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THE EQUAL PAY ACT AS APPROPRIATE LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT: CAN STATE EMPLOYERS BE SUED?

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Abstract: Congress may constitutionally abrogate state sovereign immunity only through legislation enacted pursuant to Section 5 of the Fourteenth Amendment to the U.S. Constitution. In *Kimel v. Florida Board of Regents*, the U.S. Supreme Court held the Age Discrimination in Employment Act to be inappropriate Section 5 legislation. *Kimel* was the first time the Court held an anti-discrimination statute enacted to protect civil rights inapplicable to the states. Based on the *Kimel* decision, other civil rights statutes, such as the Equal Pay Act (EPA), may face similar challenges. This Comment argues that the EPA is appropriate Section 5 legislation. Unlike recent statutes struck down as inappropriate Section 5 legislation, the EPA does not grant plaintiffs more substantive rights than the Constitution. The EPA is a narrowly tailored statute enacted to prevent gender-based wage discrimination that violates the Fourteenth Amendment. Congress reviewed substantial evidence of gender-based wage discrimination by state employers before it enacted the EPA. Based on this evidence, Congress enacted the EPA to provide a remedy for such prevalent discrimination. Courts should find that the EPA is appropriate legislation under Section 5 to enforce the substantive guarantees of the Fourteenth Amendment's Equal Protection Clause.

In 1960, three years before Congress enacted the Equal Pay Act (EPA),[1] women annually earned, on average, sixty-one percent as much as men.[2] Factors that partially explained the wage differential included lack of employment opportunities for women and the historical tendency to push women into lower-paying administrative and secretarial positions.[3] However, those factors do not explain why men and women employed in the same occupations were paid differently.[4] After eighteen months of hearings,[5] including testimony from working women and leaders of American industry, Congress enacted the EPA to remedy the serious problem of gender-based wage discrimination in the private sector.[6]

1. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)(1) (1994)).

2. MICHAEL J. ZIMMER ET AL., EMPLOYMENT DISCRIMINATION 973 (4th ed. 1997).

3. *Id.* at 973–74.

4. Thomas E. Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970*, 39 U. CIN. L. REV. 615, 617 (1970).

5. County of Wash. v. Gunther, 452 U.S. 161, 184 (1981) (Rehnquist, J., dissenting).

6. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

Gender-based wage discrimination was not, however, limited to the private sector. In the early 1970s Congress heard extensive testimony that public employers engaged in rampant gender discrimination.[7] Congress reacted to this information by enacting Title IX of the Education Amendments of 1972,[8] which prohibited gender discrimination in all education programs receiving federal funds.[9] Congress also extended the protection of Title VII of the Civil Rights Act of 1964[10] to state employees.[11] Finally, based on the substantial evidence of public-sector wage discrimination gathered by Congress over the preceding four years, Congress amended the EPA in 1974[12] to apply to state employers.[13]

Since the enactment of the EPA, the wage gap has closed, but at an extremely slow pace. In 1998, the median annual earnings for full time working women were seventy-three percent as much as men's earnings.[14] The availability of the EPA as a remedy for female employees who do not receive equal pay because of gender discrimination plays an important part in eliminating the wage gap. However, female plaintiffs employed in the public sector attempting to vindicate their right to equal pay have recently faced a new hurdle to overcome: the Eleventh Amendment defense of state sovereign immunity.[15]

In *Seminole Tribe v. Florida*,[16] the U.S. Supreme Court held that Congress could not abrogate sovereign immunity except through legislation enacted pursuant to Section 5 of the Fourteenth Amendment

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7. *See infra* note 262 and accompanying text.

8. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (1994)).

9. Pub. L. No. 92-318, § 901(a), 86 Stat. 373, 373.

10. 42 U.S.C. §§ 2000e to e-17 (1994).

11. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in 42 U.S.C. §2000e).

12. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended in scattered sections of 29 U.S.C. (1994)).

13. 29 U.S.C. § 203(d), (x) (1994) (redefining employer to include "public agencies" which include "the government of a State or a political subdivision thereof"); *see also id.* § 203(e)(2)(c) (redefining employee as "any individual employed by a State, political subdivision of a State or an interstate governmental agency").

14. U.S. CENSUS BUREAU, DEP'T OF COMMERCE, NO. P60-206, MONEY INCOME IN THE UNITED STATES x (1998).

15. Sovereign immunity precludes suits against the government without its consent. *See* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 341 (4th ed. 1996).

16. 517 U.S. 44 (1996).

to the U.S. Constitution.[17] One year after *Seminole Tribe*, the Court, in *City of Boerne v. Flores*,[18] limited the scope of appropriate Section 5 legislation to that designed to remedy or prevent unconstitutional conduct.[19] Legislation is not appropriate under Section 5 if it grants plaintiffs more substantive rights than the Constitution because such legislation changes the substance of constitutional protection.[20]

In *Kimel v. Florida Board of Regents*,[21] the U.S. Supreme Court eliminated any assumption that legislation protecting civil rights would automatically be deemed appropriate legislation to enforce the Fourteenth Amendment.[22] In *Kimel*, the U.S. Supreme Court held that Congress could not abrogate state sovereign immunity through the Age Discrimination in Employment Act of 1967[23] (ADEA).[24] This was the first time that the Court held an anti-discrimination statute enacted to protect civil rights inapplicable to the states. Since *Kimel*, three courts of appeals have evaluated whether the EPA is appropriate Section 5 legislation.[25] These courts concluded that states remain subject to suit under the EPA.[26]

This Comment argues that lower courts have correctly upheld the EPA as appropriate Section 5 legislation. Part I outlines the substantive elements of the EPA. Part II introduces the constitutional doctrine of state sovereign immunity. Part III discusses the "congruence and proportionality" test used by the U.S. Supreme Court to determine what constitutes appropriate Section 5 legislation. Part IV examines to what extent gender discrimination violates the Fourteenth Amendment. Part V

17. *See id.* at 59.

18. 521 U.S. 507 (1997).

19. *See id.* at 519–20.

20. *See id.*

21. 528 U.S. 62 (2000).

22. *Id.* at 91–92.

23. 29 U.S.C. §§ 621–633a (1994).

24. *Kimel*, 528 U.S. at 91.

25. *See* Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000), ; Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000);.

26. After *Kimel*, two district courts also upheld the EPA as appropriate Section 5 legislation. *See* Stewart v. State Univ. of N.Y. Maritime Coll., No. 99 Civ. 5153 DLC, 2000 WL 1218379 (S.D.N.Y. Aug. 25, 2000); Anderson v. State Univ. of N.Y., 107 F. Supp. 2d 158, 165 (N.D.N.Y. 2000).

argues that the EPA is appropriate Section 5 legislation and that EPA plaintiffs should remain able to sue state employers.

I. LEGISLATING AGAINST GENDER-BASED WAGE DISCRIMINATION: THE EQUAL PAY ACT

The EPA prohibits gender-based wage discrimination occurring when a man and a woman are found to do equal work for unequal pay.[27] Prior to enacting the EPA, Congress heard substantial testimony regarding gender discrimination occurring in private-sector employment.[28] Congress deemed legislation necessary to end gender-based wage discrimination, but industry leaders were concerned that Congress would disallow legitimate pay structures, such as those based on job value, seniority, or merit.[29] Due to these concerns, Congress crafted a statute that would hold liable only those employers who engaged in gender-based wage discrimination.[30]

Congress drafted the EPA narrowly, making it applicable only to gender-based wage discrimination between men and women who do equal work. The EPA's narrow scope becomes apparent after examining the prima facie requirements a plaintiff must satisfy. A plaintiff has the burden of proving that (1) two workers of the opposite sex, (2) in the same establishment, (3) are receiving unequal pay, (4) for equal work.[31] The statute specifically states that equal work entails "equal skill, effort, and responsibility . . . performed under similar working conditions."[32]

Addressing employers' concerns, Congress gave employers four affirmative defenses that they could assert to show that any alleged wage discrimination was not based on gender.[33] An employer can avoid liability under the EPA if it proves that unequal pay results from (1) a seniority system, (2) a merit system, (3) a system measuring earnings based on production, or (4) "any other factor other than sex."[34] The

27. 29 U.S.C. § 206(d)(1) (1994).

28. *See generally Equal Pay For Equal Work: Hearings Before the Select Subcomm. on Labor of the Comm. on Educ. and Labor*, 87th Cong. (1962).

29. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 198–201 (1974).

30. *See id.* at 201.

31. 29 U.S.C. § 206(d)(1); *see also* Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1074 (9th Cir. 1999) (describing plaintiff's prima facie burden under EPA).

32. 29 U.S.C. § 206(d)(1).

33. *Id.*; *see also Brennan*, 417 U.S. at 196–201.

34. 29 U.S.C. § 206(d)(1).

employer carries the burden of proving one of the affirmative defenses to avoid liability.[35] Although a clear discriminatory intent may be revealed in many EPA cases due to the defendant's inability to prove legitimate reasons for the unequal pay, the plaintiff is not required to prove discriminatory intent to prevail.[36]

II. THE RESURGENCE OF STATE SOVEREIGN IMMUNITY

The Eleventh Amendment to the U.S. Constitution[37] provides states with immunity from claims brought under federal law in both federal and state court.[38] Congress has a limited power to abrogate this immunity through federal legislation.[39] That power resides in Section 5 of the Fourteenth Amendment, which the U.S. Supreme Court has interpreted to be the only means available to Congress to abrogate sovereign immunity.[40]

A. Judicial Construction of Sovereign Immunity

The literal text of the Eleventh Amendment provides states immunity only from suits brought under the citizen-state diversity jurisdiction of the federal courts.[41] The U.S. Supreme Court, however, has not confined state sovereign immunity to the textual boundaries of the Amendment.[42] Instead, the Court has held that established constitutional principles of sovereignty and federalism bar a citizen from suing the citizen's own state in federal court even when the suit is based on federal question

35. *Brennan*, 417 U.S. at 196.

36. ZIMMER ET AL., *supra* note 2, at 1008.

37. U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

38. *See* Alden v. Maine, 527 U.S. 706, 745 (1999).

39. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

40. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

41. Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

42. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 325–27 (1934).

jurisdiction.[43] The Court has also extended the doctrine to bar suits brought under federal law against states in state courts.[44]

B. *Congressional Abrogation of Sovereign Immunity*

Congress can only abrogate state sovereign immunity through legislation enacted pursuant to Section 5 of the Fourteenth Amendment. Section 5 authorizes Congress to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."[45] The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws."[46]

In *Fitzpatrick v. Bitzer*,[47] the U.S. Supreme Court held for the first time that the Eleventh Amendment does not bar Congress from using Section 5 of the Fourteenth Amendment to authorize private lawsuits against states for money damages.[48] Through ratification of the Fourteenth Amendment, the states empowered Congress to enforce that Amendment's substantive guarantees.[49] The Court saw no reason why that enforcement could not include providing for private suits against states, notwithstanding the constitutional doctrine of state sovereign immunity.[50] The Court limited the *Fitzpatrick* holding to the validity of abrogating state sovereign immunity through the Section 5 power.[51] The Court did not discuss whether congressional power to abrogate was confined exclusively to Section 5 legislation or whether other provisions of the Constitution granted Congress the power to subject states to suit. In *Pennsylvania v. Union Gas Co.*,[52] a plurality of the Court held that Congress could use its Commerce Clause[53] power to subject states to suit.[54]

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43. *See* Hans v. Louisiana, 134 U.S. 1, 13–15 (1890).

44. Alden v. Maine, 527 U.S. 706, 745 (1999).

45. U.S. CONST. amend. XIV, § 5.

46. *Id.* § 1.

47. 427 U.S. 445 (1976).

48. *Id.* at 456.

49. *Id.* at 454–56.

50. *Id.* at 456.

51. *See id*

52. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

53. U.S. CONST. art. I, § 8, cl. 3.

54. *Union Gas*, 491 U.S. at 23.

Seven years later, the U.S. Supreme Court expressly overruled *Union Gas* in *Seminole Tribe v. Florida.*[55] The Court held that *Union Gas* was incorrectly decided and that no Article I power could be used to abrogate sovereign immunity.[56] The effect of the *Seminole Tribe* holding is that only legislation enacted pursuant to the Fourteenth Amendment can be used to subject states to suit.[57] The Fourteenth Amendment altered the pre-existing balance between state and federal power.[58] States ratified the Fourteenth Amendment well after the Eleventh Amendment with the knowledge that they were ceding significant power to the federal government.[59] The Court reaffirmed the validity of *Fitzpatrick*, finding that congressional power to abrogate state sovereign immunity is available, but limited to legislation enacted pursuant to the Section 5 power.[60]

III. SECTION 5 ENFORCEMENT POWER: FROM *FLORES* TO *KIMEL*

The *Seminole Tribe* decision increased states' ability to use sovereign immunity as a defense to suit.[61] States cannot be sued under legislation that Congress has not enacted through the Section 5 power.[62] Recent U.S. Supreme Court decisions have limited what can be considered appropriate Section 5 legislation, thereby further strengthening the sovereign immunity defense.[63]

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55. 517 U.S. 44 (1996).

56. *Id.* at 72–73.

57. *See id.* at 59.

58. *Id.* at 65–66.

59. *See id.*

60. *See id.* at 59, 66, 72.

61. *See* William Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501, 503 (1999).

62. *See id.*

63. *See id.* at 504.

A. *The Congruence and Proportionality Test:* City of Boerne v. Flores

In *City of Boerne v. Flores*,[64] the Court faced its first opportunity since the *Seminole Tribe* decision to discuss what constitutes valid Section 5 legislation. *Flores* involved a challenge to the Religious Freedom Restoration Act (RFRA),[65] a statute that prohibited the government from burdening religious practices even if the burden resulted from neutral, generally applicable laws.[66] The RFRA was enacted to supersede the holding in *Employment Division v. Smith*,[67] where the Court held that religion-neutral laws that burden religious practices need not be supported by a compelling government interest.[68] The purpose of the RFRA was restoration of the compelling interest test to all cases where the free exercise of religion is burdened.[69]

The Court in *Flores* explained that Congress exceeded its Section 5 power when enacting the RFRA.[70] Section 5 gives Congress the power to enact remedial legislation intended to remedy or prevent conduct that would independently violate the Fourteenth Amendment.[71] Congress has wide latitude in determining what constitutes remedial legislation,[72] but the U.S. Supreme Court will not uphold legislation that dilutes or expands the protection that the Constitution offers citizens.[73] Because of the difficulty in determining where the line between appropriate remedial and inappropriate substantive Section 5 legislation lies,[74] Congress may restrict some otherwise constitutional conduct if such restriction will help prevent the unconstitutional conduct primarily targeted by the legislation.[75] If the legislation goes substantially beyond the substantive

64. 521 U.S. 507 (1997).
65. 42 U.S.C. §§ 2000bb to bb-4 (1994).
66. *Flores*, 521 U.S. at 515.
67. 494 U.S. 872 (1990).
68. *Id.* at 885.
69. 42 U.S.C. § 2000bb(b).
70. *See Flores*, 521 U.S. at 532–36.
71. *See id.* at 519.
72. *Id.* at 520, 536.
73. *See id.* at 519–20, 536.
74. *Id.* at 519.
75. *Id.* at 518.

protection of the Fourteenth Amendment, Congress must show, through the legislative record, that it was justified in its legislative response.[76]

Rejecting the contention that the RFRA was appropriate remedial legislation, the Court formulated a test for lower courts to apply in determining whether legislation was appropriate under Section 5.[77] For legislation to be "appropriate" under Section 5, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[78] In other words, the substantive rights Congress gives to litigants through Section 5 legislation must be substantially similar to the rights litigants would have if they brought suit under the Constitution. The means used by Congress to prevent the harm must be proportional to the harm Congress seeks to remedy.[79]

Using the congruence and proportionality test, courts must examine whether Congress enacted the challenged legislation to remedy or prevent state action that would likely be unconstitutional.[80] The legislation must enforce actual substantive guarantees of the Fourteenth Amendment or be a proportional response to previously documented constitutional violations.[81] If the legislation is found to mirror the protection of the Constitution, the inquiry is at an end. However, if the Court finds that the legislation goes beyond the substantive protection of the Fourteenth Amendment, the Court will look into the legislative record for evidence suggesting that Congress had justification for enacting such broad legislation.[82]

Applying the congruence and proportionality test to the RFRA's compelling interest test, the Court found that the RFRA imposed the "most demanding test known to constitutional law" on states to justify facially neutral laws that burdened religious practices.[83] By raising the level of judicial scrutiny for neutral laws to the compelling interest standard, the RFRA dramatically increased the protection normally given to religious entities beyond what such entities would receive under the

76. *See id.* at 531–32.

