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Disparate Impact Claims and Punitive Damages: Justified Abrogation of State Sovereign Immunity

Brad Stewart

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Disparate Impact Claims and Punitive Damages: Justified Abrogation of State Sovereign Immunity

*Brad Stewart**

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I. INTRODUCTION

In the late 1970s, the Supreme Court imposed a heightened burden on disparate impact plaintiffs. This burden requires

* J. Reuben Clark Law School, J.D. 2020. Brigham Young University, B.S. 2015.

plaintiffs to prove that a state actor possessed a highly culpable mental state when creating a disparate impact. Accordingly, it is exceedingly difficult for plaintiffs to prove their equal protection rights have been violated when the state action at issue is facially equal. Scholars have critiqued this heightened burden as being at odds with how bias operates² and as frustrating the purposes of the Fourteenth Amendment.³ These arguments amount to a call for the Court to correct course by lowering the bar for disparate impact plaintiffs.

While the Court is uniquely positioned to respond to the disfavored constitutional doctrines it develops, waiting on the Court can be a dubious prospect. There is no guarantee that the Court will ever change course. The disparate impact plaintiff's burden has now been in place for forty years. And as time passes without a change, the cases establishing the doctrine grow in stare decisis strength.⁴ Such enduring Court inaction makes exploring non-judicial responses to disfavored constitutional doctrines worthwhile.

The alternative response considered in this Note is a congressional one. While congressional responses to constitutional doctrines do not change the doctrine, they can give constitutional doctrines fuller effect. That is, Congress can use its power to make additional law operative that complements the doctrine. This Note contends that Congress would be justified in using its powers under § 5 of the Fourteenth Amendment to pass a statute explicitly making punitive damages available to plaintiffs that bring

2. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

3. Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You?: Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1301–02 (2018) (“What is wrong with the Court’s requirement of proof of discriminatory purpose? First, it misunderstands the purpose of the Constitution’s guarantee of equal protection. The Equal Protection Clause should protect against the discriminatory results of government actions and not just against the discriminatory motivations of government actors. In other words, the government should not be able to act in a manner that harms racial minorities, regardless of why it took the action.”).

4. Though, of course, stare decisis is less exacting in the constitutional context for the very reason that only the Court can say what the Constitution means. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

successful disparate impact claims against state governments.⁵ Congress would be justified in doing so because the heightened proof burdens imposed by the Court make successful disparate impact plaintiffs especially meritorious of the damages.

The U.S. Code most nearly achieves what this Note suggests in 42 U.S.C. § 1983. Section 1983 originated with the Civil Rights Acts of 1871⁶ and grants a private right of action for money damages to individuals whose constitutional rights have been violated by persons acting under color of state law.⁷ While § 1983 has been the basis for punitive awards against state and local officials,⁸ it does not create ordinary liability for states themselves. And *City of Newport v. Fact Concerts, Inc.*⁹ held that punitive damages were improper against a municipality in a § 1983 action in light of congressional intent and policy considerations (namely, punishment and deterrence).¹⁰ Punitive damages awards against states are thus all the more outside of § 1983's ambit. Accordingly, the availability of punitive damages for disparate impact claims against states is dependent upon further congressional action.

5. This Note is not, strictly speaking, normative. It suggests that Congress *would be justified* in awarding punitive damages against the states but stops short of saying Congress *should* do so. This is because successful disparate impact plaintiffs are rare, perhaps nonexistent. See *infra* note 71 and accompanying text. This absence of successful plaintiffs means that legislatively providing for punitive damages would be largely symbolic—there is no one to award the damages. Whether Congress should enact a symbolic law raises practical considerations concerning the use of legislative resources. See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 12 (2008) (describing the opportunity costs of enacting even “relatively simple and uncontroversial” legislation). Assessing the symbolic value of providing for punitive damages against the states for disparate impact plaintiffs in light of these practical considerations is beyond the scope of this Note. Thus, this Note is limited to arguing that Congress would be justified in making the punitive award.

6. See *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (explaining § 1983's origins).

7. The law reads, in pertinent part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C § 1983 (2018).

8. See *infra* notes 102–04 and accompanying text.

9. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

10. *Id.* at 258–71.

The analysis begins in Part II with consideration of Congress's power to award punitive damages against the states, a remedy that would typically violate state sovereign immunity. However, Congress has power to abrogate state sovereign immunity when it acts pursuant to, and within the limitations on, its § 5 power under the Fourteenth Amendment. Next, Part III discusses the doctrine of disparate impact claims and punitive damages. This doctrinal discussion will facilitate the conclusion in Part IV that punitive damages awards may justifiably be extended to disparate impact plaintiffs because the legal and policy predicates to punitive damages are satisfied. Part V concludes.

II. CONGRESSIONAL POWER TO AWARD PUNITIVE DAMAGES AGAINST STATES

Before assessing whether legislatively authorizing punitive awards against the states is justified, the antecedent inquiry is whether Congress has the power to make such an award. This initial inquiry runs through the Eleventh Amendment and Congress's power to abrogate it under the Fourteenth Amendment. Abrogation permitted, this Part also considers the constitutional dictates controlling the manner of abrogation.

A. State Sovereign Immunity and the Abrogation Thereof

The first obstacle confronting an argument that Congress may justifiably award punitive damages against the states is state sovereign immunity, codified in the Eleventh Amendment.¹¹ Such a remedy would extend the judicial power of the United States to a suit in law between citizens and state governments. While the Supreme Court has never addressed whether Congress may provide a punitive damages remedy against the states, the Court has recognized other permissible incursions into state sovereign immunity. This Section briefly reviews the Eleventh Amendment's contours and then addresses Congress's power to abrogate them by virtue of § 5 of the Fourteenth Amendment.

11. "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." U.S. CONST. amend. XI.

Following its adoption to overturn *Chisholm v. Georgia*,¹² which held that federal courts could adjudicate suits between private citizens and states, the Eleventh Amendment has waxed and waned in potency.¹³ Initially interpreted narrowly, the Court read the Amendment to only prohibit suits in federal court where the diverse parties were the citizen(s) of one state and the government of another state.¹⁴ This narrow interpretation gave way in 1890 to the broad *Hans v. Louisiana* ruling that states could largely not be haled into federal court regardless of the basis of the jurisdiction or the identity of the parties.¹⁵ *Hans* immediately became the basis for an expansive understanding of state sovereign immunity.¹⁶ In just under a century, a state's immunity to suit in federal court went from anemic to brawny.

The Eleventh Amendment and *Hans* are ostensibly about sovereignty.¹⁷ The "indestructible states" have a sovereign status in our federal system that endures.¹⁸ A robust interpretation of the Eleventh Amendment respects the states' refusal, as expressed by the Amendment, to be subjected to federal jurisdiction. But there is a tension to recognizing state sovereign immunity in our American system in light of federal law's supremacy. Perhaps out of awareness of this tension, the Court has recognized certain

12. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

13. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 7-13 (1988).

14. *Id.* at 8-9. "Interpreted narrowly" in this context means simply following the text of the amendment. See U.S. CONST. amend. XI; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 348-49 (1821) (holding that a state was subject to the federal question jurisdiction of the federal courts when sued by one of its citizens).

15. *Hans v. Louisiana*, 134 U.S. 1 (1890). While *Hans* defies a search for a definitive statement of its holding, its rejection of federal question jurisdiction for suits between a citizen of a state and the state does emerge from the opinion's discussion of the longstanding immunity afforded sovereigns. *Id.*

16. *United States v. Texas*, 143 U.S. 621, 644 (1892) (citing *Hans* for the proposition that "the judicial power of the United States does not extend to suits of individuals against states").

