TITLE VII DISPARATE IMPACT SUITS AGAINST STATE GOVERNMENTS AFTER *HIBBS* AND *LANE*

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INTRODUCTION

The disparate impact theory of Title VII of the Civil Rights Act of 1964[1] enables employees and job applicants to challenge employment practices that, although neutral on their face, have a disproportionate, adverse effect on the basis of race, sex, or national origin.[2] It permits challenges to a wide variety of employment practices—including standardized tests, diploma requirements, height and weight requirements, and subjective evaluations—that have stood in the way of equal access to the workplace and to advancement.[3] The theory has been available to private- and public-sector employees alike since 1973.[4]

In recent years, the Supreme Court's "federalism revolution" has narrowed Congress's ability to override state sovereign immunity with civil rights legislation.[5] As a result, whether Congress retains the power to authorize Title VII suits against state governments has

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1. 42 U.S.C. §§ 2000e–2000e-17 (2000). Title VII targets discrimination on the basis of race, national origin, sex, and religion in the employment context. *Id.* § 2000e-2(a). Religious discrimination presents unique issues and is not discussed in this Note.

2. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 4.01, at 235 (3d ed. 2002). The other major theory under Title VII is disparate treatment, which requires proof of intent to discriminate. *Id.*

3. *Id.* § 4.02, at 249–53.

4. Congress extended Title VII to state and local government employment as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 701, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e (1972)).

5. *See generally* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001) (discussing the Rehnquist Court's federalism jurisprudence, including its expansion of state sovereign immunity).

become uncertain.[6] The Court recognized in 1976, in *Fitzpatrick v. Bitzer*, that Title VII abrogates state sovereign immunity.[7] Although several subsequent federalism decisions have reaffirmed that Congress may abrogate state sovereign immunity through its enforcement power under Section Five of the Fourteenth Amendment,[8] the stringent abrogation analysis applied in those cases undermined the holding in *Fitzpatrick* and cast doubt upon Title VII's future as a remedy for state employment discrimination.[9]

In *Nevada Department of Human Resources v. Hibbs*,[10] however, the Supreme Court, for the first time since reinvigorating the state sovereign immunity doctrine, upheld a federal statute against a sovereign immunity challenge, concluding that state employees could sue their employers for violating the family-leave provision of the Family and Medical Leave Act (FMLA).[11] The following year, in *Tennessee v. Lane*,[12] the Court upheld the private suit provision of Title II of the Americans with Disabilities Act (ADA) against a state sovereign immunity challenge.[13] Because of the similarities between these statutes and Title VII, commentators have concluded that these cases put Title VII's abrogation of state sovereign immunity on much firmer doctrinal footing.[14] It is less clear, however, that these cases authorize disparate impact suits against state governments.[15] Because disparate impact liability arises from conduct that would not be

6. SULLIVAN ET AL., *supra* note 2, § 4.01, at 244; Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 19–21 (2003).

7. 427 U.S. 445, 456 (1976).

8. U.S. CONST. amend. XIV, § 5; *see, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (citing *Fitzpatrick* for the proposition that "the Eleventh Amendment, and the principle of state sovereign immunity which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000) (same); City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (same).

9. *See infra* Part I.A.

10. 538 U.S. 721 (2003).

11. *Id.* at 740.

12. 541 U.S. 509 (2004).

13. *Id.* at 533–34.

14. *See, e.g.*, Post, *supra* note 6, at 21–23 (discussing the import of *Hibbs* for Title VII).

15. *See, e.g.*, Nicole E. Grodner, Note, *Disparate Impact Legislation and Abrogation of the States' Sovereign Immunity After* Nevada Department of Human Resources v. Hibbs *and* Tennessee v. Lane, 83 TEX. L. REV. 1173, 1212–23 (2005) (arguing that Title VII's disparate impact theory does not abrogate state sovereign immunity after *Hibbs* and *Lane*).

unconstitutional under equal protection analysis,[16] the theory may exceed Congress's remedial power under Section Five even if other aspects of Title VII do not.

This Note argues that *Hibbs* and *Lane* establish beyond peradventure that Title VII's disparate impact theory validly abrogates state sovereign immunity. Far from doctrinal aberrations, these two cases carry forward suggestions in the Supreme Court's earlier state sovereign immunity cases that racial, gender, and national-origin discrimination call for a different, more nuanced abrogation analysis—one that recognizes that discrimination takes many forms and that is more deferential to Congress's chosen means of responding to it. Under the logic of *Hibbs* and *Lane*, Title VII's disparate impact provision is an appropriate legislative response to this country's long history of discrimination against women and racial and ethnic minorities, and it applies to government and private employers alike.

Part I of this Note provides background, briefly describing both the Supreme Court's state sovereign immunity jurisprudence and Title VII disparate impact claims. It also discusses several pre-*Hibbs* lower court decisions considering whether Title VII disparate impact claims abrogate state sovereign immunity. Part II explains that Title VII satisfies the first of the two major requirements for abrogation, that Congress enacted the legislation in response to a pattern of unconstitutional discrimination. It also considers why the Court in *Hibbs* announced a new way of assessing the sufficiency of the legislative record. Finally, Part III shows that disparate impact satisfies the second major requirement for abrogation, that the remedy chosen be congruent and proportional to the pattern of unconstitutional discrimination. Although the disparate impact theory prohibits conduct that is not itself unconstitutional, *Hibbs* and *Lane* signal that Congress may enact broad prophylactic legislation to prevent infringement of rights that receive heightened scrutiny. Part III also argues that defining the disparate impact theory broadly, rather than merely as a remedy for intentional discrimination, is essential if the theory is to achieve remedial objectives.

16. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that equal protection claims require proof of discriminatory intent).

I. BACKGROUND: STATE SOVEREIGN IMMUNITY AND DISPARATE IMPACT

This Part first outlines the requirements for congressional abrogation of state sovereign immunity, focusing on the aspects of the analysis most relevant to evaluating the disparate impact theory. It then briefly describes the theory and some key statutory features. Finally, it reviews several lower court decisions that, in the wake of the Supreme Court's pre-*Hibbs* state sovereign immunity decisions, grappled with the question of whether Title VII, and specifically its disparate impact provision, could abrogate the states' newly strengthened sovereign immunity.

A. Congressional Power and State Sovereign Immunity

Congress may override the states' Eleventh Amendment immunity[17] to suits for money damages only when it legislates pursuant to its power under Section Five of the Fourteenth Amendment.[18] Congress's Section Five power, however, only authorizes legislation that "enforces" the guarantees of Section One of the Fourteenth Amendment as the Supreme Court itself has defined them.[19] The Court has rebuffed congressional efforts to increase the level of protection that rights would receive under Section One, explaining that Congress may not use its remedial powers to "redefine" the meaning of the amendment.[20] The Court has

17. The Eleventh Amendment provides, "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. The Supreme Court has held that the Amendment also applies to suits by citizens against their own states. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); *see id.* ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.").

18. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *see* Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) (holding that Congress may not abrogate state sovereign immunity pursuant to its power under the Commerce Clause). Title VII's application to private employers is an exercise of Congress's power to regulate interstate commerce. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3, at 257–58 (2d ed. 2002).; *cf.* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Title II of the Civil Rights Act of 1964, as applied to a private business, was a valid exercise of Congress's Commerce Clause power); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (same).

19. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

20. The Court has held that several federal antidiscrimination statutes are not valid exercises of Congress's Section Five power. *See Garrett*, 531 U.S. at 374 (Title I of the ADA); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 92 (2000) (Age Discrimination in Employment Act (ADEA)); *Boerne*, 521 U.S. at 536 (Religious Freedom Restoration Act (RFRA)).

developed a three-step inquiry with which to determine whether a statute authorizing private suits against state governments is valid Section Five legislation.[21] These steps are as follows: first, identify the right at issue;[22] second, determine whether there is a "history and pattern" of state discrimination infringing this right;[23] and third, assess whether Congress's chosen remedy is a "congruent and proportional" response to this history and pattern of discrimination.[24] This Section will briefly consider the first step of the inquiry and then turn to the second and third steps in greater detail.