77. *See id.* at 519–20.

78. *Id.* at 520.

79. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88–89 (2000).

80. *Flores*, 521 U.S. at 532.

81. Thro, *supra* note 61, at 504.

82. *Kimel*, 528 U.S. at 88.

83. *Flores*, 521 U.S. at 534.

Constitution. The RFRA made otherwise constitutional state legislation unlawful, and therefore the Act expanded the substance of the Constitution.[84] In addition, the Court found no evidence in the legislative record that Congress had uncovered a widespread pattern of religious discrimination that would justify remedial legislation of any sort, let alone a broad statute like the RFRA.[85]

The Court dismissed the argument that its previous decision in *Katzenbach v. Morgan*[86] approved of a "one way ratchet" theory of congressional authority.[87] Under such a theory, Congress could permissibly expand but not dilute the substantive protection found in the Fourteenth Amendment.[88] In *Morgan*, the Court upheld a challenged provision of the Voting Rights Act (VRA)[89] as appropriate Section 5 legislation.[90] Interpreting *Morgan*, the *Flores* Court explained that the challenged VRA provision should be viewed either as a measure to remedy unconstitutional discrimination in governmental services or to remedy unconstitutional discrimination in establishing voter qualifications.[91] Congress enacted the VRA to remedy state conduct that would be independently unconstitutional.[92] Unlike the RFRA, the VRA did not give plaintiffs more substantive protection than found in the Constitution.[93] The RFRA could not be considered appropriate Section 5 legislation because it was not targeted at remedying unconstitutional conduct; therefore, states were immune from suit under the RFRA.[94]

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84. *See id.* at 532–34.

85. *Id.* at 531.

86. 384 U.S. 641 (1966).

87. *See Flores*, 521 U.S. at 527–28.

88. GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 261 (3d ed. 1996).

89. 42 U.S.C. § 1973b(e)(2) (1994) (providing that no person with sixth-grade education accredited by Puerto Rico could be prohibited from voting because of inability to read or write English).

90. *Morgan*, 384 U.S. at 646.

91. *Flores*, 521 U.S. at 528.

92. *See id.*

93. *See id.*

94. *Id.* at 532.

B. Flores *and* Seminole Tribe *Together: Restricting the Ability To Sue States*

The interplay between *Flores* and *Seminole Tribe* significantly reduces the ability of plaintiffs to sue states under a variety of federal statutes.[95] If Congress did not enact a statute pursuant to Section 5 by specifically enforcing substantive constitutional guarantees, then the statute cannot abrogate sovereign immunity.[96] Because the RFRA blatantly expanded the level of constitutional protection given to religious entities, it was unclear how the U.S. Supreme Court would apply the "congruence and proportionality" test when confronted with a closer case.

The Court's opportunity to expand upon its explanation of the test came in 1999. In that year, the Court decided three cases regarding Section 5 legislation and sovereign immunity.[97] In all three cases the Court held for the States without substantial discussion of the "congruence and proportionality" test.

The most extensive analysis of the congruence and proportionality test occurred in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*[98] In *Florida Prepaid*, a patentee brought an action against an agency of the State of Florida under provisions of the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act),[99] alleging patent infringement.[100] The Court held that the Patent Remedy Act was not appropriate Section 5 legislation.[101] Applying the *Flores* test, the Court determined that the Patent Remedy Act was not

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95. Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 769–72 (1998).

96. Thro, *supra* note 61, at 504.

97. *See generally* Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

98. 527 U.S. 627 (1999). In *Alden*, the Court found that the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1994), authorizing private actions against States, were based on Congress's Article I power and could not abrogate sovereign immunity. *Alden*, 527 U.S. at 712. In *College Savings Bank*, the Court dismissed the contention that the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (codified as amended in scattered sections of 15 U.S.C. (1994)), validly abrogated state sovereign immunity. *Coll. Sav. Bank*, 527 U.S. at 672–75.

99. Codified as amended in scattered sections of 7 and 35 U.S.C. (1994). In *Florida Prepaid*, the State of Florida challenged the validity of 35 U.S.C. §§ 271(h) and 296(a) (1994). Those provisions purported to abrogate state sovereign immunity for the purpose of patent infringement suits.

100. *Florida Prepaid*, 527 U.S. at 631.

101. *Id.* at 647.

designed to prevent or remedy unconstitutional state action.[102] The Court rejected the contention that the act was designed to enforce the Due Process Clause of the Fourteenth Amendment.[103] The Fourteenth Amendment offers no independent remedy to patent holders unless the infringement occurred without due process of law.[104] Congress had "barely considered" the remedies available to patent holders in state courts, and the Court saw no evidence that Congress intended to prevent due process violations.[105]

Like the legislative findings in *Flores*, Congress had not identified a pattern of patent infringement by the states to justify federal intervention, nor was there evidence of any historical deprivation of constitutional rights in this area of the law.[106] Due to the lack of evidence of constitutional violations by the states in the patent infringement area, the Patent Remedy Act could not be considered a proportional response designed to prevent unconstitutional state action.[107]

C. *The Court Held that the ADEA Was Inapplicable to the States*

In *Kimel v. Florida Board of Regents*,[108] the U.S. Supreme Court applied the congruence and proportionality test to civil rights legislation for the first time, holding the Age Discrimination in Employment Act (ADEA)[109] inapplicable to state employers.[110] U.S. Supreme Court decisions prior to *Kimel* had held that states could constitutionally discriminate on the basis of age if the discrimination was rationally related to a state interest.[111] The Court found that the ADEA impermissibly raised the level of judicial scrutiny applicable to age discrimination claims.[112] Furthermore, the legislative record lacked

102. *See id.* at 639–41.

103. *See id.* at 641–43.

104. *Id.* at 643.

105. *Id.*

106. *Id.* at 645–46.

107. *Id.* at 646.

108. 528 U.S. 62 (2000).

109. 29 U.S.C. §§ 621–634 (1994).

110. *Kimel*, 528 U.S. at 91.

111. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991); Vance v. Bradley, 440 U.S. 93, 97 (1979); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 316–17 (1976).

112. *Kimel*, 528 U.S. at 86–88.

evidence of state-enforced age discrimination, and therefore Congress was not justified in enacting such broad, substantive legislation.[113]

The plaintiffs in *Kimel*, employees of various state universities in Florida, brought suit alleging that the Florida Board of Regents had not fulfilled its promise to require universities to provide market adjustments to the salaries of eligible employees.[114] The plaintiffs contended that this failure to allocate funds had a disparate impact on the base pay of older employees and therefore violated the ADEA.[115] The ADEA makes it unlawful for employers, including state employers, "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[116] The Eleventh Circuit held that the ADEA was not appropriate Section 5 legislation[117] and the U.S. Supreme Court granted certiorari to resolve the split that had emerged in the circuit courts.[118]

Applying the congruence and proportionality test, the Court examined whether classifications based on age generally violate the Equal Protection Clause.[119] The Court had previously decided three cases regarding the constitutionality of age classifications.[120] In each of those cases, the Court had held that the age classifications were constitutional.[121] The legislatures had had a rational basis[122] for each of the classifications at issue.[123] In *Kimel*, the Court specifically

113. *Id.* at 89–91.

114. *Id.* at 69–70.

115. *Id.* at 70.

116. 29 U.S.C. § 623(a)(1) (1994).

117. *Kimel*, 528 U.S. at 71.

118. *Id.* The Eighth Circuit had previously held that the ADEA did not validly abrogate sovereign immunity. Humenansky v. Regents of Univ. of Minn., 152 F.3d 822, 827–28 (8th Cir. 1998). Six other circuit courts had found the ADEA to be appropriate Section 5 legislation. *See* Cooper v. N.Y. State Office of Mental Health, 162 F.3d 770 (2d Cir. 1998); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger v. Bd. of Regents, 154 F.3d 296 (6th Cir. 1998); Keeton v. Univ. of Nev. System, 150 F.3d 1055 (9th Cir. 1998); Scott v. Univ. of Miss., 148 F.3d 493 (5th Cir. 1998); Goshtasby v. Bd. of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998).

119. *See Kimel*, 528 U.S. at 82–84.

120. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

121. *See supra* note 111 and accompanying text.

