Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship

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INTRODUCTION

Litigation can advance great moral causes. Owen Fiss has made the case that “[a]djudication is the process by which the values embodied in . . . the Constitution . . . are given concrete meaning and expression.” According to Fiss, “[t]he social function of contemporary litigation is not to resolve disputes, but rather to give concrete meaning to [public] morality.” This Note will explore one moral theme behind the disparate impact standard (“disparate impact standard”) of Title VII of the Civil Rights Act of 1964 (“Title VII”). The disparate impact standard is a legal theory under which employees can establish an employer’s liability for discrimination if the employer’s neutral employment practice has a disproportionately negative impact on a group of workers protected by Title VII. Under this theory, employees do not have to prove that the employer

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2. Id. at 124.
intentionally discriminated against them. The disparate impact standard is therefore an important and powerful doctrine because of its ability to eradicate institutional barriers rooted in race-based discrimination.

Gross racial disparities continue to exist in contemporary American workplaces with respect to pay, hiring, firing, promotions, and other employment-related practices. Research and experience show that racial discrimination causing these disparities operates to a large extent on the structural and subconscious levels, not at the level of intentional discrimination. The disparate impact standard recognizes that “intentionality” cannot fully capture the phenomenon of racial discrimination. In this way, the disparate impact standard can serve as a symbol of the moral imperative to rid society of racial hierarchy.

Equality of citizenship is the very premise of the Equal Protection Clause. The Clause stands as an aspiration of equal human dignity regardless of race and must require that individuals be treated with equal respect, dignity, and value in society. This understanding of citizenship necessitates

4. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971), first held 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." According to the Court, "good intent or 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." Id. Congress amended Title VII in 1991 to explicitly include a disparate impact standard. Under section 703(a)(2) of Title VII, "to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" is an "unlawful employment practice." 42 U.S.C. § 2000e-2(a)(2) (2000). According to the statute, after a plaintiff shows a discriminatory impact, the burden of persuasion shifts to the defendant to show a manifest relationship to the job skills in question or “business necessity.” Griggs, 401 U.S. at 431-32. Even if the employer carries his burden with respect to business necessity, a plaintiff may still prevail by showing that the employer refused to adopt an alternative employment practice that satisfies the employer's legitimate business interests without having a disparate impact on a protected class. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Disparate impact liability is permissible in the statutory, but not constitutional, context. Washington v. Davis, 426 U.S. 229 (1976), established that the Equal Protection Clause only forbids employers from engaging in intentional racial discrimination. Id. at 248.

5. See infra notes 110-19 and accompanying text.

6. See, e.g., Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7-8 (1997) (arguing that the Bill of Rights requires that "government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends"); see also Uma Narayan, Towards a Feminist Vision of Citizenship: Rethinking the Implications of Dignity, Political Participation, and Nationality, in RECONSTRUCTING POLITICAL THEORY 48, 54 (Mary Lyndon Shanley & Uma Narayan eds., 1997).
eliminating institutional barriers to political and social participation such that all citizens have a fair chance to enter significant social institutions.

While the disparate impact standard should be a symbol of this promise, recent litigation has challenged congressional power to pass civil rights legislation and problematized the assumption that the disparate impact standard is a proper exercise of Congress's power under Section V of the Fourteenth Amendment ("Section V"). Although both circuits to consider the issue directly have held that Congress has the power to promulgate the legislation under Section V, they did so on narrow grounds, and an additional circuit suggested in dicta that the constitutionality of the disparate impact standard is an open question.\(^7\)

These challenges, and the possibility of future litigation, render the justification for the disparate impact standard especially meaningful at this time. A variety of legal strategies, arguments, or justifications might preserve the standard's constitutionality. In choosing a strategy, however, civil rights litigators must recognize the consequences of setting forth arguments that do not fully embrace the doctrine they seek to advance. Some choices could result in the disparate impact standard being narrowed or struck down and may also make related policies harder to defend. This Note makes the case, therefore, that the disparate impact standard should not be defended or promoted simply as a means of "smoking out" intentional discrimination. Rather, advocates should affirmatively support the disparate impact standard in a manner that both reflects the social reality of institutionalized racial disparities and promotes the disparate impact standard's great moral promise of equality of citizenship.\(^8\)

Part I of this Note outlines the limitations on congressional power under Section V and their implications for justifying the constitutionality of the disparate impact standard. Part II explores the prohibition of intentional discrimination as a justification for the disparate impact standard and argues that justifying the disparate impact standard through this

7. See Okruhlik v. Univ. of Ark. ex rel. May, 255 F.3d 615, 626–27 (8th Cir. 2001) ("The Title VII 'prophylactic' response to a pattern of unconstitutional state action is proportional and congruent."); In re Employment Discrimination Litig. Against the State of Ala., 198 F.3d 1305, 1324 (11th Cir. 1999) ("[W]e conclude that in enacting the disparate impact provisions of Title VII, Congress has unequivocally expressed its intent to abrogate the states' Eleventh Amendment sovereign immunity, and that Congress has acted pursuant to a valid exercise of its Fourteenth Amendment enforcement power.").

8. Erickson v. Bd. of Governors, 207 F.3d 945, 952 (7th Cir. 2000) ("We leave [the question of whether § 5 supports the disparate impact rules under Title VII] for another day."). But see Smith v. City of Jackson, Miss., 125 S. Ct. 1536, 1544 (2005) (holding that the Age Discrimination in Employment Act authorizes recovery in disparate impact cases comparable to Title VII).

9. Although Title VII's disparate impact regime protects against more than racial discrimination, this Note focuses on race, and in particular on the experiences of Black Americans, because this group faces some of the most profound barriers to equal employment opportunities. Moreover, most antidiscrimination law, including the disparate impact standard, developed largely as a result of the experiences of Black Americans.
theory, as some courts currently do, may eventually narrow disparate impact doctrine and thus constrain the possibilities for substantive equality in employment. This Part also analogizes the limits of using an intentional discrimination rationale to justify the disparate impact standard to the limits of using the diversity rationale to justify affirmative action in higher education admissions programs. It concludes by pointing out the inadequacies of alternative effects-based theories. Part III makes the case that an equal citizenship theory, based on a moral interpretation of the Fourteenth Amendment, best justifies the disparate impact standard. Finally, Part IV confronts some of the institutional issues underlying the equal citizenship theory as a justification for the disparate impact standard and suggests that Congress should have power under Section V both to interpret the Equal Protection Clause and to enact legislation that promotes equal citizenship.

I. MODERN LIMITS ON CONGRESS'S SECTION V POWER

Recent Rehnquist Court decisions have radically narrowed the scope of congressional authority to enforce the Fourteenth Amendment though the Section V power. Although cases like Katzenbach v. Morgan accorded great deference to Congress to independently interpret and enforce the Fourteenth Amendment, the more recent City of Boerne v. Flores and its progeny imply that Congress lacks power to legislate based on the Fourteenth Amendment, the more recent City of Boerne v. Flores and its progeny imply that Congress lacks power to legislate be-

10. Restraints on congressional power to enact civil rights legislation are not limited to the Section V area. For example, United States v. Morrison, 529 U.S. 598 (2000), and United States v. Lopez, 514 U.S. 549 (1995), restricted Congress's ability to pass legislation under the Commerce Clause. These cases raise the concern that the disparate impact standard might not be sustained under the Commerce Clause authority if challenged. Hostility toward other “benign” race-conscious policies also raises questions about the future of disparate impact liability. See Richard Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 587 (2003). These restrictions not only threaten the constitutionality of Title VII’s disparate impact standard, they limit congressional authority to create new disparate impact liability under other federal statutes such as the Fair Housing Act or Title VI of the Civil Rights Act of 1964.


12. Id. at 650 (upholding Section 4(e) of the Voting Rights Act of 1965 and stating that “[b]y including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause”).