The first step identifies "with some precision" the right that the statute aims to protect and determines the level of scrutiny that courts show to the right.[25] The Court has invalidated two antidiscrimination statutes protecting rights that courts review under a rational basis standard. In *Kimel v. Florida Board of Regents*,[26] the Court concluded that the Age Discrimination in Employment Act (ADEA) implicated the right to be free of unconstitutional age discrimination, a right that receives only rational basis review.[27] Similarly, in *Board of Trustees of the University of Alabama v. Garrett*,[28] the Court held that Title I of the ADA implicated the right to be free of disability discrimination, which also receives rational basis review.[29] In both cases, the Court noted that under this minimal standard of review, a court would find very little discriminatory conduct unconstitutional—only conduct that is "irrational."[30]

In contrast, the Court upheld two statutes in which the right at issue received heightened scrutiny. In *Hibbs*, the Court determined that the FMLA's family-leave provision aimed to protect "the right to

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21. An additional requirement is that Congress must have made unmistakably clear its intention to abrogate state sovereign immunity. *Kimel*, 528 U.S. at 73. This requirement is not at issue with respect to Title VII, which clearly was intended to apply to the states. *Fitzpatrick*, 427 U.S. at 447.

22. *See infra* notes 25–34 and accompanying text.

23. *See infra* Part I.A.1.

24. *See infra* Part I.A.2.

25. *Garrett*, 531 U.S. at 365.

26. 528 U.S. 62 (2000).

27. *Id.* at 83.

28. 531 U.S. 356 (2001).

29. *Id.* at 366–68.

30. *Id.* at 368; *see also Kimel*, 528 U.S. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

be free from gender-based discrimination in the workplace,"[31] and in *Lane*, it held that Title II of the ADA implicated the right to be free of disability discrimination that would infringe the fundamental right of access to the courts.[32] Because the rights at issue in these cases receive heightened scrutiny, a great deal of conduct that infringes them would be unconstitutional.[33] The level of scrutiny the right receives is crucially important to the second and third steps of the abrogation inquiry.

1. *The Requirement of a History and Pattern of Discrimination*. In the second step, courts review a statute's legislative record to determine whether it contains sufficient evidence of a history and pattern of discrimination to justify remedial legislation abrogating state sovereign immunity.[34] When the right implicated by the statute is one that courts review under a rational basis standard, the record review is stringent and courts approach the evidence of unconstitutional state conduct skeptically. In *Garrett*, the Court credited only legislative evidence directly demonstrating disability discrimination by the states.[35] It rejected, as irrelevant, evidence of disability discrimination in the private sector and in local government employment.[36] Moreover, when rational basis review is implicated, the evidence of unconstitutional state conduct must be extensive and clear. For example, the Court concluded in *Garrett* that Congress had documented relatively few incidents of unconstitutional discrimination, despite holding extensive hearings on disability discrimination, and that these few incidents failed to establish a pattern of state discrimination.[37] The Court also discounted a number

31. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

32. Tennessee v. Lane, 541 U.S. 509, 522–23 (2004).

33. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

34. *Garrett*, 531 U.S. at 368.

35. *Id.* at 369.

36. *Id.* Similarly, the Court discounted evidence of unconstitutional state conduct in public accommodations, which it considered irrelevant because Title I specifically addresses disability discrimination in employment. *Id.* at 371 n.7.

37. *See id.* at 370 (noting that Congress had found, in enacting the ADA, that 43 million Americans have one or more disabilities and that in 1990 state governments employed 4.5 million people, and observing that "[i]t is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled").

of incidents of discrimination against disabled state employees because it found them insufficiently detailed to permit the conclusion that they described irrational, unconstitutional conduct rather than rational unwillingness to make accommodations.[38] Similarly, the Court concluded in *Kimel* that Congress had not documented sufficient evidence of age discrimination by state employers to justify a legislative remedy.[39] It made a similar determination in *City of Boerne v. Flores*[40] regarding state infringement of the right to free exercise of religion.[41]

Review of the legislative record is less stringent when Congress seeks to protect a right that courts review under a heightened-scrutiny standard. In *Hibbs*, the FMLA satisfied the record requirement even though the evidence before Congress of unconstitutional gender-based discrimination in the administration of leave benefits was not significantly more extensive or detailed than the evidence found inadequate in *Garrett*.[42] The Court credited evidence that it would have rejected under *Garrett*, such as gender-based disparities in private-sector family-leave policies.[43] It also validated Congress's concern that "stereotype-based beliefs about the allocation of family duties" produce such disparities.[44] As Justice Kennedy objected in dissent, little of this evidence directly established that the states were responsible for unconstitutional discrimination.[45] Similarly, in *Lane*, the Court relied upon "statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services" without inquiring as deeply as it had in

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38. *Id.*

39. *See* 528 U.S. 62, 91 (2000) ("A review of the ADEA's legislative record as a whole . . . reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.").

40. 521 U.S. 507, 519 (1997).

41. *Id.* at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

42. In *Lane*, the Court noted that the legislative record supporting the FMLA in *Hibbs* "contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States." 541 U.S. 509, 528 n.16 (2004).

43. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730–31 (2003) (attributing disparities in private-sector leave policies to public-sector employment on the basis of evidence before Congress that public-sector and private-sector leave policies were substantially similar).

44. *Id.* at 730.

45. *Id.* at 749–50 (Kennedy, J., dissenting); *see also Lane*, 541 U.S. at 519 ("We upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose.").

Garrett whether this evidence proved unconstitutional conduct by the states.[46]

In both *Hibbs* and *Lane*, the Court referred to its own prior decisions involving the right implicated by the statute and read these cases as further evidence of a history and pattern of discrimination. In *Hibbs*, the Court used its jurisprudence to help establish that Congress was justified in enacting legislation to combat gender discrimination.[47] *Lane* reviewed prior cases dealing with state discrimination against the disabled and found that they documented "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights" that supported the enactment of the ADA.[48] As the Court explained in *Hibbs*, the history and pattern of state constitutional violations that the record-review inquiry seeks to uncover is closely related to heightened scrutiny under equal protection.[49] Affording a right the protection of heightened scrutiny, then, is the Court's own response to clear evidence of a history and pattern of government discrimination against a protected group. The fact of heightened scrutiny, therefore, resolves in advance the question that the record review seeks to answer;[50] thus, a more deferential, less exacting form of review is appropriate for legislation protecting rights that receive heightened scrutiny.

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46. 541 U.S. at 529.

47. 538 U.S. at 730, 736.

48. 541 U.S. at 524.

49. *See Hibbs*, 538 U.S. at 730 ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny."). The Court had already acknowledged the history of race and gender discrimination and, in *Kimel*, drawn a link between this history and heightened scrutiny. Contrasting the heightened scrutiny shown to race and gender classifications with the more relaxed scrutiny applied to classifications based on age, the Court in *Kimel* made the following observation: "Older persons, . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (quoting Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)).

50. Note that this analysis formulates the right at a higher level of abstraction than authorized under *Kimel* and *Garrett*. That is, the Court did not consider whether its jurisprudence revealed a history of gender-based discrimination *in employment*. Instead, it considered gender-based discrimination generally. This less-precise analysis is easy to criticize if one starts from the assumption that the Court was performing the same analysis in *Hibbs* as in *Garrett*. This more abstracted form of analysis makes more sense, however, if, as discussed in Part II.B. *infra*, the Court was really establishing a different form of record review for rights that receive heightened scrutiny.

2. *The Congruence and Proportionality Requirement.* The third step of the abrogation inquiry considers whether Congress's chosen remedy is congruent and proportional to the history and pattern of discrimination.[51] This inquiry distinguishes between legislation that remedies violations of constitutional rights and legislation that attempts to redefine the scope of the right itself.[52] To deter or remedy violations of a right effectively, Congress may prohibit some conduct that would not itself be held unconstitutional under equal protection doctrine.[53] A statute that prohibits a great deal of conduct that would not be unconstitutional, however, may be out of proportion to the constitutional violation it purports to remedy and may instead represent an attempt to redefine the right itself.[54] Applying the congruence and proportionality test, the Supreme Court has held that the ADEA and ADA are not congruent and proportional responses to unconstitutional state discrimination against, respectively, older persons and persons with disabilities.[55] In *Kimel*, the Court invalidated the ADEA's abrogation of state sovereign immunity because it "prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[56] Rather than enforcing the constitutional prohibition on age discrimination in employment, the ADEA "effectively elevated the standard for analyzing age discrimination to heightened scrutiny."[57] The Court analyzed Title I of the ADA in *Garrett* similarly: by prohibiting disability discrimination and mandating accommodation of employees' disabilities, Title I prohibited far more conduct than would be unconstitutional under equal protection analysis and imposed a significant burden on state governments.[58]

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

52. *Id.* In *Boerne*, the Court invalidated RFRA, which had mandated strict scrutiny for facially neutral laws that substantially burdened the free exercise of religion. RFRA would have worked a dramatic change in the protection afforded to the free exercise right and could have affected every aspect of state government operations. *Id.* at 532. Thus, it was not remedial legislation because it was grossly disproportionate to the relatively insignificant problem of facially neutral laws burdening the exercise of religion. *Id.*

53. *Id.* at 518.

