Public Interest Law Reporter

Volume 22 | Issue 1 Article 11

2016

The Anti-Discrimination Paradox: How Federal Civil Rights Laws Afford Broader Protection from Discrimination Than the Constitutional Provisions that Authorize Them

Henry Rose

Follow this and additional works at: https://lawecommons.luc.edu/pilr

 Part of the Civil Rights and Discrimination Commons, Criminal Procedure Commons, Environmental Law Commons, and the Human Rights Law Commons

Recommended Citation

Henry Rose, *The Anti-Discrimination Paradox: How Federal Civil Rights Laws Afford Broader Protection from Discrimination Than the Constitutional Provisions that Authorize Them*, 22 Pub. Interest L. Rptr. 59 (2016).
Available at: https://lawecommons.luc.edu/pilr/vol22/iss1/11

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

No. 1 • Fall 2016

The Anti-Discrimination Paradox: How Federal Civil Rights Laws Afford Broader Protection from Discrimination Than the Constitutional Provisions that Authorize Them

Professor Henry Rose
Loyola University Chicago School of Law

INTRODUCTION

On April 22, 1980, the United States Supreme Court issued two decisions that present the anti-discrimination paradox. Both cases involved the rights of black citizens in southern municipalities to be free from racial discrimination that interferes with their right to vote. However, in these decisions the Supreme Court announced two very different legal standards to determine whether actionable racial discrimination had occurred.

In *City of Mobile, Ala. v. Bolden*, black citizens of Mobile, Alabama filed suit alleging that the at-large election of the city's three commissioners unfairly diluted the voting strength of the black citizens of Mobile in violation of the Fifteenth Amendment.[1] No black person had ever been elected a city commissioner in Mobile, even though blacks constituted approximately one-third of the electorate.[2] A majority of the Supreme Court held that the Fifteenth Amendment prohibits only the purposeful denial of voting rights on account of race, color or previous condition of servitude.[3]

In *City of Rome v. U.S.*, the Supreme Court considered whether Rome, Georgia's annexation of 13 geographic areas with predominantly white populations unfairly diluted the voting strength of the black citizens of Rome in violation of the Voting Rights Act of 1965 (VRA).[4] The VRA provision at issue in the case explicitly prohibited changes in voting practices that have the effect of abridging or denying the right to vote on the base of race.[5] Rome argued that Congress lacked the authority under the Fifteenth Amendment, which authorized the VRA, to prohibit voting practices that had the effect of disadvantaging black voters if they were not motivated by racially discrimina-

1 *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 58 (1980).
2 *Id.* at 122-23.
3 *Id.* at 65, 103.
4 *City of Rome v. U.S.*, 446 U.S. 156, 159 (1980).
5 *Id.* at 172.

Published by LAW eCommons, 2016

tory intent.[6] A majority of the Supreme Court rejected Rome's argument and upheld Congress' enforcement authority under Section 2 of the Fifteenth Amendment to prohibit in the VRA electoral changes that are racially discriminatory in effect even if Section 1 of the Fifteenth Amendment prohibits only intentional discrimination.[7] The majority reasoned that since electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create a risk of purposeful discrimination, it was proper for Congress to ban electoral changes that have a discriminatory impact in an effort to prevent these jurisdictions from violating the voting rights of blacks in the future.[8]

These two cases present the anti-discrimination paradox: Certain federal civil rights statutes allow proof of discrimination based on disparate-impact, even though violations of the constitutional provisions that authorize these statutes also require proof of discriminatory intent.[9] The purpose of this article is to examine this paradox and explore how the United States Supreme Court has addressed it. The anti-discrimination paradox is rooted in earlier voting rights cases addressing the constitutional issues raised by state literacy tests for voters.

STATE LITERACY TEST CASES

Under a North Carolina statute enacted in 1957, a person who sought to register to vote there must "be able to read and write any section of the Constitution of North Carolina in the English language".[10] Louise Lassiter, a black citizen of North Carolina, sought to register to vote but refused to submit to the literacy test that the statute required and, as a result, her registration was denied.[11] Ms. Lassiter appealed the denial of her voter registration arguing that the requirement of a literacy test violated her rights under the Fourteenth,

---

6 *Id.* at 173.