14. See Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (holding the Eleventh Amendment bars state employees from suing their employers in federal court for money damages under Title I of the Americans with Disabilities Act because, even though there was congressional intent to abrogate the state's sovereign immunity, there was no Section V authority to do so); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding the same with respect to the Age Discrimination in Employment Act of 1967).
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beyond what the Fourteenth Amendment sets forth as a self-executing matter. The Boerne line of decisions has called into question the assumption that existing civil rights laws, including the disparate impact standard, are, in fact, constitutional. The Court's Nevada Department of Human Resources v. Hibbs decision last term may have alleviated some of this concern, at least with respect to the disparate impact standard as applied to racial discrimination, because it suggests Congress may be afforded more deference than many previously thought. However, this Part concludes that even under Hibbs, the Section V jurisprudence reinforces the intentionality justification and thus fails to adequately justify the disparate impact standard as a means of ultimately achieving equal citizenship.

In Boerne, the Court held that congressional legislation must bear a "congruence and proportionality between the injury to be prevented... and the means adopted to that end." As such, courts must differentiate between appropriate remedial legislation and an unconstitutional substantive definition of the Fourteenth Amendment. Under this "congruence and proportionality" test, the Court has invalidated legislation enacted to further equal protection, including provisions of the Age Discrimination in Employment Act and the Americans with Disabilities Act. However, later in Kimel v. Florida Board of Regents, the Court noted that Congress can enact prophylactic legislation through its Section V power, thus going beyond the Court's interpretation of the Fourteenth Amendment. According to the Court, "Congress' power 'to enforce' the Fourteenth Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."

Hibbs is the only case in which the Court upheld legislation promulgated under Congress's Section V power under this "broader swath of conduct" rationale. In Hibbs, the Court held that the family-care provision of the Family and Medical Leave Act is a valid exercise of Section V authority pursuant to which Congress may abrogate state sovereign immunity by creating a private right of action for damages against noncompliant states. In deferring to Congress to enact this provision designed to combat a pattern of gender discrimination by states'

15. See generally Boerne, 521 U.S. 507.
17. Boerne, 521 U.S. at 520.
18. See Garrett, 531 U.S. at 374 (Americans with Disabilities Act); Kimel, 528 U.S. at 81 (Age Discrimination in Employment Act).
20. Id. at 81.
21. Id.
family-care policies, Hibbs thus seems to place a limit on the Court’s recent Section V jurisprudence.

At the same time, Hibbs appears to relegate the retrenchment of Congress’s legislative authority to areas covered by rational basis scrutiny. In Boerne, Kimel, and Board of Trustees v. Garrett the court invalidated legislation related to religion, age, and disability, respectively. On the other hand, Hibbs concerned gender-based legislation subject to intermediate scrutiny, and Katzenbach concerned race-based legislation subject to strict scrutiny. In light of this distinction, Hibbs may be properly read to mark those areas in which the congressionally identified pattern of state conduct involves a classification that triggers heightened scrutiny for deference to Congress’s Section V enactments. In the wake of Hibbs, therefore, Congress might be able to legislate to protect individuals and groups subject to heightened scrutiny but not those for whom rational basis scrutiny is appropriate.

This reading softens some of the concern that by asserting “exclusive custody of the Constitution,” the Court would strike down the disparate impact standard. It is possible that the Rehnquist Court, relying on Hibbs, would reject challenges to the constitutionality of the disparate impact standard as applied to racial and gender discrimination under this “broader swath of conduct” rationale. Yet this remains an open question; even though the Hibbs majority distinguished Hibbs and Katzenbach on the one hand from Garrett and Kimel on the other on the basis of the level of judicial scrutiny, it did not explain why it limited the application to those harms that might trigger heightened forms of scrutiny.

24. Id.
25. For more on this congressional retrenchment, see Larry D. Kramer, The Supreme Court 2000 Term—Foreword: We the Court, 115 HARV. L. REV. 4, 15 (2001).
27. It is an open question whether classifications that require heightened scrutiny would actually get more deference. According to Justice Rehnquist, there is a heightened presumption against the constitutionality of such classifications. See Hibbs, 538 U.S. at 736–37. However, it is possible that Justice Rehnquist’s opinion in Hibbs was deeply influenced by his daughter’s experience balancing work and family, and he may have engaged in an unprecedented method of intermediate scrutiny. See Linda Greenhouse, Heartfelt Words From the Rehnquist Court, N.Y TIMES, July 6, 2003, at 3.
28. However, this analysis does not explain why the Court struck down portions of the Violence Against Women Act as beyond the scope of Congress's Section V power in Morrison. An analysis of the points of departure between Hibbs and Morrison may illuminate the current Section V test. For example, Hibbs details the inadequate state remedies and previous federal legislative efforts that failed in the family-leave context.
30. 538 U.S. at 735–36. The Court reasoned:

We reached the opposite conclusion in Garrett and Kimel. In those cases, the § 5 legislation under review responded to a purported tendency of state offi-
Ultimately, even if the Court were to uphold a challenge to the disparate impact standard's constitutionality under *Hibbs*, it would still need to do so while advancing a theory that the disparate impact standard is designed to combat, or is congruent and proportional to combating, intentional discrimination. In cases decided before *Hibbs*, the Eighth and Eleventh Circuits took this approach. Both circuits upheld the disparate impact standard in Section V challenges by relying directly on *Kimel*'s "broader swath of conduct" language. The Eleventh Circuit held that Congress has the power under Section V to apply a Title VII disparate impact analysis to the states because it is congruent and proportional to the constitutional practice of combating intentional discrimination. The Court reasoned, "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."

Despite the pragmatism of this approach, progressives and others who support the disparate impact standard should not justify it simply as a means of uncovering intentional discrimination. Using the disparate impact standard to ferret out intentional discrimination is valuable; limiting the doctrine to this use, however, renders it almost meaningless. It is uncontested that intentional discrimination is unconstitutional in the employment context. The disparate impact standard must therefore mean something more. Disparate impact liability is premised on a much greater promise than simply the remedying of intentional discrimination, and continued reliance on the doctrine simply as an evidentiary tool to prove intentional discrimination will cripple the doctrine's ability to create institutional change and promote social justice.

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32. See *Okruhlik*, 255 F.3d at 626–27; *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d at 1322.

33. *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d at 1324.

34. *Id.* at 1322.
II. Justifying the Disparate Impact Standard Under Intent-and Effects-Based Theories

The congruence and proportionality test requires judges to have an understanding of what the Equal Protection Clause means. At least since Washington v. Davis, it is clear that the Court interprets the Constitution to forbid only intentional racial discrimination and not to prohibit governmental decision-making that results in disparate racial effects. The smoking-out-intent or intentionality justification therefore may be the most acceptable approach to sustaining the disparate impact standard's constitutionality. As such, this Part looks critically at this intent-based theory of equal protection as a justification for the disparate impact standard and the consequences of such a justification.

This Part begins by suggesting that as a direct matter, the intentionality justification may stifle remedies for unintentional discrimination and discourage employees from pursuing employment discrimination claims. As an indirect matter, civil rights advocates may find they have conceded the terms of the debate on this crucial issue because the justification will lend credibility to the assumption that the employment "playing field" is equal along the lines of race. This approach may affect not only the viability of the disparate impact standard as a legal doctrine but also a whole host of other race-conscious public policies, with the perverse consequence that the victories resulting from using an intent-based justification may ultimately delay or deny substantive equal citizenship. Next, this Part argues that the use of the diversity rationale in affirmative action litigation should serve as an example of the limits of the intentionality rationale. Finally, this Part explores an alternative effects-based justification for the disparate impact standard and concludes that, in light of the congruence and proportionality test, this justification simply reinforces the intentionality rationale.

A. The Intentionality Justification

Under the intentionality rationale, racial classification is improper and anti-individualist because it distributes benefits and burdens based on an ostensibly unimportant trait. When justified under the theory of proving intentional discrimination, the disparate impact standard is simply an evidentiary tool to uncover, or "smoke out," illegal—and intentional—

35. The debate over the meaning of equal protection is also at the heart of the larger debate over the methodology of constitutional interpretation. See discussion infra Sections III.A and IV.
conduct. This Section sets forth some of the direct and indirect consequences of the intentionality justification for the disparate impact standard, arguing that the use of this justification will never eradicate structural discrimination and may ultimately impede the development of other beneficial race-conscious public policies.

