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# Constitutional Limitations on Closing the Gender Gap in Employment

Marcia L. McCormick\*

## I. INTRODUCTION

Although discrimination on the basis of sex in employment and education has been prohibited for over forty years, essentially two generations, women lag behind men in workplace achievement by almost every measure. The most prestigious and well-paying jobs continue to be held predominantly by men, and at nearly every level, women's pay is less than men's pay. When race is also taken into account, the disparities are shocking. And at least some gap remains when every variable but sex is controlled for. Study after study has attempted to measure the cause of these disparities, finding some explanatory value in the number of hours worked, consistent attachment to the workplace, and gender segregation in the labor market. These three factors have been attributed to choices women have made, and thus, as not a proper subject for law or government programs to address. Even accounting for those factors, however, persistent pay and achievement gaps remain that can only be explained by sex discrimination – in other words, that employers are considering sex when they make decisions that affect hiring, promotion, or pay.

Regardless of the reasons, the legal structures we have employed have not worked to eliminate this achievement gap. And just at a time when we might want to consider new ways to approach it, the Supreme Court, in cases such as *Ricci v. DeStefano*, *Dukes v. Wal-Mart*, *Douglas v. Independent Living Center of Southern California*, and *National Federation of International Businesses v. Sebelius*, is suggesting that the Constitution may impose limits on how we might use the law

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\* Associate Professor, Saint Louis University School of Law. Thanks to Kerri Stone for encouraging the *FIU Law Review* editors to invite me to participate in this symposium on the gender gap in employment. Thanks also to Howard Wasserman, Mark Killenbeck, John Harrison, Michael Zimmer, Jeff Hirsch, Mark Weber, and participants at the Seventh Annual Colloquium on Labor and Employment Law Scholarship, Northwestern University School of Law and Loyola University Chicago School of Law for great feedback on this topic. Finally, thanks to John Bowen for excellent research assistance. Any errors or oversights are my fault entirely.

to do so. The Court in these cases redefines discrimination, suggests that the Equal Protection Clause may impose limits on Congress's ability to legislate something other than traditional formal equality, signals restrictions on judicial enforcement of constitutional and statutory rights, and suggests new limits for Congress's power under the Spending Clause. This paper explores the ways that the Court has slowly been retracting our ability to address the underlying causes of the achievement gap through the law or federal programs.

Part II addresses the gender gap and summarizes the approach federal law takes to narrow it. Part III traces the constitutional developments that have slowly eroded government's power to address inequality. Part IV identifies potential worrying trends from cases that are not employment law cases, but which nonetheless might worry the labor and employment community. Part V concludes this article.

## II. THE GAP AND LEGAL APPROACHES TO NARROW IT

There are many different gaps between men and women that have remained rather persistent over time. There is a gap in pay,<sup>1</sup> in workplace attainment or vertical integration within and across firms,<sup>2</sup> in wealth,<sup>3</sup> and in socio-economic status.<sup>4</sup> Congress has mainly tried to remedy these gaps between the sexes in two ways: through antidiscrimination legislation, or through Spending Clause statutes with contract-like conditions. The best known examples of antidiscrimination legislation include the Equal Pay Act, which prohibited sex discrimi-

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<sup>1</sup> JODY FEDER & LINDA LEVINE, CONG. RESEARCH SERV., PAY EQUITY LEGISLATION 1 (2010), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1768&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1768&context=key_workplace) (according to the U.S. Census Bureau, in 2008 full-time working women had a median annual salary of \$ 35,745, while men had a median salary of \$ 46,367).

<sup>2</sup> See, e.g., Nancy M. Carter & Christine Silva, *Women in Management: Delusions of Progress*, HARV. BUS. REV., Mar. 2010, at 19 (summarizing a study of women in management and finding that among graduates of elite MBA programs, "women continue to lag men at every single career stage, right from their first professional jobs").

<sup>3</sup> See generally MARIKO LIN CHANG, *SHORTCHANGED: WHY WOMEN HAVE LESS WEALTH AND WHAT CAN BE DONE ABOUT IT* (2010) (documenting the wealth gap that women own about thirty-six cents for every dollar of wealth owned by men and exploring the causes).

<sup>4</sup> See CARMEN DENAVAS-WALT, U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011*, 15 (2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf> (reporting that women were more likely than men to live in poverty and the difference increased with age); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, *WOMEN IN THE LABOR FORCE: A DATABOOK 2* (2010), available at <http://www.bls.gov/cps/wlf-databook-2010.pdf> (reporting that about the same number of men and women in the labor force lived in poverty, but that women made up a significantly greater proportion of the working poor); see also WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING* (2011), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/Women\\_in\\_America.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf).

nation in pay for equal work;<sup>5</sup> and Title VII of the Civil Rights Act of 1964,<sup>6</sup> which prohibited discrimination in terms, conditions, and privileges of employment or classification that would tend to deprive workers of employment opportunities on the basis of sex and other identity characteristics.

Spending Clause statutes use contract-like conditions. For example, they require recipients of federal funds to not discriminate on the basis of sex, or else risk losing the funds. One example of this kind of statute in the discrimination context is the Patsy T. Mink Equal Opportunity in Education Act, popularly known as Title IX, which prohibits sex discrimination and applies to educational institutions that receive federal funds.<sup>7</sup> Conditions are also imposed on those individuals or institutions the federal government contracts with by an Executive Order that prohibits contractors from discriminating on the basis of sex.<sup>8</sup> The reason that an Executive Order acts like the Spending Clause here is because the contracts are funded in the first place through Spending Clause legislation.

These efforts have had some success, but it is not clear that they have been responsible for narrowing the gender gaps. For example, the pay gap in the United States was essentially unchanged for the first twenty years after enactment of the first federal antidiscrimination statutes.<sup>9</sup> The pay gap did narrow in the 1980s and early 1990s, but progress seems to have stalled since then.<sup>10</sup> The beginning of the narrowing is not linked to any legislative or executive branch change, and in fact occurred more than a decade after the Equal Employment Opportunity Commission (EEOC) was given enforcement power. Clearly, something else was at work.

