A Constitutional Route to Discriminatory Impact Statutory Liability for State and Local Government Employers: All Roads Lead to Rome

LOUIS A. JACOBS*

I. SYNOPSIS

The statutory standard for determining whether state and local government employers have discriminated differs from the constitutional standard. Under Title VII of the Civil Rights Act of 1964,[1] as amended in 1972 to extend to government employers, proof of discriminatory impact suffices;[2] under the equal protection clause of the fourteenth amendment to the United States Constitution,[3] proof of discriminatory purpose is required.[4] This difference has been challenged by state and local government employers as unconstitutional.[5]

The heart of the challenge is that the meaning of a constitutional provision may not vary depending upon whether legislators or judges are the interpreters.[6] This term, in *City of Rome v. United States*,[7] the

* Assistant Professor of Law, Ohio State University College of Law. B.A., Syracuse Univ.; J.D., American Univ.; LL.M. (Labor), New York Univ.

1. 42 U.S.C.A. § 2000e, *et seq.* (Supp. 1979). Statutory liability for state and local government employment practices may conceivably be predicated on various federal statutes, their implementing regulations, and executive orders. *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (1976); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* (1976); Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794 (1976); State and Local Financial Assistance (Revenue Sharing) Act of 1972, 31 U.S.C. § 1221 (1976); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (1976); Executive Order 11,246, 3 C.F.R. 169-77 (1974); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979). Those practices are usually also subject to state laws and sometimes to local ordinances.

The focus of this Article will be on Title VII because it presents in starkest relief constitutional problems of statutory liability for discriminatory impact.

2. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

3. U.S. CONST. amend. XIV, § 1: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

4. Washington v. Davis, 426 U.S. 229, 239 (1976).

5. Although challenges are now working their way through federal appellate courts, *see* cases cited in note 13 *infra*, the United States Supreme Court has not yet had this issue properly before it. County of Los Angeles v. Davis, 440 U.S. 625, 635-36 n.* (1979) (Steward, J., dissenting); Hazelwood School Dist. v. United States, 433 U.S. 299, 306 n.12 (1977); Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977). *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 n.11 (1976) ("[R]espondents do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.")

6. After Oregon v. Mitchell, 400 U.S. 112 (1970), a majority of Supreme Court Justices can be counted in support of the proposition that the "normative content of a constitutional provision is the same for both Congress and the Court"; consequently, the impact standard under Title VII and the holding in Washington v. Davis, 426 U.S. 229, 239 (1976), conflict as to state and local government employers: "Only one of the two theories—*Washington* or [impact under Title VII]—can prevail, for the two are mutually exclusive." Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 573 n.148 (1977). My colleague is right; the two are mutually exclusive. His analysis deflates Washington v. Davis, but I do not foresee its reversal any time soon. Thus, my analysis proceeds to reconcile a seemingly irreconcilable conflict by positing a commerce clause anchor.

Supreme Court of the United States upheld a discriminatory impact standard in the Voting Rights Act[8] and rejected an argument that, because the constitutional provision[9] that Congress was enforcing reached only purposeful discrimination,[10] congressional enforcement power was so limited:

> It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," . . . In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting.[11]

Although *City of Rome* involved the fifteenth amendment while the challenge to Title VII's discriminatory impact standard involves the fourteenth amendment, *City of Rome* used fourteenth amendment precedent to buttress an expansive reading of the fifteenth amendment.[12]

Prior to *City of Rome*, courts and commentators faced with a direct fourteenth amendment challenge to Title VII have rejected the challenge, but their reasoning has been facile.[13] This Article distinguishes *City of Rome*, criticizes that reasoning, and then shows why differing standards are nevertheless constitutional.

The challenge relies on a pat argument: (1) application of Title VII to state and local governments represents an exercise of congressional power to enforce the equal protection clause of the fourteenth amendment;[14] (2)

7. 100 S. Ct. 1548 (1980).

8. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976) ("[S]uch qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.")

9. U.S. CONST. amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

10. In *City of Rome*, the Court assumed that the fifteenth amendment "prohibits only purposeful discrimination," 100 S. Ct. at 1560 (footnote omitted). Justice Marshall dropped a footnote, *id.* at n.11, disclaiming reliance on City of Mobile v. Bolden, 100 S. Ct. 1490 (1980), a decision from which he dissented, 100 S. Ct. at 1520, in which a plurality of four justices approved "the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." 100 S. Ct. at 1497. Enforcement power flows from section two of the fifteenth amendment: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

11. City of Rome v. United States, 100 S. Ct. 1548, 1562 (1980).

12. *Id.* at 1561-62.

13. *See, e.g.*, Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979); Scott v. City of Anniston, Ala., 597 F.2d 897, 899 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3154 (U.S. Sept. 7, 1979); Blake v. City of Los Angeles, 595 F.2d 1367, 1372-73 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3013 (U.S. July 12, 1979); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 25-27 (1979); Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 224 n.94 (1979); Comment, United States v. City of Chicago: *Impact Standard Applicable to State and Local Governments under Title VII*, 20 WM. & MARY L. REV. 357, 383-87 (1978).

14. U.S. CONST. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

enforcing the equal protection clause means compelling observance of its dictate; (3) the equal protection clause dictates that government employment practices not be adopted or administered with a discriminatory purpose; (4) Title VII may not reach beyond its constitutional power source; and (5) Title VII, therefore, may not proscribe, under the guise of enforcing the fourteenth amendment, government employment practices that have a discriminatory impact but not a discriminatory purpose.

Such a pat argument invites rejection. The fallacies are found in premises (2) and (3). These premises are acceptable as far as they go. The rejectionists explain, however, that the analytical journey to a constitutional justification for differing standards is not so short. Premise (2) stops at one aspect of enforcement, the proscription. Enforcement also involves a remedy. As part of the remedy for a denial of equal protection, Congress could set a lower standard of proof. Premise (3) stops at the beginning. The judicial definition of the equal protection clause dictate is acceptable as a starting point, but a congressionally contrived definition also belongs to the constitutional lexicon.[15]

The rejectionists take what appears to be a shortcut. A longer route proceeds through the commerce clause[16] but includes a speed trap: the holding in *National League of Cities v. Usery*[17] that federal minimum wage and maximum hours regulation may not be applied to state and local employers because the tenth amendment[18] imposes a federalism limit on commerce clause power. The shortcut is provided by *Fitzpatrick v. Bitzer*,[19] in which the Court held that the attorney's fees provision of Title VII may be applied to state and local employers because the 1972 amendment[20] extending Title VII to those employers represents an exercise of fourteenth amendment, not commerce clause, enforcement power.

The rejectionists' criticism of both premises is acceptable, but their conclusion is equally fallacious. While premise (2) ignores congressional power to supply a remedy for a violation of the equal protection clause, that power does not extend to a substantive alteration of what the clause means. And, while premise (3) ignores congressional lexography, the role Congress may play in defining violations of the equal protection clause is conditioned on the Supreme Court leaving room in the clause for a consistent interpretation. *Katzenbach v. Morgan*[21] does not hold

15. Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966), is universally cited by rejectionists in support of their criticism of both pronounced fallacies.

16. U.S. CONST. art. I, § 8, c. 3: "Congress shall have power to regulate commerce . . . among the several States, . . ."

17. National League of Cities v. Usery, 426 U.S. 833 (1976).

18. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

19. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

20. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

21. Katzenbach v. Morgan, 384 U.S. 641 (1966).

otherwise; instead, the section 5 power of Congress to enforce the fourteenth amendment is subject to the principle of judicial review: Congress may not adopt a meaning of the equal protection clause that the Supreme Court has rejected.[22] The shortcut becomes a dead end, the longer route more attractive.

The federalism limit established by *National League* is satisfied by Title VII and similar antidiscrimination statutes.[23] These laws do not intrude in the same way as the regulations in *National League*; therefore, the balancing done to apply the federalism limit tilts in favor of the laws. Congress has plenary power under the commerce clause[24] and may determine that commerce is affected by state and local government employer practices that have a discriminatory impact. Consequently, Title VII, snugly anchored in the commerce clause, may base liability upon a standard different from the constitutional one.

II. CITY OF ROME

On a superficial level, *City of Rome* destroys the challenge of state and local employers to statutory discriminatory impact liability. If Congress may establish impact liability under the fifteenth amendment, which has been assumed to require purposeful discrimination to prove a constitutional violation, then Congress surely can do likewise under the fourteenth amendment. Any challenge to Title VII now must circumvent *City of Rome*; yet, both the rationale and the language of the decision seem controlling.

City of Rome is distinguishable, however, on two points: first, the context of the holding is tightly linked to historic purposeful discrimination; and second, the congressional findings underlying the Voting Rights Act differ in kind and degree from those justifying extension of Title VII to state and local employers. Even if the rationale and language in *City of Rome* are insufficiently distinguishable, its holding controls only fifteenth amendment challenges, and the references to fourteenth amendment precedent are too easily dismissed as dicta to diminish the contrast between constitutional and statutory liability standards for state and local governmental employers.[25]

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22. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

23. Analysis of commerce clause power in the area of employment discrimination has largely focused on the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976). *See, e.g.*, Pearce v. Wichita Cty. Hosp. Bd., 590 F.2d 128, 132 (5th Cir. 1979); Marshall v. City of Sheboygan, 577 F.2d 1, 6 (7th Cir. 1979). The analysis is, however, apposite.

24. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

25. Both amendments protect against "racial voter dilution," City of Mobile v. Bolden, 100 S. Ct. 1490, 1500 (1980), however, their language differs in a significant way. The fifteenth amendment goes beyond denial of a right to proscribe abridgment as well. *Id.* at 1533, 1536 (Marshall, J., dissenting). Under the plurality in *Bolden*, "the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation" applies to both denial and abridgment of the franchise. *Id.* at 1498. But, abridgment can be accomplished by "a political structure that treats all individuals as

On the first point, the congressional determination that a discriminatory impact standard was an appropriate way to enforce the fifteenth amendment won judicial approval in *City of Rome* due to the context of prior purposeful discrimination. "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."[26] This approval more closely resembles an "impact-plus" standard, approved by fourteenth amendment precedent as consistent with the constitutional purpose standard,[27] than a pure impact one. The distinction is especially important when prior unconstitutional activity, presumed by the Voting Rights Act as to cities in Georgia, is to be remedied.[28]

On the second point, the majority in *City of Rome* starkly characterized the challenge there: "The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), in which we upheld the constitutionality of the Act."[29] In denying that request, the Court relied on congressional findings, first approved in *South Carolina v. Katzenbach*, of "unremitting and ingenious defiance of the Constitution," which produced seemingly neutral voting practices that were but slightly camouflaged means of intentional discrimination.[30]

In part IV of this Article, the legislative history of the 1972 amendments to Title VII is plumbed,[31] and the relationship of prior

equals but adversely affects the political strength of a racially identifiable group." *Id.* at 1509 (Stevens, J., concurring). In this sense, equal treatment under the fourteenth amendment would not prevent a violation of the fifteenth amendment. If the term "abridge" is to have a meaning additional to that of "deny," then *City of Rome* may be distinguishable.

26. City of Rome v. United States, 100 S. Ct. 1548, 1562 (1980) (footnote omitted). In his dissent, Justice Rehnquist emphasized the quoted language as the core holding with which he disagreed. *Id.* at 1581 (Rehnquist, J., dissenting). The history of purposeful discriminatory voting practices is recounted in South Carolina v. Katzenbach, 383 U.S. 301, 335 & n.47 (1966). Writing for the majority in *City of Rome*, Justice Marshall focused on "Congress' considered determination that . . . statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination." 100 S. Ct. at 1565.

27. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("The historical background of the [governmental] decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.") (citations omitted). Quite simply, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976).

28. A past violation changes the focus of the court from finding a present violation to determining "whether the [governmental entity] has taken steps adequate to abolish the dual, segregated system." Green v. County Sch. Bd., 391 U.S. 430, 437 (1968). Like the defendant in *Green*, the City of Rome was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38 (citations omitted). Yet, the trial court found as a matter of fact that changes in the voting practices and annexation of disproportionately white-populated areas would thwart a black candidate's chance to get elected. City of Rome v. United States, 100 St. Ct. at 1565-66 & 1566 nn.19-21.

29. City of Rome v. United States, 100 S. Ct. 1548, 1560 (1980).

30. *Id.*, *quoting* South Carolina v. Katzenbach, 383 U.S. 301, 309, 314-15 (1966).

31. *See* notes 49-102 and accompanying text *infra*.

purposeful discrimination to impact discrimination appears to be markedly different than what the Voting Rights Act Congress found to be a continued exercise in purposeful discrimination. Impact discrimination in employment was viewed as a separate but related constitutional violation. To combat that form of discrimination, Congress joined the remedial process of Title VII with a previously excluded set of victims, state and local government employees.[32] In contrast, the Voting Rights Act created a remedial process that included a substantive definition of the violation to be remedied.[33] What *City of Rome* does is to defer to the congressional definition, which was based on findings approved in *South Carolina v. Katzenbach.* In Title VII Congress did not purport to define either purposeful discrimination or section 1 of the fourteenth amendment, and *City of Rome* is thus inapposite.

III. A PRIMER ON TITLE VII DISCRIMINATION

Title VII was enacted "to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin."[34] Employment discrimination proscribed by Title VII occurs in two forms: differential treatment and disparate impact. When an "employer simply treats some people less favorably than others because of their[35] protected class membership, a discriminatory purpose or intent is manifest. When an employer treats an employee similarly to other employees, but the treatment results in a disparity based on a proscribed criterion, a discriminatory impact occurs."[36]

Consider, for example, *Dothard v. Rawlinson.*[37] Alabama would not assign women to prison guard positions that required direct contact with maximum security prisoners. Since men were so assigned, Alabama had engaged in differential treatment by purposely discriminating on the basis of sex.[38] Had Alabama instead declared that both female and male guards

32. *See* notes 66-75 and accompanying text *infra.*

33. In dissent, Justice Rehnquist demonstrates that the Voting Rights Act does more than set a burden of proof. City of Rome v. United States, 100 S. Ct. 1548, 1581-82 (1980) (Rehnquist, J., dissenting). The majority had approved a trial court finding "that the disapproved electoral changes and annexations had not been made for any discriminatory purpose." *Id.* at 1559. Thus, were burden of proof involved, a disfavored "irrebuttable presumption that 'vote diluting' changes are motivated by a discriminatory animus" would be used. *Id.* at 1581-82 (Rehnquist, J., dissenting). Instead, the Voting Rights Act created a substantive violation from that impact discrimination nurtured in a context of historical purposeful discrimination.

34. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

35. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (footnote added).

36. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

37. 433 U.S. 321 (1977).

38. *Id.* at 332. Because Alabama was allowed to interject the statutory defense of bona fide occupational qualification (bfoq), the discriminatory treatment did not violate Title VII. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1976), permits discrimination on the basis of religion, sex, or national origin (but not on the basis of race or color) when any of the criteria is a bfoq "reasonably necessary to the normal operation of that particular business or enterprise." A bfoq is established by a factual or legal showing that the requirements of a particular job disqualify all or substantially all

would be assigned contact positions so long as they satisfied neutrally applied minimum height and weight requirements that could be met by disproportionately more men than women, Alabama would have engaged in disparate impact discrimination.[39]

While not foreclosing the possibility that Alabama could be accused of discriminatory treatment via those neutral standards because the disparate impact was so reasonably foreseeable that the differential must have been intentional,[40] the Supreme Court has often distinguished

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members of a covered class. *Compare* Diaz v. Pan Am, 442 F.2d 385, 388 (5th Cir. 1971) *with* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

Classic examples of a bfoq are wet nurses and sperm bank donors. A bfoq may not be established "on the basis of stereotyped characterizations of the sexes." Dothard v. Rawlinson, 433 U.S. at 333 (footnote omitted). *Accord*, City of Los Angeles v. Manhart, 435 U.S. 702, 707 (1978) ("Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.") Alabama did not rely on stereotypes; instead, the bfoq was established by the "peculiarly inhospitable" environment of sub-standard prisons, a chaotic environment in which female guards would be at a disadvantage precisely because of their sex. *Id.* at 334. Allowing Alabama to build a defense on unconstitutionally operated prisons "sounds distressingly like saying two wrongs make a right," *id.* at 342 (Marshall, J., dissenting); however, *Dothard* may also be read to require an extraordinary factual setting to satisfy "an extremely narrow exception to the general prohibition of discrimination." *Id.* at 334 (footnote omitted.)

39. Alabama used height and weight minima for all law enforcement officials, Dothard v. Rawlinson, 433 U.S. at 324, and the Court upheld the district court findings based upon national statistics that the minima had a discriminatory impact because women, on the average, are shorter and weigh less than men. *Id.* at 329-30. *See also* Vanguard Justice Soc'y. Inc. v. Hughes, 471 F. Supp. 670, 710 (D. Md. 1979); Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 S. CAL. L. REV. 585, 588 (1974).

40. Title VII differentiates, however, between discriminatory treatment and discriminatory impact. Section 703(a), 42 U.S.C. § 2000e-2(a) (1976), has two subsections:

> (a) It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Subsection (1) was construed in Gilbert v. General Electric Corp., 429 U.S. 125, 133, 149 (1976), to have a meaning similar to the "concept of 'discrimination' " in the fourteenth amendment. The distinction between treatment and impact in decisions construing the fourteenth amendment is, therefore, instructive, if not controlling, on discriminatory treatment under Title VII. The concurrence by Justice Stevens in Washington v. Davis, 426 U.S. 229 (1976), would support an "objective intent" standard: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Id.* at 253. Nonetheless, in Personnel Administrator v. Feeney, 442 U.S. 256 (1979), the Court upheld a civil service veterans' preference despite its disparate impact on women:

> The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon non-veterans follow from that decision. And it cannot seriously be argued that the legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.
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> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group."