The intentionality justification is rooted in the tradition of liberal individualism, in which individuals are promised equal process. The prohibition of intentional discrimination developed as a response to our history of de jure segregation. Within the context of a segregated society, racial classification was the principal evil and easily served as a proxy for racial discrimination. This intentionality rationale continues to inform the Court's current equal protection jurisprudence, under which the Court strikes down classifications based on race unless they pass the test of strict scrutiny (as well as neutral classifications where the perpetrator has invidious motives).

While it might be the least controversial means, justifying the disparate impact standard as one that simply prohibits intentional discrimination will not alleviate disparities between races. As Charles Lawrence and Mari Matsuda remind us, “in an ideal world, where each individual is born into a community that respects and values her as much as any other person, fair individual process is all that is needed.... But that is not the world we live in.” Existing racial disparities in employment illuminate the limitations of the intentionality approach: people of color may have the right to equality in theory, but they continue to face disadvantages as compared to Whites. One direct consequence, therefore, of this approach is that it obviously does not remedy unintentional institutional discrimination. Yet to meet the aspiration of equal citizenship, practices that unintentionally produce a racially disparate impact, whether due to unconscious or subconscious racism, institutional practices, or both, need to be remedied. An intent-based justification dramatically precludes the use of the disparate impact doctrine to combat practices that lead to racial disparities in employment.

On average, people of color have fewer and less lucrative employment opportunities than Whites, and these employment disparities are

37. Paul Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1 (1976). Advocating such a position, Brest observes that the disparate impact doctrine is a useful device to address “suspected race-dependency” in governmental decision-making; however, “the doctrine cannot reasonably be applied across the board. If disproportionate impact is to remain a useful device, it must be used selectively and perhaps be modified to create rebuttable rather than conclusive presumptions of discriminatory intent.” Id. at 29.


particularly evident in blue-collar occupations. While the last thirty years have shown some improvement, income rates continue to exist on a racial hierarchy. Recent census data shows, for instance, Black women’s wages are 62% of similarly situated White men’s and 85% of similarly situated White women’s. Among the college-educated males, White men earn $66,000 a year, while Hispanics earn $49,000 and Blacks earn $45,000. Even if the Black/White income gap were to compress at the rate it did in the late 1990s, the fastest period of compression in history, it would still take decades for us to experience pay equality. Workers of color are also disproportionally unemployed. In 2003, 10.8% of Blacks, 7.7% of Hispanics, and 6.0% of Asians were unemployed, compared to 5.2% of Whites. Typical is the midwest state of Illinois; in 1995, after a substantial number of blue-collar jobs were lost, 75.2% of all White men over sixteen years old were employed while the Black male employment rate was only 56.6%. While intentionally discriminatory hiring and other employment practices account for some of these disparities, there are also a variety of subtler practices that limit employment opportunities for people of color. In the post–Civil Rights Movement era, the principal struggle for racial equality lies in dismantling these subtler, institutional barriers to equal opportunity. Standing alone, a ban on intentional discrimination does not alter the reality of racial inequality. This approach has not—and will not—lead to substantive equality in the lives of people of color because it obscures the injuries resulting from racial inequality. By focusing

41. See Finis Welch, In Defense of Inequality, 89 AM. ECON. REV. 1 (May 1999).
45. Economic Policy Institute, supra note 44. In the economic downturn from 2000 to 2002, people of color lost annual real income over three times as fast as Whites. For instance, annual real income losses were -2.4% for Blacks as compared to -0.7% for Whites. Id.
46. Cherry, supra note 40, at 9.
47. See infra notes 110–17 and accompanying text.
48. Consider the difference between a formal right and a substantive enjoyment of that right in the abortion context. Although women have the formal right to abortion, states’ refusals to fund abortions. Harris v. McRae, 448 U.S. 297 (1980), or remove the intimidating effects of anti-abortion activism, Bray v. Alexandria Women’s Health Clinic,
on large moral victories of formal equality while leaving underlying social
inequalities intact, this model does little toward achieving substantive
equality.\footnote{As Judge Gregory of the Fourth Circuit Court of Appeals has recently stated:

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discrimination. Disparate impact attacks a set of deleterious behaviors that
the intent standard fails to capture. . . . Given the struggles of this nation, a
practice that has a disparate adverse impact on a protected class, and yet ei-
ther has no legitimate business justification, or can be achieved in a less
harmful manner, is not a practice that we should allow to stand. Ultimately
this is a recognition by society that these practices, and their effects, are
harmful in their own right. To continue moving a healing society forward,
any such practices must be attacked under Title VII with a level of vigor
equal to that spent combating intentional discrimination.\footnote{Anderson v. Westinghouse Savannah River Co, 2005 WL 1027356, at *31 (4th Cir. May 4,
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employment tests at a formerly de jure segregated workplace. Although the record did not contain direct evidence of intentional discrimination, the facts—particularly the fact that the employment tests were instituted the very day Title VII was implemented—provided exceptionally strong circumstantial evidence that the defendant, Duke Power Company, intentionally instituted the exam requirements to keep Blacks out of the workplace. This standard would create an unreasonably high evidentiary burden.

Justifying the disparate impact standard on the basis of prohibiting intentional discrimination also renders consequences that transcend disparate impact litigation. This strategy positions progressive civil rights leaders in the difficult position of justifying legal programs and judicial doctrines within an intent-based framework when they do not fit comfortably within that framework. They must then use their limited resources to defend disparate impact liability as a congruent and proportional departure from the “norm” of an intent-based standard for equal protection. Working from this position ultimately forecloses opportunities to create innovative theoretical and practical approaches to combating institutional barriers to full participation in employment.

Most profoundly, those that support a different justification in theory but invoke the intentionality rationale for pragmatic reasons concede the terms of the larger debate on the meaning of equal protection. Assumptions about the relationship between race and institutional access that are reflected in the disparate impact debate ultimately transcend that debate. Based on the way in which this issue is discussed in disparate impact jurisprudence, the false notion that an equal playing field exists will be further normalized when the disparate impact standard is justified under the intentionality theory. This, in turn, will inevitably be reflected in a range of public policies and other judicial doctrines.

By way of example, the Personal Responsibility and Work Opportunity Reconciliation Act53 ("PRWORA") represents a public policy influenced by false assumptions about race and institutional access. The PRWORA fundamentally restructured welfare programs by setting new eligibility requirements and providing states with new authority to craft welfare programs. The bill attempted to move individuals from welfare to work through provisions that established a lifetime limit of five years of payment to any family and required family heads to find jobs with two years.54

As a policy, the PRWORA does not reflect the fact that institutional factors play an enormous role in poor people's employment rates. Institu-
tional barriers include lack of access to education and training; employers that do not adhere to civil rights laws; jobs that do not provide a living wage; jobs without benefits such as health care; and access to basic support services such as day care and transportation. Moreover, poverty disproportionately affects people of color, since a disproportionate number of individuals receiving welfare are of color. The PRWORA does nothing to address these underlying institutional problems or to address structural inequalities that perpetuate these racial disparities in the first place.

Not only does the bill ignore the structural inequalities, but it actually blames people of color for their poverty. While the PRWORA is "race-neutral" on its face, those pushing the bill relied on racial stereotypes, either consciously or unconsciously, to influence votes. For example, the House of Representatives' proposal cited statistics of Black behavior, including illegitimacy rates and the correlation between Black male criminality and single parent families. In this context, House Speaker Newt Gingrich explicitly attributed Black people's poverty to laziness. The bill's promoters essentially blamed poverty on the supposed moral failure of the Black community.

It is no wonder that the bill has not been successful. While there has been a reduction in the welfare caseload and overall poverty rate in the wake of the PRWORA, most of those who have made the transition from welfare to work have moved into low-income jobs with little or no room for advancement, low job security, and inadequate resources to balance work and family. Moreover, the economic troubles of the poorest fifth of single mothers was worse five years after the PRWORA passed.


58. Id.

59. Id. (citing DeWayne Wickham, Gingrich Blames Poor for Self-Made Poverty, USA TODAY, July 3, 1995, at A11) (regarding Gingrich's comments in pushing the Contract With America, for which the House's Personal Responsibility Act of 1995 was a key provision).

