

“FEEDBACK LOOP”: THE CIVIL RIGHTS ACT OF 1964 AND ITS PROGENY

DREW S. DAYS, III*

I. INTRODUCTION

It is truly an honor and pleasure to join you in commemorating the fortieth anniversary of the passage of the Civil Rights Act of 1964.¹ This legislation has brought broad, positive change and progress to American society. Although testimonials are notoriously unreliable and consequently viewed with some suspicion in academic circles, I want, nevertheless, to testify to the pervasiveness I witnessed, as a black child growing up in the South during the 1940s and early 1950s, of a state-imposed and state-enforced system of segregation and discrimination. It was a system that denied the humanity of millions of American citizens on the basis of race. I can remember “off-limits signs,” in fact or in practice, that deprived me, my family, and friends of equal access to places of public accommodation. I remember the segregated schools I attended where my mother was employed as a teacher. I can recount the employers who refused to consider African-Americans for anything more than the most menial of jobs, despite their educational background and experience.

In contrast, I want to testify to the changes that I saw after 1964 as the United States Assistant Attorney General for Civil Rights in the Carter Administration, a position where I was responsible for federal civil rights enforcement nationwide. Congress’s passage of the Voting Rights Act of 1965,² the Age Discrimination in Employment Act of 1967,³ the Fair Housing Act of 1968,⁴ the Education Amendments of 1972 (Title IX),⁵ and the Age Discrimination Act of 1975⁶ were clearly having a profound effect. This legislation, designed in significant part to complement and reinforce the provisions of the 1964 Act, created opportunities for millions of people previously blocked in their quest for the “American Dream” by discrimination

* Alfred M. Rankin Professor of Law, Yale University.

1. Pub. L. No. 88-352, 78 Stat. 241 (1964).
2. 42 U.S.C. §§ 1973–1973p (2000).
3. 29 U.S.C. §§ 621–634 (2000).
4. 42 U.S.C. §§ 3601–3619 (2000).
5. 20 U.S.C. § 1681 (2000).
6. 42 U.S.C. §§ 6101–6107 (2000).

on the basis of race, color, national origin, religion, sex, and age. The Rehabilitation Act of 1973 (§ 504)⁷ and the Americans with Disabilities Act of 1990⁸ extended the benefits of federal protection to the disabled, a group generally marginalized in American society and its economic mainstream. Both practices and attitudes toward questions of discrimination were being affected for the good by individual and public enforcement, as well as by voluntary changes in private-sector practices. Market forces, shaped by the civil rights laws, have also played a part in this societal transformation.⁹ Clearly, vestiges of that earlier time remain with us. New examples of racial or other forms of bigotry can be found across the land; problems that the civil rights statutes were meant to address have not vanished.¹⁰ Large numbers of our citizens are jobless¹¹ and are without access to basic health care.¹² Many live in substandard housing¹³ and are educated in segregated schools that lack the basic tools to prepare the next generation to assume productive roles in our society.¹⁴ Those of us who expected the Civil Rights Act of 1964 and later civil rights legislation to be the cure for all ills of inequality that beset our nation have since learned that there is only so much weight “one boat,” or fleet of boats for that matter, can effectively carry.

7. 29 U.S.C. § 794 (2000).

8. 42 U.S.C. §§ 12101–12213 (2000).

9. A recent reflection of the positive role of the private sector was the amicus brief filed by major corporations urging the Supreme Court to uphold affirmative action admissions programs in higher education. See, e.g., Brief of Amicus Curiae General Motors Corp., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Brief of Amicus Curiae General Motors Corp., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241). Supporting amicus briefs were also filed on behalf of, *inter alia*, 65 Lending American Businesses and Exxon Mobil. Justice O'Connor's opinion for the Court in *Grutter* referenced these briefs for the proposition that “skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter*, 539 U.S. at 330.

10. For example, African-Americans still encounter racial discrimination in places of public accommodations such as restaurants. See, e.g., United States Department of Justice, Civil Rights Division, *Case Summaries: United States v. Flagstar Corp. & Denny's*, at <http://www.usdoj.gov/crt/housing/documents/casesummary.htm> (last visited Jan. 5, 2005) (reporting on the consent decree in which Denny's paid \$45 million in damages and implemented a nationwide program to prevent future discrimination).

11. As of December 2004, approximately eight million people, or 5.4%, were unemployed. United States Department of Labor, *The Employment Situation*, at <ftp://ftp.bls.gov/pub/news.release/History/empstat.01072005.news> (Dec. 2004).

12. In 2003, there were forty-five million Americans without health insurance. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2003*, 14 (2004), available at <http://www.census.gov/prod/2004pubs/p60-226.pdf> (Aug. 2004).

13. Nat'l Law Income Housing Coalition, *America's Neighbors: The Affordable Housing Crisis and the People it Affects*, 1 (2004), available at <http://www.nlihc.org/research/neighbors.pdf> (last visited Nov. 15, 2004).

14. See Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?*, at <http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php> (Jan. 2004).

Now that my testimonial is out of the way, let me now turn to the 1964 Act itself.

Two civil rights cases, of particular significance as we commemorate the fortieth anniversary of the 1964 Civil Rights Act, are on the 2004-2005 docket of the United States Supreme Court. One raises the question of whether a person claiming to be a victim of retaliation for protesting discriminatory acts by a recipient of federal financial assistance has a private right of action to redress his injury.¹⁵ In the second case, the Court is asked to resolve a split among the federal courts of appeals over the issue of whether disparate impact claims may be brought for alleged employment discrimination.¹⁶ If this picture strikes you as somewhat odd, there is a reason. Forty years ago Congress included in the 1964 Act a provision known as Title VI, which prohibits "discrimination under any program or activity receiving Federal financial assistance" against anyone "on [the] ground of race, color, or national origin."¹⁷ Moreover, Title VII of the Act,¹⁸ which bars employment discrimination on the basis of race, color, religion, sex, or national origin has been construed, since the landmark 1971 Supreme Court decision in *Griggs v. Duke Power Company*,¹⁹ to permit disparate impact suits. In such litigation, the plaintiff may recover for employment discrimination if the defendant utilizes a practice that disproportionately screens out members of a group protected by the Act and if the practice cannot be shown to be job related or consistent with business necessity, even though there is no evidence of an intent to discriminate.²⁰ Congress codified this judicially created doctrine in the Civil Rights Act of 1991.²¹

Hence, the logical question to be asked might be, "Why is the Supreme Court considering these seemingly well-settled issues decades after passage of the Civil Rights Act of 1964?" They are on the docket because the first case involving retaliation arises under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance,"²² not Title VI, which does not include sex among its forbidden grounds. The second case grew out of a lawsuit filed by police officers and other law-enforcement

15. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), *rev'd*, 125 S.Ct. 1497 (2005) (holding that retaliation may be a form of intentional sex discrimination actionable under Title IX and gives rise to a private right of action).

16. *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), *aff'd*, 125 S.Ct. 1536 (2005) (holding that the ADEA does authorize disparate impact claims).

17. 42 U.S.C. § 2000d (2000).

18. 42 U.S.C. §§ 2000e-2000e-17.

19. 401 U.S. 424 (1971).

20. *Id.* at 431.

21. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

22. 20 U.S.C. § 1681(a) (2000).

personnel against their municipal department alleging violations prohibited by the Age Discrimination in Employment Act of 1967 (ADEA),²³ not Title VII of the 1964 Act.