Intertwined with the persistence of the gaps is broad horizontal sex segregation in the workforce: women and men tend to do different jobs, sometimes with differences in hours, and sometimes garnering

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<sup>5</sup> The Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. §§ 206(d), 209, 211, 213, 215-19, 255-56, 259-60, 262 (2006)).

<sup>6</sup> The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 252 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2006)). Parts of the Civil Rights Act of 1964 focused on entities that accepted federal funds rather than all private entities.

<sup>7</sup> The Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681-88 (2006)).

<sup>8</sup> Exec. Order No. 11246, 30 Fed. Reg. 12319 (Dec. 12, 2002). This Executive Order is enforced by the Office of Federal Contract Compliance Programs.

<sup>9</sup> See Mark R. Killingsworth, *Comparable Worth and Pay Equity: Recent Developments in the United States*, 28 CAN. PUB. POL'Y S171, S173-75 (2002).

<sup>10</sup> *Id.*; see also Leslie McCall & Christine Percheski, *Income Inequality: New Trends and Research Directions*, 36 ANN. REV. SOC. 329 (2010).

different pay.<sup>11</sup> Some pink collar jobs pay relatively well. In the professional category of the Bureau of Labor Statistics' occupational classifications, 82% of elementary and middle school teachers are women, with median weekly earnings of \$891.<sup>12</sup> But even within this occupational category, men have higher median wages at \$1040 per week.<sup>13</sup> Moreover, complicating this fact of horizontal sex segregation are gendered divisions of labor within families headed by heterosexual parent couples. When family friendly policies are introduced, they tend to reinforce this gendered division of labor and the horizontal sex segregation, therefore stalling progress on shrinking these gaps.<sup>14</sup>

Because just using law to prohibit discrimination does not seem to be resolving sex inequality,<sup>15</sup> we might wish to use other public policy tools to supplement that effort. However, the Supreme Court in recent years has made that more difficult. The next section traces the way the Court has viewed the power of government to regulate the workplace.

### III. CONSTITUTIONAL CONTRACTION

#### A. First, the Expansion

Significant regulation of employment coincides generally with the Second Industrial Revolution. At the turn of the twentieth century, work was increasingly dangerous.<sup>16</sup> Activists of this era sought to improve wages, hours, and working conditions for all workers. At first, these activists had success with small pieces of legislation by industry, sex, or age of the worker.<sup>17</sup> These gains were frustrated by the Supreme Court in the now infamous case of *Lochner v. New York*, in

<sup>11</sup> See Maria Charles, *A World of Difference: International Trends in Women's Economic Status*, 37 ANN. REV. SOC. 355 (2011); Nan Weiner, *Effective Redress of Pay Inequities*, 28 CAN. PUB. POL'Y S101, S103 (2002).

<sup>12</sup> U.S. BUREAU OF LABOR STATISTICS, *supra* note 4, at 30 tbl. 11, 57 tbl. 18.

<sup>13</sup> *Id.* at 57 tbl. 18.

<sup>14</sup> See generally John M. Evans, *Work/Family Reconciliation, Gender Wage Equity and Occupational Segregation: The Role of Firms and Public Policy*, 28 CAN. PUB. POL'Y S187 (2002).

<sup>15</sup> See Mark Cassidy et al., *Gender Pay Differentials and Equality Legislation in the Republic of Ireland*, 28 CAN. PUB. POL'Y S149 (2002); Weiner, *supra* note 11, at S102-03.

<sup>16</sup> See generally WALTER LICHT, *INDUSTRIALIZING AMERICA* (1995); Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Commonsense Causality*, 20 LAW & SOC. INQUIRY 621, 629-30, 641-43 (1995).

<sup>17</sup> See ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES 186-99*, 203 (1983) (describing a number of laws that limited the types of jobs, number of working hours, or amount of wages for women and sometimes minors). A description of other types of protective legislation appears in the Supreme Court's opinion in *Lochner v. New York*, 198 U.S. 45 (1905). Examples are the New York statute at issue in that case limiting hours of labor in bakeries, *id.* at 46, and a Utah law limiting the hours of miners, *id.* at 54-55.

which the Court struck down maximum hours legislation for bakers as a violation of the freedom to contract.<sup>18</sup> The Court had previously allowed such protections for workers in particularly dangerous occupations, but not for the average adult worker.<sup>19</sup>

The Great Depression and New Deal provided the impetus for enacting substantially more protective labor legislation. The first such statute was the National Industrial Recovery Act (NIRA), which provided a system for labor to bargain collectively, promoted sector-wide bargaining, covered wages and hours, and covered working conditions in some industries.<sup>20</sup> The Supreme Court struck that down, in part, because it delegated legislative authority to the Executive Branch.<sup>21</sup> Shortly after, President Roosevelt proposed expanding the size of the Court to pack it with justices that supported the New Deal.<sup>22</sup> That legislation was not successful, and the Court switched its position on the strength of the freedom to contract by upholding state minimum wage legislation for adults as constitutional.<sup>23</sup> Additional New Deal legislation was all upheld. The Wagner Act, which later became the National Labor Relations Act (NLRA), gave workers the right to bargain collectively over wages, hours, and other terms and conditions of employment.<sup>24</sup> The Fair Labor Standards Act (FLSA) set a minimum wage and mandated extra pay for hours worked over a weekly threshold for many workers.<sup>25</sup> Although worker injuries were not addressed

<sup>18</sup> *Lochner v. New York*, 198 U.S. 45, 45, 57-63 (1905).

