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Disparate-Impact Liability for Policing

ABSTRACT. This Note justifies disparate-impact liability for police practices. It develops the first structured analysis of the Safe Streets Act's (SSA's) antidiscrimination power and argues that the SSA imposes disparate-impact liability on police departments. The analysis includes an examination of the statute's text, the historical meaning of "discrimination," statutory purposes, and subsequent lawmaking on policing. The Note then considers the implications of disparate-impact liability under the SSA. Most notably, individuals can use the SSA's private right of action to hold police departments accountable for disproportionate racial effects. While conventional legal tools for police reform appear inadequate, the SSA emerges as an unrecognized path forward.

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INTRODUCTION

In Baltimore, an African American man in his mid-fifties was stopped thirty times in less than four years.[1] Sometimes, police officers claimed that he was "loitering."[2] Other times, they said that he was "trespassing" or that the stop was part of a "CDS investigation."[3] After the initial stops, officers detained him at least fifteen times while they checked for outstanding warrants. The man, however, was never found to be doing anything wrong. None of the thirty stops resulted in a citation or criminal charge.[4]

What could he do? Police officers seemed to be targeting him and other black individuals through stops and other enforcement activities. He might consider filing an equal protection claim, but his lawsuit would be unlikely to succeed without additional evidence of racial animus. He could contact the police department to complain or join news outlets and community activists in lobbying the city for reform. But such efforts had not inspired much change in Baltimore.[5]

For decades, the Baltimore Police Department (BPD) "hounded black residents who make up most of the city's population, systematically stopping, searching and arresting them, often with little provocation or rationale."[6] Though constituting only 63% of the city's residents, African Americans accounted for 84% of BPD's pedestrian stops, 82% of vehicle stops, 86% of arrests, and 88% of nondeadly uses of force.[7] These disparities did not appear to serve

1. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 50 (2016) [hereinafter CIVIL RIGHTS DIV., BALTIMORE INVESTIGATION], https://www.justice.gov/crt/file/883296/download [https://perma.cc/D77R-5SFY].

2. *Id.*

3. *Id.* CDS stands for "Controlled Dangerous Substance."

4. *Id.*

5. *See, e.g.*, *id.* at 16-19; *see also* German Lopez, *Baltimore Cops Stopped an Innocent Mid-50s Black Man 30 Times in Less than 4 Years*, Vox (Aug. 10, 2016), https://www.vox.com/2016/8/10/12418430/baltimore-police-racial-bias-justice-department [https://perma.cc/DH9U-E74T].

6. Richard A. Oppel Jr. et al., *Justice Department to Release Blistering Report of Racial Bias by Baltimore Police*, N.Y. TIMES (Aug. 9, 2016), https://www.nytimes.com/2016/08/10/us/justice-department-to-release-blistering-report-of-racial-bias-by-baltimore-police.html [https://perma.cc/A29T-K7KK].

7. CIVIL RIGHTS DIV., BALTIMORE INVESTIGATION, *supra* note 1, at 7, 48, 61; *see also id.* at 55-56 ("In addition to these common misdemeanor offenses, BPD enforces other minor charges almost exclusively against African Americans. For example, BPD charged 657 people with 'gaming' or playing 'cards or dice,' of whom 652—over 99 percent—were African Americans.").

legitimate public-safety ends. For example, despite stopping and searching African Americans at significantly higher rates, officers in Baltimore "found contraband twice as often when searching white individuals" in vehicle stops and 1.5 times as often in pedestrian stops.[8]

Baltimore is not an anomaly, and its racial disparities did not result from the actions of a few officers. U.S. Department of Justice (DOJ) reports have exposed similarly striking disparate racial impacts in law-enforcement activities across the country, from Newark, New Jersey to Los Angeles County, California.[9] Such racially disproportionate impacts have, at times, been "so severe and so divergent from nationally reported data that [they] cannot plausibly be attributed entirely to the underlying rates at which these [individuals] commit crimes."[10] Those

8. *Id.* at 7.

9. DOJ's findings reports on Newark, Los Angeles County, Ferguson, New Orleans, Alamance County, East Haven, Maricopa County, and Seattle all detail disparate impacts that seem unjustifiable. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter CIVIL RIGHTS DIV., FERGUSON INVESTIGATION], https://www.justice.gov /sites/default/files/crt/legacy /2015/03/04/ferguson_findings_3-4-15.pdf [https://perma.cc/49RV-TPJZ]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (2014) [hereinafter CIVIL RIGHTS DIV., NEWARK INVESTIGATION], https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/932A-3A54]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) [hereinafter CIVIL RIGHTS DIV., NEW ORLEANS INVESTIGATION], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [https://perma.cc/N7N6-XAAE]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/M96A-YPE7]; Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Clyde B. Albright, Cty. Att'y, Alamance Cty. (Sept. 18, 2012) [hereinafter Alamance Cty. Letter], https://www.justice.gov/sites/default/files/crt/legacy/2012/09/18/acso_findings_9-18-12.pdf [https://perma.cc/6FJX-68TW] (regarding the investigation of the Alamance County Sheriff's Office); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Leroy D. Baca, Sheriff, L.A. Cty. Sheriff's Dep't (June 28, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/28/antelope_findings_6-28-13.pdf [https://perma.cc/4A74-9YPL] (regarding the investigation of Los Angeles County Sheriff's Department stations in Antelope Valley); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Joseph Maturo, Jr., Mayor, Town of East Haven (Dec. 19, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven_findletter_12-19-11.pdf [https://perma.cc/AR6Z-VUV9] (regarding the investigation of the East Haven Police Department); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Bill Montgomery, Cty. Att'y, Maricopa Cty. (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [https://perma.cc/TV4Y-6A2M] (regarding the investigation of the Maricopa County Sheriff's Office).