17. Other considerations, like the states' inability to afford debt-related judgments rendered in federal court following the civil war, certainly were at play in *Hans*. See Jackson, *supra* note 13, at 9.

18. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869); see also *Printz v. U.S.*, 521 U.S. 898, 918-19 (1997).

exceptions to the formal rule against the judicial power extending to suits by individuals against states.¹⁹

One prominent class of exceptions deals with functional carveouts to sovereign immunity. These carveouts focus “efforts to avoid [the Amendment’s] application . . . [on] nam[ing] an officer and a form of relief that would not be regarded as within its scope.”²⁰ Plaintiffs can evade sovereign immunity where (1) the defendant is a state officer who can be sued in his or her individual capacity for actions in violation of constitutional mandates and (2) the relief sought is injunctive and prospective.²¹ But if the nature of the action – by virtue of the defendant sued or the relief sought – is such that the remedy would be paid from the state treasury, then the courts will deem the suit to be against the state and consequently barred by the Eleventh Amendment.²²

Another class of exceptions does not merely create a carveout to state sovereign immunity but rather sets the immunity aside entirely. Under the power granted it by § 5, the Court held in *Fitzpatrick v. Bitzer* that Congress may abrogate state sovereign immunity in enforcing the provisions of the Fourteenth Amendment.²³ The Court stated, “Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”²⁴ Thus while private plaintiffs must try to avoid the amendment’s application, Congress can legislate in direct contradiction of the amendment.²⁵ As will be clear from the next section, the Court’s tight policing of the Fourteenth

19. See Jackson, *supra* note 13, at 3–4.

20. *Id.* at 11; see also Edelman v. Jordan, 415 U.S. 651, 664–65 (1974); *Ex parte Young*, 209 U.S. 123, 157–60 (1908).

21. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984).

22. *Edelman*, 415 U.S. at 663.

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

24. *Id.* A threshold question when reviewing exercises of § 5 power is whether the legislation concerns the provisions of the Fourteenth Amendment. The statute suggested by this Note answers in the affirmative given the underlying problem the statute would address is a violation of the Equal Protection Clause.

25. The Court does require that Congress make “its intention [to abrogate] unmistakably clear in the language of the statute.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)). For purposes of this Note, an unmistakably clear intention to abrogate is assumed.

Amendment framework makes the § 5 exception to state sovereign immunity a narrow one.

Fitzpatrick does not explicitly address whether Congress may make provision for punitive damages against the states pursuant to its § 5 power.²⁶ But the language of the holding is broad, not admitting on its face of any such limitation. And, crucially, *Fitzpatrick* awarded money damages against state officers in their official capacity,²⁷ a remedy in direct opposition to the established rule that the Eleventh Amendment bars judgments that are paid out of the state treasury. As judgment debits on the state treasury have always been the major line guarded by the Eleventh Amendment, it is not readily apparent that a punitive award would be invalidated for crossing that line while a compensatory award is upheld despite doing the same.²⁸ Thus Congress has the power to abrogate the Eleventh Amendment and it is likely, on the authority of *Fitzpatrick*, that this power includes awarding punitive damages against the states.

B. Remedial Legislation

Caselaw since *Fitzpatrick* has emphasized that Congress must exercise its § 5 power within constitutional limits. Determining that Congress has the authority to abrogate sovereign immunity does not give Congress carte blanche. *City of Boerne v. Flores*²⁹ is the

26. Consideration of the manner of abrogation (the punitive damages award) here may be superfluous in light of Section II.B's discussion of the limitations on Congress's § 5 power. *Fitzpatrick* could be authority solely for congressional abrogation of the Eleventh Amendment with *City of Boerne* informing the manner of abrogation. But as the Court has never addressed the permissibility of a punitive award against the states made pursuant to § 5, a brief consideration of whether *Fitzpatrick*, which predates *City of Boerne*, alone supports a punitive award against the states is not undue.

27. *Fitzpatrick*, 427 U.S. at 447-50, 457.

28. There may be sound reasons to distinguish between compensatory and punitive awards for abrogation purposes. But the overriding constitutional concern has been whether the judgment will be paid from the state treasury. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994) ("[T]he prevailing view identifi[ies] 'the "state treasury" criterion—whether any judgment must be satisfied out of the state treasury—as the most important consideration' in resolving an Eleventh Amendment immunity issue." (citation omitted)). The idea of a compensatory backstop in Eleventh Amendment doctrine for abrogation purposes—as in, the Amendment generally forbids judgments that will be paid from the state treasury but even when abrogated the Amendment forbids punitive judgments—is not suggested by the case law.

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

relevant authority restraining use of the § 5 power. This Section discusses the remedial requirement that *City of Boerne* imposed on § 5 legislation. It also considers the proportionality and congruence limitations *City of Boerne* found to be central to proper § 5 legislation. A statute awarding punitive damages pursuant to § 5 must satisfy these parameters.

City of Boerne was the last of the three major acts of the Free Exercise Clause drama of the 1990s. First, in 1990, *Employment Division v. Smith* sustained the denial of unemployment benefits under Oregon law to adherents of the Native American Church whose employment was terminated for sacramental peyote consumption.³⁰ Declining to employ the then-prevailing *Sherbert* balancing test,³¹ the Court held that religious observance did not, standing alone, excuse non-compliance with a neutral law of general applicability (in *Smith*, the general ban on peyote consumption).³² Second, Congress responded with the Religious Freedom Restoration Act (RFRA) in 1993. It overturned *Smith* and restored the *Sherbert* test to all free exercise claims, consequently forbidding government at every level in the United States to substantially burden, even by neutral laws of general applicability, the free exercise of religion without satisfying *Sherbert*.³³ Then came *City of Boerne* in 1997.

The question presented was whether RFRA as applied to the states was a permissible exercise of Congress's § 5 power.³⁴ More precisely, the question was whether Congress had the power to substantively determine that the Free Exercise Clause, incorporated against the states by the Fourteenth Amendment, required state and local governments to satisfy the *Sherbert* balancing test before burdening religious exercise.³⁵ RFRA did not win the day. The Court held that Congress is not authorized by § 5 to substantively define the meaning of the Fourteenth Amendment's guarantees.³⁶

30. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

31. *Id.* at 884–85. *Smith* characterized *Sherbert* as requiring that “governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.” *Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

32. *Id.* at 882.

33. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §§ 2(a)–(b), 3(a), 5(1), 107 Stat. 1488, 1488–89 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4).

34. *City of Boerne*, 521 U.S. at 511.

35. *See id.* at 516–17.

36. *Id.* at 519.

Such is the province of the Court. Rather, Congress is limited to remedially enforcing the Fourteenth Amendment.

Observing that the line between the two can be hard to draw, the Court further found that unconstitutional substantive and constitutional remedial legislation are differentiated by requiring “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”³⁷ Proportionality and congruence are a fit of degree³⁸ and kind³⁹ between the legislation and the underlying problem. In *City of Boerne*, the Court found RFRA wanting with respect to proportionality as it broadly swept up all government action everywhere in perpetuity.⁴⁰ Congress created in RFRA a statute that, to be proportional, would have required that free exercise be assailed from every quarter. As there was no evidence that such was the case, RFRA could not be remedial and thus had to be substantive and, accordingly, unconstitutional.⁴¹

The statutory grant of punitive damages to disparate impact plaintiffs envisioned by this Note would be remedial legislation. The statute would rely upon a plaintiff satisfying the *judicially* determined burden of proof that the Equal Protection Clause had been violated as a basis for awarding the damages. This is in contrast to RFRA, which attempted to overturn a judicial determination—*Smith*—of what the Free Exercise Clause requires of states. And a disparate impact plaintiff would only have access to punitive damages upon a judicial adjudication that he or she met the judicially decreed burden. Such reliance on the judiciary for the constitutional standard and predicating the award on judicial resolution of the constitutional claim indicates the statute

37. *Id.* at 519–20.