Id. at 278-79 (citation omitted).

intentional discrimination from impact discrimination.[41] The distinction is hardly unassailable, but its mischief would be multiplied were state and local government employers granted immunity from liability for impact discrimination.[42]

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41. The Court has allowed "a strong inference that the adverse effects were desired" to be drawn from discriminatory impact that inevitably occurs as a result of a government act. Personnel Administrator v. Feeney, 442 U.S. 256, 279 n.25 (1979). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976). *Accord*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (starting with discriminatory impact, a proof of discriminatory intent proceeds to the historical background (including legislative and administrative history), contemporary statements, procedural regularity, sequence of events, and whatever other circumstances exist); Columbus Bd. of Educ. v. Pennick, 443 U.S. 449, 464 (1979) ("[T]he District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."). For an application of circumstantial evidence to prove intentionally discriminatory employment practices, see Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 693 (6th Cir. 1979). *See also* Note, *The Role of Circumstantial Evidence in Proving Discriminatory Intent: Developments Since Washington v. Davis*, 19 B.C.L. REV. 795, 798 (1978).

My colleague Professor Michael J. Perry argues that "a rule that *all* facially neutral decisions having a disproportionate racial impact are subject to a heavier burden of justification would better serve the principle of the moral equality of the races." Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1040 (1979) (footnote omitted). He would subject impact decisions to an intermediate, not strict, standard of equal protection review. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 559-61, 563-66 (1977). While not couched in intermediate standard language, *see, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971), the Court pursues an activist role in opening motivation to judicial inspection. Professor Tribe concludes from the *Arlington Heights* line of cases that "the Court has yielded a great deal, at least as regards prior decisions in which it said that inquiry into legislative motive is impermissible. . . . The Court has now reversed that view, holding that an inquiry into motive *is* permissible, and giving lots of ways that can be proved, including impact to a certain extent." J. CHOPER, Y. KAMISER & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 58-59 (1979). *Cf.* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Judicial scrutiny of motive has become an intellectual battleground, and the warriors have well dissected the subject. Brest, *The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 21-53 (1976); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36, 94-155 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970). The moral claim, then, is served by a searching inquiry beneath the surface of the governmental act. Even that inquiry, though, apparently lacks enough moral suasion to lay claim to a strict scrutiny standard of review. Yet, either discriminatory impact is just the flip side of discriminatory intent, which would engage strict scrutiny, or impact differs in a significant way from intent, which would justify lesser scrutiny. The preferable moral claim to make is the former because impact, at least when readily foreseeable, is not sufficiently distinguishable from intent to warrant less scrutiny. This is the strong moral claim Professor Dworkin makes by suggesting "that individuals have a right to equal concern and respect in the design and administration of the political instructions that govern them." R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977). Equality is defined to include impact. So defined, the distinction between intentional and impact discrimination evaporates, and government must be put to the strict scrutiny test for both.

A strong moral claim is anathema to the Washington v. Davis distinction: "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. 229, 248 (1976). A strong moral claim need not be diluted by a lesser standard to avoid this parade of "horribles." Conversely, only when strict scrutiny, based on the deeper equality Professor Dworkin suggests, is used does the promise of judicial activism in the name of equality deliver real relief to burdened groups.

42. Articles criticizing the Washington v. Davis distinction, 426 U.S. 229, 239 (1976), are legion. *See, e.g.*, Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination: A Critique*, 65 CORNELL L. REV. 1, 17-23 & 17 n.90 (1979); Perry, *The Disproportionate Impact Theory of*

Racial Discrimination, 125 U. PA. L. REV. 540, 548-50 (1977); Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 994-1000. The Court, however, has not retreated. *See* notes 40 & 41 *supra*. Were the constitutional holding extended to statutory liability, the effect would be to preclude currently typical challenges to state and local government employment practices. These challenges generally rest on the disparate impact of "selection devices, including a height requirement and physical abilities test." Blake v. City of Los Angeles, 595 F.2d 1367, 1370-71 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3013 (U.S. Jul. 12, 1979) (police department charged with sex discrimination). *See* Scott v. City of Anniston, 597 F.2d 897, 898 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3154 (U.S. Sept. 7, 1979) (public works department charged with race discrimination through personnel tests); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1258 (D. Conn. 1979) (police department charged with race discrimination through a written exam used as part of hiring process); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 674 (D. Md. 1979) (police department charged with race and sex discrimination through employment qualifications). Absent an "objective intent" standard, *see* note 40 *supra*, none of these practices, which are usually part of civil service reform, could be proven a product of discriminatory intent.

The impact of those practices still might be reached indirectly. For example, the State and Local Financial Assistance (Revenue Sharing) Act of 1972, 21 U.S.C. § 1221 (1976), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766 (1976), contain provisions that would survive any undercutting of congressional power from the fourteenth amendment or the commerce clause. The Revenue Sharing Act provision states:

> No person in the United States shall, on the ground of race, color, national origin, or sex, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under* any program or activity of a State government or unit of local government, which government or unit receives funds under subchapter I of this chapter.

31 U.S.C. § 1242(a)(1) (1976) (religion, age, and handicap are later covered in the statute) (emphasis added). This provision is substantially paralleled by the Safe Street Act, 42 U.S.C. § 3766(c)(1) (1976) (handicap is not included).

Regulations promulgated under the Revenue Sharing Act incorporate Title VII standards, which are understood to include impact discrimination. Nondiscrimination by Recipient Governments Receiving Entitlement Funds, 31 C.F.R. § 51.53(b) (1977). *See* United States v. City of Buffalo, 457 F. Supp. 612, 619 (W.D.N.Y. 1978) (legal standard in the Act "closely parallels" Title VII). A similar regulation, though premised on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et. seq.* (1976), defines discrimination in impact terms and applies to the Law Enforcement Assistance Administration. Nondiscrimination in Federally Assisted Programs — Implementation of Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.104(b) (1973). *See* United States v. Commonwealth of Virginia, 454 F. Supp. 1077, 1085 (E.D. Va.), *vacated on procedural grounds*, 569 F.2d 1300, 1302-03 (4th Cir. 1978). *See also* United States v. City of Los Angeles, 595 F.2d 1386, 1390 (9th Cir. 1979) (a funds cut-off sought because the police department used hiring tests that had a discriminatory impact.)

Congress has the "power to fix the terms on which its money allotments to States shall be disbursed." Lau v. Nichols, 441 U.S. 563, 569 (1974). In *Lau*, a school district was contractually bound to comply with federal civil rights law, and the Court agreed a duty existed to provide remedial English instruction to children whose first language was Chinese. The reasoning was that "[d]iscrimination is barred which has that [adverse] *effect* even though no purposeful design is present." *Id.* at 568.

A strain of "pursestrings control" logic was also cited in debate over extending Title VII to public employers:

> Mr. President, it is clear that with the expenditure of such sums comes the responsibility of making sure that the distribution and use of the funds is without discrimination. The failure to have adequate minority representation in those agencies of Government responsible for expending those funds is an element of this discrimination.

118 CONG. REC. 1816 (1972) (remarks of Sen. Williams, floor manager). Title VII is a regulatory, not a spending, measure, and it is doubtful Congress relied on its art, I, § 8 constitutional spending power in enacting the extension to public employers. The existence of the spending power will not likely suffice to justify an impact standard when Congress pursues a different constitutional course. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), five justices held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (1976), required a showing of intent to discriminate. 438 U.S. at 287 (Powell, J.); 438 U.S. at 325 (Brennan, White, Marshall, & Blackman, J.J.). *Accord,* Harris v. White, 479 F. Supp. 996, 1002-03 (D. Mass. 1979) (Five justices "explicitly held that Title VI prohibits racial classifications to precisely the same extent as does the Equal Protection Clause of the Fourteenth Amendment."). The Court has since indicated that the critical point is congressional intent. If Congress were bent on incorporating the fourteenth amendment standard, then the funding condition would parallel the equal protection clause. If, however, Congress wanted to impose an impact standard, the *Lau* description of plenary power would allow the condition. In Board of Educ. v. Harris, 100 S. Ct. 363, 374 (1979), the Court, in a majority opinion representing six justices, reserved an opinion on the body count in Bakke and looked for a "positive indication" from Congress that a definition of

A prima facie case of impact discrimination is simple to show; sufficient statistical disparity will transfer the burden of proof.[43] In contrast, a prima facie case of intentional discrimination usually requires drawing an inference of dissimilar treatment.[44] The defense to impact discrimination is "business necessity," which means that an employment

discrimination parallel to the fourteenth amendment was intended in the Emergency School Aid Act (ESAA), 20 U.S.C. § 3191 *et seq.* (Supp. II 1978). Because "[i]t does make sense to us that Congress might impose a stricter standard under ESAA than under Title VI," an impact standard was acceptable. 100 S. Ct. at 374. Thus, the Court's "primary concern is with the intent of Congress." *Id.* at 368. ESAA provides funds to schools undergoing financial pressures because they are desegregating. Under the statute, a school is ineligible if it engages in discrimination or "had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal" of minority personnel. 20 U.S.C. § 3196(c) (1)(B) (Supp. II 1978). That impact language was contrasted with Title VI and characterized as "an attempt by Congress to bring about the same remedy without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination." 100 S. Ct. at 374 n.13. The three dissenters disagreed on legislative intent, not power. *Id.* at 381 (Stewart, J., writing for Powell & Rehnquist, JJ., dissenting).

Congressional intent is also not affected by the tenth amendment as applied in National League of Cities v. Usery, 426 U.S. 833 (1976). There, the Court noted that congressional spending power was not at issue and would "express no view" on that power. *Id.* at 852 n.17. In Morrow v. Califano, 445 F. Supp. 532, 533 (E.D.N.C. 1977) (three-judge court), *summarily aff'd*, 435 U.S. 962 (1978), however, grants from federal health programs were conditioned on establishment of a state "certificate of need program" to guarantee federal monies went only where the need existed. Professor Tribe infers from the summary decision that "[t]he Court seems to have accepted the principle that when Congress pays the piper as well as calls the tune, there is no real threat to the autonomy either of the states or of individuals." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 18 (Supp. 1979) (footnote omitted). *National League* is, therefore, no impediment to an impact standard being imposed by a spending measure, Morrow v. Califano, 445 F. Supp. at 536 n.10, even though it may apply, depending on how its factors are balanced, to a regulatory measure like Title VII. *See* National League of Cities v. Usery, 426 U.S. at 856 (Blackmun, J., concurring with four justices to form a majority).

43. "[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). In *Dothard*, nearly half the female population of the state was disqualified for hire by the height and weight criteria, while only one percent of the male population was affected. *Id.* at 329-30. In the seminal case on disparate impact, Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971), the ratio of white to black males qualified for hire under a high school completion criterion was three to one; under a battery of pen and paper tests, the ratio of passing whites to blacks was nearly ten to one. The enforcement agencies have adopted Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978) (Equal Employment Opportunity Comm'n); 41 C.F.R. § 60-3 (1978) (Office of Federal Contract Compliance Programs); 28 C.F.R. § 50.14 (1978) (Dep't of Justice); 5 C.F.R. § 300.103(c) (1979) (Civil Serv. Comm'n). The guidelines establish a "rule of thumb" known as the "45th test": if the protected group scores at a rate 80% or lower than the highest scoring group, then significant adverse impact is suspected. 29 C.F.R. § 1607.4D; 41 C.F.R. § 60-3.4(D); 28 C.F.R. § 50.14.4D; 5 C.F.R. § 300.104(c). *But cf.* Rich v. Martin Marietta Corp., 467 F. Supp. 587, 611 (D. Colo. 1979) (the 45th test is not a statistically sophisticated standard and may be rebutted).

The textual reference to burden of proof is purposely imprecise. As a matter of evidence, the plaintiff retains the "burden of persuasion" throughout, the "defendant's burden is merely a burden of production." Sweeney v. Board of Trustees, 604 F.2d 106, 108 (1st Cir. 1979), *on remand from* 439 U.S. 24 (1978); Loeb v. Textron, 600 F.2d 1003, 1011-12 (1st Cir. 1979). Thus, the defendant may be forced by a sufficient statistical disparity to bear the burden of going forward. Wright v. National Archives and Records Serv., 609 F.2d 702, 714 n.13 (4th Cir. 1979) (en banc). Yet, as indicated in note 45 *infra*, the defense to adverse impact is so tough to make that the practical effect is to transfer the burden of proof.

44. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court established the framework for inferential proof. To establish a prima facie case, a plaintiff had to prove:

> (i) that [an individual] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. With slight modification, this framework can apply to all employment practices. *Id.* at 832 n.13. Inference is the common route to proving discrimination because "[p]ersons engaged in unlawful

practice "must [also] be *essential* to that goal."[45] Such a defense is not simple to show. Again, this contrasts with the defense to inferred intentional discrimination, which involves first the articulation, and later,

conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labeled, 'use me,' like the cake bearing the words 'eat me,' which Alice found helpful in Wonderland." F. W. Woolworth Co. v. NLRB, 121 F.2d 658, 660 (2d Cir. 1941). The *McDonnell* framework is "a practical scheme of proof for addressing the critical issue of intentional racial or other impermissible discrimination." Wright v. National Archives and Records Serv., 609 F.2d 702, 713 (4th Cir. 1979) (en banc).

The inference goes to the existence of an intent to treat a group or individual discriminatorily. Teamsters v. United States, 431 U.S. 324, 325 n.15 (1977); Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 566 (5th Cir. 1979). One circumstance supporting the inference can be the adverse impact on the group or individual affected. *Cf.* note 27 *supra*. "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977) (citation omitted). Statistics are, therefore, "not wholly irrelevant on the issue of intent." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978). The *McDonnell* framework also was a statistical backdrop for an individual's case. The individual would argue that the employer's conduct "conformed to a general pattern of discrimination against" the group in which he was a member. 411 U.S. at 805.

> The rationale underlying proof of intent by statistical inference is:
>
> Statistics showing racial or ethnic imbalance are probative . . . only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters v. United States, 431 U.S. at 339 n.20 (1977). Often, however, the explanation will be readily available, *see* note 46 *infra*. Moreover, statistical analysis is an experts' paradise. *See, e.g.*, Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 795-96 (1978). Thus, the Court has stated: "We caution only that statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." Teamsters v. United States, 431 U.S. at 340 (citation omitted).

45. United States v. St. Louis-San Francisco R.R., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973). In Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), business necessity was established as a defense under which the employer had "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." Once that job-relatedness is proven, "the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.' *Albermarle Paper Co. v. Moody*, [422 U.S. 405 (1975)] quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 [1973]." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

The business necessity defense has traditionally been couched in such harsh terms that employers were dissuaded from relying on it:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (footnote omitted). That stringency may now be receding. In N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court held that a ban on all drug users "significantly served" the employer's "legitimate employment goals of safety and efficiency" and was therefore job-related. *Id.* at 587 n.31. The Court assumed, despite statistical deficiencies, *see Update: Drug Bans,* EMPLOYMENT DISCRIMINATION ADVISOR 39 (1979), that a racially discriminatory impact resulted from the effect of the ban on methadone users. 440 U.S. at 587. The Court, however, did not proceed from the finding on job-relatedness to one on less drastic alternatives. In a section of the opinion analyzing the constitutional claims, the Court approved the right of an employer to assist "one class of problem employees," in *Beazer*, alcoholics, while not aiding drug abusers, *id.* at 591 n.37, and rejected a screening device that would have had a lesser adverse impact but would require special efforts, albeit more inconvenient than costly. *Id.* at 590 n.33 (burden of proof on plaintiff to show that abusers "could be excluded as cheaply and effectively in the absence of the rule").

if necessary, the proof of "some legitimate, nondiscriminatory reason" for the employment practice.[46] Intentional discrimination, then, is harder to prove and easier to defend than impact discrimination.[47]

46. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (per curiam), the Court continued to refine the *McDonnell* burden. *Sweeney* held that mere articulation suffices to meet the employee's prima facie case. *Id.* at 25. At that point, *McDonnell* provides the plaintiff "a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." 411 U.S. at 804. The appellate court was accused of requiring the employer to prove the absence of a discriminatory motive, "a heavier burden," on the employer than was justified. 439 U.S. at 26 n.2. The appellate decision was vacated and remanded for reconsideration in light of Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The employer in *Furnco* was not required to prove it had used "a hiring procedure that maximizes hiring of minority employees"; instead, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." *Id.* at 577-78.

The *Sweeney* appellate court had read *Furnco* to impose a burden to rebut with the burden of persuasion constantly resting on the plaintiff. 569 F.2d 169, 177 (1st Cir. 1978). Four dissenting Supreme Court justices in *Sweeney* questioned how the per curiam opinion differed. They identified two grounds: (1) articulate must mean something other than prove, and (2) what the employer must articulate is simply a legitimate reason and not "the real reason for the employment decision." But, they argued, in a trial context articulation amounts to proving a fact, and any showing of a nondiscriminatory reason "simultaneously demonstrat[es] that the action was not motivated by an illegitimate factor such as race." 439 U.S. at 28-29 (Stevens, J., dissenting, joined by Brennan, Stewart & Marshall, JJ.). The majority "agreed" with the dissent's definition of the employer's burden if it were "satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.' " *Id.* at 25 n.2, *quoting* dissent, *id.* at 28-29. On the second ground, the majority must have perceived a sharper distinction.

