NEW YORK LAW SCHOOL

NYLS Law Review

Volume 54
Issue 1 *New York Law School Law Journal Alumni Issue*

Article 3

January 2009

# Rebalancing the Scales: Restoring the Availability of Disparate Impact Causes of Action in Title VI Cases

Victor Suthammanont
*New York Law School Class of 2005*

VOLUME 54 | 2009/10

VICTOR SUTHAMMANONT

# Rebalancing the Scales: Restoring the Availability of Disparate Impact Causes of Action in Title VI Cases

ABOUT THE AUTHOR: Victor Suthammanont received a J.D. from New York Law School in 2005, and a B.F.A. from New York University in 1998. This article is dedicated to the memory of Prof. Denise Morgan, who encouraged the author in the initial conception of the article and whose inspiration was integral to its completion. She is missed as a colleague, an advocate, and a teacher. In addition, the author would like to thank Ruth Uselton for her research assistance.

## I. INTRODUCTION

While the 2008 presidential election marked a historic moment in the history of our nation, government reports,[1] academic studies,[2] and anecdotal stories[3] indicate that minorities, particularly blacks, disproportionately shoulder the burdens and byproducts of our system, our history, and our economy. Nevertheless, the extent to which the racist legacy of slavery and Jim Crow contributed to the present inequality may be debatable. Over a century has passed since slavery was abolished and people of color were given the right to vote, and a generation has passed since de jure segregation was ostensibly ended. After forty years of Title II,[4] Title VI,[5] Title VII,[6] and Title VIII,[7] after thirty years of affirmative action, is it possible to attribute the inequalities we see today to the sins of some of our grandparents, or the sins of their parents and grandparents? In 1964, politicians could build careers on racial demagoguery; today, politicians can be ruined for racial insensitivities.[8] Since 1964, we have seen men on the moon, three Popes, the downfall of Communism, the rise of the Internet and cellular phones, seven Yankees' World Series championships,[9] and nine U.S. Presidents (including the nation's first black President). After so much time, can we attribute the disproportionate burdens of today to the attitudes of yesterday?

Despite the lapse of time, however, it is clear to many that the unequal allocation of burdens along racial lines in our country is rooted in the racist policies of the past.

---

1. *See*, *e.g.*, Carmen DeNavas-Walt, Bernadette D. Proctor, & Jessica Smith, U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2006 44–49 (2007) (table showing that blacks and non-white Hispanics are twice as likely as whites or Asians to be in poverty).

2. *See*, *e.g.*, Devah Pager, MARKED: Race, Crime, and Finding Work in an Era of Mass Incarceration (2007) (describing findings that a black non-felon was as likely to be called back regarding a job application as a white felon). *See also infra* note 143.

3. *See*, *e.g.*, Adam Nagourney and Megan Thee, *Poll Finds Obama Candidacy Isn't Closing Divide on Race*, N.Y. Times, July 16, 2008, at A1. According to the story, 40% of blacks reported that they believed they were stopped by police because of their race and 70% of blacks stated that they had encountered instances of discrimination. Figures among Latinos were similarly high. The figures in the story are significant for another reason—the disparity in how whites and blacks view the state of race relations.

4. Civil Rights Act of 1964 §§ 201–207, 42 U.S.C. §§ 2000–2000a-6 (2006).

5. Civil Rights Act of 1964 §§ 601–605, 42 U.S.C. §§ 2000d–2000d-7 (2006).

6. Civil Rights Act of 1964 §§ 701–716, 42 U.S.C. §§ 2000e–2000e-17 (2006).

7. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

8. *See*, *e.g.*, Mark Leibovich, *Trent Lott, Bouncing Back from the Storms*, Wash. Post, Jan. 19, 2006, at C1 (noting Senator Lott's troubles after remarks regarding Strom Thurmond's failed presidential run). Racial politicking is not extinct, however, as evidenced in the most recent presidential campaign. *See*, *e.g.*, Michael Luo, *North Carolina G.O.P. to Run Ad Using Obama's Ex-Pastor*, N.Y. Times, Apr. 24, 2008, at A22 (describing North Carolina Republican Party's intent to run an advertisement stating that Senator Barack Obama was "too extreme for North Carolina" as potentially racially divisive).

9. And, much to the author's chagrin, two Red Sox championships.

Remediation of the effects of those policies has been continually challenged and stymied by resistance to integration after *Brown v. Board of Education*[10] to more recent efforts to end affirmative action programs. Mostly, however, it seems that, following the various civil rights acts of the 1960s, the public has not had the will to address the ongoing effects of the country's past and continuing forms of racism. Instead, there has been a collective shrug.

In addition to this shrug, those pursuing equality have found the tools limited. For example, affirmative action has been met with continued challenges that hamper its effectiveness and threaten its long-term viability, at least in the public sphere. Moreover, the Supreme Court has repeatedly narrowed and limited the rights granted in the various civil rights acts. As part of this movement towards disarming the civil rights acts, the Court, in *Alexander v. Sandoval*,[11] eliminated the availability of private rights of action to enforce Title VI on disparate-impact theories. The Court's jurisprudence over the past thirty years has represented a thumb on the scales of justice, narrowing the types of claims victims of discrimination may bring and increasing the burden on them to prevail.

This article accepts as a central normative premise that individually enforceable civil rights legislation is desirable. It also accepts that disparate-impact theories of liability, such as those formerly available under Title VI, are better suited to addressing discriminatory acts and policies than intent-based theories. This article argues that either Supreme Court or congressional action is needed to correct the various Court precedents limiting potential legislation such as individual enforcement of Title VI. It then examines the constitutionality of the Civil Rights Act of 2008, which seeks to undo the effects of a number of the Court's cases, particularly in the context of restoring disparate-impact theories of liability to Title VI.

Part II of this article provides a brief description of Supreme Court precedent addressing disparate-impact causes of action in federally funded programs and the abrogation doctrine. Part III of the article addresses the desirability of Supreme Court and congressional action in the area of disparate-impact causes of action. Part IV analyzes the proposed Civil Rights Act of 2008 as a template for a legislative solution to the Court's limitations on disparate-impact litigation. Part V is a conclusion.

## II. THE RISE AND COLLAPSE OF EFFECTIVE DISPARATE IMPACT LEGISLATION IN TITLE VI

A century after emancipation, Congress passed the Civil Rights Act of 1964.[12] The 1964 Act's reach included discrimination in places of public accommodation, federally funded programs, and employment.[13] In 1965, Congress passed the Voting

10. 347 U.S. 483 (1954).

11. 532 U.S. 275 (2001).

12. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 48 U.S.C. §§ 2000a–2000h-6 (2006)).

13. *See* Civil Rights Act of 1964 §§ 201, 601, 701, 42 U.S.C. §§ 2000a, 2000d, 2000e (2006).

Rights Act of 1965,[14] and a few years later, the Fair Housing Act of 1968,[15] prohibiting discrimination in housing, and Title IX,[16] prohibiting sex discrimination in education. The passage of these acts, in conjunction with the reinvigoration of Reconstruction-era statutory causes of action[17] and the use of implied statutory causes of action, seemed to give minorities a multitude of weapons at their disposal to counteract all manners of discrimination, both private and public.

Although there was concern initially over Congress's power to regulate against discrimination in the private sphere, the Court gave broad deference to congressional authority in that area. The Court held that Congress may pass a law prohibiting discrimination in the formation of contracts,[18] and may prohibit discrimination in places of public accommodation.[19] Congress may also constitutionally prohibit discrimination in private housing,[20] private employment,[21] and as a motive for certain crimes.[22] Nevertheless, where Congress would seem to have the most power to regulate is where the Court has chipped away the most at Congress's authority.

Title VI of the Civil Rights Act of 1964 addresses discrimination in federally funded programs.[23] Enacted pursuant to Congress's power under the Spending Clause, Section 601 prohibits "discrimination under any program or activity receiving Federal financial assistance."[24] Section 602 authorizes agencies to promulgate regulations to effectuate the provisions of section 601.[25] The Department of Justice, pursuant to section 602, issued regulations prohibiting recipients of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ."[26] Because of the "effect of" language, section 602 prohibits actions which unintentionally cause

14. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)).

15. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

16. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 § 901 (codified as amended at 20 U.S.C. § 1681 (2006)).

17. *See*, *e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Griffin v. Breckenridge, 403 U.S. 88 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See also* 42 U.S.C. §§ 1981, 1982, 1983, 1985(3) (2006).

18. *Runyon*, 427 U.S. at 179 (upholding 42 U.S.C. § 1981 (2006)).

19. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the 1964 Civil Rights Act).

20. *Alfred H. Mayer*, 392 U.S. at 422–35.

21. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

22. Griffin v. Breckenridge, 403 U.S. 88, 104–05 (1971).

23. Civil Rights Act of 1964 §§ 601–605, 42 U.S.C. §§ 2000d–2000d-7 (2006).

24. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

25. Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2006).

26. 28 C.F.R. § 42.104(b)(2) (2005).

discriminatory effects, i.e. actions that have a disparate impact.[27] In addition to the Department of Justice's authority to bring actions to enforce the statute, section 601 creates an implied private right of action.[28]

The Court initially interpreted Title VI broadly, at least in *Lau v. Nichols*.[29] *Lau* was a challenge to the San Francisco school system's failure to provide supplemental language instruction to non-English speaking students of Chinese ancestry.[30] Justice Douglas, writing for the Court, held that the school system's failure to provide instruction was a violation of section 601.[31] The Court focused on the effect of the school system's failure, implying that a discriminatory effect was enough for a violation of section 601.[32]

Four years later, the Court held in *Regents of the University of California v. Bakke* that Title VI, insofar as it is coextensive with the Fourteenth Amendment, did not prohibit affirmative-action programs.[33] Because the Fourteenth Amendment allowed remedial affirmative action and affirmative action for educational diversity, then Title VI must allow these remedies as well.[34] Holding that Title VI and the Equal Protection Clause were coextensive, however, called into question the correctness of *Lau* because, in the years between *Lau* and *Bakke*, the Court held that discriminatory intent was required to prove a violation of the Equal Protection Clause in *Washington v. Davis*.[35] This contradicted *Lau*'s holding that a discriminatory effect was sufficient for a violation of Title VI.[36]

The question of whether a violation of section 601 required discriminatory intent was addressed in *Guardians Association v. Civil Service Commission*.[37] In *Guardians Association*, a fractured Court upheld a Second Circuit decision denying damages for a violation of Title VI without a finding of intentional discrimination.[38] While seven justices found intentional discrimination was necessary to violate Title VI,[39] five also found that proof of discriminatory effect would suffice to state some manner of claim

27. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting).

28. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696–98 (1979) (citing Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967)).

29. 414 U.S. 563 (1974).

30. Lau v. Nichols, 414 U.S. 563 (1974).

31. *Id.* at 566–69.

32. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 352–53 (1978) (Brennan, J., concurring).

33. *Bakke*, 438 U.S. at 284–87 (Powell, J., plurality); 438 U.S. at 328–56 (Brennan, J., concurring).

34. *See Bakke*, 438 U.S. at 284–87 (Powell, J., plurality); 438 U.S. at 328–56 (Brennan, J., concurring).

35. Washington v. Davis, 426 U.S. 229 (1976).

36. *Bakke*, 438 U.S. at 352–53 (Brennan, J., concurring).

37. 463 U.S. 582 (1983).

38. *Id.*

39. *Id.* at 608 n.1 (Powell, J., concurring in judgment).

under Title VI.[40] Despite the confusing split, for nearly twenty years, the Court did not address the validity of disparate-impact litigation under section 602.

In 2001, the Court considered the issue of the validity of private rights of action for disparate-impact claims in *Alexander v. Sandoval*.[41] The Court had already implied that section 601 granted a private right of action in *Lau* and *Bakke*, and, in *Cannon v. University of Chicago*, it held explicitly that Title VI granted a private right of action.[42] *Sandoval* involved a challenge to an English-only testing provision for drivers' licenses instituted by Alabama.[43] Justice Scalia, writing for a 5-4 majority, held that a private right of action to enforce section 602 disparate-impact regulations does not exist.[44] "[R]egulations, if valid and reasonable, authoritatively construe [section 601] itself," Justice Scalia wrote. "[I]t is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute."[45] Reasoning that section 601 only prohibits intentional discrimination, Justice Scalia concluded that the disparate-impact regulations do not apply to section 601 because those regulations prohibited conduct (non-intentionally discriminatory conduct with a discriminatory effect) beyond that prohibited by section 601.[46] Because the regulations prohibited conduct permitted under section 601, section 601 did not include a private right of action to enforce the disparate-impact regulations.[47] Justice Scalia then found that section 602 does not contain the rights-creating language critical for the creation of a private right of action.[48] Justice Stevens, in dissent, wrote,

---

40. *Id.* at 582. Justice White "conclude[d], as [did] four other justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent." *Id.* at 584. Justice White would have held, however, that in the absence of intent, declaratory and limited injunctive relief would be the only remedies. *Id*. Justice Marshall would have held that discriminatory impact would be enough for any relief, including damages. *Id*. at 623–24 (Marshall, J., dissenting). Justices Stevens, Brennan, and Blackmun would have found a disparate-impact cause of action under section 602 regulations. *Id.* at 642–45 (Stevens, J., dissenting). In sum, the five justices would have found a disparate-impact cause of action under some section of Title VI, but disagreed as to the nature of the action and the remedies available.

41. 532 U.S. 275 (2001).

42. Cannon v. Univ. of Chi., 441 U.S. 677, 696–98 (1979) (citing Bossier Parish Sch. Bd. V. Lemon, 370 F.2d 847, 852 (5th Cir. 1967)). In *Cannon*, the Court was considering whether Title IX granted a private right of action. *Id.* at 680–83. The Court relied on Title VI because Title IX was modeled on Title VI. *Id*. at 694–96.

43. *Sandoval*, 532 U.S. at 278–79.

44. *Id*. at 279.

45. *Id*. at 284.

46. *Id*. at 285.

47. *Id*. Justice Scalia's language and reasoning seemingly invites challenges to the validity of the regulations themselves. Justice Scalia accepted the validity of the regulations for purpose of argument, *id.* at 281–82, while noting repeatedly that the regulations go beyond what section 601 proscribes.

48. *Id.* at 288–89. In order for a statute to create a private right of action, the language must be framed in terms of the persons benefited. *Id*. at 289. It should not focus on the entity regulated. *Id.* Also, there should be no other enforcement scheme in the statute. *See id*.

"this case is something of a sport" because the Title VI regulations could be enforced under 42 U.S.C. § 1983.[49] Unfortunately, the Court expanded the requirements of rights-creating language from its implied causes of action jurisprudence into section 1983 jurisprudence in *Gonzaga University v. Doe*,[50] foreclosing that route for the enforcement of Title VI disparate-impact regulations.

Title VI is the model for legislation aimed at aiding other disadvantaged groups in federally funded programs, in particular women in Title IX and the disabled in the Americans with Disabilities Act ("ADA"). Because of this connection, many of the developments in the law of Title VI, Title IX, or the ADA reverberate through the substance of all these statutes. Developments and interpretations of one statute may carry over to the others.[51] While the abrogation doctrine—which governs the ability of Congress to impose liability on the States despite their sovereign immunity—may dampen some of these reverberations,[52] it presents threats to congressional power common to all of these statutes.[53]

The abrogation doctrine governs the ability of Congress to negate the states' sovereign immunity.[54] There are two somewhat-conjoined lines of abrogation cases: those dealing with Congress's Article I powers and those addressing Congress's powers under section 5 of the Fourteenth Amendment.[55] With respect to Congress's

---

49. *Id.* at 300 (Stevens, J., dissenting). Stevens accused the majority of dissembling in its approach. "In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent." *Id.* at 313. He points to possible conflicts over the granting of certiorari in his conclusion, stating:

> [T]he Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions . . . . [E]ven if it were to ignore all of our post-1964 writing, the Court should have answered the question differently on the merits.

*Id.* at 317.

50. 536 U.S. 273, 285–86 (2002).

51. *See*, *e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (relying on an interpretation of Title VI to decide a Title IX case).

52. *See*, *e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997). Congress may have more power to regulate to protect against racial discrimination than it has to protect against discrimination on the basis of disabilities. *See* discussion *infra* text at notes 228–39. Constitutional infirmities as to one act do not necessarily translate to the other acts. *See* discussion *infra* text at notes 89–91 (discussing constitutionality of the Family Medical Leave Act and Title II of the ADA despite previous cases) and discussion in Section IV (comparing the constitutionality of the RFRA and the Civil Rights Act of 2008).

53. The abrogation doctrine is still a threat, however, to Congressional action in the civil rights area. In particular, limitations placed on Congressional power in an appropriate context, *see City of Boerne*, 521 U.S. 507, may provide support for limitations where they are not appropriate, *see Kimel*, 528 U.S. at 97–98 (Stevens, J., dissenting) (arguing that the abrogation decisions of the Court represented "judicial activism"). *See* discussion *infra* note 83.

54. *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress has the power to abrogate state sovereign immunity).

55. *See Kimel*, 528 U.S. at 78–80.

Article I authority, Congress may not abrogate the states' immunity.[56] The question of Congress's power under section 5 of the Fourteenth Amendment, however, warrants closer review.

In *City of Boerne v. Flores*, the Court addressed the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA").[57] Congress passed the RFRA in response to the Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*,[58] which, abandoning the "*Sherbert* test,"[59] held that Oregon's prohibition on the use of peyote could be enforced against religious practices.[60] The RFRA sought to restore the *Sherbert* test by prohibiting government conduct, even neutral laws of general applicability, which would "substantially burden" a person's religious observance, unless there was a compelling governmental interest and such a burden was the least restrictive means of furthering that interest.[61] At issue in *City of Boerne* was whether the RFRA was a proper exercise of Congress's power under section 5 of the Fourteenth Amendment to enforce the provisions of section 1.[62] The Court noted that section 5 of the Fourteenth Amendment is "remedial, rather than substantive,"[63] and held that "there must be a congruence between the means used and the ends to be achieved."[64] Because the RFRA was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior[,]"[65] it was struck down as unconstitutional.[66]

---

56. *Kimel*, 528 U.S. at 78 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996)).

57. *City of Boerne*, 521 U.S. at 511.

58. 494 U.S. 872 (1990).

59. Sherbert v. Verner, 374 U.S. 398 (1963). The *Sherbert* test determined whether a neutral law burdened a religious practice, and if so, whether that burden was "justified by a compelling government interest." *City of Boerne*, 521 U.S. at 507. Because application of such a test would result in "a constitutional right to ignore neutral laws of general applicability" the Court declined to apply the *Sherbert* test. *Id.* at 513–14.

60. *City of Boerne*, 521 U.S. at 514.

61. *Id.* at 515–16 (citing 42 U.S.C. § 2000bb-1 (2006)).

62. *Id.* at 517. Section 1 of the Fourteenth Amendment states the substantive protections of that amendment in the Equal Protection, Due Process, and Privileges and Immunities clauses. *See*, U.S. Const. amend. XIV, § 1. Section 5 grants Congress the power to pass "appropriate legislation" to enforce section 1's provisions. *See*, U.S. Const. amend. XIV, § 5.

63. *City of Boerne*, 521 U.S. at 520. The Court reasoned that allowing Congress to pass legislation under section 5 of the Fourteenth Amendment altering the meaning of section 1 would undermine the Constitution's place as the "paramount law." *Id.* at 529. In order to protect against such power, legislation passed under section 5 must be remedial or preventative. *See id.* at 524–29.

64. *Id.* at 530.

65. *Id.* at 532.

66. *Id.* at 536.

The Court affirmed the holding and methodology of *City of Boerne* in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[67] *Florida Perpaid* related to Congress's ability to abrogate state immunity in order to subject the states to patent suits. The plaintiffs argued that because patents were property, and property was protected by the Due Process Clause of the Fourteenth Amendment, Congress had the authority under section 5 to abrogate state sovereign immunity.[68] The Court, in a 5-4 decision, held that Congress failed to justify a remedial or preventative need to subject states to patent-infringement suits.[69] Furthermore, because the Due Process Clause only protected against the seizure of property without Due Process, Congress would have to show that there were no adequate state remedies for patent infringements.[70] Therefore, Congress could not abrogate state immunity for patent infringement.