10. CIVIL RIGHTS DIV., NEW ORLEANS INVESTIGATION, *supra* note 9, at 39. In other instances, police activities falling heavily on black individuals, like "massively additional stops," simply do

reports also indicate that racial disparities often result from institutionalized police practices, such as Ferguson's strategy of revenue generation through policing[11] or Baltimore's "zero tolerance" strategy that encouraged officers to take discretionary enforcement action, including stops, searches, and arrests against misdemeanor offenses like loitering and disorderly conduct.[12]

Despite such disparities and general concern over racial bias in policing, there is almost no use of antidiscrimination law—let alone discussion of disparate-impact law—in creating systemic change. To vindicate the Fourteenth Amendment's promise of racial equality, private individuals generally rely on Section 1983, which allows them to sue local public entities for violations of rights created by the Constitution or federal statutes.[13] These lawsuits are difficult to win, however, because equal protection claims require proof of "discriminatory purpose," which is notoriously difficult to demonstrate.[14] The federal government has a sharper array of tools, but they too come up short. Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 authorizes the U.S. Attorney General to sue for equitable and declaratory relief when there is a reasonable basis to believe that law-enforcement officials have engaged in a "pattern or practice" of deprivation of constitutional or federal statutory rights.[15] DOJ's use of Section 14141, however, is contingent on presidential support,[16] and resource limitations prevent DOJ from investigating many of the complaints it

"not yield[] more evidence of crime." CIVIL RIGHTS DIV., NEWARK INVESTIGATION, *supra* note 9, at 20.

11. CIVIL RIGHTS DIV., FERGUSON INVESTIGATION, *supra* note 9, at 15.

12. CIVIL RIGHTS DIV., BALTIMORE INVESTIGATION, *supra* note 1, at 62.

13. 42 U.S.C. § 1983 (2018); *see* Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 112-13 (2012).

14. *See, e.g.*, Fan, *supra* note 13, at 110-12; *see also* Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 275-77 (2017) (describing additional issues with using Section 1983 to remedy police misconduct in a systemic fashion). At one point, private litigants could make headway using Title VI of the Civil Rights Act of 1964. Fan, *supra* note 13, at 111. Title VI prohibits "any program or activity receiving Federal financial assistance," including those of state and local police departments that receive federal grants, from discriminating on the basis of race. 42 U.S.C. § 2000d (2018); Fan, *supra* note 13, at 110. Importantly, Title VI's administrative regulations proscribe disparate racial impacts, providing a lighter burden than the intent standard of the Fourteenth Amendment. *See* 28 C.F.R. § 42.104. The Supreme Court, however, has curtailed the private right to enforce those regulations. Alexander v. Sandoval, 532 U.S. 275 (2001).

15. 34 U.S.C. § 12601 (2018).

16. Describing DOJ's use of Section 14141 as "politically cyclical," Monica Bell aptly predicted, "One suspects that a Trump DOJ will investigate very few, if any, police departments." Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2129 (2017).

receives, likely leaving much unlawful conduct unaddressed.[17] Title VI's prohibition of racial discrimination in federally funded programs theoretically provides another federal avenue for change.[18] Title VI, however, is vastly underutilized as a federal enforcement mechanism,[19] and DOJ has avoided using the law to terminate police-assistance funds, making its prohibition somewhat toothless.[20] As a former senior DOJ official commented, "Title VI, at the end of the day, is more of a threat than anything else."[21]

This Note argues that we can begin changing this state of affairs — holding police departments accountable for their disparate racial impacts — through the use of an often-overlooked statute: the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act or SSA).[22] The SSA is the "national government's first major piece of crime control legislation."[23] Through the SSA, Congress provided block grants to state and local law-enforcement agencies "to assist [them] in strengthening and improving law enforcement,"[24] which restored a "critical degree of funding power to the states in the aftermath of Jim Crow."[25] Five years later, through the Crime Control Act of 1973, Congress amended the SSA to pro-

17. *See* Mazzone & Rushin, *supra* note 14, at 280-81.

18. DOJ can enforce its Title VI regulations prohibiting disproportionate racial effects by terminating federal funding of law-enforcement agencies that violate the regulations. 42 U.S.C. § 2000d-1 (2018); *see Overview of Title VI of the Civil Rights Act of 1964*, U.S. DEP'T JUST. (Jan. 22, 2016), https://www.justice.gov/crt/fcs/TitleVI-Overview [https://perma.cc/Y8AC-HY2V].

19. Simone Weichselbaum, *The Problems with Policing the Police*, TIME (Oct. 30, 2015), https://time.com/police-shootings-justice-department-civil-rights-investigations [https://perma.cc/C3ST-PU63] ("In theory, the civil rights law gives the federal government wide latitude to cut off funds. But while the department has sometimes accused local police agencies of violating Title VI rules — as it did in Ferguson — it has avoided using the law to cut off police assistance funds."); Memorandum from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Federal Funding Agency Civil Rights Directors 5 (Aug. 19, 2010), https://www.justice.gov/sites/default/files/crt/legacy/2011/01/21/titlevi_memo_tp.pdf [https://perma.cc/KQ6G-Q5E5] (regarding Title VI Coordination and Enforcement).

20. Fan, *supra* note 13, at 110; Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 53 (2012) ("[Title VI] is rarely used with notable effect against police departments.").

21. Weichselbaum, *supra* note 19.

22. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

23. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 134 (2016).