One explanation of that distinction is the Court's willingness to immunize otherwise discriminatory treatment when a separate cause for the treatment is nondiscriminatory. In Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), the court approved a defense that proved "by a preponderance of the evidence that [the employer] would have reached the same decision as to [the applicant's or employee's status] even in absence of the [illegal reason]." There, suppression of protected speech was one reason for a discharge, but another, independent reason was misbehavior. Because the speech was not a proximate cause, there being an intervening and independent cause, the discharge could be upheld. For Title VII employment discrimination cases, this principle parallels the rationale for the *McDonnell* inference:

> The method suggested in *McDonnell Douglas* for pursuing this [disparate treatment] inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). If the employer has two reasons, one discriminatory and one nondiscriminatory, a court could not infer the discriminatory one existed once the employer asserted the nondiscriminatory one and withstood a challenge that it was pretextual. *See Illustrating a Keen(e) Distinction,"* 1 EMPLOYMENT DISCRIMINATION ADVISOR 21, 22 (1979).

Under this standard, any inference of a discriminatory reason would merely shift to the employer "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977). Yet, the Supreme Court has indicated that discrimination need only be "one of the motivating factors, not that it has been a necessary factor." Harris v. White, 479 F. Supp. 996, 1006 (D. Mass. 1979). In Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), the Court refused to draw nice causative lines: "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Id.* at 278. The extended quote from *Feeney* in note 40 *supra* includes a lower causation correlation: the decision need only be made "at least in part 'because of' " a discriminatory reason. 442 U.S. at 279. In *Village of Arlington Heights*, the Court paid

IV. LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS

The Equal Employment Opportunity Act of 1972 added to the definition of "person" in Title VII the words: "governments, governmental agencies, political subdivisions."[48] The term "industry affecting commerce" was amended by the phrase "and . . . further includes any governmental industry, business, or activity."[49] These amendments represented "a hotly contested issue."[50] Their legislative history is revealing about both (1) the assertion that Congress meant to expand on the equal protection clause definition of person subsequently given in *Washington v. Davis*[51] and (2) the *Fitzpatrick* conclusion that "[t]here is no dispute that in

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homage to *Mt. Healthy* in the footnote quoted above while delivering a strong argument for a less demanding burden:

> [*Washington* v.] *Davis* [426 U.S. 229 (1976)] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

429 U.S. at 265-66 (footnote omitted).

The riddle becomes "when is a motivating factor not a caustive one?" *Mt. Healthy* answers this by holding that a prima facie case is shown when discrimination is a motivating factor, but rebuttal of that case occurs by a showing that the action complained of would have occurred in any event. 429 U.S. at 287; Harris v. White, 479 F. Supp. 996, 1006 n.3. (D. Mass. 1979). After *Mt. Healthy* and *Sweeney*, the burden of defending against an inferential case of discriminatory treatment is very light. Even when discrimination "does indeed play a part in that decision," liability arises only under a "but-for" causation showing. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977). *Accord*, Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979). *But cf.* Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1971) (Non-racial and racial reasons were relied upon to deny a lease; however, "race is an impermissible factor in an apartment rental decision and . . . cannot be brushed aside because it was neither the *sole* reason nor the total factor. We find no acceptable place in the law for partial racial discrimination.").

47. "A claimant's path after establishment of a prima facie case is considerably easier under the impact theory than under the treatment theory, . . . " Wright v. National Archives and Rec. Serv., 609 F.2d 702, 711 n.7 (4th Cir. 1979) (en banc). Impact analysis also provides "a relatively easy burden of prima facie proof." *Id.* at 712-13. *See* Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Racial Discrimination under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 217 & nn. 60-65 (1979) and cases cited therein ("The significance of this 'effects' test in Title VII litigation cannot be understated [sic]."). State and local government employment practices would seldom be found discriminatory were purpose, motivation, or intent a necessary proof ingredient, *see* note 42 *supra*.

48. Pub. L. No. 92-261, 86 Stat. 103 (1972), *amending*, 42 U.S.C. § 2000e-(a). When enacted in 1964, the definition of "person" in Title VII did not mention state and local governments. The definition of employment agency, 42 U.S.C. § 2000e-(c), excluded an agency of a state or political subdivision. Pub. L. No. 880352, 78 Stat. 253 (1964). That exclusion was removed by the 1972 amendments.

49. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972), *amending*, 42 U.S.C. § 2000e-(h). The remaining text was left intact.

50. 118 CONG. REC. 4940 (1972) (remarks of Senator Williams, floor manager). Rollcall votes, lengthy debate, and invocation of cloture highlighted the legislative history. *Id.* at 4908. The original adoption of Title VII was the product of an even greater legislative battle. *See* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

51. 426 U.S. 229 (1976).

enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment."[52]

A. *Defining Equal Protection*

In 1972, Congress was oblivious to the definition of the fourteenth amendment handed down by the Supreme Court in 1976. That is not to say Congress was without a fixed notion of what the substantive reach of Title VII as amended would be. The catalyst for extension of Title VII to public employers was recognition that "[a] major reason why EEOC [Equal Employment Opportunity Commission] has not been able to be more effective in eliminating employment discrimination is that large numbers of workers have not been covered."[53]

Senator Williams, the floor manager for the bill, explained that "the more than 10 million State and local government employees, constitute the largest class of persons exempt from the operation of Federal non-discrimination laws."[54] The Senate Labor and Public Welfare Committee report on the bill noted that "all indications are that the number of State and local employees will continue to increase more rapidly during the next few years."[55]

These employees were victims of discrimination. Congress accepted the findings of a report from the United States Commission on Civil Rights that concluded that "[s]tate and local governments have failed to fulfill their obligation to assure equal job opportunity."[56] The report "indicates

52. Fitzpatrick v. Bitzer, 427 U.S. 445, 443 n.9 (1976). The Court distinguished Title VII from legislation "based on the power of Congress under the Commerce Clause." 427 U.S. at 452. Because Title VII provided a "context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment," 427 U.S. at 453 (footnote omitted), the states rights challenge could be deflected. The *Fitzpatrick* conclusion about the constitutional anchor for Title VII was not mere dicta but rather was central to its analysis.

53. 117 CONG. REC. 32097 (1971) (Remarks of Rep. Abzug).

54. 118 CONG. REC. 1816 (1972). Indeed, "State and local governments are the largest single group of employers in the United States." *Hearings on H. R. 1746 Before the House Gen. Subcomm. on Labor*, 92d Cong., 1st Sess. 85 (1971) (statement of William H. Brown, III, Chair, Equal Employment Opportunity Comm'n). "There are over 9.5 million persons engaged in 81,000 State and local governments." *Id.* at 302 (statement of Rep. Chisolm).

55. S. REP. No. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted* in 118 CONG. REC. 1070 (1972). *See also* 117 CONG. REC. 31961 (1971) (There had been "an increase of over 2 million in less than a decade."). (Rep. Perkins, floor manager).

56. S. REP. No. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted* in 118 CONG. REC. 1070 (1972). The report was U.S.COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE: A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT (1969), *excerpts reprinted* in 118 CONG. REC. 1816 (1972). Congress has relied on a United States Commission on Civil Rights report in enacting legislation securing minorities voting rights, and in South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966), the Court held that "Congress . . . may avail itself of information from any probative source." A second report, U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970), was also cited to support a finding of state and local government employment discrimination. S. REP. No. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted* in 118 CONG. REC. 1070 (1972); H. R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2152. *Hearings on H. R. 1746 Before the House General Subcommittee on Labor*, 92d Cong., 1st Sess. 113 (1971) (statement of Howard A. Glockstein, Staff Director, U.S. Comm'n on Civil Rights).

that employment discrimination in State and local governments is more pervasive than in the private sector."[57] The Commission's findings described the discrimination as "perpetuated by both institutional and overt discriminatory practices, and that past discriminatory practices are maintained through de facto segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities."[58] The report informed Congress that "[u]nconstitutional practices include not only those which are purposefully discriminatory, but also those which have the effect of creating or reinforcing barriers to equal employment opportunity."[59]

The legislative history repeatedly shows a desire to provide state and local government employees "the same benefits and protections in equal employment as the employees in the private sector of the economy."[60] Representative Mink testified that "[t]here is no reason why persons working in the public sector should not enjoy the same protection and rights as those in the private."[61] The House Education and Labor Committee report stated that "it is an injustice to provide employees in the private sector with an administrative forum in which to redress their grievances while at the same time, denying a similar protection to the

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57. 118 CONG. REC. 1815 (1972) (remarks Sen. Williams). "[T]he Commission examined equal opportunity in public employment throughout the country—North as well as South—and reported widespread discrimination against minority groups in State, city, and suburban government employment." *Hearings on H.R. 1746 Before the House General Subcommittee on Labor*, 92d Cong., 1st Sess. 112 (1971) (statement of Howard A. Glickstein, Staff Director, U.S. Comm'n on Civil Rights, reading from the 1969 report). The chair of the Equal Employment Opportunity Commission concluded: "[O]bviously many of these States have a lot of discrimination being practiced by the States themselves." *Id.* at 96 (statement of William H. Brown, III). Because the number of employees and breadth of discrimination had been so great, "coverage of governmental employees [was] a monumentally important step for the cause of equal employment opportunity." 118 CONG. REC. 4940 (1972) (remarks of Sen. Williams, floor manager).

58. S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted* in 118 CONG. REC. 1070 (1972). *Accord*, 117 CONG. REC. 31961 (1971) (remarks of Rep. Perkins, floor manager).

59. 118 CONG. REC. 1817 (1972) (U.S. Comm'n on Civil Rights 1969 report, *supra* note 56). *See also* S. REP. NO. 92-415, 92d Cong., 1st Sess. 10 (1971).

60. S. REP. NO. 92-415, 92 Cong., 1st Sess. (1971), *excerpts reprinted in* 118 CONG. REC. 1070 (1972). The Chair of the Equal Employment Opportunity Commission claimed Title VII "paradoxically withholds a Federal protection which is made available to employees in the private sector to whom the government owes no comparable constitutional duties." *Hearings on H.R. 1746 Before the House General Subcommittee on Labor*, 92d Cong., 1st Sess. 85-86 (1971) (statement of William H. Brown, III).

In Dothard v. Rawlinson, the Court recognized this history: "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." 433 U.S. 321, 332 n.4 (1977) (citations omitted). One court has held that "the whole purpose of the 1972 Amendments was to give public employees the same protection against discrimination as those enjoyed by employees in the private sector." Vanguard Just. Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 700 (D. Md. 1979) (citation omitted). This purpose was paralleled as to federal government employees through enactment of § 717, 42 U.S.C. § 2000e-16 (1976). Chandler v. Roudebush, 425 U.S. 840, 848-49 (1976). Congressional power to establish standards for federal employees that include impact discrimination seems unimpeachable. *Cf.* Brown v. GSA, 425 U.S. 820, 828-29, 833-35 (1976) (Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment").

61. 117 CONG. REC. 32105 (1971).

increasing number of state and local employees."[62] Approval of the *Griggs*[63] impact standard appears throughout the legislative history.[64]

At a minimum, Congress' understanding of what discrimination was proscribed by the equal protection clause rested on the impact standard.[65] But the legislative history does not support the proposition that Congress intended to redefine, rather than use the current definition of, the equal protection clause. The legislative purpose to reach all discrimination by public employers, whether intentional or impact discrimination, is apparent. The method chosen was, however, establishment of a remedy, not creation of substantive rights. This dichotomy is exemplified by Senator Cranston's remarks during floor debate:

> Both the Constitution and Federal law prohibit job discrimination by state and local governments, but the existence of pervasive discrimination in State and local government is all too well documented. What is lacking, however, is an effective Federal administrative machinery to enforce these prohibitions. Thus, the expansion of Title VII coverage to state and local governments is necessary if we are to provide a truly effective means of implementing the declared equal opportunity employment policy of our nation.[66]

The House Committee report emphasized "the protection of an effective forum" to provide "equal access to the remedies available under the Act."[67] The substantive constitutional protection had "been seriously impeded by the failure of the Congress to provide Federal administrative machinery to assist the aggrieved employee."[68]

Instead, employees were left to a "time consuming and expensive lawsuit."[69] The House Committee report deemed it "unrealistic to expect disadvantaged individuals to bear the burden" of a federal lawsuit to enforce their rights.[70] Even a litigant with resources would only enforce equal employment opportunity in a "random" way with "the main concern [being] redress of his particular grievance."[71]

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62. H.R. REP. No. 92-238, 92d Cong., 2d Sess. *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2153-54.

63. *See* text accompanying note 36 *supra.*

64. H.R. REP. No. 92-238, 92d Cong. 2d Sess. *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2138, 2155-60. *See* Comment, *Burden of Proof in Racial Discrimination Acts Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose*, 1978 B.Y.L. REV. 1030, 1049 n.101 and citations to legislative history therein; Pennsylvania Club Valiants v. Rizzo, 466 F. Supp. 1219, 1226 (E.D. Pa. 1979).

65. *Id.* The legislative finding of discrimination was premised on a report that highlighted impact-type practices. *See* notes 49 & 50 and accompanying text *supra.*

66. 118 CONG. REC. 4931 (1972).

67. H. R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2152.

68. *Id.* at 2153.

69. *Hearings on H.R. 1736 Before the House General Subcommittee on Labor*, 92d Cong., 1st Sess. 113 (1971) (statement of Howard A. Glickstein, Staff Director, U.S. Comm'n on Civil Rights).

70. H.R. REP. No. 92-238, 92d Cong. 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2153. The Court has recognized that Title VII creates "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman, 404 U.S. 522, 527 (1972).

71. U.S. COMM'N ON CIVIL RIGHTS. *Supra* note 56, 118 CONG. REC. 1819 (1972).

Congress assumed it was "clear that the guarantee of equal protection" in the fourteenth amendment applied to state and local governments.[72] The House Committee report stated that "[t]he expansion of Title VII coverage to state and local government employment is firmly embodied in the principles of the Constitution of the United States."[73] The report found in the thirteenth and fourteenth amendments the "clear intention of the Constitution . . . to prohibit all forms of discrimination."[74] Therefore, as the head of the Civil Rights Division of the United States Department of Justice testified: "In view of the applicability of the Equal Protection clause of the Fourteenth Amendment to such [state and local] governments, the question here is not one of prescribing new duties, but rather of determining what federal remedies would be appropriate."[75]

Had Congress been faced with a judicial definition of the equal protection clause that excluded impact discrimination, the legislative history reveals that further consideration of (1) the findings on which extension of Title VII to public employers was based, (2) the acceptance of the *Griggs* decision, (3) the desire to provide protection similar to that in the private sector, and (4) the understanding that impact discrimination is as invidious as intentional discrimination would have led Congress to the same conclusion. Congress sought to impose discriminatory impact statutory liability on state and local government employers. Whether that conclusion would have been anchored in a congressional version of the equal protection clause is the more important question in light of *Washington v. Davis*.[76]

B. *Enforcing the Fourteenth Amendment and the Commerce Clause*

The footnote in *Fitzpatrick*[77] is correct; the legislative history leaves no doubt that Congress acted pursuant to section 5 of the fourteenth amendment. The footnote is not, however, exhaustive; the legislative history likewise leaves no doubt that Congress acted pursuant to its plenary power under the commerce clause.

1. *Section 5 of the Fourteenth Amendment*

In floor debate, Senator Williams introduced the expansion of Title

72. S. REP. No. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted* in 118 CONG. REC. 1070 (1972).

73. H.R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2154.

74. *Id.*

75. *Hearings on H.R. 1746 Before the House General Subcommittee on Labor*, 92d Cong., 1st Sess. 35 (1971) (statement of David L. Norman). The House Committee Report emphasized that existing rights, specifically those under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), were not affected; rather, "the remedies available to the individual under Title VII" were to be "co-extensive." H. R. REP. No. 92-238, 92d Cong., 2d Sess. 19, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2154. *See* Johnson v. REA, 421 U.S. 454, 459 (1975) (citing the House Committee Report to conclude Title VII does not pre-empt other remedies for discrimination).

76. 426 U.S. 229 (1976). *See* notes 42-43 and accompanying text *supra*.

77. 427 U.S. 445, 453 n.96 (1976). *See* note 52 and accompanying text *supra*.

VII by invoking section 5: "Through use of the enabling clause of the Fourteenth Amendment, the promise of equal protection can become a reality. The last sentence of the Fourteenth Amendment enables Congress to enforce the amendment's guarantees by appropriate legislation."[78] The Senate Committee report explained:

> The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. The inclusion of State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country.[79]

Senator Javits even distinguished the fourteenth amendment from the commerce clause: "[I]t is very important . . . that we recognize that of all the provisions in this bill, this has the most solemn congressional sanction, because it is based not on the commerce clause, which relates to the relationships between individuals as well as with governments, but is based on the Fourteenth Amendment."[80]

The legislative history shows that congressional objectives paralleled both branches of the *Morgan* description of the enforcement power: (1) a guarantee of equal participation in and services from state and local governments *qua* governments, and (2) a guarantee of equal employment opportunity in state and local governments *qua* employers.[81]

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78. 118 CONG. REC. 1816 (1972). "[T]he legislative history of the Equal Employment Opportunity Act of 1972 demonstrates clearly that the inclusion of state and local government employees was effected pursuant to Section 5 of the Fourteenth Amendment." Shawer v. Indiana University, 602 F.2d 1161, 1163 (3rd Cir. 1979) (per curiam) (citation omitted).

