

## COMMENTS

**“Our Federal System”: States’ Susceptibility  
to Challenge When Applying Federal  
Affirmative Action Law***Ross R. Fulton*<sup>†</sup>

## INTRODUCTION

In the 1980s and '90s, Congress passed a series of highway laws providing states with federal funds to augment state highway projects—but with “strings attached.”<sup>1</sup> Under these laws, states only receive federal funds if they agree to implement congressionally designed affirmative action programs on state highway projects using federal funds.<sup>2</sup> These laws accomplish Congress’s goal of promoting minority participation in state highway projects but leave states the responsibility of enacting and implementing the specific affirmative action programs.<sup>3</sup>

Congress’s authority to place conditions on federal funds stems from its constitutionally based Spending Power.<sup>4</sup> Normally, Congress passes laws that are directly implemented by the federal government.

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<sup>1</sup> See *Milwaukee County Pavers Association v Fiedler*, 922 F2d 419, 422 (7th Cir 1991) (noting that the statute in question required that a specific percentage of the funds appropriated be expended on a defined group of businesses). For the highway laws, see, for example, Transportation Equity Act for the 21st Century (TEA-21), Pub L No 105-178 § 1101(b), 112 Stat 107, 113 (1998), codified at 23 USC § 101 note (2000); Intermodal Surface Transportation Efficiency Act of 1991, Pub L No 102-240 § 1003(b), 105 Stat 1914, 1919–21 (1991), codified at 23 USC § 101 note (2000); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub L No 100-17 § 106(c), 101 Stat 132, 145–46 (1987), codified at 23 USC § 101 note (2000); Surface Transportation Assistance Act of 1982, Pub L No 97-424 § 105(f), 96 Stat 2097, 2100 (1982), codified at 23 USC § 101 note (2000).

<sup>2</sup> See *Milwaukee Pavers*, 922 F2d at 423 (“The receipt of funds under the federal Act is voluntary, but a state that decides to receive such funds is bound by the [affirmative action] regulations.”).

<sup>3</sup> It is worth noting that each of the series of laws passed by Congress has slightly different requirements and provides states with different degrees of leeway. Ultimately, however, the actual contours of such programs do not contribute significantly to the circuit split, which is couched at a more general level.

<sup>4</sup> US Const Art I, § 8, cl 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”). Implicit in this enumerated power is Congress’s authority to spend. See *South Dakota v Dole*, 483 US 203, 207 (1987).

By contrast, the Spending Power allows Congress to achieve its policy goals indirectly, using federal funds to incentivize state action.<sup>5</sup>

Under the highway laws in question, states choosing to accept the federal funds agree to enact a law implementing an affirmative action program on every state highway project funded with federal monies.<sup>6</sup> Subcontractors whose bids were rejected on such projects in favor of minority-owned businesses challenged the implementing laws as unconstitutional under two theories. First, subcontractors brought facial challenges against the federal laws as violations of the equal protection component of the Fifth Amendment.<sup>7</sup> Federal courts of appeals considering these challenges agreed that the federal laws are facially constitutional.<sup>8</sup> Second, subcontractors also brought as-applied challenges against individual states' implementation of the federal conditions as violations of the Equal Protection Clause of the Fourteenth Amendment.<sup>9</sup> These same circuits have split over whether states are susceptible to as-applied constitutional challenges for implementing federal affirmative action laws.<sup>10</sup>

This Comment resolves the circuit split through a novel approach, arguing that understanding a state's role in implementing federal conditions is essential to analyzing the split. A state is subject to the limitations of the Fourteenth Amendment when it creates and applies an

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<sup>5</sup> See *id.* (noting that when Congress legislates indirectly with its Spending Power it provides recipients with "a choice: Either [accept the statutory conditions] or forgo certain federal funds").

<sup>6</sup> See, for example, *Western States Paving Co, Inc v Washington State Department of Transportation*, 407 F3d 983, 987 (9th Cir 2005). The state of Washington adopted a federally designed affirmative action program in order to receive federal funds under TEA-21 and subsequently used those funds for the "NE Burton Road Project." The state required 14 percent minority participation on this project and rejected the bid of the plaintiff subcontractor although it was \$100,000 lower than that of the minority-owned subcontractor.

<sup>7</sup> Today it is widely accepted that the Fifth Amendment contains an equal protection component equivalent to the Fourteenth Amendment's Equal Protection Clause. See *Adarand Constructors, Inc v Peña*, 515 US 200, 217 (1995).

<sup>8</sup> See *Western States*, 407 F3d at 993–95 (finding that "Congress had a strong basis in evidence for concluding that . . . discrimination within the transportation contracting industry hinders minorities' ability to compete for federally funded contracts" and that the program at issue was narrowly tailored to meet these objectives); *Sherbrooke Turf, Inc v Minnesota Department of Transportation*, 345 F3d 964, 969–73 (8th Cir 2003) (same); *Adarand Constructors, Inc v Slater*, 228 F3d 1147, 1164–87 (10th Cir 2000) (same). See also *Tennessee Asphalt Co v Farris*, 942 F2d 969, 972 (6th Cir 1991) ("In this appeal the plaintiffs concede the facial validity of section 105(f) and the regulations, and limit their constitutional challenge to [the Tennessee Department of Transportation's] program as applied."); *Milwaukee Pavers*, 922 F2d at 423 (noting that the contractors "challenge the Act neither on its face nor as applied" and generally agreeing that the statute was immune from facial challenge).

<sup>9</sup> US Const Amend XIV, § 1 ("[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>10</sup> Compare *Western States*, 407 F3d at 996 (allowing as-applied challenges); *Sherbrooke Turf*, 345 F3d at 973 (same), with *Tennessee Asphalt*, 942 F2d at 975 (rejecting such challenges); *Milwaukee Pavers*, 922 F2d at 423 (same).

affirmative action law.<sup>11</sup> If not barred by sovereign immunity,<sup>12</sup> a plaintiff may challenge a state-created affirmative action law as a violation of the Equal Protection Clause. Here, however, a state is not the original source of the affirmative action laws. Instead, a state is implementing the federal government's program.<sup>13</sup> Thus, the question remains whether a state is immunized from all Fourteenth Amendment challenges when implementing an affirmative action law pursuant to a federal funding requirement.<sup>14</sup>

This Comment answers this question in the negative, arguing that a state's constitutional role requires its susceptibility to challenge. Four justifications support this position: (1) the Supreme Court's dictum that a state is susceptible to challenge when applying a Spending Power law; (2) the seemingly settled rule that enforcement of a law by a state is sufficient to trigger the Fourteenth Amendment's limitations; (3) the absurd consequences of not holding states susceptible to challenge; and (4) a state's sovereign role under the Spending Power.

Part I examines the current state of Spending Power law, the constitutional power under which these affirmative action statutes are passed. Part II analyzes the current circuit split. Part III evaluates the divergent holdings of the circuits, ultimately rejecting both positions as unpersuasive. Part IV offers four justifications for determining that a state must be susceptible to an as-applied constitutional challenge when it applies federal affirmative action law.

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<sup>11</sup> See *Grutter v Bollinger*, 539 US 306 (2003) (considering whether the affirmative action plan of a state institution—the University of Michigan—met the limitations of the Equal Protection Clause); *Adarand*, 515 US at 227 (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

<sup>12</sup> See US Const Amend XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”); *Hans v Louisiana*, 134 US 1, 14–16 (1890) (applying the same rule when a citizen sues her own state). See also *Ex parte Young*, 209 US 123, 144–45 (1908) (allowing one to sue a state official for a state's purportedly unconstitutional action); *Edelman v Jordan*, 415 US 651, 664–67 (1974) (limiting *Ex parte Young* to suits for prospective injunctive relief).

<sup>13</sup> See, for example, *Milwaukee Pavers*, 922 F2d at 421 (“In the first type of program the state is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government. . . . In the second type of program the state is the administrator and disbursing agent of federal highway grants.”).