7 *Id.* at 177-78.

8 *Id.*

9 Within five years of the end of the Civil War, The Constitution of the United States of America was amended to add the Thirteenth, Fourteenth and Fifteenth Amendments. Each of the Amendments provided that Congress had the power to enforce them by appropriate legislation. U.S. CONST. amends. XIII, § 2; XIV, § 5; and XV, § 2. Congress enacted various civil rights laws pursuant to these enforcement powers.

10 N.C. Gen. Stat. § 163-28 (1957) (amended by 1957 N.C. Sess. Laws ch. 287 § 1). This statute tracked a provision of §4 of Article VI of the North Carolina Constitution that provided: "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language".

11 *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 45-46 (1959).

Fifteenth, and Seventeenth Amendments of the Constitution and her appeal reached the United States Supreme Court. The Supreme Court unanimously rejected Ms. Lassiter's constitutional challenge to the literacy test requirement in *Lassiter v. Northampton County Board of Elections*, finding that states have the authority to determine qualifications for voting as long as those qualifications are not employed to perpetuate racial discrimination.[12] The Court further found that North Carolina's literacy test "has some relation to standards designed to promote intelligent use of the ballot"[13] and did not discriminate on the basis of race because it applies to members of all races[14] and is designed to raise the standards for people of all races who cast the ballot."[15] In Ms. Lassiter's case, the Supreme Court unambiguously recognized the right of states to adopt literacy tests as a qualification for voter registration as long as they do not discriminate against prospective voters on the basis of race.

In response to difficulties that blacks had in registering to vote, especially in southern states, the Congress enacted the Voting Rights Act of 1965 (VRA).[16] Section 4(a) of the VRA temporarily suspended the use of literacy tests in the voting registration process in several southern states that Congress determined had a history of denying voting rights on the basis of race.[17] One of these states, South Carolina, sued to challenge the constitutionality of various provisions of the VRA, including the suspension of its literacy test.[18] South Carolina's principal contention was that the provisions of the VRA at issue in the case exceeded the power of Congress and encroached on state power in violation of the federal Constitution.[19] With regard to its literacy test, South Carolina pointed out that literacy tests had been found constitutional in *Lassiter*.[20] The Supreme Court in *South Carolina v. Katzenbach* initially noted that Congress' authority to enact the VRA "must be judged with reference to the historical experience which it reflects".[21] To the Court, the legislative record of the VRA showed that the literacy tests used in the applicable southern states, including South Carolina, had been instituted with the purpose of dis-

12 *Id.* at 50-53.
13 *Id.* at 51.
14 *Id.* at 53.
15 *Id.* at 54.
16 Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., 79 Stat. 437.
17 *South Carolina v. Katzenbach*, 383 U.S. 301, 319, 329-30 (1966).
18 *Id.* at 307.
19 *Id.* at 323.
20 *Id.* at 333.
21 *Id.* at 308.

enfranchising blacks, thereby violating the Fifteenth Amendment.[22] Since Congress has full remedial powers under Section 2 of the Fifteenth Amendment to "effectuate the constitutional prohibition against racial discrimination in voting",[23] the suspension of the literacy tests in South Carolina and other southern states was held to be a valid exercise of Congress' power to undo the effects of past discrimination.[24]

Included in the VRA was Section 4(e), which provided that a person who had successfully completed the sixth grade in Puerto Rico could not be denied the right to vote in any federal, state or local election because of the inability to read or write English.[25]At the time of the enactment of the VRA, both the New York Constitution and the New York Election Law provided that no person shall be entitled to vote in New York unless the person is able to read and write English.[26] As a result of these provisions in New York's laws, thousands of Puerto Rican immigrants who were American citizens and resided in New York were denied the right to vote there.[27] Section 4(e) of the VRA created an obvious conflict with the Supreme Court's decision in *Lassiter*, which held that States had the authority under the Constitution to impose literacy standards as a qualification for voting as long as literacy tests did not discriminate on the basis of race.

