DISPARATE IMPACT, EQUAL PROTECTION, CONGRESSIONAL POWER, AND THE RICCI DECISION: WHY “RELAXED” STRICT SCRUTINY SHOULD APPLY WHEN CONGRESS USES ITS SECTION FIVE ENFORCEMENT POWER TO PREVENT VIOLATIONS OF THE FOURTEENTH AMENDMENT

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INTRODUCTION

Congress enacted Title VII of the Civil Rights Act of 1964 to combat discrimination within employment. Title VII is designed to deter intentional discrimination, known as disparate treatment, but it also provides a disparate-impact prong to limit facially-neutral practices that have an adverse impact on a particular class. In the wake of Ricci v. DeStefano, the United States Supreme Court left unresolved the question of the constitutionality of the disparate-impact prong of Title VII.

In New Haven, Connecticut, officials discarded the city’s selection process for promoting firefighters after discovering that the written test component resulted in a disparate impact on the City’s African American and Hispanic firefighters. A group of

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1 Regarding discrimination, Section 703(a) of Title VII of the Civil Rights Act of 1964 states:

(a) Employer Practices. 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) to 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.


An unlawful employment practice based on disparate impact is established under this subchapter only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.


4 Id. at 562, 567-72; see 29 C.F.R. § 1607.4(D) (2011) (explaining the “four-fifths rule” in regard to adverse impact).
white and Hispanic firefighters sued the city for this practice, citing both the disparate treatment prong under Title VII and the Equal Protection Clause.\(^5\) New Haven contended that it was justified in discarding the test results to prevent a violation of Title VII's disparate-impact prong—given the poor test performances of African American firefighters.\(^6\) The Supreme Court rejected this argument, ruling that the actions taken by the New Haven fire department violated the disparate-treatment prong of Title VII.\(^7\) The Court did not determine whether the disparate-impact prong of Title VII, which requires employers to take race into account in many employment decisions, violates the Equal Protection Clause of the Fourteenth Amendment.\(^8\) As Justice Scalia observed in his opinion, the Court will have to resolve this question at some later point.\(^9\)

This Comment will answer the question of whether the disparate impact prong of Title VII violates the Fifth Amendment Due Process Clause's Equal Protection component in the limited context of its application to government employers, such as the New Haven Fire Department. This Comment will show that Title VII's disparate-impact provision does not violate equal protection norms because Congress, as the enforcer of the Fourteenth Amendment's Equal Protection Clause, does not violate equal protection when it enacts legislation properly fashioned to deter violations of the actual Equal Protection Clause under its Section 5 power. This Comment outlines a three-step analysis that the Court should use to analyze disparate impact. This analysis begins with a determination of whether the legislation is within the proper scope of Congress's Section 5 enforcement power. The Court must then analyze whether there is a compelling interest

\(^5\) Ricci, 557 U.S. at 562-63.
\(^6\) Id. at 579; see supra notes 1-2.
\(^7\) Ricci, 557 U.S. at 592; see supra note 1.
\(^8\) See Ricci, 557 U.S. at 593 (“Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional questions.”).
\(^9\) Id. at 594 (Scalia, J., concurring) (“I . . . write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”).
and whether the legislation is narrowly tailored to achieve that compelling interest.

Part II will explain the history of Congress’s Section 5 power to enact prophylactic legislation and the constraints the Court has imposed. In addition, Part II will also discuss the limits that equal protection places on Congress as well as the States. Lastly, it will examine the enactment of Title VII and the Ricci decision.

Parts III and IV will explain why Congress should be afforded deference when it enacts legislation under Section 5 of the Fourteenth Amendment. First, Congress’s actions cannot be evaluated under the strict Section 1 guidelines of the Fourteenth Amendment, like the actions of the fifty states, but are governed instead under the Court-created equal protection norm established in Bolling v. Sharpe, which applies to federal actors as a matter of substantive due process. Second, Section 5 of the Fourteenth Amendment expressly identifies Congress as the enforcer of the actual Equal Protection Clause, not as a potential violator. The text and history of the Fourteenth Amendment have implications for congressional power that should not be ignored. When Congress is acting to enforce the actual Equal Protection Clause on state and local government employers, it should be afforded deference under Bolling’s Court-created equal protection norm. This deference should take the form of a “relaxed” strict scrutiny standard for race classifications designed to combat race discrimination. This Comment will also review how Title VII’s disparate impact provision fits within Congress’s Section 5 enforcement powers under the congruence and proportionality standard established by City of Boerne v. Flores to determine the scope of congressional power under Section 5.

Part V will apply the “relaxed” strict-scrutiny analysis that should apply to benevolent race-conscious legislation, which deters types of invidious race discrimination prohibited by the Fourteenth Amendment. Part V also identifies a compelling state interest for Title VII’s disparate impact prong and show why Title VII is narrowly tailored to further that interest. This three-step analysis will show that Title VII’s disparate impact provision does not violate the Fifth Amendment’s Equal Protection component. Far from violating equal protection, Title VII’s disparate impact provision prevents, deters, and remedies actual violations of the
Fourteenth Amendment. This Comment will also demonstrate that state and local government employers do not violate the Fourteenth Amendment Equal Protection Clause when they comply with the requirements of Title VII.

I. BACKGROUND

A. Textually Identified Enforcer of the Fourteenth Amendment Equal Protection Clause

1. Text

Section 5 of the Fourteenth Amendment states, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”\(^\text{10}\) This provision grants Congress the right to pass legislation to enforce all sections of the Fourteenth Amendment. Congressional authorization has been pivotal in enforcing the Equal Protection Clause contained in Section 1: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\(^\text{11}\)

The language of each section should be taken into account when evaluating the powers granted or limited within each section. In Section 1, the Fourteenth Amendment limits the States’ power with the usage of “[n]o State shall.”\(^\text{12}\) This restricts the actions of the States in regard to the Equal Protection Clause. However, in Section 5, “[t]he Congress shall have power”\(^\text{13}\) language is used when describing the power Congress has to enforce the Equal Protection Clause. The varying use of terminology between the two sections suggests the intent of Section 5 is to limit the actions of the States and grant Congress the power to enforce those restricting state actions. This language provides a basis for distinguishing the treatment of State actors and Congress in determining if race-conscious actions violate the Equal Protection Clause.