The issue of abrogation next arose in *Kimel v. Florida Board of Regents*.[71] *Kimel* regarded the authority of Congress to abrogate the state's Eleventh Amendment immunity under the Age Discrimination in Employment Act of 1967 ("ADEA").[72] The *Kimel* Court noted that the Eleventh Amendment[73] does not give the federal courts jurisdiction in suits against non-consenting states.[74] In order to determine whether Congress could abrogate the states' immunity in the ADEA, the Court would have to determine "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second," whether that abrogation was within Congress's section 5 authority.[75] After concluding that Congress expressed its intent to abrogate immunity,[76] the Court applied the "congruence and proportionality" test of *City of Boerne*, and held that because age discrimination is only subject to rational-basis scrutiny, the impositions of the ADEA against the state were not congruent and proportional to the Fourteenth Amendment's protections.[77] The Court used the

67. 527 U.S. 627 (1999).

68. *Id*. at 633.

69. *Id*. at 638–42.

70. *Id*. at 642–43 (citing Parratt v. Taylor, 451 U.S. 527, 539–41 (1981); Hudson v. Palmer, 468 U.S. 517, 532–33 (1984); *id*. at 539 (O'Connor, J., concurring)).

71. 528 U.S. 62 (2000).

72. *Id*. at 66. The Age Discrimination in Employment Act of 1967 ("ADEA"), 81 Stat. 602 (codified as amended in 29 U.S.C. § 621 *et seq*.) prohibited employment discrimination against individuals based on age and was structured in a manner similar to Title VII of the Civil Rights Act of 1964.

73. The Eleventh Amendment reads: "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." *Kimel*, 528 U.S. at 72 (citing U.S. Const. amend. XI). In Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court interpreted the Eleventh Amendment as barring suits against non-consenting states by their own citizens as well.

74. *Kimel*, 528 U.S. at 72–73.

75. *Id*. at 73 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996)).

76. *Id*. at 78.

77. *Id*. at 82–91.

same reasoning to strike down provisions of the American with Disabilities Act of 1990[78] in *Board of Trustees of the University of Alabama v. Garrett*.[79]

It is notable that in *Kimel* and *Garrett*, both 5-4 opinions, there are very strong, well-reasoned dissents.[80] In *Kimel*, Justice Stevens directly attacked the majority's reasoning and its reliance on the line of cases beginning with the decision in *Seminole Tribe*.[81] Justice Stevens argued that the Eleventh Amendment only placed a limit on diversity jurisdiction and that interpretations of that amendment giving states a broad sovereign immunity were unsupported.[82] Justice Stevens stated that he was "unwilling to accept *Seminole Tribe* as controlling precedent. . . . [T]he reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court."[83] In *Garrett*, Justice Breyer adopted a more moderate tone, questioning why the Court required evidentiary findings of Congress "reminiscent of the similar (now-discredited) limitation that it once imposed upon Congress' Commerce Clause power."[84] Both Justice Stevens' and Justice Breyer's dissents have merit.[85] Decisions like *Kimel* and *Garrett* are a concern because the statutes challenged in those cases were modeled on other civil rights statutes which may be vulnerable (deceptively so)[86] to similar analyses.

Nevertheless, the Court seems to have moved toward the dissenters. In *Nevada Department of Human Resources v. Hibbs*, the Court held that Congress validly abrogated state sovereign immunity in the Family Medical Leave Act ("FMLA").[87]

---

78. Americans with Disabilities Act of 1990, 104 Stat. 330 (codified at 42 U.S.C. §§ 12111–12117 (2006)). The ADA is modeled on Title VI of the Civil Rights Act of 1964.

79. 531 U.S. 356 (2001) (holding that because discrimination on the basis of disabilities was only subject to rational basis scrutiny, the provisions of the ADA allowing recovery of damages against the state were not congruent and proportional to the protections of the Fourteenth Amendment).

80. Actually, nearly all the abrogation cases decided during the Rehnquist Court were split 5-4 with strong dissents. The majority in these decisions were Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas, and Justices Stevens, Souter, Ginsburg, and Breyer in dissent. The cases decided with this split were Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996), College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), Fla. Prepaid Postsecondary Educ. Expense Bd v. College Sav. Bank, 527 U.S. 627 (1999), Alden v. Maine, 527 U.S. 706 (1999), *Kimel*, 528 U.S. 62, and Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

81. *Kimel*, 528 U.S. 92–99 (Stevens, J., dissenting).

82. *Id.* at 97 (Stevens, J., dissenting).

83. *Id.* at 97–98 (Stevens, J., dissenting). Justice Stevens concludes his dissent with the following statement: "The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, . . . and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises." *Id.* at 98–99 (internal citations omitted).

84. *Garrett*, 531 U.S. at 387 (Breyer, J., dissenting).

85. *See infra* text accompanying note 91.

86. *See infra* notes 87–91 and accompanying text.

87. 538 U.S. 721 (2003). The Court found that the FMLA's provisions were "narrowly targeted" to where

In *Tennessee v. Lane*, two disabled persons sued Tennessee for violations of Title II of the ADA.[88] Justice Stevens, now writing for the majority, applied the congruence and proportionality standard to hold Title II of the ADA an appropriate exercise of Congress's power.[89]

Although it appeared after *Lau* as if Title VI was going to be given a broad reading and enforcement by the Court, the Rehnquist Court significantly limited the availability of judicial relief for many victims of discrimination. While *Hibbs* and *Lane* may signal the end of the Court's retreat to the repudiated reasoning of cases such as *Carter v. Carter Coal Co.*,[90] the congruence and proportionality test remains "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."[91] Also, although the strength of the dissent in *Sandoval* gives hope that the decision eventually may be overruled, it is unlikely that such an action would occur in the near future. Currently, the scales in Title VI actions are weighted in a defendant's favor. As a method of rebalancing the scales and reinvigorating anti-discrimination law, the Court may be an attractive, but elusive hope.

## III. THE DESIRABILITY OF JUDICIAL AND CONGRESSIONAL INTERVENTION IN THE CIVIL RIGHTS AREA

### *A. The Desirability of Supreme Court Action*

The Supreme Court has rarely led the nation in the protection of minorities. Opinions like the *Dred Scott* decision,[92] *Plessy v. Ferguson*,[93] and *Korematsu v. United States*[94] are stains on the history of the Court and the nation. In addition to the obvious examples of the Court directly supporting the unjust status quo, there are numerous cases where the Court's holdings significantly, yet quietly, eroded the government's protection of minorities.[95] These are cases that children will not learn about in social studies or history classes, yet from whose effects those same children will suffer.

---

the discrimination was "strongest" and the remedies were "restricted" and, therefore, concluded the FMLA was congruent and proportional. *Id.* at 738–40. The former dissenters, now in the majority, filed separate opinions noting their previous objections. *Id.* at 740–41 (Souter, J., concurring) (Stevens, J., concurring in the judgment).

88. 541 U.S. 509, 513–14 (2004).

89. *Id.* at 531–34.

90. 298 U.S. 238 (1936).

91. 541 U.S. 509, 557-58 (Scalia, J., dissenting).

92. Scott v. Sandford, 60 U.S. 393 (1856).

93. 163 U.S. 537 (1896).

94. 323 U.S. 214 (1944).

95. These are cases that deal with policies that disproportionately affect minority citizens, *see*, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), cases that limit the claims that citizens can bring to enforce federal rights, *see*, *e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001), and cases that limit the power of states and municipalities to craft remedial affirmative-action programs, *see*, *e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

In light of this history, it is reasonable to question the desirability of Court intervention in this area. But when the Court does act to protect the civil rights of minorities, it carries a tremendous validating weight by adding legitimacy to minorities' claims.[96] First, minorities who find deaf ears in the elected branches will find that those branches will listen to the mandates of the Court.[97] Moreover, despite the debates over the practical effects of *Brown v. Board of Education*,[98] there is no question of that decision's symbolic weight and the momentum it added to the civil rights movement.

Second, to the extent that Supreme Court precedents are based on constitutional, as opposed to statutory, interpretation, the Court's reconsideration of the issue is effectively the only means of change. It is not often that the People amend the Constitution, and even less so in response to a Court decision.[99] Even if political and public will could be galvanized, it is questionable whether the Constitution should be amended to remedy every questionable decision by the Court.[100] Granted, to the extent that something is of constitutional importance, Court decisions in contravention of the norms underlying the provision should be corrected. Nevertheless, amending the Constitution every time the Court got one wrong would be impractical and create a document similar to the United States Code.[101] What would the Commerce Clause look like if the People needed to continually refine its meaning in the face of Supreme Court cases from *Schechter Poultry*[102] to *Morrison*?[103]

---

96. *See*, *e.g.*, Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: the Passive Virtues*, 75 Harv. L. Rev. 40, 77 (1961). Bickel's reliance on "principles" is criticized in Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 Harv. L. Rev. 31, 81–84 (2005) [hereinafter *A Political Court*].

97. Although not always without resistance. *See* Cooper v. Aaron, 358 U.S. 1 (1958) (resistance to the Court's decision in *Brown* required the Court to hold that states were bound by its decisions).

98. *See*, *e.g.*, Symposium, *Brown is Dead? Long Live Brown!*, 49 N.Y.L. Sch. L. Rev. 1029 (2004–2005).

99. The Constitution has only been amended sixteen times since 1791, when the Bill of Rights was ratified. It is worth noting that the last ratified Amendment, the Twenty-Seventh Amendment, was ratified in 1992—more than 200 years after the first Congress proposed it. Akhil Reed Amar, America's Constitution: A Biography 453–54 (2005). Before that, the Twenty-Sixth Amendment was ratified in 1971, lowering the voting age to 18. *Id.* at 445.

100. *See*, *e.g.*, Erwin Chemerinsky, *Amending the Constitution*, 96 Mich. L. Rev. 1561 (1998) (reviewing David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995 (1996)).

101. Such endless tinkering and refinement would, however, move the Constitution more towards Jefferson's idea that each generation was sovereign and that the laws should expire generationally. Joseph J. Ellis, Founding Brothers: the Revolutionary Generation 54–55 (2000).

102. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (reversing conviction for a violation of the Live Poultry Code because defendant's business was only indirectly connected with interstate commerce).