The Supreme Court in *Katzenbach v. Morgan*, a lawsuit challenging the constitutionality of section 4(e) of the VRA as it applied to New York, initially noted that Section 4(e) of the VRA was enacted pursuant to Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.[28] New York argued that Congress could only prohibit its state literacy test pursuant to its authority under Section 5 of the Fourteenth Amendment if the literacy test itself violated Equal Protection and the Supreme Court in *Lassiter* had found state literacy tests did not violate the Fourteenth Amendment.[29] The Supreme Court rejected New York's argument, finding *Lassiter* inapposite and interpreting Section 5 authority to include "the same broad powers expressed in the Necessary and Proper Clause, Art I, Section 8, cl. 18".[30] Applying the classic

22 *Id.* at 333-334.
23 *Id.* at 325-26.
24 *Id.* at 333-34.
25 Voting Rights Act, 42 U.S.C. § 1973b(e).
26 *Katzenbach v. Morgan*, 384 U.S. 641, 644 n. 2 (1966).
27 *Id.* at 644-45.
28 *Id.* at 643-47, 652.
29 *Id.* at 648-49.
30 *Id.* at 648-650.

formulation of the reach of these powers enunciated in *McCulloch v. Maryland*, the Court viewed the key questions to be: (1) Whether Section 4(e) is "plainly adopted" to the enforcement of the Equal Protection Clause and (2) whether Section 4(e) is not prohibited by but is consistent with the letter and spirit of the Constitution.[31]

The Court found Section 4(e) to be plainly adopted to the aims of Equal Protection because its clear purpose was to ensure members of the Puerto Rican minority nondiscriminatory treatment by government both in their participation in voting and in their receipt of other important governmental services.[32] With regard to whether Section 4(e) is consistent with the letter and spirit of the Constitution, the Court recognized that Section 4(e) did not apply to all Puerto Rican immigrants but that Congress' determination to limit the application of Section 4(e) indicated that Congress was acting incrementally to only attack the most acute aspect of the problem that it sought to address.[33] The Court concluded that Section 4(e) of the VRA was appropriate legislation to enforce Equal Protection and, therefore, protecting the right to vote of some citizens of Puerto Rican descent who do not speak or write English was a valid exercise of Congress' enforcement power under Section 5 of the Fourteenth Amendment.[34]

CITY OF BOERNE V. FLORES TEST

In 1990, the Supreme Court held in *Employment Div., Dept. of Human Resources of Oregon v. Smith* that a neutral, generally applicable criminal law may constitutionally prohibit a religious practice even when the law is not supported by a compelling government interest.[35] *Smith* ruled that earlier precedent in *Sherbert v. Verner*[36] (holding that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest) did not apply to a neutral, generally applicable criminal

---

31 *Id.* at 650-51.

32 *Id.* at 652-53.

33 *Id.* at 656-58.

34 *Id.* at 658. In 1970, Congress amended the VRA to suspend literary tests in all federal, state and local elections for a period of five years. Pub L. 91-285, 84 Stat. 314. Arizona challenged Congress' authority to suspend all literacy tests, but all justices agreed that Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit literacy tests used to discriminate against voters because of their race. *Oregon v. Mitchell*, 400 U.S. 112, 118, 132 (1970).

35 *Employment Div., Dept. of Human Resources of Oregon v.* Smith, 494 U.S. 872, 884-85 (1990).

36 Sherbert v. Verner, 374 U.S. 398 (1963).

law.[37] In response to *Smith*, Congress overwhelmingly enacted the Religious Freedom Restoration Act of 1993[38] (RFRA), which expressly sought to restore *Sherbert*'s compelling government interest test in all cases where free exercise of religion is substantially burdened by government action.[39]

Congress' constitutional authority to enact RFRA was challenged in *City of Boerne v. Flores*.[40] In *City of Boerne*, the Archbishop of San Antonio, Texas applied for a building permit to enlarge a Catholic church in Boerne and the city denied the permit on the grounds that the church was an historic building.[41] The Archbishop sued the city, contending that the denial of the building permit violated RFRA.[42]

