* at 683.

445. *Id.*

446. *See* Gordon L. Hamrick, IV, Comment, *Roving Federalism: Waiver Doctrine After* College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 49 EMORY L.J. 859, 897 (2000) (arguing that *Florida Prepaid* supports "waivers of immunity based on state participation in federal spending programs when receipt of federal funds is conditioned expressly on such waivers").

447. *See Coll. Sav. Bank*, 527 U.S. at 671.

448. *See id.* at 680.

449. *See* Atascadero v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("A State may . . . [waive] immunity to suit in the context of a particular federal program, [provided the federal law contains] an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (stating that state's consent to suit by accepting federal funds must be "unequivocally expressed").

ment in interstate commerce. Second, there was no express waiver by the state.[450] My proposed solution, in addition to focusing on the Spending Clause, involves an express statement of the congressional intent to subject states to suit.

D. *Current Anti-Discrimination Spending Clause Legislation*

Two prime examples of anti-discrimination Spending Clause legislation are Title VI[451] and Title IX.[452] Title VI is part of the 1964 Civil Rights Act and Title IX came about through the Education Amendments of 1972.[453] Title VI prohibits discrimination on the basis of race in any program that receives federal funding:

> No person in the United States, shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[454]

Title IX was modeled after Title VI.[455] Title IX was enacted in an attempt to remedy the inequities suffered by women and girls in education.[456] The statute provides:

> No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal funds.[457]

It is generally accepted that Title IX was enacted pursuant to Congress' spending power, although the Supreme Court has never addressed

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450. *See Coll. Sav. Bank*, 527 U.S. at 680-81.

451. 42 U.S.C. § 2000(d) (1994).

452. 20 U.S.C. §§ 1681-1683, 1685, 1686 (1994).

453. *Id.* §§ 1681-1683, 1685, 1686.

454. 42 U.S.C. § 2000(d).

455. *See* Diane Heckman, *Women and Athletics: A Twenty-Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 (1992) (reviewing history of Title IX). The uncertainty of schools regarding implementation of Title IX led to HEW's issuance of a policy interpretation in 1979. *See id.* In 1980, the regulations were recodified with the establishment of the Department of Education, which was given authority to oversee compliance with Title IX. *See id.* at 14 (noting procedure of codification); *see also* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (stating that Title IX is expressly modeled after Title VI). The Supreme Court has recognized the relevance of looking to the body of the law developed under Title VI when answering Title IX questions. *See* Grove City Coll. v. Bell, 465 U.S. 555, 556 (1984), *overruled by* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 56 U.S.L.W. 45 (1988).

456. 20 U.S.C. § 1681 (2000); *see* Felice Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does Not Exist*, 19 QUINNIPIAC L. REV. 67, 74 (2000) (stating that Congress enacted Title IX in response to findings of discrimination against women in education).

457. 20 U.S.C. § 1681 (1988).

this issue directly.[458] It is unclear whether Congress enacted Title IX and § 2000d-7 pursuant to its Spending Clause powers or its section 5 powers. When Congress enacted the statutes, it did not expressly state its authority for doing so. The Supreme Court has never decided the issue.[459] At least one court has assumed that both statutes were passed pursuant to the Fourteenth Amendment.[460]

Congress, in enacting Title VI and Title IX, failed to provide answers to several important questions: 1) whether these statutes prohibit intentional discrimination only or do they encompass acts which have a disparate impact; 2) whether a private right of action is available to enforce these statutes; and, if so, 3) what remedies are available. Federal agencies provided their own answers to these questions by promulgating regulations that interpreted Title VI and Title IX to forbid actions with a disparate impact.[461] As the regulations were challenged, the Supreme Court, in a series of cases, answered the above questions.

The question of intent or effects under these statutes has a scattered history. In *Lau v. Nichols*,[462] the Court held that Title VI prohibits both intentional and unintentional discrimination.[463] The plaintiffs raised

458. *See* Jill Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation for Standards of Compliance*, 74 B.U. L. REV. 553, 559 (1994) (describing procedures for enforcement of statute). The procedures for enforcement are similar to those for Title VI. *See id.*

459. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (treating Title IX as legislation enacted pursuant to Congress' power under Spending Clause). The Court also did not take the opportunity to examine the issue in *Geyser v. Lago Vista Independent School District* and *Franklin v. Gwinnett County Public Schools*. *See id.* (stating that *Geyser* and *Franklin* treated Title IX as enacted pursuant to Spending Clause).