<sup>14</sup> Compare *id* at 423 (“If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.”), with *Sherbrooke Turf*, 345 F3d at 969–74 (applying strict scrutiny analysis to the plaintiffs' as-applied challenges because “[t]hrough [the statute] confers benefits on ‘socially and economically disadvantaged individuals,’ a term that is facially race-neutral, the government concedes that the program is subject to strict judicial scrutiny”).

## I. THE CURRENT STATE OF SPENDING POWER LAW

The circuit split developed over laws promulgated under the Spending Power. It is therefore helpful to examine the constitutional basis and use of this power, particularly as it relates to the role of states in implementing federal conditions in exchange for federal funds. Under the Spending Power, states must be given the choice to participate and to make the decision to enact the federally mandated conditions as state law, even though Congress can accomplish its legislative goals by using federal funds as incentives to encourage states to adopt the federal regulations.<sup>15</sup>

Congress typically legislates in one of two ways. First, Congress may regulate directly by passing laws that the federal government enforces. Second, Congress may legislate indirectly, making recipients implement prescribed conditions in exchange for federal funds.<sup>16</sup> Congress's constitutional authority for such indirect legislation is the Spending Power.<sup>17</sup> The Spending Power is derived from Congress's Article I power to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."<sup>18</sup> This power implicitly provides Congress with a general grant of power to spend.<sup>19</sup> Under this grant, Congress may "attach conditions on the receipt of federal funds."<sup>20</sup> In so doing, Congress provides the recipient a choice: either accept the constitutionally required conditions or forego federal funding.

A state's authority over its choice to accept federal funds and, consequently, to adopt the federal regulations as a condition for such funds, is critical to maintaining state sovereignty.<sup>21</sup> This choice allows "elected state officials [to] regulate in accordance with the views of the local electorate," even if the promise of funds influences a state's

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<sup>15</sup> See *New York v United States*, 505 US 144, 168–69 (1992).

<sup>16</sup> See, for example, *Rumsfeld v Forum for Academic & Individual Rights, Inc.*, 547 US 47, 126 S Ct 1297, 1306 (2006). See also *New York*, 505 US at 188 (stating that the Constitution "permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes").

<sup>17</sup> On the Spending Power, see generally David E. Engdahl, *The Spending Power*, 44 Duke L J 1 (1994); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan L Rev 1103 (1987).

<sup>18</sup> US Const Art I, § 8, cl 1.

<sup>19</sup> *South Dakota v Dole*, 483 US 203, 207 (1987), quoting *United States v Butler*, 297 US 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

<sup>20</sup> *Dole*, 483 US at 206.

<sup>21</sup> *New York*, 505 US at 168–69 (explaining that Spending Power legislation is constitutional because it does not usurp the legislative authority of state officials and so does not "insulate" the federal lawmakers "from the electoral ramifications of their decision").

decision.<sup>22</sup> If the federal government does not give states the choice to participate and instead mandates state participation, the federal law is unconstitutional for usurping state sovereignty.<sup>23</sup> If a state chooses to accept congressional conditions, it enacts the federal conditions as *state* law and implements that law through state regulations.<sup>24</sup> A state's decision to adopt federal conditions as state law is "the prerogative of the States not merely in theory but in fact."<sup>25</sup>

Several restrictions limit the Spending Power's regulatory scope. Most importantly, congressional regulation under the Spending Power must present the choice to states unambiguously. The choice must be unambiguous so that "[s]tates [can] exercise their choice [to participate in the federal law] knowingly, cognizant of the consequences of their participation."<sup>26</sup> Spending Power regulations might also be invalidated if a court finds them coercive. The Supreme Court has noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."<sup>27</sup> However, the Court has not found a program coercive since 1936.<sup>28</sup> The Court generally justifies its unwillingness to find a spending program coercive by emphasizing that a recipient has the right to refuse the conditions by refusing funds.<sup>29</sup> In this sense, the Court's analysis of a state's decision to accept federal funds is analogous to a court's probing of an agreement under the common law of contract, as opposed to modern contract law.<sup>30</sup> The Court will presume

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<sup>22</sup> Id at 169.

<sup>23</sup> Id at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

<sup>24</sup> See *Dole*, 483 US at 211–12. See also *Western States Paving Co, Inc v Washington State Department of Transportation*, 407 F3d 983, 983 (9th Cir 2005).

<sup>25</sup> *Dole*, 483 US at 211–12.

<sup>26</sup> Id at 207, quoting *Pennhurst State School and Hospital v Halderman*, 451 US 1, 17 (1981).

<sup>27</sup> *Dole*, 483 US at 211 (internal quotation marks omitted).

<sup>28</sup> See *Butler*, 297 US at 71 (striking the federal spending provision of the Agricultural Adjustment Act as a coercive attempt to interfere with state agricultural regulation).

<sup>29</sup> See, for example, *Dole*, 483 US at 211 ("We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective."); *Grove City College v Bell*, 465 US 555, 565 n 13 (1984) (noting that if the college found the condition objectionable, it was free to cease participating in the funding and thus escape the condition).

<sup>30</sup> See *Pennhurst*, 451 US at 17 ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."); Engdahl, 44 Duke L J at 78 (cited in note 17) ("Certain implications of the contractual character of spending conditions already are well recognized."). For examples of the differences between the common law of contract and the modern contract approach, compare *Batsakis v Demotsis*, 226 SW 2d 673, 674–75 (Tex Civ App 1949) (holding the defendant liable for return performance when the defendant received \$25 in foreign currency in exchange for a promise to pay the plaintiff \$2000), with *Williams v Walker-Thomas Furniture Co*,

that a state acted in its best interest in accepting federal funds and the attached conditions, and an overly enticing choice only demonstrates this interest.<sup>31</sup> As Professor David Engdahl has stated:

Even though [powerful] pressure techniques... have become commonplace, and although a dependency on federal funds akin to addiction may have developed, the standard response to claims of spending power “coercion” still is [the same]: complaints of coercion should not be heard because the recipient could have employed the “simple expedient of not yielding.”<sup>32</sup>

By contrast, the Court has struck down federal program where states were given only a choice between two regulatory regimes. The law unconstitutionally made the states agents of the federal government.<sup>33</sup>

Congress increasingly regulates on an indirect basis by requiring states to adopt a particular regulatory scheme as a prerequisite for federal funds.<sup>34</sup> Concomitantly, states find it difficult to refuse such funds.<sup>35</sup> Nevertheless, states have the choice to enact the federal conditions as state law, and the federal government cannot constitutionally require states to regulate.<sup>36</sup> This tension creates several problems leading to the circuit split, as examined below.

## II. THE CIRCUIT SPLIT: IS A STATE SUSCEPTIBLE TO AN AS-APPLIED CHALLENGE?

This Part examines the circuit split between courts that have considered whether states are susceptible to as-applied challenges when implementing federal affirmative action laws as a condition for the receipt of federal funds. The circuit courts agree that the federal laws at issue are facially constitutional and do not violate the Fifth Amend-

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350 F2d 445, 449-50 (DC Cir 1965) (applying the unconscionability doctrine to relieve the defendant of her contractual obligations).

<sup>31</sup> Consider *Butler*, 297 US at 81 (Stone dissenting) (“Threat of loss, not hope of gain, is the essence of economic coercion.”).

<sup>32</sup> Engdahl, 44 Duke L J at 81 (cited in note 17) (internal citations omitted).

<sup>33</sup> See *New York*, 505 US at 175 (noting that when Congress provides only a choice between two different regulatory techniques, “Congress has crossed the line distinguishing encouragement from coercion”).

<sup>34</sup> Rosenthal, 39 Stan L Rev at 1103 (cited in note 17) (“The past five decades have seen tremendous growth in both the dimensions and the objects of spending by the federal government.”). See also Engdahl, 44 Duke L J at 2 (cited in note 17) (“The pervasive influence of the federal government in modern American life is attributable in significant part to Congress's manipulation of federal funds.”).