The issue of Congress' authority to enact RFRA reached the Supreme Court in *City of Boerne* and the Court concluded that RFRA exceeded Congress' power.[43] The Court recognized that the free exercise of religion is protected from state action under the Due Process Clause of the Fourteenth Amendment.[44] Therefore, the specific issue in the case was whether Congress had authority to enact RFRA under Section 5 of the Fourteenth Amendment.[45] Under Section 5, Congress can seek to enforce free exercise of religion rights that are protected under the Fourteenth Amendment.[46] Congress can also rely on its Section 5 authority to prevent or remedy violations of rights guaranteed by the Fourteenth Amendment.[47] However, the Court ruled that when Congress exercises its Section 5 enforcement authority: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[48] The Court determined that RFRA was neither remedial nor preventive legislation but instead sought a substantive change in constitutional protections.[49] The Court concluded that it is the Ju-

37 494 U.S. at 884-85.

38 107 Stat. 1488, 42 U.S.C. § 2000bb et seq.

39 42 U.S.C. § 2000bb(b).

40 *City of Boerne v.* Flores, 521 U.S. 507, 511 (1997).

41 *Id.* at 512.

42 *Id.*

43 *Id.* at 511.

44 *Id.* at 517-19.

45 *Id.* at 516-17.

46 *Id.* at 519.

47 *Id.* at 518-19.

48 *Id.* at 519-20.

49 *Id.* at 532.

dicial Branch's duty to interpret the Constitution and "say what the law is," and RFRA was unconstitutional in that it violated separation of powers.[50]

The only subsequent Supreme Court decisions that have applied the *City of Boerne* test for interpreting Congress' enforcement power under Section 5 of the Fourteenth Amendment have been in the context of state challenges to Congress' efforts to abrogate States' Eleventh Amendment immunity from suit in federal court.[51] The Supreme Court has not applied the *City of Boerne* standards for assessing Congress' enforcement power in subsequent Supreme Court decisions that have involved the anti-discrimination paradox.

EMPLOYMENT DISCRIMINATION

In Title VII of the Civil Rights Acts of 1964,[52] Congress prohibited employment discrimination on the basis of race, color, religion, sex or national origin.[53] Initially, Title VII only applied to private employers engaged in commerce but 1972 amendments extended its coverage to government employers as well.[54] The application of Title VII to state and local governments was authorized by Section 5 of the Fourteenth Amendment.[55]

In 1971, the Supreme Court in *Griggs v. Duke Power Company* held that a private employer that imposed neutral job qualifications that were not related to job performance violated Title VII of the Civil Rights Act of 1964 if these qualifications disproportionately excluded black job applicants.[56] The Title VII violation occurs even if the employer did not intend for these job qualifications to disadvantage black applicants.[57] However, the Court in *Griggs* did not address the source of Congress' constitutional authority to enact Title VII or to authorize statutory violations of it based on evidence of discriminatory effects alone.[58]

In 1976, the Supreme Court in *Washington v. Davis* held that in order for employment discrimination against blacks to violate Equal Protection, a gov-

50 *Id.* at 536.

51 Erwin Chemerinsky, Constitutional Law: Principles and Policies 310, 314-15 (5th ed. 2015).

52 42 U.S.C. § 2000e et seq.

53 42 U.S.C. § 2000e – 2(a).

54 42 U.S.C. § 2000e – 2(b).

55 *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976).

56 *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

57 *Id.* at 432.

58 Title VII was amended in 1991 to explicitly allow disparate-impact claims of employment discrimination. 105 Stat. 1071, 42 U.S.C. § 2000e-2(k)(1)(A)(i).

ernment employer must act with racially discriminatory purpose.[59] The Court rejected the black plaintiffs' arguments that employment discrimination, under Equal Protection, could be proved by the same racially differential impact standard adopted by the Court in *Griggs*.[60]

The combination of *Griggs* and *Davis* presents the anti-discrimination paradox: Congress' authority to prohibit racial discrimination in employment by state and local government employers under Title VII emanates from Section 5 of the Fourteenth Amendment; yet a Title VII violation against a government employer can be based on a discriminatory effects theory of liability even though employment discrimination by a government employer under Equal Protection also requires proof of discriminatory intent. Unlike in the voting rights cases, the Supreme Court has not addressed the source of Congress' authority to provide a discriminatory effects standard of liability under Title VII against state and local government employers when the Equal Protection standard of liability requires proof of intentional racial discrimination by government employers.

When Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA),[61] it only applied to private employers. In 1974, Congress amended the ADEA to cover states and their political subdivisions as employers.[62] In *E.E.O.C. v. Wyoming*, the Supreme Court upheld the 1974 amendment applying the ADEA to state and local government employers as authorized by Congress' power under the Commerce Clause but declined to decide whether this amendment to the ADEA was also authorized by Section 5 of the Fourteenth Amendment.[63]

In *Smith v. City of Jackson, Mississippi*, the Supreme Court addressed whether the ADEA allows age discrimination in employment claims based on a theory of disparate-impact.[64] The Court found that the ADEA's provision prohibiting discrimination in employment on the basis of age was identical to a provision of Title VII of the Civil Rights Act of 1964 except for the substitution of the word "age" for Title VII's prohibition of employment discrimination on the basis of "race, color, religion, sex or national origin."[65] The Court recognized that the Supreme's Court decision in *Griggs v. Duke Power Com-*

59 *Washington v. Davis*, 426 U.S. 427, 431 (1971).
60 *Id.* at 238-39.
61 81 Stat. 603, 29 U.S.C. § 621 et seq.
62 88 Stat. 74, 29 U.S.C. § 630(b).
63 *E.E.O.C. v.* Wyoming, 460 U.S. 226, 243 (1983).
64 *Smith v. City of Jackson,* Mississippi, 544 U.S. 228, 230 (2005).
65 *Id.* at 233.

pany,[66] interpreting the nearly identical Title VII text, "strongly suggested" that a disparate-impact theory should be cognizable under the ADEA.[67] In addition, the Court recognized that the Equal Employment Opportunity Commission, the federal agency charged with implementing the ADEA, had consistently interpreted the ADEA to authorize relief on a disparate-impact theory.[68] For these reasons, the Court concluded that the disparate-impact theory of liability is available under ADEA.[69]

Smith v. City of Jackson, Mississippi is interesting for the dog did not bark. The Supreme Court's decision in *Smith* made no mention of *City of Boerne*. At first blush, this omission makes sense because *City of Boerne* interpreted Congress' authority under Section 5 of the Fourteenth Amendment[70] and the Supreme Court in *E.E.O.C. v. Wyoming* found that the application of the ADEA to state and local government employees was a valid exercise of Congress' power under the Commerce Clause, declining to decide whether it was also authorized under Section 5 of the Fourteenth Amendment.[71] However, in *Kimel v. Florida Board of Regents*, the Supreme Court had previously applied the *City of Boerne* test to the ADEA, holding that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity in the ADEA.[72] In applying the *City of Boerne* test in *Kimel*, the Court found that since age classifications are scrutinized under Equal Protection with rational basis review, the ADEA prohibits substantially more state employment decisions and practices than would likely be held to violate Equal Protection.[73] In addition, the Court found that Congress had failed to develop a legislative record identifying a widespread pattern of age discrimination by the States.[74] Accordingly, the Court held in *Kimel* that the ADEA did not satisfy *City of Boerne's* "congruence and proportionality" test and that the States' Eleventh Amendment immunity was not validly abrogated in the ADEA under Section 5 of the Fourteenth Amendment.[75]

---

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

67 Smith, 544 U.S. at 236-37.

68 *Id.* at 239-40.

69 *Id.* at 240.

70 521 U.S. 507, 516-517 (1997).

71 460 U.S. 226, 243 (1983).

72 *Kimel v. Florida Board of* Regents, 528 U.S. 62, 91 (2000).

73 *Id.* at 86.

74 *Id.* at 90-91.

75 *Id.* at 67, 82-83, 91.