54. *Id.* at 518–20.

55. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000).

56. 528 U.S. at 86.

57. *Id.* at 88.

58. 531 U.S. at 372.

When the statute in question aims to protect a right that receives heightened scrutiny, however, Congress has significantly greater latitude to prohibit conduct that would not be unconstitutional. In *Hibbs*, the Court upheld the provision of the FMLA authorizing private suits against state employers for failing to provide twelve weeks of unpaid leave annually to employees caring for ill spouses, children, or parents.[59] The Court concluded that the provision was appropriate remedial legislation because it targeted the "formerly state-sanctioned stereotype that only women are responsible for family caregiving" that had led employers to discriminate against women in hiring and promotion.[60] In *Lane*, the Court sanctioned another remedy against state governments: Title II of the ADA's requirement that states accommodate disabilities if failing to do so would burden disabled persons' fundamental right of access to the courts.[61]

B. Title VII's Disparate Impact Provision

Broadly speaking, there are two theories of liability under Title VII.[62] The first theory, disparate treatment, prohibits intentional discrimination;[63] liability requires proof of discriminatory animus.[64] Under the second theory, disparate impact, an employer may be liable if it makes use of an employment practice that, although seemingly neutral, has a disproportionately adverse effect on one of the groups protected by the statute.[65] The employer need not have

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59. 538 U.S. at 724–25.

60. *Id.* at 737.

61. Tennessee v. Lane, 541 U.S. 509, 531–34, 532 n.20 (2004). In *Lane*, the respondents were paraplegics unable to access courthouses that were not wheelchair accessible. *Id.* at 513–14. Respondent Lane was unable to appear in court to face criminal charges and had to crawl up two flights of stairs. *Id.* at 514. Respondent Jones was a court reporter who was unable to access a number of county courthouses, and thus she "lost both work and an opportunity to participate in the judicial process." *Id*.

62. SULLIVAN ET AL., *supra* note 2, at 38.

63. *Id.*

64. *See id.* ("Intent, purpose, or state of mind is crucial to . . . disparate treatment [claims].").

65. *See id.* at 43 ("The Supreme Court has said that disparate impact discrimination 'involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977))).

been motivated by discriminatory animus; what matters is the practice's effect.[66]

The disparate impact theory was not explicitly part of Title VII as originally enacted.[67] Rather, the Supreme Court established the theory in 1971, in *Griggs v. Duke Power Co.*,[68] based upon its understanding of the language and purpose of the statute.[69] The theory was used for several decades, with *Griggs* as its doctrinal underpinning, until Congress codified it as part of Title VII in the Civil Rights Act of 1991[70] in response to several Supreme Court decisions significantly narrowing the theory's scope.[71] As enacted in 1964, Title VII did not apply to state and local government employers; Congress amended the statute to cover them as part of the Equal Employment Opportunity Act of 1972 (EEOA).[72]

Griggs involved a Title VII disparate treatment suit by African-American employees who challenged their employer's practice of requiring high school diplomas and intelligence tests for placement in any but its lowest-paying department.[73] The employer had openly discriminated against African-American employees prior to the effective date of Title VII and had added the intelligence-test and diploma requirements on the day Title VII went into effect.[74] These requirements had the effect of disproportionately limiting African-American employees to the lowest-paying department, thus

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66. *See id.* ("Proof of discriminatory motive . . . is not required under a disparate impact theory." (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977))).

67. *Id*. § 1.03, at 5.

68. 401 U.S. 424 (1971).

69. *See id.* at 429–30 ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); *see also* Connecticut v. Teal, 457 U.S. 440, 448 (1982) ("When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity* 'because of . . . race, color, religion, sex, or national origin.'" (emphasis added) (quoting Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (2000)).

70. Pub. L. No. 102-166, § 703, 105 Stat. 1071, 1074–75 (codified as amended at 42 U.S.C. § 2000e-2(k)(1) (2000)).

71. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court significantly weakened the disparate impact theory. SULLIVAN ET AL., *supra* note 2, § 4.01, at 240–41.

72. Pub. L. No. 92-261, § 701, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e (2000)).

73. 401 U.S. at 427–28.

74. *Id.*

preserving the effects of the company's pre–Title VII discriminatory practices.[75] Nevertheless, the district court found that the company had no intention to discriminate, and it dismissed the plaintiffs' claim.[76] The Supreme Court reversed, holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[77] The employer had failed to show that either its diploma or intelligence-test requirement bore "a demonstrable relationship to successful performance of the jobs for which it was used."[78] According to the Court, "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[79]

As the language of *Griggs* indicates, the primary purpose of the disparate impact theory is to remove barriers to employment opportunity that disproportionately burden women or racial or ethnic minorities.[80] It is available to challenge both objective employment standards, such as standardized tests, and also subjective practices, such as job interviews, in which supervisors' exercise of discretion has a disparate impact.[81] The theory has been used to challenge a wide range of employment practices, including (although not always successfully) policies against hiring persons with arrest or conviction records, interviews, experience requirements, no-spouse rules, and no-beard policies.[82]

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75. *Id.* at 430.

76. *Id.* at 428.

77. *Id.* at 431.

78. *Id.*

79. *Id.* at 432.

80. *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982) (noting the Court's conclusion in *Griggs* that in enacting Title VII, Congress's primary objective was "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (quoting *Griggs*, 401 U.S. at 429–30)).

81. SULLIVAN ET AL., *supra* note 2, § 4.02, at 251–53; *see infra* notes 173–77 and accompanying text.

82. SULLIVAN ET AL., *supra* note 2, § 4.02, at 251.

Since *Griggs*, a tripartite structure of proof has emerged for disparate impact claims.[83] A plaintiff must put forward a prima facie case by identifying a particular employment practice that, although facially neutral, has a disproportionate, adverse impact on a protected group.[84] Generally, plaintiffs bringing disparate impact claims must not only show that a protected group is underrepresented in the employer's workforce, but also must identify the specific practice that gives rise to the discrepancy.[85] The defendant may then attempt to rebut the prima facie case[86] or else show, as an affirmative defense, that the practice is "job related for the position in question and consistent with business necessity."[87] Finally, if the employer proves this defense, the plaintiff may yet prevail by showing that the employer refuses to adopt an "alternative employment practice" that would have a less-discriminatory effect.[88] Such a showing undermines the employer's claim that the practice is a business necessity.[89] It also may suggest that the employer's claim of business necessity is a pretext for intentional discrimination.[90]

C. Lower Court Challenges to Title VII's Abrogation of State Sovereign Immunity

Although the Supreme Court held in 1976 that Title VII abrogated state sovereign immunity,[91] lower courts heard new

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83. *Id.* § 4.01, at 239. This structure of proof is now part of the statute. 42 U.S.C. § 2000e-2(k) (2000).

84. SULLIVAN ET AL., *supra* note 2, § 4.01, at 239.

85. *Id.* § 4.02, at 246–49. The exception is when "the plaintiff can prove that the elements of an employer's selection process are incapable of separation for analysis." *Id.* at 246.

86. *See* Dothard v. Rawlinson, 433 U.S. 321, 338–39 (1977) (Rehnquist, J., concurring in the result and concurring in part) ("[T]he defendants . . . . may endeavor to impeach the reliability of the [plaintiffs'] statistical evidence, . . . offer rebutting evidence, or . . . disparage . . . the probative weight [that the] evidence should be accorded.").

87. SULLIVAN ET AL., *supra* note 2, § 4.01, at 239. Title VII does not define "job related" or "business necessity." *Id.* at 242. Congress's Interpretive Memorandum to accompany the Civil Rights Act of 1991 states only that these terms retain their meaning prior to the Supreme Court's 1989 decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *Id.* § 4.03, at 285–86. In practice, courts have applied the standard with varying degrees of stringency. *Id.* at 289–93. That Congress, in codifying the theory, specifically rejected the Court's weak articulation of the standard in *Wards Cove* suggests that the required showing is fairly stringent. *Id.* at 289.

88. *Id.* § 4.01, at 242–43.

89. *Id.* § 4.03, at 294.

90. *Id.* at 293–94.