103. United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act as exceeding Congress's Commerce Clause power).

Finally, by correcting its own "mistakes," the Court restores its own "legitimacy" in this area.[104] For example, with respect to the abrogation doctrine, to those who view *Seminole Tribe* in the same light as Justice Stevens, the doctrine is not due "the usual deference or respect owed to decisions of this Court."[105] Therefore, legitimacy would be restored to the constitutional order if *Seminole Tribe* and its progeny—including *Sandoval*—were reversed, much in the same way *Plessy* was undone by *Brown* or *Bowers v. Hardwick* was corrected by *Lawrence v. Texas*.[106] Of course, such a willingness to revisit old decisions invites dissent and political challenge the Court does not always receive well.[107]

Much has been written about the correctness of the Court's Eleventh Amendment jurisprudence,[108] among other areas progressive scholars target for reform.[109] While a doctrinal shift is desirable, as a practical matter, it is unlikely to occur in any short or cohesive order. Instead of adding to the voluminous discourse on this topic, this article will turn to Congress's power to do what the Court will likely not do—restore the promise of disparate-impact litigation.

### *B. The Desirability of Congressional Action*

A clear theory of legislative power to passing a more effective civil rights act cannot be articulated without first establishing the desirability of congressional action. Many of the political and jurisprudential hurdles Congress faces in attempting to restore a private right of action for disparate impact under Title VI can only be overcome with a well-formulated argument regarding the need for such an action. Congress should act because of systemic concerns about the balance of power between the judiciary and the legislature, moral concerns about the racism that underlies conditions of disparate impact, and finally, necessity concerns about the effectiveness of current policies at combating racism.

---

104. To a large extent, whether a decision is a "mistake" or "wrong" or "correct" or "legitimate" is a perception borne as much of political and moral beliefs as it is of belief in a particular methodology of decision. See, *e.g.*, *A Political Court*, *supra* note 96, at 32–34 (noting that normative analysis of Supreme Court decisions is a form of rhetoric or advocacy).

105. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting).

106. 539 U.S. 558 (2003). *Lawrence*, in its language that *Bowers* "was not correct when it was decided[,]" reinforces the idea that certain decisions are illegitimate at the time of decision, meaning they "ought not to remain binding precedent." *Id.* at 560, 578.

107. *See*, *e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 861–68 (1992) (noting that the Court's legitimacy is the foundation of its power and that legitimacy would erode with vacillation); Cooper v. Aaron, 358 U.S. 1 (1958).

108. *See*, *e.g.*, William D. Araiza, *The Section 5 Power after* Tennessee v. Lane, 32 Pepp. L. Rev. 39 (2004); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 Notre Dame L. Rev. 953 (2000).

109. For example, the intent requirement of *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See* article cited *infra* note 134.

Since *Marbury v. Madison*,[110] the authority to interpret the Constitution and laws has been a powerful tool for the judiciary. Not only can the Court define the edges of congressional and executive power to act,[111] it can also interpret the meaning and therefore shape the result of such action. Beyond the academic discussions of judicial review,[112] the politicization of the issue,[113] and perhaps its trivialization as "judicial activism,"[114] the interplay between the Court and Congress is healthy, necessary, and envisioned by the Framers.[115] This interaction is not as one-sided as some people may believe, particularly where Congress can act to correct the Court, such as in matters of statutory interpretation. This has happened before in the civil rights area.[116]

Even in the realm of constitutional interpretation, Congress can, and should, challenge the Court's understanding of Congress's power.[117] As a practical matter, it is imperative that Congress be able to act in areas of federal concern, such as civil rights.[118] It is also important that Congress's power be as clearly delineated as possible, both to add legitimacy to the laws Congress passes and to increase efficiency. While Congress and other legislatures have the duty to act within their constitutional boundaries,[119] they also have the duty ensure that the Court is acting within its

---

110. 5 U.S. 137 (1803).

111. *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (limiting the Executive's discretion); United States v. Morrison, 529 U.S. 598 (2000) (limiting Congress's authority to pass legislation under the Commerce Clause without a finding of a significant effect on interstate commerce); The Civil Rights Cases, 109 U.S. 3 (1883) (defining Congress's ability to legislate using the Fourteenth Amendment).

112. *See*, *e.g.*, Erwin Chemerinsky, David C. Baum Memorial Lecture, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. Ill. L. Rev. 673 (2004); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787 (2005); Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 Ark. L. Rev. 729 (2005).

113. *See*, *e.g.*, Paul Gewirtz & Chad Golder, Op-Ed, *So Who Are the Activists?*, N.Y. Times, July 6, 2005, at A19 (arguing that "judicial activism" can be measured in part by the amount of times a judge invalidates an act of Congress); Samatha Levine, *DeLay Charges Left Unduly Influences Supreme Court*, Hous. Chron., Aug. 15, 2005, at A4; Dahlia Lithwick & Richard Schragger, *Congress Behaving Badly*, Wash. Post, October 8, 2006, at B02.

114. *See*, *e.g.*, Keenen D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 Cal. L. Rev. 1441 (2004); John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 La. L. Rev. 785 (2003); Adam Cohen, Editorial Observer, *Psst . . . Justice Scalia . . . You Know, You're An Activist Judge, Too*, N.Y. Times, Apr. 19, 2005, at A20 (noting the indeterminacy of the label "judicial activist").

115. *See* The Federalist No. 78 (Alexander Hamilton) (describing the judiciary's duty to enforce the "power of the people" as embodied in the Constitution where it contradicts the "will of the legislature" as enacted in statutes).

116. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991) (amending various sections of 42 U.S.C. § 1981).

117. This is not to imply that Congress should pass politically expedient laws with the knowledge that they are unconstitutional. *See* Lithwick & Schragger, *supra* note 113.

118. Civil rights are a federal concern in light of the long history of the Reconstruction amendments and civil rights legislation.

119. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

boundaries. Challenging the Court, particularly in decisions where the Court's reasoning is suspect, may force the Court to issue decisions with stronger, clearer analyses, or to reconsider suspect logic. For example, in the abrogation line of cases, the Court was consistently narrowly divided with strongly worded dissents concerning Congress's power.[120] Continued congressional challenges to the abrogation doctrine would be justified in light of the tenuous reasoning underlying it, the narrow margin of the decisions supporting it, and the inconsistency in its applications.[121]

In addition to these systemic concerns, moral concerns weigh in favor of congressional action to restore disparate-impact legislation. Racial animosity is almost universally derided as immoral and a social blight, yet it still survives, most obviously among fringe elements.[122] But given America's history with race and racism, it is not surprising to find that remnants of racial animosity survive in the mainstream of Americans of all races. Racial stereotyping is generally socially unacceptable. But despite our aversion to racial stereotyping, the actual incidence of stereotyping may be very high indeed.[123] A study has shown that people are more likely to admit to holding negative stereotypes where they believe such stereotypes are acceptable.[124] This is evidenced in ways benign and malicious. For example, some very popular comedy only works based on stereotypes or the common understanding of a particular stereotype.[125] More perniciously, the debates over welfare, drug, and immigration

120. *See supra* text accompanying notes 80–86.

121. This is distinguishable from the circumstances in *Cooper*, 358 U.S. 1, where the state legislature sought to defy the unanimous decision of the Supreme Court in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). There has been scholarly commentary on the history of Congressional efforts to challenge decisions by the Supreme Court. *See* Frank Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 911–12 (1990); Mark E. Herrmann, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 Wm & Mary L. Rev. 543 (1992); Rebecca E. Zeitlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 Rutgers L. Rev. 945 (2005).

122. *See generally* Anti-Defamation League, *Extremism Frontpage*, http://www.adl.org/main_Extremism/default.htm (last visited Sept. 13, 2009) (outlining press releases and information about racist groups and events).

123. *See*, *e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1491–1538 (2005) (discussing numerous studies regarding racial perceptions); Diane Cardwell, *Race Bubbles to the Surface in Standoff*, N.Y. Times, Dec. 22, 2005, at B1 (noting possible racial issues in the New York City transit strike, "the union . . . shut down a Web log where the public could comment on the strike after it became so clogged with messages comparing the workers to monkeys and calling them 'you people.'"); Jay Fitzgerald, *Publisher mulls fight over Curious shirts*, Boston Herald, May 15, 2008, at pg. 4 (reporting a controversy over a t-shirt with the cartoon monkey, Curious George, and the slogan "Obama in `08"). *See also* Diversity Digest, *How Do Americans View One Another? The Persistence of Racial/Ethnic Stereotypes*, http://www.diversityweb.org/Digest/W98/research2.html (last visited Sept. 13, 2009).

124. *See* Charles Stangor et al., *Perceived Consensus as a Foundation of Racial Stereotyping*, Stanford University Graduate School of Business Research Paper Series, Paper No. 1517 (1997), *available at* https://gsbapps.stanford.edu/researchpapers/library/rp1517.pdf.

125. For example, see almost all of the comedy of Chris Rock, Mel Brooks, et al. That so much popular comedy is based on stereotypes, even the subversion of stereotypes, is an example of how widely some stereotypes are understood.

policy since the early 1990s can very much be understood as debates about race because of stereotypes and "racial coding." The ongoing challenges to affirmative action[126] are obviously very much a debate about race. In addition, the 2008 presidential race is a further example that racial issues are not fully resolved.[127]

Unlike the open bigotry that is quickly condemned when it arises, these stereotypes (and the damage they cause) not only exist, but are either tolerated—so long as they are not expressed too openly—explained away, excused, or ignored. It is easy to condemn or dismiss the racist ravings of the "lunatic fringe." The intent of such people is there for all to see. But all too often, the troubling statements or actions of "reasonable people" [128] are excused by "she didn't mean it that way," or "you're reading into things," or worse, "you're being overly sensitive."[129] Sometimes, they are not questioned at all. Yet not all troubling statements or actions can be adequately explained in this fashion, despite whatever reasoning or rationalization is used to excuse it. It is not that these people are racist in the manner of the "lunatic fringe," but rather their words or actions evidence the retention of stereotyping or animus. Because they are not obviously, actively, or even consciously racially biased, others excuse the displays of stereotyping as unintentional slips or awkward gaffs, and do not look further to examine the cause underlying the gaff. Retained stereotypes and animus may also manifest as apathy towards people of other races, including tolerance of unnecessary conditions of disparity.