24. Pub. L. No. 90-351, 82 Stat. 197, 198.

25. HINTON, *supra* note 23, at 134.

hibit state and local governments that receive funds from discriminating in programs or activities funded in whole or in part by the federal government.[26] Indeed, the SSA's antidiscrimination provision provides that no person "shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any [funded] programs."[27] The remedies for noncompliance include suspension, termination, and repayment of funds.[28] This is meaningful given that most major police forces, from Baltimore to Chicago, receive copious funding.[29]

DOJ is the only entity, to date, to justify a disparate-impact framework under the SSA. Generally, DOJ implements this framework in its "findings reports," which are documents describing systemic legal violations found after pattern-or-practice investigations into police departments. For support, DOJ cites its implementing regulations.[30] These regulations clearly assert that disparate-impact claims are cognizable under the SSA, drawing regulatory power from the underlying statute, the text of which prohibits "discrimination" but does not explicitly create liability for disproportionate racial impacts.[31] DOJ has also on occasion cited cases for support, but those cases do not expressly substantiate disparate-impact liability under the SSA.[32]

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26. Crime Control Act of 1973, Pub. L. No. 93-83, § 518(c)(1), 87 Stat. 197, 214. Congress passed the Crime Control Act of 1973 "[t]o amend title I of the Omnibus Crime Control and Safe Streets Act of 1968." *Id.* at 197.

27. 34 U.S.C. § 10228(c)(1) (2018).

28. *Id.* at § 10228(c)(3).

29. *See, e.g.*, Ivana Dukanovic, Note, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911, 915 (2016); Office of Justice Programs, *OJP Award Data*, U.S. DEP'T JUST., https://ojp.gov/funding/Explore/OJPAwardData.htm [https://perma.cc/X2L5-DL4N].

30. *See, e.g.*, CIVIL RIGHTS DIV., BALTIMORE INVESTIGATION, *supra* note 1, at 48.

31. The SSA authorizes relevant DOJ components "to establish such rules, regulations, and procedures as are necessary to the exercise of their functions." 34 U.S.C. § 10221(a) (2018). On the basis of this provision, DOJ enacted a regulation prohibiting fund recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, sex, national origin, or religion." 28 C.F.R. § 42.203(e) (2018).

32. For example, DOJ has cited *Charleston Housing Authority*, a housing discrimination case, in a findings report:

> [T]he Safe Streets Act applies not only to intentional discrimination, but also to any law enforcement practices that unnecessarily disparately impact an identified group based on the enumerated factors. 28 C.F.R. § 42.203. *Cf. Charleston Housing Authority v. USDA*, 419 F.3d 729, 741-42 (8th Cir. 2005) (finding in the related Fair

Scholarly literature has explored neither the legal footing nor the scope of this power. Indeed, while literature exists on the general topic of disparate impact, no studies provide a concrete way to apply a disparate-impact regime to policing. Further, while several articles have attempted to detail legal tools for reforming discriminatory policing, no studies to date have thoroughly examined the SSA. Some scholars note that DOJ has opened investigations and made findings under the SSA,[33] and a handful of scholarly commentaries have mentioned disparate impact and the SSA in passing. But these pieces do not analyze whether the SSA authorizes disparate-impact claims.[34] Instead, they simply assume that it does.

This Note aims to fill that gap. It provides an initial attempt to justify disparate-impact liability in the realm of police reform, developing the only structured analysis of the SSA's power to curb discriminatory policing as well as the first legislative history of the Act's antidiscrimination provision. The Note argues that the SSA's prohibition of discrimination in law-enforcement agencies does, in fact, proscribe unjustified disparate effects, similar to Title VII. In examining the scope of this power, the Note contends that the SSA provides an unrecognized remedy for discriminatory policing: individuals can use its private right of action to enforce the aforementioned disparate-impact prohibition. In doing so, this Note presents the Act as a formidable tool for practitioners.

The Note's analysis unfolds in four Parts. In Part I, the Note provides background on disparate-impact principles and contemplates whether the law should apply such principles in the realm of policing. It claims that the justifications for creating disparate-impact liability in traditional domains apply equally well to policing.

Housing Act context that where official action imposes a racially disparate impact, the action can only be justified through a showing that it is necessary to nondiscriminatory objectives).

CIVIL RIGHTS DIV., FERGUSON INVESTIGATION, *supra* note 9, at 69-70. The text of the Fair Housing Act (FHA), however, is not clearly comparable to that of the SSA. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 800-901, 82 Stat. 73, 81-90. Moreover, the opinion does not question whether the FHA can permissibly create disparate-impact liability in the first place. Therefore, it does not elucidate whether the SSA authorizes disparate-impact claims.

33. *See, e.g.*, Bell, *supra* note 16, at 2130; Dukanovic, *supra* note 29, at 915-16; Harmon, *supra* note 20, at 52-53; Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 293, 295-96 (2015); Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 732, 735 (2004).

34. *See, e.g.*, Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2405 n.44 (2017); Reva B. Siegel, *The Constitutionalism of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss's Brennan Lecture*, 106 CALIF. L. REV. 2001, 2015 n.78 (2018).

Part II develops a statutory-interpretation framework for analyzing the SSA based on Supreme Court cases interpreting the antidiscrimination provisions of other statutes. It elucidates the Court's theory of finding disparate-impact liability, which focuses primarily on congressional intent, and highlights how that theory remains prevalent today through various interpretive tools.

In Part III, the Note considers whether the SSA's discrimination prohibition reaches disparate racial impacts. Using the framework established in Part II, it conducts the inquiry by examining the historical meaning of "discrimination," congressional objectives in legislative history, and subsequent lawmaking on police reform. All point to the conclusion that Congress understood the SSA to proscribe unjustified disproportionate racial effects. This understanding is confirmed by administrative interpretations and a textual analysis.