38. Factors including “termination dates, geographic restrictions, [and] egregious predicates” are relevant to proportionality. *Id.* at 533.

39. A subsequent case indicated congruence (and proportionality) requires that the legislation be aimed at state, as opposed to private, action. *United States v. Morrison*, 529 U.S. 598, 625–26 (2000). In *Morrison*, the Violence Against Women Act was incongruent because it sought to remedy states’ public underenforcement of crimes of violence perpetrated against women by giving the victims a private civil remedy against their abusers. *Id.* at 619–20, 626.

40. *City of Boerne*, 521 U.S. at 532 (“RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”).

41. *Id.* at 534–35.

suggested here would not be a congressional attempt at substantive interpretation of the Equal Protection Clause. Rather, Congress's authorization of the punitive award would be a means appropriate to the end of remedying disparate impact violations of the Equal Protection Clause.

Congruence and proportionality, to the degree that they are necessary,⁴² are also satisfied. The punitive grant contemplated by this Note would only be available upon an adjudication that a state had unreasonably classified with a discriminatory purpose.⁴³ The law would thus operate in a targeted fashion, allowing punitive damages in proportion to instances of unreasonable and highly culpable classification as plaintiffs successfully litigate them. Moreover, statutory provision of a damages remedy for constitutional claims is an accepted exercise of § 5 power.⁴⁴ Using this accepted exercise of power to provide for punitive damages makes these plaintiffs a vehicle for punishing states for creating disparate impacts. By operating in this tailored fashion to address state violations of constitutional rights, a punitive award for disparate impact plaintiffs satisfies the proportionality and congruence requirements.

Accordingly, Congress has the constitutional power to award punitive damages for disparate impact violations given that such an award would be a permissible abrogation of state sovereign immunity and would be remedial.

III. DOCTRINAL LANDSCAPE

Having established that Congress has the power to provide punitive damages for plaintiffs bringing disparate impact claims against states, the analysis now inquires into the doctrines of disparate impact claims and punitive damages. Reviewing these

42. Congruence and proportionality are tools to ensure that exercises of § 5 power are remedial. *See supra* note 26 and accompanying text. If the legislation at issue, like that suggested in this Note, is not a close call on the remedial versus substantive question, then the analytical aid offered by congruence and proportionality is not needed.

43. *See infra* Sections III.A, IV.A.1.

44. Section 1983 is a prime example. *See supra* note 7; *infra* notes 102-04. The title of the Civil Rights Act of 1871 – “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes” – makes clear that Congress passed the law pursuant to § 5. *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *rev'd on other grounds*, *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

doctrines will frame the legal and policy arguments justifying the damages provision contemplated by this Note.

A. Disparate Impact Claims

The Fourteenth Amendment's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁴⁵ Thus, read literally, equal protection means a state cannot make classifications among citizens that distribute burdens or benefits inequitably. Now of course the state has to make some classifications that distribute burdens or benefits inequitably, otherwise state government would be hamstrung.⁴⁶ (These classifications range from the innocuous—for example, an age classification for obtaining a driver's license—to the controversial—for example, a race classification for admission to state institutions of higher education.) Accordingly, courts reviewing an Equal Protection Clause challenge have to ascertain whether the classification is reasonable.⁴⁷

Before inquiring into reasonableness, however, a reviewing court will ask whether the classification is on the face of the government action, that is, whether the action expressly classifies. For facially classificatory state actions, the plaintiff's claim proceeds to the application of the tier of scrutiny (usually heightened or rational basis) commensurate with the classification's reasonableness.⁴⁸ A non-facially classificatory state action may still be unreasonable in operation, but the plaintiff's claim first goes through a burden-shifting framework to determine whether the

45. U.S. CONST. amend. XIV, § 1.

46. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

47. See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656-57 (1981) (recognizing that the Fourteenth Amendment "does not prevent the States from making reasonable classifications").

48. See *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (applying heightened review to a state institution of higher education that by explicit provision only admitted men).

state action even classifies in the first place.⁴⁹ Only if the claim survives this burden-shifting does it then proceed to the tiers of scrutiny.⁵⁰ Use of a burden-shifting framework insulates non-facially classificatory actions from judicial scrutiny under the guise of a presumption of constitutionally valid state action.⁵¹ Consequently, states have a freer hand to trench on equal protection and challenges to non-facially classificatory state actions—disparate impact claims—are harder to win than challenges to facially classificatory actions.

The elements of the burden-shifting framework are taken in turn in the next three subsections. Three Supreme Court cases from the latter half of the 1970s are crucial to this framework. *Washington v. Davis* concerned a qualifying test for firemen that black applicants disproportionately failed.⁵² *Village of Arlington Heights v. Metropolitan Housing Development Corporation* dealt with a rezoning denial that frustrated low-income, black housing construction.⁵³ And *Personnel Administrator of Massachusetts v. Feeney* centered on a state public employment preference for veterans that routinely failed to benefit women.⁵⁴ These cases are largely responsible for the modern framework of disparate impact claims and their proof requirements.

1. *Alleging a disparate impact*

The burden-shifting framework begins with the plaintiff alleging that a state action has had a disparate impact. But the allegation almost always plays a minor role in the burden-shifting framework. This owes in large part to the Court's emphasis on the second part of the framework, the defendant's discriminatory

49. The state action likely classifies in some fashion. *See supra* note 46. For example, an exam might facially classify (even amongst white examinees) on the basis of a passing exam score. But the burden-shifting analysis gets at whether a non-facial classification (black examinees scoring poorly as a group) can be said to classify at all.

50. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995) (demonstrating the analysis in the context of a non-facially classificatory redistricting plan).

51. *See infra* note 66.

52. *Washington v. Davis*, 426 U.S. 229, 232–36 (1976).

53. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 255–59 (1977).

54. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261–65 (1979).

purpose.⁵⁵ Indeed, alleging the disparate impact is typically insufficient on its own to shift the burden of proof to the defendant.⁵⁶

The limited circumstance where an impact is extreme or irrational does allow the allegation of the disparate impact to take on an all-important role. Where the disparate impact is such that the state action can only be explained as motivated by a discriminatory purpose, the disparate impact itself is sufficient to switch the burden to the state-actor defendant.⁵⁷ The Court has opined that such a circumstance is the rare exception to the general rule that the disparate impact does not switch the burden.⁵⁸ The Court cites *Yick Wo v. Hopkins*⁵⁹ and *Gomillion v. Lightfoot*⁶⁰ as examples of this rare exception.⁶¹ *Yick Wo* involved a permit requirement in San Francisco that had been used to grant permits to all but one white applicant and to no Chinese applicant.⁶² *Gomillion* was a redistricting case where Alabama redrew a square shaped city as “an uncouth twenty-eight-sided figure” with the effect of excluding nearly all of its black voters from the boundaries without excluding a single white voter.⁶³ The reference to these cases suggests that for this rare exception to apply, (almost) all similarly situated individuals within the state action’s ambit have to be impacted and (almost) no individuals outside this group may be impacted. But even when this exception applies, it does so only as a proxy for discriminatory purpose, the focus of the framework’s analysis.⁶⁴

55. *Davis*, 426 U.S. at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

56. *See id.*

57. *Arlington Heights*, 429 U.S. at 266.