The Supreme Court's decision in *Kimel* suggests that the ADEA's disparate-impact standard for establishing age discrimination by states and local units of government might not satisfy *City of Boerne's* test of congruence and proportionality for the proper exercise of Congress' authority under Section 5 of the Fourteenth Amendment. The disparate-impact standard would likely prohibit many more employment decisions and practices of states and local units of government than would be found to violate the Equal Protection rational basis test. In addition, the Court in *Kimel* found that the legislative record compiled by Congress for the ADEA "reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employers on the basis of age".[76]

On the other hand, in upholding a disparate-impact standard for establishing employment discrimination in *Griggs v. Duke Power Company* and *Smith v. City of Jackson, Mississippi*, the Supreme Court implicitly upheld such a standard when Congress prohibits employment discrimination through its Commerce Clause power. In both *Griggs* and *Smith*, the Supreme Court interpreted the statutory language of Title VII and the ADEA to allow disparate-impact claims of employment discrimination against employers. Although the Supreme Court has not directly addressed the issue, *Griggs* and *Smith* suggest that disparate-impact standards of proving employment discrimination are authorized under Congress' Commerce Clause power.[77]

HOUSING DISCRIMINATION

In 1968, Congress enacted the Fair Housing Act (FHA)[78] which prohibits housing discrimination on the basis of race, color, religion, sex, familial status, handicap or national origin.[79] The Supreme Court has not addressed Congress' constitutional authority to enact the FHA. However, in the same year that the FHA was enacted, the Supreme Court held in *Jones v. Alfred H. Meyer Co.* that Section 2 of the Thirteenth Amendment authorized Congress to enact

---

76 *Id.* at 91.

77 The Supreme Court has broadly applied the Commerce Clause power in upholding Congress' authority to enact civil rights laws. In *Heart of Atlanta Motel, Inc. v. United States*, the Court upheld Title II of the Civil Rights Act of 1964 on Commerce Clause grounds, applying a rational basis test to Congress' enactment. 379 U.S. 241, 258-59 (1964). In *Katzenbach v. McClung*, the Court, upholding the application of Title II to a family-owned restaurant, described Congress' Commerce Clause power in this area as "broad and sweeping". 379 U.S. 294, 305(1964).

78 82 Stat. 81, 42 U.S.C. § 3601 et seq.

79 42 U.S.C. § 3604.

42 U.S.C. 1982, which prohibits all racial discrimination in the sale and rental of property.[80] There is little doubt that the Section 2 of Thirteenth Amendment would also authorize Congress' enactment of the FHA's prohibitions against racial discrimination in the sale and rental of housing.[81]

The Supreme Court has not decided whether a violation of the Thirteenth Amendment or 42 U.S.C. 1982 requires proof of discriminatory intent. However, the Supreme Court did hold in *Village of Arlington Heights v. Metro Housing Development* that to prove racial discrimination by a governmental entity in a housing decision under Equal Protection, there must be proof of racially discriminatory intent.[82]

In *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, the Supreme Court held that disparate-impact claims are allowed under the FHA.[83] The Court found that the statutory language of the FHA,[84] the FHA's legislative history,[85] and the consistency of the disparate-impact theory of liability with the central purpose of the FHA[86] support this holding.

Since the Supreme Court has not addressed the constitutional source of Congress' authority to enact the FHA, the anti-discrimination paradox is not fully established with regard to housing discrimination. If the Supreme Court were to hold that Congress' power to enforce Equal Protection under Section 5 of the Fourteenth Amendment authorized the FHA's disparate-impact theory of liability, the anti-discrimination paradox would be presented. A claim of housing discrimination by a government entity that violates Equal Protection would require proof of discriminatory intent while housing discrimination claims against government entities under FHA would only require proof of disparate-impact.

---

80 *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 413, 439 (1968).

81 Congress' authority to prohibit housing discrimination on the basis of religion, sex, familial status, handicap or national origin would likely be upheld under the Commerce Clause. *See Heart of Atlanta Motel, Inc. v. U.S.* 379 U.S. 241 (1964).

82 *Village of Arlington Heights v. Metro Housing Development*, 429 U.S. 252, 265 (1977).

83 *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2525 (2015).

84 *Id.* at 2518-19.

85 *Id.* at 2520.

86 *Id.* at 2521.

SUMMARY

Section 2 of the Thirteenth and Fifteenth Amendments and Section 5 of the Fourteenth Amendment grant Congress the power to enforce the substantive provisions of each Amendment. The anti-discrimination paradox involves the extent to which Congress' civil rights statutes enacted pursuant to these enforcement powers can allow proof of discrimination based on a disparate-impact theory of liability when proof of violations of the constitutional provisions that the statutes seek to enforce also require proof of discriminatory intent.