<sup>19</sup> *Id.* at 54-55, 58-59 (noting that protections for workers in underground mines and smelting operations and coal workers had been upheld in *Holden v. Hardy*, 169 U.S. 366 (1898), and *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901), on the grounds that those occupations were dangerous to the health of workers). The Court in *Lochner* suggested that the prior cases presented two justifications for the legitimate use of the police power of the state to limit the hours of work a person could do: (1) if the members of the class suffered from a disability that made them less able to protect their own interests; and (2) if the work to be done was unusually dangerous. *Id.* at 57-62. In *Lochner*, the Court proposed a third potential ground – injuries to the public caused through demands on those workers. *Id.* at 57, 62-63.

<sup>20</sup> The National Industrial Recovery Act, Pub. L. No. 73-90, 48 Stat. 195 (1933).

<sup>21</sup> *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

<sup>22</sup> See generally MARIAN CECILIA MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (2002).

<sup>23</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Many historians have argued that the policy switch was made to avoid Roosevelt's court packing plan, but others contest that argument, arguing instead that the plan was dead before the policy switch. See Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (2011).

<sup>24</sup> The National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)). The act was upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>25</sup> The Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-19 (2006)). The Fair Labor Standards Act was upheld in *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

comprehensively by the federal government,<sup>26</sup> most states enacted workers' compensation systems to provide wage insurance and payment of medical bills for workers injured or killed on the job.<sup>27</sup> The federal Social Security Act created a system of retirement, unemployment insurance, and welfare benefits for poor families and people with disabilities.<sup>28</sup>

The years surrounding World War II and the early days of the Cold War saw little legislative action on workplace laws,<sup>29</sup> but the civil rights movement and other movements for workers in the depths of the Cold War created support for a flood of new regulation. In the 1960s and 1970s, several statutes were enacted: the Equal Pay Act,<sup>30</sup> the Civil Rights Act of 1964,<sup>31</sup> the Age Discrimination in Employment Act,<sup>32</sup> the Occupational Safety and Health Act,<sup>33</sup> Title IX, the Equal Employment Opportunity Act,<sup>34</sup> the Rehabilitation Act,<sup>35</sup> and the Pregnancy Discrimination Act.<sup>36</sup> About a decade later, a new set of workplace legislation was enacted: the Americans with Disabilities Act<sup>37</sup> and the Family and Medical Leave Act.<sup>38</sup> Since then, there have been some amendments to existing laws, but no new civil rights legis-

<sup>26</sup> Federal law did address injuries of some employees, such as those who worked for railroads or on ships, for example. Federal Employers Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (2006)) (governing railroads); Merchant Marine Act of 1920, ch. 250, § 33, 41 Stat. 1007 (codified as amended at 46 U.S.C. § 30104 (2006)).

<sup>27</sup> *E.g.*, N.Y. WORKERS' COMP. LAW § 13-g (McKinney 2011). New York's Workers' Compensation Law, enacted in 1911, struck down and enacted in a slightly different form in 1914, was a product of the Wainwright Commission's findings after the Triangle Shirtwaist Factory fire. PETER M. LENCIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 11-13 (1998). When the Supreme Court upheld New York's law in *N.Y. Central R.R. v. White*, 243 U.S. 188 (1916), along with similar laws from Iowa, *Hawkins v. Bleakly*, 243 U.S. 210 (1917), and Washington, *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), other states quickly enacted their own such laws; forty-two states by 1920, and all states by 1949. *See also* John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998).

<sup>28</sup> The Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 401-34 (2006)). The Supreme Court upheld the Social Security Act in a series of cases: *Helvering v. Davis*, 301 U.S. 619 (1937) (interpreting the general welfare spending clause); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (concerning unemployment insurance); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1937) (involving unemployment insurance).

<sup>29</sup> One notable exception was the Taft-Hartley amendments to the National Labor Relations Act, applying new rules to unions. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

<sup>30</sup> The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

<sup>31</sup> The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>32</sup> The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.

<sup>33</sup> The Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

<sup>34</sup> The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

<sup>35</sup> The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

<sup>36</sup> The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>37</sup> The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

<sup>38</sup> The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

lation.<sup>39</sup> The biggest workplace development has come through the Patient Protection and Affordable Care Act<sup>40</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>41</sup>

The Civil Rights Act of 1964, the most sweeping of these Acts, was challenged on the grounds that Congress could not require private parties to stop discriminating. The challengers focused on the public accommodations provisions and claimed that the statute exceeded Congress's Commerce Clause power and deprived them of liberty and property without due process.<sup>42</sup> The Court rejected that claim in *Heart of Atlanta Motel, Inc. v. United States*, holding that the Commerce Clause empowered Congress to prohibit private race discrimination.<sup>43</sup> After *Heart of Atlanta Motel*, Congress's power to enact Title VII was mostly settled, although its reach and the anti-discrimination principle embodied by the Equal Protection Clause were litigated.<sup>44</sup> There was no hint at that time that prohibiting discriminatory effects would pose a constitutional problem, and in fact, the Court seemingly approved of such a rule, but thought Congress should be the body to create it: "extension of the [disparate impact] rule beyond those areas where it is already applicable by reason of

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<sup>39</sup> Congress extended family and medical leave to members of the military and their families and to flight crews. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 565, 123 Stat. 2190, 2309 (2009). It also provided whistleblower protections for employees reporting fraud in the financial sector. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (providing whistleblower protection and prohibiting mandatory employment arbitration provisions). Finally, it amended Title VII and the Equal Pay Act to clarify that pay discrimination occurs with each paycheck that provides less pay on the basis of sex. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5 (Supp. III 2009)).

<sup>40</sup> Congress required larger employers to provide affordable health insurance for employees or pay a tax, created incentives for smaller employers to provide health insurance, and also mandated breaks and facilities for lactating women to express milk. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>41</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 748, 922-24, 124 Stat. 1376, 1739-46, 1841-50 (2010).

<sup>42</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).