\(^{10}\) U.S. CONST. amend. XIV, § 5. \\
\(^{11}\) U.S. CONST. amend. XIV, § 1. \\
\(^{12}\) Id. \\
\(^{13}\) U.S. CONST. amend. XIV, § 5.
2. History

The Fourteenth Amendment was drafted and proposed by the Joint Committee on Reconstruction after testimony on the conditions in the South following the Civil War revealed that the ex-Confederate states were reluctant to enforce laws to protect African Americans.14 The Supreme Court accepted the argument that the framers did not intend to limit the applications of Section 5 exclusively to actions that were violations of Section 1.15 This decision greatly supports Congress’s enhanced power to enforce the Fourteenth Amendment under Section 5. It would make very little sense for the framers to limit the powers of Congress due to the framers’ lack of confidence in the judiciary’s willingness to enforce Section 1.16 This was evident in the lack of protection for the interests of slaves prior to the Civil War.17 In addition, the Court also ruled in Dred Scott v. Sandford that freed slaves were not citizens for purposes of diversity jurisdiction.18 These decisions, coupled with the findings of the Joint Committee, suggest that the Fourteenth Amendment was drafted to empower Congress.19

3. Precedent

Section 5 of the Fourteenth Amendment states, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”20 This section grants Congress the power to enact legislation and enforce Section 1 of the Fourteenth Amendment. However, Congress’s newly acquired power has been closely scrutinized by the judiciary.21 The Court has not only reviewed legislation enacted under Section 5, but also restricted

14 Laurent B. Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1353, 1354 (1964).
15 See infra note 24.
16 See generally Frantz, supra note 14.
17 See, e.g., Prigg v. Pennsylvania, 41 U.S. 539, 625-26 (1842) (holding that a state law that helped prevent slave owners from using self-help to capture their fugitive slaves was unconstitutional).
18 60 U.S. 393, 454 (1856).
19 Frantz, supra note 14, at 1355.
20 U.S. CONST. amend. XIV, § 5 (emphasis added).
21 See infra Parts I.A.3.a-b.
Congress’s power to enact legislation over time.\textsuperscript{22} Despite the Court’s restriction on Congress’s enforcement powers, it has still deferred to Congress on matters where there is evidence to support the proposed legislation.\textsuperscript{23}

\textit{a. South Carolina v. Katzenbach}

In \textit{South Carolina v. Katzenbach}, the Court addressed Congress’s power under Section 2 of the Fifteenth Amendment to enforce the Voting Rights Act (VRA).\textsuperscript{24} The Court relied on the \textit{McCulloch} test to determine the constitutionality of the federal statute, stating, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”\textsuperscript{25} The Court specifically dealt with the issue of literacy tests that were ruled constitutional.\textsuperscript{26} Congress elected to ban all literacy tests with the enactment of the VRA.\textsuperscript{27} Although the VRA was passed in the wake of \textit{Lassiter}, the Court instead looked at how the tests were being implemented stating:

The record shows that in most of the States covered by the Act . . . various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been

\begin{itemize}
\item \textsuperscript{22} See infra Part I.A.3.c.
\item \textsuperscript{23} See infra Part I.A.3.a-c.
\item \textsuperscript{24} South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); 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.”); U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). Although the Fourteenth and Fifteenth amendments’ enforcement mechanisms are different, the language authorizes the same powers, making an analogous comparison between the two possible. The Fifteenth Amendment addresses the issue of voting rights exclusively.
\item \textsuperscript{25} Katzenbach, 383 U.S. at 326 (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)) (internal quotations omitted).
\item \textsuperscript{26} Id. at 333-34; see also Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that requiring members of all races “be able to read and write any section of the Constitution of North Carolina in the English language” was constitutional).
\item \textsuperscript{27} 42 U.S.C. § 1973(b) (Supp. I 1964).
\end{itemize}
framed . . . to facilitate this aim, and have been administered in a discriminatory fashion for many years.  

The Court deferred to the factual findings of Congress to allow the passage of an act that prohibited an activity that was not unconstitutional, but prevented unconstitutional behavior that could result from the usage.

b. City of Boerne v. Flores

In City of Boerne v. Flores, the Supreme Court began to restrict Congress’s Section 5 power under the Fourteenth Amendment to enact statutes. Similar to Katzenbach, Congress attempted to pass legislation in response to a recent judicial decision. The Court noted how the Religious Freedom Restoration Act of 1993 (RFRA) explicitly attempted to overrule Smith and reinstate the Sherbert test. The Court viewed RFRA as an attempt to change the Court’s interpretation of the Constitution. Although the Court relied heavily on Katzenbach in its decision, it did not use the McCulloch test. Instead, the Court employed the standard of “congruence and proportionality” when allowing Congress to deter or remedy constitutional violations. While the Court still allowed Congress to pass prophylactic laws, the congruence and proportionality test was implemented to prevent Congress from redefining or making its own interpretation of the Constitution. The Court cited language from the Civil Rights Cases, to support Congress’s power to pass legislation that provided criminal penalties in an attempt to regulate private conduct, stating, “Although the specific holdings

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28 Katzenbach, 383 U.S. at 333-34 (citation omitted).
30 See Dep’t of Human Res. v. Smith, 494 U.S. 872 (1990). In Smith, the Court did not apply the test found in Sherbert v. Verner to a certain class of individuals regarding free exercise of religion. Id. at 884-85; see also Boerne, 521 U.S. at 512-514.
31 Boerne, 521 U.S. at 515.
32 Id. at 524.
33 Id. at 520.
34 Id.
35 Id. at 532.
36 The Boerne Court stated, “The power to interpret the Constitution in a case or controversy remains in the Judiciary.” Id. at 524.
37 109 U.S. 3 (1883).
of these early cases might have been superseded or modified, . . . their treatment of Congress’ § 5 power as corrective or preventive, not definitional, has not been questioned,” providing the guidelines in which Congress can enact legislation.\textsuperscript{38}

c. Post-Boerne

Since the \textit{Boerne} decision, the Court continued to restrict Congress’s Section 5 power,\textsuperscript{39} but two later decisions upheld laws passed under Section 5 of the Fourteenth Amendment. In \textit{Nevada Department of Human Resources v. Hibbs},\textsuperscript{40} the Court afforded Congress greater deference than it had in previous decisions. In \textit{Hibbs}, the Court listed a history of gender-related stereotypes regarding family-care leave as justification for the Family and Medical Leave Act.\textsuperscript{41} The Court also cited the States’ unconstitutional support in fostering these gender-based stereotypes as justification of the Act.\textsuperscript{42} \textit{Hibbs} provides an example of the Court showing increased deference to Congress in order to combat a pattern of gender discrimination.\textsuperscript{43}

\textit{Tennessee v. Lane}\textsuperscript{44} was decided the following year and relied on similar principles to support its decision. In \textit{Lane}, the respondents sued the State of Tennessee arguing they were denied access to the services of the state court system because of their disability, violating Title II of the Americans with Disabilities Act (ADA).\textsuperscript{45} In deciding the merits of the case, the Court determined whether Title II was a valid exercise of Congress’s Section 5 power.\textsuperscript{46} In determining whether it was a valid exercise, the Court

\footnotesize{\textsuperscript{38} \textit{Boerne}, 521 U.S. at 525.}

\footnotesize{\textsuperscript{39} See \textit{Kimel v. Fla. Bd. of Regents}, 528 U.S. 62, 88, 91 (2000) (stating that in the absence of “[d]ifficult and intractable problems,” Congress has no reason to enforce prophylactic legislation); \textit{Bd. of Trs. of Univ. of Ala. v. Garrett}, 531 U.S. 356, 374 (2001) (“[T]here must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.”).}

\footnotesize{\textsuperscript{40} 538 U.S. 721 (2003).}

\footnotesize{\textsuperscript{41} \textit{Id.} at 729-34.}

\footnotesize{\textsuperscript{42} \textit{Id.} at 735.}

\footnotesize{\textsuperscript{43} See \textit{id.} at 729-31 (listing several cases supporting decisions regarding gender discrimination, as well as quotes from multiple Congressional hearings).}

\footnotesize{\textsuperscript{44} 541 U.S. 509 (2004).}

\footnotesize{\textsuperscript{45} \textit{Id.} at 513.}

\footnotesize{\textsuperscript{46} \textit{Id.} at 522.}
stated that the question “must be judged with reference to the historical experience which it reflects.”