60. See National Partnership for Women & Families, supra note 55.

61. Id. (section on Welfare Reform Legislation).
than at the time it was instituted, despite the strong economy of the late 1990s.\footnote{Wendell Primus, \textit{What Next for Welfare Reform}, 19 Brookings Rev. 17 (2001).} The bill was based on the assumption that the playing field was equal. This assumption lead to the conclusion that people of color were to blame for being disproportionately poor and that poor people would be better off if the government forced them to work.

The PRWORA thus serves as an example that false assumptions about race and institutional access—that all individuals have equal opportunities and therefore people of color are poor because of their moral failings—can result in policies that are unsuccessful and that perpetuate racial disparities and stereotypes. Indeed, only if one assumes that the playing field is equal can policies such as the PRWORA be considered reasonable. Yet importantly, it would be difficult to find strong evidentiary proof of racially discriminatory intent underlying the PRWORA. The disparate impact standard, and discourse based on the equal citizenship theory of equal protection animating the standard, can serve to challenge false assumptions about institutional access.

Civil rights strategies that focus on the intentionality theory of equal protection have yielded profound substantive gains that cannot be discounted. Doors of opportunity have opened for people of color as a result of intent-based arguments, providing individuals with greater space to lead dignified lives. Access to the various benefits of full citizenship, including more equitable employment opportunities, has greatly increased.

Despite the progress made through the use of intent-based arguments, however, a justification for disparate impact that relies exclusively on the intent standard assumes that the playing field is equal and fails to address the problem of institutional racism. While the intent-based rationale is undoubtedly one method of justifying the disparate impact standard, it seems clear that to preserve the distinct benefits available under the different standards, disparate impact must also mean something more.

\textbf{B. Affirmative Action and Insufficient Justifications}

The current assault against affirmative action—in the media, the courts, and public opinion—signals that when weakly and apologetically defended, even remedial race-conscious policies may be narrowed or attacked on the constitutional level. Although the constitutionality of race-conscious admissions policies in higher education was upheld by the Supreme Court in \textit{Grutter v. Bollinger} on diversity grounds,\footnote{539 U.S. 306 (2003).} the justification for affirmative action should not hinge on this rationale. Certainly,
diversity is an important goal. However, diversity is best understood as a beneficial consequence, not the central mission, of affirmative action programs. Continued reliance on the diversity rationale to support affirmative action programs will stifle the social benefits of those programs.

Affirmative action was not initially conceptualized as a tool to enhance diversity in education. When first promulgated in the 1960s, affirmative action programs were understood as means of increasing access to institutions from which Blacks had been excluded under force of law. Despite this, California defended the first lawsuit challenging affirmative action in education on, among others, diversity grounds. In response, Justice Powell’s opinion in *Regents of the University of California v. Bakke* 64.

Diversity is important in the employment setting as well. The “functional theory of diversity” submits that workplaces can be more efficient and productive if they have a diverse employee base. Lani Guiner & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1019 (1996). Guinier and Sturm argue, “work-team heterogeneity promotes more critical strategic analysis, creativity, innovation, and high-quality decisions.” *Id.* at 1024.


66. According to Lawrence and Matsuda, “[t]he deep meaning of affirmative action...recognizes that the only remedy for racial subordination based on the systemic establishment of those structures, institutions, and ideologies is the systematic disestablishment of these structures, institutions, and ideologies.” *LAWRENCE & MATSUDA, supra* note 39, at 27.

The phrase “affirmative action” was first used in an Executive Order by President Johnson that required federal contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” Exec. Order No. 11,246 (Sept. 24, 1965). Explaining the affirmative action concept, Johnson said, “This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result.” President Lyndon Johnson, Speech at Howard University Graduation (June 4, 1965), available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp (last visited Jan. 5, 2005).

67. Brief for Petitioners at 44, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811). Section II of the brief is entitled “An Admissions Program Adopted Voluntarily by a State Medical School to Counter the Effects of Pervasive Discrimination and to Secure the Educational Benefits of Racial and Ethnic Diversity in a Student Body Accords with the Equal Protection Clause.” Petitioners argued, for example, “it would be nonsense to conclude that an absence of de jure discrimination blocks the Davis faculty from voluntarily adopting race-conscious means to promote racial and ethnic diversity in the student body.” *Id.* at 64. The Regents of the University of California also made arguments about remediating general discrimination.

established the legal basis for the diversity argument, which became the leading rationale for affirmative action. To comply with the holding in *Bakke*, many universities rewrote their affirmative action policies, justifying them with diversity language. Enrolling a diverse student body was also the sole rationale asserted by the University of Michigan Law School in defense of its policy. The school argued that achieving a diverse student body is a compelling state interest, and that its program was narrowly tailored to that end. The media's coverage of *Grutter* correspondingly framed affirmative action in diversity terms. And most importantly, the Supreme Court essentially adopted Powell's opinion as its holding.

The diversity rationale as a primary, or sole, justification for affirmative action presents at least one immediate problem: the programs risk legal challenges on narrow tailoring grounds. In fact, since the Court held that diversity is a compelling government interest, narrow tailoring is perhaps the strongest argument against many affirmative action programs. This reasoning served to invalidate the University of Michigan's undergraduate admissions policy. Even the Court that upheld the policy at issue in *Grutter* was deeply divided on this issue. As Justice Scalia observed in his *Grutter* dissent, "Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant 'as an individual,' and avoids 'separate admissions tracks,' to fall under *Grutter* rather than *Gratz*." Some schools have already changed or eliminated programs, such as race-based orientation programs, out of fear that they might be vulnerable to litigation on the

70. *Id.* at 3 ("[M]eaningful interaction among students of different racial backgrounds improves the quality of education at the law school in many important ways.").
73. An additional practical problem may be that the diversity rationale does not easily transcend the educational context. Courts have been less favorable to the diversity argument as support for affirmative action in employment, particularly in cases with no demonstrated history of racism. See *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1563 (3d Cir. 1996) (holding educational benefits derived from a racially diverse faculty an impermissible basis for an affirmative action program under Title VII).
74. *Gratz* v. *Bollinger*, 539 U.S. 244, 275 (2003) ("We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.").
75. *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting) (joined by Scalia, J., Kennedy, J., and Thomas, J. in dissenting: "I do not believe, however, that the University of Michigan Law School's means are narrowly tailored to the interest it asserts").
76. *Id.* at 348 (Scalia, J., dissenting) (citations omitted).
grounds that the racial classifications are not narrowly tailored to the school's diversity interest.\(^7\)

The tactical decision to rely solely on the diversity rationale in the affirmative action litigation context poses some of the same dangers as relying solely on the intentionality rationale in the disparate impact context. Reliance on the diversity rationale concedes the terms of the debate over the reality of race and institutional access, placing progressive civil rights activists in a defensive position. A justification that highlights the institutional practices that result in racial disparities in education and challenges the assumption that affirmative action is a deviation from an otherwise properly functioning meritocracy\(^5\) would be more in line with the original aspiration of affirmative action programs.

There are a variety of built-in institutional preferences for Whites in education—such as traditional admissions criteria, non-need-blind admissions, and alumni preferences\(^7\)—that belie the notion of an existing meritocracy. The diversity rationale does not, on its own, challenge the assumption that a level playing field exists in education or point to preferences for Whites and their resultant racial disparities. Rather, the rationale can sit comfortably with the assumption that people of color are not qualified enough to succeed in elite institutions.

On the other hand, the diversity argument was perhaps the only hope for sustaining the constitutionality of the Michigan programs. This consideration pushed civil rights advocates and the University to make a strategic choice to ignore the extent to which the University's own admissions practices actually discriminated against people of color. They believed that only through the diversity argument did they have a chance to win the case and retain the affirmative action programs. From a stare decisis view, \textit{Bakke} practically mandated such an argument. However, the costs of this approach are significant.

To work toward the larger goal of equal citizenship, civil rights litigators should revive the original understanding of affirmative action as a means of access for people of color and other underrepresented groups. The programs should be conceptualized as tools to open previously closed doors in order to increase social participation and ensure that all individuals are treated with equal respect and dignity, regardless of their race. Understood in this way, affirmative action focuses on institutional

77. For example, in 2004, the University of Michigan Law School discontinued an orientation program designated for students of color and replaced it with a program open to all incoming students.


practices. This understanding challenges the assumption that educational institutions operate with a clear, objective, and fair set of criteria. In this respect, the equal citizenship rationale operates in the same way in the context of both affirmative action and disparate impact law.