122. When a statute is evaluated under a "rational basis" standard, the court will accept almost any justification even if it was not the one that motivated the legislature when writing the statute. *See* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

123. *See Kimel*, 528 U.S. at 84–86.

distinguished governmental age classifications from those based on race or gender under which the government must show a substantial or compelling interest to justify the classification.[124] Unlike race or gender, states are allowed to discriminate on the basis of age if the classification is rationally related to a legitimate state interest.[125]

In *Kimel*, the Court found the ADEA to lack the necessary "congruence and proportionality" required for appropriate Section 5 legislation.[126] The Court noted that a substantial number of state employment classifications that would not violate the Constitution would be unlawful under the ADEA.[127] The Act also imposed a higher level of judicial scrutiny on age classifications than required by equal protection analysis.[128] The Equal Protection Clause allows broad, general classifications based on age if a rational basis exists for the action.[129] To the contrary, the ADEA required the employer to make individualized determinations regarding whether a specific older employee was suitable for employment.[130] The ADEA therefore imposed a substantially heavier burden than rational basis review on state employers seeking to justify classifications based on age.[131] The ADEA subjected age classifications to a higher level of judicial scrutiny than the Equal Protection Clause, and therefore it impermissibly expanded the substance of constitutional protection.

After finding that the ADEA expanded the substance of the Fourteenth Amendment, the Court looked for evidence in the legislative record that would justify the enactment of such broad legislation.[132] The Court found that Congress had uncovered inconsequential evidence of age

124. *Id.* at 83–84.
125. *See id.* at 84.
126. *Id.* at 82–83.
127. *Id.* at 85–86.
128. *See id.* at 86–88.
129. *See id.* at 87–88.
130. *Id.* at 87.
131. *Id.* at 87–88.
132. *See id.* at 88–91.

discrimination by state employers.[133] The limited findings made by Congress only related to discrimination that would not have amounted to equal protection violations, meaning that the age classifications were rationally related to legitimate state interests.[134] Although Congress discovered age discrimination that was committed by private employers, this evidence was wholly irrelevant to whether the states had engaged in discrimination.[135] Thus, the Court determined that the evidence before Congress did not justify the broad legislative response as applied to the states.[136] The ADEA could not be justified as a proportional response to discrimination by the states against older Americans and was inappropriate Section 5 legislation.[137]

D. Lower Court Challenges to the Equal Pay Act

The EPA has not been immune from challenges to its validity as Section 5 legislation. Prior to *Kimel*, the only two circuit courts of appeal to consider whether the EPA was appropriate Section 5 legislation under the congruence and proportionality test upheld it as such.[138] The U.S. Supreme Court vacated and remanded both decisions for reconsideration in light of *Kimel*.[139]

Pre-*Kimel* challenges to the validity of the EPA as Section 5 legislation primarily focused on the fact that an EPA plaintiff need not prove discriminatory intent.[140] For example, one district court held that

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133. *Id.*

134. *See id.* at 89–91.

135. *See id.* at 90–91.

136. *Id.* at 91.

137. *See id.* at 91–92.

138. *See* Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999), *vacated and remanded by* 528 U.S. 1111 (2000); Varner v. Ill. State Univ., 150 F.3d 706 (7th Cir. 1998), *vacated and remanded by* 528 U.S. 1110 (2000); *see also* Timmer v. Mich. Dep't of Commerce, 104 F.3d 833, 842 (6th Cir. 1997) (upholding EPA as appropriate Section 5 legislation prior to *Flores*).

139. *See* State Univ. of N.Y. v. Anderson, 528 U.S. 1111 (2000); Ill. State Univ. v. Varner,.

140. *See Varner*, 150 F.3d at 714–15; *see also* Larry v. Bd. of Trustees, 975 F. Supp. 1447, 1449–50 (N.D. Ala. 1997) *rev'd in part, vacated in part*, 211 F.3d 598 (11th Cir. 2000). *Larry* was reversed and vacated by the Eleventh Circuit Court of Appeals two weeks after its decision in *Hundertmark v. Florida Department of Transportation*, 205 F.3d 1272 (11th Cir. 2000). *See Larry*, 211 F.3d 598.

the EPA was invalid Section 5 legislation on the sole basis that the EPA does not require the plaintiff to prove the discriminatory effects were the result of a state decision-maker's discriminatory intent.[141] That court found the EPA lacked the intent element required in equal protection claims, so it could not be viewed as a statute enforcing the Equal Protection Clause.[142] Other decisions dismissed this line of attack stating that the EPA was enacted to prevent unconstitutional discrimination and that Congress can forbid conduct otherwise permissible to prevent or remedy unconstitutional conduct.[143]

Three circuit courts of appeal have rendered decisions in suits challenging the EPA since the *Kimel* decision.[144] In each case, the court has held that the EPA is appropriate Section 5 legislation even in light of *Kimel*, although each court's reasoning and depth of analysis has varied. In *Varner v. Illinois State University*,[145] the Seventh Circuit disagreed with the defendant's contention that removing the burden of proving intent from an EPA plaintiff renders the EPA incongruent with the Equal Protection Clause.[146] The court noted that compared to the ADEA, the EPA was narrow in scope,[147] allowed employers a greater opportunity to escape liability,[148] and targeted unconstitutional state action.[149] The court found that in light of the prevalent problem of unconstitutional gender discrimination, the enacted remedial scheme was sufficiently congruent and proportional to the Fourteenth Amendment to be considered appropriate Section 5 legislation.[150]

With only brief analysis, the Eleventh Circuit in *Hundertmark v. Florida Department of Transportation*[151] held that the EPA is congruent

141. *See Larry*, 975 F. Supp. at 1449–50.

142. *See id.*

143. *See Varner*, 150 F.3d at 715–17; *see also* Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999), *vacated*, 528 U.S. 1111 (2000).

144. Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000); *Hundertmark*, 205 F.3d 1272; Varner v. Ill. State. Univ., 226 F.3d 927 (7th Cir. 2000).

145. 226 F.3d 927 (7th Cir. 2000). In its first disposition of *Varner*, the Seventh Circuit Court of Appeals had held that the EPA was appropriate Section 5 legislation. *See Varner*, 150 F.3d 706. The U.S. Supreme Court vacated and remanded the decision for reconsideration in light of *Kimel*. *See Varner*, 528 U.S. 1110, 1110 (2000).

146. *See Varner*, 226 F.3d at 933–34.

147. *See id.* at 933.

148. *See id.* at 934.

149. *See id.* at 934–35.

150. *See id.* at 935–36.

151. 205 F.3d 1272 (11th Cir. 2000).

with the Equal Protection Clause solely because the aim of the EPA is to eradicate intentional gender discrimination.[152] Most of the court's per curiam opinion was dedicated to describing how gender discrimination is a "problem of national import" and how, unlike age discrimination, gender discrimination is generally unconstitutional.[153] The opinion did not discuss the different burdens of proof in EPA and Equal Protection Clause litigation, nor did it question whether Congress made sufficient findings of gender discrimination in the *public* sector before extending the EPA to the states.[154]

The Sixth Circuit in *Kovacevich v. Kent State University*,[155] also with limited discussion, upheld the EPA as appropriate Section 5 legislation.[156] Relying heavily on dicta from *Kimel*,[157] the court concluded that unlike the ADEA, the EPA does not prohibit substantially more state employment decisions than would likely be held unconstitutional.[158] The court emphasized that in the Sixth Circuit EPA liability is equated with intentional gender discrimination and also noted that the affirmative defenses available to employers reduce the possibility that constitutional conduct is held unlawful under the EPA.[159]

IV. GENDER DISCRIMINATION AND THE FOURTEENTH AMENDMENT

When analyzing whether the EPA is appropriate Section 5 legislation, a court must determine whether the EPA renders otherwise constitutional conduct unlawful or if it simply remedies unconstitutional state action. Therefore, courts must examine whether the conduct the EPA conceivably targets would violate the Fourteenth Amendment, specifically the Equal Protection Clause. Because the EPA is targeted at ending differential rates of pay based solely on an employee's gender,[160]

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152. *See id.* at 1276–77.

153. *See id.*

154. *See id.*

155. 224 F.3d 806 (6th Cir. 2000).

156. *Id.* at 821.

157. *See id.* at 819 (placing special emphasis on language in *Kimel* contrasting age classifications with those based on gender).