Congress enacted both statutory schemes, Title IX and the ADEA, explicitly borrowing significant features of the Civil Rights Act of 1964, with appropriate changes, to reflect the fact that they were intended to address discrimination on grounds not included in the 1964 “model” provisions. Section 504 of the Rehabilitation Act of 1973,²⁴ the Age Discrimination Act of 1975,²⁵ and the Americans with Disabilities Act of 1990,²⁶ similarly draw their substantive and procedural features significantly from the Civil Rights Act of 1964. There are undoubtedly several reasons why Congress chose to draft the new statutes in this fashion. It may have found, for example, some sense of security in adopting and altering, only slightly, provisions that had already received legislative blessing and favorable judicial interpretation.²⁷

I mention the two cases scheduled to be heard and decided during the Supreme Court’s upcoming term to underscore the central thesis of this article, namely that the future impact of the Civil Rights Act of 1964, for good or ill, will be very much determined not only by the way in which the courts continue to construe the provisions of that law but also the statutes that were fashioned explicitly upon the 1964 Act, its “progeny,” in a manner of speaking. It is a type of “feedback loop” that I believe is unprecedented in American law. By “feedback loop,” borrowing liberally from applied physics, I mean a process within a system in which signals are sent out from the source that return to that source producing sometimes positive or negative effects and triggering yet a new cycle.²⁸ What I hope to show is precisely how the 1964 Civil Rights Act and its progeny act and react with each other as the courts go about interpreting and applying their similarly constructed provisions. One, however, has reason to ask on this occasion how effective has the 1964 Act been?

23. 29 U.S.C. §§ 621–634 (2000).

24. 29 U.S.C. § 794 (2000).

25. 42 U.S.C. §§ 6101–6107 (2000).

26. 42 U.S.C. §§ 12101–12213 (2000).

27. It might be explained by what economic theorists call “path dependence.” See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606–22 (2001); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251–67 (2000).

28. See Principia Cybernetica Web, *Feedback*, available at <http://pespmc1.vub.ac.be/FEEDBACK.html> (last visited Feb. 20, 2005); see also THE AMERICAN HERITAGE DICTIONARY 495 (2d ed. 1991).

II. EVALUATING THE 1964 ACT'S EFFECTIVENESS.

The 1964 statute is composed of eleven separate titles,²⁹ but only three of those have been the subject of any extended legislative, judicial, or academic focus over the intervening years. Title VI (nondiscrimination in federally assisted programs)³⁰ and Title VII (prohibiting employment discrimination) have already been described.³¹ The third, Title II, provides for injunctive relief against discrimination in places of public accommodations on the basis of race, color, religion, or national origin.³² Of these three titles, Title II, though one of the most controversial provisions in the bill during its long passage to enactment, has been viewed as probably the most effective and transformative in terms of its impact upon pre-Act public accommodation practices in the Deep South and Border States. Scholars have offered various reasons why this has been so, one being that Title II "attacked a simpler and more vulnerable target than did other provisions" of the Act.³³ Among other things, it addressed primarily a regional, not national problem; it attacked the most blatant forms of racism; it involved no redistribution of valuable opportunities previously enjoyed only by whites; and it provided a form of "cover" for white entrepreneurs in the South who were willing, but for the existence of Jim Crow laws and racist violence, to serve an integrated clientele for purely financial reasons.³⁴ Another scholar observed that "[i]n attacking segregated stores, hotels, and restaurants, Title II 'tore old Dixie down' almost overnight."³⁵ In a similar vein, a 1971 U.S. Commission on Civil Rights report on the status of civil rights progress stated that Title II was one of the most dramatic examples of the weight a civil rights law can carry, noting that "thousands of hotels, motels, restaurants, and theaters" had abandoned their discriminatory policies.³⁶ Among other factors was the speed with which the United States Department of Justice (DOJ) acted to enforce the provision. "Within a few months after enactment, the Department . . . brought several enforcement actions which tested the constitutionality of the public accommodations law" and ensured that it was, and would remain, the law of the land.³⁷ Finally, there were social factors. Desegregation of places of public accommodation, as opposed to neighborhoods, was seen as less threatening to whites. It was also more likely that those blacks able to take advantage of desegregation of public accommodations would come from a relatively small, middle-class group that would not create class, as well as, racial discomfort for whites.³⁸

29. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (Title I (Voting Rights), Title II (Injunctive Relief Against Discrimination in Places of Public Accommodation), Title III (Desegregation of Public Facilities), Title IV (Public Education), Title V (Commission on Civil Rights), Title VI (Nondiscrimination in Federally Assisted Programs), Title VII (Equal Employment Opportunity), Title VIII (Registration and Voting Statistics), Title IX (Intervention and Procedure After Removal in Civil Rights Cases), and Title X (Establishment of Community Relations Service)). For a selection of the voluminous literature on the legislative history of the

Most commentators have found the enforcement record with respect to Title VI rather mixed, except for a short period of vigorous enforcement when the Administration of President Lyndon Johnson pressed for faster school desegregation in the mid-1960s.³⁹ Title VI was originally conceived as primarily an administrative rather than judicial technique for addressing discrimination under programs or activities receiving federal financial assistance. The sanctions available for non-compliance were suspension, or ultimately, termination of federal funding.⁴⁰ In reality, however, this provision was hedged about with various presidential and congressional restrictions upon the use of fund cutoffs, bureaucratic inertia, delays caused by funding agency referrals to the Department of Justice for court-enforcement, and, on occasions, intense political pressure to relax any tendency toward vigorous enforcement.⁴¹

There was, however, another mode of enforcement not explicitly provided for in Title VI. Approximately fifteen years after the Act's passage, the Supreme Court adopted a position that had been broadly recognized in the case

1964 Act, see generally BUREAU OF NAT'L AFFAIRS, *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY: WHAT IT MEANS TO EMPLOYERS, BUSINESSMEN, UNIONS, EMPLOYEES, MINORITY GROUPS* (1964); *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* (Robert D. Loevy ed., 1997); David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, in *LEGACIES OF THE 1964 CIVIL RIGHTS ACT* (Bernard Grofman ed., 2000); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972* (1990); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

30. 42 U.S.C. §§ 2000d-2000d-7 (2000).

31. 42 U.S.C. §§ 2000e-2000e-17.

32. 42 U.S.C. § 2000a-3.

33. Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, in *LEGACIES OF THE 1964 CIVIL RIGHTS ACT* 156, 161 (Bernard Grofman ed., 2000).

34. *Id.* at 160-62.

35. Hugh Davis Graham, *The Civil Rights Act and the American Regulatory State*, in *LEGACIES OF THE 1964 CIVIL RIGHTS ACT* 43, 48 (Bernard Grofman ed., 2000).

36. U.S. COMM'N ON CIVIL RIGHTS, 92D CONGRESS, *FEDERAL CIVIL RIGHTS ENFORCEMENT* 10 (Comm. Print 1971).

37. *Id.*

38. HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, *LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES* 63 (1972).

39. See generally STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995); AUGUSTUS J. JONES, JR., *LAW, BUREAUCRACY AND POLITICS: THE IMPLEMENTATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964* (1982); NORMAN C. AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* 62-64 (1988).