58. *Id.*

59. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

60. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

61. *Arlington Heights*, 429 U.S. at 266.

62. *Yick Wo*, 118 U.S. at 357–59.

63. *Gomillion*, 364 U.S. at 339–40.

64. *See, e.g., Washington v. Davis*, 426 U.S. 229, 241 (1976) (“It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an ‘unequal application of the law . . . as to show intentional discrimination.’” (quoting *Akins v. Texas*, 325 U.S. 398, 404 (1945))).

2. Proving discriminatory purpose

Having alleged that the state action results in a disparate impact, the plaintiff must then prove that the state acted with a discriminatory purpose to cause the disparate impact.⁶⁵ This burden is designed to be demanding. The Court attaches a presumption of validity to non-facially classificatory actions out of respect for the decisions made by state governments.⁶⁶ A heavy burden on the plaintiff in the form of a presumptively valid state action also has the formalistic convenience of foreclosing inquiry behind the neutral face of a state action unless compelling reasons exist to so inquire.⁶⁷

The Court has consistently formulated “discriminatory purpose” as the kind of motive or mental state that the disparate impact plaintiff must prove the state possessed. *Feeney* gave discriminatory purpose its most definitive—and, for plaintiffs, devastating—gloss. There the Court threw cold water on the petitioner’s argument, “common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions.”⁶⁸ As discriminatory purpose “implies more than intent as volition or intent as awareness of consequences[,]” *Feeney* required the plaintiff to prove that the state action was taken “because of,” not merely “in spite of,” the disparate impact.⁶⁹ One scholar has observed of *Feeney* that “the Court asked plaintiffs to prove that legislators adopting a policy that would foreseeably injure women or minorities had acted with the *express* purpose of

65. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

66. *See* *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 272–73 (1977) (noting that there is a “presumption of constitutionality to which every duly enacted state and federal law is entitled”); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1291 (2011) (“[G]overnment actions not containing racial classifications . . . [do] not provoke the presumption of unconstitutionality, even if such facially neutral policies tend[] to bear more harshly on one group than another.”).

67. The Court’s response to the disparate impact in *Davis* is illuminating.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies ‘any person . . . equal protection of the laws’ simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.

Davis, 426 U.S. at 245.

68. *Feeney*, 442 U.S. at 278.

69. *Id.* at 279.

injuring women or minorities – in short, a legislative state of mind akin to malice.”⁷⁰

As of 2012, not a single plaintiff since *Feeney* had proved that a state had acted with discriminatory purpose.⁷¹ As result, the exact line dividing discriminatory purpose after *Feeney* and lesser motives cannot be precisely determined, or at least common law reasoning is not available to ascertain it. This paucity of successful plaintiffs, however, is suggestive of the *relative* height of the discriminatory purpose standard. While discriminatory purpose’s absolute height is unknown, it is more demanding than what forty years of disparate impact plaintiffs have argued it is.⁷²

The change *Feeney* wrought in the evidence that will discharge the plaintiff’s burden further suggests the relative height of the discriminatory purpose standard. This is so because “[t]he debate over proof is only roughly separable from the question of what counts as a discriminatory purpose.”⁷³ *Davis* said discriminatory purpose “may often be inferred from the totality of the relevant facts.”⁷⁴ *Arlington Heights* then enumerated some “relevant facts.” The disparate impact itself, though insufficient to satisfy the standard, was a useful starting point.⁷⁵ Further avenues to proving discriminatory purpose included the historical background of the decision, the specific sequence of events leading up to the decision, departures from the normal procedural or substantive sequence, and the legislative or administrative history.⁷⁶ In short, under *Davis* and *Arlington Heights*, contextual evidence drawn from the circumstances surrounding the state action was probative of discriminatory purpose.

70. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (emphasis added).

71. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012). Professor Haney-López’s assertion is unfortunately bare. He cites no empirical data set nor describes any search methodology that allow him to state that there have not been any successful disparate impact claims since *Feeney*.

72. This Note does not present data for the number of disparate impact claims since *Feeney*. But there have been some disparate impact claims in the last forty years. See *infra* note 79.

73. Haney-López, *supra* note 71, at 1796.

74. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

75. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

76. *Id.* at 267–68.

Feeney's take on discriminatory purpose amounted to a rejection of the sufficiency of contextual evidence to prove discriminatory purpose and, commensurately, a heightening of the standard.⁷⁷ As an initial matter, that *Feeney* changed discriminatory purpose is evident from the language of the opinion. *Feeney's* requirement that but for the disparate impact the state would not have taken the challenged action is in direct opposition to *Arlington Heights's* finding that “[r]arely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”⁷⁸ In light of this change, the Court after *Feeney*, finding discriminatory purpose satisfied only by a but-for motive and rejecting the “natural and foreseeable consequences” of a state action to prove it, required plaintiffs to provide direct evidence of discriminatory purpose.⁷⁹ Scholarly commentary on the discriminatory purpose standard after *Feeney* has observed that “with only slight hyperbole one might say that the contemporary malice standard seems to demand a sworn affidavit admitting to discrimination, or perhaps even a confession in open court.”⁸⁰

In sum, discriminatory purpose is a but-for mental state, provable only by direct evidence of a state actor’s subjective motive. And, for what it is worth in understanding the standard, possibly no disparate impact plaintiff has yet proved that a state acted with discriminatory purpose in causing a disparate impact.

77. This is Professor Haney-López’s argument. Haney-López, *supra* note 71, at 1825–26 (observing that *Feeney* was a departure point for the eventual understanding that discriminatory purpose “necessitat[ed] direct proof of actual mindsets”).

78. *Arlington Heights*, 429 U.S. at 265. *Arlington Heights* was therefore concerned with discriminatory purpose when it became a “motivating factor” in the state’s decision. *Id.* at 266.

79. *E.g.*, *McClesky v. Kemp*, 481 U.S. 279, 298–99 (1987) (refusing to *infer* discriminatory purpose on the part of Georgia in its racially disparate capital sentencing system due to legislative discretion and the existence of some legitimate reasons for the system); *City of Mobile v. Bolden*, 446 U.S. 55, 71–74 (1980) (rejecting contextual evidence of discrimination in a municipality’s electoral system as insufficient proof of discriminatory purpose). These cases do not explicitly call for direct evidence of individual state actor’s subjective state of mind. But it is challenging to conceive of anything less than that satisfying discriminatory purpose given the cases’ rejection of contextual evidence.

80. Haney-López, *supra* note 71, at 1790.

3. *Lawful motivation*

Provided that the plaintiff successfully proves discriminatory purpose, the burden then shifts to the state defendant. The precise contours of this burden are uncertain. *Davis* quotes a jury selection case as requiring the state to “rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced [a] monochromatic result.”⁸¹ But *Feeney* is silent as to burden shifting. And given the fatality of the discriminatory purpose standard to plaintiffs, this ultimate burden on the state is largely theoretical – the analysis does not reach this stage.

Whatever the burden, if the state successfully discharges it, then the state will be deemed to have not possessed a discriminatory purpose and the plaintiff’s action will fail. If, on the other hand, the defendant does not disprove that the disparate impact was the but-for motivation of the state action, the case will proceed to application of the tier of scrutiny commensurate with the disparate impact’s reasonableness.