---

126. *See* Dan Frosch, *Colorado Petition Draws Charges of Deception*, N.Y. Times, Apr. 1, 2008, at A16 (referencing voter initiatives, pending in five states—Arizona, Colorado, Missouri, Nebraska and Oklahoma—to ban affirmative action programs).

127. *See*, *e.g.*, Nagourney & Thee, *supra* note 3 (discussing racial divisions in polling data concerning then-Senator Obama). An analysis of President Obama's victory in 2008 and what it may entail for race-relations in the United States is beyond the scope of this article. But despite President Obama's victory and the hope it engenders that the racial divide is closing (or mattering less), it should not be forgotten that his candidacy both reflects a particular moment in history (an extremely unpopular incumbent party, due in part to two wars and a downward-spiraling economy) and President Obama's political appeal (due in part to his lack of a race-based agenda). *See* Rachel L. Swarns, *Vaulting the Racial Divide, Obama Persuaded Americans to Follow*, N.Y. Times, Nov. 5, 2008, at P7. President Obama's victory does not undo the racial tensions or disparities that existed prior to and since his election, and indeed, there is concern that his victory may result in the persistence of racial disparities. *See*, *e.g.*, Stephen Ohlemacher, *Black euphoria ... and racial realities*, St. Louis Post-Dispatch, Nov. 25, 2008, at A3.

128. *See*, *e.g.*, Thomas George, *The Pushing and Pulling of Black Quarterbacks*, N.Y. Times, Oct. 3, 2003, at D7 (analyzing Rush Limbaugh's racially insensitive statements about Philadelphia Eagles' quarterback Donovan McNabb); Leibovich, *supra* note 8 (noting Senator Lott's troubles after remarks regarding Strom Thurmond's failed presidential run). This is not meant to imply that every instance of an awkward remark or comment or action is racist or is caused by some underlying animosity or stereotype. There are honest mistakes and slips of tongue. But not every slip of tongue is an unfortunate, but innocent, mistake. These slips may well reveal an underlying stereotype that even "reasonable people" hold.

129. This last criticism is particularly objectionable. First, while the mistake may have been innocent, requesting a clarification, apology, or an explanation for such a mistake is reasonable. Second, in light of the history of race relations in the country, some sensitivity may be justified. Finally, it wrongly implies the victim is persecuting the person who made the remark, which is hardly fair.

All of these slips, gaffs, and displays of apathy can be understood as symptoms of unconscious racism.[130] Insofar as this unconscious racism shares the characteristics of stereotyping, animosity, and fear with conscious racism, it leads to many of the same conditions. Indeed, the apathy caused by unconscious racism is more dangerous today than avowed and open racists. For example, where racists are constrained by the Constitution from mandating ghettos or segregation, apathy works just fine to accomplish the same results.[131] Indeed, racists seeking to further segregate the nation or hurt minorities need only to ensure that the status quo of apathy and inaction continue to achieve their ends.

Current legal doctrines in anti-discrimination law protect the status quo, leading to apathetic results. Even without considering the impact of unconscious racism on judges and juries, the intentional-discrimination requirement, especially because of the level of proof required by *Washington v. Davis*[132] and *Arlington Heights*,[133] effectively excuses all manners of racially discriminatory policies.[134] To the extent that this institutionalized and systematic apathy allows conditions of inequality and injustice to exist, it is immoral.[135] Therefore, even beyond the questionable utility of the *Davis* and *Arlington Heights* standards to root out and prevent intentional discrimination, Congress should act to mitigate the effects that these forces are likely to have upon minorities.

---

130. There is much scholarly study of the existence, cause, and effect of unconscious racism, although scholars may use different terms for the concept. *See*, *e.g.*, Imani Perry, *Post-Intent Racism: A New Framework for an Old Problem*,, 19 Nat'l Black L.J. 113 (2006–2007); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1491–1538 (2005); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803 (2004); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). This article does not adopt any particular meaning or definition of the concept beyond acknowledging its existence and effects.

131. *See*, *e.g.*, Jonathan Kozol, The Shame of the Nation: The Restoration of Apartheid Schooling in America (2005) (describing resegregation of public schools); Gary Orfield, *Why Segregation is Inherently Unequal: The Abandonment of* Brown *and the Continuing Failure of* Plessey, 49 N.Y.L. Sch. L. Rev. 1041 (2004–2005) (describing re-segregation of schools since 1988).

132. 426 U.S. 229 (1976).

133. 429 U.S. 252 (1977).

134. For example, consider the judicial reaction to challenges to the crack/powder-cocaine sentencing disparity. *See* Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship between the Davis Intent Requirement and the Crack Laws*, 50 How. L.J. 345, 382–94 (2007). Mr. Tyson discussed the district court opinion in *United States v. Clary*, 846 F. Supp 768 (E.D. Mo. 1994), holding that that the crack/powder-cocaine sentencing disparity violated the Equal Protection Clause, and the Eighth Circuit opinion reversing the district court, 34 F.3d 709 (8th Cir. 1994).

135. *See*, *e.g.*, *Luke* 10:29–37 (parable of the Good Samaritan); President John F. Kennedy, Inaugural Address (Jan. 20, 1961) ("If a free society cannot help the many who are poor, it cannot save the few who are rich."), *available at* http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03Inaugural01201961.htm.

One manner of doing so is through disparate-impact litigation. Because outright racism mostly has been driven underground,[136] or worse, into the subconscious, most racism will not be evidenced in laws like "non-whites are not allowed to vote" or city policies where "only black and Latino males will be stopped and frisked" or "schools must be segregated according to race." Instead, one easily can imagine a situation where only those who can afford a voter-identification card are allowed to vote, even if the cards cost $20 and there are no means for those living in a predominately black city to acquire one without traveling outside the city.[137] One can also easily imagine situations where blacks and Latinos are pulled over and searched more frequently than white motorists, or stopped and frisked more often in the Bronx.[138] Another imaginable situation is where, due to historically segregated housing patterns and "white flight," a city school is almost predominately minority while its suburban counterpart, perhaps fifteen minutes away, is predominately white and better funded.[139]

Each of these scenarios is imaginable because they happened and continue to happen. Yet, while each of these scenarios presents a variety of legal issues, the Equal Protection issue cannot be raised without overcoming a tremendous burden on the plaintiff to show evidence of intentional discrimination.[140] And while some laws and policies with a disparate impact may be innocuous, there are many instances where judges and juries must labor hard to turn a blind eye to less innocent motivations.[141] And it is likely that such less innocent motivations are there.[142]

---

136. Some racism is still openly manifested in mainstream forums. For example, on Web sites like AbovetheLaw.com, visitors posting comments in the wake of Barack Obama's election posted messages such as "I don't remember jumping around in the street like some damn baboon after the two times Bush was elected" and worse. *See* Posting of Guest to http://abovethelaw.com/2008/11/obama.php#comments (Nov. 5, 2008, 12:18 a.m.). Other postings at that and other Web sites on issues such as affirmative action also encourage the anonymous posting of racist comments. There are two relevant insights that these postings reveal. First, the postings are anonymous, which, while keeping with the typical practice on such sites, demonstrates that there are ideas with which people are hesitant to publicly identify themselves, but which they hold and need to express in some fashion. Second, to the extent that these visitors posting comments make employment decisions, study or practice law, adjudicate disputes, or serve in a public capacity, their prejudice and bigotry may affect how they make decisions in those capacities.

137. *See* Common Cause/Georgia v. Billups, 439 F.Supp.2d 1294 (N.D. Ga 2006); Nancy Badertscher, *General Assembly's First Day: No Time Wasted on Revised ID Bill*, Atlanta J.-Const., Jan. 10, 2006, at A1.

138. *See*, *e.g.*, Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001); Michael Powell, *N.Y. Settles Lawsuit on Racial Profiling; Police Must Report Frisk Cases*, Wash. Post, Sept. 20, 2003, at A3; Dana E. Sullivan, *Anti-Profiling: Cops Go to School*, N.J. Law., Sept. 19, 2005, at 4.

139. *See generally* Kozol, *supra* note 131 (discussing inequalities in school funding); Orfield, *supra* note 131, at 1044–1046 (describing re-segregation of schools since 1988).

140. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

141. *See* discussions *supra* note 130, 134, and *infra* note 152.

142. For example:

> Representative Burmeister told the Voting Section of the DOJ 'that if there are fewer black voters because of this bill, it will only be because there is less opportunity for

Anecdotal evidence shows the existence of subconscious and hidden stereotyping. For example, a study conducted by a group of university professors showed that equally qualified white felons were more likely to receive job offers than black felons in New York City.[143] Politicians also acknowledge the burdens of subconscious and hidden stereotyping. For example, President Bush spoke of the "soft bigotry of low expectations"[144] when passing the No Child Left Behind Act.[145] In the wake of Hurricane Katrina in 2005, after criticisms that President Bush was indifferent to the plight of the black refugees, he also acknowledged that the "history of racial discrimination which cut off generations from the opportunity of America" contributed to the tragedy in New Orleans.[146]

Even if intentional racism is not a factor in some instances of disparate-impact claims, the perception of racism is a fundamental problem. This was illustrated by the public reaction to the government response to the flooding of New Orleans caused by Hurricane Katrina. Blacks overwhelmingly perceived that race affected the inadequate governmental response, while the same ratio of whites held the opposite view.[147] The perception of minorities—that governmental action is influenced by race—decreases the legitimacy of government action in the eyes of minorities.[148] In addition to the underlying perceptions of governmental legitimacy among whites and blacks, the differing perceptions themselves can add to the belief among minorities that whites do not realize the level to which minorities are disparately impacted by

---

> fraud. She said that when black voters in her black precincts are not paid to vote, they do not go to the polls.

*Common Cause/Georgia*, 439 F.Supp.2d at 1304. This statement reflects a stereotype about black voters. But it may also reflect the desire of Rep. Burmeister to suppress the black vote.

143. Paul von Zielbauer, *Study Shows More Job Offers for Ex-Convicts Who Are White*, N.Y. Times, June 17, 2005, at B1; (discussing results of study showing that white felons are more likely to receive job offers than black felons, and as likely to receive a job offer as non-felon blacks). The study is by Devah Pager & Bruce Western, *Barriers to Employment Facing Young Black and White Men with Criminal Records*, http://www.princeton.edu/~pager/auditnyc_offenders_draft.pdf.