460. *See* Franks v. Ky. Sch. for the Deaf, 956 F. Supp. 741, 750-51 (E.D. Ky. 1996) (finding that Title IX and section 2000d-7 were enacted pursuant to Fourteenth Amendment).

461. *See, e.g.*, Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (1994) (giving Department of Heath and Human Services authority to issue regulations interpreting Title VI). The regulation states:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

45 C.F.R. § 80.3(b)(2) (2001) (emphasis added).

462. 414 U.S. 563 (1974).

463. *See Lau*, 414 U.S. at 568. In *Lau*, non-English speaking Chinese students challenged the failure of the San Francisco School Board to provide remedial education. *See id.* at 564-65 (stating facts). The Court avoided the Equal Protection Clause claim and decided the case under Title VI. *See id.* at 566-67. Relying on

both an Equal Protection Clause challenge and a Title VI challenge.[464] The Court avoided the question under the Equal Protection Clause and decided instead the reach of Title VI. Relying on the agency regulations promulgated to effectuate the purposes of Title VI, the Court found that an action by a recipient of federal funds with discriminatory effects fell within the purview of Title VI although outside the purview of the Equal Protection Clause.[465] However, in *Regents of University of California v. Bakke*,[466] five Justices held that the reach of Title VI is tied to that of the Constitution.[467] Therefore, due to the *Feeney-Washington-Arlington Heights* trilogy, Title VI could not reach disparate impact. Despite *Bakke*, the Court reaffirmed an "effects" test in a post-*Bakke* decision.[468] In 1979, in *Fullilove v. Klutnick*,[469] the Court upheld a minority set-aside program.[470] Under the Public Works Employment Act of 1977, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members.[471] Plaintiffs charged that the minority set-aside violated the Equal Protection Clause and Title VI.[472] The *Fullilove* plurality found that Title VI was not violated by the set-aside program and in doing so, referred with approval to the opinion in *Lau*.[473]

Such was the state of the law when the Court provided a fractured answer to the effects or intent question in *Guardians Ass'n v. Civil Service Commission*.[474] In *Guardians*, African-American and Hispanic police officers challenged written examinations offered by the New York City police department.[475] The lower court found that the examinations had a disparate impact on the plaintiffs and was not job related.[476] Although the plaintiffs were hired as police officers, they were hired later than similarly-situated whites.[477] The difference in hiring date led to weaker seniority and related benefits.[478] Thus, during a lay-off, the officers with the lowest

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regulations issued by HEW, the Court found that plaintiffs properly stated a claim for a discriminatory effect of the school board's English only policy. *See id.* at 568.

464. *See id.* at 566-68.

465. *See id.* at 568-69.

466. 438 U.S. 265 (1978).

467. *See Bakke*, 438 U.S. at 281-87 (finding that Title VI addresses only racial classifications that would violate Equal Protection Clause); *see also* Alexander v. Sandoval, 121 S. Ct. 1511, 1516 (2001) (stating that "§ 601 [of Title VI] prohibits only intentional discrimination") (citing *Bakke*, 438 U.S. at 328).

468. *See* Fullilove v. Klutnick, 448 U.S. 448, 479-80 (1980).

469. 448 U.S. 448 (1980).

470. *See Fullilove*, 448 U.S. at 492.

471. *See id.* at 454.

472. *See id.* at 455.

473. *See id.* at 479-80.

474. 463 U.S. 582 (1983).

475. *See Guardians*, 463 U.S. at 585.

476. *See id.* at 586.

477. *See id.* at 585.

478. *See id.*

scores (predominantly African-American and Hispanic officers) on the test were "first-fired."[479]

Turning to the question of disparate impact, three justices held that although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate impact standard are valid.[480] Justice White agreed that, if Title VI does not prohibit disparate impact discrimination on its face, the administrative regulations prohibiting such are valid.[481] Justice Marshall found that Title VI itself prohibits disparate impact discrimination.[482] Thus, a majority of justices held that in an action to enforce the regulations promulgated under Title VI, a disparate impact claim may be brought.[483] In addition, a majority of the justices found that proof of discriminatory intent is required to prove a violation of the statute itself.[484]

It is now established that although both Title IX and Title VI expressly provide only an administrative remedy, courts have implied a private right of action.[485] In *Guardians*, the justices agreed that Title VI created an implied private right of action.[486] After discussing prior opinions wherein a private right of action was assumed or explicitly approved by a minority of justices, the Court relied on a Title IX case.[487] In *Cannon v. University of Chicago*,[488] the Court noted that Congress understood private remedies to be available under Title VI and wished Title IX to be similar legislation.[489] Generally, an educational organization can be held liable under the statute if the statute clearly put the organization on notice that it was subject

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479. *See id.*

480. *See id.* at 591.