<sup>43</sup> *Id.* at 257-58, 261 (considering a challenge to the public accommodations provision of the Civil Rights Act of 1964).

<sup>44</sup> One big question was whether state action that had discriminatory effects (rather than that taken with intent to discriminate) was prohibited by the Equal Protection Clause. Most courts answered in the affirmative, but the Supreme Court rejected that possibility. See *Washington v. Davis*, 426 U.S. 229, 243-45 (1976) (detailing Supreme Court cases that seemed to recognize that and the extent of agreement among the courts of appeals). Justice Stevens, concurring, did suggest that discriminatory impact might sometimes show a violation of equal protection, not because it clearly showed a subjective motivation, but because people are presumed to intend the natural consequences of their actions. *Id.* at 253 (Stevens, J., concurring); see also *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (despite usual rule of intending natural consequences, no evidence that veteran's preference was adopted because it kept women out of positions); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that discriminatory purpose could be inferred from denial of permit to all Chinese applicants and grant to about 98% of non-Chinese applicants).

statute, such as in the field of public employment, should await legislative prescription.”<sup>45</sup>

## B. The Contraction

Even as Congress was expanding rights through statutes, the Court began to limit Congress’s power to do so. Limits began with the Tenth Amendment in *National League of Cities v. Usery*,<sup>46</sup> which concerned the application of the FLSA’s minimum wage and maximum hours rules to state and local governments. The Court analyzed the issue as a clash between Congress’s Commerce Clause power and the right states have to continue to exist as sovereigns, which is a right recognized by the Tenth Amendment.<sup>47</sup> The *National League of Cities* test proved unworkable, and the Court overruled it in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>48</sup> But only a few years after *Garcia*, the Court began to strengthen the Tenth Amendment again, holding that it prohibited a federal court from ordering a state to raise property taxes to adequately fund a school system as a remedy for discrimination the school district had engaged in.<sup>49</sup> The principle was further developed to prohibit Congress from coercing state governments into either accepting ownership of radioactive waste or

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<sup>45</sup> *Davis*, 426 U.S. at 248.

<sup>46</sup> *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>47</sup> *Id.* at 840-52. The Court refined the test for when federal statutes would violate the Tenth Amendment in *Hodel v. Va. Surface Mining & Reclamation Ass’n.*, 452 U.S. 264 (1981). The federal statute at issue must regulate “the States as States,” it must regulate what are clearly “attribute[s] of state sovereignty,” state compliance with the federal statute must “directly impair [the States’] ability ‘to structure integral operations in areas of traditional governmental functions,’” and the federal interest at stake must not be one that “justifies state submission.” *Hodel*, 452 U.S. at 287-88, & n.29 (quoting *Nat’l League of Cities*, 426 U.S. at 845, 852, 854).

<sup>48</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Because the nature of government had changed in the course of history, relying on history and tradition to delineate the boundaries of the rule provided a moving target. *Id.* at 543-45. And state government should be allowed to change within the limits of the U.S. Constitution in order to maximize the power of state citizens to shape the form of their government through the political process. *Id.* at 545-46. Finally, the Court theorized that the states had adequate structural protection from congressional overreaching as evidenced by the fact that the states remained immune from obligations under a number of federal statutes and the fact that the states had secured compensation in the form of federal funding for many programs at the same time any obligations were imposed. *Id.* at 552-55. Thus, both pragmatism and federalism required that *National League of Cities* be overruled.

<sup>49</sup> *Missouri v. Jenkins*, 495 U.S. 33 (1990). The Court further held that a federal court could have allowed or required the school district to levy property taxes at a rate adequate to fund the desegregation remedy, and it could have enjoined the operation of state laws that would have prevented the district from exercising this power. The distinction between what was prohibited and allowed may seem a fine one.

implementing legislation dictated by Congress,<sup>50</sup> and to prohibit Congress from requiring local law enforcement to conduct background checks on applicants for gun permits.<sup>51</sup> This anti-commandeering principle was seen as a way to protect the political system: if average people could not tell what government was responsible for legislation they either liked or disliked, they would not be able to engage the right political system to respond.<sup>52</sup>

The Court also limited Congress's power under the Commerce Clause during this period. In 1995, the Court struck down legislation as beyond Congress's Commerce Clause power in *United States v. Lopez*, which concerned a statute that made possession of a firearm in a school zone a federal crime.<sup>53</sup> The Court found that criminalizing gun possession near schools was not regulation of any sort of economic activity, nor did gun possession in a school zone, by itself, substantially affect interstate commerce.<sup>54</sup> Following *Lopez*, the Court struck down the civil remedy in the Violence Against Women Act, holding that gender-motivated violence was neither economic activity itself, nor did such violence substantially affect interstate commerce.<sup>55</sup> After *Morrison*, in *Gonzales v. Raich*,<sup>56</sup> the Court upheld the federal Controlled Substances Act<sup>57</sup> as valid Commerce Clause legislation that preempted a California law which had allowed individuals to grow small amounts of marijuana for their own use when a doctor recommended the drug for serious medical conditions.<sup>58</sup>

The Court avoided the federalism issue entirely in a case involving the executive branch's attempts to preempt an Oregon law that allowed doctors to prescribe drugs to help terminally ill patients commit suicide,<sup>59</sup> by finding that Congress failed to give the executive

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<sup>50</sup> *New York v. United States*, 505 U.S. 144, 174-77 (1992) (prohibiting Congress from requiring state governments to accept ownership of radioactive waste or implement legislation dictated by Congress).

<sup>51</sup> *Printz v. United States*, 521 U.S. 898, 925-33 (1997) (prohibiting Congress from commandeering local law enforcement).

<sup>52</sup> See *New York*, 505 U.S. at 168-69.

<sup>53</sup> *United States v. Lopez*, 514 U.S. 549, 551 (1995) (considering the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (1990), *superseded by statute*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125-26 (1994); see Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 2-3 (2004).