The current legal and political assault against affirmative action should inspire civil rights litigators to defend race-conscious policies like the disparate impact standard in a manner that highlights the fundamental problem of institutional bias. Not only does the diversity rationale open the door to further constitutional challenges on narrow tailoring grounds, it detracts from an understanding of the original and most important goals of affirmative action: breaking down barriers to participation and promoting substantive equality.

C. The Equality of Results Justification

Civil rights advocates have long criticized the intentionality theory and offered other models of equal protection. Some of these models justify the disparate impact standard as a means of achieving equal effects or results. To justify the disparate impact standard in this way, one could focus exclusively on employment outcomes and advocate a complete redistribution of racial privilege. This position would not accept a compelling justification for inequality, such as provided for through the use of Title VII's business necessity defense, but instead would require equal and proportional results.

Embracing such a theory, Owen Fiss asserts that racial groups that are perpetually at the bottom of society have the right to distributive, as well as compensatory, justice. While the Court has never embraced this approach as a constitutional matter, it has held that such effects may sometimes be considered. In *Griggs v. Duke Power Co.*, *Grutter v. Bollinger*, and the majority-minority districting cases, for example, the Court has permitted legislatures and state decision-makers to consider the racial effects of governmental decision-making as long as race is not the sole consideration.

However, overwhelming judicial and political opposition accompany effects-oriented legal doctrines. Hostility to this approach may actually be responsible for the Court's retrenchment of the civil rights doctrines as a

82. 401 U.S. 424 (1971).
constitutional matter. The majority in *Washington v. Davis* was deeply troubled by exactly this theory of equal protection and accordingly refused to constitutionalize disparate impact liability. There, the Court expressed concern that laws forbidding a disparate impact "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." Hostility toward anything like proportional racial representation is also visible in the affirmative action debate. Consider that in 1993, after the media dubbed Lani Guinier a "quota queen," former President Clinton withdrew her nomination as Assistant Attorney General for Civil Rights and declared her ideas "undemocratic." More recently, Justice O'Connor's *Grutter* opinion devoted an entire section to qualifying how the University of Michigan Law School's affirmative action program is not a quota system. As Justice Scalia noted in dissent, the Law School's "mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."

In a constitutional challenge, relying on an effects-based justification for the disparate impact standard would certainly be a more difficult path than relying on the intentionality justification. It would require arguing that *Davis* was wrongly decided and that an equal protection violation could thus be shown through the racially disparate impact of a facially neutral rule. The normative and political opposition to this, and, of course, the constitutional entrenchment of the intent doctrine itself, makes it a difficult course of action.

The other option, which may prove more attractive, is for advocates to push for a larger congressional space to interpret the Constitution. In light of the *Boerne* jurisprudence, one could argue that the effects-based theory of justifying the disparate impact standard is congruent and proportional to the Court's theory and justification, which rest on the idea of intentionality. In practice, however, relegating the effects-based doctrine to the statutory setting does not move much beyond the intent-based rationale. Considering the Court's current practice of judicial supremacy or

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86. *Id.* at 248.
88. *Grutter*, 539 U.S. at 334. ("[T]o be narrowly tailored, a race-conscious admissions program cannot use a quota system.").
89. *Id.* at 346–47 (Scalia, J., dissenting).
exclusivity, it still reifies intentionality as the constitutional baseline for determining an equal protection violation.

In this way, intent- and effects-based theories ultimately both obscure what is at stake in understanding the disparate impact standard. The next Part explores a third theory of the Equal Protection Clause—equal citizenship—and argues that equal citizenship, and its promise of equal opportunity, best captures the moral core of the Fourteenth Amendment in order to justify the disparate impact standard.

III. THE EQUAL CITIZENSHIP JUSTIFICATION

The third—and best—justification for the disparate impact standard is as a means of promoting equal citizenship. This basis for equal protection is aspirational. It is grounded in the moral ideal that all individuals and groups should be treated with equal respect, dignity, and value in society. The equal citizenship paradigm ultimately requires breaking down institutional barriers that impede opportunities for political and social participation such that all citizens have a fair chance to enter significant social institutions, including places of employment. Although the Supreme Court has never explicitly endorsed this principle, a moral reading of the Equal Protection Clause leads to this understanding. As such, this theory first requires some discussion of the legitimacy of using morality as a source of constitutional interpretation.

A. A Moral Reading of the Constitution

Moral interpretation challenges judges to draw on a set of values, morals, and passions in interpreting the concrete applications of vague constitutional provisions. This Section explores how the moral methodology is particularly important when interpreting the Reconstruction Amendments, because their meanings are vague at the textual level and debatable at the moral level. The moral reading is also valuable because it explains a current method of constitutional interpretation that will be difficult, if not impossible, to change because “politics” and “law” are not easily—if at all—distinguishable.

90. See Narayan, supra note 6, at 54; see also Dworkin, supra note 6, at 7.
91. See generally Harris & Narayan, supra note 65, at 17–18.
92. See Dworkin, supra note 6, at 2; see also Sortirios Barber, ON WHAT THE CONSTITUTION MEANS 39–62 (1984) (arguing that the Constitution is coherent only if we choose to understand it in light of our current best conception of the “good society”); Sortirios Barber, Fidelity and the Constitutional Aspirations, 65 Fordham L. Rev. 1757 (1997).
According to Ronald Dworkin, "the moral reading proposes that we all—judges, lawyers, citizens—interpret abstract [constitutional] clauses on the understanding that they invoke moral principles about political decency and justice." He argues:

I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends..." Dworkin suggests that tools such as the structural design of the Constitution and "past legal and political practice" should also inform Constitutional interpretation.

According to Dworkin, the methodology itself and "constitutional integrity" serve as meaningful restraints on the morally-based definitions judges may give to the Constitution. The methodological restraint derives from looking at the framers' intent from a contextualized audience meaning, rather than determining what they actually thought. He states, "just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said". Constitutional integrity further restrains judges by requiring that they not use a personal moral interpretation. He says that judges "may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent with the structural design of the Constitution as a whole [and] the dominant lines of past constitutional interpretation."

While Dworkin's restraints are meaningful attempts to keep judges from acting as super-legislatures, they are limited in practice because of the subjective nature of constitutional interpretation. Dworkin's first limit, looking to the framers' intent in their legal and political context, involves a set of ideological choices. Historical analysis inevitably requires the

93.  DWORKIN, supra note 6, at 2.
94.  Id. at 7–8.
95.  Id. at 8.
96.  Id. at 9–10.
97.  Id. at 10.
98.  Id.
privileging of certain positions and events. For example, *Runyon v. McCrary*\(^99\) fostered an intense debate among historians as to whether the framers intended Section 1981,\(^100\) an antidiscrimination statute, to apply to private contracts. However, even if Section 1981 was not meant to apply to private contracts, privileging the framers' intent in this respect arguably would continue to institutionalize racial subordination because it would legally justify practices intended to elevate the status of Whites. Whether to give power to that intent, in other words, is a moral choice. Second, it is not possible for judges to completely separate themselves from their personal moral reading and act with Dworkin's "constitutional integrity." Law is not, and can never be, completely objective and apolitical. The rule of law has developed ideologically and involves political choices.\(^101\)

Even without Dworkin's restraints, the moral reading is a critical method of constitutional interpretation, particularly with respect to the Fourteenth Amendment, for at least three reasons. First, the Amendment's meaning is not self-evident, so it lends itself to subjective and moral interpretation. Its language sets forth philosophical and abstract principles that do not easily lend themselves to uniform interpretation or application. People inevitably bring their life experiences and personal morality to bear on its understanding. For this reason, equal protection, in particular, has been one of the most highly contested and changing areas of law.