481. *See id.* at 591-93.

482. *See id.* at 615 (Marshall, J., dissenting); *see also* Selmi, supra note 382, at 7 ("Title VI can be interpreted through the government's spending power as a condition for the receipt of those funds.").

483. *See Guardians*, 463 U.S. at 607 n.27. The Court indicated that an action to enforce the disparate impact provisions of the Title VI regulations would necessarily be brought pursuant to 42 U.S.C. § 1983. *See id.* at 608 n.1 (stating that it "seem[s] that the regulations may be enforced only in a suit pursuant to 42 U.S.C. § 1983"); *see also* Alexander v. Sandoval, 121 S. Ct. 1511, 1517 (2001) (stating that while no opinion of this Court held so, five Justices in *Guardians* voiced view that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups.").

484. *See Guardians*, 463 U.S. at 608 n.1.

485. *See generally Guardians*, 463 U.S. 582 (implying private right of action under Title IX and Title VI); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (finding that Title IX implies private right of action).

486. *See Guardians*, 463 U.S. at 600-03.

487. *See id.* at 608-10 (Powell, J., concurring) (subjecting Title VI to analysis espoused in *Cannon*).

488. 441 U.S. 677 (1979).

489. *See Cannon*, 441 U.S. at 694-96.

to the law. Part of the requirement of notice can be shown by the school's deliberate indifference toward discrimination occurring within it.[490]

Turning to the question of remedies, Justice White rejected the notion of the availability of "make whole" remedies.[491] Recognizing the general rule from *Bell v. Hood*[492] that a federal court may use any available remedy to afford full relief, the Court found such a rule inappropriate for private actions brought under Spending Clause legislation.[493] A violation of either Title VI or Title IX can result in cancellation of federal funds to the recipient school until it comes into compliance.[494] The Department of Education, through its Office of Civil Rights, is responsible for enforcing Title IX.[495]

Finally, the courts have addressed the question of waiver of states' immunity under these anti-discrimination Spending Clause statutes.[496] Title IX conditions funds on recipients' consent to being sued under the statute

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490. *See* Geyser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-91 (1998) (describing "deliberate indifference" that equals notice).

491. *See Guardians*, 463 U.S. at 595.

492. 327 U.S. 678 (1946).

493. *See Guardians*, 463 U.S. at 595-96.

494. *See* Heckman, *supra* note 455, at 9-14 (describing overview of Title IX). "Recipient" of federal funds under the statute has developed to include schools that receive any type of federal funds. *See* Johnson, *supra* note 458, at 560 (describing history of defining which institutions are under control of statute). Originally, parties were confused as to whether the statute applied institution-wide or only program-wide. *See id.* (same). The program-specific view supposed that Title IX applied only to the programs that directly received federal funding. *See id.* On the other hand, the institution-wide view asserted that the whole institution is subject to Title IX provisions if any part receives federal funds. *See id.* The Supreme Court resolved the breadth of the statute's application in the rejection of the institution wide theory. *See* Grove City v. Bell, 465 U.S. 555, 573 (1984) (holding that entire school would not be subject to Title IX merely because one student or department received federal grant money). Congress responded by introducing a bill that would mandate the institution-wide approach. *See* B. Glenn George, *Sports Law in the 21st Century: Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 274 (1999) (noting that Congress effectively overturned *Grove City* decision). The Civil Rights Restoration Act of 1987, 102 Stat. 28, substituted a broader meaning and countermanded the program-specific ruling of *Grove City*. *See id.* (noting that Congress intended to clarify meaning of Title IX with replacement of "recipient" with "program or activity"). As long as a single program within a school received federal funds, the institution would fall under Title IX's scope. *See id.* In addition, once a school was established as a recipient, there was an implied right of action against it that provided for a damages remedy. *See* Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 690 (6th Cir. 2000) (stating that there is remedy for damages under Title IX) (citing Franklin v. Gwinnett County Public Schs., 503 U.S. 60, 74 (1992)). Other courts have analyzed the definition of recipient. *See Horner*, 206 F.3d at 687 (6th Cir. 2000) (defining recipient high school); Haffer v Temple Univ., 688 F.2d 14, 16 (3d Cir. 1982) (defining recipient standard under Title IX); O'Conner v. Bd. of Educ., 645 F.2d 578, 582 (7th Cir. 1981) (same).