<sup>54</sup> *Lopez*, 514 U.S. at 561-68.

<sup>55</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (considering the Violence against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941-42 (1994)).

<sup>56</sup> *Gonzales v. Raich*, 545 U.S. 1, 12-22 (2005).

<sup>57</sup> 21 U.S.C. §§ 801-904 (2006).

<sup>58</sup> CAL. HEALTH AND SAFETY CODE § 11362.5 (West 2012).

<sup>59</sup> OR. REV. STAT. ANN. §§ 127.800-.897 (West 1998).

branch the power to prohibit doctors from prescribing these drugs.<sup>60</sup> Most recently, though, the Court held that Congress lacked power under the Commerce Clause to mandate that individuals buy health insurance, rejecting the government's argument that health care was a market everyone participated in already.<sup>61</sup>

Despite *Raich*, when taken together, these cases make fairly clear that the Commerce Clause can only reach commercial activity or activity that relates to goods or services that might travel in commerce. To the extent that the gender pay gap is caused at least in part by gender segregation in the labor force, and that gender segregation depends in part on constraints related to family, the Commerce Clause may not provide a source of power to remedy it. In other words, the Commerce Clause may not support legislation that relates to family relationships and the division of caregiving responsibilities.

In addition to the Tenth Amendment and Commerce Clause contexts, the Court has put limits on the power of Congress, the Executive Branch, and the states under the Equal Protection principles of the Fifth and Fourteenth Amendments. In the 1980s and 1990s, the limits began in the context of affirmative action. Through a series of cases, the Court held that any consideration of race, even to benefit historically disadvantaged groups, received the same scrutiny as considerations to harm those groups.<sup>62</sup>

This shift to limit Congress's power was invigorated in 1996 in a series of cases on the Eleventh Amendment. In *Seminole Tribe v. Florida*,<sup>63</sup> the Court held that Congress could not subject the states to suits by private parties when it acted under its Commerce Clause power, but could only do so under its Fourteenth Amendment pow-

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<sup>60</sup> *Gonzales v. Oregon*, 546 U.S. 243, 257-69 (2006).

<sup>61</sup> *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>62</sup> The series began with *Wygant v. Jackson Bd of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality op.); *id.* at 285 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 295 (White, J., concurring in the judgment only). In *City of Richmond v. J.A. Croson Co.*, the Court struck down an affirmative action plan the city was requiring its contractors to agree to that involved minority set-asides for subcontractors, and a majority of justices finally agreed that strict scrutiny should apply. 488 U.S. 469, 493, 508 (1989); *id.* at 520 (Scalia, J., concurring). The plurality rested its decision in part on the fact that a city council lacked the powers expressly given to Congress in the Fourteenth Amendment to enforce the equal protection guarantees. *Id.* at 488, 490. In *Adarand Constructors, Inc. v. Peña*, the Court held that the Fifth Amendment's equal protection guarantee should be made identical to the Fourteenth Amendment's. 515 U.S. 200, 227 (1995) (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

<sup>63</sup> 517 U.S. 44 (1996). The plain language of the Eleventh Amendment prohibits suits "in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or . . . of any Foreign State." U.S. CONST. amend XI. In *Hans v. Louisiana*, 10 S. Ct. 504 (1890), the Court read more into that language, holding that it prohibited suits in federal courts not only by citizens of foreign states but also by a citizen against his or her own state.

ers.<sup>64</sup> The result in *Seminole Tribe* left intact a decision that had upheld Title VII's prohibition on disparate treatment as validly within the Court's power to enforce the Fourteenth Amendment.<sup>65</sup> But Congress's power under the Fourteenth Amendment became more important the year after the *Seminole Tribe* decision with *City of Boerne v. Flores*,<sup>66</sup> which held that Congress could not statutorily expand rights founded in the Constitution beyond what the Court had declared them to be, nor could it create remedies out of proportion to a demonstrated record of Fourteenth Amendment violations.<sup>67</sup>

After *City of Boerne*, the Court invalidated Congress's attempt to make states liable for damages in a number of statutes, holding that they did not enforce the Fourteenth Amendment.<sup>68</sup> Two of these were employment discrimination laws. In *Kimel v. Florida Board of Regents*,<sup>69</sup> the Court held that the Age Discrimination in Employment Act<sup>70</sup> was neither congruent nor proportional to any documented pattern of constitutional violations by states;<sup>71</sup> it held the same thing for Title I of the Americans with Disabilities Act<sup>72</sup> in *Board of Trustees v. Garrett*.<sup>73</sup> While the Court upheld the family leave provisions of the Family and Medical Leave Act as properly enforcing the Fourteenth

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<sup>64</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 59-66 (1996). The Court revised that limitation in two bankruptcy cases, *Central Virginia Community College v. Katz* and *Tennessee Student Assistance Corp. v. Hood*, holding that Congress could subject the state to suit in bankruptcy proceedings under its Article I bankruptcy powers. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373-79 (2006); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446-51 (2004).

<sup>65</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976).

<sup>66</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>67</sup> *Id.* at 517, 519-20, 536 (holding that, while Congress has broad authority under the Constitution to adopt legislation to protect Fourteenth Amendment rights, the Court retains the right to determine whether such legislation amounts to an abuse of authority under the Constitution).

<sup>68</sup> For instance, in *Florida Prepaid Postsecondary Education & Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Education & Expense Board*, 527 U.S. 666 (1999), the Court held that the Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992), and the Trademark Remedy Clarification Act, 15 U.S.C. §§ 1051, 1114, 1122, 1125, 1127 (1994), were not valid enactments under the Fourteenth Amendment. *Fla. Prepaid Postsecondary Educ. & Expense Bd.*, 527 U.S. at 647 (involving the Patent and Plant Variety Protection Remedy Clarification Act); *Coll. Sav. Bank*, 527 U.S. at 690-91 (involving the Trademark Remedy Clarification Act).