158. *See id.* at 819–20.

159. *See id.* at 820.

160. *See* 29 U.S.C. § 206(d)(1) (1994).

the appropriate initial inquiry is to what extent gender-based wage discrimination violates the Fourteenth Amendment.[161]

The Fourteenth Amendment does not preclude state governments from classifying groups of people.[162] When determining the constitutionality of a legislative classification a court will normally ask whether the classification is directed at the achievement of a legitimate governmental purpose and whether it rationally furthers that purpose.[163] Courts examining the constitutionality of legislation under this "rational basis" standard are extremely deferential to the judgment of legislatures.[164] If any conceivable set of facts could explain the basis for the legislation under the rational basis standard, a court will uphold the legislation as proper under the Fourteenth Amendment.[165]

If legislatures classify individuals primarily on the basis of immutable characteristics such as race[166] and gender,[167] judicial scrutiny is heightened and the state bears a much heavier burden to justify the classification.[168] If a state facially discriminates on the basis of gender, it has the burden of providing an "'exceedingly persuasive'" justification for the discriminatory classification.[169] The state can meet this high standard only if the discriminatory classification "'serves 'important governmental objectives and . . . [is] substantially related to the achievement of those objectives.'"'[170] Any classifications used to "create or perpetuate the legal, social, and economic inferiority of women" are invalid.[171] If a

161. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (making initial inquiry into whether and under what circumstances age discrimination violates Fourteenth Amendment).

162. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 271–72 (1979).

163. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

164. *See* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

165. *See id.*

166. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944). Racial classifications are subject to "strict scrutiny," meaning they can only be upheld if they are justified by a compelling state interest and are narrowly tailored to further that interest. *See* Bush v. Vera, 517 U.S. 952, 976 (1996).

167. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996).

168. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 272–73 (1979).

169. *Virginia*, 515 U.S. at 533 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

170. *Id.* (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))).

171. *Id.* at 534.

state uses gender to classify individuals for purposes of distributing benefits or burdens, such action will rarely be upheld.[172]

Gender-neutral classifications that have discriminatory effects on women also violate the Equal Protection Clause, but only if enacted with a discriminatory purpose.[173] Unlike facially gender-specific classifications, courts will not presume discriminatory intent behind such classifications, and the burden of proof remains on the plaintiff to prove the state action was enacted with discriminatory intent.[174] Proof of the discriminatory effect alone will not be enough to make a prima facie showing of intent.[175] If a plaintiff makes a prima facie showing that gender was a motivating factor in the decision-making process, the burden shifts to the defendant to establish that the same decision at issue would have been made even if gender had not been considered.[176]

The "heightened scrutiny" test applied to gender-specific classifications also applies to neutral classifications where the plaintiff proves discriminatory intent.[177] However, if gender discrimination is proven to be a motivating factor behind state action that has a discriminatory effect on women, the state cannot justify it under the heightened scrutiny test described above. For example, a facially neutral pay scale administered by state officials in a discriminatory fashion would violate the Equal Protection Clause if the plaintiff proved that gender and not a legitimate non-discriminatory factor was the basis behind the discriminatory treatment.[178]

V. COURTS SHOULD UPHOLD THE EPA AS APPROPRIATE SECTION 5 LEGISLATION

The EPA is congruent and proportional with the Equal Protection Clause of the Fourteenth Amendment and therefore qualifies as appropriate Section 5 legislation. Unlike recent congressional acts struck down as inappropriate Section 5 legislation, the EPA does not grant

172. *See id.* at 533.

173. *See Feeney*, 442 U.S. at 273–74.

174. *See id.* at 276.

175. *See* Washington v. Davis, 426 U.S. 229, 241–42 (1976).

176. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977).

177. *See Feeney*, 442 U.S. at 272.

178. *See id.* at 276 (stating that dispositive question for determining whether Equal Protection Clause was violated was whether facially neutral statute was enacted with discriminatory purpose).

plaintiffs more substantive rights than the Constitution. The EPA also does not raise the level of scrutiny given to gender-based classifications, and the EPA is congruent with the Equal Protection Clause even though a plaintiff need not prove discriminatory intent to prevail. Overall, due to the narrow scope of the EPA, it is a proportional measure to combat gender-based wage discrimination. In addition, Congress made the EPA applicable to the states in response to substantial evidence that gender-based wage discrimination was a serious problem in public employment.[179] Thus, the EPA was enacted for a remedial purpose and is valid Section 5 legislation.

A. The EPA Satisfies the Congruence and Proportionality Test

Under the congruence and proportionality test, a court must determine whether the EPA targets the prevention of unconstitutional conduct or if it impermissibly attempts to redefine the substance of constitutional protection.[180] The EPA is congruent and proportional to the Equal Protection Clause and is appropriate Section 5 legislation for three reasons. First, the EPA does not subject gender-based classifications to a higher level of judicial scrutiny than the Equal Protection Clause. Second, although an EPA plaintiff need not prove discriminatory intent to prevail, the affirmative defenses available under the EPA make it unlikely in practice that employers who lack the discriminatory intent necessary for an equal protection violation will be held liable under the EPA. Third, the EPA is very narrow in scope and is limited to preventing unequal compensation of men and women who do equal work.

1. The EPA Does Not Mandate Closer Scrutiny of Gender-Based Classifications than the Equal Protection Clause

The EPA does not impose a higher level of judicial scrutiny on gender-based classifications than would be given to such claims if challenged under the Equal Protection Clause.[181] Under the Equal

179. *See infra* Part V.B.

180. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000).

181. *See* Varner v. Ill. State Univ., 226 F.3d 927, 935 (7th Cir. 2000) (asserting that in some ways Equal Protection Clause standard of liability is even more demanding than EPA); *see also* Kovacevich v. Kent State Univ., 224 F.3d 806, 820 (6th Cir. 2000) ("The standard for liability under the EPA closely approximates the equal protection analysis for state-sponsored gender discrimination."). In *Hundertmark v. Florida Department of Transportation*, 205 F.3d 1272 (11th

Protection Clause, courts analyze gender classifications with a heightened level of scrutiny.[182] Because of the heightened scrutiny given to gender-based classifications, it is unlikely that courts would find any gender-based wage structure unlawful under the EPA that would not also be independently unconstitutional.

A state wage structure expressly stating that females will be paid less than males for doing the same work would clearly violate the EPA.[183] Proof of a facially discriminatory policy that required paying men and women unequally for equal work would easily satisfy the EPA's prima facie requirements.[184] The government employer would then have the burden of proving that the differential pay was based on a factor other than gender.[185] The employer could not successfully invoke this defense because by definition a gender-specific classification is based on gender.[186]

Assuming an analogous factual situation litigated under the Fourteenth Amendment, the only way the state would not violate the Equal Protection Clause is if it had an "exceedingly persuasive justification" for the policy.[187] A state is unlikely to proffer any justification for a pay classification requiring unequal pay for men and women who did equal work persuasive enough for the U.S. Supreme Court to uphold the pay classification as constitutional. The Equal Protection Clause offers women extensive protection from gender-based classifications enacted by states and states carry a heavy burden to justify them.

Cir. 2000), the court concluded that the EPA was congruent with the U.S. Supreme Court's standard for reviewing cases under the Equal Protection Clause although the court provided nominal justification for its position. *See id.* at 1277.

182. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

183. *See* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 704 (1978) (describing employment policy requiring women to contribute more to pension fund than men on sole basis that they are women); *see also Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor*, 92d Cong. 433 (1971) (describing public school salary schedule in Salina, Kansas, that expressly paid male teachers more than female teachers).

184. *See supra* note 31 and accompanying text.

185. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974).

186. Judicial interpretations of the EPA suggest that gender "can provide no part of the basis for the wage differential." ZIMMER ET AL., *supra* note 2, at 1007.

187. *See Virginia*, 518 U.S. at 533. "Exceedingly persuasive justification" means the state must prove that the discriminatory classification "'serves 'important governmental objectives and . . . [is] substantially related to the achievement of those objectives.'" *Id.* (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))).