495. *See* Heckman, *supra* note 455, at 14.

496. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 632-33 (1999).

for a breach of the promise not to discriminate.[497] The Rehabilitation Act Amendments of 1986[498] provide that states are not immune from suit for a violation of Title VI or Title IX.[499] Thus, Congress showed its intent to abrogate the States' Eleventh Amendment immunity in these cases.[500] Every circuit court to consider the issue has found section 2000d-7 to constitute a clear statement waiver of state immunity in exchange for receipt of federal funds.[501]

V. RE-ENACTING DISPARATE IMPACT CLAIMS AGAINST STATES UNDER THE SPENDING CLAUSE POWERS

In order to preserve disparate impact claims now employed under Title VII, Congress should enact new legislation pursuant to the Spending Clause power and utilize the current jurisprudence under Title VI and Title IX as a guide. These statutes do not currently provide a remedy for this future problem. Title VI expressly does not reach employment and the circuits are split as to whether Title IX does so.[502] In looking to the

497. *See id.*

498. 42 U.S.C. § 2000d-7 (1988).

499. *See id.* § 2000d-7(a)(1)-(2) (providing that states are not immune from suit for violations of Title VI or Title IX). The statute states:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of . . . title IX . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of federal financial assistance.
>
> (2) In a suit against a state for a violation of a statute referred to in paragraph (1), remedies . . . are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a state.

Id.

500. *See* Lane v. Pena, 518 U.S. 187, 200 (1996) ("Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in § 1003."); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 71-73 (1992) (finding that Congress effectively ratified traditional assumption in favor of waiver of immunity in Title IX); Sandoval v. Hagan, 197 F.3d 484, 493 (11th Cir. 1999) ("Neither side disputes that Title VI, Section 2000d-7 of the Rehabilitation Act Amendments of 1986, explicitly waives state sovereign immunity for Title VI suits in accordance with the *Atascadero* waiver formula.").

501. *See Sandoval*, 197 F.3d at 493-94 (collecting cases).

502. *See* Clinger v. N.M. Highlands Univ., 215 F.3d 1162, 1168 (10th Cir. 2000) ("Both Title VII and Title IX prohibit discrimination on the basis of sex. . . . We find no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits.") (quoting Mabry v. State Bd. of Cmty. Coll. & Occupational Educ., 813 F.2d 311, 316 (10th Cir. 1987)); Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1182 (9th Cir. 1999) (relying on Court's "broad" interpretation of Title IX that "favor[ed]" inclusion of employees); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655 (5th Cir. 1997) (following *Mabry*); Cohen v. Brown Univ., 101 F.3d 155, 176-77 (1st Cir. 1996) (finding Title VII standards inapplicable to Title XI, which have different purpose). Further, to the extent that Title IX covers employment actions, it is limited to actions within the context of an educational program and to claims based on sex discrimination. *See* 20 U.S.C. § 1681(a) (1994) (stating that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits

lessons of Title VI and Title IX, several recurring—and easily fixable—problems emerge: first, the question of intent to cover disparate impact claims; second, the intent to create a private right of action; third, the remedies available for the violations of the statute; fourth, the intent to subject states to suit; and, fifth, providing explicit notice to states of parameters for the disparate impact claim.

Congress should pass a new statute that clearly addresses the problems encountered in Title VI and Title IX claims and that prohibits the use of devices, tests and requirements that create a disproportionate impact in employment on the basis of race, color, national origin, sex or religion. In doing so, Congress should refer explicitly to its powers under the Spending Clause (as opposed to section 5 of the Equal Protection Clause). Any future anti-discrimination legislation should include within the statute a clear statement of the existence of a private right of action, the remedies available for violations and a statement of intent to waive states' immunity from suit in federal court. Further, the statutes themselves should prohibit actions that have a disparate impact on a protected class.[503] An express inclusion of disparate impact in the statute will avoid the past gymnastics that courts have engaged in to determine whether the statute itself or the implementing regulations create an implied right of action for disparate impact.[504] To meet these requirements, I propose the following model statute to be included in congressional enactments that provide funds to states:

In the exercise of the powers provided to Congress in Article I, section 8, clause 1, we hereby impose the following conditions upon the receipt of funds under [this Act]:

(a) A State recipient of funds under [this Act] shall not through its actions or the use of neutral devices operate to create a disparate impact in employment on the basis of race, color, national origin, sex or religion.
(b) By accepting funds pursuant to [this Act], the State waives its Eleventh Amendment immunity to suit in federal court.
(c) Any person who is the subject of a device employed by a State that creates a disparate impact in the context of employment in programs administered under [this Act] on the basis of race, color, national origin, sex or religion has the right to sue the State in federal court.
(d) The federal agency charged with implementing the funds pursuant to [this Act] has the power to promulgate regulations and bring enforce-

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of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

503. Such an explicit statement will allow for private causes of action and avoid the problems of *Alexander v. Sandoval*. *See supra* notes 462-84.

504. *See generally* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (holding that regulations create implied right of action); Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997) (finding private right of action under regulations), *rev'd*, 524 U.S. 974 (1998).

ment actions to prevent the occurrence of employment practices with a disparate impact.

The statute focuses on state recipients of funds because Congress retains the power under the Commerce Clause to regulate private employers. In addition, the statute focuses on disparate impact because Congress, pursuant to its section 5 enforcement powers, may waive the sovereign immunity of states for acts of intentional discrimination. This model statute is intended to cover any federal program. For example, if a state receives money through the federal government under the VAWA for "law enforcement, prosecution [and] victim agencies,"[505] state workers employed in such programs would be covered by the model statute.

With statutory interpretation questions answered, there are two remaining issues: first, whether the recent federalism cases impact on Congress' ability to condition the receipt of federal funds on a state waiver of immunity; and, if not, then second, whether disparate impact legislation meets the *Dole* test. Disparate impact claims under Spending Clause powers survive both these tests.

The first requirement under *Dole* is that the spending power must be in pursuit of the general welfare.[506] Although in *Dole* and prior cases the Court adopted a deferential stance in relation to Congress' determination of what constitutes the general welfare,[507] the current hostility between the Court and Congress may render this deference a relic of the past.[508] Despite this new climate, anti-discrimination conditions will meet this general welfare test. In *Fullilove*, the Court noted that Congress has sought to "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[509] In the past, the Court has approved such policy objectives as the safe disposal of radioactive waste,[510] "better public service by

505. *See* Urban Coordinating Council, NJ Guide to State Resources, *available at* http://www.state.nj.us/dca/one/lpsfsp.htm (last visited Oct. 1, 2001) (listing federal and state grant programs that may be awarded to local municipalities); North Dakota Dept. of Public Instruction, Description of Federal Grants Administered by DPI, *available at* http://www.dpi.state.nd.us/grants/grntdesc.shtm (last visited Oct. 1, 2001) (listing sources of federal grant to Department of Public Instruction).

506. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

507. *See, e.g.*, Helvering v. Davis, 301 U.S. 619, 645 (1937) ("When [Federal] money is spent to promote the general welfare, the concept of welfare of the opposite is shaped by Congress, not the states.").

508. Deference previously accorded to Congress by the Court has diminished in recent years, particularly in the area of legislative findings. *See* Christopher J. Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 331 (2001) ("Until recently the Court did not make the constitutionality of federal statutes depend on Congress supporting its formal finding with record evidence, at least outside the narrow categories of laws subject to the strictest judicial scrutiny.").

509. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

510. New York v. United States, 505 U.S. 144, 149 (1992).

those who administer funds for national needs,"[511] and reducing drinking and driving on the nation's highways.[512] More on point, however, are the congressional attempts to remedy unemployment and to reduce discrimination in employment in public contracting. In *Steward*, the Court upheld the Social Security Act as a valid exercise of congressional spending powers.[513] The Court found the desire to remedy the unemployment crisis during the Depression was a matter of national concern and therefore within the general welfare. Further, and more on point, the Court upheld the minority business set aside program in *Fullilove* whereby public contractors must make good faith efforts to provide 10% of the contracts to minority-owned businesses. Pursuant to the Public Works Employment Act, "grantees who elect to participate [in receiving public contracts] would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities."[514] After concluding that the objectives of the set-aside could be achieved under the Commerce Clause, the Court held "that in this respect the objectives of the MBE provision are within the scope of the Spending Power."[515] Further, the Court used language that resembles the description of disparate impact claims. "The MBE participation requirement is directed at the utilization of criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations."[516] In light of the broad policy objectives approved in the past and the specific approval of a minority set-aside in *Fullilove*, the use of spending powers to prevent states from creating a disparate impact on employees is within the current understanding of the "general welfare."[517]

Second, Congress must state any condition unambiguously, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[518] As I have previously stated, I recommend that Congress enact a waiver in the new legislation similar to the

511. Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947). In this case, the Court approved the restriction of partisan political activities by "those who administer funds for national needs" as promoting the general welfare by way of better public service. *Id.* at 143.