Part IV examines the implications of this finding. The most significant implication is that the SSA's private right of action reaches disparate-impact liability and can instigate a forced funding cutoff. Thus, everyday citizens can demand that law-enforcement agencies provide a justification for practices with a disproportionate effect on minorities. This implication highlights a unique path towards reforming discriminatory policing—one that is unlike the route through Title VI, which neither includes a private right to enforce a disparate-impact framework nor requires a termination of federal funding. It also comes with an easier standard of proof than the Fourteenth Amendment, as proving discriminatory purpose often presents plaintiffs with an insurmountable obstacle. As a result, the SSA can empower marginalized groups and present a new avenue to address the pervasive issue of racially discriminatory policing.

I. APPLYING DISPARATE-IMPACT PRINCIPLES TO POLICING

American law first acknowledged disparate-impact discrimination in 1971. In *Griggs v. Duke Power Co.*, the Supreme Court considered hiring requirements that left a disproportionate number of African Americans ineligible for employment.[35] The *Griggs* Court did not conclude that the requirements were adopted with discriminatory purpose. It instead noted that the racial disparity was "directly traceable" to disadvantages that African Americans encountered in other parts of life, such as education.[36] Nevertheless, the Court unanimously interpreted Title VII as proscribing the hiring requirements and prohibited private

35. 401 U.S. 424 (1971).

36. *Id.* at 430; *see* Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878, 2903 (2014). According to the Court, "Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v.*

employers from using tests or other educational requirements with a disparate impact on African Americans unless those requirements could be shown to be related to job performance or business necessity.[37]

Disparate-impact liability exists in domains outside of employment. These domains include housing discrimination through the Fair Housing Act (FHA); age discrimination through the Age Discrimination in Employment Act (ADEA); lending discrimination through the Equal Credit Opportunity Act; disability discrimination through the Americans with Disabilities Act (ADA); and voting discrimination through the Voting Rights Act.[38] Criminal-justice reform—and police reform more specifically—is not understood to include disparate-impact principles.[39] Yet, the standard rationales for disparate-impact liability squarely apply to policing as well.

Judges and legal scholars generally understand disparate-impact law as redressing at least three types of discrimination.[40] The first is covert intentional discrimination. As Justice Kennedy detailed in a recent decision, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, "recognition of disparate-impact liability . . . plays a role in uncovering discriminatory

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United States, 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race." *Griggs*, 401 U.S. at 430.

37. *Griggs,* 401 U.S. at 432. Following *Griggs*, the Court established a three-step process that pressures employers to use employment tests that minimize disparate racial impacts. *See* Owen Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1945, 1947 (2018) ("(1) [T]he plaintiff must show that the challenged test has an adverse disparate impact on Blacks by denying employment opportunities to a disproportionately higher number of them; (2) if the plaintiff makes that showing, the burden shifts to the firm to demonstrate that the test is reasonably designed to measure job performance. If the firm fails to make that showing, the test will be barred; (3) even if the defendant firm is able to show that the employment test is an adequate measure of job performance, the plaintiff still has the opportunity to show that another test exists, which measures job performance equally well, but has less of an adverse impact on Blacks than the one preferred by the firm. If the plaintiff makes this showing, the test that the firm proposed will be barred, and presumably the alternative will be instituted."); Nicholas Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1570, 1596-97 (2019).

38. *See, e.g.*, Stephanopoulos, *supra* note 37, at 1596-1600; *see also* Fiss, *supra* note 37, at 1950-53 (detailing disparate-impact law in other domains).

39. *See, e.g.*, Fiss, *supra* note 37, at 1974-75 ("We must go beyond the current reach of the *Griggs* principle to spheres of social action, like public education and perhaps even police practices that, thanks to *Washington v. Davis*, do not appear to be covered by disparate impact doctrine." (citing 426 U.S. 229 (1976)).

40. Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV 653, 657 (2015).

intent: [i]t permits plaintiffs to counteract . . . disguised animus that escape[s] easy classification as disparate treatment."[41] On this view, disparate-impact law is an extension of individual-focused antidiscrimination norms. Given laws prohibiting discrimination, "few contemporary defendants are so foolish as to create records that reveal their invidious objectives."[42] Disproportionate effects then serve as a "proxy for the true concept of interest: a racially discriminatory purpose."[43] And disparate-impact law serves as a vehicle for targeting such purposes that are suspected but difficult to prove,[44] "prob[ing] facially neutral practices to ensure their enforcement does not mask covert intentional discrimination."[45]

The second form of discrimination is implicit bias. The Supreme Court also recently commented on the importance of disparate-impact liability for targeting "unconscious prejudices" that evade recognition as disparate treatment in *Inclusive Communities*.[46] It previously explained that "even if one assumed that [intentional] discrimination can be adequately policed through disparate-treatment analysis, the problem of subconscious stereotypes and prejudices would remain" and can be appropriately addressed through disparate-impact analyses.[47] This view recognizes that, after society rejects a formal hierarchical system, traditional norms continue to shape judgments in ways that may not be perceptible to those making decisions.[48] Thus, disparate-impact law "probe[s] facially neutral practices to ensure their enforcement does not reflect implicit bias or unconscious discrimination."[49]

The third form of discrimination is structural in nature. In *Inclusive Communities*, for example, the Court observed that disparate-impact liability allows plaintiffs to challenge arbitrarily entrenched unjust distributions, such as "zon-

41. 135 S. Ct. 2507, 2522 (2015).

42. Stephanopoulos, *supra* note 37, at 1605.

43. *Id.* at 1571.