Alternatively, a state could argue that even though gender classifications are subject to heightened scrutiny, the EPA still holds employers to a higher standard than the Fourteenth Amendment.[188] Under the EPA, wage structures that pay women unequally based on gender are illegal regardless of whether an important governmental purpose is served.[189] Under the Equal Protection Clause, classifications based on gender are presumptively unconstitutional, but the presumption is rebuttable. For example, to justify the classification under the "exceedingly persuasive justification" test,[190] the state has the opportunity to show that the classification serves "'important governmental objectives'" and is "'substantially related to the achievement of those objectives.'"[191]

Such an argument underestimates the burden on an employer to justify a gender-based classification under the Equal Protection Clause. Courts reserve the most stringent level of judicial scrutiny for state classifications that discriminate on the basis of race. However, as a practical matter, the judicial scrutiny given to gender classifications is much more similar to the "strict scrutiny"[192] given to racial classifications than to the extremely deferential "rational basis"[193] standard used to evaluate all other legislative decisions.[194] In fact, in his dissent in *United States v. Virginia*,[195] Justice Scalia described the majority opinion as an

188. *But see* Varner v. Ill. State Univ., 226 F.3d 927, 935 (7th Cir. 2000) ("The Constitution demands an exceedingly persuasive justification for gender discrimination, while the [EPA] only requires an employer to offer some legitimate reason for a wage disparity other than sex.").

189. *See* 29 U.S.C. § 206(d)(1) (1994) (stating that wage differential must be based on "any other factor other than sex").

190. *See supra* note 170 and accompanying text.

191. *See Virginia*, 518 U.S. at 533. (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))).

192. Under "strict scrutiny" review, the government must have a compelling state interest to justify the racial classification and there must be no less restrictive means to accomplish the objective. *See* Bush v. Vera, 517 U.S. 952, 976 (1996). Facially race-based classifications will almost always fail "strict scrutiny" and therefore be held unconstitutional. *See* STONE ET AL., *supra* note 88, at 601. *But see* Korematsu v. United States, 323 U.S. 214, 217–19 (1944) (holding national-security concerns enough to justify race-based classification).

193. *See supra* note 122.

194. Gender classifications are highly scrutinized because they are likely to reflect "archaic and overbroad" generalizations about women. Schlesinger v. Ballard, 419 U.S. 498, 507–08 (1975). However, gender classifications are not scrutinized as highly as race because, unlike with race, there are cases where a legitimate justification for the disparate treatment of men and women exists. *See* Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981).

195. 518 U.S. 515 (1996).

application of "strict scrutiny" to gender classifications.[196] A number of commentators have also noted that, in practice, there is little difference between the level of scrutiny given to gender and race classifications after *Virginia*.[197] This similarity is significant because classifications based on race are considered almost impossible to justify.[198]

States engaging in unequal gender-based pay are unlikely to have any explanation that would satisfy the exceedingly persuasive justification test. A state would have a difficult, if not impossible task explaining why underpaying a woman who did equal work as a man served an important governmental objective. A court would certainly classify any offered justification as rooted in the stereotypical and overbroad generalizations that are impermissible under the Equal Protection analysis of gender-based classifications.[199]

Finally, the EPA does not suffer from the primary problem the Court found with the ADEA in *Kimel v. Florida Board of Regents*,[200] which was that the ADEA effectively raised the level of judicial scrutiny given to age classifications.[201] The ADEA imposed a level of scrutiny far more rigorous than the "rational basis" review normally given to presumptively constitutional age classifications.[202] States may constitutionally restrict employment opportunity for individuals above a certain age so long as a rational basis exists for the action.[203] The ADEA required courts to apply a higher level of judicial scrutiny than the Constitution would, making such otherwise constitutional age classifications presumptively illegal.[204]

In summary, the EPA does not raise the level of constitutional scrutiny given to gender classifications as the ADEA did with age classifications. Unlike age classifications, the level of scrutiny given to gender

196. *See Virginia*, 518 U.S. at 574–75 (Scalia, J., dissenting).

197. *See* Barbara A. Lee, *Discrimination Against Students in Higher Education: A Review of the 1996 Judicial Decisions*, 24 J.C. & U.L. 619, 622 (1998); Carrie Corcoran, Comment, *Single-Sex Education After* VMI*: Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987, 1010 (1997).

198. No facially race-specific statute that disadvantaged a racial minority has been upheld since *Korematsu v. United States*, 323 U.S. 214 (1944). *See* STONE ET AL., *supra* note 88, at 601.

199. *See Virginia*, 518 U.S. at 533–34.

200. 528 U.S. 62 (2000).

201. *See* Varner v. Ill. State Univ., 226 F.3d 927, 934–35 (7th Cir. 2000).

202. *See supra* note 131 and accompanying text.

203. *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

204. *See Kimel*, 528 U.S. at 86.

classifications under the Equal Protection Clause is so high that such classifications would rarely be constitutional.[205] The EPA does not impose a higher level of judicial scrutiny on gender-based classifications than would be given to such claims if challenged under the Equal Protection Clause.

2. *The EPA Is Congruent with the Equal Protection Clause Even Though an EPA Plaintiff Need Not Prove Discriminatory Intent To Prevail*

A plaintiff does not have the burden of proving discriminatory intent to prevail under the EPA. That fact notwithstanding, the EPA is congruent with the Equal Protection Clause because the affirmative defenses available to employers make it unlikely that employers will be held liable under the EPA unless they had a discriminatory motive behind their pay structure. While the EPA requires no prima facie showing of intent, placing the burden of proof on the employer in EPA litigation does not make it inappropriate Section 5 legislation.[206] The shifting of the burden of proof does not change the fact that employers who have legitimate non-discriminatory justifications for their wage structures will escape liability under the EPA.

When plaintiffs challenge a facially neutral pay structure that has the effect of discriminating against women[207] under the Equal Protection Clause, the important issue is not the level of judicial scrutiny given to the pay structure, but whether the plaintiff can prove that it was enacted with discriminatory intent.[208] In contrast, a plaintiff does not have to

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205. *See id*

206. The burden-shifting issue was not addressed in *Hundertmark v. Florida Department of Transportation*, 205 F.3d 1272 (11th Cir. 2000). In *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000), the court did not specifically discuss whether the burden-shifting effect of the EPA affects its congruence to the Equal Protection Clause. In *Varner v. Illinois State University*, 226 F.3d 927 (7th Cir. 2000), the state's primary argument was based on the burden-shifting effect of the EPA. *See id.* at 934. The court agreed that the requirements of the EPA did not mirror the Equal Protection Clause and that some constitutional conduct was prohibited under the EPA. *Id.* The court noted, however, that the EPA's affirmative defenses provide sufficient opportunity for an innocent employer to escape liability. *Id.*

207. *See, e.g.*, EEOC v. Del. Dep't of Health & Social Services, 865 F.2d 1408, 1414–16 (3d Cir. 1989) (showing that female nurses were paid less than male physician's assistants even though their jobs entailed equal work satisfies prima facie case under EPA).

208. *See supra* note 173 and accompanying text.

prove discriminatory intent to prevail under the EPA.[209] In an EPA claim, the defendant has the burden of persuading the trier of fact that the pay structure was based on legitimate, non-discriminatory factors.

Notwithstanding the differences in the plaintiff's prima facie case and in the defendant's burden of proof in EPA and equal protection claims, the EPA is appropriate Section 5 legislation. Although the plaintiff in an EPA claim does not have to prove discriminatory intent to prevail, the structure of EPA litigation ensures that employers will only be held liable when the court finds an impermissible motive of gender discrimination behind the pay structure.[210] The EPA requires the employer to show that the wage differential was in fact the result of non-discriminatory intentions.[211] By allowing the employer to escape liability with a showing that any "factor other than sex" motivated the wage structure,[212] all possible motives for the wage differential other than gender will be eliminated and a court will be left with essentially a finding of gender-based discrimination.[213] By definition, when a court finds an employer's conduct to be based on gender and not motivated by non-discriminatory reasons, the court has found that the employer intended to discriminate.[214]

The EPA is conducive to uncovering the same discriminatory intent necessary for Equal Protection violations. While the EPA does not expressly require evidence of intent, what separates many successful EPA defendants from unsuccessful ones is whether or not the court has reason to suspect intent to discriminate.[215] Therefore, the lack of a prima facie intent requirement should not be enough to make the EPA inappropriate Section 5 legislation.

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209. *See supra* note 36 and accompanying text.

210. *See Varner*, 226 F.3d at 934.

211. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974).

212. Facially pretextual justifications offered by employers will not satisfy the fourth affirmative defense. *See* Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982); *supra* note 34 and accompanying text.

213. *See Varner*, 226 F.3d at 934.