79. S. REP. No. 92-415, 92 Cong., 1st Sess. (1971), *excerpts reprinted in* 118 CONG. REC. 1070 (1972). The chair of the Equal Employment Opportunity Commission testified on this point: "Legislation to implement this aspect of the Fourteenth Amendment right is long overdue, and I believe an appropriate remedy is contained in the bill making State and local governments subject to the requirements of the process of Title VII in the same manner as any other employer." *Hearings on H.R. 1746 Before the House General Subcommittee on Labor*, 92d Cong., 1st Sess. 86 (1971) (Statement of William H. Brown, III). For the distinction between imposition of a new procedure to enforce existing rights and imposition of new rights, *see* notes 66-75 and accompanying text *supra*.

80. 118 CONG. REC. 1839 (1972). After that eloquent testimonial to the fourteenth amendment, Senator Javits hedged his bet on the constitutional anchor two sentences later by adding: "Also, in Maryland against Wirtz, in 1968, the Court upheld the application of the Fair Labor Standards Act to certain classes of public employees as a legitimate exercise of congressional regulatory authority under the commerce clause." *Id.* Not content with having it both ways, a few sentences further Senator Javits raised his first bet: "[T]he only way [public employees] can get [equality], because the authority so far as they are concerned is the State, is at the hands of the United States, under the Fourteenth amendment." *Id.* at 1840. In miniature, Senator Javits' recognition of two constitutional anchors, and preference for the more noble one, mirrors the congressional debate. *Cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 279 (1964) (Douglas J., concurring) ("[T]he right of people to be free of State action that discriminates against them because of race . . . 'occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.' "); *Hearings on S. 1732 Before the Senate Committee on Commerce*, 88th Cong., 1st Sess. (1963), *excerpts reprinted* in G. GUNTHER, CONSTITUTIONAL LAW 216 (9th ed. 1975); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 118 (1966) (fourteenth amendment anchor means "avoiding the necessity of resorting to the use of the commerce power which some observers found disingenuous even in the public accommodations title of the Civil Rights Act of 1964.")

81. Katzenbach v. Morgan, 384 U.S. 641, 653-54 (1966).

The House Committee report identified "the most deleterious effect [of employment discrimination] in those governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated."[82] The Senate Committee report agreed:

> From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community but also creates mistrust, alienation, and all too often hostility toward the entire process of government.[83]

Senator Williams based the Committee's conclusion on "the very practical consideration that employment discrimination at the State and local government level reflects very unfavorably upon the ability of those governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment."[84]

The legislative history on the pervasiveness of employment discrimination in the public sector, as discussed above,[85] reflects congressional concern with employment discrimination apart from any collateral effect on delivery of government services.

2. *Commerce Clause*

Congressional focus on enforcing the fourteenth amendment was accompanied by recognition of the commerce clause as a constitutional anchor. Title VII originally was adopted pursuant to the commerce clause.[86] In amending Title VII, Congress continued to assert its power to regulate commerce.

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82. H. R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2153.

83. S. REP. No. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted in* 118 CONG. REC. 1070 (1972).

84. 118 CONG. REC. 1816 (1972). Senator Williams believed that a "participatory government" demanded equal access to government jobs. *Id.* at 1815. His fear was that "[t]he exclusion of minorities from the effective participation in the bureaucracy . . . promotes ignorance of minority problems in that particular community. . . ." *Id. Cf.* Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) ("This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.") (footnote omitted).

85. *See* notes 56-59 and accompanying text *supra.*

86. Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979); Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417, 422 (1966) ("There is little question that the framers of Title VII did an excellent job in providing a solid constitutional foundation for the legislation. The power of Congress to regulate commerce has been utilized in an appropriate manner, and there can be no doubt about the constitutionality of the statute after the Supreme Court's decision in the *McClung* and *Heart of Atlanta* cases.") (footnotes omitted); Katzenbach v. McClung, 379 U.S. 294 (1964), upheld the public accommodations section, Title II, of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (1976), as applied to a restaurant, while Heart of

Senator Williams characterized the "potential for labor strife" that arose from treating public sector employees differently than private sector ones as a "practical consideration."[87] "This potential, with its concomitant effect upon interstate commerce, gives ample reason for imposition of Federal equal employment standards on state and local governmental units."[88] The Senate Committee report relied on *Maryland v. Wirtz*,[89] a commerce clause decision overruled by *National League*,[90] stating: "The Supreme Court has further indicated that at least part of the extension of jurisdiction [over state and local governments] as contemplated by § 2515 is a proper constitutional exercise of power under the Commerce Clause."[91] *Maryland v. Wirtz* was even reprinted in the Congressional Record.[92]

In the legislative debate, the commerce clause served as a response to opposition based on federalism. Senator Taft referred to Senator Williams' citation of *Maryland v. Wirtz* to refute a federalism challenge:

> [I]n the committee, with regard to the employing of personnel by state and local governments, there were a good many comments and a great deal of discussion as to whether or not constitutional problems that might occur from the Federal Government's attempting to regulate state and local governments might be serious. As the Senator from New Jersey has stated, there are already court holdings on this subject.[93]

The Senate Committee report cited the case to prove "that Federal regulation of the employment practices of state and local governments is [not] an improper infringement upon the sovereignty of the states."[94] Senator Williams argued that "[t]he full impact of this case is to suggest that there are proper situations and proper means to impose Federal standards upon state and local governments."[95] He added:

> I would suggest that the insurance of equal employment opportunity is just such a situation. The means employed by this bill authorize minimal contacts between the Federal Government and State and local governments; public

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Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), did the same as to motels. In *McClung*, the Court deferred to a congressional finding of a burden on commerce: "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." 379 U.S. at 304-05. Although the legislative history indicated that Congress relied on the fourteenth amendment as well, the Court focused on the commerce power, which was "ample" alone. *Heart of Atlanta*, 379 U.S. at 250.

87. 118 CONG. REC. 1816 (1972).

88. *Id.*

89. 392 U.S. 183 (1968).

90. 426 U.S. 833 (1976).

91. S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted in* 118 CONG. REC. 1070 (1972).

92. 118 CONG. REC. 1833 (1972).

93. *Id.* at 1837.

94. S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971), *excerpts reprinted in* 118 CONG. REC. 1070 (1972).

95. 118 CONG. REC. 1816 (1972).

> employers will be able to hire whomever they please, so long as it is done in a nondiscriminatory manner.[96]

A colloquy during the House floor debate reflects the same response. Representative Mazzoli decried "an interposition under the committee bill which I think is disastrous, that is, the interposition of the Federal Government into State and local matters."[97] He yielded to Representative Dent for a question: "Then, would you also say that we should remove from the jurisdiction of the EEOC all those companies that do not do interstate business, because intrastate business has just as much right to be exclusively under State and local government as any other?"[98] The question was a ringer; congressional power under the commerce clause to regulate intrastate business had long been established.[99]

The legislative history of the 1972 amendments transcends the implication of the *Fitzpatrick* footnote[100] that congressional power was exercised solely under the fourteenth amendment. In *Fitzpatrick*, two concurring justices noted that the commerce clause was a constitutional source of congressional power;[101] the Solicitor General has since cited to the Supreme Court both the commerce clause and section 5 of the fourteenth amendment as anchors for the 1972 amendment of Title VII.[102]

V. Analyzing Constitutional Anchors

A. *The Challenge*

The essence of the challenge to a discriminatory impact standard under Title VII for state and local government employers is that "it is

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96. *Id.*

97. 117 Cong. Rec. 31971 (1971). In similar words, Senator Allen stated: "I object, too, to the extension of the jurisdiction of the EEOC over the employment practices of State, county, and local governments because I believe Federal bureaucracy should not encroach further on the powers of State and local governments." 118 Cong. Rec. 4907 (1972).

98. 117 Cong. Rec. 31971 (1971).

99. In Wickard v. Filburn, 317 U.S. 111 (1942), the Court rejected any absolute immunity for intrastate commerce from the reach of the federal commerce power: "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts substantial economic effect on interstate commerce. . . ." 317 U.S. 111, 125 (1942). The seminal commerce clause precedent, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), also acknowledged that power extended "to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." Id. at 195 (1824).

100. *See* note 52 and accompanying text *supra.*

101. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Justice Brennan concurred: "Congressional authority to enact the provisions of Title VII at issue in this case is found in Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment." *Id.* at 458. Justice Stevens separately concurred: "In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on § 5 of the Fourteenth Amendment." *Id.* at 458.

102. Brief for Appellee at 55, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977), *reprinted in* 10 Sup. Ct. L. Reprints (Lab. Ser.) No. 21 at 187 (1977).

simple logic that a statute can be no broader than its Constitutional base."[103] After *Washington v. Davis*, the fourteenth amendment can only be read in accord with "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[104]

The challengers appreciate the force of *Morgan*; however, that simple logic asks how Congress can be enforcing a prohibition that does not exist to be enforced.[105] Labeling the 1972 amendment to Title VII a congressionally prescribed remedy that merely lowers the burden of proof in Title VII cases is no answer. Any distinction between a congressionally prescribed duty and a congressional remedy for a constitutionally prescribed duty is illusory. The challengers are "not speaking in the narrow

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103. Scott v. City of Anniston, Ala., 430 F. Supp. 508, 515 (N.D. Ala. 1977), *rev'd*, 597 F.2d 897 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3154 (U.S. Sep. 7, 1979).

104. Washington v. Davis, 426 U.S. 229, 240 (1976).

105. The challenge relies on an interpretation of section 5 enforcement power that is perfectly congruent with section 1. Early judicial construction of the fourteenth amendment supports the challenge. In The Civil Rights Cases, 109 U.S. 3 (1883), the Court used a rhetorical question to answer an assertion of section 5 power: "To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectively null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it." *Id.* at 11. The author of that opinion, Justice Bradley, had dissented in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 123-24 (1873), similarly arguing that the fourteenth amendment would be self-executing: "Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect." Professor Monaghan finds merit in the contention: "Section 5 is a limited, backstopping authority, allowing the national government to correct State wrongs. The Civil Rights Cases . . . are surely right on that point even if they take too narrow a view of the substantive reach of congressional power under the fourteenth amendment." Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 18 n.100 (1975) (citation omitted). The legislative history of the fourteenth amendment reveals rejection of a broad enforcement power. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 57-60 & 60 n.115 (1955) ("Presumably the lesson taught by the defeat of the Bingham amendment had been learned. Congress was not to have unlimited discretion, and it was not to have the leeway represented by 'necessary and proper' power.") (footnote omitted). *See also* J. JAMES, FRAMING THE FOURTEENTH AMENDMENT 50, 82-83 (1956).

Professor Bickel explains the more limited phrasing of enforcement power as a tactical compromise using language "sufficiently elastic to permit reasonable future advances," Bickel, *supra* at 61, after there was "time and the chance to educate the public." *Id.* at 64. That explanation must, however, be understood in the historical context of the Reconstruction Era following the Civil War. The purpose of the fourteenth amendment was to "constitutionalize" an earlier statutory protection of civil rights. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last*. Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272, 293 (1969). The House Chair of the Joint Committee on Reconstruction, the committee responsible for drafting the fourteenth amendment, voiced the fear that subsequent Congresses could easily repeal by majority vote statutory protection for civil rights, whereas a two-thirds majority would be needed to even begin a repeal of a constitutional amendment. "[T]he first time that the South with their Copperhead allies obtain the command of Congress [the civil rights statute] will be repealed." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Stevens). A Congress so distrustful of future Congresses would not likely grant them broad powers. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 93.

Regardless of legislative motivation, though, the language of section 5 surely suggests that some, perhaps not perfect, congruity with section 1 was intended. Unlike substantive provisions whose meaning is expandable because a transcendent concept underlies the transitory conception of their framers, *see* R. DOWRKIN, TAKING RIGHTS SERIOUSLY 134-35 (1977), section 5 is a mechanical provision with a more literal meaning. *Cf.* United States v. Guest, 383 U.S. 745, 779 (1966) (Brennan, J., concurring) (The author of *Morgan* construes elements of the statutory crime of denying civil rights "secured" by the fourteenth amendment, 18 U.S.C. § 241 (1976), to include any right that "emanates from the Constitution [or] . . . finds its source in the Constitution.")

sense of 'relief,' but rather in the broad sense of a 'remedy for a wrong.' "[106] Absent the wrong, claiming purely remedial rather than substantive characterization does not decide the issue.

When *Washington v. Davis* told state and local governments "that a law or other official act, without regard to whether it reflects a racially discriminatory purpose" cannot be held "unconstitutional *solely* because it has a racially disproportionate impact",[107] it established a constitutional claim against any lower burden of proof. Consequently, a statutory burden of proof that conflicts with the constitutional one cannot be justified as an enforcement of the Constitution by the statute.

B. *Meeting the Challenge*

The challenge is more often ridiculed than seriously met. Federal appellate courts have been unanimous: "Neither the Supreme Court nor any circuit court has held that Title VII imposes different requirements depending upon whether the suit is against a governmental employer or a private litigant."[108] Consensus among lower courts, however, has not

106. Opposition to Petition for Writ of Certiorari at 11, County of Los Angeles v. Davis, 440 U.S. 625 (1979), *reprinted in* 12 SUP. CT. L. REPRINTS (Lab. Ser.) No. 6A at 50 (1978). This argument was stated by the respondents to the county's petition, yet its logic supports the challenger's position: if the remedy is tied to the wrong, rather than a separate equitable notion of how an established wrong should be rectified, then labeling Title VII remedial does not broaden the statutory reach beyond the limited constitutional anchor of purposeful discrimination under the equal protection clause. *Cf.* Milliken v. Bradley, 418 U.S. 717, 752 (1974) ("absent an inter-district violation there is no basis for an inter-district remedy" for de jure public school segregation).

In *Davis*, the challengers wanted to distinguish the remedial scope of 42 U.S.C. § 1981 (1976) from that of Title VII. They relied on the distinction established in Johnson v. REA, 421 U.S. 545, 461 (1975): "[T]he remedies available under Title VII and Sec. 1981, although related and although directed to most of the same ends, are separate, distinct, and independent. . . ." To counter that argument, the respondents emphasized that the remedies mentioned in Johnson were simply procedural whereas the remedies they sought were substantive. The challengers are thus better served by jettisoning the *Johnson* distinction and directly joining the issue.

As to § 1981, however, the scope may be tied not only to the fourteenth but also to the thirteenth amendment. *See, e.g.*, Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412, 426 (1976); Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976) (section 1981 was "drawn from both § 16 of the 1980 Act and § 1 of the 1866 Act."); R. BERGER, GOVERNMENT BY JUDICIARY 22-48 (1977). Consequently, the challengers may lose under either a remedy/substantive dichotomy or a straight substantive analysis. *But see* County of Los Angeles v. Davis, 566 F.2d 1334, 1348-49 (9th Cir. 1977) (Wallace, J., dissenting) *vacated as moot*, 440 U.S. 625 (1979). Dissenting in *Davis*, Justice Powell, joined by the Chief Justice, viewed the impact/intent issue under § 1981 as unsettled: "We should reach, rather than seek a questionable means of avoiding, the important question—heretofore unresolved by this court—whether cases brought under 42 U.S.C. § 1981, like those brought under the Fourteenth Amendment, require proof of racially discriminatory intent or purpose." *Id.* at 637. One reading of Washington v. Davis, 426 U.S. 229, 255 (1976) (Stevens, J. concurring), suggests this issue was resolved in that decision. Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 228 (1979). In light of the thirteenth amendment heritage of § 1981, though, the issue would not likely be resolved by unfocused discussion. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (Referring to 42 U.S.C. § 1982 (1976)), the Court stressed that the thirteenth amendment " 'clothed Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery*.' " (citation omitted).

107. 426 U.S. 229, 239 (1976).

108. Scott v. City of Anniston, Ala., 597 F.2d 897, 899 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3154 (U.S. Sept. 7, 1979). *See, e.g.*, Rice v. City of St. Louis, 607 F.2d 791, 794 (8th Cir. 1979); Harris v. White, 479 F. Supp. 996, 1002 (D. Mass. 1979); Brown v. New Haven Civ. Serv. Bd., 474 F. Supp. 1256, 1259 (D. Conn. 1979).

hindered the Supreme Court from reaching an opposite decision in other Title VII cases,[109] and the rejectionists do advance an argument based on *Katzenbach v. Morgan.*

In *Morgan*, the Supreme Court held: "The fourteenth amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the amendment."[110] The rejectionists extrapolate from the holding a second point: "Congress' power under Section 5 of the Fourteenth Amendment to enforce that amendment by 'appropriate legislation' is not limited to prohibiting state action that itself violates the Constitution."[111] Instead, "Congress is authorized to enact more stringent standards than those provided by the fourteenth and fifteenth amendments in order to carry out the purpose of those amendments."[112]

1. *The Morgan Power*

Gauging what legislation is appropriate under section 5 begins with the "classic formulation of the reach" of powers under the necessary and proper clause:[113] "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 consistent with the letter and spirit of the constitution, are constitutional."[114]

Applying this formulation, the rejectionists conclude that Congress plainly had "authority to determine that implementation of the equal

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109. In General Elec. Co. v. Gilbert, 429 U.S. 125, 147 (1976) (Brennan, J., dissenting), the Court "reject[ed] the unanimous conclusion of all six Courts of Appeals that have addressed this question." In Washington v. Davis, 426 U.S. 229, 244-45 & 244 n.12 (1976), the Court produced a laundry list of circuit and district court opinions it disapproved, noting only that "[t]he cases impressively demonstrate that there is another side to the issue."