<sup>35</sup> See Engdahl, 44 Duke L J at 81 (cited in note 17).

<sup>36</sup> See *New York*, 505 US at 188 (“Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

ment.<sup>37</sup> They disagree, however, over whether a state is still subject to an as-applied challenge under the Fourteenth Amendment when implementing federal conditions.<sup>38</sup> The Sixth and Seventh Circuits held that a state is not susceptible to as-applied challenges in these situations for two reasons. First, they found that a state is an agent of the federal government and thus not susceptible to challenge for Fourteenth Amendment violations.<sup>39</sup> Second, they held that Congress may permit states to implement affirmative action programs as an exercise of their power to enforce the Fourteenth Amendment.<sup>40</sup> By contrast, the Eighth and Ninth Circuits held that as-applied challenges against states for possible Fourteenth Amendment violations are available. They found such challenges warranted by the “narrowly tailored” prong of strict scrutiny review of Fourteenth Amendment challenges.<sup>41</sup>

#### A. Circuit Courts Refusing to Allow As-Applied Challenges against a State

As noted above, the Sixth and Seventh Circuits find a state’s implementation of a federal affirmative action law not open to an as-applied challenge. The Seventh Circuit’s decision in *Milwaukee County*

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<sup>37</sup> See note 8.

<sup>38</sup> Compare *Western States Paving Co v Washington State Department of Transportation*, 407 F3d 983, 996 (9th Cir 2005) (“As a threshold matter, we must therefore determine whether [the state of] Washington’s [affirmative action] program is even susceptible to an as-applied challenge.”); *Sherbrooke Turf, Inc v Minnesota Department of Transportation*, 345 F3d 964, 969 (8th Cir 2003) (allowing such challenges), with *Tennessee Asphalt Co v Farris*, 942 F2d 969, 975 (6th Cir 1991) (denying such challenges); *Milwaukee County Pavers Association v Fiedler*, 922 F2d 419, 423 (7th Cir 1991) (same).

<sup>39</sup> See *Tennessee Asphalt*, 942 F2d at 975 (“[E]very aspect of participation in the federal highway program is mandated by Congress. And . . . a state’s compliance with the mandates of a federal scheme is nothing more than compliance with federal law.”); *Milwaukee Pavers*, 922 F2d at 423 (“Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.”).

<sup>40</sup> See *id* at 423–24 (observing that pursuant to the Fourteenth Amendment, the federal government may authorize states to take actions that would be impermissible without affirmative authorization). See also *Tennessee Asphalt*, 942 F2d at 974.

<sup>41</sup> See *Western States*, 407 F3d at 997 (“[I]t is necessary to undertake an as-applied inquiry into whether Washington’s DBE [Disadvantaged Business Enterprise] program is narrowly tailored, and we therefore conclude that the district court erred when it upheld Washington’s DBE program simply because the State complied with the federal program’s requirements.”); *Sherbrooke Turf*, 345 F3d at 973 (noting that “because the revised DBE program affords grantee States substantial discretion,” in order to find the program narrowly tailored it is necessary to “examine the program as implemented by [the] States”). This Comment will only address whether a state’s application may be challenged, not what standard should apply to the state’s application of an affirmative action program if challenges are permissible. The Eighth and Ninth Circuit are split on this question. Compare *Western States*, 407 F3d at 997–98 (stating that the state must demonstrate past discrimination within the state), with *Sherbrooke Turf*, 345 F3d at 973–74 (examining whether the state followed appropriate federal regulations).

*Pavers Association v Fiedler*<sup>42</sup> illustrates this approach.<sup>43</sup> In *Milwaukee Pavers*, highway contractors challenged the state of Wisconsin for its implementation of a federal law that required states, as a condition for federal funds, to ensure that “10 percent of the amounts appropriated under the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.”<sup>44</sup>

The *Milwaukee Pavers* court focused on the fact that the state was applying a federal statute, noting “[t]he basic question raised by the contractors’ appeal is the proper characterization of the state’s role.”<sup>45</sup> In addressing this question, the court distinguished between a state-enacted law and a federally enacted law that a state applies.<sup>46</sup> In the former case, the court reasoned, the state is the principal, while in the latter, the state is an agent of the federal government.<sup>47</sup> The Seventh Circuit asserted that “[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.”<sup>48</sup> The court continued, “If the state does exactly what the statute expects it to do, and the statute is conceded for the purposes of the litigation to be [facially] constitutional, we do not see how the state can be thought to have violated the Constitution.”<sup>49</sup> Under this reasoning, as the agent of the federal government the state cannot violate the Constitution by implementing a facially constitutional statute and hence is not susceptible to Fourteenth Amendment challenges.<sup>50</sup>

The *Milwaukee Pavers* court recognized that the weakness of its rationale was that a state can reject federal funds to avoid participa-

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<sup>42</sup> 922 F2d 419 (7th Cir 1991).

<sup>43</sup> Although the Ninth Circuit reasoned that *Milwaukee Pavers* did not deal with an as-applied challenge, the Sixth Circuit found it did address such challenges and expressly adopted the Seventh Circuit’s approach. Compare *Western States Paving*, 407 F3d at 997 n 9 (“The [Seventh Circuit] refused to consider whether discrimination had actually taken place in Wisconsin because the contractors had conceded that the federal statute was constitutional both on its face and as applied.”), with *Tennessee Asphalt*, 942 F2d at 975 (citing *Milwaukee Pavers* with approval). See also *Western States*, 407 F3d at 1004 (McKay dissenting) (“Reading *Milwaukee County Pavers* as not discussing an as-applied challenge focuses too much on the opinion’s form instead of on its substance.”). Since the Sixth Circuit expressly adopted the Seventh Circuit’s reasoning, this Comment will focus upon the Seventh Circuit’s approach.

<sup>44</sup> *Milwaukee Pavers*, 922 at 422 (internal quotation marks omitted), examining the Surface Transportation and Uniform Relocation Assistance Act of 1987.

<sup>45</sup> 922 F2d at 422.

<sup>46</sup> See id at 421.

<sup>47</sup> See id.

<sup>48</sup> See id at 423.

<sup>49</sup> See id. See also *Tennessee Asphalt*, 942 F2d at 975 (“[A] state’s compliance with the mandates of a federal scheme is nothing more than compliance with federal law.”).

<sup>50</sup> See *Milwaukee Pavers*, 922 F2d at 423.



tion.<sup>51</sup> Consequently, the court supported its analysis with an analogy. The court stated that Congress may use its enforcement authority under § 5 of the Fourteenth Amendment to allow states to apply federal affirmative action laws—when the federal government is permitted to do so—in a way similar to Congress’s ability to permit states to regulate interstate commerce by lifting the negative command of the Dormant Commerce Clause.<sup>52</sup> Congress has plenary power over such commerce and may use this authority to authorize states to regulate interstate commerce otherwise barred.<sup>53</sup>

In *Milwaukee Pavers*, the Seventh Circuit asserted that Congress enjoys similar authority under § 5 of the Fourteenth Amendment. The court argued that § 5 provides the federal government with a “freer hand” to “engage in affirmative action” than the states.<sup>54</sup> If Congress can authorize states to regulate interstate commerce when otherwise prohibited, “[w]hy then cannot Congress use its powers under section 5 of the Fourteenth Amendment to authorize states to engage in activities that would otherwise violate section 1 of the amendment?”<sup>55</sup>

Thus, the *Milwaukee Pavers* court reasoned that the federal government can delegate to states its constitutional authority to apply an affirmative action law when the federal law is facially constitutional. The court held that this grant of congressional authority, in conjunction with a state’s role as an agent of the federal government, requires that states be immune to as-applied challenges when applying federal affirmative action laws.

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<sup>51</sup> See *id.* (“It is true that the statute does not *require* the states to accept funds under it and, by doing so, to become subject to the set-aside provision and the implementing regulations. But it authorizes them to do so, and action pursuant to a valid authorization is valid.”).