91. Fitzpatrick v. Bitzer, 427 U.S. 445, 456–57 (1976).

challenges to Title VII in the wake of the Court's decisions reinvigorating state sovereign immunity and contracting the scope of Congress's Section Five power. Following these decisions, three federal courts of appeals have considered, and upheld, Title VII's abrogation of state sovereign immunity; two of them specifically decided challenges to abrogation in the context of disparate impact claims.[92] The ways in which these courts reconciled the disparate impact theory with the abrogation inquiry, however, are somewhat troubling, because they may signal a narrowing of the theory's scope.

All three courts held that Congress had extended Title VII to the states in response to evidence of a pattern of discrimination in state employment. To reach this conclusion, the Eleventh Circuit, in *In re Employment Discrimination Litigation Against Alabama*[93] cited the EEOA's legislative history, which "documented the troubling persistence of race discrimination in public employment";[94] the court also took notice of "this nation's sad history of racial domination and subordination."[95] Because the court was writing before *Garrett*, which announced the rigorous record-review inquiry,[96] this limited review of Title VII's legislative history is unsurprising. The Eighth Circuit, in *Okruhlik v. University of Arkansas*,[97] however, reached the same result after *Garrett*. The court cited the same legislative history as had the Eleventh Circuit and additionally cited the Senate's floor debates.[98] It further noted that when Congress extended Title VII to the states it was also gathering evidence regarding gender discrimination for other pending civil rights provisions, including the Equal Rights Amendment (ERA) and Education Opportunity Act.[99] The court therefore concluded that Congress had had before it

92. The Eleventh Circuit's decision in *In re Employment Discrimination Litigation Against Alabama* involved challenges to a number of Alabama's employment practices alleged to have a disparate impact on African Americans. 198 F.3d 1305, 1308–09 (11th Cir. 1999). The claims the Eighth Circuit considered in *Okruhlik v. University of Arkansas* included a female professor's allegation of disparate impact on the basis of sex. 255 F.3d 615, 620 (8th Cir. 2001). And the Seventh Circuit in *Nanda v. Board of Trustees of the University of Illinois* evaluated a professor's disparate treatment suit alleging race, sex, and national-origin discrimination. 303 F.3d 817, 819 (7th Cir. 2002).

93. 198 F.3d 1305 (11th Cir. 1999).

94. *Id.* at 1323.

95. *Id.*

96. *See supra* notes 35–38 and accompanying text.

97. 255 F.3d 615 (8th Cir. 2001).

98. *Id.* at 625.

99. *Id.*

evidence of a history and pattern of both race and gender discrimination.[100] The Seventh Circuit, in *Nanda v. Board of Trustees of the University of Illinois*,[101] followed *Okruhlik* in taking notice of the other legislation pending before Congress when the EEOA was enacted. Additionally, it found support in "the well-documented history of gender [and race] discrimination in this Nation . . . that is embodied in the Supreme Court's own jurisprudence."[102]

The Eleventh and Eighth Circuits, the two courts of appeals to consider state sovereign immunity challenges to the disparate impact theory, applied the congruence and proportionality analysis in somewhat different ways. The Eleventh Circuit characterized the disparate impact theory as a remedy for covert intentional discrimination that would be difficult to prove under the disparate treatment theory.[103] The court explained that "[alt]hough the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive."[104] Therefore, the court concluded,

> Our analysis of the mechanics of a disparate impact claim has led us unavoidably to the conclusion that although the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination.[105]

The court thus found that Title VII's disparate impact provision, as a remedy for intentional discrimination that is difficult to prove, was a congruent and proportional response to intentional discrimination.[106]

The Eighth Circuit reasoned that "employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to [unconstitutional] intentional discrimination . . . [and] may have effects that are indistinguishable

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100. *Id.* at 624.

101. 303 F.3d 817 (7th Cir. 2002).

102. *Id.* at 830–31 (quoting Varner v. Ill. State Univ., 226 F.3d 927, 936 (7th Cir. 2000)).

103. *In re* Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1321–23 (11th Cir. 1999).

104. *Id.* at 1321.

105. *Id.* at 1322.

106. *Id.* at 1323–24.

from intentionally discriminatory practices."[107] Therefore, the court held, the disparate impact theory was a "'prophylactic' response to a pattern of unconstitutional state action [that] is proportional and congruent."[108] The court did not explain precisely what this conceptualization entails; the Supreme Court, in the opinion from which this characterization of disparate impact is taken, indicated that it may include both practices that perpetuate the effects of historical discrimination and those that rely on unconscious stereotypes.[109]

Thus, both circuits were able to find a rationale, prior to the Supreme Court's decisions in *Hibbs* and *Lane*, for concluding that Title VII's disparate impact theory satisfied the congruence and proportionality test. Neither court explored in any depth what effect defining disparate impact in terms of intentional discrimination—either as a remedy for intentional discrimination that is difficult to prove, or as a remedy for conduct that is the "functional equivalent" of intentional discrimination—would have on how the theory operates. As discussed in Part III, there is some reason to think that these conceptualizations, particularly the Eleventh Circuit's, may significantly limit the disparate impact theory's reach.

II. THE RECORD-REVIEW INQUIRY

No court reviewing Title VII has yet performed an extensive review of its legislative record.[110] This Part shows that this record satisfies the more deferential review shown to rights that receive heightened scrutiny: Congress extended Title VII to the states in response to evidence of race, gender, and national-origin discrimination by state employers. This Part then turns to the record-review inquiry itself and considers why the Court established this second form of review in *Hibbs*. It concludes that the continued viability of the state sovereign immunity doctrine required that it do so: not only would the *Garrett* test's skepticism be incongruous when the rights involved have been judicially recognized as important, but the test also would have put the Court in the awkward position of

107. Okruhlik v. Univ. of Ark., 255 F.3d 615, 626 (8th Cir. 2001) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987, 990 (1988)).

108. *Id.* at 626–27.

109. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988); *see infra* notes 173–78 and accompanying text.

110. *See supra* notes 93–102 and accompanying text.

having to disbelieve that the states have ever discriminated on the basis of race, gender, or national origin.

A. Title VII's Legislative Record

Review of Title VII's legislative record reveals that when Congress extended Title VII to the states it was responding to a perceived nationwide pattern of unequal employment opportunity for women and for racial and ethnic minorities—a pattern that resulted, in significant part, from intentional discrimination. In extending Title VII, Congress relied in large part on a report by the United States Commission on Civil Rights[111] regarding racial and national-origin discrimination in state and local government employment.[112] According to the House Committee on Education and Labor, the Commission's report documented that "widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices."[113] The Committee noted that "[t]he report cites widespread perpetuation of past discriminatory practices through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities."[114] Moreover, the report found that "employment discrimination in State and local governments is more pervasive than in the private sector."[115]

The Commission's report, which studied state and local government employment in seven large metropolitan areas, recorded instances of intentional discrimination as well as discriminatory attitudes among supervisors and institutionalized barriers to equal

111. U.S. COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE: A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT (1969).

112. *See* H.R. REP. NO. 92-238, at 17–18 (1971), *reprinted in* SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 77–78 (1972) [hereinafter LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT]. A second Commission report cited by Congress found that Mexican Americans were underrepresented in law enforcement agencies in the southwestern United States. U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 78–83 (1970).

113. H.R. REP. NO. 92-238, at 17.

114. *Id*.

115. *Id*.

opportunity. Although the Commission found that "blatant racism openly admitted by a public official [was] atypical," it encountered "[s]egregated facilities, segregated work assignments, social ostracism, and lack of courtesy" in government employment.[116] It also observed that government officials commonly expressed indifference to issues of equal employment opportunity, particularly in the context of promotions, and it further determined that administrators of merit-based promotion systems "frequently violated the merit principle and practiced conscious, even institutionalized, discrimination."[117] The report found that African Americans, and to a lesser extent Latinos, faired poorly compared to their white counterparts in obtaining the more desirable jobs in state government.[118]

The Senate Committee on Labor and Public Welfare also reviewed a Census Bureau report showing that "while some progress has been made toward bettering the economic position of the Nation's black population, the avowed goal of social and economic equality is not yet anywhere near a reality."[119] According to the report, African Americans in 1970 were "concentrated in the lower-paying, less prestigious positions in industry and [were] largely precluded from advancement to the higher paid, more prestigious positions."[120] The unemployment rate for African Americans was also considerably higher than that of whites.[121] The report observed that average pay among Latinos was also lower than for whites and that Latinos had higher rates of unemployment than whites.[122] On the basis of all of these findings, Congress was justified in concluding that it was faced with a pervasive problem of state race and national-origin discrimination.

Congress also had before it evidence regarding gender-based employment discrimination. Research conducted by the Department

116. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 111, at 61.

117. *Id.* at 64.