144. George W. Bush, Acceptance Speech at the 2004 Republican National Convention (Sept. 2, 2004), *in Bush Accepts: "Our Tested and Confident Nation Can Achieve Anything"*, N.Y. Times, Sept. 3, 2004, at P4.

145. The No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (codified in 20 U.S.C. §§ 6301–7941 (2006) (effective 2002)).

146. Marc Sandalow, *Bush Promises to Rebuild*, S.F. Chron., Sept. 16, 2005, at A1.

147. *See* Todd S. Purdum & Marjorie Connelly, *Support for Bush Continues to Drop as More Question His Leadership Skills, Poll Shows*, N.Y. Times, Sept. 15, 2005, at A18. The article reported:

> The poll also pointed up starkly different attitudes toward Mr. Bush and the government among blacks and whites that were not so much caused by the storm as laid bare by it. While two-thirds of all Americans said Mr. Bush cares at least somewhat about the people left homeless by the hurricane, fewer than one-third of blacks agreed. Two-thirds of blacks said race was a major factor in the government's slow response to the flooding in New Orleans, while an almost identical number of whites said it was not.

*Id*.

148. *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) (racial classifications are irrelevant to most legitimate policy considerations therefore justifying strict scrutiny of such actions).

governmental policies.[149] From this conclusion, racial minorities might conclude that when white majorities pass laws or enact policies which have a negative effect on minorities, those majorities are doing so in ignorance, or apathy, or animosity, and therefore the action is illegitimate.[150] This fosters such points of view as "the War on Drugs is really a war on minorities,"[151] which can lead to a lack of support among communities who may stand to benefit the most from governmental intervention and whose support is essential for the government initiatives to succeed.

Furthermore, the judicially-imposed limitations on the relief available or the ability to seek relief for perceived racism increases the perception of marginalization.[152] Not only are minorities faced with perceived racism or apathy from the legislature or executive enacting or enforcing a policy with a disparate impact, but they are left without possible judicial remedy. This unbalanced judicial treatment of discrimination plaintiffs reinforces the perception of an apathetic and hostile government. Having strong civil rights protections increases the perception that the law protects all people equally and not just the status quo. Thus, from the standpoint of increasing the perceived legitimacy of government policies, a stronger civil rights regime is desirable.

## IV. THE POSSIBILITIES AND LIMITATIONS OF CONGRESSIONAL POWER TO RESTORE THE PROMISE OF DISPARATE-IMPACT LITIGATION

In taking action on the issue of disparate-impact litigation, Congress should closely consider the nature of the action it wishes to take. Congress could take no direct legislative action, but rather, seek to change the Court's civil rights jurisprudence

---

149. This is not to forget the beliefs this differing perception can engender in whites.

150. *See* David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 Suffolk U. L. Rev. 241, 252–53 (2001) ("Two features of the war on drugs in particular corrode legitimacy. The first is the reality and perception that the system is unfair to minorities, subjecting them to much harsher treatment than whites." (citing David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999)). *See also* Barak Obama, Speech at the National Constitution Center (March 18, 2008), *in* The Chi. Sun-Times, Mar. 19, 2008, at 26 (discussing the "racial stalemate" cause by the anger and resentment of blacks and whites).

151. *See*, *e.g.*, Cole, *supra* note 150, at 253–54; Arianna Huffington, *The War on Drugs Is Really a War on Minorities*, March 27, 2007, http://www.alternet.org/rights/49782/ (last visited Sept. 16, 2009). It also leads to more extreme points of view, such as that the government created the HIV virus. Jeff Zeleny, *Obama Adds To Distance From Pastor And Opinions*, N.Y. Times, Apr. 29, 2008, at A14 (describing Rev. Jeremiah Wright's belief that the government invented the HIV virus). For musical examples of these points of view, see Dead Prez, *Propaganda*, *on* Let's Get Free (Relativity 2000); 2Pac, *Changes*, *on* 2Pac:Greatest Hits (Interscope Records 1998).

152. For example, compare the difficulties minorities face when seeking to modify policies, which disparately impact their interests, with the hurdles that face the opponents of affirmative action. Majority whites can easily challenge affirmative action in the courts, *see*, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003), or at the polls on election day. *See also* Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N.Y. Times, Oct. 31, 2006, at A1. In addition, the current legal standards may unjustifiably favor these challenges. *See* Victor Suthammanont, *Note: Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y.L. Sch. L. Rev. 1173 (2005).

through rhetoric and political threats. They could also confirm judges friendlier to congressional power or civil rights. Congress could completely redraft the Civil Rights Act, implementing an updated civil rights regime. Or they could simply update the old law in an effort to undo the Court's decisions limiting the availability of civil rights actions. One possible correction in this vein would be passage of the Civil Right Act of 2008 or similar legislation.

During the 110th Congress, the Civil Rights Act of 2008 was proposed in both the House[153] and the Senate.[154] The findings of Congress outlined in the Act note that the *Sandoval* decision "contradicts settled expectations created by title VI of the Civil Rights Act of 1964[.]"[155] The findings trace the development of antidiscrimination law,[156] and note that the civil rights statutes[157] cannot be enforced properly without private attorneys general,[158] and that all the enumerated civil rights acts contain implied rights of action.[159] Congress's last finding is that: "The right to maintain a private right of action under a provision added to a statute under this subtitle will be effectuated by a waiver of sovereign immunity in the same manner as sovereign immunity is waived under the remaining provisions of that statute."[160]

The Civil Rights Act of 2008 then amends the various civil rights statutes to correct the effects of various Supreme Court decisions from the past three decades. With respect to Title VI, the Civil Rights Act of 2008 adds two new subsections to section 601 after the text of the original statute.[161] Of these two subsections, subsection (b) prohibits "[d]iscrimination (including exclusion from participation and denial of benefits)" which can be proven by disparate impacts on the basis of race, color, or national origin, and for which the state fails to provide a reason "related to and necessary to achieve the nondiscriminatory goals of the program[.]"[162] The

153. *See* Civil Rights Act of 2008, S. 2554, 110th Cong. (2008) (H.R. 5129).

154. *See* Civil Rights Act of 2008, S. 2554, 110th Cong. (2008).

155. *Id*. § 101(2).

156. *Id*. § 101.

157. *See id*. § 101(2) for a list of which acts are included. These are:

> [T]itle VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 (also known as the 'Patsy Takemoto Mink Equal Opportunity in Education Act') (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)[.]

*Id.*

158. *See id*. § 101(3) (2008) (citing Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (per curiam)). In *Newman*, the Court noted that the enforcement of the Civil Rights Act of 1964 would rely in part on private litigants and stated: "If [a plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402.

159. Civil Rights Act of 2008, S. 2554, § 101(4) 110th Cong. (2008).

160. *Id*. § 101(10).

161. *Id*. § 102(a)(2).

162. *Id*.

recipient of federal funds may also be found to have discriminated "if a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice."[163] Each policy or practice must separately be shown to cause a disparate impact, except where the processes are not capable of separation for analysis.[164] If there is intentional discrimination, necessity of achieving the goals of the program is not a defense.[165]

Section 602 of Title VI would also be amended. The Civil Rights Act of 2008 adds a new subsection (b) to section 602 stating: "Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action."[166] This language creates a private right of action to enforce regulations under section 602 of Title VI, directly overruling the result in *Sandoval*.[167] The Civil Rights Act of 2008 then creates a new section 602A outlining the recovery available under Title VI.[168]

The remedies available depend on the manner of claim brought by the plaintiff.[169] For a claim of intentional discrimination, a plaintiff may recover both equitable relief and damages, including punitive and compensatory damages, attorney's fees, and costs.[170] For claims based on disparate impact, a plaintiff is only entitled to equitable relief, attorney's fees, and costs.[171] Section 602A also explicitly notes that claims may be brought under the implementing regulations.[172] This scheme adopts the remedies that Justice White would have allowed in *Guardians Association*.[173]

Even if Congress passes an act similar to the Civil Rights Act of 2008 to remediate the Supreme Court's decisions limiting civil rights actions, it is possible that a recipient of federal funding would challenge Congress's authority to pass such legislation or to impose liabilities upon it. In particular, a state, relying on the Supreme Court's abrogation jurisprudence or other theories, could attempt to defend an action brought under legislation such as the Civil Rights Act of 2008 by attacking its constitutionality. Therefore, congressional action in the civil rights area would only be effective if it could withstand the scrutiny of the Supreme Court.

---

163. *Id*.

164. *Id*.

165. *Id*.

166. *Id*. § 103(b).

167. *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

168. Civil Rights Act of 2008, S. 2554, § 104(a) 110th Cong. (2008).

169. *Id*. § 104(a).

170. *Id*. § 104(a). Punitive damages are not available against governmental entities. *Id*. This is not a change from existing law.

171. *Id*. § 104(a).

172. *Id*. § 104(a).

173. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983).

Congress's authority to pass Title VI of the Civil Rights Act of 1964 most likely arises under the Spending Clause of the Constitution.[174] The amendments to that Title in the Civil Rights Act of 2008 would derive from the same grant of authority. Congress spending power is limited by case law.[175] Congress must exercise the spending power for "the general welfare."[176] Conditional grants of funding must be unambiguous so that states knowingly accept the conditions attached.[177] In addition, conditions on federal funding may be impermissible if they are unrelated to "the federal interest in particular . . . programs"[178] or if prohibited by constitutional provisions.[179] These requirements are merely for Congress to condition the receipt of federal funds; for Congress to require a state to waive sovereign immunity, other considerations may come into play.[180]

Insofar as Congress wishes to stop state actors from discriminating, it has power under section 5 of the Fourteenth Amendment to pass legislation to achieve those ends.[181] Congress also has the power to abrogate states' Eleventh Amendment immunity from suit to enforce the Fourteenth Amendment.[182] This power, however, is limited by the scope of protections in section 1 of the Fourteenth Amendment.[183] The Court has held that legislation under section 5 must "exhibit congruence and proportionality between the injury to be . . . remedied and the means adopted to that end."[184] This restriction has invalidated congressional abrogation of state immunity under the ADEA[185] and the ADA.[186]

---

174. U.S. Const. Art. 1 § 8. As Title VI deals with spending, this is the most likely authority for the Congress's power to pass the legislation. To the extent that the recipient of federal funding is a state, however, Title VI would also be authorized under section 5 of the Fourteenth Amendment.