<sup>69</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>70</sup> 29 U.S.C. §§ 621-34 (2006).

<sup>71</sup> *Kimel*, 528 U.S. at 63.

<sup>72</sup> 42 U.S.C. §§ 12111-117 (2006).

<sup>73</sup> *Bd. of Trustees v. Garrett*, 531 U.S. 356, 374 (2001). The Court upheld Title II of the ADA, 42 U.S.C. §§ 12131-65 (2006), which requires government bodies to provide access to government buildings and services to those with disabilities, at least in cases where the plaintiff was denied access to the courts or suffered cruel and unusual punishment, both constitutional violations in their own right. *Tennessee v. Lane*, 541 U.S. 509, 509-10, 515, 523 (2004).

Amendment,<sup>74</sup> it held that the self-care provisions did not enforce the Fourteenth Amendment.<sup>75</sup>

Outside of the intersection of the Fourteenth and Eleventh Amendments, the Court has also taken a restrictive view of federal power in other civil rights contexts: habeas corpus jurisdiction,<sup>76</sup> voting rights cases,<sup>77</sup> and implied rights of action directly under the Constitution.<sup>78</sup> The Court also seems to have narrowed the definition of discrimination, diminishing the possibility of using the disparate impact theory under Title VII,<sup>79</sup> and rejecting the possibility that evidence of implicit biases could be evidence of either disparate impact or disparate treatment.<sup>80</sup>

#### IV. THE NEWEST TRENDS – CUTTING OFF HOPE ENTIRELY?

In addition to these trends, even more troubling trends are suggested by what the Court is not addressing in some of its decisions and what individual justices are saying in concurrences and dissents. This section explores some of those trends.

The Court's decision in *Ricci v. DeStefano*<sup>81</sup> is one such case. At issue in *Ricci* was whether a city government's rejection of results from a test for promotion that caused a disparate impact on firefighters of color was disparate treatment, and if so, whether the city could defend its actions on the grounds that it was avoiding liability for the disparate impact.<sup>82</sup> Because the employer was a city government, the Equal Protection clause also applied to it, and the firefighters who

<sup>74</sup> Nev. Dep't of Human Servs. v. Hibbs, 538 U.S. 721, 722-24 (2003).

<sup>75</sup> Coleman v. Ct. App. Md., 132 S. Ct. 1327, 1333-37 (2012). Justice Scalia, concurring, would have held that outside of race, Congress's enforcement power is limited to regulating conduct that itself violates the Fourteenth Amendment. *Id.* at 1338 (Scalia, J., concurring). Justices Ginsburg and Breyer would overrule *Seminole Tribe* and hold that Congress may validly abrogate state immunity from suit under its Commerce Clause powers. *Id.* at 1339 & n.1 (Ginsburg, J., dissenting).

<sup>76</sup> *E.g.*, *Schlup v. Delo*, 513 U.S. 298, 318 (1995) (expressing concern that habeas filings threatened the finality of state court judgments, implicating comity and federalism), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244, 2255 (2006).

<sup>77</sup> *E.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476-85 (1996) (holding that preclearance under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1994), cannot be denied simply because a jurisdiction's voting procedures violate Section 2 of the Act, *id.* § 1973); *Grove v. Emison*, 507 U.S. 25, 32 (1993) (recognizing that, even though federal and state courts may have concurrent jurisdiction over particular subject matter, there are circumstances in which federalism and comity concerns dictate federal abstention). *But see* *Bush v. Vera*, 517 U.S. 952, 1069 (1996) (5-4 decision) (Souter, J., dissenting) (criticizing the plurality opinion for going too far in limiting state discretion under the Voting Rights Act).

<sup>78</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 680-82 (2009).

<sup>79</sup> *Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>80</sup> *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-55 (2011).

<sup>81</sup> *Ricci*, 557 U.S. at 557.

<sup>82</sup> *Id.* at 578-81.

sued the city argued that rejecting the results violated both Title VII and the Equal Protection clause.<sup>83</sup> The majority found that the city's rejection of the results was disparate treatment under Title VII, declining to reach the equal protection issue.<sup>84</sup>

Justice Scalia concurred that the City of New Haven's decision to not certify a promotion list was because of the race of the successful applicants, but he wrote separately to say that he believed the Court would have to decide one day whether the disparate impact provisions of Title VII violate equal protection.<sup>85</sup> Title VII prohibits employers from using neutral practices that have a disparate impact on members of a protected group unless those practices are job related and consistent with business necessity.<sup>86</sup> To comply with the prohibition on disparate impact, employers have to look at the race, sex, or other identity characteristics of the members of its work force and compare the proportions of each group to their proportions in the labor pool.<sup>87</sup> They must consider the race of employees and take particular actions because of the race of successful candidates.<sup>88</sup> Additionally, the duty to act based on the protected class of the employees does not depend on prior discrimination by that employer the way that it might under the Equal Protection clause.<sup>89</sup>

Asking whether there has been a disparate impact and rejecting the neutral practice that produced it, in Justice Scalia's view, was a consideration of protected class in which the federal government would not be able to engage while remaining consistent with the equal protection principles embodied in the Fifth Amendment.<sup>90</sup> And if Congress cannot do it, Congress should not be able to require private employers to do it. Justice Scalia did not bring up the issue in the next case to present a disparate impact claim, this one in the private sector; in fact, he did not address that theory of discrimination at all in his opinion.<sup>91</sup>

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<sup>83</sup> See *id.* at 561-63, 576-77, 592-93.

<sup>84</sup> *Id.* at 576-77, 592-93.

<sup>85</sup> *Id.* at 594-95 (Scalia, J., concurring).

<sup>86</sup> See 42 U.S.C. § 2000e-2(h) (2006).

<sup>87</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing the disparate impact cause of action); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (refining the calculations in light of the relevant labor pool), *superseded by statute on other grounds as stated in Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011).