<sup>52</sup> See *id.* (“There is an analogy to the power of Congress to lift the bar of the ‘dormant’ or ‘negative’ commerce clause.”). The Commerce Clause, by its own import and without any additional congressional action, forbids states from interfering in certain circumstances with interstate commerce, a prohibition known as the “Dormant Commerce Clause.” See US Const Art I, § 8, cl 3. For a description of when the Dormant Commerce Clause applies, see *Southern Pacific Co v Sullivan*, 325 US 761, 766–68 (1945) (reserving to the states the residual authority to enact certain minimal regulations affecting interstate commerce “in the absence of conflicting legislation by Congress”).

<sup>53</sup> For Congress’s power to lift the Dormant Commerce Clause, see *Wilkerson v Rahrer*, 140 US 545, 562–65 (1891) (deciding that states may enact commercial regulations when Congress permits them to do so). See also *United States v Darby*, 312 US 100, 114 (1941) (“The power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”) (internal quotation marks omitted).

<sup>54</sup> See *Milwaukee Pavers*, 922 F2d at 423–24 (reasoning that Congress is freer to engage in affirmative action because § 1 of the Fourteenth Amendment is a restriction on state power while § 5 grants Congress positive authority).

<sup>55</sup> *Id.* at 424.

## B. Circuit Courts Permitting As-Applied Challenges

The Eighth and Ninth Circuits have adopted a contrary conclusion, holding that a state's application of a federal statute conditioning funds on the adoption of an affirmative action program is susceptible to as-applied challenges.<sup>56</sup> These courts held that such review is mandated by the dictates of the narrowly tailored prong of strict scrutiny review. They reasoned that an affirmative action law is only narrowly tailored if it is limited to geographical areas where it is "demonstrably needed."<sup>57</sup> Hence, states must be susceptible to challenge to ensure that the federal program is constitutionally permissible in each state that implements the affirmative action laws.<sup>58</sup>

The Ninth Circuit's holding in *Western States Paving Co v Washington State Department of Transportation*<sup>59</sup> illustrates this reasoning.<sup>60</sup> The Ninth Circuit first found the federal law in question facially constitutional.<sup>61</sup> Turning to the as-applied challenge against the state of Washington, the court stated that "as a threshold matter, we must therefore determine whether [a state's application of a federal] program is even susceptible to an as-applied challenge."<sup>62</sup>

The court answered this question in the affirmative, basing its conclusion on the dictates of strict scrutiny review.<sup>63</sup> Strict scrutiny review is a merits-based review standard, applied by a court to determine whether a race-based affirmative action program meets the mandates of the Equal Protection Clause.<sup>64</sup> To pass strict scrutiny re-

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<sup>56</sup> See *Western States*, 407 F3d at 997; *Sherbrooke Turf*, 345 F3d at 973–74 (considering and rejecting an as-applied challenge to state programs).

<sup>57</sup> See *Western States*, 407 F3d at 996, quoting *Sherbrooke Turf*, 345 F3d at 971 ("[T]o be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed.").

<sup>58</sup> See *Western States*, 407 F3d at 996–97, quoting *Sherbrooke Turf*, 345 F3d at 971 ("To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny.").

<sup>59</sup> 407 F3d 983 (9th Cir 2005).

<sup>60</sup> Since the Ninth Circuit adopted the Eighth Circuit's approach to this issue, this case reflects the reasoning of both circuits. See *id.* at 997 ("We also agree with the Eighth Circuit that it is necessary to undertake an as-applied inquiry.").

<sup>61</sup> See *id.* at 995 ("We are satisfied that TEA-21's DBE program is a narrowly tailored means of remedying the effects of race- and sex-based discrimination within the transportation contracting industry, and thus *Western States'* facial challenge must fail.").

<sup>62</sup> *Id.* at 996.

<sup>63</sup> See *id.* at 996–97, 999 (arguing that a statute cannot be rationally tailored without being limited by state application). The United States also argued that a state should be susceptible to an as-applied challenge. See *id.* at 996 ("The United States, which intervened solely to defend [the statute's] facial constitutionality, disagrees with Washington's effort to shelter its [implementing] program from as-applied scrutiny.").

<sup>64</sup> See *Adarand Constructors, Inc v Pena*, 515 US 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be

view, an affirmative action law must be narrowly tailored to achieve a compelling state interest.<sup>65</sup>

The *Western States* court, however, examined the affirmative action spending program under strict scrutiny review not to conduct a merits review of whether the program was constitutionally permissible under the Fourteenth Amendment, but to determine whether a Fourteenth Amendment claim against the state was even justiciable.<sup>66</sup> The court began by assessing the compelling interest prong,<sup>67</sup> reasoning that reviewing for compelling interest assesses a statute on its face.<sup>68</sup> Under this federal law, the court concluded, a facial challenge only requires challenging the federal government. Accordingly, the compelling state interest prong did not require state susceptibility to as-applied challenges.<sup>69</sup>

The Ninth Circuit next asserted that the narrowly tailored prong of strict scrutiny review requires state susceptibility to challenge.<sup>70</sup> The court reasoned that a federal affirmative action program is only narrowly tailored if it is limited to states where it is demonstrably needed.<sup>71</sup> States implement these federal affirmative action laws. Accordingly, states must be susceptible to challenge to ensure that the race-based program is demonstrably needed in that state.

*Western States*' reasoning resulted in a vigorous dissent, which argued for the Sixth and Seventh Circuits' solutions.<sup>72</sup> Nevertheless, neither side of the circuit split provides a satisfactory solution to this question.

### III. CIRCUIT SPLIT ANALYSIS

This Part concludes that neither position properly accounts for a state's susceptibility to challenge when applying a federal affirmative action law. The Sixth and Seventh Circuits' two arguments—that the

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analyzed by a reviewing court under strict scrutiny.”). For a thorough discussion of strict scrutiny review, see generally *Grutter v Bollinger*, 539 US 306 (2003).

<sup>65</sup> *Grutter*, 539 US at 322.

<sup>66</sup> See *Western States*, 407 F3d at 996–98 & n 9 (examining whether a state can defend the constitutionality of its application of a federal statute merely by showing that it comports with the statute). For a critique of the court's approach, see Part III.B.

<sup>67</sup> See *id.* at 997 (“We agree with the Eighth Circuit that Washington need not demonstrate an independent compelling interest for its DBE program. When Congress enacted [the statute], it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry.”).

<sup>68</sup> See *id.* at 996, quoting *Sherbrooke Turf*, 345 F3d at 970.

<sup>69</sup> See *Western States*, 407 F3d at 996–97 (“Even if [the discrimination at issue] does not exist in Washington, the State's implementation of TEA-21 nevertheless rests upon the compelling nationwide interest identified by Congress.”).

<sup>70</sup> See *id.*, citing *Sherbrooke Turf*, 345 F3d at 971 (“To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny.”).

<sup>71</sup> See *Western States*, 407 F3d at 996, quoting *Sherbrooke Turf*, 345 F3d at 971.

<sup>72</sup> See *Western States*, 407 F3d at 1003 (McKay dissenting).

state is an agent of the federal government and that Congress can enable states to apply federal affirmative action laws under § 5 of the Fourteenth Amendment—both fail. A state cannot constitutionally be a congressional agent because the Constitution’s federal system and Spending Power mandate state sovereignty apart from the federal government.<sup>73</sup> Section 5 of the Fourteenth Amendment does not provide Congress with constitutional authority comparable to its power over interstate commerce to allow states to freely implement federal affirmative action laws.<sup>74</sup> Likewise, the Eighth and Ninth Circuits’ position is unpersuasive because they misuse strict scrutiny review, using the merits-based review standard to determine justiciability. Furthermore, even accepting their reasoning, it does not necessitate as-applied challenges against states. An alternative analysis is required to resolve this controversy.