175. South Dakota v. Dole, 483 U.S. 203 (1987).

176. *Id.* at 207 (citing Helvering v. Davis, 301 U.S. 619 (1937)).

177. *Id.* (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981)).

178. *Id.* (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

179. *Dole*, 483 U.S. at 208.

180. A state must expressly state its waiver of sovereign immunity. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–77 (1999). Additionally, Congress may not coerce the states into waiving sovereign immunity. *Dole*, 483 U.S. at 211. Such compulsion is evident where "what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *College Sav. Bank*, 527 U.S. at 687.

181. U.S. Const. amend. XIV.

182. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

183. *Id.* at 365 (citing City of Boerne v. Flores, 521 U.S. 507 (1997)).

184. *Id.* (internal quotes and citations omitted).

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

186. *Garrett*, 531 U.S. 356. The proposed Civil Rights Act of 2008 also seeks to circumvent the decisions in *Kimel* and *Garrett* to a certain extent, although that is not the focus of this paper.

Congress specifically authorized private actions under Title VI against the states in 42 U.S.C. § 2000d-7.[187] Courts have held that section 2000d-7 both abrogates state immunity under § 5 of the Fourteenth Amendment and is the required waiver of immunity for a state to receive federal funding.[188] Despite this authority for revising Title VI, given the Court's recent hostility to civil rights actions against the states, the validity of the Civil Rights Act of 2008 should be examined in detail.

A state challenging an implementation of the Civil Rights Act of 2008 could do so by at least three methods. The first method would be by challenging Congress's authority under the Constitution to create a disparate-impact cause of action under section 601 of Title VI and a cause of action to enforce regulations promulgated under section 602. The second method would be for a state to challenge whether 42 U.S.C. section 2000d-7 is an adequate notice of waiver to a state for that state to waive sovereign immunity. The third method would be for a state to challenge whether Congress's abrogation under section 2000d-7 is valid as applied to the new causes of action.

Congress's power to pass the Civil Rights Act of 2008 is very likely valid under the Spending Clause. Congress has wide power under the Spending Clause to condition the receipt of federal money.[189] In amending Title VI, Congress certainly would be legislating for "the general welfare."[190] There is a strong federal interest in anti-discrimination law, as evidenced in the Constitution.[191] Congressional conditioning of federal money is unambiguous in Title VI.[192] There seem to be no other constitutional bars to allowing disparate-impact claims under the Spending Clause, especially considering the mandate given to Congress to enforce the Fourteenth Amendment.[193] As to the prohibition of "coercion" by Congress,[194] it is unlikely that any withdrawal of federal funding would be so severe as to constitute coercion,[195] particularly where Congress is not obligated to give money to the states in the first instance.

---

187. 42 U.S.C. § 2000d-7 says that states are not "immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."

188. *See*, *e.g.*, Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (stating that section 2000d-7 abrogates state immunity); Pace v. Bogalusa City Sch. Bd., 403 F.3d 272 n.34 (5th Cir. 2005) (*en banc*) (citing, *e.g.*, A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 244–51 (3d Cir. 2003); Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees, 344 F.3d 1288, 1292–93 (11th Cir. 2003) (per curiam); Robinson v. Kansas, 295 F.3d 1183, 1189–90 (10th Cir. 2002)).

189. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

190. *Id.* at 207.

191. *See*, *e.g.*, U.S. Const. amend. XIII; U.S. Const. amend. XIV. *See also* Civil Rights Act of 1964 § 601, 42 U.S.C. §2000d (2006).

192. *See*, *e.g.*, *Pace*, 403 F.3d 272. *See also* 42 U.S.C. § 2000d-1 (stating "[c]ompliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program . . . .").

193. *See* U.S. Const. amend. XIV.

194. *Dole*, 483 U.S. at 210–11.

195. *See id.* at 211 (allowing withdrawal of federal highway funds); New York v. United States, 505 U.S. 144 (1992) (allowing monetary incentives).

Also, Congress's power to create disparate-impact causes of action has been upheld in the Title VII[196] and ADEA context.[197] While it may be argued that Title VII and the ADEA were passed (insofar as they regulate private employers) under the Commerce Clause, and Title VI was passed under the spending power, the rationality standard under which both powers are reviewed, absent a separate constitutional prohibition, is similar enough to presume that importing a statutory disparate-impact cause of action into Title VI is permissible.[198]

Section 2000d-7's sovereign-immunity waiver provisions are likely valid with respect to subjecting states to suit under a disparate-impact theory. As discussed earlier, Congress has broad power to condition the receipt of federal funds.[199] The amendments to Title VI do not trigger the restrictions on Congress's power articulated in *South Dakota v. Dole*.[200] On a surface analysis, the waiver may be valid.

A challenger to the Civil Rights Act of 2008, however, could use language from *Kimel v. Florida Board of Regents* to call into question whether Congress can legislate in this manner in this field. *Kimel* involved a challenge to abrogation of state immunity under section 5 of the Fourteenth Amendment.[201] Disturbingly broad language in *Kimel* states that "Congress's failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[202] Although a challenge to abrogation under section 5 of the Fourteenth Amendment, this language indicates—at least with respect to state and local government discrimination—that Congress could not act at all to prevent or discourage age discrimination by states or municipalities absent some "significant pattern" that gives Congress the reason to believe it needs to act in that field.[203] The Civil Rights Act of 2008 has no such findings, and the findings relevant to Title VI are over thirty years old.[204] While *Kimel* relates to the power of Congress to act under section 5 of the Fourteenth

196. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

197. Smith v. City of Jackson, 544 U.S. 228 (2005).

198. *See id.* (allowing disparate impact under the ADEA due to similarity to Title VII). If the permissibility of disparate-impact claims is transferable between racial discrimination (Title VII) to age discrimination (ADEA), then it should be more likely that it should be transferable between Title VII and Title VI because both target racial discrimination.

199. *See supra* text accompanying notes 174–80.

200. *Id.*

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

202. *Id.* at 91.

203. This is a highly restrictive standard, especially considering the Court's standard for finding discrimination. If, under the Fourteenth Amendment, intent is required to find discrimination, then Congress could make all the findings it wished to about disparate impact to no avail. Congress may have to find a pattern of intentional discrimination in order to legislate in this realm under § 5 of the Fourteenth Amendment. Even then, there could still be problems insofar as abrogation is concerned. *See infra* text accompanying notes 222–236.

204. This is not to say that things are so different as to question the need for Title VI.

Amendment, there is reason to believe that the Court may try to extend that logic to other areas of constitutional inquiry considering the trend of its jurisprudence.[205] Thus, it is conceivable that Congress could not permissibly require a waiver of state sovereign immunity under the Spending Clause for violations of Title VI because it lacks a finding of "significant discrimination" by the states in administering federally funded programs.

While such an extension of *Kimel* would hardly be as justifiable as this cursory analysis may indicate, it is the simplicity of this shallow analysis that could make it appealing to those seeking to undermine federal power to combat discrimination. Another wrinkle in requiring a finding of "significant discrimination" is the conundrum Congress faces in making that finding. The Court decides what discrimination is, and only intentional discrimination is prohibited. Thus, even if Congress finds that numerous state programs have discriminatory effects, it is unclear whether these effects would be at all relevant to the findings that the Court may require.

But the Court has shown great deference to Congress in Spending Clause cases.[206] At least one appeals court has reaffirmed that, despite the trend of recent Supreme Court jurisprudence, laws passed under the Spending Clause are binding on the states under the Supremacy Clause.[207] The fact that states can refuse federal funding rather than be subject to laws binding them upon acceptance weighs heavily in favor of accepting the legitimacy of congressional action.[208] Therefore, it is highly probable that the Court would uphold the waiver of sovereign immunity with respect to disparate-impact claims as a condition of receiving funds.

The ability of Congress to unilaterally abrogate a state's sovereign immunity with respect to creating disparate-impact liability, however, is much more doubtful. The states are immune from suit by private individuals in federal courts under the Eleventh Amendment.[209] Congress may abrogate state immunity when it acts

---

205. *See*, *e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (limiting rights protected under the "and laws" language of § 1983 to those that conform to rights creating language from private right of action cases); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (limiting Congress's power to abrogate state immunity to protect only the scope of rights articulated under § 1 of the Fourteenth Amendment); United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act as outside of Congress's Commerce Clause power); United States v. Lopez, 514 U.S. 549 (1995) (striking down Congress's power to act under the Commerce Clause in prohibiting possession of a firearm near a school). *But see* Smith v. City of Jackson, 544 U.S. 228 (2005) (upholding municipal liability in disparate-impact claims under ADEA); Tennessee v. Lane, 541 U.S. 509 (2004) (upholding abrogation of state immunity under Title II of ADA under the Due Process Clause of the Fourteenth Amendment). *See also* Rebecca E. Zeitlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 Wake Forest L. Rev. 141, 147–67 (2002) (describing the Rehnquist Court's restrictions on court's abilities to enforce civil rights).

206. Zeitlow, *supra* note 205, at 167–90.

207. Westside Mothers v. Haveman, 289 F.3d 852 (6th Cir. 2002).

208. Zeitlow, *supra* note 205, at 177–78. *See also Dole*, 483 U.S. at 207–08 (Congress may condition the use of federal funds provided that such conditions are not coercive).

209. *See Garrett*, 531 U.S. at 363; U.S. Const. amend. XI.

unequivocally and "pursuant to a valid grant of constitutional authority."[210] Congress may also "remedy and . . . deter violation of rights . . . by prohibiting a . . . broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[211] In the instance where Congress reaches "beyond the scope of § 1's actual guarantees[,]" the legislation must be congruent and proportional to the injury Congress is attempting to limit or prevent.[212] In order for a remedy to be congruent and proportional, for example, it cannot seek to redefine the "substance of constitutional guarantees."[213]

In a challenge to Congress's authority to abrogate state immunity, the crucial issue may be less a matter of substantive law, and more a matter of how a party frames the "substance" of the right that Congress is attempting to protect. For example, it is clearly within Congress's power under section 5 of the Fourteenth Amendment to act to prevent or remedy discrimination on the basis of race prohibited by section 1.[214] Where Congress does not exceed the scope of section 1, it is only subject to the deferential test stated in *McCulloch v. Maryland*.[215] If the Court frames the challenged guarantee broadly, such as "the guarantee against racial discrimination," it is likely that the Civil Rights Act of 2008 revisions would be permissible. This is because Congress's underlying purpose in preventing and remedying discrimination is a permissible end, requiring only a rational means of accomplishing that end.[216]

If, however, the legislation is narrowly characterized as a guarantee against state actions with disparate impacts, then the permissibility of the abrogation is questionable. Disparate impact alone is not enough to prove impermissible discrimination by the state,[217] although it may be indicative of prohibited intent.[218] The disparate-impact provisions of the Civil Rights Act of 2008 could be framed as legislating beyond the scope of section 1's protections, implicating the aforementioned test for congruence and proportionality in *City of Boerne v. Flores*.[219] The language in the Civil Rights Act of 2008 findings that disparate impact is often an indicator of

210. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).