Tennessee claimed the Eleventh Amendment prohibited respondents’ suit, but the Court denied that argument. The Court held that the findings of Congress provided enough evidence to support the claim that citizens with disabilities were being denied access to state courthouses. This ruling was important because only three years earlier the Court held that Title I of the ADA was unconstitutional because Congress could not provide enough evidence of past discrimination.

B. Equal Protection Limits on Congress

1. Bolling v. Sharpe

*Bolling v. Sharpe* is a pivotal ruling in Congress’s enforcement powers of the Equal Protection Clause. In *Bolling*, the petitioners challenged segregation in public schools in the District of Columbia, stating the policy violated the Due Process Clause of the Fifth Amendment because students were denied admittance based on their race. In ruling for the petitioners, the Court incorporated in reverse the equal protection rights of the Fourteenth Amendment because the Fifth Amendment lacked an equal protection clause. Because this clause was “created” by the Court, it gives the Court the power to enforce and to interpret the meaning. This suggests that Congress should be given deference by the Court when enforcing the Fourteenth Amendment’s Equal Protection Clause.

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47 Id. at 523 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).
48 See id. at 514-15, 522, 533-34.
49 Id. at 527. The Court noted many state and federal laws that failed to remedy discrimination towards citizens with disabilities. In addition, the Court noted several judicial decisions that supported the unequal treatment of individuals with disabilities. See id. at 525, nn.11-14.
50 See supra note 39.
52 Id. at 498.
53 The Court stated, “The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment, . . . . [b]ut the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.” Id. at 499.
2. Adarand Constructors, Inc. v. Pena

The decision in Adarand Constructors, Inc. v. Pena\(^{54}\) is important because it also relied on “reverse incorporation” to hold the federal government to the same standard of state and local officials under the Fourteenth Amendment. In Adarand, the majority struck down the Federal Government’s practice of providing a financial incentive to general contractors on Government projects if they hired economically disadvantaged individuals, stating that such practices violated the equal protection component of the Fifth Amendment’s Due Process Clause.\(^{55}\) However, Justice Stevens’s dissent questioned the use of similar standards for Congress and state legislatures given the authorities’ different histories.\(^{56}\) To establish this point, Justice Stevens cited Justice Scalia’s concurrence in City of Richmond v. J.A. Croson Co. to describe why the two should be viewed differently.\(^{57}\) Justice Stevens proceeded to list additional reasons why Congress should be afforded greater deference from the text of the Fourteenth Amendment.\(^{58}\) The Fourteenth Amendment expressly limits the powers of the states, but at the same time empowers Congress. Justice Stevens reasoned that this makes it impossible for there to be “congruence” between the two.\(^{59}\)

\(^{55}\) See id. at 204.
\(^{56}\) See id. at 249-50 (describing how the Court’s assumption that there is “congruence” between Congress and state and local legislation is false).
\(^{57}\) See id. at 250 stating:

[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1.

(qoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521-22 (1989)).
\(^{58}\) Id. at 254-55.
\(^{59}\) Id. at 255.
C. Equal Protection Limits on States

1. Washington v. Davis

The issue of whether disparate impact is recognized in the Equal Protection Clause was initially addressed in the Supreme Court decision Washington v. Davis. In Davis, two African American police officers filed suit against the Commissioner of the District of Columbia, the Chief of the District’s Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission. Respondents alleged that a series of practices, including a written personnel test that excluded a disproportionately high number of African Americans, violated the Due Process Clause of the Fifth Amendment because of the discriminatory effects of the policies. The Court held that, absent discriminatory intent, a racial disparity in results alone does not violate the Equal Protection Clause.

2. McCleskey v. Kemp

The Court again addressed a “racially disproportionate impact” in McCleskey v. Kemp. Though McCleskey did not address work or job related disparity, the Court echoed similar reasons in refusing to recognize statistical race disparity in the absence of discriminatory intent. In McCleskey, Warren McCleskey was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, and was sentenced to death following a jury recommendation. After his conviction, McCleskey appealed to the federal courts alleging that the state’s capital sentencing process was applied in a discriminatory manner. Professors
David C. Baldus, Charles Pulaski, and George Woodsworth performed a study (Baldus Study), which showed a statistical disparity in the imposition of the death penalty between African Americans and whites.\textsuperscript{69} The Court held that the statistical results do not imply discriminatory intent.\textsuperscript{70} In order for an equal protection violation claim to prevail, one “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect.”\textsuperscript{71}

\section*{D. Title VII and Disparate Impact}

Congress passed Title VII of the Civil Rights Act of 1964 to encourage hiring on the basis of merit and not on race or color.\textsuperscript{72} Title VII has two provisions drafted to protect employees not only from intentional discrimination, or disparate treatment,\textsuperscript{73} but also from hidden or indirect discrimination, or disparate impact.\textsuperscript{74} When originally drafted, Title VII only prohibited disparate treatment and required plaintiffs to show there was actual discrimination in order to bring a claim.\textsuperscript{75} The Supreme Court first recognized disparate impact in 1971 in \textit{Griggs v. Duke Power Co}.\textsuperscript{76}

In only the Supreme Court’s second interpretation of Title VII, \textit{Griggs} presented the issue of whether employers could condition employment or job transfers based on the applicant obtaining a high school diploma or achieving a score on an intelligence test.\textsuperscript{77} Duke Power Company had a history of discrimination in its hiring and transfer policies prior to the

\begin{footnotesize}
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\item \textsuperscript{69} Id. at 286-87. The study found that black defendants were almost three times more likely to receive the death penalty than white defendants when there was a white victim. \textit{Id.} at 286. Also the death penalty was sought in 70\% of cases concerning black defendants and white victims, as opposed to 32\% for white defendants. \textit{Id.} at 287.
\item \textsuperscript{70} Id. at 298.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} 110 CONG. REC. 7247 (1964).
\item \textsuperscript{73} 42 U.S.C. \S 2000e-2(a) (2006).
\item \textsuperscript{74} 42 U.S.C. \S 2000e-2(k) (2006).
\item \textsuperscript{75} 42 U.S.C. \S 2000e-2(a) (2006).
\item \textsuperscript{76} 401 U.S. 424, 431 (1971).
\item \textsuperscript{77} Id. at 425-26.
\end{itemize}
\end{footnotesize}
adoption of Title VII. The Supreme Court invalidated the policies, stating that the Civil Rights Act was not limited to intentional discrimination. The Court reasoned that although the employers may not have acted in bad faith, employment practices that resulted in a disparate impact must be justified as a business necessity related to job performance. The Court concluded that because there was evidence that workers without a high school education or who did not take the aptitude test performed their jobs satisfactorily, the company did not show a business necessity for the requirements, ultimately creating a disparate impact.