44. *Id.* According to Stephanopoulos, without "smoking guns," we must infer discriminatory intent from circumstantial evidence. A significant racial disparity—caused by a particular practice that could have been avoided without compromising a legitimate interest— is perhaps the most probative form of circumstantial evidence. *Id.*

45. Siegel, *supra* note 40, at 657 ("Once a society adopts laws prohibiting discrimination, discrimination may simply go underground. When discrimination is hidden, it is hard to prove. Disparate impact tests probe facially neutral practices to ensure their enforcement does not mask covert intentional discrimination.").

46. *Inclusive Cmtys.*, 135 S. Ct. at 2522.

47. *See, e.g.*, Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988).

48. Siegel, *supra* note 40, at 657.

49. *Id.* at 657-58.

ing laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification";[50] criticized housing policies that "arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation"; and noted that "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers.'"[51] In doing so, the Court quoted language from *Griggs*, which first introduced disparate-impact liability as a tool for stemming structural discrimination. In requiring "the removal of artificial, arbitrary, and unnecessary barriers to employment,"[52] the *Griggs* Court explained, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[53] This account of disparate-impact law recognizes that "[a]n employer acting without bias may adopt a standard that has a disparate impact on groups because the standard selects for traits whose allocation has been shaped by past discrimination, whether practiced by the employer or by others with whom the employer is in close dealings."[54] Thus, disparate-impact law probes facially neutral practices to prevent them from unnecessarily perpetuating the effects of past intentional discrimination.[55]

Other scholars view this anti-racial-stratification commitment more expansively. On their account, *Griggs* represents a desire to end enduring social subordination rooted in slavery and maintained by Jim Crow.[56] Certain institutions must minimize the disadvantages that minorities suffer—including those disadvantages received from another institution in a different time period and domain—because they have an obligation to make good on the Constitution's promise of racial equality.[57] Accordingly, disparate-impact law functions as a tool

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50. *Inclusive Cmtys.*, 135 S.Ct. at 2521–22.

51. *Id.* at 2522 (citation omitted).

52. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

53. *Id.* at 430. According to the Court, "[A]bsence 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.* at 432.

54. Siegel, *supra* note 40, at 658.

55. *Id.* at 658-59.

56. Fiss, *supra* note 37, at 1948-49; *see also* Stephanopoulos, *supra* note 37, at 1571 (describing needless disparate racial impact as "an evil in and of itself: an unwarranted form of stratification in a society aspiring for racial equality").

57. Fiss, *supra* note 37, at 1949. In this way, writes Fiss, disparate-impact law recognizes the "interconnected character of social life and the fact that people carry the disadvantages they receive in one domain . . . to others." *Id.*; *see* Franklin, *supra* note 36, at 2902 ("The Court's 1971 decision in *Griggs v. Duke Power Co.* strongly reinforces *Gaston County*'s message that civil

for improving conditions for minorities, preventing their existing disadvantages from spreading into new areas, and eradicating the racial stratification that has long marked American society.[58]

All three standard understandings of disparate-impact law apply neatly to policing. Viewing disparate-impact law as a method for targeting racially discriminatory intent provides a particularly compelling motivation. Over the last few decades, police departments nationwide have employed a litany of law-enforcement programs fueled by racial animus. There are ample examples.[59] For instance, a federal judge in New York found that "[u]nder the NYPD's policy, targeting the 'right people' means stopping people in part because of their race."[60] The highest-ranking New York Police Department (NYPD) officer singled out as the target population for stop and frisk "young black and Hispanic youths [aged] 14 to 20."[61] Across the country, in Alamance County, the sheriff's office targeted Latinos for heightened enforcement activity, as encouraged by the County Sheriff, who fostered a culture of bias.[62] Indeed, the County Sheriff "directed his supervisory officers to tell their subordinates, 'if you stop a Mexican, don't write a citation, arrest him.'"[63] Meanwhile, disturbing police killings of African American boys and men—many caught on camera—have elevated concerns about pervasive racial discrimination in law enforcement.[64]

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rights law cannot achieve its goals without attending to the cumulative effects of disadvantage across spheres.").

58. Stephanopoulos, *supra* note 37, at 1604-05.

59. For specific cases, see the Justice Department's various findings reports detailing Fourteenth Amendment violations. *Special Litigation Cases and Matters*, U.S. DEP'T JUST., https://www.justice.gov/crt/special-litigation-section-cases-and-matterso [https://perma.cc/VTN2-5ZC6]. In fact, out of all the Civil Rights Division's pattern-and-practice investigations and/or reform agreements on policing, discriminatory policing based on race and ethnicity was an issue in nearly half of those cases. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 17 (Jan. 2017) [hereinafter CIVIL RIGHTS DIV., PATTERN AND PRACTICE POLICE REFORM WORK], https://www.justice.gov/crt/file/922421/download [https://perma.cc/NMN3-CDBM].

60. Floyd v. City of New York, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013).

61. *Id.* at 603; *see also* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—And Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1287 n.106 (2018).

62. Alamance Cty. Letter, *supra* note 9, at 5.

63. *Id.* at 5.