512. *See* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987).

513. Steward Mach. Co. v. Davis, 301 U.S. 548 (1987).

514. *Fullilove*, 448 U.S. at 473.

515. *Id.* at 476.

516. *Id.* at 479-80.

517. *See* Selmi, *supra* note 382, at 75 ("The government funding cases compel the conclusion that the government can require more of its fund recipients than the constitution would otherwise require so long as the conditions are consistent with pertinent constitutional strictures.").

518. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

current section 2000d-7 which provides an explicit intent to waive states' immunity. Further, by including the creation of disparate impact claims in the statute, no state may argue that it did not realize that devices causing a disparate impact were prohibited.

Third, the *Dole* test requires that conditions must be related "to the federal interest in particular national projects or programs."[519] For example, in *Dole*, the condition imposed (21-year-old drinking age) is directly related to the main purpose for which highway funds are expended—state highway travel. Although my proposed statute covers state employees, the statute should focus on the use of federal money within each particular program. That is, if a state receives federal money to provide Head Start programs, the state may not in its hiring and employment for those Head Start programs engage in conduct that has a disparate impact. In this manner, the federal interest remains tied to each particular program at issue but covers the use of discriminatory devices in state employment. In addition, the use of the funds is directly related to the main purpose—providing, for example, effective educational programs to children. To the extent that federal funds are used to pay salaries of employees, those funds are used to carry out the mission of the program.

Finally, Congress may not be able to exercise its Spending Clause powers if there is an independent bar based on some other constitutional provisions.[520] As the Court stated in *Dole*, "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly."[521] Thus, to violate the fourth prong of the *Dole* test, the condition imposed must require action that is itself unconstitutional. For example, in *Fullilove*, the Court stated that, "Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment."[522] Because my proposed statute prohibits discrimination rather than requiring the use of racial or ethnic classifications, the Fourteenth Amendment does not present an independent bar. The only possible independent bar is the Eleventh Amendment. However, by conditioning the receipt of funds on a waiver of immunity, the proposed statute does not require states to engage in unconstitutional activity.[523]

519. *Id.* at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

520. *See id.* at 208.

521. *See id.* at 209.

522. Fullilove v. Klutnick, 448 U.S. 448, 480 (1980).

523. For an excellent argument in favor of upholding affirmative action programs under the Spending Clause, see Selmi, *supra* note 382, at 76. Professor Selmi advocates for restructuring contract set-aside programs "to focus on the diversity of the workforce rather than the race of the owners." *See id.* The restructuring, combined with an explicit tie-in to the Spending Clause, should require the courts to uphold the programs under a rational basis review.

The focus in considering Congress' power to condition funds on a waiver of immunity for disparate impact claims must remain on the manner in which the waiver is brought about. In Spending Clause legislation, the waiver is entirely consensual. The state may accept or decline the "contract" offered.[524] There is no exercise of overbearing congressional authority that fails to recognize the principles of federalism.[525] To consider this waiver as impermissible coercion is, as Professor Chemerinsky argues, to "confuse[ ] hard choices with coercion.[526] In fact, because the decision to accept the funds (and waive immunity) would be made by each state on its own basis, this method of protecting disparate impact is more deferential to states and protects the "minority" states who choose to decline the funds.[527] A perfect example of this view is the Eleventh Circuit decision in *Sandoval v. Hagan*.[528]

Martha Sandoval challenged the State of Alabama's official policy of administering its driver's license exam in English only.[529] Until 1990, the State administered the test in a number of different languages; however, in 1990, an English-only amendment to the Alabama Constitution was ratified.[530] Thereafter, the Department of Public Safety administered the exam in English only and forbade the use of interpreters and translation dictionaries.[531] After Ms. Sandoval was unable to secure a driver's license due to her inability to pass the test in English, she brought a class action alleging that the English-only policy violated Title VI and its implementing

524. Jason C. Rylander, *The Emerging Federal Role in Growth Management*, 15 J. LAND USE & ENVTL. L. 277, 296-97 (2000) ("For example, Arizona initially declined to participate in Medicare because the costs of providing healthcare to Native Americans exceeded the benefit."). Rylander also notes that more than half the states "declined federal funding under the Occupational Safety and Health Act of 1970." *Id.*

525. *See* Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 102 (2001) (rejecting argument that allowing Congress to condition money on waiver of sovereign immunity is condition that impermissibly coerces state governments). For a contrary argument, see Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995). Professor Baker argues that the Court should presume invalid conditional offers of federal funds to the states that seek to regulate the states in ways that Congress could not directly mandate.