<sup>88</sup> See 42 U.S.C. § 2000e-2(k) (2006) (defining the burden of proof in disparate impact cases and making clear that the employer will be liable if the challenged practice causes a disparate impact but is not consistent with a business necessity).

<sup>89</sup> *E.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (recognizing that remedying past discrimination was a compelling governmental interest).

<sup>90</sup> *Ricci v. DeStefano*, 557 U.S. 594-95 (2009).

<sup>91</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552-57 (2011).

That case, *Wal-Mart v. Dukes*, had other troubling aspects.<sup>92</sup> The case involved whether all of the women who had worked for Wal-Mart since 1998 could proceed as a class in a case involving sex discrimination in pay and promotions.<sup>93</sup> The class certification was overturned as not satisfying the class action rules.<sup>94</sup> Along the way, Justice Scalia, writing for the majority, rejected social science evidence on how implicit biases could infect a corporate culture and promote discriminatory sex stereotyping. He found the claim that people tend to make choices infected by stereotypes not believable based on how he believed people would act.<sup>95</sup> In essence, Justice Scalia seems to have held that employers will be liable for discrimination only when their agents are motivated to treat employees in a particular way because the employees are members of a protected class, and those agents fully realize that this is their motivation.<sup>96</sup> *Ricci* and *Wal-Mart* suggest that Congress cannot prohibit inequitable effects.

Justice Scalia is not the only Justice who is skeptical that discrimination still exists and of Congress's ability to enact prophylactic rules that grant rights greater than what the Constitution provides. Justice Thomas, too, is skeptical. He would have held that the pre-clearance provision of the Voting Rights Act exceeded Congress's power in *Northwest Austin Municipal Utility District Number One v. Holder*.<sup>97</sup> The majority avoided deciding the issue,<sup>98</sup> but it is back at the Supreme Court in the current term.<sup>99</sup>

With every contraction of rights by the Court, scholars and activists retrenched at two safety nets: the *Ex Parte Young* doctrine,<sup>100</sup> and the Spending Clause.<sup>101</sup> First, let me explain the *Ex Parte Young* safety

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2556-67.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2553-55.

<sup>96</sup> See Marcia L. McCormick, *Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 1401 (2013).

<sup>97</sup> 557 U.S. 193, 215-82 (2009) (Thomas, J., concurring in part and dissenting in part). The amendment at issue was the Fifteenth, which specifically concerns voting.

<sup>98</sup> *Id.* at 201-06.

<sup>99</sup> *Shelby Cnty. v. Holder*, No. 12-06. Justice Scalia demonstrated his skepticism about the validity of this part of the Voting Rights Act, calling it a "racial entitlement." Oral Argument Transcript, at 47, *Shelby Cnty. v. Holder*, No. 12-06 (Feb. 27, 2013). At the time this article went to press, the third week in June, the Court had still not issued its decision in the case.

<sup>100</sup> See, e.g., Rochelle Bobroff, *Ex Parte Young as a Tool to Enforce Safety-Net and Civil-Rights Statutes*, 40 U. TOL. L. REV. 819 (2009); Bruce E. O'Connor & Emily C. Peysner, *Ex Parte Young: A Mechanism for Enforcing Federal Intellectual Property Rights against States*, 10 B.U. J. SCI. & TECH. L. 225 (2004).

<sup>101</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) ("Congress is free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes."); *New York v. United States*, 505 U.S. 144, 167 (1992).

net. When the Court said that states could not be sued for damages under statutes that Congress created, it removed only that remedy. The states still had to comply with the statutes as long as they were valid commerce clause legislation. And the way that individuals could force compliance was by bringing an action against a state actor seeking prospective relief for the state to comply with the statute in the future. Under *Ex Parte Young*, such an action is not viewed as a suit against the state, which would be barred by sovereign immunity.<sup>102</sup> Now, let me explain why the Spending Clause seemed to provide some relief. Because Congress had more power to spend federal money for the general welfare than it had even to regulate under the Commerce Clause, it could impose conditions – like complying with anti-discrimination laws or even engaging in affirmative action – on those funds before they were accepted as long as those conditions were not coercive.<sup>103</sup> However, two additional cases from the Court’s 2012 term suggest that these safety nets are in danger, as well.

In *Douglas v. Independent Living Center of Southern California*, the Supreme Court had to decide whether a private action could be brought against state officials directly under the Supremacy Clause using the *Ex Parte Young* implied right of action.<sup>104</sup> The majority dodged the question,<sup>105</sup> but four justices would have said no.<sup>106</sup> Those dissenters would have limited *Ex Parte Young* even more fundamentally to essentially not apply to spending clause legislation at all, and to rarely apply to commerce clause legislation unless it provided a private right of action explicitly.<sup>107</sup> If this view were to command a majority of the Court, it is possible that the Spending Clause will become less available, and it may also signal that the Court will limit *Ex Parte Young* in other ways.

The Court has limited the doctrine before. It was refined in *Edelman v. Jordan*, in which the Court held that the exception to state immunity only applied when plaintiffs were seeking prospective relief.<sup>108</sup> In a later case, the Court held that the federal courts may not hear claims for relief based on alleged violations of state law,<sup>109</sup> and

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<sup>102</sup> 209 U.S. 123 (1908).

<sup>103</sup> See *New York v. United States*, 505 U.S. 144, 167 (1992); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>104</sup> 132 S. Ct. 1204 (2012).

<sup>105</sup> *Id.* at 1210-11.

<sup>106</sup> See *id.* at 1211-15 (Roberts, C.J., dissenting).

<sup>107</sup> See *id.*; see also Stephen I. Vladeck, *Douglas and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13 (2012), available at <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/douglas-and-the-fate-of-ex-parte-young/>.

<sup>108</sup> 415 U.S. 651 (1974).