In review, to clear the burden-shifting hurdles prior to application of a tier of scrutiny, a disparate impact plaintiff must allege that the disparate impact exists, prove that the state action was taken with the intention of causing the disparate impact to occur, and survive the state actor’s contrary proof that the state action resulted from a lawful motivation.

B. Punitive Damages

Punitive, or exemplary,⁸² damages can be a species of common or statutory law.⁸³ They go beyond the damages necessary to make

81. See *Washington v. Davis*, 426 U.S. 229, 241 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

82. 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES, §§ 1.3, 2.1(A) (7th ed. 2015).

83. See, e.g., 15 U.S.C. § 15(a) (2018) (providing for treble damages for violations of antitrust laws); *Plains Res., Inc. v. Gable*, 682 P.2d 653, 664–65 (Kan. 1984) (allowing for punitive damages as a remedy in tort law). Treble damages are not classic punitive damages in that the jury, as finder of fact, lacks discretion to determine the amount, but they are still punitive in nature. See SCHLUETER, *supra* note 82, § 2.0.

a plaintiff whole and are thus extra-compensatory.⁸⁴ In their modern iteration they are largely justified on punishment and deterrence grounds⁸⁵ and, when not set by statute, their determination is a matter for the judge or jury as finder of fact.⁸⁶ Most importantly for present purposes, the legal predicates to awarding punitive damages typically consist of mental state and serious misconduct requirements.⁸⁷

1. *Mental state*

The mental state and serious misconduct requirements operate together to justify the award of punitive damages, which justification is necessary in light of the remedy's extra-compensatory nature. But while a mental state is typically predicate to a punitive award, punitive damages law does not have its own finely graded and consistently applied mental states framework.⁸⁸ Rather, punitive damages law borrows from a generalized law of mental states. Accordingly, this Note has selected two sources to inform its analysis.

First, this Note will employ the Model Penal Code's (MPC) mental states framework for purposes of assessing in Section IV.A.1 the amenability of disparate impact claims to a punitive damages award. The MPC framework is divided into a hierarchy of four mental state gradations—purposely, knowingly, recklessly, negligently—with purposely being the most culpable and negligently the least.⁸⁹ The use of the MPC framework, a criminal law *mens rea* framework, is a rational choice given punitive damages' quasi-criminal nature.⁹⁰

84. SCHLUETER, *supra* note 82, § 1.4(B).

85. *Id.* § 2.2(A)(1).

86. *Id.* § 1.3(A).

87. See DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES 315 (3d ed. 2018).

88. There is, at minimum, no general constitutional or statutory regime governing the mental state predicate for punitive damages. While the Due Process Clauses do bear on the mental state predicate via the reprehensibility concept, *see infra* note 107, it is unlikely that the Due Process Clauses are controlling when Congress legislates pursuant to § 5. *See infra* note 119.

89. MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1985).

90. *See infra* note 129. In addition to being rational, the MPC's explicit hierarchical ranking of mental states makes its framework helpful as a comparison tool. *See infra* notes 109–11 and accompanying text.

Second, this Note will utilize the mental state requirement for punitive damages under § 1983, as the Court discussed it in *Smith v. Wade*. As § 1983 is the statute most similar to what this Note proposes, its mental state requirement provides an opportunity to examine how the punitive award suggested here comports with the state of mind Congress has previously found to be sufficiently egregious for state deprivations of constitutional rights. Although § 1983 does not directly address the necessary mental state for punitive damages, the Court (with Justice Brennan writing for the majority) took up the very subject in *Wade*.⁹¹ In response to the petitioner-defendant's argument that actual intent was the standard under § 1983,⁹² the Court held that "evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others" satisfied the mental state requirement.⁹³ Thus under § 1983 intent is a sufficient but not a necessary mental state.

In a spirited dissent, then-Justice Rehnquist took umbrage at the *Wade* majority's efforts to divine the 1871 Congress's intent with regard to punitive damages.⁹⁴ Rehnquist concluded actual intent is the proper standard for punitive damages under § 1983.⁹⁵ Justice O'Connor, in her *Wade* dissent, looked to the purposes underlying § 1983.⁹⁶ Finding the compensatory purpose satisfied by ordinary money damages, she opined that the deterrence purpose of the law did not militate in favor of a less-than-intent standard given the potential for interference with officials' duties.⁹⁷

While the debate on display in *Wade* is ultimately moot for purposes of this Note,⁹⁸ canvassing the opinions highlights that all three posit intent (or malice) as the highest possible mental state requirement that § 1983 could impose as a predicate for punitive damages. The 1871 Congress, according to the Court, set a reckless

91. *Smith v. Wade*, 461 U.S. 30, 31 (1983).

92. *Id.* at 38.

93. *Id.* at 56.

94. *Id.* at 65-68 (Rehnquist, J., dissenting).

95. *Id.* at 68-84. Rehnquist asserted that a number of considerations—punitive damages being disfavored in the law, § 1983 not explicitly referring to punitive damages, federalism—weighed in favor of the "intent standard," which is more restrictive. *Id.* at 84-92.

96. *Id.* at 92-93 (O'Connor, J., dissenting).

97. *Id.* at 93-94.

98. *See infra* Section IV.A.

threshold for punitive damages under § 1983, but a modern Congress could require no more than intent. Thus, the discussion of the mental state standard in *Wade* and the hierarchical ranking of the MPC's *mens rea* gradations confirm that there is an upper bound to mental states that intent and purpose orbit.⁹⁹

2. *Serious misconduct*

In order for punitive damages to be warranted, the sufficiently culpable mental state must lie at the root of serious misconduct.¹⁰⁰ The intuition is straightforward: extra compensatory remedies are only appropriate in response to extraordinarily deviant behavior. Case law highlights at least two factors relevant to the serious misconduct predicate—community standards of morality and due process considerations.

Where a cause of action does not explicitly address the severity of the misconduct that will trigger an award of punitive damages, it preserves the jury's traditional role in determining whether the challenged conduct is sufficiently abhorrent to merit the imposition of punitive damages. Section 1983 falls into this category. The Court described this jury determination as a “discretionary moral

99. The discussion of mental states in this Section does not reckon with the many critiques of mental state inquiries, from their obscurity, *e.g.*, Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99 (1971) (describing legislative motive as “one of the most muddled areas of our constitutional jurisprudence”), to their propriety, *e.g.*, Lino A. Graglia, *Ricci v. DeStefano: Even Whites Are a Protected Class in the Roberts Court*, 16 LEWIS & CLARK L. REV. 573, 581–82 (2012) (discussing how an intent standard “rais[es] issues as to . . . why . . . a competent actor’s mental state (‘subjective intent’) rather than the effects of his deliberate (non-accidental) act should determine the act’s legal consequences”). Moreover, this Section and Section IV.A.1’s equating of various mental states are susceptible to criticism as conclusory for failing to engage the nuance in mental state law. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 466 (1992) (suggesting ways in which the “reigning hierarchy” of mental states is both “too simplistic” and “all too accurate[]”). However, these shortcomings are not germane to this Note’s purpose, which is to demonstrate that Congress would be justified in making punitive damages available to disparate impact plaintiffs. This Note takes as a given the mental state requirement disparate impact plaintiffs face, warts and all, and in light of that requirement’s extremity does not spend time parsing the boundless varieties of mental state formulations. *See infra* Section IV.A.1.