110. 384 U.S. at 651.

111. Blake v. City of Los Angeles, 595 F.2d 1367, 1372-73 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3013 (Jul. 12, 1979). The *Morgan* holding need not be so expansive. To say that the fourteenth amendment by its own force establishes in § 1 a foundation that may be built upon by congressional action pursuant to §5 is not to say that the building may proceed apart from the foundation.

112. Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3154 (Sep. 7, 1979). Again, this reading of *Morgan* is not necessarily so. That Congress may more strictly regulate pursuant to § 5 than the fourteenth amendment does by its own force in § 1 does not mean Congress may regulate beyond the scope of § 1. The more defensible reading is that Congress may regulate to fill in those gaps that a law in constitutional form naturally leaves. *See* Weems v. United States, 217 U.S. 349, 373 (1910).

113. Katzenbach v. Morgan, 384 U.S. 641, 650 n.9 (1966) ("By including § 5 the draftsman sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. . . . ") (footnote omitted). This understanding of § 5 has been discredited. *See* note 105 *supra*. Even the breadth of the necessary and proper clause is subject to a constitutional measure. *Cf.* Kinsella v. Singleton, 361 U.S. 234, 254-55 (1960) (Harlan, J., dissenting) ("Of course, the Necessary and Proper Clause cannot be used to 'expand' powers which are otherwise constitutionally limited, but that is only to say that when an asserted power is not appropriate to the exercise of an express power, to which all 'necessary and proper' powers must relate, the asserted power is not a 'proper' one."). Were § 1 of the fourteenth amendment an article 1 congressional responsibility, the necessary and proper clause could not change the meaning of § 1 by enforcing it because that would be an expansion of § 1.

114. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

protection clause required extension of the *Griggs* impact standard to state and local governments."[115] A rational relationship between that extension and "the goal of enforcing the equal protection clause's prohibition of discrimination"[116] is predicated upon the evidence before Congress that pervasive discrimination existed in the public sector.[117] Congress could properly "weight the competing policy considerations and determine that public employees required the safeguards against discrimination given to private employees by the *Griggs* standard."[118]

The legislative history is replete with references to promoting equal employment opportunity as both an end in itself and a means to equal participation in and benefits from government. These references indicate that Congress acted with the values of the equal protection clause in mind. Congressional power in enforcing section 5 is plenary,[119] and the policy of imposing a discriminatory impact standard may not be second-guessed or rejected by courts. Justice Powell's opinion in *Bakke* may well have spoken for the other Justices on at least this point: "We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."[120]

2. *The Definition in* Washington v. Davis

Congressional power to determine whether impact discrimination thwarted enforcement of the equal protection clause could not have been precluded by the *Washington v. Davis* holding that a judicial finding of a

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115. Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3013 (Jul. 12, 1979). The legislative history of Title VII does reflect a congressionally perceived need to extend the discriminatory impact standard of Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), to public employers. *See* notes 58-65 and accompanying text *supra*.

116. Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3013 (Jul. 12, 1979).

117. *See* notes 55-59 and accompanying text *supra*. A "special function of Congress [may be] making determinations of legislative fact" to which the courts should defer. Oregon v. Mitchell, 400 U.S. 112, 240 (1970) (Brennan, J., separate opinion). *Accord*, Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106-07 (1966).

118. United States v. City of Chicago, 573 F.2d 416, 423-24 (7th Cir. 1977) (citation omitted). *Cf.* Mourning v. Family Publications Serv., Inc., 411 U. S. 356, 371-72 (1969) (Because "reasonable minds may differ as to which of several remedial measures should be chosen," congressional balancing of interests deserves judicial deference).

119. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Section 5 represents "legislative authority that is plenary *within the terms of the constitutional grant*.") (emphasis added). The modifying phrase is often slighted as a truism; however, the boundaries of the constitutional grant in § 5 are set by § 1.

120. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 302 n.41 (1978) (Powell, J., separate opinion). The findings are amply present in the legislative history. *See* notes 55-65 and accompanying text *supra*. Congress identified pervasive public sector employment discrimination and sought "to insure that all citizens are treated equally in this country." Shawer v. Indiana Univ., 605 F.2d 1161, 1164 (3d Cir. 1979) (per curiam). That insurance was based on both types of denial of equal protection: discriminatory exclusion from jobs and discriminatory delivery of services. *See* notes 81-85 and accompanying text *supra*. *Cf.* United States v. State of New York, 475 F. Supp. 1103, 1109 (N.D.N.Y. 1979) ("In a democratic society, a police force that includes a reasonable proportion of members from the various groups of people that it serves will have a better image with the public [and] will better be able to carry out its law enforcement functions. . . . ").

constitutional violation requires a showing of discriminatory purpose.[121] The Court distinguished the constitutional definition of discrimination from a statutory one: "However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative presumption."[122] Indeed, one phrasing of the question in *Washington v. Davis* is whether the standard of Title VII should be read into the equal protection clause.[123] To this, the Court directly responded: "We have never held that the constitutional standard for adjudicating claims of invidious discrimination is identical to the standard applicable under Title VII, and we decline to do so today."[124]

Congressional power to impose statutory liability for employment practices with a discriminatory impact is at least "unshaken by the *Washington* decision"[125] and the decision might be construed as "expressly refut[ing] the contention . . . that discriminatory purpose or intent must be demonstrated in a Title VII case."[126]

3. *The Fourteenth Amendment*

Since *Washington v. Davis* does not preclude a congressional definition of the equal protection clause, the *Morgan* criteria for measuring section 5 power is satisfied if the congressional definition is supportable as a matter of law. While Congress could not abandon the equal protection clause under the guise of enforcing it, *Morgan* suggests that judicial deference will be shown to any fair reading of the scope of the equal protection clause. The legislative history of the fourteenth amendment supports construing the equal protection clause as a means to "secure to all persons within the United States practical freedom."[127]

During the Reconstruction Era following the Civil War, the

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121. The rejectionists agree that Washington v. Davis established "the constitutional reach which [the Supreme Court] ascribed to equal protection," but further note that the Court "in no way suggested that the power of the Congress pursuant to the Fourteenth Amendment is so circumscribed that the Congress itself may not apply the same Title VII standards to all employers, private and governmental alike." Vanguard Just. Soc'y, Inc. v. Hughes, 471 F.2d 670, 701 (D. Md. 1979). In Dothard V. Rawlinson, 433 U.S. 321, 331 n.14 (1977), the Court rejected what was "perhaps a variation of their constitutional challenge" that more deference was due the state's employment conditions by approvingly citing congressional "intent that the same Title VII principles be applied to governmental and private employers alike." The key phrase, though, remains "the constitutional reach." In Washington v. Davis, the Court defined that reach; therefore, at least the suggestion exists that Congress may not overreach when its objective is enforcement of the equal protection clause.

122. 426 U.S. at 248.

123. *Id.* at 236.

124. *Id.* at 239.

125. Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 509-10 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1978).

126. United States v. City of Chicago, 573 F.2d 416, 421 (7th Cir. 1977).

127. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull). The senator was referring to 42 U.S.C. § 1981 (1976), but "the principles of the civil rights bill (Act of 1866)" had been incorporated into the fourteenth amendment. Hurd v. Hodge, 334 U.S. 24, 32 n.13 (1948).

vanquished states were reluctant to accord full and equal rights to former slaves.[128] A set of "Black Codes" was passed[129] that, though generally neutral on their face, operated to the disadvantage of the former slaves.[130] The framers of the fourteenth amendment had no illusions that the Civil War had changed deep-seated feelings about racial equality. Aware of the "Black Codes," Congress first amended the Constitution and then re-enacted one section of the Civil Rights Act of 1866, now codified as 42 U.S.C. section 1981, originally passed pursuant to the thirteenth amendment in response to the "Black Codes."[131] The fourteenth amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the Law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."[132] Section 1981 became one method of enforcing the fourteenth amendment: "There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits."[133] In sum, the Reconstruction Era produced state laws that perpetuated "under other names and in other forms a system of involuntary servitude."[134] Enacted in this context, the equal protection clause could be interpreted by Congress to reach discriminatory impact.[135]

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128. *See generally* J. TEN BROEK, THE ANTISLAVERY ORIGINS OF THE Fourteenth AMENDMENT 163 (1951); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 17 & n.42 (1955); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last*: Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272, 278 (1969).

129. The codes were primarily oriented in fears that newly emancipated slaves would wander the countryside without jobs and commit violent acts against the slave-holding class. Thus, vagrancy and apprenticeship laws were enacted. Kohl, *supra* note 128, at 278.

130. For example, the conditions on employment, "in the case of South Carolina, Alabama, and Louisiana, literally applied to all laborers regardless of race. . . . " Brief Amicus Curiae for N.A.A.C.P. Legal Defense and Educ. Fund, Inc. at 19, County of Los Angeles v. Davis, 440 U.S. 625 (1979), *reprinted in*, 12 SUP. CT. L. REPRINTS (Lab. Ser.) No. 6A at 53 (1978).

131. CONG. GLOBE, 41st Cong., 2d Sess. 3658 (1870) (remarks of Sen. Stewart). *See* Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 12 & n.58 (1977).

132. Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

133. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull).

134. CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) (Rep. Cook).

135. Challengers of a discriminatory impact standard for state and local governmental employers recognize that the Black Codes were neutral in form but disparate in impact. They argue, however, that "it was obvious to Congress as well as the military occupational government that these statutes were enacted with a purposeful discriminatory intent and were designed to place the newly free blacks in a position subservient to their former masters." Reply Brief for Appellant at 5, County of Los Angeles v. Davis, 440 U.S. 625 (1979), *reprinted in* 12 SUP. CT. L. REPRINTS (Lab. Ser.) No. 6A at 223 (1978). The Brief Amicus Curiae of the Equal Employment Advisory Council in *Davis* likewise argued that the Reconstruction Era "was a period of rampant, overt discrimination; the concept of consequential discrimination resulting from the disproportionate impact of otherwise racially neutral conduct was still a century into the future." *Id.* at 28, 12 SUP. CT. L. REPRINTS (Lab. Ser.) No. 6A at 326. While arguments over how the 39th Congress perceived the Black Codes persist, they can hardly be dispositive of the meaning of the equal protection clause after Washington v. Davis.

4. *Burden of Proof under Title VII*

In *Griggs*, the Supreme Court recognized that "Congress directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply the motivation."[136] The congressional objective "was to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group."[137] Congress adopted a disparate impact standard to achieve that objective:

> Disparate impact doctrine as first laid down in *Griggs* was clearly designed to ensure more perfect realization of the beneficient purposes of Title VII by making plain that discriminatory consequences as well as discriminatory intent fell under the ban of this remedial legislation, and by providing a relatively easy burden of *prima facie* proof of discriminatory consequences to overcome difficulties that might normally obtain in proving "discrimination in employment" *vel. non.*[138]

In providing a statutory burden of proof that was lighter than one imposed by the Constitution, Congress broadened the enforcement of equal employment opportunity. "[C]ongressional adjustment of the burdens of proof in litigation is a familiar method of enforcing the post-Civil War amendments which [the Supreme] Court has upheld in the context of voting rights."[139]

Morgan exemplifies such an adjustment. In a prior case, the Supreme Court had rejected a facial challenge to literacy tests used to qualify voters.[140] The argument was that the tests were "in all circumstances

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136. 401 U.S. 424, 432 (1972).

137. *Id.* at 429-30.

138. Wright v. National Archives and Rec. Serv., 609 F.2d 702, 712-13 (4th Cir. 1979) (en banc). The challengers may argue, based on General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), that, contrary to *Griggs*, Congress did not adopt a discriminatory impact standard. In *Gilbert*, the term "discrimination" in § 703(a)(1), 42 U.S.C. § 2000e-2(a) (1) (1976), was defined by analogy to the fourteenth amendment. 429 U.S. at 145. Because the constitutional issue of pregnancy exclusion from employee health benefits plans had been decided in Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974), reading a constitutional definition of discrimination into Title VII produced the same holding as in *Geduldig*. Using the same rationale, the Washington v. Davis constitutional holding would find a parallel in Title VII.

Gilbert did not, however, proceed under § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976), the provision in *Griggs*. 429 U.S. at 137. That provision establishes "an unlawful employment practice for an employer . . . to limit or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, ..." Indeed, *Gilbert* recognized that § 703(a) (2) created liability for impact discrimination and found that "there is no proof that the package is in fact worth more to men than to women." *Id.* at 138. Although *Gilbert* has been fairly criticized for measuring the impact on risks, rather than the impact on individuals, *id.* at 155 (Brennan, J., dissenting); *id.* at 161-62 n.5 (Stevens, J., dissenting) ("The classification is between persons who face a risk of pregnancy and those who do not."), the furthest reach of the opinion on its face is to construe the § 703(a)(1) term, "or otherwise to discriminate," by reference to the constitutional concept of discrimination. Gilbert does not tie Title VII discrimination to a constitutional definition. *See also, Recent Developments in Women's Rights, Sex Discrimination and Insurance Planning: The Rights of Pregnant Men and Women under* General Electric Co. v. Gilbert, 22 ST. LOUIS U. L. J. 101, 126 (1978).

139. Brief for Appellee at 53 Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977), *reprinted in* 10 SUP. CT. L. REPRINTS (Lab. Ser.) No. 21 at 185 (1976) (citations omitted).

140. Lassiter v. Northampton Election Bd., 360 U.S., 45, 54 (1959).

prohibited by the" equal protection clause and the fifteenth amendment.[141] Congress subsequently enacted the Voting Rights Act of 1965 and proscribed literacy tests.[142] Any person who "successfully completed the sixth primary grade" was conclusively presumed sufficiently literate to vote.[143] Prior to the Voting Rights Act, the Supreme Court's decision required a person to show that a challenged literacy test was discriminatory *as applied*; that is, "employed to perpetuate that discrimination" constitutionally forbidden.[144] *Morgan* upheld the substitution of a statutory conclusive presumption for a constitutional burden of proof.[145] The rejectionists conclude that Congress can do likewise with Title VII.

C. *Criticizing Rejection of the Challenge*

Intuitively, the state and local government employers' challenge is unappealing. The history of discrimination in the United States, so pointedly drawn in Justice Marshall's opinion in *Bakke*,[146] compels disdain for any employer, especially a government employer, who engages in discrimination. That the discrimination is subtly based on impact rather than patently founded in intent makes no difference to the victim.[147] Nevertheless, the merit of the challenge must be analyzed separate from a preordained conclusion.[148] Analysis begins with congressional power under section 5 of the fourteenth amendment. That power is "plenary

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141. Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).

142. 42 U.S.C. § 1973a-p (1976).

143. § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e)(2) (1976).

144. Lassiter v. Northampton City Bd. of Elections, 360 U.S. at 53. The Court was referring to the fifteenth amendment guaranty that "[t]he right of citizens of the United States to vote shall not be denied . . . on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. *Lassiter* was brought pursuant to both the fourteenth and fifteenth amendments, and the analytical point is unchanged by the context of the quote. 360 U.S. at 50. *Accord*, Katzenbach v. Morgan, 384 U.S. at 649.

145. 384 U.S. at 654 ("Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement" of a literacy test whether discriminatory purpose lies at the heart of the requirement.) (footnotes omitted).

146. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-397 (1978) (Marshall, J., separate opinion).

147. In a play on the aphorism about a dog's capacity to distinguish variations in human conduct, Professor Karst explains that "[o]ne who is stumbled over often enough may, understandably, notice that those cumulative impacts bear a certain functional resemblance to kicks." Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977).

148. Prior to his appointment to the Supreme Court bench, and while he was thus insulated from the reality of judicial decision-making at that level, Benjamin N. Cardozo distinguished the legal process from the political one:

> [The judge] is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, ...

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). The sentiment is sound though its fulfillment be unattainable in a judiciary that manifests the same prejudices as the society it serves. To the extent that written public opinions encourage the Cardozo ideal judiciary, however, commentators, and even advocates, must play an objective analytical game.

within the terms of the constitutional grant."[149] Legislation that does not "enforce, by appropriate legislation, the provisions" of the equal protection clause may not be justified by the power granted in section 5.[150]

1. *The* Morgan *Power*

When "[c]orrectly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the *guarantees* of the Fourteenth Amendment."[151] Deference to a congressional judgment about the equal protection clause is premised on the existence of the objective: securing the guarantee of the clause. Beyond that premise, courts may not closely scrutinize a congressional determination of either the means or the ends identified as components of the guarantees.[152] But, absent that premise, Congress is without power to exercise its discretion.

Professor Tribe has observed that "subsequent Court decisions reveal substantial uncertainty as to *Morgan's* validity; similarly the commentators are undecided as to whether the opinion is or is not heresy."[153] Both issues are not of direct concern here; instead, it is the application of *Morgan* to Title VII that will resolve the challenge over discriminatory impact. Yet, in applying *Morgan*, its validity and heresy come into play. "The starting point for most judicial and scholarly discourse about section 5 is that the provision means only what it says, and that Congress' power pursuant to section 5 is restricted to the enforcement of the fourteenth amendment's substantive provisions."[154] At that point, validity and orthodoxy seem assured.