64. *See, e.g.*, Roseanna Sommers, Note, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304, 1307-08 (2016) ("In July [2014], Staten Island resident Eric Garner was killed by New York Police Department (NYPD) officer Daniel Pantaleo, who sought to arrest Garner for allegedly selling untaxed cigarettes. A video recorded by a bystander showed that Pantaleo put Garner in a chokehold, a maneuver banned by the NYPD, and ignored repeated pleas

Yet these problems are notoriously difficult to uncover and address. It took decades' worth of efforts by activists, grassroots organizations, and affected communities and fourteen years of litigation to hold the NYPD accountable for its discriminatory policing practices.[65] Other discriminatory practices, like those in Alamance County, often only come to light after resource-intensive, multiyear investigations by DOJ, which has special authority to launch pattern-and-practice investigations into police departments.[66] And, despite seemingly damning video footage, almost no officers involved in recent police shootings of African Americans have faced legal consequences.[67]

Implicit bias, a second motivation for disparate-impact liability, is also a well-recognized problem in policing. Numerous studies have found that "police officers and civilians are consistently more likely to associate black faces with criminality, to misidentify common objects as weapons after being shown photos of black faces, and to label photos of black people as threatening."[68] A multitude of scholars, committed to introducing implicit-bias interventions into the criminal-justice system, have even begun working collaboratively with police departments in an effort to address this serious problem.[69] DOJ also recognizes the importance of implicit bias in perpetuating discrimination in law enforcement,

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from Garner that he was unable to breathe. In November, twelve-year-old Tamir Rice was shot by Cleveland police officers who mistook the boy's pellet gun for a real firearm. Surveillance videos captured the shooting as well as the officers' failure to administer timely first aid to the boy, who died the following day. In April 2015, Walter Scott was shot eight times in the back while fleeing from officer Michael Slager of the North Charleston Police Department, who had pulled Scott over for a broken taillight. Slager initially claimed that he had feared for his life, but an amateur video later surfaced showing that Scott was running away when Slager fired." (citations omitted)).

65. Dorothee Benz, *Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory*, CTR. FOR CONST. RTS. (Aug. 12, 2013), https://ccrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices [https://perma.cc/Z6VX-V67G].

66. CIVIL RIGHTS DIV., PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 59, at 3 (2017).

67. Mitch Smith, *How the Eric Garner Decision Compares with Other Cases*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/eric-garner-police-shootings.html [https://perma.cc/7MFC-VZ23].

68. Tom James, *Can Cops Unlearn Their Unconscious Biases?*, ATLANTIC (Dec. 23, 2017), https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996 [https://perma.cc/EAH9-HKYW]; *see* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 171 (2016) ("[A] range of empirical studies detail the robust associations between black men on the one hand, and aggression, violence, and criminality on the other."); Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 952 (2019).

69. Siegel, *supra* note 61, at 1290-91 n.121.

treating implicit-bias training as "a core feature of the Division's reform agreements" addressing discriminatory policing.[70]

Finally, policing also resonates strongly with the structural perspective on disparate-impact law. It is widely acknowledged that policing in the United States is "intimately interwoven with the country's history of discrimination" against minorities.[71] As former NYPD Police Commissioner William J. Bratton commented, "some of the worst parts of black history would have been impossible without a perverted, oppressive law and order," referring to "[s]lavery, Reconstruction, Jim Crow, lynchings, [and] blockbusting."[72] And scholars have documented how authoritarian and regulatory patterns of police behavior toward minority communities have evolved across time into contemporary law-enforcement policies addressing, for example, the war on drugs and urban disorder.[73]

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70. CIVIL RIGHTS DIV., PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 59, at 27 ("Training on implicit bias has been a core feature of the Division's reform agreements since 2012."); *see also* Siegel, *supra* note 61, at 1291 n.122 ("[T]he Civil Rights Division's police reform agreements with the Baltimore Police Department, Newark Police Department, Ferguson Police Department, Cleveland Police Department, Los Angeles County Sheriff's Department, New Orleans Police Department, and East Haven Police Department all require officers to undergo implicit bias training.").

71. PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 251,(David Weisburd & Malay J. Majmundar eds., 2018), https://www.nap.edu/read/24928/chapter/9 [https://perma.cc/DZ8T-MHYA].

72. William J. Bratton, N.Y. Police Dep't Comm'r, Remarks at the National Organization of Black Law Enforcement (NOBLE) William R. Bracey CEO Symposium: State of Policing in New York City (Mar. 13, 2015), https://trustandjustice.org/resources/article/william-bratton-remarks-at-noble-friday-march-13-atlanta-ga [https://perma.cc/7BCC-7V86]. FBI Director James Comey has likewise noted, "At many points in American history, law enforcement enforced the status quo, a status quo that was often brutally unfair to disfavored groups." James B. Comey, Dir., Fed. Bureau of Investigation, Hard Truths: Law Enforcement and Race, Address at Georgetown University (Feb. 12, 2015), https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race [https://perma.cc/ W4C7-S8UJ]; *see* Fields, *supra* note 68, at 941.

73. Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 163-64 (2001); *see* Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, 48 J. BLACK STUD. 551 (2017); Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/ theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof [https://perma.cc/QE2X-WKZY]; Stephen L. Carter, Opinion, *Policing and Oppression Have a Long History*, BLOOMBERG (Oct. 29, 2015, 6:19 PM), https://www.bloomberg.com/opinion/articles/2015-10-29/policing-and-oppression-have-a-long-history # footnote-1446147495376 [https://perma.cc/SWX6-XGFS].

Further, policing is one of the most pressing domains for stopping the migration of disadvantage from one realm to another. Excessive enforcement and surveillance practices fuel mass incarceration and the accumulation of criminal records in minority neighborhoods.[74] The disproportionately large rate of imprisonment of African American men, in turn, represents a "system of racialized social control that functions in a manner strikingly similar to Jim Crow," relegating black individuals to an inferior position.[75] And the destructive consequences of convictions on individuals' ability to function as full members of society have been well documented: criminal records prevent minorities from finding work, securing stable housing, attaining public benefits, achieving education, voting, and serving on juries.[76]

II. A FRAMEWORK FOR STATUTORY INTERPRETATION

Case law on the SSA's antidiscrimination provision does not address whether the statute includes disparate-impact liability.[77] This Note aims to provide the first such account by developing, in this Part, an appropriate statutory-interpretation framework. When faced with similar questions in interpreting antidiscrimination statutes, the Supreme Court has hinged its determination on

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74. *See, e.g.*, Kathryne M. Young & Joan Petersilia, Book Review, *Keeping Track: Surveillance, Control and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318 (2016).

75. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4, 20-57 (2010).

76. U.S. COMM'N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES (2019), https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/PS45-VWQG].

77. Only a handful of cases cite the SSA's antidiscrimination provision. Of those cases, a few illustrate a willingness to associate the SSA with the prohibition of employment discrimination as consistent with Title VII, which has been interpreted to include disparate-impact liability. For example, the Fourth Circuit held that "although the district court improperly dismissed the Title VII claim, it correctly employed Title VII standards in interpreting the antidiscrimination provisions of the Crime Control Act." United States v. Virginia, 620 F.2d 1018, 1022 (4th Cir. 1980). In doing so, it cited a House Report, which states that "[i]n the area of employment cases brought under this section it is intended by the conferees that the standards of [T]itle VII of the Civil Rights Act of 1964 apply." H.R. CONF. REP. NO. 94-1723, at 32 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5410, 5418. Another case provides similar reasoning. United States v. Miami, 614 F.2d 1322, 1328-29 (1980) ("Moreover, the standards to be applied, at least in a suit in which the Attorney General's authority is based on 42 U.S.C. § 3766, are the same as those applied under Title VII."); *see also* Curl v. Reavis, No. ST-C-82-91, 1983 WL 509, at *16 (W.D.N.C. May 24, 1983), *aff'd in part*, *rev'd in part*, 740 F.2d 1323 (4th Cir. 1984) ("The violations of Title VII found above constitute, as a matter of law, a violation of 42 U.S.C. § 3789d(c)(1)."). No cases, however, thoroughly analyze whether the SSA includes disparate-impact liability in a nonemployment context.

congressional intent rather than on plain text.[78] Perhaps this is because the concept of discrimination is amorphous, as the Court has suggested, and a plain reading of antidiscrimination provisions—like that of the SSA—provides little information on disparate-impact liability.[79] Regardless, text does not often dominate the Court's reasoning in disparate-impact cases.

To elucidate the Court's theory of finding disparate-impact liability and develop a framework for analyzing the SSA, this Part analyzes Supreme Court cases interpreting the antidiscrimination provisions of other statutes. In particular, as established by Section II.A, *Washington v. Davis* presents a guide for imposing disparate-impact liability. There, the Court established a legislative-mandate requirement for expanding *Griggs* to new domains.[80] Section II.B then illustrates how this judicial construct remains prevalent today in recent jurisprudence through various interpretive tools.[81]

A. The Legislative Mandate: Griggs *and* Davis

The Supreme Court's theory for deciphering the applicability of disparate-impact liability rests largely on congressional intent. This is clear from *Griggs v. Duke Power Co.*[82] and *Washington v. Davis*.[83] In particular, *Davis*'s treatment of

78. *See infra* Section II.B.

79. The concept of discrimination—based on a plain text reading—has no clear meaning. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (White, J., concurring) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so."); Bd. of Ed. v. Harris, 444 U.S. 130, 138, 140 (1979) (holding that "the wording of the statute is ambiguous" with respect to an intent versus impact standard when the statutory language creating funding ineligibility is that an agency "otherwise engage[es] in discrimination . . . in the hiring, promotion, or assignment of employees"); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 284 (1978) ("The concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations . . . ."); *see* Smith v. City of Jackson, 544 U.S. 228, 264 (2005) (Scalia, J., concurring) (finding the ADEA's text ambiguous and thus deferring to an agency interpretation); Alexander v. Sandoval, 532 U.S. 275, 308 n.17 (2001) (Stevens, J., dissenting) (categorizing various "civil rights provisions" that prohibit discrimination as "ambiguous" with respect to disparate-impact liability). Further, there is no language in the SSA's provision that refers to the consequences of actions. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015) ("Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.").

80. *See infra* Section II.A.

81. *See infra* Section II.B.

82. 401 U.S. 424 (1971).

83. 426 U.S. 229 (1976).

Griggs revealed the Court's desire for a legislative mandate to guide its decisions sanctioning disparate-impact liability.

From the *Griggs* decision in 1971 until *Davis* in 1976, the Equal Protection Clause was commonly understood to create liability for unjustified disparate impacts—consistent with *Griggs*'s framework. Although *Griggs* technically implicated only Title VII, the *Griggs* opinion appears to implicate legal understandings of discrimination more broadly—that is, discrimination under the Constitution.[84] Further, in drafting and passing Title VII, Congress considered itself to be expanding the Supreme Court's interpretation of equal protection in *Brown* to a domain that the Court left uncovered due to the Fourteenth Amendment's state-action requirement.[85] In other words, representatives did not endeavor to create a new substantive rule for a statute. "It was therefore not surprising that . . . the legal profession treated the *Griggs* principle as governing both statute and Constitution."[86] This was reflected in case law: nearly all courts of appeals had employed *Griggs*'s disparate-impact framework in evaluating discrimination complaints under the Equal Protection Clause by 1975.[87]

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84. Fiss, *supra* note 37, at 1950-51. *Gaston County*, a case that Chief Justice Burger relied upon as crucial precedent in *Griggs*, had constitutional implications. It rested upon the Fifteenth Amendment and its codification in the Voting Rights Act of 1965. *See* Gaston County v. United States, 395 U.S. 285 (1969); *see also* Fiss, *supra* note 37, at 1951 ("[T]he attention Justices ordinarily pay to the language of a statute was replaced by a reference to the ancient fable of the stork and fox, a mode of analysis more suited to constitutional exegesis than statutory interpretation.").