526. Chemerinsky, supra note 525, at 103. Chemerinsky also argues that it is impossible to draw a distinction between permissible "inducement" and impermissible "coercion." *Id.*; *see also* Carl W. Chamberlin, *Johnny Can't Read Cause Jane's Got a Gun: The Effects of Guns in School, and Options After* Lopez, 8 CORNELL J.L. & PUB. POL'Y 281, 337-38 (1999) ("The potentially coercive effect of the Spending Clause has not been recognized as a valid basis for striking down Spending Clause legislation. . . . In fact, the Supreme Court has suggested that an inquiry as to the coercive nature of the conditional would be inappropriate.").

527. *See* Lynn A. Baker, *Putting the Safeguards Back Into the Political Safeguards of Federalism*, 46 VILL. L. REV. 95, 956-61 (2001).

528. 197 F.3d 484 (11th Cir. 1999), *rev'd*, 121 S. Ct. 1511 (2001).

529. *See Sandoval*, 197 F.3d at 487.

530. *See id.* at 487-88.

531. *See id.* at 488.

regulations discriminated on the basis of national origin.[532] The district court ruled in favor of the plaintiffs and enjoined the Department of Public Safety from enforcing its English only policy.[533]

On appeal, the State asserted its Eleventh Amendment immunity and argued that section 602 of Title VI does not contain an implied private right of action.[534] Specifically, the State argued that the Department's acceptance of over one million dollars in federal funds from the Department of Transportation and the Department of Justice every year does not constitute a waiver of its sovereign immunity.[535] Second, the State argued that Title VI is not a valid waiver of state immunity pursuant to section 5 of the Fourteenth Amendment.[536]

The Eleventh Circuit began with the proposition that a state may waive its immunity by accepting federal funds. The court noted several requirements established by Supreme Court precedent. First, the federal government may condition the receipt of money on a waiver of immunity.[537] Second, the waiver must be based on an unequivocal indication that the State has consented to federal jurisdiction.[538] This indication may come from the language of the condition or "'by such overwhelming implication from the text as (will) leave no room for any other reasonable construction.'"[539] Finally, the Eleventh Circuit cited *Atascadero* for the proposition that the statute must evince a "'clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'"[540]

The court found this "clear statement" of "unmistakable intent" in section 2000d-7 of the Rehabilitation Act Amendments.[541] Section 2000d-7 states: "[A] State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation . . . of Title VI . . . or the

532. *See id.* at 487-88. The Eleventh Circuit assumed that the regulations at issue were those of the United States Department of Transportation and the Department of Justice, both of which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." *Id.* at 488 n.2 (citing 49 C.F.R. § 21.5(b)(2) (2001) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (2001) (Department of Justice)).

533. *See id.* at 488-89.

534. *See id.* at 491.

535. *See id.* at 492.

536. *See id.* In addition, the State argued that its Director of the Public Safety could not be sued pursuant to the *Ex parte Young* doctrine. *See id.* The Eleventh Circuit rejected this argument as well. *See id.* at 500-01 (rejecting Department's argument that suit is barred under *Seminole Tribe*'s modification of *Ex parte Young*).

537. *See id.* at 492.

538. *See id.* at 493.

539. *Id.* (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

540. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)).