Congress officially codified disparate impact in § 703(k) of Title VII with the passing of the Civil Rights Act of 1991, which states:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the

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78 Id. at 426-27.
79 Id. at 427.
80 Id. at 427-29.
81 Id. at 430 n.6.
82 Id. at 429.
83 Id. at 431. The Court noted that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Id. The Court’s analysis represents a step towards the expansion of the rights of Congress through judicial decisions.
84 Id.
85 Id. at 431-32.
challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.86

E. Ricci v. DeStefano

In 2003, the New Haven fire department administered written and oral examinations for an opportunity to be promoted to captain or lieutenant.87 When making promotions, the department used a merit system governed not only by city charter, but federal and state law.88 After the examinations are given, the most qualified applicants are ranked by the scores to determine who will receive the promotion.89 After ranking the applicants, the city charter requires that the “rule of three” be used to select individuals for promotion.90 The written examination accounted for 60 percent of an applicant’s score with the oral examination accounting for 40 percent.91 In order to take the lieutenant exam, candidates needed “30 months’ experience in the Department, a high-school diploma, and certain vocational training courses.”92 Candidates who wanted to apply for the captain position needed one year’s service as a lieutenant in the Department, as well as the other requirements for the lieutenant’s exam.93 The city hired Industrial/Organization Solutions, Inc., an Illinois company that specialized in designing entry-level and promotional examinations for fire and police departments, to develop and administer the exam.94

The tests were given to the candidates in November and December of 2003 with forty-three whites, nineteen blacks, and

88 Id. at 563-64.
89 Id. at 564.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
fifteen Hispanics taking the lieutenant exam.\textsuperscript{95} Out of the seventy-seven who took the test, the top ten applicants were eligible for the eight lieutenant positions based on the “rule of three,” and all of the top ten applicants were white.\textsuperscript{96} For the captain examination, twenty-five whites, eight blacks, and eight Hispanics took the exam.\textsuperscript{97} Once the results were released, seven white and two Hispanic candidates were eligible for promotion.\textsuperscript{98} Over the course of the next three months, several meetings were held to determine if the tests should be certified, exposing the department to disparate impact liability.\textsuperscript{99} As a result, one Hispanic and seventeen white firefighters who passed the exam, but were denied the opportunity for promotion, filed a lawsuit alleging that the refusal to certify the test results violated the Equal Protection Clause and the disparate-treatment prohibition contained in Title VII of the Civil Rights Act of 1964.\textsuperscript{100} The District Court ruled in favor of the Defendant, and the Court of Appeals affirmed.\textsuperscript{101}

In Justice Kennedy’s majority opinion, the Court noted that it has held that “certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.”\textsuperscript{102} The plaintiffs argued that Title VII bars the use of race-based adverse-employment actions to avoid disparate-impact liability.\textsuperscript{103} The plaintiffs also suggested that in order for race-based actions to be taken, the employer must actually be in violation of the disparate-impact provision.\textsuperscript{104} The defendants argued that an employer’s “good faith belief” that the actions are needed to comply with disparate impact should be enough to justify race-based actions.\textsuperscript{105} Rejecting both parties’

\textsuperscript{95} Id. at 566.  
\textsuperscript{96} Id.  
\textsuperscript{97} Id.  
\textsuperscript{98} Id.  
\textsuperscript{99} Id. at 565-74.  
\textsuperscript{100} Id. at 574-75.  
\textsuperscript{101} Id. at 575-76.  
\textsuperscript{102} Id. at 582 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).  
\textsuperscript{103} Id. at 580.  
\textsuperscript{104} Id. at 580-81.  
\textsuperscript{105} Id. at 581.
proposed standards, the Court used a standard commonly used in similar equal protection cases to find an appropriate balance between the “conflicting” statutes. This test allowed employers to comply with the disparate-impact prong and the other provisions of Title VII.

In lieu of remanding the case, the Supreme Court applied the standard to the case. The Court determined that there was not a strong evidentiary basis to objectively conclude the tests were inadequate even if the results demonstrated a disparate-impact. Although there was a statistical disparity, the City failed to show the exams were not job related, or if there was an equally valid, but less discriminatory alternative, making it difficult for the City to prove there was a strong evidentiary basis. The Court further held that “[f]ear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.” Justice Kennedy concluded his opinion by restating that the actions taken by the City violated Title VII, and if there was a disparate-impact suit, there would be no liability.

Justice Scalia wrote a concurrence predicting one “evil day” in which the Court will “have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” He stated that disparate impact requires employers to evaluate the racial outcomes of policies, and make a decision based on those outcomes, which he suggested is incompatible with the Equal Protection Clause.

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106 Id. at 582.
107 Id. at 583-84.
108 Id. at 585-86.
109 Id. at 585.
110 Id. at 587.
111 Id. at 592.
112 Id. at 592-93 (“Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.”)
113 Id. at 594 (Scalia, J., concurring).
114 Id.
Writing in dissent, Justice Ginsburg attacked the majority’s decision. Justice Ginsburg pointed out that Congress extended Title VII to public employers because fire departments traditionally discriminated against minorities.\(^\text{115}\) She goes on to present statistical facts that show a disparity not only in the city’s racial makeup and the racial makeup of the senior officer ranks, but also a disparity in the percentage of minority firefighters and senior officers.\(^\text{116}\) Ginsburg also criticized the Court’s strong basis in evidence standard, and questioned if the vague standard could be met.\(^\text{117}\)

II. DEFERENCE IF CONGRESS IS WITHIN THE SCOPE OF SECTION 5

With the decision in *Bolling v. Sharpe,*\(^\text{118}\) the Supreme Court reverse incorporated the Equal Protection Clause to apply to the federal government, including Congress, using the Due Process Clause of the Fifth Amendment. The Court thought the idea of the Equal Protection Clause only applying to State actors did not make sense.\(^\text{119}\) The Court noted that although the Due Process Equal Protection Clause protects the same rights as the Fourteenth Amendment’s Equal Protection Clause, conflict arises with the enforcement of the Due Process Equal Protection Clause.\(^\text{120}\) When applying the Fourteenth Amendment Equal Protection Clause to state actors, the Court applies a strict-scrutiny analysis in racial discrimination cases.\(^\text{121}\) However, this should not be the case when Congress is attempting to fulfill its role as the enforcer of the Equal Protection Clause. Similar principles are used when evaluating weight limits on structures. If a structure needs to regularly carry a load of 1000 pounds, the designer will build the structure with a “buffer” of typically two percent to ensure it will hold the needed 1000 pounds. This same

\(^{115}\) *Id.* at 609 (Ginsburg, J., dissenting).

\(^{116}\) *Id.* at 610-11.

\(^{117}\) *Id.* at 627.

\(^{118}\) *See supra* Part I.B.1.

\(^{119}\) *Id.*

\(^{120}\) *Id.*

“buffer” should apply to Congress when it enacts legislation to enforce the Fourteenth Amendment’s Equal Protection Clause.

The Court grants this analytical buffer by affording Congress deference when acting within its Section 5 power to enforce the Equal Protection Clause. If this deference is not present, the Court usurps Congress’s Section 5 power. Should Congress be viewed by the Courts the same way the Court would view a state in the Deep South with a history of discrimination? When viewed in this light, the answer is definitely, “No,” because if not, it implies that Congress can potentially violate and enforce the Equal Protection Clause in the same action although Congress does not have a history of acting with discriminatory intent.