100. *Wade*, 461 U.S. at 52 (describing the finder of fact’s determination as to the suitability of punitive damages as a step separate from and in addition to the state of mind inquiry); *see also* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (“Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong . . .”).

judgment.”¹⁰¹ Juries and judges have exercised this moral judgment to award, and appellate courts have upheld, punitive damages in a variety of § 1983 cases, including where guards at a correctional facility made cell assignments that resulted in an assault,¹⁰² police officers went beyond a warrant in searching a property,¹⁰³ and a state penitentiary segregated cell assignments by race.¹⁰⁴ These cases illustrate that finders of fact making “discretionary moral judgment[s]” have determined violations of constitutional rights to be sufficiently serious to merit the imposition of punitive damages.

In addition to the finder of fact’s discretion, the Due Process Clause also informs the severe misconduct predicate. Indeed, the Clause typically serves to impose limits on the finder of fact’s discretion, particularly as it relates to the amount of the punitive award.¹⁰⁵ The Due Process Clause dictates that conduct be sufficiently egregious in order to merit a particular quantum of punitive damages. And the Supreme Court employs the concept of reprehensibility to determine whether the punitive award is excessive.¹⁰⁶ Reprehensibility itself turns on such factors as “whether[] the harm caused was physical as opposed to economic; . . . the target of the conduct had financial vulnerability; [and] the conduct involved repeated actions or was an isolated incident”¹⁰⁷ By influencing the quantum of damages juries may

101. *Wade*, 461 U.S. at 52.

102. *Id.* at 32–34.

103. *Creamer v. Porter*, 754 F.2d 1311, 1314–16 (5th Cir. 1985).

104. *Sockwell v. Phelps*, 20 F.3d 187, 189 (5th Cir. 1994).

105. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“[I]t is well established that there are procedural and substantive constitutional limitations on [punitive damages] awards. . . . The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments”); *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 376 (4th Cir. 2008) (stating that the same due process limitations on punitive damages under the Fourteenth Amendment against states are operative under Fifth Amendment against the federal government).

106. *Campbell*, 538 U.S. at 419 (“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996))).

107. *Id.* Unfortunately the court also posits whether the conduct “evinced an *indifference to or a reckless disregard of the health or safety of others . . . and the harm was the result of intentional malice, trickery, or deceit, or mere accident[,]*” as pertinent to reprehensibility, which unhelpfully blends the mental state and serious misconduct predicates. *Id.* (emphasis added). Ideally, the concept of reprehensibility would only concern conduct, not mental state.

award, these reprehensibility factors, and thus the Due Process Clause, operate to heighten the seriousness of the misconduct that is required for an award of punitive damages.

IV. AWARDING DISPARATE IMPACT CLAIMANTS PUNITIVE DAMAGES

Having established the doctrinal frameworks of punitive damages and disparate impact claims, the analysis now applies the one to the other. Such application is the heart of this Note. As a matter of the legal principles involved, successful disparate impact plaintiffs present a compelling case for access to punitive damages. This Part also considers the policy bases for providing the punitive damages award.

A. The Legal Aspects of Providing Punitive Damages to Disparate Impact Claimants

Organizing the legal application around the predicates to punitive damages focuses the inquiry on two questions. First, does the discriminatory purpose showing required of disparate impact plaintiffs present a sufficiently culpable mental state to merit punitive damages? Second, does a disparate impact claim meet the serious misconduct standard for punitive damages? Answering these questions in light of the doctrines discussed in Part III reveals that a successful disparate impact plaintiff has, by carrying the burden of proof, met the standards for awarding punitive damages.

1. Discriminatory purpose and the mental state predicate

Discriminatory purpose is a sufficiently culpable mental state to satisfy the punitive damages mental state predicate. This is so whether Congress examines discriminatory purpose for satisfaction of a lesser mental state threshold—for example, the same reckless or callous indifference standard that controls the award of punitive damages in § 1983 cases—or the most heightened mental state.

As a matter of plain meaning, any mental state formulation based on purpose is more heightened than a mental state

formulation based on recklessness.¹⁰⁸ And while the cases do not directly compare recklessness and discriminatory purpose, a proxy for recklessness can be found in the disparate impact cases – the disparate impact itself. Recall that the allegation of the disparate impact alone fails to satisfy the plaintiff’s burden. If all that a state does is disregard the risk that its action will operate unequally upon different classes of people – as in, act recklessly – then the fact that a disparate impact has occurred is unavailing. A state action only classifies, and thus potentially violates the Equal Protection Clause, if the state acted with discriminatory purpose, the subjective goal of causing the disparate impact. Analogizing the disparate impact to recklessness therefore allows for the conclusion that discriminatory purpose is a more heightened mental state showing than recklessness.

Where discriminatory purpose stands in relation to a lower mental state threshold, like § 1983’s recklessness standard, is inapposite given that discriminatory purpose satisfies even the most heightened mental state requirement. Utilizing the Model Penal Code’s (MPC) mens rea hierarchy confirms this conclusion. The *purposely* mental state, the hierarchy’s most culpable, is the “conscious object to engage in conduct of [a given] nature or to cause [a given] result.”¹⁰⁹ *Feeney* requires that the state, in taking a facially neutral action, had the conscious object to work a discriminatory purpose. Thus, *Feeney*’s requirement that the state action be taken “because of” the disparate impact means that discriminatory purpose fits comfortably within *purposely*’s bounds.

Perhaps the clearest comparison of mental states, however, involves the MPC’s *knowingly* mental state. This comparison leverages the employment of identical terms in the MPC and

108. The difficulties of mental state inquiries notwithstanding, the author is aware of no mental state hierarchy that ranks recklessness as equal to, much less more heightened than, purpose. Compare *Reckless*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk...”), with *Discriminatory Purpose*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A design or desire to restrict the rights of a class of people, esp. a protected class.”). Recklessness is only conscious or deliberate with regard to an indifference to the risk of adverse consequences while the adverse consequences (the disparate impact) are the design or desire of discriminatory purpose.

109. MODEL PENAL CODE § 2.02(2)(a)(i) (AM. L. INST. 1985).

Feeney. In *Feeney*, the Court observed that discriminatory purpose is more than “awareness of consequences.”¹¹⁰ The MPC, for its part, states that a “person acts knowingly . . . if . . . he is aware that it is practically certain that his conduct will cause” a certain result.¹¹¹ Given how little daylight there is between purposely and knowingly in the MPC hierarchy,¹¹² *Feeney*’s rule that discriminatory purpose is more than “awareness of consequences” necessarily puts discriminatory purpose on the same level as *purposely*.

A final comparison, this time with § 1983, further demonstrates discriminatory purpose’s nature as an apex mental state. Discriminatory purpose is of a piece with the dissent’s argument in *Wade* that the proper mental state requirement under § 1983 is “intent to do injury.”¹¹³ An exact ordering of *Feeney*’s “because of” and *Wade*’s “intent to do injury” may be impossible. But that the two are likely equivalents is supported by their proponents’ understanding of the rationale behind such heightened requirements; namely, that punitive damages should rarely be granted¹¹⁴ and disparate impact claims should rarely be successful.¹¹⁵ If the majority in *Feeney* and the dissent in *Wade* understood themselves to be articulating the most restrictive mental state requirements for disparate impact claims and punitive damages under § 1983, respectively, then it stands to reason that they were articulating the same standard.

There is no more demanding showing of mental state than what the Court has already required of disparate impact plaintiffs. Congress should accordingly feel confident that disparate impact plaintiffs have met the mental state predicate for awarding punitive damages.

110. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added).

111. MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST. 1985) (emphasis added).

112. *See United States v. Bailey*, 444 U.S. 394, 404 (1980) (noting the “limited distinction between knowledge and purpose” (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978))).