211. *Id.* at 81.

212. *Garrett*, 531 U.S. at 365.

213. *Id.* at 365 (citing City of Boerne v. Flores, 521 U.S. 507, 519–24 (1997)). This is because "it is the responsibility of [the] Court, not Congress, to define" constitutional substance. *Id.*

214. *See* Katzenbach v. Morgan, 384 U.S. 641, 648–50 (1966).

215. *Id.* at 650 (citing McCulloch v. Maryland, 17 U.S. 316 (1819)). Chief Justice Marshall formulated the test as: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421.

216. *See Morgan*, 384 U.S. 650–51.

217. Washington v. Davis, 426 U.S. 229 (1976).

218. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

219. City of Boerne v. Flores, 521 U.S. 507 (1997).

intentional discrimination,[220] however, may mitigate against the Court ruling that the disparate-impact cause of action is "reaching beyond § 1's actual guarantees[.]"[221] But if the Court holds that the Civil Rights Act of 2008 exceeds section 1's protections, the Court will apply the congruence and proportionality test.

To test congruence and proportionality, first the Court will determine the congruence between the purpose of the legislation and the corresponding constitutional protection.[222] Then the Court will determine whether the challenged legislation would prohibit "substantially more state . . . decisions and practices than would be likely be held unconstitutional under the applicable equal protection . . . standard."[223] If so, the abrogation is invalid.[224] For example, in *Kimel*, the Court examined whether liability provisions in the Age Discrimination in Employment Act were applicable against the states.[225] Because age discrimination by the states is only subject to rationality review, the ADEA was struck down as so disproportional that it "cannot be understood as . . . designed to prevent . . . unconstitutional behavior."[226] Using the same standard in *Board of Trustees of the University of Alabama v. Garrett*, the Court struck down liability for damages under Title I of the Americans with Disabilities Act because disability discrimination is only tested by rational-basis scrutiny.[227]

The Court may be able to choose to apply the same standard to the Civil Rights Act of 2008. Because facially neutral laws with a disparate impact, without more, are subject to rational-basis scrutiny,[228] the Court could hold that the Act could prohibit substantially more practices and decisions than would be held unconstitutional under the Equal Protection Clause.[229] Section 2000d-7, therefore, would be invalid insofar as it abrogates state immunity with respect to the disparate-impact claims.[230]

The Civil Rights Act of 2008 could be distinguished, however, in that it does target intentional racial discrimination,[231] which is subject to strict scrutiny. The Court has found that disparate impact can be an indicator of intentional

220. Civil Rights Act of 2008, S. 2554 §102(a), 110th Cong. (2008).

221. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

222. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (noting that age discrimination is subject only to rationality review).

223. *Id.* at 86.

224. *Id.*

225. *Id.* at 62.

226. *Id.* at 82 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

227. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367–68 (2001).

228. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

229. *See Kimel*, 528 U.S. at 86. This is particularly true because the Court has not held a law's impact to be so disproportional as to evidence discrimination since *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

230. But section 2000d-7, in that instance, could still be valid as notice of waiver. *See supra* text accompanying notes 198–208.

231. *See* Civil Rights Act of 2008, S. 2554 §102(a), 110th Cong. (2008).

discrimination.[232] Nevertheless, because the Court has already held that intent is required for a violation of the Equal Protection Clause[233] and the Civil Rights Act of 2008 only requires a showing of disparate-impact,[234] the Court may find that Congress cannot require less than discriminatory intent to find that a state discriminated under Title VI. But where the ADEA in *Kimel* and the ADA in *Garrett* authorized money damages,[235] the Civil Rights Act of 2008 only allows injunctive relief and attorneys' fees and costs for disparate-impact claims.[236] This difference may allow the Act to meet the proportionality requirement because, even if the Act would prohibit more decisions and practices than might be held unconstitutional, the remedies are far more limited.

The congruence and proportionality requirement articulated in *City of Boerne* and applied in *Kimel* and *Garrett* may also be violated if the Court finds that Congress was seeking to redefine a constitutional guarantee in adding a disparate-impact cause of action to Title VI.[237] In *City of Boerne*, the Court held that Congress did not have the power to pass the RFRA because it sought to redefine the limits of First Amendment protections.[238] Without showing a history of laws of general applicability that were passed to target religious groups, Congress had no authority to act under § 5 of the Fourteenth Amendment to burden states.[239]

On the surface, an application of *City of Boerne* seems fatal to holding that abrogation under section 2000d-7 is permissible as applied to the Civil Rights Act of 2008. In *City of Boerne*, Congress attempted to redefine the substance of impermissible state intrusion upon religious practice,[240] whereas in the Civil Rights Act of 2008, Congress might be attempting to redefine the substance of impermissible discrimination.[241] Both religious freedom and freedom from impermissible discrimination are protected against state infringement by strict scrutiny.[242] Thus, RFRA and the Civil Rights Act of 2008 are not distinguishable on that basis. Furthermore, the lack of findings in the Civil Rights Act of 2008 of impermissible state discrimination mirrors the lack of such findings in the RFRA.

---

232. *Arlington Heights*, 429 U.S. 252.

233. Washington v. Davis, 426 U.S. 229 (1976).

234. Civil Rights Act of 2008, S. 2554 §§ 101(a) and 102(a), 110th Cong. (2008).

235. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

236. Civil Rights Act of 2008, S. 2554 § 104(a), 110th Cong. (2008).

237. *See Garrett*, 531 U.S. at 365.

238. 521 U.S. at 534–35.

239. *Id.* at 529–35.

240. *See id.*

241. *See* Civil Rights Act of 2008, S. 2554 §102, 110th Cong. (2008).

242. *See* Grutter v. Bollinger, 539 U.S. 306, 321 (2003) (strict scrutiny applied in an Equal Protection Clause case); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993) (strict scrutiny applied in a Free Exercise Clause case).

The Civil Rights Act of 2008, however, may be distinguished from the RFRA in a meaningful respect. The RFRA states in 42 U.S.C. § 2000bb-1(a) that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ."[243] Section 601 of Title VI is phrased as follows: "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."[244] This distinction is important. A statute may create a private right if its text is "phrased in terms of the person benefited."[245] Section 601 is such a statute,[246] while the RFRA is not because its language is phrased as a limitation on government.[247]

The Civil Rights Act of 2008 adds the following to section 601: "Discrimination . . . based on disparate impact is established *under this title* . . ." by two separate tests.[248] The Civil Rights Act of 2008 is not redefining impermissible discrimination under section 1 of the Fourteenth Amendment; it is defining impermissible discrimination under § 601.[249] Congress is then not redefining a constitutional right, as prohibited by *City of Boerne*, but rather a statutory right. Because Congress validly created a private right of action under section 601,[250] it may redefine that statutory right.[251] Courts have held that Congress abrogated state sovereign immunity in Title VI via section 2000d-7.[252] Therefore, *City of Boerne* is not fatal to the proposed Civil Rights Act of 2008.

---

243. 42 U.S.C. § 2000bb-1(a) (2006).

244. 42 U.S.C. § 2000d (2006).

245. Gonzaga Univ. v. Doe, 536 U.S. 273,284 (2002) (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 692 n.13 (1979)). *Cannon* is important because it relied on Title VI as a foundation for its holding of a private right of action in Title IX.

246. *See Gonzaga Univ.*, 536 U.S. at 284 (using Title VI as an example of a statute creating an individual right); *see also* Alexander v. Sandoval, 532 U.S. 275, 279–80.

247. *See Gonzaga Univ.*, 536 U.S. at 284 n.3 (containing examples of rights-creating language).

248. Civil Rights Act of 2008, S. 2554 § 102(a), 110th Cong. (2008) (emphasis added). The two tests are first, if the state's policy has a disparate impact unrelated to and unnecessary to the achievement of nondiscriminatory goals, or second, if the state forgoes a less discriminatory alternative policy. *Id.*

249. This reading of the Civil Rights Act of 2008 is supported in the Act. Section 102(a) notes that intent is required for discrimination. Civil Rights Act of 2008, S. 2554 § 102(a), 110th Cong. (2008).

250. *See*, *e.g.*, *Cannon*, 441 U.S. at 696–98.

251. Redefining the definition of discrimination under section 601 may call into question whether section 601 is only valid to the extent that it enforces the substantive understanding of discrimination in section 1 of the Fourteenth Amendment. While Justice Scalia cites *Bakke*, 438 U.S. 265, for the proposition that section 601 prohibits only intentional discrimination, the decision in *Bakke* depended on Congressional intent in reaching that conclusion, *id.* at 284–85 (Powell, J., plurality), 340 (Brennan, J., concurring), and Congress can change its intent. Nothing in any of the Title VI cases indicates that Congress is limited in § 601 by the Fourteenth Amendment.

252. Pace v. Bogalusa City Sch. Bd., 403 F.3d at 272 n.34 (*en banc*); A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 244–51 (3d Cir. 2003); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1292–93 (11th Cir. 2003); Robinson v. Kansas, 295 F.3d 1183, 1189–90 (10th Cir. 2002).

## V. CONCLUSION

Disparate impact causes of action were available to plaintiffs for over thirty years before the Supreme Court decision in *Sandoval*. In addition to upsetting the expectations of those who required the protections of Title VI, the Court's jurisprudence generally has reflected a thumb on the scales of justice in favor of the status quo. Congress should act to undo this imbalance to help remediate past discrimination and prevent present discrimination. Legislation similar to the proposed Civil Rights Act of 2008 is a positive step in rebalancing the scales.