As mentioned earlier, there is no doubt that Congress has been identified textually, historically, and through a series of Court decisions as the enforcer of the Fourteenth Amendment. The question becomes how much freedom should Congress receive from the Court when enacting legislation to enforce the Fourteenth Amendment? Certainly more than the state of Alabama, but there also must be a limit to the powers that Congress has so that it does not violate the Constitution. Although there are no facts to support it, an argument can be made that there is no textual Equal Protection Clause that applies to federal actors because there was no need. Throughout history, the majority of discrimination has occurred on the state and local level, which explains why the framers of the Fourteenth Amendment explicitly stated that “[n]o State shall” in the language of Section 1. This language makes it very difficult to justify applying the same level of scrutiny to the actions of Congress with the Due Process Equal Protection Clause.

This issue of distinguishing acts by Congress from acts by state and local actors was first addressed by Justice Stevens in Adarand. Justice Stevens relied on the fact that the Court mentioned affording Congress deference based on its “enhanced”

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122 See supra notes 8-48 and accompanying text.
123 See supra note 2 and accompanying text.
124 See supra notes 54-59 and accompanying text.
powers concerning race granted by the Fourteenth Amendment.\textsuperscript{125} The Court has repeatedly distinguished between Congressional legislation and legislation by state and local governments.\textsuperscript{126} There would be no reason to distinguish the two if both had similar histories, but by distinguishing the two as the Court has done, it calls into question whether both Equal Protection Clauses should be treated the same. If the actions of Congress are held to the same standard as state actors under the same strict-scrutiny analysis, the Court will become the enforcer of the Fourteenth Amendment, which was not the intention of the framers of the Fourteenth Amendment.\textsuperscript{127}

III. TITLE VII WITHIN THE SCOPE OF SECTION 5

Title VII’s disparate impact provision fits within the enforcement power of Congress. As stated previously, the purpose of Congress’s Section 5 enforcement power is to deter and remedy violations of the Fourteenth Amendment.\textsuperscript{128} The test for determining if legislation is within Congress’s enforcement power comes from the “congruence and proportionality” test in Boerne.\textsuperscript{129} There is no doubt, as seen through the development of the provision in case law,\textsuperscript{130} as well as the disparate impact provision itself,\textsuperscript{131} that disparate impact is congruent and proportional to

\textsuperscript{126} See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990) (upholding a federal program designed to promote racial diversity in broadcasting). This is significant because in upholding the program, the Court emphasized the fact that the program was mandated by Congress. Id. See also Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (“A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to ‘provide for the . . . general Welfare of the United States’ and ‘to enforce, by appropriate legislation,’ the equal protection . . . of the Fourteenth Amendment.” (quoting U.S. CONST. amend. XIV, § 5)).
\textsuperscript{127} See supra notes 14-16 and accompanying text.
\textsuperscript{128} See supra note 2 and accompanying text.
\textsuperscript{129} See supra notes 29-38 and accompanying text.
\textsuperscript{130} See supra note 129 and accompanying text; see infra notes 131-134 and accompanying text.
\textsuperscript{131} See supra note 2.
eliminating hidden discrimination that would otherwise be ignored and would deny citizens equal protection of the law.

Shortly after Griggs, the Supreme Court expanded the disparate-impact doctrine to allow plaintiffs to rebut the business-necessity exception in Albemarle Paper Co. v. Moody. In Albemarle, the company argued that the recently adopted requirements of a high school diploma and intelligence test were “necessary for the safe and efficient operation of the business.” The Supreme Court reaffirmed its position, but also stated:

If an employer does then meet the burden of proving that its tests are “job related,” it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in “efficient and trustworthy workmanship.” Such a showing would be evidence that the employer was using its tests merely as a “pretext” for discrimination.

Seven years later in Connecticut v. Teal, the Court clarified that although members of a certain race may be hired proportionally, Title VII was imposed to present each applicant with an equal opportunity regardless of race. In Teal, the employer argued that although the tests caused a disparate impact, the overall result of the hiring process resulted in no disparate impact because minorities were hired and promoted equally. The Supreme Court rejected this argument reinforcing disparate impact. Over the next few years the Supreme Court made several additional changes to disparate impact, further refining the provision.

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132 See supra Part I.D.
133 422 U.S. 405 (1975).
134 Id. at 411.
135 Id. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 804-805).
137 Id. at 454-55 (citing Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978)).
138 Id. at 452.
139 Id.
140 See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988) (holding that “subjective or discretionary employment practices may be analyzed under the
To determine if eliminating attempts at masking discrimination falls within the congruence and proportionality test mentioned in *Boerne*, *Hibbs* provides the strongest reasoning. In *Hibbs*, the object of the Family Medical Leave Act was to “protect the right to be free from gender-based discrimination.”\(^{141}\) This is important because the Court lists patterns of discrimination in states regarding women in the workplace, but the Court does not cite any discrimination based on pregnancy or maternity leave.\(^{142}\) The upholding of this legislation is persuasive in the idea that the Court allows Congress to enact legislation that, although it is not directly the cause of discrimination, its enactment prevents violations of the Equal Protection Clause by providing a “buffer.” In support of providing a buffer, the Court noted that in a general across-the-board application of the FMLA, it prevents instances of discrimination that may be too subtle to detect.\(^{143}\)

Discrimination on the basis of race has been equally as prevalent, if not more pervasive than gender discrimination over time. More importantly, disparate impact protects minorities and women from discrimination by creating an even broader spectrum of citizens who have experienced a pattern of discrimination.\(^{144}\) Under the *Hibbs* standard, there is room for debate that disparate impact is congruent and proportional with preventing hidden discrimination of minorities and other protected classes, making it within the scope of Congress’s Section 5 enforcement power.

In addition to the current standard established in *Boerne*, a more direct justification can be drawn from *Katzenbach*. Like the VRA, disparate impact prevents something that can become unconstitutional if applied in a discriminatory manner. Disparate impact in this light is synonymous with the VRA. The VRA prevented the use of a facially neutral practice that could be used disparate impact approach in appropriate cases”); Wards Cove Packing Co. v. Atonio 490 U.S. 642, 659-60 (1989) (modifying the business necessity rule from "essential" to "legitimate" and requiring the plaintiff to show that an employment opportunity was denied).


\(^{142}\) See *id.* at 729.

\(^{143}\) *Id.* at 737.

\(^{144}\) See supra notes 54-58. The development of the case law associated with disparate impact clearly shows a pattern of litigated discriminations closely associated with hidden discrimination. This provides the Court, along with Congress, evidence that there is a pattern of discrimination to justify legislation.
in a discriminatory manner, which mirrors the function of disparate impact. Although the Supreme Court has ruled that the use of literacy tests were constitutional,\textsuperscript{145} the Court permitted Congress to pass legislation to prevent the potential unconstitutional use of literacy tests.\textsuperscript{146}

IV. APPLICATION OF STRICT SCRUTINY TO DISPARATE IMPACT

When enacting prophylactic legislation to deter or prevent violations of the Equal Protection Clause under Congress’s Section 5 power, the Court has held Congress to the \textit{Boerne} standard of “congruence and proportionality.”\textsuperscript{147} Furthermore, in satisfying this standard, a pattern of discriminatory behavior,\textsuperscript{148} as well as an existing problem,\textsuperscript{149} provides Congress with reason to enact prophylactic legislation. Once Congress has the power to enact legislation, it must pass the test of strict-scrutiny in order for it to be permissible. This strict-scrutiny analysis should not be as strenuous as the analysis used to evaluate Fourteenth Amendment Equal Protection legislation.\textsuperscript{150} To pass this relaxed strict-scrutiny standard, there must be a compelling interest and it must be narrowly tailored to achieve that compelling interest.