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149. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

150. U.S. CONST. amend. XIV, § 5.

151. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (emphasis added). The *Morgan* holding has been described as construing section 5 to grant Congress power to define the guarantees of the fourteenth amendment. *See, e.g.*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 132 ("[T]o acknowledge that Congress has some role in defining the constitutional imperatives that limit its own authority is truly to turn *Marbury v. Madison* on its head, but that somersault was implicit in *Morgan* itself") The emphasized portion of the *Morgan* language is the starting point for rejecting such a construction. *Morgan* held that Congress could act to secure, not define, the guarantees of the fourteenth amendment. Implicitly, the guarantees exist apart from the enforcement power flowing from the view of Section 5 in *Morgan*.

152. *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 90 HARV. L. REV. 91, 104 (1966). In *Morgan*, the Court used a very deferential scrutiny: "It is not for us to review the congressional resolution of these factors [referring to the extent of discrimination, remedies, and impact on state interests]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." 394 U.S. at 653. *Cf.* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (deference to economic legislation).

153. L. TRIBE, AMERICAN CONSTITUTION LAW 29 (1978). Similar comments describe the fractionated handling of *Morgan* in Oregon v. Mitchell, 400 U.S. 112 (1970), as "a constitutional law disaster area," Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, (1975), and "a state of analytical disarray occasioned in part by the issue of section 5 authority." Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1232 (1978) (footnote omitted).

154. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1237 (1978). This starting point would make a fine finish line but for doubt that a literal reading of section 5 might contradict the *Morgan* decision. There can be no doubt, though, that at a

Why analysis need be confused beyond that point is not readily apparent. The likely culprit is a misguided claim about the meaning of that starting point. In *Morgan*, the state asserted that the judiciary, either before or after congressional action, must agree that the congressionally proscribed state action violated the equal protection clause.[155] The Court rejected that notion.[156] Section 5 enlarged the power of Congress to "make the [Civil War] amendments fully effective."[157] Congress is authorized to decide, on its own, whether state action violates the equal protection clause. Although courts should require minimum rationality under the *McCulloch* formulation quoted above, they may not defer to an inconsistent judgment about what the Constitution means. The formulation requires that the end "be within the scope of the constitution" and the means "consistent with the letter and spirit of he constitution."[158] That judgment will initially be made by Congress, but "[i]t is emphatically the province and duty of the judicial department to say what the law is."[159] It is too late in the jurisprudential day to doubt that a judicial interpretation of the Constitution trumps a conflicting congressional one.

The courts may, and probably should, be deferential to the initial determination of Congress that a guarantee of the equal protection clause is implicated by a particular state action. But, "it is deference not capitulation which is espoused in [*Morgan*]."[160] *Morgan* can best be understood when a distinction is made between judicial definition and

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minimum "[i]n that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Haggling over how the "substantive provisions" are to be defined need not implicate differing interpretations of the clear language in section 5, and the doubt perceived from the *Morgan* holding can be reconciled with the clear language.

155. 384 U.S. at 648. The Attorney General for the State of New York argued that the challenged statute "cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by [the statute] is forbidden by the Equal Protection Clause." *Id.*

156. To the Attorney General's argument, the majority opinion tersely responded: "We disagree." *Id.*

157. Ex Parte Virginia, 100 U.S. (10 Otto) 339, 345 (1880), *quoted in*, Katzenbach v. Morgan, 384 U.S. at 648 (1966).

158. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). The quoted phrases apply to both the purported enabling provisions of the Constitution and other constitutional provisions that restrict the power exercised. In *McCulloch*, discussion of the power granted by the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18, focused on the tension between two concepts: first, "that the powers of the government are limited, and that its limits are not to be transcended," 17 U.S. (4 Wheat.) at 482, and second, "that it is *a constitution* we are expounding," *id.* at 474, which was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *Id.* at 478. This tension frames the *McCulloch* formulation and indicates that real scrutiny, whether denominated minimal or strict, of the end and means is constitutionally mandated.

159. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *Morgan* has been read as a step back from *Marbury*. "The Court is suggesting that, to some extent at least, § 5 exempts the Fourteenth Amendment from the principle of Court-Congress relationships expressed by *Marbury v. Madison*, that the judiciary is the final arbiter of the Constitution." Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 84 (footnote omitted).

160. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV.

application. Although the distinction is not absolute, each function being performed as an incident of the other, the primary function at work in any decision can still be identified.[161] When courts define the Constitution, Congress is bound by the definition; when they merely apply the Constitution, Congress is free to apply it differently.

In *Morgan*, the state flouted the *Lassiter v. Northampton County Board of Elections*[162] decision. *Lassiter* had rejected a facial challenge to literacy tests, holding that North Carolina's judgment about voting qualifications was "an allowable one measured by constitutional standards."[163] Were the tests "employed to perpetuate" discrimination or even presented to the Court in a context that "made clear that a literacy requirement was merely a device to make racial discrimination easy," the tests would be unconstitutional.[164] In *Morgan*, the court declined the state invitation "to determine whether the New York English literacy requirement *as applied* to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause."[165] The judgment had been made by Congress; it had not been forclosed by *Lassiter*. A definition of the guarantee in the equal protection clause was not critical in *Lassiter*; rather, "constitutional standards" were merely applied to a record that, intriguingly, charged no "influence" of use of the literacy tests in a context of racially discriminatory voting practices.[166] *Morgan* has been so

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L. REV. 1212, 1230 (1978) (footnote omitted). Professor Tribe views this power sharing as part of the structural design:

> [There is a] clear constitutional message: despite the growth of federal judicial power, the Constitution remains a fundamentally democratic document, open to competing interpretations limited only by the values which inform the Constitution's provisions themselves, and by the complex political process that the Constitution creates—a process which on various occasions gives the Supreme Court, Congress, the President, or the states, the last word in constitutional debate.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 33 (1978). This observation is fine as a message but inadequate as a resolution of conflicting claims over the allocation of power to define the Constitution. What Professor Tribe remonstrates about is a knee-jerk reaction to judicial supremacy whenever a conflict arises. For example, legislative power exists under the commerce clause, U. S. CONST. art I, § 8, cl. 3, "above the judicially established floor," Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975), if the judiciary interprets the clause in the face of a dormant Congress. *See, e.g.*, Milk Control Bd. v. Eisenberg Farm Prod., 306 U.S. 346, 351-52 (1939). *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557-78 (1978) (Congress, not the judiciary, may choose whether to try nuclear energy as a source of power). The tougher issue arises when the power sharing is threatened by a direct conflict about the judicially established ceiling.

161. This dichotomy is not a profound one; however, it is analytically serviceable. *Cf.* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) ("Plainly, any distinction between constitutional exegesis and common law cannot be analytically precise, representing as it does, differences of degree. But I hope that we may be left with something more than the 'expert feel of lawyers,' or 'I know it when I see it,' although I do not denigrate the importance of either feeling in this process.").

162. 360 U.S. 45 (1959).

163. *Id.* at 53.

164. *Id.*

165. 384 U.S. at 649 (emphasis supplied).

166. Lassiter v. Northampton City Bd. of Elections, 360 U.S. at 53.

construed by three current members (one a dissenter in *Morgan*) of the Court:

> The Court's opinion made clear that Congress could impose on the States a remedy for the denial of equal protection that *elaborated upon* the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion.[167]

Justice Stevens also seems to support the distinction between definition and application. In *Fitzpatrick*, he was "not sure that the 1972 Amendments [to Title VII] were 'needed to secure the guarantees of the Fourteenth Amendment.' "[168]

The congressional choice of means in applying the Constitution is seldom questioned upon a review under the minimum rationality standard. "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."[169] In a like manner, congressional selection of ends, short of a selection conflicting with a definition excluding the end from the reach of the constitutional provision, is discretionary. Congress may decide, for example, that equal protection of the laws includes equal employment opportunity as an end and may choose any means rationally related to that end *so long as* both the end and means are consistent with the controlling definition of the equal protection clause.[170]

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167. Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Steward, J., concurring and dissenting in part, joined by Burger, C. J. and Blackmun, J.) (emphasis supplied).

168. Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976) (Stevens, J., concurring). His concurrence also questioned whether a violation of the fourteenth amendment had been proven; however, he argued that Congress could impose liability on the states through power provided by the commerce clause. *Id.*

169. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

170. Congress has two pegs upon which to hang its interpretation of the equal protection clause. Not only may discrimination be defined to include employment practices with a disparate impact, but equal protection may also be defined to include governmental services that employ proportional numbers of minorities and therefore more equitably deliver services. *See* notes 82-85 and accompanying text *supra*. While the definition of discrimination is foreclosed by Washington v. Davis, 426 U.S. 229 (1976), the viability of the second approach is not settled. May discriminatory impact be prohibited because it indirectly denies equal protection to governmental services? Although there is a strong argument, based on deference to legislative findings, supporting an affirmative response to that question, the evolving judicial definition of the equal protection clause suggests a negative response.

First, the claim would be that otherwise equal employment opportunity, in the sense that discriminatory purpose is absent, has an impact on delivery of government services. Purposeful discrimination in government services would clearly be proscribed; impact discrimination would not. In Washington v. Davis, the Court included in its wholesale rejection of "cases [that] impressively demonstrate that there is another side to the issue" one on delivery of services. 426 U.S. at 244 n.12. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1977), *aff'd on reh'g en banc*, 461 F.2d 1171 (1972) (per curiam). Hawkins was decided on the theory that "it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials." *Id.* at 1172. Were a challenge relying on impact theory to delivery of services directly made, it would fail under the equal protection clause. An indirect challenge relying on the impact of employment practices as a cause for discriminatory impact in delivery of services would be equally ill-fated.

Second, the core claim in services delivery cases derived from impact theory is that unequal results have been provided. Yet, the Supreme Court now deems it "a settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." Personnel Adm'r v. Feeney, 442 U.S. 256, 273

The brunt of commentary on *Morgan* has been on the "ratchet" theory.[171] The *Morgan* majority noted that Congress had "no power to restrict, abrogate, or dilute" guarantees in the fourteenth amendment.[172] Once Congress had discretion under section 5 to enforce guarantees in the fourteenth amendment, the pundits were hard at intellectual work either justifying a one-way ratchet or denouncing the decision.[173] The time has come to bury that ratchet. Theories justifying the ratchet of begging the question are commonly cited,[174] yet none challenges the fallacy that

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(1979). Put differently, all citizens have a right of equal opportunity to receive government services, but that right does not guarantee elimination of the "many inequalities [that] are consistent with the notion that each of us is entitled to respect as a person, a participating member of society." Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 9 (1977).

The critical issue for any claim is whether opportunity has been equally provided, with the impact being "merely" a coincidence. To justify the disparity in delivery of governmental services in *Hawkins*, the town argued that neutral criteria, like the special needs of particular neighborhoods or traffic usage, produced the discriminatory results. 437 F.2d at 1280-90. Had that been true, as the district court found but upon which was quite rightly reversed, the impact would have been a function of realities that, while anchored in past societal discrimination, were germane to choices about delivery of services. Those choices would treat each recipient of services with equal respect to the extent the recipient's apparent status, *e.g.*, resident of an older neighborhood or a less traveled one, was taken into account. At bottom, Washington v. Davis adopts this concept of equality.

The concept has been soundly criticized, *see* notes 41 and 42 *supra*, and is particularly defective in purporting to treat with equal respect disproportionately affected persons. The apparent status of a recipient of services is a superficial one. That status is derived from deeper causes, baggage that each recipient carries with him or her. Only when government delivers services with cognizance and deference to that baggage is true equal respect and dignity accorded. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977). Consequently, "government has an obligation, an affirmative duty, to pursue its legitimate interests by means of laws selected and fine-tuned for the purpose of avoiding unnecessary intrusion on the interests of racial minorities." Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 556-57 (1977).

Finally, the power of Congress to render a legislative finding of a violation of the equal protection clause is not eviscerated by judicial parameters restricting that power. That power is in the first instance independent of the judicial role in *enforcing* the equal protection clause. "Even if discrimination solely for [disparity in delivery of services] is not a violation of the Fourteenth Amendment that the Court could itself strike down, because the state does not draw lines in terms of race, still it is within the larger area of violations which may be declared by Congress." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 120 (1966). But the judiciary not only enforces the equal protection clause, it also polices congressional enactments under that clause. This judicial review function differs from the shared judicial and legislative power to enforce the clause. Thus, the analysis by Professor Cox is correct but does not address the conflict between judicial definition, rather than application, of the Constitution and a legislative definition and/or application, both of which are controlled by the judicial definition, even though judicial application would leave room for either legislative power to act independently.

171. The ratchet metaphor was introduced in Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606-07 (1975). According to WEBSTER'S THIRD NEW INT'L DICTIONARY 1884 (1966), a "ratch" is a "notched bar with which a pawl or click works to prevent reversal of motion."

172. 384 U.S. at 651 n.10. The footnote was important to the majority's analysis because it refuted Justice Harlan's dissenting opinion that under the holding he did "not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of the Court." *Id.* at 668.

173. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 265-72 (1978); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

174. Professor Tribe treats the issue as a false one and suggests that both internal constitutional restraints, particularly the Bill of Rights, and external democratic restraints, like federalism, satisfy any

"enforcement" means "expansion." *Morgan* does not operate as a ratchet. Enforcement is not a ratchet-like exercise because the Constitution is not twisted in one direction rather than another. The Constitution is enforced like a vise. It firmly grips whatever comes between its jaws. The width of the

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need to keep Congress from restricting under the guise of enforcing. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 272 n.61 (1978). That position, while undoubtedly true on its face, begs the question of just what section 5 means.

Professor Cox defers to "congressional supremacy over the judiciary in the areas of legislative factfinding and evaluation," Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966), and reads *Morgan* as leaving "no doubt that Section 5 of the Fourteenth Amendment gives Congress power to deal with conduct outside the scope of section 1." *Id.* at 103. That reading is to be limited, however, to congressional "power under Section 5 of the Fourteenth Amendment to extend the practical application of the amendment's broad constitutional guarantees upon its own findings of fact, characterizations, and resolution of questions of proportion and degree." Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 238 (1971). In seeming contradiction to the broader reading, Professor Cox has settled on a circumscribed interpretation:

> Nothing in *Morgan* suggested that the Court should defer to Congress in the process of deriving the applicable legal standard from the document and other sources of law; the opinion seemed to require Congress to *apply the same standard* as the Court, merely leaving it free to apply the standard differently where the application turned upon questions of fact.

Id. at 234. The problem, of course, is one Professor Cox recognized: "When the definition depends upon appraisal of the facts," the rationale for deferring to Congress remains. Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 n.86 (1966). Under his approach, Professor Cox would be hard-pressed to reconcile a discriminatory impact standard under amendments to Title VII that were based on the fourteenth amendment with a fourteenth amendment that was controlled by Washington v. Davis. If Congress is free to apply that standard differently, then the standard has no meaning. Only when both the courts and Congress are engaged in applying the same standard is judicial deference to the legislature imperative. Similarly, only when both the courts and Congress are engaged in defining the same standard is legislative deference to the judiciary imperative.

Professor Cohen raises two barriers to resolving the ratchet problem. First, he rejects a "remedy-interpretation distinction" as too limited to explain why Congress may expand but not restrict equal protection guarantees. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 608 (1975). Whether a remedy is involved would "turn on both the ostensible congressional theory and the legislative facts supporting that theory;" therefore, the distinction is unworkable because the ratchet could be used to move in two directions depending on legislative characterization. *Id.* at 608-09. Moreover, the distinction is less exclusive than a definition/application dichotomy because remedies may contain a substantive aspect. Second, Professor Cohen suggests a federalist approach that would require judicial deference to "a congressional judgment resolving at the national level and issue that could—without constitutional objection—be decided in the same way at the state level." *Id.* at 614. He concludes "that the enforcement power under the 14th amendment insofar as it involves disputed issues of interpreting section 2, is a power to legislate only at the margins." *Id.* at 618-19. The problem with this analysis is determining where the margins are. Professor Cohen uses the example of Branzburg v. Hayes, 408 U.S. 665 (1972), for the proposition that were *Morgan* to have continuing vitality, "Congress should have the power to create a newsman's privilege binding against the states." 27 STAN. L. REV. at 619. Under his federalist approach and a reading of *Branzburg* as judicial deference to legislative line-drawing, Professor Cohen would have Congress hold the same power as states did to enact a privilege. That power would not, however, flow from enforcement of the first amendment. *Branzburg* held that the first amendment "does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." 408 U.S. at 691-92. The Supreme Court *defined* the first amendment to include protection of news-gathering, *id.* at 681, then *applied* that protection to countervailing societal obligations "of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses." *Id.* at 686. Professor Cohen's conclusion as to congressional power is probably correct but not instructive about section 5 power. Congress would not merely be enforcing the first amendment, it would be balancing law enforcement interests against first amendment ones. While quite a chunk of traditionally reserved police power would be rather cavalierly displaced by a national balancing, that is a federalism question, not an enforcement one. See Dixon. *Newsmen's Privilege by Federal Legislation: Within Congressional Power?*, 1 HASTINGS CONST. L. Q. 39, 39 (1974). The reason Congress has the

vise remains for the courts to decide ultimately, with Congress sometimes playing a secondary role in defining the width and a co-equal role in applying the vise.[175]

The dissent in *Morgan* wrongly applied the right rationale. Justice Harlan wrote that "it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the section 5 power into play at all."[176] That is an accurate statement when read to mean that a guarantee of the Constitution must exist to be enforced. Justice Harlan probably meant his statement that way because he read *Lassiter* as foreclosing congressional proscription of literacy tests.[177] Thus, he concluded, "[i]n effect the Court reads section 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment."[178] He could not have meant that Congress may never initially or without minimal review decide whether a particular state action "is in truth an infringement"[179] because he approvingly cited precedent in

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enforcement power is not simply that balancing of interests was involved in *Branzburg* but rather that the first amendment was first defined, then applied in a way consistent with congressional power.