40. U.S. COMM'N. ON CIVIL RIGHTS, *FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS* 38 (Comm. Print 1996).

41. HALPERN, *supra* note 39, at 284-320.

law—namely, that there was an implied private right of action.⁴² At its best, then, Title VI afforded a three-pronged enforcement regime: administrative sanctions, DOJ litigation, and suits by private parties.⁴³

Title VII, the employment discrimination provision, was at the heart of intense debate in the Congress prior to passage. On one side were those in favor of creating an administrative agency (what became the Equal Employment Opportunity Commission (EEOC)) with “cease and desist” powers akin to those possessed by the National Labor Relations Board.⁴⁴ Others, whose model was later inacted, took the position that the EEOC should have authority only to investigate and attempt conciliation of charges filed by individuals, this leaving enforcement to individual lawsuits or “pattern or practice” suits brought by the Attorney General.⁴⁵ The 1972 amendments to Title VII extended coverage that had previously reached only private sector employees to those in the public sector and authorized the EEOC to bring suits against non-governmental employers.⁴⁶ Enforcement of Title VII was hampered from the start by the fact that the Department of Justice was slow in initiating litigation⁴⁷ and the EEOC was over-worked and under-funded, a condition that has plagued that agency’s effectiveness through the years.⁴⁸ Moreover, despite some exceptions in its history, the Commission has found itself unable to systematically address patterns and practices of employment discrimination, focusing instead on attempting to resolve individual complaints.⁴⁹ In the late 1960s and early 1970s, nevertheless, the Department of Justice did win several important victories, and the Supreme Court took a rather sympathetic view of Title VII’s substance and purpose, most especially in its 1971 *Griggs* decision. The subject of Title VII’s effectiveness has

42. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

43. Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1776 (2003) (hereinafter *After Sandoval*).

44. Amaker, *supra* note 39, at 108.

45. See, e.g., David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1135–36 (1989).

46. William A. Hazel, *Title VII Does Not Preempt Section 1983 Actions by State Employees Alleging Employment Discrimination: Trigg v. Fort Wayne Community Schools*, 28 B.C. L. REV. 140, 141 n.5 (1986).

47. Rose, *supra* note 45, at 1137–38 (1989).

48. See *id.* at 1135–36; see also U.S. COMM’N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977; TO ELIMINATE EMPLOYMENT DISCRIMINATION: A SEQUEL 201 (1977); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 326–30 (2001); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 256 (1995).

49. See Munroe, *supra* note 48, at 256–60. Title VII was amended in 1972 to grant the EEOC the right to sue in federal courts and to intervene in suits brought by private parties. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 105 (1972) (codified at 42 U.S.C. § 2000e-5(f) (2000)).

spawned a large, contentious scholarly literature, both theoretical and empirical. These views range from claims that Title VII was unnecessary because market forces would ultimately eradicate employment discrimination because it is economically inefficient,⁵⁰ to assertions that it, in fact, reduces the employment prospects of members of the covered groups,⁵¹ to evidence that the provision had its greatest effect only during the first ten years after the Act was passed in attacking egregious forms of employment discrimination against blacks in the South.⁵²

III. CONGRESS, THE SUPREME COURT, AND THE 1964 ACT.

The ensuing forty years have also witnessed a tug of war between Congress and the Supreme Court over the nature and scope of enforcement mechanisms under the Civil Rights Act of 1964, providing, in part, an answer to yet another often-asked question: “Why does it take so long for civil rights laws to have any real impact?”

By the end of the first decade after passage of the 1964 Act, lower federal courts had recognized the extent to which successful enforcement of the civil rights laws depended upon the combined efforts of government agencies, “private attorney[s] general,” individuals, and organizations willing and able to bring lawsuits seeking remedies for acts of discrimination.⁵³ In 1975, however, the Supreme Court held that federal courts were *not* authorized to award attorney’s fees to litigants in civil cases without congressional authorization.⁵⁴ Up until that point, courts in civil rights cases had developed a “common law” with respect to awarding such fees in appropriate cases.⁵⁵ Congress responded a year later by enacting legislation explicitly granting federal courts the discretion to award attorneys’ fees to prevailing parties in cases brought under a number of civil rights provisions, including Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.⁵⁶ It is here that one sees the earliest intertwining of provisions of the 1964 and 1972 Acts in subsequent legislation. Rules governing the award of attorneys’ fees were, thenceforth, applied equally to each of them.

50. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 37–38 (1992).

51. Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 517–19 (1987).

52. John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1635–40 (1991).

53. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968).

54. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 267–71 (1975).

55. See, e.g., *Bell v. Sch. Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963).

56. Civil Rights Attorney’s Fees Award Act of 1976, Pub L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988(b) (2000)).

Shortly thereafter, the Court recognized the existence of an implied private right of action under Title IX.⁵⁷ Because Title IX was patterned by Congress after Title VI— except that the former provision prohibited sex discrimination only with respect to educational programs or activities receiving federal financial assistance—the Court held that Title VI also implicitly authorized private rights of action.⁵⁸

The next interaction among parallel provisions of 1964 Act and its progeny occurred in 1984. In that year, the Supreme Court decided the *Grove City College* case.⁵⁹ It presented the Court with two central questions having to do with the proper construction of the phrase in Title IX, "any education program or activity receiving federal financial assistance."⁶⁰ The first was whether the College, one that received no direct federal financial assistance, was, nevertheless, a "recipient" of such assistance because some of its students received federal grants and loans. The Court held that it *was* a recipient.⁶¹ The second question was whether the College itself was the "program or activity," requiring it to commit itself to non-discrimination on the "basis of sex" throughout the entire institution, or just in that part of its operation at issue in the case, its financial aid office. On that point, the Court concluded that the entire college was *not* a "program or activity" under Title IX.⁶² This second holding had, according to one account, a "devastating impact" upon federal administrative enforcement of Title IX,⁶³ as well as upon private suits,⁶⁴ particularly with respect to institutions of higher education. As a theoretical matter, *Grove City College* could, thereafter, discriminate on the basis of sex in athletics or in physics classes because neither would fall within the category of a covered "program or activity." Because the term "program or activity receiving federal financial assistance," in Title IX was drawn from Title VI and replicated in § 504 of the 1973 Rehabilitation Act and the Age Discrimination Act of 1975, enforcement of all four funding statutes, not just Title IX, became subject to this "program specific" restriction.⁶⁵ Congress's response to the *Grove City College* decision was to enact the Civil Rights Restoration Act of 1987,⁶⁶ which, once again, made an entire institution subject to the four federal

57. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 715-17 (1979).

58. *Id.* at 694-96.

59. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

60. *See* 20 U.S.C. § 1681(a) (2000).

61. *Grove City Coll.*, 465 U.S. at 569-71.

62. *Id.* at 570-74.

63. Robert M. Hendrickson et al., *The Impact of the Civil Rights Restoration Act on Higher Education*, 60 EDUC. L. REP. 671, 673 (1990); *see also* S. REP. NO. 100-64 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3.

64. *See* S. REP. NO. 100-64, at 10-11 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3.

65. *See, e.g., Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 635-36 (1984) (finding § 504 enforcement limited by "program specific" requirement).