\textbf{A. Compelling Interest in Equal Protection}

The disparate-impact prong of Title VII uses race as a means of classification.\textsuperscript{151} Under the Equal Protection Clause, practices that involve racial classification are subject to strict scrutiny by the Supreme Court and must be shown to be “narrowly tailored’ to achieve a ‘compelling’ government interest.”\textsuperscript{152} Issues that have

\begin{itemize}
\item \textsuperscript{145} See supra note 26.
\item \textsuperscript{146} See supra note 27 and accompanying text.
\item \textsuperscript{147} City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
\item \textsuperscript{148} See supra note 37 and accompanying text.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} See supra Part II (describing why the Court should defer to Congress).
\item \textsuperscript{151} See supra note 2 and accompanying text.
\item \textsuperscript{152} Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)) (explaining judicial review on actions that explicitly take into account race as the determining factor).
\end{itemize}
been recognized as compelling government interests\textsuperscript{153} are: diversity,\textsuperscript{154} remedying past discrimination,\textsuperscript{155} and preventing intentional and pre-textual discrimination.\textsuperscript{156} Title VII was implemented to remedy the effects of past discrimination within employment decisions and provides penalties for obvious discrimination.\textsuperscript{157} However, the disparate-impact prong is designed to prevent hidden discrimination,\textsuperscript{158} and provide equal opportunities regardless of race or gender.\textsuperscript{159} The Supreme Court dealt with facially neutral practices that have disparate results in \textit{Washington v. Davis},\textsuperscript{160} suggesting that disparate results \textit{may} give rise to strict scrutiny, but not in that specific circumstance.

Although the Equal Protection Clause does not provide its own disparate-impact analysis, this does not mean that there cannot be a compelling governmental interest to support disparate impact in the absence of actual discrimination.\textsuperscript{161}

The most important compelling governmental interest in regard to disparate impact is preventing current discrimination, whether actual or hidden, and provides equal employment opportunities. With the creation of the disparate impact provision, it has become harder to hide discriminatory practices. These discriminatory practices are highlighted in \textit{Griggs v. Duke Power Co.}\textsuperscript{2}

\textsuperscript{156} See id.
\textsuperscript{157} See supra note 1 and accompanying text.
\textsuperscript{158} See supra note 2 and accompanying text.
\textsuperscript{159} See supra note 2 and accompanying text.
\textsuperscript{160} 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”) (citation omitted); see, e.g., \textit{Palmer v. Thompson}, 403 U.S. 217, 226 (1971) (holding that the City of Jackson did not violate the Fourteenth Amendment by closing all of the city pools in anticipation of hostility and increased costs in response to a decree to integrate the pools. Although the petitioners argued the integration was the actual reason behind the closings, the Supreme Court ultimately ruled that public swimming pools were not a Constitutional right.).
In *Griggs*, the employer used an intelligence test and education requirement to discriminate against African American workers in hiring and promotion procedures. The district court’s determination that there was no violation based on the employer’s intent clearly demonstrates the need for disparate impact.

In *Griggs*, the Court stated, “The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.” When Title VII was originally adopted, there was no mention of a disparate-impact provision or pretextual discrimination, but the Court adopted this standard in *Griggs*. The Court also stated in *Griggs* that the act was never intended to give aid to the less qualified, but to place all evenly qualified applicants on an even playing field stating, “[T]hat the less qualified [should not be] preferred over the better qualified simply because of minority origins.” Lastly the disparate-impact provision outlined in *Griggs* was adopted in the Civil Rights Act of 1991, effectively confirming Congress’s stand against all forms of discrimination in providing equal employment opportunities created by the Court.

Disparate impact’s entire creation rested on preventing pretextual or hidden discrimination after disparate treatment prevented intentional discrimination. In *Griggs*, the Court recognized that the purpose of the Civil Rights Act of 1964 was “the removal of artificial, arbitrary, and unnecessary barriers to employment.” Once intentional discrimination was prohibited by disparate treatment, employers then attempted to circumvent this newly enacted legislation by using a facially neutral practice.

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163 Id. at 427-28.
164 Id. at 428.
165 Id. at 429-30.
166 See supra note 1.
167 See supra note 85 and accompanying text.
168 *Griggs*, 401 U.S. at 436.
169 See supra note 2 and accompanying text.
170 *Griggs*, 401 U.S. at 431.
in a discriminatory manner. At this point, the Court recognized a new problem and ultimately created disparate impact to attempt to combat facially neutral practices that created discriminatory results. Although the Equal Protection Clause does not recognize a cause of action based on disparate results, Section 5 allows for Congress to go beyond the text of the Fourteenth Amendment to enact prophylactic legislation.

As highlighted in Griggs, it is impossible for disparate treatment to catch all forms of discrimination. Applying the facts from Griggs in light of the passage of the Civil Rights Act of 1964, there was no question the personnel tests were applied in a discriminatory manner. However, without the employer’s known history of discrimination within the hiring process, could this overt act of discrimination have been detected? Under the Equal Protection Clause, there would not be a violation in the absence of discriminatory intent. As a result, disparate impact should not be viewed as a cause of action that lacks foundation, but a safety net to ensure that employers do not use “neutral” practices to deny citizens equal employment opportunities. The Court, in effect, provides the foundation for the codification of disparate impact with its series of decisions post-Griggs. The evolution of cases between Griggs and the Civil Rights Act of 1991 showcases a history and pattern of pretextual or hidden discrimination within employment procedures, which closely resembles the reasoning the Court used in Hibbs to support legislation. Once this pattern has been established, it must be understood how disparate impact prevents or deters Congress’s compelling interest.

B. “Narrowly Tailored” as Applied to Disparate Impact

Once a compelling interest has been found, the Court must determine if it has been “narrowly tailored” to “fit” that

171 Id. at 427.
172 See Part I.C.
174 See supra note 63.
175 See supra Part IV.
176 See supra notes 40-43 and accompanying text.
“compelling goal.”

Eang L. Ngov recognized a number of factors that have been used to determine if racial classifications are narrowly tailored:

1) quotas,
2) scope,
3) individualized considerations, and
4) the necessity of the program in comparison to race neutral alternatives.

Much of the reason that disparate impact has failed under the Equal Protection Clause is because disparate results alone are not narrowly tailored enough to achieve its compelling interest. Holding an employer accountable on disparate results alone would be “far-reaching.”

Luckily the Court has addressed these issues in the development of disparate-impact case law, leading to neatly narrowly-tailored statutes. Each element of a disparate impact claim, as well as the newly added strong basis in evidence standard in Ricci, will display how each step has been narrowly tailored to serve its compelling interest.