Finally, Professor Burt agrees that any remedial/interpretive distinction is shallow: "Clearly such [remedial] power has broad substantive impact. To grant or withhold such remedies dictates the effective substance of the rights." Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 84. His complaint is that *Morgan* offers little firm guidance and uses instead "flexible notions [under which] the Court could approve congressional action that reshaped Court doctrine to make it responsive to conflicting interests in a manner that the Court itself might not comfortably be able to reach." *Id.* at 121. With practical institutional restraints being the only governor, Professor Burt reads *Morgan* as leaving *Marbury v. Madison* behind. His paradigm is Miranda v. Arizona, 384 U.S. 436 (1966), and the Court's willingness to yield to the "creative rule-making capacities" of Congress and the states "so long as they are fully as effective . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." *Id.* at 490. What the Court did in *Miranda* was first to define the fifth amendment privilege to be available outside of criminal court proceedings and to protect persons in all settings in which their freedom of action is curtailed in any significant way, thereby establishing a constitutional minimum neither Congress nor the states can intrude upon, and then to apply that definition in a judicial framework that invite differing applications, consistent with the definition. Contrary to Professor Burt, there was no "somersault" of *Marbury* by *Morgan*, 1969 SUP. CT. REV. at 132; rather, *Morgan* was an exercise in parallel bars.

175. This relationship between the court and Congress is explained in Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 92 HARV. L. REV. 1212, 1241 (1978): "[O]ccasion for federal judicial invalidation is presented when a congressional enactment pursuant to section 5 is based upon a broader reading of a substantive norm of the fourteenth amendment than that which the Court has made and the more limited Supreme Court interpretation of the applicable provision is firmly rooted in analytical rather than institutional perceptions." Professor Sager illustrates his point by distinguishing between a holding that "X clause stops here" and one that "X clause does not extend this far, at any event." *Id.* at 1242 (footnote omitted). Definition of a constitutional provision would be analytical, whereas application of the provision would be limited by lack of political responsiveness, absence of judicially manageable and enforceable standards, and the "legislative" nature of interest balancing. *Id.* at 1217-18 & nn. 11-13 and commentators cited therein. *Cf.* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23 (1975) (Courts sometimes establish "rules that are admittedly *not* integral parts of the Constitution and that go beyond its minima requirements.")

176. 384 U.S. at 666 (Harlan, J., dissenting).

177. *Id.* at 668.

178. *Id.*

179. *Id.* at 669. Justice Harlan distinguished *Morgan* from Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), Katzenbach v. McClung, 379 U.S. 294 (1964), and South Carolina v. Katzenbach, 383 U.S. 301 (1966). Those cases involved legislative records supporting the congressional judgment about a constitutional violation.

which "a congressional estimate, based upon its determination of legislative facts,"[180] justified an exercise of section 5 power. His major objection to the Voting Rights Act was that "[t]here is simply no legislative record supporting such hypothesized discrimination" as Congress relied on in banning literacy tests.[181] Without that record, Congress would have been in conflict with the part of the *Lassiter* decision that defined the equal protection clause as excluding a facial challenge to literacy tests.

The majority in *Morgan* deferred to congressional findings on two points: "nondiscriminatory treatment by government"[182] and "elimination of an invidious discrimination."[183] On each point, the majority ruled it sufficient that they could "perceive a basis upon which" Congress might act.[184] A formulation that was minimally rational calls for no greater scrutiny. The majority did not, contrary to Justice Harlan's dissent, surrender judicial "power to define the *substantive* scope of the Fourteenth Amendment."[185] Instead, the majority approved Congress' acceptance of the invitation implicit in *Lassiter*: bring literacy tests used in a context of racially discriminatory voting practice, and the equal protection clause will bar them.[186]

2. *The Definition in* Washington v. Davis

In *Washington v. Davis*,[187] the Court defined the equal protection clause. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[188] The Court distinguished the Title VII standard from the equal protection clause standard:

> [Title VII] involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more

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180. 384 U.S. at 669 (Harlan, J., dissenting). *But cf.* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 84 HARV. L. REV. 91, 105 (1966) ("No case has ever held that a [legislative] record is constitutionally required. . . ." The reason for not requiring such a record is that "the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor.") (footnote omitted). Justice Harlan has the better of any argument that demands deference to legislative action only when some record is established.

181. 384 U.S. at 652.

182. *Id.* at 654.

183. *Id.* at 653, 656.

184. *Id.*

185. *Id.* at 668.

186. For this reason, the argument in City of Rome v. United States, 100 S. Ct. 1548, 1561-62 (1980), that Congress has enforcement power independent of the meaning of the provision being enforced is a bit off. What really happened in the cases cited was legislative acceptance of an invitation to fill the void identified by the Court as necessary to show a violation other than what the provision proscribed by its own force.

187. 426 U.S. 229 (1976).

188. *Id.* at 248.

> rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.[189]

After *Washington v. Davis*, state and local government employers could claim constitutional immunity from a charged violation of the equal protection clause that relied "solely" on discriminatory impact evidence. After *Lassiter*, states with literacy tests could claim constitutional immunity from a charged violation of the equal protection clause that relied solely on a facial argument. In both cases, the Constitution was defined. Had Congress enacted the Voting Rights Act without accepting the *Lassiter* invitation, section 5 would not have been a sufficient constitutional anchor. For the same reason, had Congress enacted Title VII without honoring the *Washington v. Davis* definitional limits, section 5 would not have been a sufficient constitutional anchor.

The language in *Washington v. Davis* surely approves, if only in dicta, the Title VII discriminatory impact standard for public employers.[190] That approval does not, however, extend to the source for the standard in Title VII. *Washington v. Davis* does not approve the discriminatory impact standard as an exercise of section 5 or commerce clause power.

3. *The Fourteenth Amendment*

Section 5 expressly grants Congress power only to enforce the provisions of the fourteenth amendment. Twelve years after adoption of the fourteenth amendment, the Court held that Congress had been empowered to enact "[w]hatever legislation is appropriate, that is, adopted to carry out the objects the amendments have in view, *whatever tends to* enforce submission to *the prohibitions they contain.*"[191] That power was not absolute; the fourteenth amendment, while a reaction to a Civil War in which states acted irresponsibly toward the federation, was not intended to overhaul federalism totally. Perhaps from some sense that Congress too might act irresponsibly in the future, the victorious states were hardly so humble that they would yield to congressional powers that intruded upon the minimal restraints of federalism.[192] The fourteenth amendment was not "intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves."[193] Though broad, the fourteenth amendment has limits:

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189. *Id.* at 247-48.

190. *Id.* at 248 ("[E]xtension of the rule [of disparate impact] beyond those areas where it is already applicable by reason of statute, such as in the field of public employment should await legislative prescription.").

191. Ex Parte Virginia, 100 U.S. 339, 345-46 (1880).

192. The fourteenth amendment certainly centralized "civil rights authority in the federal government," Greesman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329 (1952), but the operating force was hubris, not humility. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 36-37 (1955) (Representatives from New York argued from the "proud position" that the South should learn from the North how to protect civil rights.)

193. Oregon v. Mitchell, 400 U.S. 112, 127 (1970) (Black, J., separate opinion). *But see* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952) ("The states' rights doctrine suffered a complete albeit temporary eclipse.")

> Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. . . . Hence the power of Congress comes into play only when the pre-condition of a denial of equal protection of the laws by a state has been met.[194]

4. *Burden of Proof under Title VII*

Congressional adjustments of burdens of proof are fine if done within congressional power. A burden of proof, however, is more than just a formal technique of persuasion. "Although such words as 'standard of proof' and 'prima facie case' refer to procedural and evidentiary issues, they also strike at the substantive heart of" constitutional and statutory proscriptions.[195]

In *Vance v. Terrazas*,[196] the Court used a definition/application dichotomy for determining congressional power to enact a burden of proof different from one adopted by a prior Court decision. The Court had interpreted the fourteenth amendment to require that an "intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proven conduct" be shown before Congress stripped a person of citizenship.[197] That holding parallels *Washington v. Davis*. A later decision, based on the Immigration and Naturalization Act of 1952 and "not rooted in the Constitution," held that the burden of proof was a "clear, convincing, and unequivocal" showing of the requisite intent.[198] That holding parallels *Lassitter*. Congress "took direct aim" at that holding and amended the Act to allow a rebuttable presumption of the voluntariness of acts inconsistent with citizenship, which presumption operated to create "rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government."[199] That amendment parallels the Voting Rights Act.

The Court upheld the amendment: "[S]ince Congress has the express power to enforce the Fourteenth Amendment, it is untenable to hold that it has no power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished."[200] The Court distinguished its earlier constitutional holding[201] that conditioned expatriation on intent from its earlier statutory holding[202] that, in effect,

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194. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97.

195. Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 208 n.9 (1979).

196. 100 S. Ct. 540 (1980).

197. *Id.* at 545, *referring to* Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

198. Nishikawa v. Dulles, 356 U.S. 129, 138 (1958).

199. Vance v. Terrazas, 100 S. Ct. at 547 & n.8, *citing* H. R. REP. No. 1086, 87th Cong., 1st Sess. 41, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2985.

200. 100 S. Ct. at 548.

201. *See* note 197 and accompanying text, *supra*.

202. *See* note 198 and accompanying text, *supra*.

usurped the "traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts."[203] As in *Morgan*, the Court deferred to a "congressional judgment . . . that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship."[204] Yet the Court had not budged on the constitutionally imposed intent requirement; instead it used the requirement as a counterbalance to the lowered evidentiary burden. Either intent is not an evidentiary standard (an unlikely proposition) or the constitutional definition blocked any inconsistent congressional one.

In dissent, Justice Marshall objected to the preponderance standard because an aspect of liberty was implicated.[205] His description of congressional power under section 5 is revealing. He believed that the congressionally established burden of proof was "the beginning, not the end, of the inquiry. It remains the task of this Court to determine when those rules and standards impinge on constitutional rights."[206] Again, this argument parallels *Morgan*. Justice Marshall would have given less deference to Congress because a review for minimum rationality is inappropriate when a liberty interest is affected. He and the majority agreed, however, that when Congress acts pursuant to section 5, it gains no greater power by labeling the act a mere procedural or evidentiary one.

The distinguishing characteristic is whether a substantive constitutional guarantee is affected by the procedural or evidentiary rule.[207] The substantive guarantee of equal protection *is* affected by the Title VII standard. State and local employers lose their constitutional immunity from being found in violation of the equal protection clause for discriminatory impact practices alone. The burden of proof in actuality reverses the *Washington v. Davis* definition of the equal protection clause because it adds to "the basic equal protection principle"[208] of discriminatory purpose a second principle of discriminatory impact. That is more than an adjustment; it is an amendment. Congress is not empowered by section 5 to amend the fourteenth amendment, whether directly or by tinkering with the burden of proof. Title VII is likewise restricted.

D. *Renewing the Challenge*

The attraction of section 5 as a constitutional anchor for imposing discriminatory impact statutory liability on state and local government

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203. 100 S. Ct. at 548.

204. *Id.*

205. *Id.* at 550-51 (Marshall, J., dissenting).

206. *Id.* at 551 (Marshall, J., dissenting).

207. Outcome-determinativeness is hardly talismanic. Hanna v. Plumer, 380 U.S. 460, 466-67 (1965). Nonetheless, the analysis in Vance v. Terrazas, 100 S. Ct. 540 (1980), parallels that suggested: the critical question is whether the constitutional guarantee is equally well served by the legislation. *Cf.* Miranda v. Arizona, 384 U.S. 436, 490 (1966) (Congress and the States may substitute procedures so long as the substantive right is protected.)

208. Washington v. Davis, 426 U.S. 229. 240 (1976).

employers is the detour around the roadblocks of the tenth and eleventh amendments. Title VII was able to avoid blithely those roadblocks in *Fitzpatrick.*[209] Section 5 is "one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."[210] Decided four days after *National League* and authored by the same justice,[211] *Fitzpatrick* suggested the shortcut of section 5; but, if section 5 is not an adequate constitutional anchor for discriminatory impact liability, the shortcut truly does become a dead end.

National League[212] struck down a congressional effort to regulate state and local government wage and overtime practices. The effort was anchored in the commerce clause. The Court recognized that "[i]t is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority of Congress."[213] The tenth amendment, however, was a bar to the congressional effort:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[214]

The state and local government challenges to the Title VII discriminatory impact standard assert that "attributes of sovereignty" are "impaired" by the standard. Since courts and commentators invariably reject the challenge to section 5 power, this renewed challenge has not been studied seriously. The challenge has been rejected, however, when made against the Equal Pay Act, though most discussion, again, has been focused on section 5 power.[215]

The challenge was stated succinctly in a petition for certiorari:

> (1) Does Title VII of 1964 Civil Rights Act require local government to change manner in which job of police officer is performed (*i.e.*, providing for use of greater force, such as baton or nightstick, rather than for some physically demanding hand control holds in effectuating arrest) merely because those different policies would permit selection standards having less 'adverse impact' upon women as class, or does Act and/or constitutional concepts of federalism permit local government to establish law enforcement

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209. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

210. *Id.*

211. Justice Rehnquist may well have been laying the groundwork for a chance at "writing on a clean slate" about section 5 and title VII. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 304-05 (1976).

212. National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

213. *Id.* at 840.

214. *Id.* at 845.

215. *See, e.g.*, Pearce v. Wichita Cty. Hosp. Bd., 590 F.2d 128, 132 (5th Cir. 1979) (commerce); Marshall v. City of Sheboygan, 577 F.2d 1, 3 (7th Cir. 1979) (commerce); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1282 & n.3 (9th Cir. 1979) (both commerce and section 5); Comment, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities v. Usery*, 125 U. PA. L. REV. 665, 677 (1977) (section 5).

policies and to select most qualified candidates to perform tasks required by those policies?[216]

The challenge reemphasizes the traditional local nature of employment decisions; particularly those, like civil service examinations, that are regular targets for the disparate impact standard. These decisions often involve employers in traditional government services, like police and fire departments.[217] The argument is that "[i]f Congress cannot prescribe the wages and hours of public employees, including [inter alia] school employees, it cannot prescribe how public school districts [inter alia] must go about hiring and promoting their employees."[218] While *National League* involved a congressionally imposed substantial increase in expenditures, the costs of compliance were derived from the interference with government operations, and the discriminatory impact standard of Title VII similarly interferes.[219]

E. *Meeting the Renewed Challenge*

As the legislative history of the Equal Employment Opportunity Act reflects, Congress amended Title VII pursuant to both the fourteenth amendment and the commerce clause.[220] The interpretation of the commerce clause heavily relied on by Congress was the Supreme Court decision in *Maryland v. Wirtz*,[221] which had partially extended the Fair Labor Standards Act to state and local government employers. That decision was overruled in *National League*.[222] An interim decision, *Fry v. United States*,[223] however, remained relatively unscathed. *Fry* upheld the Economic Stabilization Act of 1970,[224] which imposed a temporary freeze on the wages of state and local government employees. *Fry* was distinguished from *National League* on five grounds: (1) the Economic

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216. Petition for Certiorari, Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3698 (U.S. Apr. 28, 1980) 48 U.S.L.W. 3125 (1979).

217. *See, e.g.*, Brief Amicus Curiae of City of San Francisco 10-12, County of Los Angeles v. Davis, 440 U.S. 625 (1979), *reprinted in* 12 Sup. Ct. L. Reprints (Lab. Ser.) No. 6A at 358-60 (1978). The United States Civil Rights Commission indicates in FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE: A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT (1969), "that each community in this country faces special and unique problems; and, indeed, the report notes many instances wherein state and local governments had made substantial progress in the area of equalization of employment opportunities." *Id.* at 32-33, 12 Sup. Ct. L. Reprints at 380-81.

218. Brief for Petitioners 12-13, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977), *reprinted in* 10 Sup. Ct. L. Reprints (Lab. Ser.) No. 21 at 58-59 (1977).

219. *Cf.* Note, *Federalism and Federal Regulation of Public Employers: The Implications of National League of Cities v. Usery*, 26 CLEVE. ST. L. REV. 259, 289 (1977) (The Equal Pay Act involves structuring wages, and any commerce clause anchor is thus controlled by *National League of Cities.*); Marshall v. Owensboro-Daviess Cty. Hosp., 581 F.2d 116, 119 n.3 (6th Cir. 1978) (Regarding wage differentials, the "seemingly definite and inflexible language of the Supreme Court is National League of Cities" appears to prohibit the Equal Pay Act.).

220. *See* notes 78-102 and accompanying text, *supra.*

221. 392 U.S. 183 (1968).

222. National League of Cities v. Usery, 426 U.S. 833, 854-55 (1976).

223. 421 U.S. 542 (1975).

224. Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970) (expired 1974).