<sup>109</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

may not exercise jurisdiction when Congress has created an extensive alternative enforcement scheme.<sup>110</sup> Finally, the doctrine cannot be used to sue state officials to quiet title to lands possibly within the territory of the state.<sup>111</sup> This latest round in the *Ex Parte Young* line of cases suggests that the Court may be likely to impose even more stringent limitations in the future.

In *National Federation of Independent Businesses v. Sebelius*,<sup>112</sup> the Court also suggested that new limits to Congress's power under the Spending Clause may be in the works. The Court held that the Patient Protection and Affordable Care Act's expansion of Medicaid was too coercive to be within Congress's Spending Clause powers.<sup>113</sup> While Justice Roberts appeared to agree that Congress could have repealed Medicaid and replaced it with a different program that accomplished the Medicaid expansion, he rejected the significance of that fact:

[I]t would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be "ritualistic."<sup>114</sup>

Justice Roberts' opinion seems to have implicitly accepted that Congress could, alternatively, create a wholly federal program under the Spending Clause, but it also implied that Congress could not repeal Medicaid unless it was going to replace it with a federal program.<sup>115</sup> If the Court is set to reign in Congress's powers under the Spending Clause, many important workplace programs might be in

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<sup>110</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996). In an analogous case, the Court has held that 42 U.S.C. § 1983 cannot be used to sue state actors for violations of statutes that contain comprehensive enforcement schemes. See *Middlesex Cty. Sewage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

<sup>111</sup> *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997) (concerning the title to submerged lands). This may be a very narrow exception applicable only to disputes between states and Indian tribes over the territorial boundaries of both. This context is one of the few land disputes that could raise a federal question, namely where land was reserved through a federal treaty with a tribe.

<sup>112</sup> 132 S. Ct. 2566 (2012).

<sup>113</sup> *Id.* at 2633-39 (Roberts, C.J.). Only Justices Breyer and Kagan joined in this part of the opinion. Ordinarily, the opinion of three Justices within a majority would not be controlling. However, once the four Justices who dissented entirely are counted, there are seven Justices who believed that the Medicaid expansion was unconstitutional for one reason or another. *Id.* at 2656-68 (Scalia, J., dissenting). Conversely, only two Justices believed that the Medicaid expansion was constitutional. *Id.* at 2609, 2629-42 (Ginsburg, J., concurring in part and dissenting in part).

<sup>114</sup> *Id.* at 2606 n.14 (Roberts, C.J.).

<sup>115</sup> See *id.* at 2661-66 (Scalia, J., dissenting) (discussing the scope of the Medicaid program and states' reliance on it).

danger, and Congress's toolbox to address the gender gap will be much more poorly equipped.

#### V. IMPLICATIONS FOR THE GENDER GAP

The actual and potential limitations discussed in the preceding section pose especially serious problems for addressing the gender gap through law. Research has demonstrated that antidiscrimination provisions and family friendly policies cannot reduce the gap significantly by themselves: they fall victim to the equal rights/special rights problem.<sup>116</sup> Formal equality principles, equality of rights or equal opportunity, have not been successful because men and women are not considered to be the same, either because of biological differences or because of how people are acculturated to perform their gender. Overall, we have not progressed very far in addressing inequality in contexts where we think people are different.

In the law, formal equality or equal rights usually refers either to the absence of classification or to a mandate not to classify on the basis of membership in a particular group. Formal equality is focused on the individual rather than on the group that the individual may be a member of. Formal equality is nothing more or less than the Aristotelian principle that likes should be treated alike while those who are not alike should be treated differently. An alternate approach to equality is substantive equality or equality of outcomes or results. Substantive equality generally refers to equality in the distribution of goods, resources, and power, and is often described as embodying an anti-subordination principle. This anti-subordination principle provides that actions enforcing the inferior status of historically oppressed groups should be prohibited.

The formal equality approach, at least to some extent, retains historical inequities. It prohibits different pay within an occupation if that difference is because of the sex of the worker, but it accepts just about any other reason for that difference in pay, without requiring the employer to justify its reason. It accepts that all nurses should be paid the same basic wage, but accepts that firefighters should be paid more. To the extent that the gender gap is caused by occupational segregation, by choices and human capital investments that women make, or by cognitive biases of employers or women themselves, as long as Congress's power is limited to the tools of formal equality, there seems little Congressional power that can reach the gap.

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<sup>116</sup> See, e.g., Evans, *supra* note 14 (describing how work/family reconciliation policies – leave policies – exacerbated gender segregation in the labor market and a pay and promotions gap; and summarizing prior research reaching the same conclusions).

Formal equality tends to view social goods as fixed resources in a closed system. In a closed system with scarce resources, every allocation decision is a zero-sum game. To give to one person is to take away from another, and when group identity status is mixed in, things get more complicated. Giving something to women looks like taking something away from men. The distribution of resources and social goods appears natural, and advantages are invisible, at least to those who have them. Even small changes in how resources should be allocated may look like they injure “rights” of members of the dominant group.

The one power that may be left open to Congress, the one power we actually use to redistribute wealth and income, seems to be the taxing power.<sup>117</sup> And so maybe this is the direction we should begin to focus on. Perhaps we could tax occupations at different rates, creating a tax incentive for people who work in fields that are integrated or that are dominated by members of another sex. Maybe we could tie corporate income tax rates to the level of vertical integration in a firm or the integration of its workforce across jobs. Perhaps investment income from companies that have integrated across job categories could be taxed at a lower rate than income from companies that have not. Maybe we could provide other tax-expenditure incentives for employers that could reduce either occupational segregation or the lower pay linked with pink collar jobs. There may be very good policy reasons not to use the taxing power in this way, reasonable minds can differ. But if the only power left open for government to take a role in promoting equality is the taxing power, perhaps we should explore it; that may be our future.

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<sup>117</sup> At least one other scholar has come to the same conclusion. Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures* (unpublished manuscript 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2183278](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183278).