South Carolina v. Katzenbach described Congress' power under Section 2 of the Fifteenth Amendment as "remedial"[87] and held that Congress could suspend literacy tests for voting in states where they had been used to violate rights created in Section 1 of the Fifteenth Amendment in an effort to undo the effects of past discrimination.[88] Thus, Congress' enforcement power under Section 2 of the Fifteenth Amendment encompasses the power to provide remedies for violations of the voting rights created in Section 1 of the Fifteenth Amendment.

Katzenbach v. Morgan addressed whether Congress' power under Section 5 of the Fourteenth Amendment to enforce Equal Protection could be used to provide voting rights to citizens of Puerto Rican descent who could not vote under New York law due to their inability to read and write English. The Supreme Court held that Congress' enforcement power under Section 5 of the Fourteenth Amendment encompasses the same broad powers that Congress has under the Necessary and Proper Clause of the Constitution.[89] The Supreme Court concluded that this grant of Congressional power allowed Congress to require New York to allow some Puerto Rican immigrant citizens to vote even if they could not read or write English.[90]

In *City of Rome v. United States*, the Supreme Court identified a preventive dimension to Congress' enforcement powers under Section 2 of the Fifteenth Amendment. The Court in *City of Rome* upheld a discriminatory effects test for determining violations of the VRA in order to prevent the risk of purposeful discrimination in the future by southern jurisdictions with a history of denying blacks the right to vote.[91]

---

87 *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

88 *Id.* at 333-34.

89 *Katzenbach v. Morgan*, 384 U.S. 641, 648-650 (1966).

90 *Id* at 658.

91 *City of Rome v. U.S.*, 446 U.S. 156, 177-78 (1980).

In *City of Boerne v. Flores*, the Supreme Court announced a new test for reviewing Congressional legislation enacted pursuant to its enforcement power under Section 5 of the Fourteenth Amendment. The Court recognized that this enforcement power could be used to prevent or remedy violations of the substantive constitutional rights that they seek to enforce.[92] The Court also acknowledged that Congress can enact statutes, pursuant to this enforcement power, that prohibits conduct which is not itself unconstitutional under the substantive provisions of the Fourteenth Amendment.[93] Nevertheless, the Court held that when Congress exercises this enforcement power there must be congruence and proportionality between the constitutional injury sought to be prevented or remedied and the legislative means Congress has adopted.[94] The congruent and proportionality test announced in *City of Boerne* arguably limits the broad grant of Congress' enforcement power under Section 5 of the Fourteenth Amendment that was announced in *Morgan*.

The *City of Boerne* test was not applied in subsequent Supreme Court cases addressing whether Congress could validly adopt disparate-impact standards for establishing age discrimination in employment violations under the ADEA (*Smith v. City of Jackson*, Mississippi) and housing discrimination under the FHA (*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*). In neither case was it clear that the ADEA or the FHA were enacted pursuant to Congress' enforcement power under Section 5 of the 14th Amendment. Had the Supreme Court found that either the ADEA or the FHA was enacted pursuant to Section 5 of the Fourteenth Amendment the Supreme Court arguably could have applied the *City of Boerne* test to determine whether Congress validly exercised this power. In both cases, the Supreme Court upheld the disparate-impact standard for establishing actionable discrimination based on the Court's interpretation of the legislative intent of the ADEA and FHA. Another series of Supreme Court cases suggest that disparate-impact liability standards in federal civil rights laws would also be independently authorized under Congress' Commerce Clause authority.

The Supreme Court has held that Congress can enact civil rights statutes that create disparate-impact theories of liability for proving discrimination even when the substantive constitutional provisions that the statutes seek to enforce also require proof of discriminatory intent. This anti-discrimination

92 *City of Boerne v.* Flores, 521 U.S. 507, 518-19 (1997).

93 *Id.*

94 *Id.* at 520.

paradox indicates that the Constitution grants Congress broad enforcement authority to enact laws that seek to prevent or remedy violations of our Constitutional provisions that seek to guarantee equality under law.