Second, to the extent that one believes that the Fourteenth Amendment seeks to provide all citizens with equal respect and dignity, the moral reading is anti-authoritarian and anti-elitist. The elite American legal and political culture has historically preferred "reason" over passionate or moral-based decision-making. In elaborating a conception of the separation of powers, Madison argues in *The Federalist No. 49* that "it is the reason of the public alone that ought to controul [sic] and regulate the government. The passions ought to be controulled [sic] and regulated by the government."\(^102\) This desire to restrain the people's passions or moral sensibilities is the antithesis of equal respect and dignity.

While elites have expressed a preference for "reason," groups without power have historically used moral reasoning—based on their lived experiences—to bring about legal and social change. For example, the tactics of the Civil Rights Movement and the women's movement explicitly drew on morality. These movements demonstrate how morality has been an effective tool to challenge the status quo and bridge the divide between elites and the disempowered.

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Finally, judges already use their moral convictions as a source of constitutional interpretation. David Strauss has argued that constitutional theory should both account for the reality of constitutional practice by illuminating its ongoing contours and have normative appeal. The moral reading fits this framework. First, it is an intellectual farce to believe that judges are not already incorporating a moral reading into their work. Even Dworkin admits, "the moral reading is not revolutionary in its practice. Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments." He finds evidence for this in judges' conservative or liberal outcomes; he states that "the best explanation of the differing patterns of judges decisions lies in their different understandings of central moral values embedded in the Constitution's text."

Second, on the normative level, it is neither possible nor desirable to completely divorce politics from law—to remove ourselves from our social context and ideological underpinnings—to be "objective." As the Critical Legal Studies movement taught, the rule of law itself is not objective. Moreover, equal application of normatively biased rules will not remedy the underlying bias. So in this case, the descriptive practice of constitutional law—the moral reading—is already doing the normative justificatory work.

Moral interpretation has received its share of criticism. First, critics argue that it is an authoritarian, and thus anti-democratic, methodology since judges—members of the elite—will institute their own, arguably elitist, moral values. This concern is heightened for federal litigation, such as Title VII, as federal judges are unelected and represent an advantaged, non-representative demographic of the American population. These judges, the argument goes, have a set of moral imperatives that will represent and reinforce the status quo. This argument is supported by the worry that the judiciary's institutional power—through doctrines such as stare decisis and the Supreme Court practice of judicial supremacy and judicial sovereignty—can ingrain judges' moral convictions into constitutional law in a way that has significant long-lasting implications.

Second, critics have suggested that the moral reading is vague and unspecific and therefore non-justiciable. They argue that the theory does not illuminate what exactly "equal respect and dignity" means, how it should be applied, what the test should be, and whether the same test is applicable to all races. A final criticism is that morality should not, on a normative level, be a source of constitutional interpretation because it is

104. DWORKIN, supra note 6, at 3.
105. Id. at 7–8.
106. See generally Kramer, supra note 25.
unprincipled, arbitrary, and contrary to the rule of law. This argument is rooted in the theory that judges are capable of striving for objectivity. Critics optimistically suggest that there are moments in constitutional law where judges have refused to adopt their preferred personal reading and instead took a more "principled" or "objective" position.\(^{107}\)

The first two criticisms, that the moral reading is anti-democratic and non-justiciable, represent valid concerns about invoking the moral reading in a court-centered model of constitutional interpretation. However, when Congress has space to interpret and enforce the Constitution, these criticisms lose their force. To the extent the moral reading appears unprincipled, it bears repeating that law and politics cannot be separated. The constitutional moments that scholars point to in support of an objective rule of law approach, when there appears to be a space between a judge's constitutional interpretation and his politics, are very rare. So it is questionable whether objectivity is even a practical goal to strive for. At the same time, it is fair to suggest that judicial pronouncements are more worrisome than legislative pronouncements because they can be longer-lasting and more authoritative. However, this objection does not render the moral reading a deficient interpretational methodology but rather highlights the need to discuss an institutional remedy. One remedy, providing Congress broad interpretive space, is discussed in the concluding Part of this Note.

B. The Underlying Theory in the Employment Context

The Equal Protection Clause serves as the textual basis for the aspiration of equal citizenship. According to Kenneth Karst, "the equality that matters in our Supreme Court is ... the equality guaranteed in the Equal Protection Clause of the [F]ourteenth [A]mendment and elsewhere in the Constitution. That constitutional equality draws on an egalitarian ideal that has evolved from the colonial era to our own time."\(^{108}\) For Karst, the Fourteenth Amendment creates a positive right to equal citizenship: "The equal citizenship principle that is the core of the [F]ourteenth [A]mendment does have substantive content, and, to be sure, that content is properly stated in the form of a right. It is the presumptive right 'to be treated by the organized society as a respected, responsible, and participating member.'"\(^{109}\) This theory of equal citizenship can be read to require

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107. Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905), is one example. There, Justice Holmes famously argued that the Court was constitutionalizing a preference for laissez-faire capitalism. *Id.* at 75–76 (Holmes, J., dissenting).


the removal of institutional and structural barriers that result in a racially disparate impact in the workplace.

Institutional arrangements, both external and internal to the labor market, limit employment opportunities for people of color.\textsuperscript{110} External to the labor market, our communities are profoundly unequal along the lines of race\textsuperscript{111} and are marked by a lack of equal opportunity in education, transportation, health care, and other services. Each of these bears on the ability to gain access to employment opportunities. Even when these barriers are transcended, people of color face obstacles in entering employment institutions for reasons that include selection criteria that fail to accurately reflect necessary job qualifications and disparities in wealth and power that obstruct networking and other employment-related opportunities.\textsuperscript{112} For example, the privileged position of White workers in many blue-collar industries is accentuated by the widespread practice of relying on recommendations from current employees when job openings occur.\textsuperscript{113}

Once in the workplace, people of color face additional internal obstacles to full participation. For example, the culture of the “old boys network” in many workplaces leads to a shortage of available mentoring opportunities for women and people of color\textsuperscript{114} or a lack of access to

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\textsuperscript{110} See Harris & Narayan, supra note 65, at 17-18 (“[T]he equal opportunity and full citizenship model appropriately shifts our attention to the here and now, focusing on the ways in which people continue to face institutional obstacles to equal consideration and equal treatment.”).


\textsuperscript{112} Even where Whites and people of color seem to be on an equal playing field, Whites often have more opportunities in the workforce. In a 2004 study where young Black and White testers filled out job applications for entry level jobs with nearly identically assigned interpersonal styles and education, employment, and criminal histories, Blacks were less than half as likely as their White counterparts to receive consideration by employers. Devah Pager, Consequences of Incarceration and Racial Disparities, 108 Am. J. Soc. 937 (2003). Moreover, Whites with criminal records received callbacks seventeen percent of the time, while Blacks with no criminal history received callbacks fourteen percent of the time. Id.

\textsuperscript{113} See Cherry, supra note 40, at 9.

\textsuperscript{114} See Vicki Shultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1816–32 (1990) [arguing that "sex segregation persists ... [because] ... employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally
clients in certain professions. Other internal obstacles include workplace harassment and a lack of affordable childcare. More subtle internal obstacles exist as well; for example, Floyd Weatherspoon has found that Black men are "assigned the less desirable duties in [the workplace, are] more often accused of and terminated for sexual harassment, [are] monitored more closely, receive[] lower performance evaluations, and are continuously confronted with hostility.”

Unconscious biases lead to the development and maintenance of these obstacles. A large and growing body of psychological and sociological literature recognizes that people are not always aware of their racial biases. Organizational sociologists have observed that, to a significant degree, discriminatory human behavior within organized settings such as the workplace rarely occurs at a high level of consciousness. This unconscious or subconscious racism thus contributes to the development and maintenance of institutional biases.