66. Pub. L. No. 100-259, 102 Stat. 28 (1988).

funding statutes, "even if only one portion of the institution received federal funds."⁶⁷

As mentioned earlier, the Supreme Court's 1971 *Griggs* decision represented a major advance in challenges under Title VII to segregated employment patterns, for it outlawed certain practices that, although not intentionally discriminatory, had disproportionately segregative effects without a sufficient business justification.⁶⁸ *Griggs* served as controlling precedent in such litigation until the late 1980s when the Supreme Court handed down two major decisions that substantially undermined its fundamental premises and significantly increased the burdens plaintiffs had to carry in order to prevail in such lawsuits.⁶⁹ There ensued several years of intense debate and controversy within Congress (and between Congress and the White House) over various proposals to enact legislation overturning these decisions, as well as others that cut back on favorable precedents construing related civil rights laws prohibiting employment discrimination.⁷⁰ What ultimately emerged was the Civil Rights Act of 1991, which, for the first time, codified the *Griggs* precedent.⁷¹ The Act did far more than enshrine the *Griggs* standard. Finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace"⁷² Congress, for the first time, made available compensatory and punitive damages as remedies under Title VII.⁷³ The Act also affords a right to a jury trial where damages are sought.⁷⁴

Two other comprehensive statutes also drew their inspiration from the 1964 Civil Rights Act: the Age Discrimination in Employment Act of 1967 (ADEA)⁷⁵ and the American with Disabilities Act of 1990 (ADA).⁷⁶ Their reach is not limited to recipients of federal financial assistance.

67. See Hendrickson, *supra* note 63, at 671.

68. See *supra* notes 19-20 and accompanying text.

69. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

70. See *Patterson v. McLean Credit Union*, 490 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT & T Tech's, Inc.*, 490 U.S. 900 (1989). See generally DAVID A. CATHCART ET AL., *THE CIVIL RIGHTS ACT OF 1991* (1993); HENRY H. PERRITT, JR., *CIVIL RIGHTS ACT OF 1991: SPECIAL REPORT* (1992).

71. Pub. L. No. 102-166, 10 Stat. 1071 (1991).

72. Civil Rights Act of 1991 § 2.

73. *Id.* § 102(a)(1).

74. *Id.* § 102(c)(1).

75. 29 U.S.C. §§ 621-34 (2000).

76. 42 U.S.C. §§ 12101-12213 (2000); see also *Oubre v. Energy Operations, Inc.*, 522 U.S. 422, 426-27 (1998) (discussing Congress's efforts to provide greater protection to older workers by enacting the Older Workers Benefits Protection Act of 1990).

A. Age Discrimination

The ADEA protects workers who are at least forty years old against discrimination because of age. It is generally patterned in both substantive and procedural terms after those found in Title VII.⁷⁷ Consequently, it has been argued, but not yet resolved by the Supreme Court, that the ADEA authorizes bringing claims based upon the disparate impact test announced in *Griggs* as well as those alleging intentional discrimination. Because the ADEA and Title VII are largely *in pari materia*, that conclusion should necessarily follow, it is contended.⁷⁸ Counterarguments, however, point to features of the ADEA that sufficiently distinguish it from Title VII to undermine any claims that it authorizes disparate impact suits.⁷⁹ But, perhaps most telling, the opponents of reading *Griggs* into the ADEA assert that when Congress codified the *Griggs* test in the Civil Rights Act of 1991, it added no such parallel provision to the ADEA.⁸⁰ Congress did make other amendments, however, to the ADEA.⁸¹ The Supreme Court has agreed to hear, during the 2004-2005 term, a case raising this exact question: Are disparate impact claims cognizable under the Age Discrimination in Employment Act? Without venturing to predict the outcome in this case, I would like to point out that whatever the Court decides, its opinion will very likely address issues that may affect general understandings with respect to Title VII, the ADEA, and the Civil Rights Act of 1991.⁸²

Despite their great similarities, another tension has arisen between the Supreme Court's construction of Title VII and the ADEA. The Supreme Court has, since the early days of Title VII, held that the prohibition against racial discrimination is designed to protect majorities as well as minorities, whites as well as blacks.⁸³ Yet the Court only recently held in *General Dynamics Land Systems, Inc. v. Cline*⁸⁴ that an employer and its union were free under the

77. See, e.g., *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

78. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000).

79. See *Mullin v. Raytheon Co.*, 164 F.3d 696, 701-703 (1st Cir. 1999).

80. See *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996).

81. See, e.g., Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991) (amending time period for filing).

82. *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), *aff'd*, 125 S. Ct. 1536 (2005). Shortly before publication, the Supreme Court held that the ADEA does encompass disparate impact claims. It was clear, however, to note that impact liability under the ADEA is narrower than under Title VII. Not only is liability limited by the former statute's "reasonable factor other than age" (RFOA) provision but also in light of Congress's failure to include the ADEA in the Civil Rights Act of 1991 that codified the *Griggs* standard. As a consequence, the Court held that disparate impact cases under the ADEA must meet pre-1991 Title VII standards established by the *Wards Cove* and *Watson* decisions. See *supra* note 69 and accompanying text.

83. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

84. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004).

ADEA to negotiate a contract where then-current employees fifty years or older at the date of the contract would still receive full health benefits, despite the elimination of the company's obligation to provide such benefits to subsequently retired employees, but those under fifty would not. The plaintiffs, those employees under fifty, were unsuccessful in arguing that because the ADEA was intended to prohibit younger employees from being favored over old ones, it should also preclude *older* employees from being favored over *younger* ones.⁸⁵

B. Disability

In 1990, Congress enacted a comprehensive statute, the Americans with Disabilities Act (ADA), that prohibits broadly discrimination on the basis of disability. The ADA is not limited, as is Title 504 of the Rehabilitation Act of 1973, to addressing only discrimination committed by recipients of federal financial assistance.⁸⁶ The ADA's composition reflects Congress's decision, once again, to incorporate in this new statute both substantive and procedural provisions from earlier legislation.

The ADA's prohibitions apply to employers, public entities, and places of public accommodation.⁸⁷ Several critical definitions in the Act, such as who is "a person with a disability," are drawn from § 7 of the Rehabilitation Act of 1973.⁸⁸ The employment title (Title I) borrows substantively, as well as with regard to its enforcement procedures and remedies, from Title VII.⁸⁹ Consistent with this effort was Congress's decision, in the Civil Rights Act of 1991, to extend the right of prevailing plaintiffs in ADA, along with Title VII, intentional discrimination cases to obtain compensatory and punitive damages.⁹⁰

The ADA's title having to do with "public entities" (Title II) uses language almost identical to that in § 504 of the Rehabilitation Act.⁹¹ Although there is

85. *Id.* at 594–600.

86. *See, e.g.*, 42 U.S.C. §§ 12111(2), (5), 12112(a) (2000) (prohibiting covered employers from discriminating); 42 U.S.C. § 12182 (2000) (prohibiting discrimination in any place of public accommodation).

87. *See* 42 U.S.C. §§ 12111(2), (5), 12112(a) (2000) (prohibiting employers from discriminating); 42 U.S.C. § 12182 (2000) (prohibiting places of public accommodation from discriminating); 42 U.S.C. § 12132 (prohibiting public entities from discriminating). Note additionally that, in 1988, Congress passed the Fair Housing Amendments Act, which, among other things, extended the Fair Housing Act's protections against housing discrimination to the disabled. *See* Pub. L. No. 100–430, §§ 5(b), 6(b)(1), 102 Stat. 1619, 1619–20, 1622 (1988).

88. *Compare* 42 U.S.C. § 12102(2) (2000), *with* 29 U.S.C. § 705(20) (2000).