214. In *Korte v. Diemer*, 909 F.2d 954 (6th Cir. 1990), the court held that a finding of liability under the EPA could be used in a later Title VII suit as evidence of intentional discrimination. *Id.* at 959. It noted that conduct found to violate the EPA could not be said in a later suit to lack intent to discriminate based on gender. *Id.*; *see also* Kovacevich v. Kent State Univ., 224 F.3d 806, 820 (6th Cir. 2000) (equating EPA liability with Title VII liability for intentional gender discrimination).

215. *See* ZIMMER ET AL., *supra* note 2, at 1008; *see also* Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 747–49 (1986) (describing cases that suggest intent to discriminate is touchstone of liability under EPA).

The EPA's structure prevents employers from being held liable for constitutionally permissible behavior despite the placement of the risk of non-persuasion on the employer. To ensure that the EPA would not interfere with legitimate pay structures, Congress gave employers four affirmative defenses to avoid liability if the wage discrimination was not based on gender.[216] The fourth affirmative defense states that if the wage differential was based on "any other factor other than sex" the employer will escape liability.[217]

While courts have not interpreted the EPA's fourth affirmative defense to literally mean that any factor, no matter how obviously pretextual, will justify the wage differential, courts are deferential to an employer's stated purpose.[218] Courts "are not permitted to 'substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system, so long as it does not discriminate on the basis of sex."[219] The broad interpretation given to this affirmative defense makes it unlikely that a substantial number of employers would be held liable under the EPA for conduct that would not violate the Fourteenth Amendment.[220]

The fact that the state bears the risk of non-persuasion[221] in EPA litigation does not compel the result that the EPA is incongruent with the Fourteenth Amendment. The U.S. Supreme Court has granted Congress wide latitude in determining where the line between remedial and substantive legislation lies.[222] If Congress enacts legislation to prevent or remedy unconstitutional conduct, it may simultaneously prohibit a "somewhat broader swath of conduct" including conduct not otherwise unconstitutional.[223] Chief Justice Rehnquist, who has a very narrow view

216. *See supra* note 33 and accompanying text.

217. *See* 29 U.S.C. § 206(d)(1) (1994).

218. *See* Kouba v. Allstate Ins. Co., 691 F.2d 873, 876–77 (9th Cir. 1982).

219. County of Wash. v. Gunther, 452 U.S. 161, 171 (1981).

220. *See* Nina Joan Kimbell, *Not Just Any 'Factor Other Than Sex': An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 320–21 (1984) (arguing that broad interpretations of EPA have limited its remedial effectiveness).

221. The party who bears the burden of proof on an issue bears the risk that the trier of fact will not be persuaded. *See* 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 410 (5th ed. 1999).

222. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

223. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); *supra* note 75 and accompanying text.

of what constitutes appropriate Section 5 legislation,[224] has suggested that placing the burden of proof on the government is permissible in the Section 5 context when legislation is otherwise focused on preventing unconstitutional conduct.[225]

The significance of placing the risk of non-persuasion on the state is limited to cases where the trier of fact remains uncertain who should prevail after all the evidence is presented.[226] The law needs one party to bear the risk of non-persuasion only because a decision must be made; litigation cannot end in a tie.[227] Who bears the risk is often a somewhat arbitrary judicial or legislative determination guided by principles of fairness and public policy.[228] Congress presumably felt that it would be more fair for the employer shown to have a policy of paying men and women unequally for equal work to bear the risk of non-persuasion. Considering that the purpose of the EPA is to eradicate gender-based wage discrimination,[229] as well as the difficulties inherent in proving subjective discriminatory intent,[230] and the broad defenses available to employers,[231] Congress justifiably placed the risk of non-persuasion on the employer instead of the employee.

Congress narrowly defined the substantive elements of the EPA so that only employers who pay discriminatory wages on the basis of gender are held liable.[232] Because the structure of EPA litigation often brings discriminatory motives to the forefront, the lack of a prima facie intent requirement should not be enough to make the EPA incongruent with the Fourteenth Amendment. Additionally, the congressional decision to shift the risk of non-persuasion to the employer is within the permissible bounds of the Section 5 power.

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224. Chief Justice Rehnquist has authored many of the recent decisions limiting Congress's ability to legislate under Section 5. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

225. City of Rome v. United States, 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting) ("Congress could properly conclude that . . . it was necessary to place the burden of proving lack of discriminatory purpose on the [government].").

226. *See* STRONG ET AL., *supra* note 221, at 410.

227. *See id.*

228. *See* Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11–12 (1959).

229. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

230. *See* David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 298 (1998).

231. *See supra* note 34 and accompanying text.

232. County of Wash. v. Gunther, 452 U.S. 161, 170 (1981).

3. *The EPA Is a Proportional Measure To Combat Gender-Based Wage Discrimination*

Congress narrowly limited the scope of the EPA to prevent only unconstitutional gender-based wage discrimination.[233] Legislation that is broadly over-inclusive is less likely to be a proportional response to the specific unconstitutional conduct at issue.[234] The EPA is very narrow in scope and is a proportional measure to combat gender-based wage discrimination.

The EPA is focused on only one area of state responsibility: the relationship between state employer and employee. The EPA only regulates the compensation aspect of public employment. It does not deal with hiring, promotions, firing, or other wage discrimination issues relating to unequal or comparable work.[235] It addresses only the rate of compensation between two employees who do equal work.[236] This extremely narrow scope supports a finding that the EPA is a proportional response to gender-based wage discrimination.[237]

Unlike the EPA, previous statutes challenged as inappropriate Section 5 legislation have broadly intruded into traditional areas of state responsibility.[238] The Religious Freedom Restoration Act (RFRA)[239] was a broad intrusion into the state legislative process.[240] The RFRA affected potentially every piece of legislation that a state enacted. If state legislation would possibly burden a religious entity, the statute would have to satisfy the stringent "compelling interest" test required by the RFRA.[241] Similarly, the ADEA[242] intruded on all areas of state

233. Thro, *supra* note 61, at 505.

234. *Compare* South Carolina v. Katzenbach, 383 U.S. 301 (1966), *and* Katzenbach v. Morgan, 384 U.S. 641 (1961), *with* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000), *and* City of Boerne v. Flores, 521 U.S. 507 (1997).

235. Title VII protects employees from discrimination in these other aspects of the employment relationship. 42 U.S.C. §§ 2000e to e(17) (1994).

236. ZIMMER ET AL., *supra* note 2, at 988.

237. Post-*Kimel* circuit court opinions have not emphasized the narrow scope of the EPA. It is clear, however, that the U.S. Supreme Court often focuses its attention on the scope of a challenged provision. *See supra* note 234 and accompanying text.

238. *See, e.g.*, *Kimel*, 528 U.S. at 85–86; *Flores*, 521 U.S. at 532.

239. 42 U.S.C. §§ 2000bb to bb-4.

240. *Flores*, 521 U.S. at 534.

241. *Id.* at 533–34.

242. 29 U.S.C. §§ 621–634 (1994).

employment[243] by imposing requirements on every aspect of the relationship between state employer and employee.[244]

The EPA does not reach more broadly than is necessary to combat gender-based wage discrimination. The EPA only regulates the wages of individuals who do equal work but are paid unequally. It does not regulate other aspects of the employment relationship, or other state functions. Due to the EPA's narrow reach and scope, courts should consider the statute a proportional measure to combat unconstitutional discrimination.

B. *Congress was Justified in Applying the EPA to States Due to Substantial Evidence of Gender-Based Wage Discrimination by State Employers*

Because it gathered substantial evidence that state employers engaged in gender-based wage discrimination, Congress was justified in applying the EPA to the states.[245] Testimony heard throughout the early 1970s gave Congress substantial evidence that gender-based wage discrimination was a serious problem in public employment.[246] This evidence strengthens the argument that Congress was justified in applying the protection of the EPA to state employees.

In its recent re-evaluation of sovereign immunity in *Flores*, *Florida Prepaid*, and *Kimel*, the Court has looked into the legislative record for evidence that the legislative response at issue was necessary to prevent constitutional violations by the states.[247] "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted

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243. *See Kimel*, 528 U.S. at 85–87.

244. *See* 29 U.S.C. § 623(a)(1).