118. The report noted that African Americans were "noticeably absent from managerial and professional jobs" except in a few fields, notably health and welfare. Latinos, although more successful in obtaining higher-level positions than African Americans (who held the majority of laborer and other low-level positions), had been "less successful than majority group members." *Id.* at 118–19.

119. S. REP. NO. 92-415, at 6 (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT, *supra* note 112, at 415.

120. *Id.*

121. *Id.*

122. *Id.* at 6–7.

of Labor's Women's Bureau showed that women received substantially lower salaries than their male counterparts for comparable work.[123] Moreover, far fewer women had earnings in the highest pay bracket recognized in the survey.[124] The House Committee on Education and Labor concluded that "[w]omen are subject to economic deprivation as a class. Their self-fulfillment and development is [*sic*] frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone."[125] Congress, on the basis of this evidence, concluded that "blatantly disparate treatment" persisted in employment,[126] but did not draw specific conclusions about state governments.[127]

Three aspects of the Court's review of the FMLA's legislative record in *Hibbs* are particularly relevant in assessing the adequacy of Title VII's legislative record. First, the Court expanded the types of evidence that it would recognize as suggestive of discrimination. It cited approvingly statistical evidence of disparities, such as research indicating that many private employers offered family leave only to female employees; under the *Garrett* test, such evidence would be

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123. *Id.* at 7.

124. H.R. REP. NO. 92-238, at 4 (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT, *supra* note 112, at 2140.

125. *Id*. The Committee did not introduce these "numerous studies" into the legislative record.

126. *Id.* at 64. The Committee noted that this discrimination "is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964." *Id.* at 64–65.

127. Thus, Title VII's legislative record contained less evidence regarding gender discrimination than regarding racial and national-origin discrimination. As the Eighth Circuit noted, however, the same Congress that enacted the EEOA also passed the ERA. *See supra* notes 99–102 and accompanying text. The Subcommittee on Constitutional Amendments of the Senate Judiciary Committee held three days of hearings on the ERA in 1970, during which it "received testimony from 42 witnesses, received 75 additional insertions of material, and compiled a hearing record of almost 800 pages." S. REP. NO. 92-689, at 4 (1972). The full Committee subsequently heard additional testimony. *Id.* In its report on the ERA, the Judiciary Committee cited examples of state gender discrimination, including the persistence of "protective" labor laws that barred women from performing certain tasks or holding certain positions. *Id.* at 9. Based upon this and other evidence, the Committee stated that "[s]ex discrimination is clearly present even in government employment." *Id.* It noted that women disproportionately occupied the lowest grades of federal civil service employment; although women filled 62 percent of the lower four employment grades, they constituted only 2.5 percent of the highest four grades. *Id.* Although the Supreme Court has never indicated whether evidence compiled for contemporaneous legislative action can be considered in the record-review inquiry, the Eighth Circuit's decision to take note of the legislative record of the ERA seems reasonable.

irrelevant both because it does not offer direct evidence of unconstitutional conduct and because it does not directly implicate state-government conduct.[128] This suggests that, in extending Title VII, Congress was justified in relying not only upon direct evidence of intentional discrimination by state governments, but also upon the voluminous numerical data it had collected regarding segregation and disparities in both government and private-sector employment. In particular, Congress justifiably relied upon data showing that female employees were paid less than men and that African-American employees tended to hold lower-paying and less-prestigious positions than white workers.

Second, the Court in *Hibbs* permitted Congress to draw inferences about discrimination from the data before it.[129] Its review of maternity-leave statutes revealed that only eleven states offered male and female employees different amounts of leave. Similarly, its review of family-leave statutes showed that only seven states offered childcare leave to women but not to men.[130] A number of states, however, did not guarantee family leave to any employees, relying instead on voluntary or discretionary leave programs, and Congress had received evidence that such discretionary policies could "leave[] 'employees open to discretionary and possibly unequal treatment.'"[131] The Court permitted Congress to infer, from this potential for discrimination, that "even where state laws and policies are not facially discriminatory, they [are] applied in discriminatory ways."[132]

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128. The Court connected this private-sector data to state employment by citing a "50-state survey also before Congress [that] demonstrated that '[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'" Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 n.3 (2003) (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong. 33 (1986) (statement of Meryl Frank, director of the Yale Bush Center Infant Care Leave Project)).

129. The *Hibbs* opinion on several occasions expressed deference toward, or even approval of, the inferences Congress had drawn from the evidence before it. *See id.* at 734 ("Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees . . . ."); *id.* ("[F]our states provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law.").

130. *Id.* at 733–34.

131. *Id.* at 732–33 (quoting H.R. REP. NO. 103-8, pt. 2, at 10–11 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 18).

132. *Id.* at 732. The Court indicated that this inference was justified because Congress had heard testimony that "[t]he lack of uniform parental and medical leave policies in the work

This deference to congressional inferences is important for Title VII. In extending Title VII to the states, Congress inferred a broad pattern of discrimination by combining documented instances of intentional discrimination by state governments with extensive numerical evidence of race- and gender-based disparities in pay and promotions. The Court in *Hibbs* approved this kind of legislative reasoning.

Third, and perhaps most fundamentally, the Court in *Hibbs* concluded that its own gender-discrimination jurisprudence could provide evidence of a history and pattern of state gender discrimination.[133] Because Title VII targets race, gender, and national-origin discrimination, all of which receive heightened scrutiny under the Supreme Court's equal protection jurisprudence,[134] this doctrinal shift has great import for Title VII. The Court specifically indicated in *Hibbs* that it would review Title VII in the context of its prior cases: after reviewing its gender-discrimination jurisprudence, the Court concluded that "Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964."[135] When the substantial legislative record of state discrimination is read against the backdrop of the Court's equal protection jurisprudence, Title VII is on solid ground.

B. The Need for Two Tiers of Record Review

After *Hibbs*, there are two forms of record-review inquiry: one for rights that receive only rational basis review and another for rights that receive heightened scrutiny. This revision of the sovereign immunity doctrine was necessary because the *Garrett* record-review inquiry is inadequate when applied to rights that receive heightened scrutiny. In several of its recent federalism cases, the Court has indicated that at least certain key antidiscrimination statutes, such as

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place has created an environment where [sex] discrimination is rampant." *Id.* (quoting *The Parental and Medical Leave Act of 1986: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong., pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago) (alteration in original)).

133. The Court had also looked to its own jurisprudence in *Kimel* and *Garrett*, but in those cases the result of this inquiry was to confirm that Congress was attempting to provide state employees with far more protection than the Court would offer them under the Equal Protection Clause. *See supra* notes 26–30 and accompanying text.

134. CHEMERINSKY, *supra* note 18, § 9.1, at 645.

135. *Hibbs*, 538 U.S. at 729.

the Voting Rights Act, validly abrogate state sovereign immunity.[136] In *Garrett*, however, the Court established a doctrinal test that was flawed in two ways. First, the test is weighted too heavily against abrogation, perhaps making abrogation impossible even when the legislation under review is truly responsive to a history and pattern of discrimination. Second, applied to a statute like Title VII, the test would put the Court in the politically and intellectually awkward position of doubting that the states had ever been involved in pervasive racial, gender, and national-origin discrimination.

First, the *Garrett* record review prevents Congress from offering additional protection to rights that the Court has decreed should receive only minimal scrutiny. Thus, although the test is neutral on its face—it merely inquires whether Congress documented a pattern of state violations of the specific constitutional right before attempting to abrogate state sovereign immunity—in effect it would invalidate most legislation protecting rights that receive only rational basis review. Although the Court has claimed that the *Garrett* test would be easier to satisfy for rights that receive heightened scrutiny,[137] in practice heightened scrutiny would only make it more likely that apparently discriminatory conduct really represented unconstitutional conduct. It would not relieve Congress's enormous burden of documenting a sufficiently large number of incidents of discrimination such that the Court would feel comfortable inferring a pattern.

The problem with the *Garrett* inquiry is that there is no logical connection between a statute's societal importance and the strength of its legislative record. Congress may have been entirely justified in enacting a core antidiscrimination statute and yet failed to place in the legislative record sufficiently detailed evidence with which the Court could "check Congress's homework"[138] years later.[139] The

136. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001) (comparing the ADA unfavorably to the Voting Rights Act (VRA)); City of Boerne v. Flores, 521 U.S. 507, 532–33 (1997) (comparing RFRA unfavorably to the VRA).

137. *See Hibbs*, 538 U.S. at 736 ("[G]ender discrimination . . . triggers a heightened level of scrutiny. . . . [Thus] it was easier for Congress to show a pattern of state constitutional violations.").