Stabilization Act was a temporary measure in an emergency period; (2) the emergency was an extremely serious problem, that of "severe inflation that threatened the national economy"; (3) the means selected were narrowly tailored to least "interfere with the States' freedom"; (4) the Act "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves"; and (5) the Act "operated to reduce the pressures upon state budgets rather than increase them."[225]

These distinctions led Justice Blackmun to concur, an important vote because only four justices joined the majority, and his one paragraph opinion vacillates between agreement with the majority and the dissent. The "understanding on my part" that allowed him to join the majority opinion was that "it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards could be essential."[226] The temporary wage freeze upheld in *Fry* would have had its "effectiveness drastically impaired if it were inapplicable to state and local government employers."[227] Thus, the importance of the federal interest and the impact of state and local government nonadherence to that interest become balancing criteria.

Title VII fares well under these standards. "Title VII intrudes less than minimum wage legislation on the role of state and local governments, places a less stringent financial burden on them, and reflects a more important national purpose—that of ending discrimination."[228] Nor does the impact of Title VII on state and local governments "impair their ability to function effectively in a federal system."[229] Title VII "leaves the States free to set all substantive terms of employment"[230] except one: discrimination. The ability to discriminate, even if "only" by discriminatory impact practices, is hardly essential for state and local governments to maintain the "separate and independent existence" protected in *National League*.[231] Congress' finding of an impact on interstate commerce surely is sufficiently based in fact and precedent to withstand judicial scrutiny.[232] Title VII "does not displace any State policies regarding the manner in which a State may structure delivery of its

225. National League of Cities v. Usery, 426 U.S. at 852-53.

226. *Id.* at 856.

227. Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1084 (5th Cir. 1979).

228. Scott v. City of Anniston, Ala., 597 F.2d 897, 900 (5th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3698 (U.S. Apr. 28, 1980).

229. *Id.*, *quoting* Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

230. Pearce v. Wichita Cty. Hosp. Bd., 590 F.2d 128, 132 (5th Cir. 1979).

231. National League of Cities v. Usery, 426 U.S. at 851, *quoting* Coyle v. Oklahoma, 221 U.S. 559, 580 (1911).

232. *See, e.g.*, United States v. Darby, 312 U.S. 100, 120-22 (1941) (Congress may make policy choices and choose rational means); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258

services."[233] Any interference from Title VII differs in kind, not merely degree, from that in *National League*. This desire to avoid interfering with state and local governments was also evidenced in Senate floor debate on the Equal Employment Opportunity Act of 1972.[234] However expensive their compliance with Title VII, state and local governments will not likely be able to produce evidence of the need for a tax increase or massive layoffs, the results claimed in *National League*.

Title VII does not satisfy all the *National League* standards. Moreover, while commerce clause power extends to purely local activity that affects interstate commerce, the nature of the activity remains a factor in the balance.[235] The unfortunate fact is that Title VII was neither

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(1964) (power to regulate over any local activities that have a "substantial and harmful effect upon" interstate commerce). The magnitude of state and local government employment forces, *see* notes 54-55 and accompanying text, *supra*, and the societal and economic impact of discrimination in those forces, *see* notes 87-88 and accompanying text, *supra*, were of concern to Congress in enacting the 1972 amendments to Title VII. *Cf.* Marshall v. City of Sheboygan, 1577 F.2d 1, 2 (7th Cir. 1979) ("[T]he Equal Pay Act was based upon a congressional adverse impact on interstate commerce."). H.R. REP. No. 95-948, 95th Cong. 2d Sess., *reprinted in* [1978] U.S. CODE & AD. NEWS 4760 (1978) ("Because this bill [prohibiting pregnancy-related discrimination under Title VII] will encourage women to remain in the work force during and after pregnancy, it should operate to reduce employee replacement, retraining and unemployment compensation costs while increasing labor market stability and productivity.")

233. Marshall v. City of Sheboygan, 577 F.2d 1, 6 (7th Cir. 1979), *referring to* National League of Cities v. Usery, 426 U.S. 833, 847 (1976). *Cf.* Peel v. Florida Dep't of Transp., 600 F.2d 1010, 1083 (5th Cir. 1979) (no "serious financial strains" arise from a federal veteran's assistance law); Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977) ("The impact of enforcement [of environmental laws], to the contrary, can be expected merely to involve the use of existing structures and personnel. . . . ").

234. 118 CONG. REC. 1816 (1972) (Sen. Williams) ("The means employed by this bill authorize minimal contacts between the Federal Government and State and local governments; public employers will be able to hire whomever they please, so long as it is done in a non-discriminatory manner.")

235. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978). "Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.* at 441. *Accord*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Employment decisions are local in nature even though their impact may have interstate repercussions. United States v. Karby, 312 U.S. 100, 115 (1941) (minimum wage and maximum hours regulation of intrastate labor producing for interstate market). The only distinction between *National League of Cities* and *Darby* is that "in NLC the state is, whereas in *Darby* it is not, affected in its capacity as an agent pursuing particular interests" and not as a legislature rendering policy choices. Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1168 n.15 (1977). That distinction is not, however, critical. The separate existence of states is threatened as much by infringement on legislative choices made pursuant to the sovereign's police power as by intrusion in employment decisions. Indeed, not only is the kind of invasion of states' rights similar, but the degree may even be more severe when legislative choices are infringed. Telling a state whom to employ for how many hours and how much compensation is less obnoxious to sovereignty than telling the state *what* the employee may substantively do.

National League focuses on evidence that legislative choices would be displaced as a direct result of minimum wage and maximum hours legislation. 426 U.S. at 846-48. Those choices are normally worth deferring to due to "the greater sensitivity of local officials to preference of citizens and the costs of achieving [governmental] goals in a given locality, the diffusion of governmental power and the promotion of cultural and social diversity; and the enhancement of individual participation in and identification of governmental decision-making." Stewart, *Pryamids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1231 (1977). One extrapolation from *National League* turned on the states' inability to provide basic services due to the fiscal impact of imposed employment practices, "protected expectations" about receiving those services arise. Tribe, *Unraveling* National League of Cities: *The New Federalism and*

intended to be nor will be in the predictable future but a temporary measure.[236] It is, nonetheless, a measure of some emergency, long overdue in its extension to state and local governments, that serves an overwhelming federal interest.[237] The number of state and local employees renders any federal objective of equal employment opportunity unattainable unless those employees are protected.[238] Regardless of the manner in which the fourteenth amendment was construed in *Washington v. Davis*, its text, history, and values establish a federal commitment to equal

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Affirmative Rights to Essential Government Services, 90 HARV. L. REV. 1065, 1076 (1977). Even if these affirmative readings of *National League* are fair readings, rather than hopeful prophecies, Title VII would not conflict because the restructuring there found by the Supreme Court to result from federal legislation would be negligible under Title VII. Beyond that, were Title VII challenged as an assault on sovereignty, the judiciary should yield to a "congressional determination" on the impact of the assault. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954) ("[T]he national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.")

236. What is "temporary" for Title VII purposes may differ from the lay sense of the term. In Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979), the Court approved a training program with a racial quota because "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Based on employee turnover and current size of the program, however, the quota would last 15 years before the goal set for eliminating an imbalance were reached. Although not temporary in a temporal sense, the program is temporary in nature because it sets a goal that marks the conclusion of the quota. Modification of employment practices to avoid discriminatory impact, for example, eliminating height and weight requirements, is temporary in the same sense: only so long as men and women (and some ethnic groups) markedly differ in height and weight will the practice be modified. Temporary in this sense is much like permanent. Certainly, Title VII differs from a temporary wage-price freeze; but, of all the factors derived from *National League*, the duration of the intrusion seems least important. Were the intrusion of sufficient magnitude, its duration would be only a matter of degree that made no difference in kind. *Cf.* U. S. Trust Co. v. New Jersey, 431 U.S. 1, 22 n.19 (1977) (Concerning the impairment of contracts, "[u]ndoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case.")

237. The precise federal interest served by discriminatory impact liability for state and local government employers is the same as that for private employers: elimination of barriers to equal participation in the economic system. The Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), interpretation of Title VII to include impact discrimination was necessary to reach "practices that are fair in form, but discriminatory in operation." To that end, "Congress has now required that the posture and condition of the job-seeker be taken into account," and that employers remove "artifical, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* "This effort [in *Griggs* to redefine discrimination] was, without doubt, crucial. The traditional definitions of discrimination permitted the employer to translate the unfair treatment of minorities in other segments of society into a limitation on employment opportunities." Blumrosen, *Strangers in Paradise:* GRIGGS V DUKE POWER CO. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59. 69 (1972). Criticizing *National League*, Professor Tribe argues that federal rights-based legislation should receive more deference: "the crucial point is that a necessarily over-inclusive protection of human rights should not serve to paralyze Congress in the face of overriding national problems." Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*," 90 HARV. L. REV. 1065, 1099 (1977). *See* Regeants of the University of Cal. v. Bakke, 438 U.S. 265, 387-98 (1978) (Marshall, J., separate opinion). And, "[i]t is now clear that, however important the Court may view the theoretical autonomy of state governments, it does not intend to promote that value at the expense of the federal government's capacity to vindicate individual civil liberties protected by the Federal Constitution." Ripple & Kenyon, *State Sovereignty - A Polished But Slippery Crown*, 54 NOTRE DAME LAW. 745, 773 (1979).

238. *See* notes 53-57, 79, 82-84.

employment opportunity, a commitment imposed upon the states by an amendment that decreased their sovereignty.[239] Congress had sufficient evidence before it to determine that discriminatory impact practices were equally, if not surpassingly, pervasive problems compared with discriminatory purpose practices.[240] Title VII could not more narrowly tailor its standard by extending only a discriminatory purpose standard because discriminatory impact practices were (and are, in the author's experience) so pervasive. Absent a showing that the structure or budget of government

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239. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *See* notes 72-74 and accompanying text, *supra.* It is not circular to use the fourteenth amendment as a weight in a commerce clause balancing test while eschewing the force of the amendment by itself to impose discriminatory impact liability. The effect of the fourteenth amendment on states' rights is structural; the extent of that effect is interpretive. Before its adoption, "the Civil War had irrevocably and profoundly altered the balance of power between Federal and State Governments." Quern v. Jordan, 440 U.S. 332, 364 (1979) (Brennan, Jr., concurring).

In the eleventh amendment context, had Congress enacted the 1972 amendments to Title VII solely as an exercise of section 5 power under the fourteenth amendment, the legislation would have "abrogated any existing immunity of the states from liability for discriminatory employment practices." Shawer v. Indiana U., 602 F.2d 1161, 1164 (3rd Cir. 1979) (per curiam). That power permits Congress to "provide for private suits against States or State officials which are constitutionally impermissible in other contexts." Fitzpatrick v. Bitzer, 427 U.S. at 456. *See also* Hutto v. Finney, 437 U.S. 678, 693-94 (1978). Thus, there must be "the threshold fact of congressional authorization to sue a class of defendants which literally includes States." Edelman v. Jordan, 415 U.S. 651, 672-73 (1974). The problem as to state governments is that a Title VII limited to its section 5 power base would be stuck with the Washington v. Davis, 426 U.S. 229, 239 (1976), definition of the discrimination proscribed by the equal protection clause. *See* notes 105-94 and accompanying text, *supra.* As to local governments, immunity is vitiated by the holding in Monell v. New York City Dep't of Social Serv., 436 U.S. 658, 690 (1978) (municipalities are not part of the state for eleventh amendment purposes).

To resolve the problem as to state governments, resort is taken to the commerce clause; yet, *Fitzpatrick* suggests an anchor solely in that clause would be inadequate. 427 U.S. at 452-53. But, the eleventh amendment does not extend to injunctive relief against state officials. Ex parte Young, 209 U.S. 123, 159-60 (1880). Whatever financial impact injunctive relief might have would not be an "enormous fiscal" burden, Hutto v. Finney, 437 U.S. at 697 n.27, and would be "ancillary to the prospective relief." Quern v. Jordan 440 U.S. at 349. Moreover, the commerce clause is one of the enumerated powers that the states ceded to the federal government. Fitzpatrick v. Bitzer, 427 U.S. at 457-58 (Brennan, J., concurring) (referring to his dissenting opinions in Employees v. Missouri Pub. Health Dep't, 411 U.S. 279, 319 (1973) and Edelman v. Jordon, 415 U.S. at 687). There is no greater enumeration of power on the face of section 5 than in the combination of the necessary and proper and commerce clauses. Also, in both Employees v. Mo. Pub. Health Dep't, 411 U.S. at 283-85, and Parden v. Terminal R., 337 U.S. 184, 190-92 (1964), the Court recognized that the commerce clause would be a sufficient anchor to overcome immunity. *Employees* did refer, 411 U.S. at 283, to Maryland v. Wirtz, 392 U.S. 183 (1968), now overruled by National League of Cities v. Usery, 426 U.S. 833, 855 (1971), but the reference was not to eleventh amendment immunity, and *National League* in leaving at least some commerce clause power for federal regulation of state enterprises notably approved of *Parden.* 426 U.S. at 854 n.18 (the *Parden* holding in "unimpaired"). In light of the legislative "history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." Title VII would abrogate Quern v. Jordon, 440 U.S. at 345. In the tenth amendment context, *National League* also accepted the concept that federal interests may outweigh those of the state. 426 U.S. at 854 n.18 (*citing approvingly* Case v. Bowles, 327 U.S. 92, 102 (1946), and stating that a claim of immunity may be rejected if "it would impermissibly 'impair a prime purpose of the Federal Government's establishment' "). This approach produces the balancing test Justice Blackmun desires. Courts must "assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions." Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979). In that balancing, "no automatic displacement of federal power would follow a finding that the exercise of such power reached into areas of traditional state governmental functions." Ripple & Kenyon, *State Sovereignty—A Polished But Slippery Crown,* 54 NOTRE DAME LAW. 745, 748 (1979).

240. *See* notes 58-59 and accompanying text, *supra.*

operations is seriously affected, Title VII should still win on balance.[241] The challengers' argument that Title VII would change the way a job is performed ignores the business necessity defense to discriminatory impact.[242] "Since Title VII prohibits only selection practices which are not job related, compliance will not interfere with any legitimate state or local policies or practices and will contribute significantly to the efficacy of their personnel methods."[243]

On balance, Title VII should meet with the same success as the Equal Pay Act in satisfying the tenth amendment limit on the commerce clause. Federalism does demand respect for state and local government operations. Nevertheless, reciprocal respect for federal interests must be shown. The *National League* standards accommodate the respect due each part of the federalist system. Title VII is a fair accommodation.

VI. CONCLUSION

Discriminatory impact statutory liability for the employment practices of state and local governments must satisfy the same rigorous challenges as other laws.[244] By not facing those challenges squarely, courts and commentators may lull proponents into a false sense of constitutional security.[245] The route to a solid constitutional anchor may well pass through *City of Rome*; but, as with the original empire, all roads also lead elsewhere.

In American jurisprudence, precedent is seldom quickly and never

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241. In National League remand, *sub nom.* National League of Cities v. Marshall, 429 F. Supp. 703, 705 (D. D. C. 1977), the trial court allowed the federal legislation to apply to employees not "engaged in activities integral to and traditionally provided by government." Even as to those core functions, the teaching of *National League* is only that "Congress must . . . be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell." Tribe, *Unraveling* National League of Cities. *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1071 (1977). Applying discriminatory impact standards to state and local governments cannot fairly be characterized as a gutting force. To the contrary, the traditional limit on commerce clause power is that it "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). The legislative findings of an impact upon commerce from state and local employment practices counters any argument that the effects are to indirect and remote.

242. *See* note 45 and accompanying text, *supra.*

243. Brief Amicus Curiae for the NAACP Legal Defense & Educ. Fund, Inc. 23, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977), *reprinted in* 10 Sup. Ct. L. Reprints (Lab. Ser.) No. 21 at 345 (1976).

244. "[U]nlike the wage and hour provisions, the Equal Pay Act sets no substantive terms of employment. The states remain free to set . . . all other terms and conditions of employment as they see fit, as long as they do not do so in a discriminatory fashion. . . . [S]ex discrimination in employment is neither an exercise of discretion essential to state sovereignty nor an undoubted attribute of such sovereignty." Comment, *Applying the Equal Pay Act to State and Local Governments: The Effects of* National League of Cities v. Usery, 125 U. PA. L. REV. 665, 670 (1977) (footnotes omitted). *See also* Note, *Federalism and Federal Regulation of Public Employers: The Implications of* National League of Cities v. Usery, 26 CLEV. ST. L. REV. 259, 292 (1977).

245. After this Article was completed, the Supreme Court refused to entertain two challenges to application of discriminatory impact standards to local government employers. Blake v. City of Los Angeles. 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3698 (U.S. Apr. 28, 1980); Scott v.

lightly ignored; instead, an evolutionary line of holdings nibbles away at the target until, underpinnings weakened, the precedent collapses. To forewarn of such demise is at worst paranoia and at best soothsaying. This Article, then, has been built on a combination of fear and prophecy.

The fear is that through a line of decisions culminating in *Fitzpatrick*, *Washington v. Davis*, and *National League*, a number of Supreme Court Justices have sandbagged the full extension of Title VII to public employers. The prophecy is that clear analysis will make the fear groundless.

City of Anniston, Ala. 597 F.2d 897 (5th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3698 (U.S. April 28, 1980). A state employer was not involved in either case. Thus, the challenges will continue as to state employers and, despite the certiorari denial, probably as to local employers. Divining what the certiorari denial means is speculation; however, the three-judge panels in the two circuits were not in conflict. Justice Jackson had perhaps the definitive statement on the effect of certiorari denials: "The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible." Brown v. Allen, 344 U.S. 443, 542 (1953) (Jackson, J., concurring in result).