A disparate-impact claim begins when “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . .” This prong specifically addresses the issue of scope. The Court must assess the overinclusiveness or underinclusiveness of the

178 See Ngov, supra note 153 at 546.
179 See, e.g., Croson, 488 U.S. 469 (1989) (preventing the use of a program that awarded at least thirty percent of construction contracts to minorities); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (disallowing medical school’s admissions program that set aside sixteen seats for underrepresented minorities).
180 Bakke, 438 U.S. at 300-01 (“[T]he scope of the remedies [is] not permitted to exceed the extent of the violations.”).
181 See Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (“Universities can, however, consider race or ethnicity more flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant.”); Bakke, 438 U.S. at 318 n.52 (“The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner’s special admissions program.”).
182 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995) (“It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting, or whether the program was appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.”) (citations omitted) (internal quotation marks omitted).
classification. An overinclusive act includes not only the group the practice was intended to include, but it also includes groups that are not similarly situated. In comparison, if a practice does not include all parties or groups that are similarly situated, there is a problem of underinclusiveness.

The Supreme Court addressed overinclusiveness in several opinions as a factor that limits the use of race-conscious programs. In Croson, the Court listed several examples of overinclusiveness as reasons the minority contract quota was unconstitutional. The 30% requirement allowed any minority to benefit, which presented problems because there was "absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." The inclusion of minorities with no prior discrimination called into question whether the practice actually served as "remedial relief."

Likewise in Bakke, the Court pointed to the fact that the sixteen allotted seats for minorities included Asians who were well-represented without the quota. Due to the "overinclusion" of Asians who did not need the assistance, but benefited from the allotment, the Court ruled the practice was overinclusive.

As previously stated, disparate impact alone is overinclusive because it ignores any legitimate reason which may be reasonable.

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185 See Bernal v. Fainter, 467 U.S. 216, 221 (1984) ("[A] classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends.") (quoting Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982)).
186 Id. at 222 ("[T]he statute . . . does not indiscriminately sweep within its ambit a wide range of offices and occupations . . . . Clearly . . . the statute is not overinclusive.").
187 See Adarand, 528 U.S. at 219 (stating the federal guidelines were underinclusive because it excluded members of groups who were disadvantaged).
189 Croson, 488 U.S. at 506.
190 Id.
191 Id.
192 Id.
193 Bakke, 438 U.S. at 309, n.45 ("[T]he university is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American-Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.").
194 Id. at 309-10, n.45.
for the practice. In addition to being overinclusive, it lacks flexibility because it ultimately performs as a strict liability statute and can almost be seen as a quota to promote racial balance. However, because disparate impact has a shifting burden, it allows for the employer to justify the employment practices. The employer can show “the challenged practice is job related for the position in question and consistent with business necessity.” This allows individualization because two identical practices can be used by two separate employers with similar results. However, if one employer cannot justify the use of his practice while the other can, one would have violated the statute while the other would have been in compliance. There is also critical case law that supports disparate impact not being solely for the purpose of racial balance.

The next prong of disparate impact addresses the issue of quotas. Quotas are normally struck down by the Court when it is thought to promote racial balance. In Local 28 of the Sheet Metal Workers’ International Association v. EEOC, the Court upheld a twenty-nine percent nonwhite membership goal “to remedy petitioners’ pervasive and egregious discrimination.” This practice for increased nonwhite membership was instituted by the District Court after finding that nonwhites had been discouraged to apply. Because of the intentional lack of action in the past by the employer, the District Court held that an affirmative action-based policy was necessary.

The Court noted that the flexibility of the practice served as an indicator that the practice was not used solely as an attempt to “achieve and maintain racial balance.” In addition to the

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195 See supra notes 188-92 and accompanying text.
198 Id.
199 Id. at 476-77.
200 Id. at 477.
201 Id.
202 Id. at 477-78. (“The court has twice adjusted the deadline for achieving the goal, and has continually approved of changes in the size of the apprenticeship classes to account for the fact that economic conditions prevented petitioners from meeting their membership targets; there is every reason to believe that both the court and the
flexibility of the practice, the Court also stated that the length of the program supported the stance that the practice was instituted to remedy past discrimination and not for the purposes of racial balance. The final reason the Court offers to support the practice is that it does not discriminate against existing members of the union.

The strongest support for the argument that disparate impact does not promote racial balance or the use of quotas is found in *Connecticut v. Teal*. The employer in *Teal* asked the Court to allow the use of the disparate tests, although they were not job related, because the overall process compensated for the disparate results in a more balanced rate of hiring and promotion for African Americans. This procedure is very similar to the admissions policy that the Court rejected two decades later in *Gratz*, when it ruled the systematic addition of twenty points to minority applicants was not narrowly tailored enough. In addition to *Teal*, the statute also forbids employers from adjusting test scores based on race or any other factor, which also distinguishes disparate impact from *Gratz*.

Similar to the plaintiff's burden in a disparate-impact claim, a race-neutral alternative must be considered to achieve
the goal. The Croson Court noted that the city failed to consider a race-neutral alternative when implementing its 30% minority contract quota. Alternatives open to the city included financing small firms, which would lead to increased minority participation, as well as simplifying the bidding process, relaxing bond requirements, and training for other disadvantaged entrepreneurs. However, in some cases, race-neutral alternatives may exist, but the Court may still allow the practice as a necessity. In Sheet Metal Workers, the Court allowed the practice because of the union’s inability to comply with the district court’s initial order. Similarly in Paradise, the lower court attempted to implement race-neutral practices, but delays in compliance prompted alternative measures.

Once the employer has shown the practice is job-related, the burden shifts and the plaintiff must prove that an “alternative employment practice and the respondent refuses to adopt such alternative employment practice.” This addresses whether or not a race-based classification is necessary. If there is an equally efficient practice that does not have disparate results, and the employer refuses that practice, then the plaintiff will succeed. Refusing to adopt the practice is important because it adds to the presumption that the employment practices served as a pretext to discriminate against a class of citizens. However, if there is no equally sufficient practice that does not create a disparate impact, the employer will not face liability for the disparate results.

It is arguable that disparate impact failed to pass strict scrutiny because it has no end point. However, this is hard to determine because the use of disparate impact technically does not start with its enactment, but with each individual, potential violation, and with each potential violation there is an automatic


212 Id. at 507-10.


214 Sheet Metal Workers, 478 U.S. at 481.

215 Paradise, 480 U.S. at 172-73.

end point. Disparate impact itself is a doctrine that will cease to be useful in the absence of hidden discrimination. Because disparate impact is designed to promote equal employment opportunities and not racial balance, disparate impact ends with the discontinuation of potentially discriminatory employment practices.

Lastly, Justice Alito addressed a problem with how employers remedied disparate impact; suggesting New Haven was being pressured by a local political activist to promote more African Americans. Although this may be true, the Court once again created a standard to prevent the use of race in hiring and promotion standards. The Court held that in order to remedy a disparate impact violation there must be a “strong basis in evidence to believe it will be subject to disparate-impact liability.” This last addition to the doctrine again preserves Congress’s initial goal of deterring violations of the Equal Protection Clause by removing employment barriers and pretextual or hidden discrimination for all classes of citizens. Also, it provides the foundation for allowing state and local actors to comply with disparate impact without violating the Fourteenth Amendment Equal Protection Clause.