245. Of the post-*Kimel* opinions, only *Varner v. Illinois State University*, 226 F.3d 927 (7th Cir. 2000), adequately addressed the legislative findings issue. *Id.* at 935 (citing Congress's clear understanding of state-enforced gender discrimination). In *Hundertmark v. Florida Department of Transportation*, 205 F.3d 1272 (11th Cir. 2000), the court stated that the lack of findings with respect to wage discrimination in the public sector was not dispositive because "gender discrimination is a problem of national import." *Id.* at 1276. This directly contradicts language in *Kimel* stating that evidence of discrimination in the private sector is irrelevant when determining whether legislation is appropriate under Section 5. *See* Kimel, 528 U.S. at 90. The court in *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000) did not address the legislative findings of Congress.

246. *Infra* note 262.

247. *Kimel*, 528 U.S. at 88–91; *Florida Prepaid*, 527 U.S. 639–40; *Flores*, 521 U.S. at 530–31.

response to another, lesser one."[248] Courts must look to the legislative record for evidence showing whether Congress was justified in enacting the purportedly remedial statute.[249]

Prior to *Kimel*, lower courts upheld the EPA as appropriate Section 5 legislation based on the extensive evidence placed before Congress that *private* employers engaged in a long history of gender-based wage discrimination.[250] This type of evidence, however, is irrelevant to whether Congress was justified in applying the EPA to the states.[251] In *Kimel*, the U.S. Supreme Court expressly noted that a congressional finding of "substantial age discrimination in the private sector . . . is beside the point."[252] The inquiry into the legislative record should be limited only to evidence placed before Congress that the states themselves were engaged in unconstitutional discrimination.[253]

This inquiry need not be limited only to the hearings relating specifically to the EPA. When considering whether the EPA is appropriate Section 5 legislation, the Court may look to all the evidence placed before Congress to see if it could have rationally concluded that there was a problem.[254] Courts cannot ignore the substantial evidence that Congress had gathered in hearings relating to the other legislation enacted in the early 1970s that dealt with gender-discrimination in public employment. Because members of Congress may use information learned from one set of hearings or debates as a basis for enacting other legislation,[255] it is appropriate to consider the full range of evidence Congress heard regarding the extensive nature of sex discrimination by the states.

Before enacting the Fair Labor Standards Amendments, Congress heard extensive testimony regarding the need for the Fair Labor

248. *Flores*, 521 U.S. at 530 (citations omitted).

249. *Id.*

250. *See, e.g.*, Varner v. Ill. State Univ., 150 F.3d 706, 716–17 (7th Cir. 1998).

251. *Kimel*, 528 U.S. at 90. Lack of legislative findings is not determinative of the Section 5 inquiry. *Id.* at 91.

252. *Id.* at 90.

253. *See id.*

254. *E.g.*, Fullilove v. Klutznick, 448 U.S. 448, 502–03 (1980) (Powell, J., concurring) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.").

255. *Id.*

256. 29 U.S.C. §§ 201–219 (1994).

Standards Act,[256] of which the EPA is an amendment, to be applied to the states.[257] The majority of the evidence Congress heard related to the need for extending the reach of the minimum-wage and child-labor provisions.[258] However, Congress also called numerous witnesses to testify to the pervasive nature of gender-based wage discrimination in public schools and state universities, and therefore the need for making the EPA applicable to public employers.[259] This evidence showed that, especially in the university and public school settings, women were paid less than men even though they performed equal work and that this wage disparity was attributable to intentional gender discrimination.[260] The evidence showed that the problem was present in universities throughout the nation.[261]

In addition to the hearings relating specifically to the Fair Labor Standards Amendments, the early 1970s were a time when Congress heard much testimony regarding discrimination against women by the states.[262] Before extending the EPA to the states, Congress enacted Title

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257. *See generally Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Comm. on Labor & Public Welfare*, 93d Cong. 14 (1973).

258. *Id.*

259. *Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 92d Cong. 292–93 (1971) [hereinafter *1971 FLSA*] (testimony of Judith Lonnquist, Legal Counsel, Chicago Chapter, National Organization of Women); *id.* at 317 (testimony of Dr. Ann Scott, National Organization of Women); *id.* at 321 (testimony of Dr. Bernice Sandler, Member, Women's Equity Action League); *id.* at 350 (Dr. Alan Bayer, Research Scientist, Institute for Research in Education); *id.* at 363 (Helen Bain, President, National Education Association); *see also To Amend the Fair Labor Standards Act: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ & Labor*, 91st Cong. 477–78 (1970) [hereinafter *1970 FLSA*] (testimony of Wilma Scott Heide, Chairman of the Board, National Organization of Women).

260. *1971 FLSA*, *supra* note 259, at 363 (testimony of Helen Bain) (testifying that female college professors "almost without exception, receive . . . substantially less for the same work than do their male counterparts" and that "[i]t is highly doubtful that these statistics are merely accidental").

261. *1971 FLSA*, *supra* note 259, at 322 (testimony of Dr. Bernice Sandler) (documenting studies showing unequal pay for equal work at University of Minnesota, University of Arizona, and Kansas State Teachers College); *see also 1970 FLSA*, *supra* note 259, at 547–50 (testimony of Dr. Bernice Sandler) (documenting complaints of unequal pay for equal work by female employees at University of Pittsburgh, University of California at Berkeley, and University of Michigan).

262. *E.g.*, *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the Comm. on Educ. & Labor*, 91st Cong. 234–35 (1970) (statement of Congresswoman Catherine May); *id.* at 433–34 (statement of Congresswoman Patsy Mink); *Equal Rights for Men and Women 1971: Hearings Before Subcomm. No. 4 of the Comm. on the Judiciary*, 92d Cong. 95 (1971) (statement of Congressman William Ryan); *Economic Problems of Women: Hearings Before the Joint Economic Comm.*, 93d Cong. 131–32 (1973) (statement of Aileen C. Hernandez, Equal Employment Opportunity Commission).

IX of the Education Amendments of 1972,[263] and extended Title VII to state employers.[264] Evidence gathered in the hearings relating to these pieces of legislation also revealed pervasive gender discrimination by public employers.[265] The legislative hearings relating to the amendment of Title VII included extensive testimony regarding the pernicious nature of state-enforced employment discrimination.[266] The evidence gathered at these hearings relating to anti-discrimination measures enacted just prior to the EPA indicates that Congress passed the EPA based on substantial evidence of gender-based wage discrimination in public employment.

As opposed to *Flores*, where Congress had not documented modern instances of religious discrimination by states that would justify the RFRA,[267] or in *Kimel*, where Congress had no evidence the states engaged in unconstitutional age discrimination,[268] Congress had evidence before it that the states did engage in gender-based wage discrimination.[269] Not only did the hearings specifically relating to the Fair Labor Standards Amendments reveal this, but so did the extensive hearings relating to the other acts passed by Congress in the 1970s that were aimed at preventing women from being discriminated against by state employers.[270] Considering all the evidence of state enforced gender-based wage discrimination placed before Congress in the early 1970s, Congress was justified in applying the EPA to the states.

VI. CONCLUSION

Unlike legislation recently held to be inappropriate Section 5 legislation, the EPA is congruent with the Fourteenth Amendment and is a proportional response to gender-based wage discrimination engaged in

263. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (1994)).

264. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended 42 U.S.C. § 2000e (1994)).

265. *Supra* note 262.

266. *E.g.*, *Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the Comm. on Educ. & Labor*, 92d Cong. 466 (1971) (testimony of Helen Bain, President, National Education Association); *id.* at 489 (statement of Commission on the Status of Women of the Modern Language Association of America).

267. City of Boerne v. Flores, 521 U.S. 507, 531 (1997).

268. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

269. *Supra* note 262.

270. *Supra* note 262.

by the states. The Act does not raise the level of constitutional scrutiny given to gender-specific classifications, nor does it broadly interfere with state responsibility. The EPA prevents states from doing what they are prohibited from doing under the Fourteenth Amendment: paying a woman less than a man simply because of her gender. The EPA does not require a plaintiff to prove discriminatory intent to make out a prima facie case, but this does not automatically render the EPA inappropriate Section 5 legislation. The statute is narrowly designed to ensure that employers' legitimate pay structures are upheld and employers who sexually discriminate are held liable. The EPA should be upheld as appropriate Section 5 legislation. State employees should remain able to vindicate their right to equal pay for equal work when state employers fail to meet the standards found not only in the Equal Pay Act, but also in the Fourteenth Amendment itself.