541. *See* Lane v. Pena, 518 U.S. 187, 200 (1996).

provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[542] The court found this abrogation to apply to the accompanying administrative regulations promulgated under section 602.[543] Next, the court noted that waivers of state immunity under Spending Clause legislation is not the type of unilateral congressional action which concerned the Supreme Court in the cases discussed in Parts I and II above.[544] Rather, Spending Clause legislation more closely approximates a contract wherein states are free to accept or reject the funding. Provided Congress encourages rather than compels state action and does not create conditions that are coercive, there is no Constitutional bar to state waiver of immunity pursuant to Spending Clause legislation.[545]

After addressing the immunity arguments, the Eleventh Circuit turned to the question of an implied right of action to enforce regulations under section 602 of Title VI. The court found such cause of action, relying on Supreme Court and Circuit Court precedent. After reviewing its own precedent and that of eight other circuits, the court stated, "we believe that a close reading of *Lau*, *Guardians* and *Alexander* necessarily establishes several holdings logically supporting an implied private cause of action under section 602 of Title VI."[546] First, the court found that disparate impact regulations promulgated pursuant to section 602 are "an authoritative construction of Title VI's antidiscrimination provisions."[547] Second, private parties may receive declaratory and injunctive relief in an action to enforce these regulations.[548] Finally, "Title VI's legislative history and scheme unequivocally support an implied cause of action under Section 601 and Section 602."[549]

The Supreme Court rejected this reading of precedent and held that section 602 of Title VI does not create a private right of action.[550] The

542. 42 U.S.C. § 2000d-7 (1988).

543. *See Sandoval*, 197 F.3d at 493, n.5.

544. *See id.* at 494.

545. *See id.* The State also argued that it did not receive proper notice of the requirements the funds placed upon them. *See id.* at 494-95. That is, the State had no notice that it was required to administer driver's license exams in foreign languages. The court rejected this argument. *See id.* at 495. The court also rejected the argument that a private right of action exists only under section 601 of the Title VI. *See id.* at 502-03. Section 601 provides the basic prohibition on discrimination while section 602 authorizes federal agencies to promulgate rules and regulations. *See id.* at 501. The regulations promulgated prohibit actions with a discriminatory effect on the basis of race, color or national origin. *See id.* at 502. The court recognized an implied right of action under section 602. *See id.* at 503. Because my suggested solution involves explicit statements by Congress to avoid the need for implying rights of action, this portion of the decision is not relevant to my analysis.

546. *Id.* at 504.

547. *Id.* at 507.

548. *Id.*

549. *Id.*

550. *See* Alexander v. Sandoval, 121 S. Ct. 1511, 1518-23 (2001).

Court held that the private right of action available under section 601, which prohibits intentional discrimination, does not include actions under section 602. The Court found no evidence of congressional intent to create a cause of action under section 602 for several reasons. First, there is no "rights-creating" language present in section 602 as there is in section 601. Second, the Court held that the focus on agency enforcement in section 602 is further evidence that Congress did not intend to create a private cause of action.

Although the Court's decision in *Sandoval* is a blow to civil rights actions, it leaves untouched congressional Spending Clause powers. By focusing on the statutory interpretation issues, the Court did not reach the questions addressed by the Eleventh Circuit. Therefore, at this time, the Spending Clause remains a viable option for re-enacting civil rights actions against the states.[551]

VI. CONCLUSION

The Supreme Court's on-going concern for federalism has opened new possibilities for the opponents of civil rights statutes. As the Court restricts the reach of Congress' powers under the Commerce Clause, civil rights statutes may fall against the private sector. Currently, the battleground remains focused on the states. The Court's simultaneous restriction of Eleventh Amendment waivers and contraction of the ability of Congress to enforce the protections of the Fourteenth Amendment has left federal civil rights statutes as applied against states vulnerable to attack. Even those statutes that seem in complete proportionality to the protections of the Fourteenth Amendment are in danger. The "New Federalism" is destined to strike down the disparate impact provisions of numerous civil rights statutes, including Title VII.

Congressional powers under the Spending Clause remain, at this point, unchanged. Provided any new Spending Clause statutes contain explicit indications of intent to subject states to suit in federal court, the disparate impact provisions of Title VII should survive unscathed, although in a different form. Further, waivers under the Spending Clause address the Court's concerns inherent in the New Federalism. By agreeing to accept federal funds, each state chooses on its own to waive its immunity from suit. Thus, there is no unilateral action by Congress. The use of the Spending Clause meets both the New Federalism and the protection of individual rights embodied in the Constitution. As Justice Burger stated for the plurality in *Fullilove*:

> Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this ef-

551. *See* Chamberlin, *supra* note 526, at 338 (noting that "decisions since *Lopez* do note reflect a narrower view of the Spending Clause").

> fort, Congress has necessary latitude to try new techniques . . . ; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the program may press the outer limits of congressional authority affords no basis for striking it down.[552]

552. Fullilove v. Klutnick, 448 U.S. 448, 490 (1980).