89. *See* *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 420–21 & n.1 (2002); Beth Collins, *The Americans with Disabilities Act: Rehabilitating Congressional Intent*, 28 J. LEGIS. 213, 215 (2002).

90. *See* 42 U.S.C. § 1981a(a)(2) (2000).

91. *Compare* 42 U.S.C. § 12131(1) (2000), *with* 29 U.S.C. § 794(b) (2000).

substantial overlap between the reach of the two statutory texts, the ADA is focused on states, municipalities, and their various agencies, irrespective of whether they are recipients of federal financial assistance.⁹² Remedies under this provision are those available under § 504 which, in turn, borrows from those in Title VI of the Civil Rights Act of 1964. As a consequence, plaintiffs bringing suit under the "public entities" provision of the ADA enjoy the "implied private right of action" recognized by the Supreme Court with respect to Title VI, Title IX, and § 504.⁹³

The "public accommodations" title (Title III) of the ADA⁹⁴ can properly be viewed as a direct statutory descendant of Title II of the Civil Rights Act of 1964. Although significantly more detailed in the description and scope of "covered entities" than the 1964 provision, the ADA provision on public accommodation has been construed by the Supreme Court in light of the body of case law developed with respect to that earlier statute.⁹⁵ Similarly, the remedial provisions of the 1990 Act were patterned after the Civil Rights Act of 1964: injunctive relief and attorney's fees, but not compensatory damages, are available.⁹⁶

IV. NEGATIVE FEEDBACK: SUPREME COURT DECISIONS CURTAILING THE REACH OF THE 1964 ACT AND ITS PROGENY

The decision by Congress since the Civil Rights Act of 1964 to borrow selectively from that statute in extending protection against other forms of discrimination has had generally positive consequences. But one can see from a recent Supreme Court decision that this is not always the case. There the question presented was whether punitive damages may be awarded in a private action brought pursuant to the "public entities" title of the Americans with Disabilities Act.⁹⁷ The Court answered that question in the negative, holding that because the remedies available under the ADA provisions are those under Title VI of the 1964 Act and because punitive damage are unavailable under Title VI, the result under the ADA had unavoidably to be the same.⁹⁸ The Court added that § 504 remedies were similarly limited.⁹⁹ However, as three Justices concurring in the judgment pointed out, the opinion of the Court treats the ADA, on the one hand, and Title VI, on the other, as amenable to identical legal interpretation, despite the fact that Title VI was enacted pursuant to

92. See 42 U.S.C. § 12131(1) (2000).

93. See *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

94. 42 U.S.C. §§ 12181-89 (2000).

95. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 681 (2001).

96. See *Ruth Colker, ADA Title III: A Fragile Compromise*, 21 *BERKELEY J. EMP. & LAB. L.* 377, 378 (2000).

97. *Barnes*, 536 U.S. at 183.

98. *Id.* at 189.

99. *Id.*

Congress's Spending Power whereas the ADA was not.¹⁰⁰ This case is a stark example, therefore, of how the "feedback" among the members of the family of modern civil rights laws can result in a curtailment rather than an expansion of remedies for illegal discrimination.

A. *Discontent Within the "Family"*

The view that expansion of civil rights protections initially granted by the Civil Rights Act of 1964 ought to encompass other protected groups and prohibitions against discrimination has come under some rather intense, critical reassessment in recent years. This has been caused, in large part, by the fact that the courts have proven significantly unreceptive to claims brought under the ADA, particularly with respect to employment.¹⁰¹ Disability rights advocates have, in addition to criticizing certain specific judicial rulings, raised the fundamental question of whether the drafters of the ADA should have looked to the "civil rights" model for inspiration and drawn upon the remedial and administrative schemes of the Civil Rights Act of 1964.¹⁰² They argue that, because they did, courts have come to expect that the problems faced by persons with disabilities, and the required remedies and corrective measures for such problems, will closely parallel those that have historically been associated with racial and ethnic groups, as well as women.¹⁰³ Although this expectation is justified in some respects, there are, nevertheless, fundamental differences between persons with disabilities that the ADA was enacted to address and those provided protection under earlier civil rights laws. At the heart of the ADA are two terms that have found little expression in prior civil rights laws, namely, "reasonable accommodation" and "undue hardship."¹⁰⁴ Although Title VII's provision prohibiting employment discrimination on the basis of religion includes those terms,¹⁰⁵ largely to avoid unnecessary tension

100. *Id.* at 192 (Stevens, J., concurring). Because Title IX is also based upon Title VI, it is likely that punitive damages will be similarly barred there as well. Farah S. Ahmed, *Education Law Chapter: Title IX of the 1972 Education Amendments*, 5 GEO J. GENDER & L. 361, 373 (2004).

101. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 160 (2000); Steny H. Hoyer, *Not Exactly What We Intended, Justice O'Connor*, WASH. POST, Jan. 20, 2002, at B1.

102. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 37-38 (2000); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 340-41, 343, 362 (2001).

103. Diller, *supra* note 102, at 32.

104. See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6-7 (1996).

105. See 42 U.S.C. § 2000e(j) (2000).

between the 1964 Act and the Establishment Clause of the First Amendment, the Supreme Court has held that an employer's compliance with that reasonable accommodation requirement entails nothing beyond the most modest, de minimus alteration of its ordinary practices.¹⁰⁶ The ADA, in contrast, states that "reasonable accommodation" in the employment context may include making existing facilities accessible, job restructuring, "adjustment or modifications of examinations," and "provision of qualified readers or interpreters."¹⁰⁷ Also, "undue hardship" is defined under the Act as "requiring significant difficulty or expense."¹⁰⁸ Both proponents and opponents acknowledge that these requirements go beyond the concept of "equal treatment" that has been at the core of the earlier civil rights statutes.¹⁰⁹ Some proponents contend, however, that there is a consistency, in fact and in theory, between what the ADA requires and the demands of the earlier "equal treatment" antidiscrimination regimes.¹¹⁰ For the ADA is designed to promote equality by providing otherwise qualified disabled people an equal chance to participate fully as producers in the American economic system.¹¹¹

A significant number of commentators, however, reject the assertion that the ADA is just another in a long line of antidiscrimination statutes. Thus, they discern no overlap between Title VII and the employment provisions of the ADA. Although sympathetic to the purposes and goals of the Act, they contend that it promises more than equality.¹¹² Requirements that persons with disabilities be treated the "same as" and "different from" the non-disabled can both be found in provisions of the Act.¹¹³ It has been argued, in response, that the ADA, while not an antidiscrimination statute in the strict sense, is nevertheless consistent with an "antibusordination" theory animating constitutional equal protection doctrines and the more traditional civil rights statutes.¹¹⁴ More pointedly, some scholars have asserted that the *Griggs* disparate impact test itself is not based entirely on an antidiscrimination theory but rather on one that is "accommodationist" in many of the ways that the ADA demands. It requires an employer whose practices disproportionately disfavor members of certain groups to change those practices, even though

106. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977).

107. 42 U.S.C. § 12111(9) (2000).

108. 42 U.S.C. § 12111(10) (2000).

109. *See* Diller, *supra* note 102, at 46–47; Karlan & Rurtherglen, *supra* note 104, at 40.

110. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645–46 (2001).

111. H.R. REP. NO. 101–485(II), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 316.

112. *See, e.g.*, Karlan & Rurtherglen, *supra* note 104, at 9–11.