113. *Smith v. Wade*, 461 U.S. 30, 70 (1983) (Rehnquist, J., dissenting). The *Wade* dissent also uses the term “malice” to describe the mental state requirement it understands § 1983 to impose for punitive damages. *Id.* at 68. Notably, scholarly commentary also uses the “malice” term to describe the discriminatory purpose standard after *Feeney*. *See supra* notes 70, 80 and accompanying text.

114. *Wade*, 461 U.S. at 87–88.

115. *See supra* notes 66–67 and accompanying text.

2. *Disparate impact and the serious misconduct predicate*

Assessing disparate impacts under the serious misconduct requirement is more qualitative and less formulaic than the mental state requirement analysis. Serious misconduct analysis invokes the finder of fact's discretion. In the context of this Note, Congress is the "finder of fact," operating in an anticipatory manner in assessing whether the seriousness of a disparate impact ever merits the award of punitive damages.¹¹⁶ Discretion notwithstanding, Congress is not likely to affect a complete departure from the principles of fairness and community norms of morality that have guided courts and juries thus far in determining the contemptibility of conduct. And Congress can be assured that state action creating a disparate impact satisfies these principles and standards.

The Constitution's disdain for violations of equal protection rights is a key indicator of how seriously disparate impacts transgress principles of fairness and morality. While it is easy to lose sight of the severity of a disparate impact in light of the Court's focus on discriminatory purpose, a disparate impact is the same, for constitutional purposes, when discriminatory purpose is present as a facial classification. Thus, disparate impact classifications are exactly what the plain language of the Equal Protection Clause forbids, only all the more contemptible for hiding under the cover of neutral, legitimate governing. Accordingly, disparate impacts caused by a discriminatory purpose fall within the unreasonable classifications to which the Constitution metes out serious treatment.¹¹⁷ Juries, exercising their moral discretion, have followed the Constitution's

116. When Congress authorizes a punitive damages award it makes a determination regarding the seriousness of the conduct at issue analogous to the discretionary moral judgment that juries make when awarding punitive damages. Congress simply makes the judgment *ex ante*, not in the context of a lawsuit. And Congress's *ex ante* judgments are of various amplitudes. Sometimes punitive damages automatically accompany a victory on the merits. *See, e.g.*, 15 U.S.C. § 15(a) (2018). In other instances, they are simply available, preserving a role for the jury or judge as finder of fact while ensuring the possibility of the punitive award for deserving plaintiffs. *See, e.g.*, 42 U.S.C. § 1981a(a)(1)-(2), (b)(1) (2018).

117. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 534 (1996) ("[C]lassifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." (citation omitted)); *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

lead by awarding punitive damages against state officials where constitutional rights are attacked.¹¹⁸ As officers of the United States under oath to uphold the Constitution, Congress members should similarly look to our nation's charter in assessing whether disparate impacts are sufficiently serious to merit punitive damages.

Turning to due process considerations reveals a less stinging but still complete rebuke of disparate impact violations as constituting severe misconduct.¹¹⁹ The reprehensibility factors discussed in Section III.A.2 look to whether the misconduct was repeated, how vulnerable (financially) the plaintiff was, and the nature of the harm suffered.¹²⁰ These factors will vary from case to case, which in itself may argue in favor of at least making the damages available even if not mandatory, but disparate impacts often present compelling bases for finding the misconduct was serious. Disparate impact claims have alleged repeated¹²¹ economic harm¹²² to disadvantaged individuals.¹²³ The harm suffered may also be dignitary in nature.¹²⁴ Consequently, Due Process Clause considerations argue in favor of finding disparate impact violations to be serious misconduct.

The Equal Protection Clause, due process principles, and community norms all support a finding that disparate impact

118. *See supra* notes 102–04 and accompanying text.

119. The Due Process Clauses of the Fifth and Fourteenth Amendments are not likely binding on Congress in its exercise of § 5 power. As the Fourteenth Amendment's Due Process Clause is a protection for individuals from state power, it is difficult to see how it could also be a protection for states from federal power. Similarly, the Fifth Amendment's Due Process Clause is a protection for individuals but from federal power. Nonetheless, the Clauses may well inform, even though they do not constrain, Congress. The concerns of reviewing courts—namely, that a lack of procedural safeguards will lead to an “arbitrary deprivation of property[.]” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994))—will likely influence Congress because exercises of § 5 power affect the Congress members' home states. Accordingly, the principles undergirding the serious misconduct predicate in the traditional punitive damages context, including that the conduct be reprehensible under the Due Process Clauses, likely set a floor beneath which Congress would not go in defining conduct serious enough to merit punitive damages.

120. *See supra* text accompanying note 107.

121. *Washington v. Davis*, 426 U.S. 229, 232–36 (1976) (numerous black applicants failing test).

122. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261–65 (1979) (deprivation of public employment preference).

123. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 255–59 (1977) (low-income housing rezoning denied).

124. *See infra* Section IV.B.2.

violations amount to serious misconduct, or at minimum have the capacity to be serious misconduct. This support all indicates that Congress should view disparate impact violations as the kind of serious misconduct that justifies making punitive damages available.

B. The Policy Aspects of Providing Punitive Damages to Disparate Impact Claimants

Despite the strong legal arguments for allowing plaintiffs in disparate impact cases to seek punitive damages against states, punitive damages are non-mandatory in nature. Plaintiffs do not have a right to punitive damages.¹²⁵ The award of such damages is traditionally, and often still, a matter for the discretion of the jury, subject to certain limitations.¹²⁶ Moreover, punitive damages are highly disfavored – likely because they are a windfall beyond what is necessary to compensate the plaintiff.¹²⁷ Accordingly, the consideration of policy factors in this Section gets at the question of whether providing punitive damages for disparate impact plaintiffs is a good idea.

The primary policy justifications for awarding punitive damages are punishment and deterrence.¹²⁸ These justifications are in keeping with punitive damages' nature as "quasi-criminal."¹²⁹ They are also in keeping with, or perhaps are necessitated by, the fact that punitive damages are extra compensatory; they award a plaintiff beyond what is necessary to make the plaintiff whole.¹³⁰

125. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist J., dissenting) ("Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries – but no more.").

126. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

127. See *Wade*, 461 U.S. at 59 (1983).

128. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (describing punitive damages as "'private fines' intended to punish the defendant and deter future wrongdoing").

129. *Wade*, 461 U.S. at 59 (quoting *Huber v. Teuber*, 10 D.C. (3 MacArth.) 484, 590 (1877)). In criminal law, punishment is a state-imposed deprivation for which retribution and deterrence are justifications. See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 33–34 (7th ed. 2016).

130. It is probably more accurate to say that punitive damages are extra compensatory because they award a plaintiff beyond what the compensatory damages determination says will make the plaintiff whole. It is impossible to determine what, if anything, will make some

The law is willing, sometimes begrudgingly, to give a plaintiff more than he or she “deserves” because the award is accomplishing other ends. The punishment and deterrence justifications for punitive damages apply with force to disparate impact claims because of the insidious nature of disparate impact violations.

1. *Punishment*

Punishment in the punitive damages sense likely draws meaning from both retributivism and the notion that punishment provides an opportunity for society to express outrage at the wrongdoer.¹³¹ Criminal law’s retributivism is entirely self-fulfilling; that is, retributivism “is a *nonconsequentialist* justification of punishment. It is the claim that what makes the practice of punishment morally permissible is that criminals *deserve* punishment”¹³² It looks to no other end than imposition of the adverse consequence to the wrongdoer. Relatedly, punishment as a vindication of a violated community norm provides a channel for society to express its dissatisfaction with the misconduct.¹³³ While other ends, principally social control, may flow from punishment, it is not imposed to achieve those ends. The goal is commensurate retribution and expression of outrage, not effective incentivization.