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115. See Schultz, supra note 114, at 1833.
119. See Lawrence, supra note 117, at 322. Lawrence argues, “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.” Id. To account for this reality, he suggests that courts should interpret the “cultural meaning” of allegedly discriminatory actions. Id. Many legal academics have expanded on Lawrence’s groundbreaking work. For example, Ian F. Haney Lopez argues that as part of the institutional structure, individuals “fail to recognize their reliance on racial notions, and indeed may stridently insist that no such reliance exists, even while acting in a manner that furthers racial status hierarchy.” Haney Lopez, supra note 118, at 1723.
Breaking down these institutional barriers is a precondition to meaningful social participation. According to Uma Narayan:

[A] variety of policies that work to reduce disparities, ensure equal access to the workplace, provide quality education and affordable childcare might be grounded not only in terms of their value to the particular lives of individual citizens, but also in terms of their enabling a variety of forms of citizen participation in national political life. Such provisions and policies need to be understood in part as social preconditions for the possibility of politically active citizens who are vital to the political health of liberal democratic societies.120

Social participation is an integral component of one's social worth. As Kenneth Karst argues, "[t]he values of participation and responsibility contribute to an individual's self-respect, but they also have independent significance in a political tradition that emphasizes not only doing but belonging."121 Amy Gutmann and Dennis Thompson argue that the elimination of structural barriers is a precondition to democracy itself.122 And as the Grutter Court recognized, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."123

Employment is one of the most important forms of social participation.124 Among other things, employment links individuals with education, housing, insurance, benefits, social networks, and personal identity. These mechanisms are fundamental for social participation. As Lani Guinier and Susan Sturm observe, employment functions as a "proxy for citizenship."125 Similarly, Judith Sklar argues that work is at the core of citizenship. She asserts that "a citizen is neither an aristocrat or a slave, but an economically productive and independent agent."126 Ensuring equal employment opportunities for people of color is a cornerstone of a society that values equal citizenship. Indeed, the exclusion of people of color from desired employment positions has reinforced existing social inequalities and has

120. Narayan, supra note 6, at 58.
122. See generally Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996).
124. The equal citizenship approach to equal protection applies beyond the employment context to, for example, housing and education. The model also applies beyond race to all social categories that define and have the ability to circumscribe one's social participation, for example, class, gender, and sexual orientation.
125. Guinier & Sturm, supra note 64, at 1031.
been central to their second-class citizenship. So in practice, the removal of institutional and structural barriers is necessary to guarantee equality of opportunity in employment. Equal opportunity is essential to realizing the aspiration of equal citizenship, because equal opportunity in employment provides a basis for real social participation.

Despite existing barriers to access, there endures a myth that all individuals have equal opportunities in employment. Therefore, critics argue that advocating equal opportunity reinforces a racist and class-biased structure and actually perpetuates institutional biases because it assumes the legitimacy of the free market. For example, Kimberlé Crenshaw argues that the "myth of equal opportunity ... explains and reinforces broader class hierarchies." She explains:

Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for Whites to see the Black situation as illegitimate or unnecessary. If Whites believe that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince Whites that something is wrong with the entire system. Similarly, a challenge to the legitimacy of continued racial inequality would force Whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained.

Crenshaw is correct to point to the myth of equal opportunity, as well as the central role of a racist ideology inimical to the value of equal citizenship. However, racial and economic hierarchy is not the inevitable outcome of endorsing the idea of equal opportunity. Understood within the context of equal citizenship, an equal opportunity ideal cannot justify

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127. While observing the critical link between employment and citizenship, Uma Narayan rightly urges that "we need to be careful not to reinforce the assumption that engaging in waged work is a necessary condition for individuals to deserve the social standing and to warrant the rights and dignity associated with citizenship." Narayan, supra note 6, at 50–51. Narayan further argues "the social standing of citizens should neither be grounded in their ability to earn nor depend on their ability to 'contribute' to national life, even if the scope of 'contributions' is widened to include activities other than paid labor." Id. at 50.


129. Crenshaw, supra note 128, at 1380–81.
social inequality. Equal opportunity in employment should thus be understood as both a myth and an aspiration.

Ultimately, existing barriers to equal employment opportunity both external and internal to the labor market act to further the subordinate status of persons of color in our workforce. These barriers do not comport with a Constitution that promotes equal citizenship. Applying the equal citizenship perspective to disparate impact analysis does not require a choice between jurisprudence that seeks to ban either intentional discrimination or unequal outcomes. It might do either or both, depending on the context of the situation. For example, one could say a workplace treats its employees with respect and dignity and provides an equal opportunity to participate where that workplace is predominantly female or predominantly Mexican American. Ultimately, instead of looking solely at the employer's intent or the effects of policies in isolation, an equal citizenship perspective puts a moral imperative at its center.

C. The Theory Employed in Disparate Impact Litigation

This Section explores how equal citizenship theory as applied to the disparate impact standard might practically bring about the realization of equal citizenship in the workplace. This Section briefly considers both a constitutional challenge and a typical disparate impact lawsuit brought under Title VII.

Without disturbing the current Section V jurisprudence, there are at least two ways to use an equal citizenship justification if faced with a constitutional challenge. First, the disparate impact standard can be justified as reflecting a congressional understanding of the Equal Protection Clause based on a theory of equal citizenship that is congruent and proportional to the Court's intentionality standard. Alternatively, a case can be made that the best understanding of the current judicial standard already contains the ideal of equal citizenship.

Assuming that Congress has the authority to argue that equal citizenship animates the Equal Protection Clause, the former approach is probably the easier of the two. As discussed above, the Court has never explicitly held that violations of the Equal Protection Clause may be based on the equal citizenship principle in the way it has held that violations of the Equal Protection Clause must be based on intentional discrimination.

The aspiration of equal citizenship can justify the standard's constitutionality and can also inform judicial review of typical Title VII disparate impact litigation. When viewed through the aspirational lens of

130. However, as Professor Crenshaw recently asked an audience at the University of Michigan Law School, why is racial proportionality not the baseline? Professor Kimberlé Williams Crenshaw, Address at the University of Michigan Law School (Spring 2004).
equal citizenship, commonplace disparate impact cases can take on a deeper meaning. These suits can be more meaningful to the extent that they link individual disputes to the moral objective of facilitating equal citizenship.

Lawsuits can tell stories and advance causes with deep moral themes. If advocates justified their disparate impact suits with a theory of equal citizenship, disparate impact litigation outcomes could change. Litigants, juries, and judges could attend to whether employees have been treated with equal respect and dignity in the sense that they have been provided with the same fundamental opportunities to participate in employment opportunities. If provided with a context to understand the standard as one that reflects deep moral and societal norms of equal citizenship, individual cases could be viewed in their more complex institutional contexts. Espousing this position, Karst argues, "[t]he principle of equal citizenship is a general principle that informs decisions by centering a court's attention on the substantive values of respect, responsibility, and participation."[131]

This could come about in a variety of ways. First, evidence related to subtle institutional inequalities that impede access to the workplace could be admitted as relevant evidence in litigation. Such evidence would allow the judge or jury to look through a broader structural lens at the various ways in which race played out in the employment-related decision-making. Courts might allow plaintiffs to introduce and subsequently rely on psychological and sociological evidence relating to subconscious and unconscious bias.[132] The moral story, in essence, places the individual case within its broader social and institutional context.

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131. Karst, supra note 108, at 248 n.12. Elaborating on the point that the equal citizenship theory is not a judicial rule, Karst argues:

Equal citizenship is no absolute; nor does our constitutional rhetoric of equality produce "monolithic" judicial scrutiny of legislation .... Indeed, Justice Stevens, concurring in Craig v. Boren, 429 U.S. 190, 211–12 (1976), called for an attitude exactly opposite to absolutism: one of interest balancing, weighing other considerations against the claim of constitutional equality. What is required is a serious effort to justify governmental imposition of inequalities, in proportion to the degree of invasion of the values of equal citizenship. The critical point for our purposes is that those values, i.e., respect, responsibility, and participation, take the claim to equality out of the realm of empty formalism and into a flesh-and-blood society where equality matters.

Second, with respect to cases that challenge employment selection criteria, courts might provide less deference to employers' articulations of "business necessity." Currently, an employer can rebut an employee's showing of disparate impact if it demonstrates that the challenged employment practice is job-related for the position in question and consistent with business necessity. The line of cases interpreting "business necessity" might change in favor of plaintiff employees if courts are fundamentally focused on the moral concept of equality of citizenship.