113. *See, e.g., id.* at 8–9.

114. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, (2000) (arguing that an antibusordination approach "accords with a powerful normative understanding of disability rights law and of civil rights law more generally").

there is no evidence of an intent to discriminate.¹¹⁵ The ADA similarly requires that employers, even though they have not been found guilty of any intentional discrimination, to take special steps in response to the distinctive needs (measured against existing market structures) of disabled employees. Consequently, there is an overlap between certain features of so-called traditional civil rights laws and the ADA.¹¹⁶ Furthermore, if this general description of what has become an intense and complex scholarly debate were not complicated enough, the picture can be “complexified” further by adding just one more data point: Certain proponents of the view that the ADA is an antidiscrimination statute do not deny that its origins can also be traced to a history of social welfare legislation. That history reflects a view that assistance to the disabled, particularly with respect to employment, will result in an economic gain to society as a whole. Rather than being a drain on public resources, they would become contributors.¹¹⁷

Beyond the legitimate intellectual concerns of the legal academy, however, one can understand how this debate may be animated also by a very practical set of concerns: the long-standing national battle over affirmative action.¹¹⁸ Some proponents of the ADA suggest that a lack of judicial receptivity to the Act, especially with regard to employment, may stem from the fact that it is viewed as nothing more than a broad-scaled affirmative action measure.¹¹⁹ Resistance to the notion that there is a close relationship between Title VII disparate impact theory and that underlying the ADA also raises profound concerns for defenders of the earlier antidiscrimination laws lest they, too, become more attractive targets for those opposed to affirmative action.¹²⁰

115. Jolls, *supra* note 110, at 652–66.

116. *Id.* at 666–72.

117. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 954 (2003); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 56 (2004); Diller, *supra* note 102, at 50. For a helpful review of the existing literature on whether the ADA has produced positive results for people with disabilities in the employment sector, see Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP & LAB. L. 527 (2004) (reviewing, THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds., 2003)).

118. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

119. Diller, *supra* note 102, at 46–47.

120. *See* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 314–15 (2001).

B. *Federalism and Civil Rights*

Over the past decade, the Supreme Court has developed and deployed an expansive view of state sovereignty, the consequence of which has been to curtail severely the ability of Congress to legislate pursuant to powers granted it by both Article I and section 5 of the Fourteenth Amendment to the Constitution.¹²¹ Beginning with a nineteenth-century decision that construed the Eleventh Amendment to the Constitution in ways that the text of that Amendment does not justify,¹²² the Court has now reached a point where it openly admits that its view of state sovereignty is untethered to the text of that Amendment altogether.¹²³

Additionally, the Court has held that Congress may not abrogate a state's sovereign immunity and render it amenable to suit in damages pursuant to section 5 unless Congress has determined that a widespread violation of individual rights requires remediation and that the remedy chosen is "congruent and proportionate" to the nature of the violation.¹²⁴ In these respects, the Court has evaluated the constitutionality of Congress's identification of violation and remedy based upon the Court's own tests for determining the constitutionality of state-imposed classifications.¹²⁵ Applying this complex calculus, the Court has, thus far, held unconstitutional, among other laws, the ADEA's provisions allowing damage actions against states¹²⁶ and a similar employment provision of the ADA.¹²⁷ In each instance, the Court concluded that Congress had not adequately documented any "pattern of discrimination" by state agencies and improperly had made actionable conduct that would satisfy the "reasonableness" or "rational basis" standard of review under its "levels of scrutiny" equal protection jurisprudence.¹²⁸

Not until the past two terms did it become apparent that the Court was not going to strike down every attempt by Congress to abrogate state immunity to suits in damages under section 5.¹²⁹ In one case, the Court upheld the family-

121. *United States v. Lopez*, 514 U.S. 549, 565–66 (1995) (restricting Congress's power to regulate pursuant to the commerce clause); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (restricting Congress's power to regulate pursuant to the Indian commerce clause).

122. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

123. *Alden v. Maine*, 527 U.S. 706, 727–29 (1999).

124. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

125. *Drew S. Days, III, Race and the Constitution*, 45 N.Y.L. SCH. L. REV. 101, 104–15 (2000); *Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 525–26 (2000).

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

127. *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

128. *Id.* at 372–74; *Kimel*, 528 U.S. at 89–91.

129. The Court did not leave plaintiffs in *Garrett* without any recourse, however. There, the Court recognized that ADA standards may be enforced against states by the United States for suits in damages, as well as by private individuals in actions for injunctive relief. 531 U.S. at 373 n.9 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). The United States has acted recently in

leave provision of the Family and Medical Leave Act of 1993¹³⁰ on the grounds that Congress had legislated to protect the right of employees to be free from gender-based discrimination in the workplace.¹³¹ And, just last term, it upheld a provision in that title of the ADA prohibiting discrimination by “public entities” (Title II) on the basis of disability, but only “as it applies to the class of cases implicating the fundamental right of access to the courts.”¹³² The Court continues, however, to utilize the analytical framework that caused it to strike down the provisions having to do with employment discrimination based upon age and disability. Consequently, predicting the outcome of the next challenge to section 5 legislation is truly a perilous exercise.¹³³

The decisions in *Kimel*, *Garrett*, *Hibbs*, and *Lane* raise a number of interesting and vexing questions, to be sure. Three in particular, however, deserve attention because they offer possible future uses of the “feedback loop” thesis of this paper. First, the Court has upheld Title VII of the 1964 Civil Rights Act as a valid abrogation of state immunity to damage suits pursuant to Congress’s section 5 power.¹³⁴ It has yet to rule, however, on whether the disparate impact doctrine of *Griggs* is similarly authorized by the Constitution. It should be noted in this regard that in *Garrett*, the Court found particularly wanting, from a constitutional standpoint, the provision of the ADA that prohibits “‘utilizing standards, criteria, or methods of administration’ that disparately impact the disabled, without regard to whether such conduct has a rational basis.”¹³⁵

It can be argued, in this regard, that the Court should respond differently when faced with a situation where the disparate impact theory is utilized in cases of discrimination based upon race or sex, given that both categories are subject, unlike age and disability, to heightened constitutional scrutiny. On the other hand, the *Griggs* test has been generally understood as one adopted by the Court originally to “smoke out” subtle cases of intentional discrimination and to “thaw” racially discriminatory employment practices that had

reliance upon that principle in both ADA and ADEA cases. See *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 497–98 (5th Cir. 2003) (ADA); *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 299 (7th Cir. 2002) (citing *Alden v. Maine*, 527 U.S. 706, 755 (1999)) (ADEA).

130. Pub. L. No. 103-3, 107 Stat. 6 (1993).

131. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

132. *Tennessee v. Lane*, 124 S. Ct. 1978, 1994 (2004).

133. In his dissent in *Tennessee v. Lane*, Justice Scalia states he would circumscribe the use of the liberally applied “congruence and proportionality test” to congressional action targeted at racial discrimination, applying a more restrictive “enforcement test” in all other contexts. Under this latter approach, federal regulation extending beyond mere enforcement of the Fourteenth Amendment’s proscriptions to prophylactic measures would exceed the constitutional authority granted under section 5. See *id.* at 2009–10, 2013 (Scalia, J., dissenting).

134. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456–57 (1976).

135. *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001).

historically "frozen" black workers, in particular, into traditionally segregated jobs.¹³⁶ Whether those rationales could be defended, however, as of 1991 when Congress codified the disparate impact test, is a more difficult matter.