#### A. The Sixth and Seventh Circuits: A Constitutionally Flawed Position

Neither justification proffered by the Sixth and Seventh Circuits satisfactorily immunizes a state from as-applied challenges. First, it violates constitutional principles to find a state immune from challenge because it is an agent of the federal government.<sup>75</sup> States cannot become agents of the federal government but instead must maintain their sovereignty.<sup>76</sup> Moreover, Spending Power laws—such as affirmative action statutes—are constitutional precisely because they do not make a state an agent of the federal government.<sup>77</sup> Furthermore, the analogy between Congress’s authority under § 5 of the Fourteenth Amendment and the Dormant Commerce Clause cannot sustain the Sixth and Seventh Circuit’s conclusions. Congress’s § 5 power is fundamentally different from its Dormant Commerce Clause authority. Section 5 does not give Congress the authority to enable states to freely implement federal affirmative action laws.

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<sup>73</sup> See *New York v United States*, 505 US 144, 188 (1992), quoting Federalist 39 (Madison), in *The Federalist Papers* 240, 245 (New American Library 1961) (Clinton Rossiter, ed) (stating that the Constitution reserves to states an “inviolable sovereignty” separate from the federal government).

<sup>74</sup> See *City of Boerne v Flores*, 521 US 507, 520–24 (1997) (noting that Congress does not have plenary power under the Fourteenth Amendment as it does under the Commerce Clause).

<sup>75</sup> See *New York*, 505 US at 188 (“States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart.”).

<sup>76</sup> *Id.* (“The Constitution instead leaves to the several States a residuary and inviolable sovereignty reserved explicitly to the States by the Tenth Amendment.”) (internal quotation marks and citation omitted).

<sup>77</sup> See *id.*

1. A state cannot be the federal government's agent.

In *Milwaukee Pavers*, the Seventh Circuit declared that it did not “see how the state can be thought to have violated the Constitution” when it was not the progenitor of affirmative action laws.<sup>78</sup> Instead, the court concluded, a state was an agent of the federal government, “no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.”<sup>79</sup> Initially, this analogy to agency law appears sensible. Agency is a “fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”<sup>80</sup> Here, the federal government (principal) creates the program, inducing the state's (agent's) agreement for monetary gain, with the state's implementation of the program subject to some control.<sup>81</sup> Like a federal agency, states implement and execute (with some discretion) the law promulgated by Congress.<sup>82</sup> The differences between general state law and the implementing regulations may support the inference that a state enacting federally promulgated law becomes an agent of the federal government.

The Seventh Circuit's analogy also retains superficial appeal on fairness grounds. States are so dependent on federal funds that a state often has no choice but to accept the conditions Congress attaches to the receipt of funds.<sup>83</sup> It is perhaps equitable to treat states as agents of Congress in implementing federal law.<sup>84</sup>

Nonetheless, this comparison to agency law fails because it is inconsistent with the background presumption of the constitutional principles of federalism. The Supreme Court is very reluctant to consider a state an agent of the federal government. Concurrently, the Court is concerned with the maintenance of state sovereignty. In following this background presumption, one should be reluctant to consider a state an agent in this circumstance, leading to a rejection of the

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<sup>78</sup> *Milwaukee Pavers*, 922 F2d at 423.

<sup>79</sup> *Id.*

<sup>80</sup> Restatement (Second) of Agency § 1(1) (1958). Technically, the Seventh Circuit seems to be arguing the state is a servant of the federal government, as opposed to an independent contractor; both can be agents. See *id.* at § 220. The Restatement notes, however, that “agent” is a colloquial term for servant. See *id.* at § 14N comment a. This Comment will thus adopt the conventions of the *Milwaukee Pavers* court when using this term.

<sup>81</sup> See *id.* at § 1 comment a.

<sup>82</sup> See *Western States*, 407 F3d at 989 (“The regulations do not establish a nationwide . . . program centrally administered by the [United States Department of Transportation]. Rather the regulations delegate [the responsibility] to each State that accepts federal transportation funds.”).

<sup>83</sup> See text accompanying notes 34–35.

<sup>84</sup> Consider *Tennessee Asphalt Co v Farris*, 942 F2d 969, 975 (6th Cir 1991) (noting, but dismissing, the theoretical possibility that Tennessee could reject federal funds).

Sixth and Seventh Circuit approach.<sup>85</sup> In *New York v United States*,<sup>86</sup> the Supreme Court held unconstitutional a federal law requiring states to either (a) regulate waste sites according to Congressional instructions, or (b) take title to those lands.<sup>87</sup> The Court found this law unconstitutional because it violated a state's implicit constitutional sovereignty by turning a state into an agent of the federal government.<sup>88</sup> The Court repeatedly emphasized that states should not be lightly considered agents of the federal government.<sup>89</sup> Instead, the Constitution's federal system requires that states have a "residuary and inviolable sovereignty" separate from the federal government.<sup>90</sup> Although the Court's holding focused on the narrower rejection of federal compulsion of state regulations, their thrust was clear. The Court displayed a reluctance to consider states agents of the federal government under a federal system where states are sovereign actors. The Court seemed to suggest a background presumption that states are sovereigns and should not lightly be considered agents of the federal government.<sup>91</sup> The Sixth and Seventh Circuits' position is therefore incompatible with constitutional principles and should be rejected.

More importantly, the Court in *New York* distinguished Spending Power legislation from the unconstitutional law at issue.<sup>92</sup> The Court stated that "[t]he Constitution . . . permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes."<sup>93</sup> Spending Power legislation is constitutionally acceptable, the Court stated, because a state chooses to participate and enact the federal conditions, thereby maintaining state sovereignty and preventing the state from becoming an agent of the federal government.<sup>94</sup> It is problematic to term the state an agent

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<sup>85</sup> The Sixth and Seventh Circuits' position is based on an analogy to the common law of agency. Although further exploration of agency law, such as the doctrine of frolic and detour, may help resolve this circuit split, it is beyond the scope of this Comment, which resolves the issue at a constitutional level.

<sup>86</sup> 505 US 144 (1992).

<sup>87</sup> Id at 153, invalidating the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub L No 99-240, 99 Stat 1842, 1851, § 102(5)(d)(2)(C), codified at 42 USC § 2021(e)(d)(2)(C) (1986).

<sup>88</sup> *New York*, 505 US at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program . . . . While there may be many constitutional methods of achieving [Congress's policy goals in this area, such as by providing states with incentives], the method Congress has chosen is not one of them.")

<sup>89</sup> Id ("State[s] . . . are [not] administrative agencies of the Federal Government . . . . The Federal Government may not compel the States to enact or administer a federal regulatory program.")

<sup>90</sup> Id, quoting Federalist 39 (Madison) at 256 (cited in note 73).

<sup>91</sup> *New York*, 505 US at 188.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> See, for example, id at 168 (contrasting an unconstitutional federal compulsion of a state with a conditional spending law because in the later, "the residents of the State retain the ulti-

of the federal government in implementing a federal affirmative action law when these laws are promulgated under the Spending Power—which the Court explicitly affirms maintains state sovereignty and does not make a state an agent of the federal government.<sup>95</sup>

Moreover, it is logically inconsistent to find that agency law absolves a state from constitutional challenge. Agency law identifies agents to ensure that the principal is responsible for the agent's legal wrongs.<sup>96</sup> It does not absolve the agent from preexisting legal responsibilities—here the Fourteenth Amendment's limitations.<sup>97</sup>

2. The weakness of the analogy with § 5 of the Fourteenth Amendment; raising the bar of the Dormant Commerce Clause.

The Sixth and Seventh Circuits' analogy between § 5 of the Fourteenth Amendment and Congress's authority to raise the bar of the Dormant Commerce Clause is also an insufficient justification for finding a state immune from as-applied challenges. The analogy fails for two reasons. First, Congress's latitude to enact affirmative action statutes is no wider than that of the states.<sup>98</sup> Second, Congress's § 5 power is not so broad, in contrast to its Commerce Clause authority, as to enable states to employ an otherwise unconstitutional affirmative action statute.<sup>99</sup>

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mate decision as to whether or not the State will comply"); *South Dakota v Dole*, 483 US 206, 211–12 (1987) (holding a Spending Power law constitutional because “[h]ere Congress has offered relatively mild encouragement to the States . . . . But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.”). For further discussion, see Part IV.D.