The moral theme of equal citizenship should form the basis of any defense of the disparate impact standard's constitutionality. Such an aspirational basis for the disparate impact standard does not easily translate to a fixed judicial standard. However, considering evidence related to institutional biases and unconscious racism and giving less deference to an employer's articulations of business necessity might change the outcomes of disparate impact cases. Aspirational litigation and ideas can also shape future norms.

IV. WHO IS INTERPRETING EQUAL PROTECTION?

This Part addresses some of the institutional concerns raised by the suggestion that the disparate impact standard should be justified as a tool of equal citizenship. This Part suggests that the Court's current Section V jurisprudence is an attempt to assert the Court's substantive disagreement with Congress's understanding of the Fourteenth Amendment. This Part then argues that Congress should have the authority to promulgate the disparate impact standard under its Section V power and justify it through its own independent interpretation of the Fourteenth Amendment. Finally, this Part asserts that legislatures are better institutionally equipped to advance the goals of the Equal Protection Clause and that courts should therefore either interpret Boerne's congruence and proportionality test to allow Congress sufficient room to experiment or else overturn the test altogether.

Allowing the Court to constitutionalize the entire equal protection debate without room for Congress to weigh in eliminates the ability for the people to decide what policies—and justifications for those policies—best advance equal protection. It is radically undemocratic. This freedom is particularly troublesome in the area of antidiscrimination law because whether policies ultimately advance equal protection is highly debatable.
and has changed—and will continue to change—over time. As Alan Freeman recognizes, "the development of antidiscrimination law is an ongoing dialogue . . . between the concrete historical reality of oppression and the principals generated by that experience."135 Indeed, our society’s race relations have dramatically changed over even the last thirty years and will continue to change. The Rehnquist Court itself recently acknowledged this in setting the twenty-five year "deadline" for affirmative action policies in Grutter v. Bollinger. 136

While legislatures are more able than the courts to respond to the changing dynamics of race and power in contemporary America, the Court has asserted itself as the exclusive interpreter of the Fourteenth Amendment in the recent Section V jurisprudence. This jurisprudence demonstrates that handing moral authority over to the Court represents not only a loss of democratic integrity but also a loss of room to promote an aspirational reading of the Fourteenth Amendment based on equal citizenship. In fact, the Court recently referenced The Civil Rights Cases 137 as guiding authority even though our understanding of race and racial status as a society has radically changed since the Court decided The Civil Rights Cases. The Court proudly remains true to this vision of equality—articulated more than 120 years ago—when even formal racial equality did not exist.138

Robert Post and Reva Siegel argue that in the Boerne line of cases, the Court has taken on "the task of cabining and inhibiting democratic vindication of equality values." 139 For this reason, they suggest the Boerne congruence and proportionality test "is actually a tool for restraining Congress whenever the Court is indifferent or hostile to the constitutional values at stake in particular instances of Section V legislation. It is a vehicle for the Court to express substantive disagreement with Congress’s understanding of the Fourteenth Amendment . . . ."140 There is nothing in the Constitution, however, that requires the Court to strike down congressional enactments because of such substantive disagreement; in fact, history suggests that this is an unprecedented role for the Court. The assumption that the Court has always been the primary interpreter of the Constitution is simply not true.141

In addition to being institutionally equipped to respond to changes in society, legislatures can enact proactive measures. They can experiment

137. 109 U.S. 3 (1883).
139. Post & Siegel, supra note 134, at 522.
140. Id.; see also Kramer, supra note 25, at 15.
141. See Kramer, supra note 25, at 15.
with rules in a way the courts cannot since courts must adjudicate the
precise issues before them. Post and Siegel suggest that "courts often adopt
liability rules to govern constitutional litigation that do not reflect the full
range of meanings that the Constitution's text might reasonably be under-
stood to embody."142 They rely explicitly on what Sager has called the
"enforcement gap" or "the underenforcement of the Equal Protection
Clause by the federal courts."143 This thesis holds that separation of powers
actually requires Congress to participate in the substantive definition of
the Equal Protection Clause, because as legislators, its members are better
able to represent the democratic will of the people. In this interpretative
space, the people's passions and moral sensibilities can become the foun-
dation for constitutional interpretation.

It is commonly suggested that Congress is not the best protector of
minority rights because majority rule will trump minority interests. This
notion has long been a popular justification for judicial review.144 How-
ever, it is not necessarily the case that the majority's passions will trammel
minority rights in the legislature more than in the courts. For instance,
Congress historically has provided more substantive rights and opened
more doors of opportunity for people of color than has the Supreme
Court. Congress can be credited with passing far-reaching and meaning-
ful legislation such as the Reconstruction-era statutes, the Civil Rights
Act of 1964, the Fair Housing Act of 1968, and the Civil Rights Act of
1991. On the other hand, the Court is credited with expanding minority
rights and civil liberties only during the years of the Warren Court, an
anomaly in the history of the Court.

Certainly, Congress has not always vindicated the rights of people of
color. Yet handing over power to the Court is not the only remedy for a
legislature that does not adequately represent minority or less-powerful
interests. Kramer reminds us that the founders "did not solve the problem
of constitutional interpretation and enforcement by delegating it to
judges,"145 arguing, "[t]heir structural problems were meant to operate in
politics: elections, bicameralism, an executive veto, political connections
between state and national governments, and, above all, the capacity of
politicians with competing interests to appeal for support to the people
who made the Constitution."146

Delegating more power to Congress should not end judicial review.
The Court can and should still play a role in interpretation. Although
criticism of a court-centered model is warranted, on civil rights issues, it
is acceptable and even desirable for the courts to weigh in. On some level,
judges are more insulated from the majoritarian process and may espouse views that, though politically unpopular, are useful to a collective understanding of the Constitution. The judicial skill of consistent application of general principles to different fact patterns through a process of analogical reasoning can illuminate modern understandings of the Constitution. Further, there are judicial practices, such as the use of amicus curiae briefs, that can enable the Court to integrate minority perspectives into its opinions. In these ways, the Court can continue to offer its perspective to the understanding of the Constitution. Congress can listen to the Court at the same time the Court listens to Congress.

While equal citizenship should inform the understanding of the Equal Protection Clause, the Court’s current understanding is deeply rooted in the intentionality standard. Thus, the Court must reconsider the Boerne congruence and proportionality test. Working to expand Congress’s ability to legislate would allow Congress to enforce the guarantees of the Fourteenth Amendment in a way that maximizes the aspiration of equal citizenship. Recent Section V case law represents a regression in this area, as it represents “the Justices’ conviction that they and they alone are responsible for the Constitution.” In contrast, a strong institutional dialogue between the Court and Congress should guide further constitutional interpretation of the Fourteenth Amendment.

CONCLUSION

Formal equality did not achieve the realization of full and equal citizenship for all members of society. Subtle institutional factors continue to foster exclusion and inequality based on race in America’s workplaces. The disparate impact standard represents one important tool in the attainment of the aspiration—and the moral imperative—of full and equal citizenship for all citizens. Despite the pragmatic reasons for justifying the disparate impact standard as a means of smoking out intentional discrimination, this narrow ground will constrain the ability to use the standard to remedy institutional, subconscious, and unconscious discrimination.

The justification for the disparate impact standard should reflect the theory that animates equal protection doctrine as a whole. This Note advocates a vision of equal protection grounded in a guarantee of equal citizenship. To effectuate this end, Congress and the Court must both play roles in substantively defining the Equal Protection Clause. Since racial

147. Kramer argues that this is not limited to the Section V cases. He also looks at, for example, the Commerce Clause cases and Bush v. Gore, 531 U.S. 98 (2000), to argue that history does not compel the Rehnquist Court’s judicial sovereignty. Kramer, supra note 25, at 163.

power, institutional factors, and morals that determine such power evolve and change over time, our institutional process of creating and reviewing antidiscrimination law must be equipped to deal with these changing social norms through the same "institutional dialogue within which Americans have attempted to work out the meanings of national citizenship during the past half century." As an institutional matter, the Court must either provide Congress with sufficient room to develop its own understanding of the Equal Protection Clause or overturn the congruence and proportionality test altogether. Such changes will bring our society closer to understanding the Equal Protection Clause as a legal and moral commitment to equal respect and dignity for all persons.

149. Post & Siegel, supra note 134, at 526.