Second, in the principal dissent in *Hibbs*, Justice Kennedy argued essentially that the Family and Medical Leave Act of 1993's family-leave provision was not a proper exercise of Congress's section 5 power to remedy discrimination on the basis of sex but rather just another entitlement program.¹³⁷ This prompts the question of whether further consideration by the Court of the "public entities" provision of the ADA will revisit this same issue. In this respect, the ongoing scholarly debate over whether the ADA is really an antidiscrimination statute is likely to have important relevance for some members of the Court.

Third, the Court's federalism/state sovereign immunity decisions have all addressed Congress's exercise of its section 5 power. Congress has also invoked, however, its spending power as a basis for prohibiting certain forms of discrimination by recipients of federal financial assistance, most notably, in Title VI, Title IX, section 504, and the Age Discrimination Act.¹³⁸ Because it is a truism that, without exception, states are recipients of large amounts of federal financial assistance, there is serious reason to wonder whether it would be constitutionally proper for Congress to use its spending power to prohibit those recipients from discriminating in employment on the basis of age and disability, thereby achieving by this means a result that the Court blocked under the ADEA and the ADA in *Kimel* and *Garrett*.¹³⁹

The plaintiffs in *Garrett* have, in fact, argued this point successfully in the lower courts on remand, invoking the remedial provisions of § 504.¹⁴⁰ The ultimate success of this strategy, however, will turn on how the Court applies two lines of precedent. The first is with respect to waiver of state sovereign immunity.¹⁴¹ The second involves the Tenth Amendment principle that Congress may attach conditions on the receipt of federal funds by states as

136. See generally Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

137. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 744-45 (2003) (Kennedy, J., dissenting).

138. See, e.g., David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1198-2002 (2004).

139. See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Should Provoke It To Do So*, 78 IND. L. J. 459, 503 (2003).

140. See generally *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 128 (11th Cir. 2003).

141. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Secondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999); Johathan Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003).

long as the conditions are in pursuit of the general welfare, unambiguous, related to a federal interest, and not violative of other constitutional restrictions.¹⁴²

C. Limits on Government Agency Enforcement.

Much of the discussion, thus far, has focused on the extent to which the Civil Rights Act of 1964 and its progeny have explicitly granted, or have been construed to implicitly grant, private rights of action to remedy discriminatory practices. But what Congress envisioned with respect to each of these statutory schemes was that there would be essentially a “public-private nexus” in which some combination of federal administrative action, suits by the Department of Justice or the Equal Employment Opportunity Commission, and litigation initiated by private parties would make for a most effective combination of enforcement mechanisms.¹⁴³ Put otherwise, the 1964 Act promoted the concept of the “private attorney general,”¹⁴⁴ recognizing that the federal government would be unlikely to have the resources or, with changes in administration, sometimes the lack of political will to mount and maintain a sustained campaign against discrimination.

Central to this arrangement was Congress’s assignment in the Civil Rights Act of 1964 to various administrative agencies¹⁴⁵ of responsibility for promulgating regulations that would serve to reduce the general language of the statutes to practical and operative terms for the guidance of all likely to be affected: other federal agencies, courts, employers, recipients of federal funds, places of public accommodation, and prospective plaintiffs. This format was replicated by Congress in subsequent civil rights statutes. The EEOC, for example, assumed major responsibility for promulgating procedural regulations pursuant to not only Title VII but also the employment provisions of the ADA.¹⁴⁶

In the case of Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments, once the Supreme Court concluded that those provisions afforded an implied private right of action, it was widely assumed

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

143. *After Sandoval*, *supra* note 43, at 1774, 1776–78; *see* 42 U.S.C. § 2000e-4 (2000) (addressing the EEOC).

144. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

145. The Civil Rights Act of 1964 grants authority over Title VI to each agency or department that provides federal financial assistance. *See* 42 U.S.C. § 2000d-1 (2000). The EEOC was also created to help eliminate discrimination. *See* 42 U.S.C. § 2000e-4. The Department of Health, Education, and Welfare (HEW) was delegated authority over Title IX of the Education Amendments of 1972 by the Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). *See Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993).

146. 42 U.S.C. § 2000e-12 (2000) (Title VII); 42 U.S.C. § 12116 (2000) (ADA).

that agency regulations promulgated by the responsible agencies would similarly supply the basis for private rights of action.¹⁴⁷ More specifically, this meant that not only administrative and Department of Justice enforcement but also private suits could be brought seeking remedies for disparate impact discrimination, as well as intentional discrimination. In other words, the benefits that the *Griggs* doctrine afforded plaintiffs in Title VII litigation, such as not having to prove discriminatory intent, would become available to those suing under the several federal financial assistance provisions.¹⁴⁸

1. *Alexander v. Sandoval*

This regime came to an end, however, in 2001 when the Supreme Court held in *Alexander v. Sandoval* that agency regulations interpreting Title VI to bar disparate impact discrimination by recipients of federal financial assistance did not create a private right of action.¹⁴⁹ The Court based this conclusion on the fact that Title VI had been construed by a number of prior decisions to prohibit only intentional discrimination.¹⁵⁰ Regulations, standing alone, could not authorize anything else. Because Title IX and § 504 are *in pari materia* with Title VI, presumably, regulations under those statutes can no longer support private litigation alleging disparate impact discrimination either.¹⁵¹ Indeed, the Court dropped strong hints, although it did not formally so hold, that the disparate impact regulations themselves may not be authorized by Title VI.¹⁵² What this would mean if the Court were to turn hint into reality is that neither administrative agency enforcement nor Department of Justice litigation based on Title VI, Title IX, and § 504 regulations would be able to rely upon a *Griggs* theory of discrimination. In any event, the impact of *Sandoval* upon civil rights enforcement has been profound, much like what occurred after the 1984 *Grove City College* decision narrowly defining "program or activity."¹⁵³

This brings me to the second case mentioned at the outset of this article that has been accepted for Supreme Court review during the 2004-2005 Term.

147. See, e.g., *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Roberts*, 998 F.2d at 827-28; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406-07 (11th Cir. 1993).

148. See *Mabry v. State Bd. of Cmty. Colls. and Occupational Educ.*, 813 F.2d 311, 317 n.6 (10th Cir. 1987) (Title IX); *N.M. Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 854 (10th Cir. 1982) (Section 504).

149. 532 U.S. 275, 278 (2001).

150. *Id.* at 280-81.

151. See *Weser v. Glen*, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002) (denying disparate impact claim under Title IX regulations). *But see* *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002) (holding that *Alexander v. Sandoval* does not bar disparate impact claims under § 504 in view of the holding of *Alexander v. Choate*, 469 U.S. 287, 296-97, 299 (1985), that § 504 was intended by Congress to reach more than intentional discrimination).

152. *Sandoval*, 532 U.S. at 279, 281-82.