138. This phrase is Justice Scalia's description of the congruence and proportionality test. Tennessee v. Lane, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting).

139. *Cf.* Holmes v. Marion County, 349 F.3d 914, 921 (7th Cir. 2003) (Easterbrook, J.) ("Although the Supreme Court has consistently limited its review to the legislative record we nonetheless assume that, if the history were written elsewhere for all to see, as the history of race and sex discrimination is, then the lack of a legislative record would not matter. . . .

Garrett test is a useful tool with which to constrain congressional decisionmaking. But if, as the Court had suggested, the Section Five power should be more expansive when Congress acts to remedy racial, gender, and national-origin discrimination, the Court needed a different doctrinal tool with which to review these statutes. The Court provided this tool in *Hibbs* by establishing a more lenient form of record-review inquiry.

Second, the *Garrett* test poses a question that the Court would find difficult to ask with regard to race, gender, or national-origin discrimination: whether Congress had a sufficient basis for believing that states are responsible for unconstitutional discrimination.[140] It was politically and doctrinally acceptable in *Garrett* for the Court to engage in a rigorous and highly skeptical review of Congress's assertion that states discriminate against disabled workers.[141] It was also acceptable for it to speak of *rational* disability discrimination[142] and to doubt the contention that states' refusal to accommodate the disabled in public facilities bears on the question of whether they discriminate against the disabled in the workplace.[143] With a statute aimed at race, gender, or national-origin discrimination, however, such doctrinal skepticism would be troubling; state discrimination against women and racial and ethnic minorities is unquestionably part of this nation's history. The *Hibbs* test, by reviewing the legislative record more generously and taking notice of equal protection jurisprudence, relieves the Court of having to ask whether Congress has a basis for believing that racial, gender, or national-origin discrimination are really problems in need of a remedy.

Legislative power under § 5 depends on the state of the world, not the state of the Congressional Record." (citation omitted)).

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

141. Professor Post argues that *Hibbs* was intended to avoid the political controversy that would have resulted from invalidation of Title VII's abrogation of state sovereign immunity:

> In the years since *Boerne* the Court has used its new enforcement model of Section 5 power primarily to invalidate statutes of relatively low political salience. The nation's conviction that an essential mission of the federal government is the prevention of racial and gender discrimination . . . . would be forcefully challenged were the Court to hold that important dimensions of Title VII were beyond Congress's Section 5 power.

Post, *supra* note 6, at 22–23. Post is likely right about the political stakes. The focus in this Note, however, is on the doctrinal incongruity of doubting, and requiring Congress to prove, that the states ever practiced racial, gender, and national-origin discrimination.

142. *See supra* notes 37–41 and accompanying text.

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

III. TITLE VII DISPARATE IMPACT THEORY'S CONGRUENCE AND PROPORTIONALITY

After *Hibbs* and *Lane*, Congress may use its Section Five power to provide broad remedies for discrimination against women and racial and ethnic minorities, and it has significant discretion in selecting those remedies. This Part argues that Title VII's disparate impact theory is within Congress's Section Five power to enact prophylactic legislation and that a disparate impact-based remedy is congruent and proportional even when not narrowly defined as merely a remedy for hard-to-prove intentional discrimination. First, this Part shows that *Hibbs* recognized that forms of discrimination other than intentional constitutional violations are legitimate targets of Section Five legislation, and it explains that, under this reasoning, prohibiting employment practices that have a disparate impact is a legitimate congressional goal. It then shows that disparate impact is similar to the remedies found congruent and proportional in *Hibbs* and *Lane*. Finally, it examines the Supreme Court's treatment of the disparate impact theory outside the state sovereign immunity context and argues that a broad conception of disparate impact, not defined merely as a remedy for covert intentional discrimination, is essential if the theory is to achieve its remedial purposes.

A. Hibbs and Forms of Discrimination

In *Hibbs*, the Court affirmed that even gender discrimination that would not be unconstitutional can be worthy of legislative response; *Hibbs* authorizes Congress to target neutral practices that have a disparate impact. The Court took seriously—and affirmed that Congress may target with its Section Five power—entrenched social roles and unexamined attitudes that have tangible effects on women's employment, even if those effects are only remotely connected to unconstitutional discrimination:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those

> perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.[144]

It is not clear how the Court's "subtle discrimination" is related to intentional discrimination; "subtle" is not a word normally used to describe the overt intent to discriminate that the Court requires to establish an equal protection violation.[145] Assuming that the Court is referring to intentional discrimination, however, the line of causation through which "stereotypes about women's domestic roles" produce this subtle discrimination is, as the Court described it in *Hibbs*, remarkably long. Thus, even if intentional discrimination is the Court's ultimate concern, Congress may address the underlying social processes that produce it rather than just punishing it after it occurs.[146]

Of course, beginning with *City of Boerne*, the Court indicated that the congruence and proportionality test would afford Congress greater legislative flexibility to deter or remedy violations of the most important rights: "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[147] Thus, when Congress acts to deter or remedy violations of a right that receives heightened scrutiny, it should be able to enact a statute that prohibits more constitutional conduct than when it acts to protect a right that receives only rational basis review. Before *Hibbs*, however, the Court had not made clear how much more authority Congress would have. The Court's discussion of gender-based stereotypes in *Hibbs* reveals how much more authority Congress possesses when heightened scrutiny is implicated. The congruence and proportionality test requires that the ultimate target of Section Five legislation be intentional discrimination. After *Hibbs*, however, Congress may deter this discrimination by targeting its roots in stereotypes and unconscious attitudes.

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144. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

145. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (explaining that disparate treatment analysis fails to reflect accurately the psychological processes that produce most "intentional" discrimination).

146. In *Lane*, the Court seemed to reaffirm this principle: "When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." Tennessee v. Lane, 541 U.S. 509, 520 (2004).

147. City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (citation omitted).

Moreover, *Hibbs* strongly indicates that the remedy need not be aimed, even indirectly, at intentional discrimination. The Court made clear that Congress prevents employers from offering no family leave at all, a practice that would have a disparate impact on women:

> [I]n light of the evidence before Congress, a statute mirroring Title VII that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.[148]

There is no indication, in this passage, that the target of the remedy must be intentional discrimination, even via a long causal chain. If Congress perceives that failure to provide family leave will disproportionately affect female employees, it may provide a remedy.

Thus, *Hibbs* authorizes Congress to target either the deep roots of intentional discrimination or practices with a disparate impact. Under either reading, *Hibbs* announces a remarkably expansive congruence and proportionality standard that has great significance for Title VII's disparate impact theory. Disparate impact aims at effects and is agnostic about the motivations behind them.[149] Thus, under a more cramped congruence and proportionality analysis, this lack of concern on intent would be a significant shortcoming.[150] Under the more expansive analysis outlined in *Hibbs*, however, legislation aimed at protecting a right that receives heightened scrutiny need not directly target unconstitutional conduct. Just as the FMLA's family-leave provision was not, on its face, concerned with remedying intentional (gender-based discriminatory) conduct, but rather targeted conduct far down the line of causation, Title VII's disparate impact provision need not aim at intentional discrimination to be a congruent and proportional remedy. Although surely there must be some limits to the attenuation of the connection, *Hibbs* shows that these limits will not be strict: so long as the theory targets practices

148. *Hibbs*, 538 U.S. at 738 (citation omitted) (quoting H.R. REP. NO. 103-8, pt. 1, at 24 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 18).

149. *See infra* Part III.C.