<sup>95</sup> See *New York*, 505 US at 168 (commenting on the differences between Spending Law enactments and federally compelled state legislation).

<sup>96</sup> See Restatement (Second) of Agency at § 215 (cited in note 80) (“A master or other principal who unintentionally authorizes conduct of a servant or other agent which constitutes a tort to a third person is subject to liability to such person.”).

<sup>97</sup> *Id.* at § 343 (“An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.”) Concededly, an agent is not liable under contract law for acting under the command of the principal. The theory, however, is that the agent is not a party to the contract and thus has no legal duty in entering the contract. *Id.* at § 320. Here, in contrast, the state's position is more naturally compared to tort law, where the state has a preexisting legal responsibility and entering into the agency relationship does not absolve this responsibility.

<sup>98</sup> See *Adarand Constructors, Inc v Pena*, 515 US 200, 227 (1995) (reviewing all affirmative action laws, by whatever level of government, under the same standard).

<sup>99</sup> Compare *City of Boerne*, 521 US at 519 (holding that Congress cannot use its § 5 authority to make constitutional acts that would otherwise violate the Fourteenth Amendment), with *Wilkerson v Rahrer*, 140 US 545, 560–62 (1891) (holding that Congress can authorize otherwise unconstitutional state interferences with interstate commerce, owing to its plenary power over interstate commerce).

Admittedly, § 5 of the Fourteenth Amendment sometimes gives Congress positive authority.<sup>100</sup> For instance, Congress is normally forbidden from abrogating state sovereign immunity but may do so if legislating pursuant to § 5.<sup>101</sup> Congress could conceivably enjoy similar power here.

Nonetheless, the analogy drawn by the Sixth and Seventh Circuits is inadequate. Contrary to the courts' holding, the federal government does not have more constitutional latitude than states to enact affirmative action laws. In *Adarand Constructors, Inc v Pena*,<sup>102</sup> the Supreme Court held that any affirmative action program will be reviewed under the same strict-scrutiny standard regardless of the enacting level of government.<sup>103</sup> Congress does not possess wider authority than states when adopting affirmative action laws, and so lacks the authority to immunize states from constitutional challenges.<sup>104</sup>

Furthermore, the Supreme Court has held that Congress cannot simply enforce its own interpretation of the Fourteenth Amendment and use § 5 to legislate pursuant to its own interpretation.<sup>105</sup> Thus, even if Congress did enjoy wider authority than states to implement affirmative action programs, Congress cannot make an otherwise unconstitutional state affirmative action program constitutional through the use of its § 5 power.

By comparison, Congress may allow states to regulate interstate commerce when states are otherwise constitutionally prohibited from doing so.<sup>106</sup> Congress simply does not possess authority over the Fourteenth Amendment as it does over interstate commerce, destroying this

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<sup>100</sup> See *Seminole Tribe of Florida v Florida*, 517 US 44, 59 (1996).

<sup>101</sup> *Id.* (noting that the Court had previously “recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution”).

<sup>102</sup> 515 US 200 (1995).

<sup>103</sup> *Id.* at 227 (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

<sup>104</sup> See *id.*

<sup>105</sup> See *City of Boerne*, 521 US at 519 (“Congress’ power under § 5 . . . extends only to [the enforcement of] the provisions of the Fourteenth Amendment. . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”). See also Robert C. Post, *The Supreme Court 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv L Rev 4, 12–29 (2003) (noting that recent Supreme Court jurisprudence suggests that Congress can only use § 5 to enforce the rights the judiciary would protect pursuant to § 1, but cannot use § 5 to enforce Congress’s own interpretation of § 1).

<sup>106</sup> See *Wilkerson*, 140 US at 560–62. Strikingly, Congress rejected a draft of the Fourteenth Amendment that would have given Congress plenary power over the Fourteenth Amendment, further illustrating the weakness of this analogy. See *City of Boerne*, 521 US at 520–24 (detailing Congress’s rejection of this proposed draft).



analogy. Thus, because this justification, like the justification from agency law, is an insufficient basis for immunizing a state from Constitutional challenge, the Sixth and Seventh Circuits' reasoning should be rejected.

#### B. The Eighth and Ninth Circuits: Why Affirmative Action Precedent Cannot Solve the Circuit Split

This section argues that the Eighth and Ninth Circuits' reasoning is insufficient despite reaching the correct conclusion. These circuits correctly recognized that a two-part test is necessary for determining whether a state violated the Fourteenth Amendment by enforcing an affirmative action law. The Eighth and Ninth Circuits conflate these two steps, using strict scrutiny review, a merits-based determination, to determine the jurisdictional question of whether a state is even susceptible to suit under the Fourteenth Amendment.<sup>107</sup> Furthermore, the Eighth and Ninth Circuits' reasoning does not require a state's susceptibility to challenge. The Eighth and Ninth Circuits' position is driven by the belief that subjecting a state to challenge is essential in determining whether a federal law is narrowly tailored or, in other words, "demonstrably needed" in that state.<sup>108</sup> However, even assuming that strict scrutiny requires that an affirmative action law is "demonstrably needed" in that state, it does not require a state's susceptibility to challenge.

The Eighth and Ninth Circuits correctly noted that a two-part analysis exists to determine whether a state violated the Fourteenth Amendment by enforcing an affirmative action law. First, one must determine if the state is limited under the Fourteenth Amendment and susceptible to challenge for potential violations of that Amendment.<sup>109</sup> Second, a court applies strict scrutiny review to determine whether the state's application is constitutionally acceptable if it is decided that a state is open to challenge.<sup>110</sup> For example, in *Grutter v Bollinger*,<sup>111</sup> the Supreme Court applied strict scrutiny in determining that the University of Michigan Law School's affirmative action program was constitutional—but only after it found the school was responsible for meeting the Fourteenth Amendment's limitations.<sup>112</sup>

The Eighth and Ninth Circuits incorrectly conflate the two-step analysis by holding that strict scrutiny review requires a state's suscep-

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<sup>107</sup> See *Western States*, 407 F3d at 996, quoting *Sherbrooke Turf, Inc v Minnesota Department of Transportation*, 345 F3d 964, 971 (8th Cir 2003).

<sup>108</sup> *Western States*, 407 F3d at 996, quoting *Sherbrooke Turf*, 345 F3d at 971.

<sup>109</sup> See *Western States*, 407 F3d at 996.

<sup>110</sup> *Id.*

<sup>111</sup> 539 US 306 (2003).

<sup>112</sup> *Id.* at 326.

tibility to challenge.<sup>113</sup> Strict scrutiny review is a judicial tool to determine whether a governmental program complies with the Fourteenth Amendment once it is accepted that the state is susceptible to challenge. Strict scrutiny does not determine the antecedent jurisdictional question of whether a state is subject to the Fourteenth Amendment. If, as the Sixth and Seventh Circuits hold, a state is not subject to the Equal Protection Clause when applying federal law, there are no constitutional limitations to violate and hence no need for strict scrutiny review.<sup>114</sup> Instead, a court must first determine whether a state is subject to challenge for violations of the Fourteenth Amendment before applying strict scrutiny review.<sup>115</sup>

Conceivably, the Eighth and Ninth Circuits' "strict-scrutiny required" holding can be understood as an attempt to determine the affirmative action law's constitutionality. That is, their background reasoning is that an affirmative action law is only constitutional in areas where it "is demonstrably needed."<sup>116</sup> With this in mind, they hold that a state must be available to challenge to determine whether the federal law is narrowly tailored because states are applying these laws.<sup>117</sup>

Even accepting the premise that strict scrutiny requires that an affirmative action law is demonstrably needed in that state, this premise does not require a state's susceptibility to challenge. The courts reasoned that affirmative action laws are only narrowly tailored in states where affirmative action is necessary. Since states are applying these laws, they should be subject to as-applied challenges to determine their constitutionality.<sup>118</sup> In essence, these circuits are stating that these federal laws are only narrowly tailored if implemented in areas where affirmative action is needed. The Eighth and Ninth Circuits' concerns are better addressed by asking whether the federal laws are narrowly tailored by being limited in scope to areas where affirmative action is "demonstrably needed" and finding these laws constitutional only if the federal law is limited to states where affirmative action is required. Thus, the Eighth and Ninth Circuits' "strict scrutiny re-

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<sup>113</sup> See *Western States*, 407 F3d at 997–98.