153. See *supra* notes 59-64 and accompanying text.

It has to do with whether there is a private right of action under Title IX for retaliation. In this case, Mr. Jackson, a physical education teacher and girls basketball team coach, expressed to his superiors his belief that the girls team was being denied, in violation of Title IX, equal funding and equal access to sports facilities and equipment enjoyed by boys.¹⁵⁴ Jackson claims that, thereafter, he received negative work evaluations and was ultimately relieved of his coaching duties, although he was retained as a tenured physical education teacher. He subsequently filed suit against the school board seeking relief under Title IX for retaliation. The dismissal of his suit by the trial court was affirmed on appeal.¹⁵⁵

The court of appeals held that Jackson had no private right of action under Title IX for retaliation based on a rather contorted reading of *Sandoval*. The court said that although there is an implied private right of action for direct discrimination under Title IX, no holding of the Supreme Court exists for the proposition that Congress meant to provide for discrimination suits seeking remedies for retaliation under Title IX.¹⁵⁶ It acknowledged that administrative regulations had long interpreted Title IX to provide a private cause of action for retaliation and had been successfully relied upon by private litigants for years to reach such claims.¹⁵⁷ Nevertheless, the court of appeals invoked *Sandoval* for its stated proposition that administrative regulations cannot prohibit what the statute in question does not. It noted that *Sandoval* was especially instructive because Title IX was patterned after Title VI.¹⁵⁸

On the face of it, it is hard to imagine that “discrimination” under Title IX does not include retaliation against one who is protesting against discrimination in education on the basis of sex. This reading of Title IX requires no argument, clearly ruled out by *Sandoval*, that an implied cause of action for retaliation arises out of agency regulations. It is based, instead, on the statute itself.¹⁵⁹ *Sandoval*, in contrast, rejected a claim that regulations could create a cause of action for unintentional discriminatory conduct, despite the fact that the statute itself permits suits only for claims of intentional discrimination.¹⁶⁰ As a practical matter, leaving unprotected those who protest against such conduct is likely to increase the vulnerability of the direct

154. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002) *rev'd*, 125 S. Ct. 1497 (2005). The Court’s decision embraced a rationale like that set out *infra* notes 159–60.

155. *Jackson*, 309 F.3d at 1347–48.

156. *Id.* at 1343, 1347–48.

157. *Id.* at 1346 n.13.

158. *Id.* at 1344–46.

159. Another court recently held that retaliation was covered under Title VI even though it makes no explicit reference in that regard. *Peters v. Jenney*, 327 F.3d 307, 318–19 (4th Cir. 2003).

160. *Alexander v. Sandoval*, 532 U.S. 275, 286–88, 292 (2001).

beneficiaries of Title IX's provisions, like the members of Mr. Jackson's girls basketball team.

A case accepted for review by the Supreme Court, however, is hardly ever a straightforward proposition. At least two considerations point against the Court's ruling in Mr. Jackson's favor. First, Title VII of the 1964 Act contains an explicit prohibition against retaliation.¹⁶¹ This was pointed to by the court of appeals and by Jackson's opponents as evidence that when Congress wishes to prohibit retaliation it knows how to do so explicitly.¹⁶² That retaliation is expressly prohibited also by the ADEA and the ADA reinforces this argument.¹⁶³

Implying a private right of action for retaliation, it is argued, would not be consistent with what Congress intended but would be the precise opposite. Second, even if the Court concludes that an implied private right of action for retaliation does exist, it may find, nevertheless (as did the court of appeals), that Mr. Jackson was not "within the class meant to be protected by Title IX" in this regard.¹⁶⁴ What the court of appeals envisioned is, at most, an implied private cause of action for retaliation only for "direct victims" of sex discrimination—here, the members of the girls basketball team. If they had complained about being denied equal treatment and had been retaliated against (in effect, doubly discriminated against) for not accepting that mistreatment in silence, presumably, their standing would be incontrovertible.¹⁶⁵ Although this may seem curious, the Supreme Court has made clear that, because the implied private right of action under Title IX is a judicially created one, it has rather broad latitude to shape "a sensible remedial scheme that best comports with the statute."¹⁶⁶ Here the "feedback loop" may occur once more; however the Court resolves the *Jackson* case, its decision and its impact will likely also be felt in litigation brought under Title VI and the Age Discrimination Act.¹⁶⁷

2. *Sandoval* and Congress

Since enactment of the Civil Rights Act of 1964, where the Supreme Court has construed provisions of that and subsequent enactments in ways tending to curtail effective enforcement against acts of discrimination, Congress has, as discussed earlier, responded with countering legislation. Such has been congressional reaction to the *Sandoval* decision. In February of 2004,

161. 42 U.S.C. § 2000e-3(a) (2000).

162. *Jackson*, 309 F.3d at 1345 n.12.

163. 29 U.S.C. § 623(d) (2000) (ADEA); 42 U.S.C. § 12203(a) (2000) (ADA).

164. *Jackson*, 309 F.3d at 1346.

165. *Id.* at 1346–47.

166. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998).

167. Congress amended § 504 of the Rehabilitation Act of 1973 to import the ADA standard for establishing a violation which includes an express retaliation provision. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 506, 106 Stat. 4344, 4428 (1992).

proposed legislation, the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, was introduced in both Houses of Congress by Senator Edward Kennedy of Massachusetts and Representatives John Conyers of Michigan, John Lewis of Georgia, and George Miller of California.¹⁶⁸ Insofar as *Sandoval* is concerned, the bill is designed to confirm “that individuals may obtain relief under Title VI of the Civil Rights Act of 1964, . . . Title IX of the Education Amendments of 1972, . . . and the Age Discrimination Act of 1975 from practices in federally funded programs that have an unjustified discriminatory effect.”¹⁶⁹ The legislation, in other words, codifies the *Griggs* test. The bill’s findings are that the “effectiveness [of those statutes] . . . depends on the right of private enforcement, including the private right to enforce protections against practices having an unjustified discriminatory effect.”¹⁷⁰ Consequently, after forty years of “feedback loop” developments, both positive and negative, the “conversation” between the Supreme Court and Congress continues unabated.

V. CONCLUSION

If history is any guide, Congress may get its way, sooner or later, and enact the Fairness Act to reverse the Supreme Court’s decisions in *Sandoval* and several other cases¹⁷¹ viewed as unduly restricting the reach of civil rights laws. The “feedback loop” that I have described here is likely to continue, as well.

It is clear, however, that the central story of the forty years since the Civil Rights Act of 1964 was enacted is very much one of the consistency and constancy of the United States Congress, acting in a bipartisan fashion to ensure that the civil rights laws of the United States continue to extend their

168. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2004); Dina Lassow, *In Support of a New Civil Rights Act*, HUM. RTS., Summer 2004, at 22.

169. *Fact Sheet: The Fairness Act*, at http://www.house.gov/johnlewis/pdf/040211_FactSheet2-5-04.pdf (last visited Feb. 21, 2005).

170. *Fairness and Individual Rights Necessary to Ensure a Stronger Society: The Civil Rights Act of 2004 (“The Fairness Act”)*, at http://www.house.gov/johnlewis/pdf/040211.SectionbySection01_26_04.pdf (last visited Feb. 21, 2005) (section-by-section summary of the bill).

171. *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002) (barring punitive damages for intentional violations of the ADA and § 504 of the Rehabilitation Act); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 600 (2001) (limiting the abilities of victims of unlawful treatment to recover attorney’s fees in certain civil rights cases); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 111–12, 123 (2001) (holding that employers may require workers to arbitrate employment discrimination and unfair labor disputes to gain employment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (barring claims for damages against states under the ADEA); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (limiting remedies for students’ sexual harassment claims).

protections, both procedurally and substantively, in the cause of greater opportunity and promise for all Americans.

Of this legacy, the members of the 88th Congress deserve to be very proud, indeed.

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