150. Indeed, the Court in *Garrett* rejected disparate impact liability as a remedy for disability discrimination. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001).

that are connected in some way to intentional discrimination, the congruence-and-proportionality requirement will be satisfied.[151]

So even if the *Hibbs* congruence-and-proportionality requirement mandates conceptualizing disparate impact in a way that ties it to intentional discrimination, the connection can be so loose that it would not alter how the theory functions in practice. *Hibbs* thus provides a better rationale for disparate impact than either the Eleventh or Eighth Circuit could offer under the reasoning of the Supreme Court's earlier Section Five decisions.[152] The Eleventh Circuit's conception of disparate impact as a remedy for intentional discrimination that would be difficult for plaintiffs to prove is far more limiting. Tying disparate impact so tightly to intentional discrimination risks limiting disparate impact's usefulness in challenging practices that impose barriers through indifference, thoughtlessness, and unconscious stereotypes. Under the Eleventh Circuit's approach, courts may feel compelled to dismiss disparate impact claims that do not bear the "scent" of covert intentional discrimination.[153] In contrast, the Eighth Circuit's conceptualization of

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151. There is no conflict between this expansive view of Congress's power to target conduct that is not itself unconstitutional and the Court's rejection of disparate impact liability under the Equal Protection Clause. When the Court rejected disparate impact liability under equal protection in *Washington v. Davis*, 426 U.S. 229 (1976), it recognized that the theory would continue to be available through Title VII. *See id.* at 239 ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII . . . ."). Thus, *Davis* holds only that disparate impact is not authorized by Section One of the Fourteenth Amendment and does not address whether Congress may provide for disparate impact liability pursuant to its Section Five power. Indeed, the very existence of the congruence and proportionality test reveals that Section One and Section Five are not coextensive; if they were, there would be no reason to measure *how much* conduct Congress may prohibit that would not be unconstitutional under Section One. *See City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ."). Moreover, the Court was concerned in *Davis* that disparate impact liability could have dramatic, unforeseen societal consequences. *See* 426 U.S. at 248 (concluding that the effects of recognizing a disparate impact theory "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes" that disproportionately affect African Americans). This concern does not arise with regard to disparate impact liability under Title VII, which applies only in the employment context and has well-defined statutory parameters. *See supra* Part I.B.

152. *See supra* notes 103–09 and accompanying text.

153. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 452 (2000) ("If the conclusion of the Eleventh Circuit were taken seriously, it would suggest a fundamental reworking of an important area of Title VII jurisprudence."). Professor Jolls, however, argues

disparate impact as the "functional equivalent" of intentional discrimination is less precise and, thus, likely would narrow the disparate impact theory less dramatically than would the Eleventh Circuit's approach. It faces a similar problem, however, in that it produces an expectation that disparate impact claims will be similar to claims of intentional discrimination. The disparate impact theory, instead, has always permitted challenges so long as a practice produces a disparate impact, even when an employer's motivations appear entirely innocent.[154] A theory targeting practices that are the functional equivalent of intentional discrimination is not as broad or as generally applicable as a theory that targets all disproportionately adverse effects.

B. The Disparate Impact Remedy Compared with the FMLA and Title II of the ADA

In addition to falling within the broad language of the *Hibbs* opinion, Title VII's disparate impact theory is similar, in three key respects, to the remedies upheld in *Hibbs* and *Lane*. First, like the FMLA's family-leave provision and the reasonable accommodation mandated by Title II of the ADA, disparate impact does not punish intentional discrimination, but rather imposes a duty on employers to ensure that protected groups are not disproportionately burdened by facially neutral policies. The Supreme Court explained in *Hibbs* that the family-leave requirement protected women from being harmed disproportionately by the absence of employer-provided leave policies.[155] Congress was justified in imposing a requirement that employers offer their employees twelve weeks of leave as prophylaxis for the disparate impact that neutral leave policies would have on female employees. Disparate impact liability would target the same adverse effects as the FMLA's leave policy, but in a less-intrusive way—by prohibiting the discriminatory policies directly rather than by setting a standard that overrides them. If Congress may take the more-intrusive step of imposing a mandatory leave policy to guard against leave policies that would have a disparate impact on women,

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that understanding disparate impact as a remedy for covert discrimination is compatible with a "robust conception" of the theory. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 675 (2001).

154. *See infra* Part III.C.

155. *See supra* note 148 and accompanying text.

it should be able to take the less-intrusive step of imposing liability on employers who employ such policies.

Moreover, disparate impact is closely aligned with the reasonable accommodation upheld in *Lane*. Both remedies impose a duty over-and-above the baseline duty to refrain from intentionally discriminating. Title II of the ADA requires governments to take affirmative steps to ease disabled persons' access to courthouses; it does not inquire whether governments refrain from taking such steps out of discriminatory animus toward the disabled. Title II is thus agnostic toward questions of intent and focuses, instead, on effects in much the same way as disparate impact. Indeed, the Court in *Lane* acknowledged that the failure to accommodate and the maintenance of policies that have a disparate impact are closely related problems: "[F]ailure to accommodate persons with disabilities will often have the same practical effect as outright exclusion."[156]

Second, like both the FMLA's family-leave provision and Title II of the ADA's reasonable-accommodation requirement, disparate impact under Title VII displays legislative crafting that limits the burden it imposes. In *Hibbs*, the Court noted with approval a number of statutory limitations on the FMLA's reach. These included the limited definition of covered employees; the requirement that employees give advance notice of foreseeable leave requests; the requirement that a health-care provider certify the need for leave; and the twelve-week limit on leave, which was a "middle ground" between the needs of employees and employers.[157] Moreover, the damages available were "strictly defined and measured by actual monetary losses."[158] Similarly, in *Lane*, the Court emphasized that "[t]he remedy Congress chose is nevertheless a limited one."[159] Reasonable accommodation "would not fundamentally alter the nature of the service provided," and governments are not required to make accommodations that "would impose an undue financial or administrative burden."[160]

The disparate impact theory, as codified, incorporates the judicially developed tripartite structure of proof, including the business necessity defense, as well as the requirement that plaintiffs

156. Tennessee v. Lane, 541 U.S. 509, 531 (2004).

157. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738–39 (2003).

158. *Id.* at 740.

159. *Lane*, 541 U.S. at 531.

160. *Id.* at 532.

identify the specific employment practice responsible for the disparate impact.[161] These limitations ensure that disparate impact liability is only imposed upon employers who refuse to abandon employment practices that clearly burden women or racial or ethnic minorities disproportionately. Moreover, disparate impact plaintiffs may not recover compensatory or punitive damages, but instead are limited to backpay, attorney's fees, and injunctive relief.[162] This is a further indication that the theory is tailored to accomplish important ends without imposing an excessive burden on employers, who may not have been aware initially of their policies' discriminatory effects.

Finally, disparate impact, like the remedies in *Hibbs* and *Lane*, responds to the failure of prior efforts. The Court emphasized in both cases that more extensive remedies are justified by the failure of more limited previous efforts. In *Hibbs*, it noted that Congress had enacted the FMLA in the face of evidence that Title VII and the Pregnancy Disability Act had failed to address workplace gender discrimination fully: "Congress again confronted a 'difficult and intractable proble[m]' where previous legislative attempts had failed. Such problems may justify added prophylactic measures in response."[163] Referring to this passage, the Court noted in *Lane* that Congress had enacted the ADA in the face of "considerable evidence of the shortcomings of previous legislative responses."[164] Title VII's disparate impact theory, like the FMLA and Title II of the ADA, is an "added prophylactic measure" that was created in response to the failures of prior efforts. The Court itself created the remedy in response to evidence that employment practices imposing significant barriers to workplace equality were escaping the reach of Title VII's disparate treatment theory.[165] In sum, the disparate impact theory is similar in nature, scope, and purpose to the remedies upheld in *Hibbs* and *Lane*.

C. The Value of a Broadly Defined Disparate Impact Theory

Although the Eighth and Eleventh Circuits were able to find a doctrinal basis for upholding the disparate impact theory before

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161. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); *see supra* notes 83–90 and accompanying text.

162. SULLIVAN ET AL., *supra* note 2, § 4.01, at 241.

163. *Hibbs*, 538 U.S. at 737 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000) (alteration in original) (citations omitted)).

164. *Lane*, 541 U.S. at 531.

165. *See supra* notes 73–79 and accompanying text.

Hibbs and *Lane*, they did so by defining the theory in terms of intentional discrimination; the Eleventh Circuit's approach, in particular, seemed to reduce the theory to an "evidentiary dragnet" for detecting hidden intentional discrimination.[166] As shown by the three decades of Supreme Court precedent dealing with disparate impact claims, the theory can only provide an effective remedy if it is broadly defined. The disparate impact theory is broad enough to reach a range of employment practices that, although outside the scope of the disparate treatment theory, nevertheless impose substantial barriers to equal employment opportunity. In particular, disparate impact has been used to target arbitrary employment practices that impose barriers to equal opportunity and practices that result from unconscious bias. Only if disparate impact has the same broad reach under Congress's Section Five Power will the theory be a viable remedy for state employees. Moreover, a narrow disparate impact theory, conceived of solely as a remedy for intentional discrimination, would be unworkable in practice.

From its inception, the disparate impact theory has been concerned with "*artificial, arbitrary, and unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[167] Since *Griggs*, the theory has been important in cases involving arbitrary barriers in which probing for discriminatory animus would be neither practical nor meaningful. For example, in *Dothard v. Rawlinson*,[168] a female applicant for a prison-guard position used the disparate impact theory to challenge statutory height and weight requirements

166. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 518 (2003) ("[T]here has long been a dispute over whether disparate impact doctrine is an evidentiary dragnet designed to discover hidden instances of intentional discrimination or a more aggressive attempt to dismantle racial hierarchies regardless of whether anything like intentional discrimination is present."); *supra* Part I.C.

167. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added). The Court subsequently reaffirmed this conception of the theory in *Connecticut v. Teal*. *See* 457 U.S. 440, 451 (1982) ("Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary, and unnecessary' employer-created barriers to professional development that have a discriminatory impact upon individuals."). This is not to say, however, that either the Court or Congress has ever settled upon a single conception of the theory. *See* SULLIVAN ET AL., *supra* note 2, § 4.01, at 243 (noting that the "disparate impact theory remains a complicated and confusing doctrine"). Nevertheless, the conception of disparate impact as a means of achieving equal employment opportunity is a prominent one that is traceable to the theory's origins in *Griggs*.

168. 433 U.S. 321 (1977).

that excluded many women, but almost no men.[169] Because it was a disparate impact claim, the Court did not have to attempt to discern the motives of the Alabama legislators who had enacted these requirements. Not only would such an inquiry have been difficult, but it also would not have contributed much. In the face of evidence that the height and weight requirements would preclude more than 40 percent of women, but less than one percent of men, from serving as prison guards,[170] it matters little whether the legislature intended to exclude women or simply acted without considering the disproportionate burden these requirements would impose. What the plaintiff in *Dothard* sought, and won, was a new policy that would measure the characteristics that prison guards must possess without unnecessarily screening out qualified female applicants.[171] Because the purpose of the litigation was to remove barriers to equal employment rather than to punish the employer for discriminating, there was little reason to require proof that the state had acted out of discriminatory motives once the existence of the barriers was established.[172] This salutary change in policy was only possible because the disparate impact theory is not tethered to considerations of intent and can reach practices that impose arbitrary, rather than intentional, barriers.

A broad disparate impact theory is also important because it can reach practices that, although imposing significant barriers to workplace equality, reflect unconscious bias rather than volitional discriminatory animus (and thus fall outside the ambit of disparate treatment). In *Watson v. Fort Worth Bank & Trust*,[173] an African-

169. *Id.* at 323–24, 329–30 & n.12. The five-foot-two-inch height requirement would have excluded 33.29 percent of the state's female population but only 2.35 percent of men. *Id.* Similarly, the 120-pound weight requirement would have prevented 22.29 percent of women, but only 3.63 percent of men, from working as guards. *Id.*

170. The two standards, when combined, would have excluded 41.13 percent of women in the state but less than 1 percent of men. *Id.*

171. For example, the Court held that a test that more directly measures strength would satisfy Title VII. *Id.* at 332.

172. One of the Court's misgivings about disparate impact seems to be that it "would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'" Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality opinion)). The urge to link disparate impact to intentional discrimination may reflect the Court's concern that disparate impact should not punish "innocent" employers. *See supra* note 162 and accompanying text.

173. 487 U.S. 977 (1988).

American bank employee was repeatedly passed over for supervisory positions in favor of white employees;[174] the bank had never developed formal criteria for evaluating candidates for promotion, relying instead upon supervisors' subjective assessments.[175] Because the bank had been able to offer nondiscriminatory reasons for each of its promotion decisions, the lower courts had dismissed the plaintiff's Title VII disparate treatment claims.[176] The Supreme Court held, however, that the plaintiff could proceed under the disparate impact theory. Although subjective employment practices are not themselves objectionable, the Court explained, they may violate Title VII if their effects are "functionally equivalent to intentional discrimination."[177] Even if supervisors are not motivated by discriminatory animus in selecting candidates for promotion, unstructured subjective hiring practices may permit unconscious biases to distort the supervisors' assessments:

> [E]ven if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with "a lot of money . . . for blacks to have to count." Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.[178]

The Court's explicit recognition of the role of unconscious bias in employment decisions reveals the inadequacy of conceptions of disparate impact that view it as merely a remedy for covert intentional discrimination. As the Court described it, what was at work in *Watson* was not intentional discrimination, covert or otherwise. Rather, it was a neutral practice that nonetheless worked to exclude African Americans disproportionately from the supervisory ranks because it allowed unconscious biases to operate

174. *Id.* at 982.
175. *Id.*
176. *Id.* at 983–84.
177. *Id.* at 987.
178. *Id.* at 990–91 (citation omitted).

unchecked. Thus, if courts had to limit disparate impact to cases of covert discrimination, cases like *Watson* might not present valid Title VII claims.

In addition to these conceptual reasons for a broad disparate impact theory, there are also practical reasons not to conceive of disparate impact as merely a remedy for covert intentional discrimination. Although states may raise Eleventh Amendment defenses early, often it will not be clear until well into the litigation process whether a facially neutral practice is the product of discriminatory animus. In *Watson*, for example, the district court conducted a full trial on the plaintiff's disparate treatment claims before concluding that no intentional discrimination had occurred.[179] Thus, courts hearing disparate impact cases against state employers would have to defer ruling on Eleventh Amendment defenses until after hearing sufficient evidence from which to determine whether covert intentional discrimination was at work. It would be an enormous waste of judicial resources, and would be unfair to litigants, to let cases proceed to discovery, or even to trial, before deciding whether they should even have been brought in the first place. Although the Eleventh Circuit made clear that it would not require case-by-case findings of intent,[180] there is no reason to suppose that other courts adopting its approach would not demand proof of intent in each individual case.[181]

Courts also would have to make findings regarding intent on the basis of evidence ill-suited to the inquiry. The structure of proof in disparate impact cases aims to determine the effects of employment practices on protected groups and to assess whether these practices

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179. *Id.* at 983–84.

180. *In re* Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1322 (11th Cir. 1999).

181. An alternate reading of the Eleventh Circuit's conception of disparate impact is that the court did not envision a case-by-case assessment of whether facially neutral practices reflect covert intent to discriminate. Rather, the court may have been suggesting that because *some* facially neutral practices that disproportionately burden protected groups are undoubtedly the product of discriminatory animus, and because it would be difficult in practice to identify these cases, the disparate impact theory should be available in all cases. This reading suggests a much broader conception of the theory. Because it permits disparate impact liability for many facially neutral practices that are not actually the product of intentional discrimination, it is a far broader prophylactic ban than one that only ferrets out the intentional discrimination lurking behind apparently neutral practices. Understood in this way, the Eleventh Circuit's conception may, therefore, exceed the narrow definition of Congress's Section Five power outlined in *Garrett*. Of course, it would fit comfortably within the Section Five power as conceived after *Hibbs* and *Lane*.

are justified.[182] It does not offer the opportunity to delve into employers' motives. In the course of hearing evidence about effects and justifications, however, courts hearing disparate impact claims would have to make findings as to whether a covert intent to discriminate was at work. The disparate treatment theory is better suited to this inquiry. Disparate impact's structure of proof should be reserved for the inquiry it was designed to address—assessing whether neutral employment practices are justified—and should not be used to attempt to root out intentional discrimination.

CONCLUSION

The Supreme Court's decisions in *Hibbs* and *Lane* give flesh to the suggestion in earlier cases that Congress has the power to respond in meaningful ways to racial, gender, and national-origin discrimination by state governments. In announcing a more nuanced and flexible standard for reviewing the legislative record and describing a more expansive view of Congress's power to legislate under Section Five of the Fourteenth Amendment, these cases put Title VII's disparate impact theory on much more solid doctrinal ground. It is now clear that the disparate impact theory can reach a wide range of state-government employment practices that, although constitutional, pose barriers to equal employment opportunity.

The disparate impact theory is important both practically and symbolically. Although disparate impact cases are relatively infrequent,[183] the theory remains an important tool with which to challenge arbitrary barriers to equal employment opportunity.[184] It also embodies society's commitment to opening workplaces to all persons, regardless of race, ethnicity, or gender. For some time, it appeared that the Supreme Court would elevate the "dignity" of the states above Congress's power to apply this core equal protection principle in state government workplaces. The Court has finally

182. *See supra* notes 83–90 and accompanying text.

183. *See* Krieger, *supra* note 145, at 1162 n.3 (noting that far more disparate treatment claims than disparate impact claims are brought each year).

184. *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597, 600 (2004) (noting that "disparate impact litigation is not making a major impact in this new century" but arguing that "perhaps [the] most important[] reason that disparate impact litigation has been languishing is that its potential is not often appreciated by the practicing bar").

reaffirmed in *Hibbs* and *Lane*, however, that it shares at least this basic commitment to equality.