<sup>114</sup> See *Milwaukee Pavers*, 922 F2d at 423.

<sup>115</sup> Affirmative action precedent is unhelpful in resolving this issue because it typically assumes state susceptibility to challenge. See, for example, *Grutter*, 539 US at 326–46; *Adarand*, 515 US at 227.

<sup>116</sup> *Sherbrooke Turf*, 345 F3d at 970–71.

<sup>117</sup> See *id.* (noting that review of the specific implementation is essential to determining whether the program in question is narrowly tailored).

<sup>118</sup> *Western States*, 407 F3d at 997–98 (describing how local circumstances determine whether a given state program is narrowly tailored); *Sherbrooke Turf*, 345 F3d at 970–71 (concluding that when the federal government "delegates" its narrow tailoring responsibility to the states, a state's implementation must be subject to strict scrutiny).

quired” analysis actually does not require a state’s availability to challenge. These circuits’ position should therefore be rejected. The question of whether a state is available to challenge when applying a federal affirmative action law should be decided using the constitutional role of a state when applying federal law, not the constitutional status of the federal law being implemented.

#### IV. RESOLVING THE CIRCUIT SPLIT: WHY A STATE MUST BE SUSCEPTIBLE TO CHALLENGE

This Part argues that a state’s role in applying federal affirmative action laws provides four reasons why a state should be susceptible to an as-applied constitutional challenge. First, members of the Supreme Court have implied that the Court is amenable to as-applied challenges in such situations.<sup>119</sup> Second, the Fourteenth Amendment makes a state’s enforcement of a law sufficient to trigger constitutional limitations and hence open that state to challenge. Third, barring as-applied challenges would lead to absurd consequences: if states are unavailable for as-applied challenges, facially constitutional laws may be applied unconstitutionally, leaving citizens without a remedy to vindicate their constitutional rights.<sup>120</sup> Fourth, Spending Power laws maintain a state’s sovereign independence,<sup>121</sup> so a state should remain responsible for meeting the requirements of the Fourteenth Amendment.

##### A. The Supreme Court’s Openness to As-Applied Challenges

Although it has yet to address the issue directly, the Supreme Court has implied that as-applied challenges against states are available.<sup>122</sup> The *Milwaukee Pavers* court actually observed the Supreme Court’s openness to this position,<sup>123</sup> stating that in *Fullilove v Klutznick*<sup>124</sup> the Supreme Court held a federal Spending Power law constitutional on its face, “but left open the possibility that it might be condemned later *because of the way in which it was administered in fact.*”<sup>125</sup>

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<sup>119</sup> See, for example, *United States v American Library Association, Inc.*, 539 US 194, 215 (2003) (Kennedy concurring).

<sup>120</sup> For example, if we assume that the *Western States* court is correct in asserting that federal affirmative action law can only be applied where there exist past examples of race-based discrimination, see *Western States*, 407 F3d at 996–97, then surely there would be situations where the law would be facially constitutional but nonetheless applied unconstitutionally.

<sup>121</sup> See, for example, *New York*, 505 US at 167–68 (noting that a Spending Power law is constitutional because it maintains a state’s sovereign independence in the federal system).

<sup>122</sup> See, for example, *American Library Association*, 539 US at 215 (Kennedy concurring).

<sup>123</sup> *Milwaukee Pavers*, 922 F2d at 423.

<sup>124</sup> 448 US 448 (1980).

<sup>125</sup> See *Milwaukee Pavers*, 922 F2d at 423 (emphasis added). Surprisingly, given this observation, the Seventh Circuit did not find the state susceptible to an as-applied challenge.

Justices Kennedy and Breyer alluded to the potential availability of as-applied challenges against states in *United States v American Library Association, Inc.*<sup>126</sup> This case involved a facial challenge to a spending program on the grounds that it required state libraries to violate the First Amendment.<sup>127</sup> Chief Justice Rehnquist's plurality opinion, in which Justices O'Connor, Scalia, and Thomas joined, upheld the program against facial challenge.<sup>128</sup> In their concurring opinions, critical since they were necessary to form a majority, Justices Kennedy and Breyer indicated the possibility of as-applied challenges against states. As Justice Kennedy stated:

If some [public] libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be *subject for an as-applied challenge*, not the facial challenge made in this case.<sup>129</sup>

Moreover, it has been asserted by at least one commentator that after *American Library Association*, as-applied challenges are available against states.<sup>130</sup> These statements support the proposition that a state is susceptible to challenge when applying a law created under the Spending Power. Here, states are applying a law passed under this constitutional authority.<sup>131</sup> Consequently, Kennedy and Breyer's suggestions should be followed and states should be susceptible to as-applied challenges when applying these affirmative action laws.

B. Textual Guidance from the Fourteenth Amendment:  
A State Remains Subject to the Fourteenth Amendment  
When "Enforcing" a Law

The text of the Fourteenth Amendment supports the argument that a state is susceptible to an as-applied challenge when implementing a federal affirmative action law. The Fourteenth Amendment's text makes

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<sup>126</sup> 539 US 194 (2003).

<sup>127</sup> See *American Library Association*, 539 US at 220 (Breyer concurring).

<sup>128</sup> See *id.* at 214 (plurality) (concluding that the law in question was a valid use of the constitutional Spending Power, did not "induce libraries to violate the Constitution," and did not "impose an unconstitutional condition on public libraries").

<sup>129</sup> See *id.* at 215 (Kennedy concurring) (noting that if some libraries were unable to apply the law constitutionally this would be grounds for an as-applied challenge) (emphasis added).

<sup>130</sup> See Barbara A. Sanchez, Note, *United States v. American Library Association: The Choice between Cash and Constitutional Rights*, 38 *Akron L Rev* 463, 499 (2005) (observing that the decision "open[s] the door to the 'as-applied' challenges foreseen by Justice Kennedy").

<sup>131</sup> See *Western States*, 407 F3d at 988-89 (noting that here Congress required states to implement federal conditions in exchange for federal funds).

a state subject to its limitations whenever it “make(s) or enforce(s)” a law.<sup>132</sup> A state’s implementation of federal law seemingly activates the “enforce” clause, triggering a state’s susceptibility to challenge.

A textualist reading of the Fourteenth Amendment lends credence to the conclusion that a state is subject to constitutional scrutiny when implementing federal affirmative action laws. The Amendment states, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor . . . deny to any person within its jurisdiction . . . the equal protection of the laws.”<sup>133</sup> The Fourteenth Amendment seemingly announces on its face when a state is subject to that Amendment’s limitations: when it enforces a law. Webster’s Dictionary defines “enforce” as to “cause to take effect.”<sup>134</sup> Here, states clearly enforce these regulations, mandating compliance on highway projects using federal funds. This state action should be sufficient to trigger the Fourteenth Amendment’s limitations.