Given the foregoing, the application of punitive damages to disparate impact claims is justified on punishment grounds. There is the commission of a wrong worthy of punishment – the disparate impact – and a defendant on whom society’s outrage may be expressed – the state entity. While the punishment rationale does justify the availability of punitive damages for disparate impact

plaintiffs whole. Indeed, some authorities have reasoned that the difficulty in assessing compensable harm is a factor that militates in favor of a greater punitive damages award. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–77 (7th Cir. 2003).

131. See Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2075 (1998) (“[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the actions of serious wrongdoers.”). Some authorities roll retributivism and expression of societal outrage into one, see *id.* at 2085–86, while others draw a sharp line between them; see *Smothers v. Alaska*, 579 P.2d 1062, 1064 (Alaska 1978) (“The support of community expectations that existing norms will be enforced and delicts will be punished is separate from retribution.”).

132. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992).

133. See Sunstein et al., *supra* note 131, at 2085 (“Juries believe that such [punitive damages] awards express the community’s outrage at certain forms of behavior”).

claims, it likely also justifies punitive damages for all claims that meet the legal predicates for awarding the damages.¹³⁴ Such a fact limits the potency of the punishment rationale as an independent justification for awarding punitive damages. But the suitability of the punishment justification to other claims does not diminish its suitability to disparate impact claims, where the defendant has been proven to have an especially condemnable mental state and the misconduct is an insidious frustration of a constitutional guarantee, that of the equal protection of the laws.

2. Deterrence

Deterrence, unlike retributive punishment, justifies the imposition of punitive damages based on an incentives scheme. Punitive damages force would-be defendants to internalize the costs of their wrongful actions and thereby incentivizes social responsibility.¹³⁵ The optimal amount of deterrence is achieved by a damages award that forces “injurers . . . to pay for the harm their conduct generates, not less, not more.”¹³⁶ Accordingly, punitive damages are most appropriate where the “probability of detection and successful suit for compensation” is low.¹³⁷ Relatedly, the deterrence justification may support punitive damages where the harm is difficult to quantify.¹³⁸ And, from a non-economic standpoint, scholars have called for punitive damages to deter defendants from deriving benefits where full compensatory

134. See *id.* at 2085–86 (“The retributive idea would probably focus on two principal factors: the defendant’s *state of mind* and the *degree of harm* actually caused or likely to be caused by the defendant’s behavior.” (emphasis added)).

135. *Id.* at 2082.

136. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998).

137. Sunstein et al., *supra* note 131, at 208; see also *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–77 (7th Cir. 2003) (arguing that greater punitive damages awards are merited where “probability of detection is very low”).

138. See *Mathias*, 347 F.3d at 676–77 (“Compensatory damages w[ill] not do the trick . . . because they are difficult to determine in the case of acts that inflict largely dignitary harms. . .”).

damages fail to negate the “hedonic” utility of socially harmful behavior.¹³⁹

Ideally the analysis would continue with empirical assessment of how effective compensatory damages are at deterring disparate impact violations and then inquiring as to the need for punitive damages to make up any difference. Such analysis is impossible, however, given the dearth of successful disparate impact claims.¹⁴⁰ But the absence of successful claims does not render the deterrence justification nugatory. First, the Court has not formally repudiated the disparate impact theory of Equal Protection Clause violations. Thus, there remains a claim through which punitive damages might, at least in theory, deter state action that results in a disparate impact. Second, in other contexts the Court has been willing to call into question state actors’ intent with at least a variant of the analysis described in *Feeney*.¹⁴¹ So it remains possible that through some combination of direct evidence of discriminatory purpose and a willing court, a disparate impact plaintiff may yet be successful.

Proceeding on theory then, the deterrence purpose behind punitive damages applies with force to disparate impact violations given their non-facially classificatory nature. By definition, a disparate impact is not on the face of the government action. Individuals who are disparately impacted must first determine whether their adversity is due to the facially neutral reason—a low test score, lack of military status—or their demographic group—black, female. Then once plaintiffs, these individuals must prove that the state action was taken with the intention of disabling their demographic group. This surreptitious working of the disparate impact and the difficulty in proving it are the very factors giving

139. Sunstein et al., *supra* note 131, at 2083; *see also Mathias*, 347 F.3d at 677 (finding punitive damages may be necessary “because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay . . .”).

140. *See supra* note 71 and accompanying text.

141. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729–31 (2018) (scrutinizing hearing statements from members of a state adjudicatory entity for evidence of a lack of “neutral and respectful consideration” despite the existence of a facially neutral ruling).

rise to the low “probability of detection and successful suit” that demand the deterrent effect of punitive damages.¹⁴²

Disparate impact claims are also not wanting with respect to the other deterrence considerations. The dignitary harm of being the subject of discrimination is not easy to quantify, even where the economic harm of that discrimination might be. This is all the more where the discrimination has been so intentionally wrought by subterfuge. Disparately impacted individuals are left to simultaneously suffer the discrimination and the indignity that the state is so intent upon discriminating that it has attempted to achieve by stealth what it is forbidden to do directly. The message sent to the disparately impacted individual is that the state will employ whatever means it can to treat that individual inequitably. The difficulty of measuring the harm such a message inflicts augurs in favor of awarding punitive damages, as does the need to prevent the state from deriving utility from flouting the Constitution with impunity while only having to pay a lesser price.

V. CONCLUSION

The equal protection principle stands in tension with the states’ general police power to regulate their citizens. And the equal protection principle sweeps broadly, encompassing, in the first instance, all state action. Disparate impact theories of Equal Protection Clause violations take things even further, potentially imposing a second layer of review. The first scrutinizes state action on its face, the second scrutinizes state action in its effects. It is unsurprising that the Court, in deference to the states’ status as sovereigns, has restrained the fullest reach of the equal protection principle through the discriminatory purpose standard.

In so limiting the scope of the equal protection principle the Court has created a safe harbor for two categories of states. The first category includes the states that create a disparate impact spontaneously, solely by dint of the state action’s operation. The second includes the states that create a disparate impact intentionally

142. That no disparate impact claims since *Feeney* have met the discriminatory purpose standard also suggests the claims have at least a low probability of successful suit. Although, in this circumstance, the low probability owes largely to the Court’s jurisprudence rather than the nature of the state’s conduct.

but possess the minimum competence necessary to hide that intent. States belonging to either category wreak real-world harm. Indeed, police shootings and killings of non-violent, unarmed black individuals—a pressingly salient topic¹⁴³—can probably be understood in terms of ostensibly neutral law enforcement regimes that disparately impact black communities. A state belonging to either of the above safe harbor categories could cause such a disparate impact and still avoid equal protection liability.

Congress, while not capable of disturbing the safe harbor, could authorize a punitive damages remedy in order to accomplish a variety of ends—reinforce the boundary between permissible and illegitimate state action, signal to the states that Congress is mindful of how they are treating their populations, or ensure a deserved punishment for constitutional violations. Regardless of Congress’s goal, the Court’s heightening of the disparate impact plaintiff’s burden made disparate impact claims meritorious of punitive damages. As this Note has shown, Congress should consider itself justified to use its § 5 power under the Fourteenth Amendment to complement the Court’s raising of the bar for disparate impact plaintiffs by providing a punitive award for these plaintiffs.

143. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.