V. COMPLIANCE WITH A FEDERAL STATUTE

Once Congress passes a statute under its Section 5 power, there must be a compelling state interest to prevent state and local officials from violating the Fourteenth Amendment. Richard Primus suggests that complying with a federal statute is a compelling state interest. However, the Court has failed to address whether compliance with a federal law can be a compelling state interest. In League of United Latin American Citizens v. Perry, however, justices discussed, in dicta, how the

219 Id. at 585.
220 Id.
Court would rule in determining whether compliance with a federal antidiscrimination law would serve as a compelling state interest.225

The main focus in Perry centered on early redistricting by the Texas State Legislature.226 However, in eight of the justices’ opinions, compliance with a federal statute is a compelling state interest.227 The first justice to address this is Justice Stevens in Part IV of his dissent. Justice Stevens discusses this in light of the standing required to challenge a district as an unconstitutional partisan gerrymander, and once there is standing, the plaintiff would have to prove improper purpose and effect.228 In proving improper purpose, Stevens states, “[T]he State must justify its districting decision by establishing that it was narrowly tailored to serve a compelling state interest, such as compliance with § 2 of the Voting Rights Act.”229

Justice Scalia offers the most in-depth discussion of this issue in his opinion. After stating that the Court has not yet addressed this issue, he states that if the issue ever arose, he would hold that “compliance with § 5 of the Voting Rights Act can be such an interest.”230 He then goes on to explain how not recognizing compliance as a compelling interest would present the very problem, addressed in this Comment, of compliance with Section 5 and compliance with the Equal Protection Clause.231 Justice Scalia’s support of the use of Section 5 compliance with respect to a particular redistricting provides strong support for considering compliance with Title VII as a compelling state interest.232 Here Scalia states that in order for a State to demonstrate compliance was its “actual purpose,” it must have “‘a strong basis in evidence’ for believing.”233 The fact that the same “strong basis in evidence” standard was adopted in Ricci234 opens the possibility that

225 See generally id.
226 Id. at 410.
227 See generally id.
228 Id. at 475 (Stevens, J., dissenting).
229 Id.
230 Id. at 518 (Scalia, J., concurring in the judgment in part & dissenting in part).
231 Id. at 518-19.
232 Id. at 519.
233 Id. (quoting Shaw v. Hunt, 517 U.S. 899, 908-09 (1996)).
234 See supra note 102 and accompanying text.
compliance would be a compelling state interest. This is further supported by the fact that seven of the nine justices sitting on the Perry Court are currently still sitting today. In addition, many of them agreed, in dicta, with Justice Scalia’s reasoning as to why compliance would be a compelling state interest. Of the eight justices who agreed with Justice Scalia’s reasoning, only Justice Stevens and Justice Souter no longer sit on the Court.

**CONCLUSION**

The disparate-impact doctrine is destined to be challenged by the Equal Protection Clause. On the day this issue reaches the Supreme Court, disparate impact will not violate the Fifth Amendment Due Process Clause’s Equal Protection component. As the enforcer of the Fourteenth Amendment’s Equal Protection Clause, Congress does not violate equal protection when it enacts legislation to deter violations of the actual Equal Protection Clause under its Section 5 power. This Comment outlined a three-step analysis that the Court should use to determine the constitutionality of disparate impact.

In the three-step analysis, the Court will first determine if the legislation is within the scope of Congress’s Section 5 enforcement power. Once the Court has evaluated the legislation under Congress’s Section 5 power, it must then determine if the legislation violates the Court-created Fifth Amendment Due Process Clause’s Equal Protection component from Bolling. This step is split into two separate analyses similar to that used in the Fourteenth Amendment’s determination of race-conscious classification. The Court must first determine if there is a compelling interest, and once a compelling interest has been found, the Court must decide if the race-conscious legislation has been narrowly tailored to achieve that compelling interest. However, this Comment explains why, although the same analysis

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235 See Perry, 548 U.S. at 475 n.12 (stating that Justice Stevens and Justice Breyer agreed with Justice Scalia’s reasoning that compliance with § 5 of the Voting Rights Act is a compelling state interest); id. at 485 n.2 (stating that Justice Souter along with Justice Ginsburg agreed as well). It should also be noted that Justice Thomas, Chief Justice Roberts, and Justice Alito also joined Justice Scalia in his compelling state interest argument. Id. at 511.
is used, the Court should use a relaxed version of this analysis when applying it to Congress.

The first step requires the Court to evaluate Congress’s power to enact legislation under Section 5 of the Fourteenth Amendment. Congress is identified textually as the enforcer of the Fourteenth Amendment under Section 5 of the Fourteenth Amendment. Under Boerne, to fit within the scope of Section 5, Congress’s legislation must be congruent and proportional, which places a limit on the legislation Congress is allowed to enact. Congress uses disparate impact to deter violations of the Fourteenth Amendment Equal Protection Clause by “smoking out” potential violations that may not be sufficient to satisfy a disparate treatment claim. Because there has been a pattern of hidden discrimination since disparate impact was enacted, the Court permitted Congress to enact legislation to combat hidden discrimination.

If Congress is acting within the scope of Section 5 of the Fourteenth Amendment, it is understood that the proposed legislation has the overall goal of deterring violations of the Equal Protection Clause. As the enforcer of the Equal Protection Clause, Congress’s actions cannot be evaluated under the normal Section 1 standards used to govern state and local actors, but Congress is instead governed by the Court-created equal protection norm established in Bolling that applies to federal actors. This difference in governing law supports affording Congress deference, because when enforcing the Fourteenth Amendment, Congress cannot violate the Fourteenth Amendment. In attempting to deter violations of the Equal Protection Clause, Congress should receive a break from the Courts in the form of a relaxed strict-scrutiny analysis. This buffer prevents the conflict of Congress potentially violating the Equal Protection Clause in an attempt to enforce it.

When applying the “relaxed” strict-scrutiny analysis to benevolent race-conscious legislation to deter violations of the Fourteenth Amendment, the Court must find a compelling interest for Title VII’s disparate impact prong. Disparate impact is used to deter employers from using practices that have a disparate impact on protected classes that serve as hidden devices to discriminate. This “smoking out” of discrimination that may not
exist under disparate treatment serves as the compelling state interest.

Lastly, the Court will determine if disparate impact is narrowly tailored enough to pass strict-scrutiny and achieve the compelling interests. This Comment describes each element of disparate impact, which, combined with the shifting burden that accompanies the disparate impact analysis, supports the narrow tailoring of disparate impact. This is supported by the use of other affirmative-action programs used in *Grutter*, *Gratz*, and *Paradise*.

This three-step analysis of disparate impact not only supports the notion that disparate impact does not violate the Constitution, but in fact shows that disparate impact is actually a tool used by Congress to enforce Section 1 of the Fourteenth Amendment. When this issue finally reaches the Supreme Court, the issue can potentially eliminate the use of disparate impact. How the Court will decide this issue is unknown, but it will be a case that will have lasting effects.

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