Moreover, “enforce” is coequal with “make.”<sup>135</sup> Hence, a state should be susceptible to challenge for enforcing a law in situations where it would be open to objection for making such a law. A state is liable to a constitutional suit when it creates an affirmative action law and should thus be susceptible to remonstrance for enforcing an affirmative action law.<sup>136</sup> Thus, the “enforcement” clause of the Fourteenth Amendment supports the position that a state should be liable to an as-applied challenge when implementing a federal spending power affirmative action law.

### C. The Absurd Consequences of Refusing As-Applied Challenges

This Comment’s position is further supported by a consequentialist argument.<sup>137</sup> States applying affirmative action laws are the only government entities susceptible to as-applied challenges in these cases.<sup>138</sup> Because states might apply a facially constitutional law in an unconstitutional manner, as-applied challenges are necessary to ensure that states do not infringe individuals’ Fourteenth Amendment rights without possibility of redress.

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<sup>132</sup> US Const Amend XIV, § 1.

<sup>133</sup> *Id.*

<sup>134</sup> Webster’s Third New International Dictionary 751 (Merriam-Webster 1993).

<sup>135</sup> See US Const Amend XIV, § 1.

<sup>136</sup> Consider *Grutter*, 539 US at 343.

<sup>137</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 515 (noting one of the most frequent reasons a court chooses a particular construction is that the alternative “would produce ‘absurd’ results”).

<sup>138</sup> See *Western States*, 407 F3d at 990–91 (stating that a facial challenge to these laws must go against the federal government, but an as-applied challenge must be brought against individual states).

Justice Kennedy's statement in *American Library Association*, noted above, underscores a basic recognition that facial challenges against Spending Power laws are alone an insufficient protector of Constitutional rights.<sup>139</sup> Upholding the federal statute against facial challenge only means that the statute *can potentially* be applied constitutionally. It does not mean that the statute will *always* be applied constitutionally. Therefore, if a state's application of federal affirmative action laws is not susceptible to challenge, then no as-applied challenge will exist against these laws, creating circumstances where states may apply such statutes unconstitutionally without redress or judicial check. To give states unfettered discretion to implement affirmative action laws creates the potential for the serious infringement on individuals' Fourteenth Amendment rights. As-applied challenges are therefore essential to protect constitutional rights under Spending Power legislation such as the laws at issue.

#### D. Why a State's Role under the Spending Power Requires Its Susceptibility to As-Applied Challenges

A state's role as an independent actor under Spending Power laws further supports making states susceptible to as-applied challenges. A conditional spending law is permissible for the reason that states maintain their constitutionally required sovereignty through their choice to either enact the federal conditions or refuse federal funds.<sup>140</sup> A state should remain responsible under the Fourteenth Amendment for its decision to apply federal law and hence be susceptible to challenge since it retains its sovereignty under Spending Power legislation.

Recall that in *New York v United States* the Supreme Court held unconstitutional a congressional act requiring states to regulate according to constitutional desires because it usurped state sovereignty and turned a state into the federal government's agent.<sup>141</sup> The Court explicitly distinguished Spending Power laws from these unconstitutional mandates, stating that the Spending Power maintains the state sovereignty required by "our federal system."<sup>142</sup> The Court noted that a state's constitutional role is appropriately maintained under Spending Power legislation through a state's choice to participate in the federal law.<sup>143</sup> This is so because "the residents of the State retain the ultimate decision as to whether the State will comply."<sup>144</sup> State independence is

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<sup>139</sup> See Part IV.A.

<sup>140</sup> See *New York*, 505 US at 168–69.

<sup>141</sup> See *id.* For further discussion, see Part III.A.1.

<sup>142</sup> See *New York*, 505 US at 188.

<sup>143</sup> See *id.* at 188.

<sup>144</sup> *Id.* at 168. See also text accompanying notes 21–31.

preserved because the state legislature ultimately determines whether it is in the state's best interest to adopt the federal conditions or reject funding.<sup>145</sup> This maintenance of sovereignty is why it is so important that the states be given the clear, unambiguous choice to participate. A state formally enacts the federal conditions as state law, even if the "conditions attached to the funds by Congress may influence a State's legislative choices."<sup>146</sup> Accordingly, the Supreme Court has consistently rejected states' protests and arguments that they were coerced into involvement when the states independently chose to enact the federal conditions.<sup>147</sup> Congress's ability to require a state to apply regulations in exchange for federal funds is constitutional precisely because it maintains state sovereignty.<sup>148</sup>

It follows that states, as sovereign actors, should remain responsible for meeting the limitations on state action in the Fourteenth Amendment and be susceptible to challenge for failing to do so. It is counterintuitive to assert that a state decides to enact and apply the federal affirmative action law, but that once it chooses to participate it is no longer subject to Fourteenth Amendment restrictions on state action. A state, by choosing to implement the federal conditions, should participate cognizant of the constitutional limitations on state action since states enjoy the sovereignty to refuse participation.<sup>149</sup>

One may argue this distinction is formalistic.<sup>150</sup> Since states are highly dependent on federal funds, they have no choice but to accept Congress's conditions, creating an illusory sovereignty.<sup>151</sup> However, this very formalism is crucial for maintaining the federalism required by the Constitution. A state's choice to participate allows the state to

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<sup>145</sup> *New York*, 505 US at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

<sup>146</sup> *Id.* at 167. See also *Dole*, 483 US at 211–12 ("[T]he enactment of [Spending Power] laws remains the prerogative of the States not merely in theory but in fact.").

<sup>147</sup> See text accompanying notes 27–32.

<sup>148</sup> See *New York*, 505 US at 168–69, 188 (holding Congress's use of the Spending Power is constitutional because, by providing a state the formal choice to participate, it maintains a state's sovereignty); *Dole*, 483 US at 211–12 (stating that states enact the federal law "not merely in theory but in fact").

<sup>149</sup> See *Grove City College v Bell*, 465 US 555, 565 n 13 (1984) (noting that if the recipient found the condition objectionable it was free to cease participating to escape the condition). Similar logic would suggest that if the state did not want to be subject to equal protection scrutiny it could likewise cease participating.

<sup>150</sup> See Engdahl, 44 Duke L J at 78–86 (cited in note 17) (noting that the Supreme Court repeatedly finds that as long as states have the choice they can remain independent of the federal government, implying that this is a formalistic distinction, and asserting that the Spending Power should have protections for states from accepting funds akin to unconscionability and public policy in contract law).

<sup>151</sup> *Id.*

adopt federal conditions in the same manner it would enact regulations; a state makes the decision to adopt the conditions as state law and then enforces those conditions. This allows a state to undergo the same sovereign processes that maintain the state autonomy constitutionally required by our federal system. If a state is given the choice to participate, the Constitution considers a state a sovereign entity regardless of how frequently a state chooses to enact the federal conditions. A state, as a constitutionally sovereign entity, should be subject to constitutional limitations including the Fourteenth Amendment.

In sum, the Spending Power establishes a participating state as a state actor. As such, the state should remain subject to the Fourteenth Amendment and be susceptible to challenges for potential violations of that Amendment.

#### CONCLUSION

Though the circuit split ostensibly deals with affirmative action, it really involves underlying questions of federalism. Courts must consider a state's position when applying these federal affirmative action laws if they wish to answer these questions. A state's role suggests allowing as-applied challenges against state application of federal affirmative action spending programs. In fact, this answer sweeps more broadly, suggesting that states are susceptible to challenge whenever they apply a federal law under Spending Power legislation. Beyond the Supreme Court's openness to such challenges, the Spending Power's animating force is that a state remains an independent sovereign in choosing to adopt the federal conditions and, accordingly, should remain subject to the Fourteenth Amendment and susceptible to challenge. Furthermore, a state's activity in applying such regulations activates that Amendment's limitations, requiring a state's availability to suit. Finally, absolving states from challenge would create an untenable situation where no as-applied objection existed. Accordingly, individual states' application of congressional statutes making the receipt of federal funds conditioned upon the adoption of a federal affirmative action program must be susceptible to an as-applied challenge.