85. Fiss, *supra* note 37, at 1951.

86. *Id.*

87. Reva B. Siegel, *Foreward: Equality Divided*, 127 HARV. L. REV. 1, 12-15 (2013) ("During the 1970s, when plaintiffs brought equal protection challenges to public employment selection criteria with a racially exclusionary impact, at least eight federal courts of appeals employed disparate impact frameworks in adjudicating these lawsuits, all importing to the constitutional context the liability rule that had been set down in *Griggs*."); *see Davis*, 426 U.S. at 426 ("[V]arious Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications."); Siegel, *supra* note 40, at 661 ("In 1971, when the Burger Court recognized the disparate impact cause of action under Title VII in *Griggs*, there was *no clear distinction between statutory and constitutional equality standards*. In this period, many federal courts thought that inquiry into state action with a racial disparate impact was required by the Equal Protection Clause."); *see also* David J. Galalis, *Environmental Justice and Title VI in the Wake of* Alexander v. Sandoval*: Disparate-Impact Regulations Still Valid Under* Chevron, 31 B.C. ENVTL. AFF. L. REV. 61, 92 n.250 (2004) ("[In *Washington v. Davis*,] the Court also recognized a long line of appellate cases that had 'expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation.' The Court then found it necessary to disagree explicitly with

The Court in *Davis*, however, downgraded disparate impact from an Equal Protection Clause principle to a statutory right.[88] In *Davis*, rejected applicants sued the Washington, D.C. police department under the Fifth Amendment's equal protection component as well as under Title VII. The applicants asserted that the department's recruiting procedures were racially discriminatory because they had no relationship to job performance and excluded a disproportionately high number of black applicants. The Court responded by characterizing the *Griggs* principle as a statutory rule, drawing a strong distinction between the Constitution and statute.[89] The Court required proof of "discriminatory purpose" for a constitutional claim under the Equal Protection Clause.[90]

In doing so, the *Davis* Court introduced a larger theory for imposing disparate-impact liability. After constraining the reach of *Griggs*, the Court wrote, "[in] our view, extension of the [*Griggs*] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription."[91] By stating that the courts should wait for guidance from the legislature, the Justices indicated that Congress—and not the courts—was responsible for furthering America's civil-rights agenda in this

these cases and offer a policy analysis of why proof of discriminatory intent is a necessary component of showing an Equal Protection violation, thereby implicitly indicating that prior to *Washington v. Davis*, the issue had not yet been conclusively settled.").

88. *See* Fiss, *supra* note 37, at 1950 ("The majority drew a bold distinction between constitution and statute and downgraded the *Griggs* principle to a statutory rule."); *see also* Siegel, *supra* note 87, at 16 ("In *Washington v. Davis*, the Court rejected the many circuit decisions that employed the *Griggs* disparate impact framework to evaluate discrimination complaints against public employers under the Equal Protection Clause . . . ."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 772 (2011) ("When *Davis* declined to permit disparate impact, standing alone, to raise the burden of justification required from the state, the constitutional and statutory regimes tacked apart. Disparate impact on a protected group, in and of itself, did not trigger any heightened burden of justification by the state under the constitutional equal protection rubric. It did, however, trigger a heightened burden of justification by an employer under the congressional antidiscrimination rubric.").

89. Fiss, *supra* note 37, at 1950; *see Davis*, 426 U.S. at 239 ("[Title VII standards are] not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."). According to Fiss, this was an irregular move. The Court could have avoided deciding whether the *Griggs* principle had a constitutional basis since another ground for the decision was available. Fiss, *supra* note 37, at 1951.

90. *Davis*, 426 U.S. at 240–42 ("[T]he basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose . . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

91. *Id.* at 248.

arena.[92] Thus, in essence, the Court imposed a legislative-mandate requirement for expanding the *Griggs* principle to new domains.[93]

B. Finding Disparate-Impact Liability

The judicial construct that responsibility for spreading disparate-impact liability lies with Congress remains prevalent today. Indeed, Supreme Court doctrine on disparate impact often focuses on whether there is a congressional mandate for disparate-impact liability.[94] A mandate is not often explicit in the text of the statute, but it can be deduced from legislative history, historical context, and even subsequent legislative action. To better illustrate the importance of the legislative mandate and to more fully ground this Note's approach to statutory interpretation, this Section will detail the Supreme Court's approach when considering whether a statute includes disparate-impact liability in cases on employment, housing, age, disability, and federal funds.

1. Congress's Understanding of "Discrimination"

In analyzing whether a statute includes disparate-impact liability, the Court consistently attempts to achieve Congress's intent at the time the statute was passed. This has, at times, involved determining representatives' understanding of the word "discrimination" in passing the statute. Decisions on Title VI are a striking example of the Court's commitment to elucidating whether Congress intended to proscribe disparate racial impacts in programs receiving federal financial assistance—an endeavor that has focused largely on legislative history. The story begins with *Lau v. Nichols* in 1974.[95] In *Lau*, the Court concluded that Title VI itself proscribed disparate impact by drawing meaning from the relevant agency regulations, which clearly proscribed disparate effects, and from congressional intent evident in a floor debate on Title VI. The Court quoted Senator Humphrey's statement: "Simple justice requires that public funds, to which all

92. Fiss, *supra* note 37, at 1951-52.

93. For a fuller defense of this theory of disparate impact, see *id.* at 1959.

94. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015); Fiss, *supra* note 37, at 1958-61; Stephanopoulos, *supra* note 37, at 1627-28.

95. 414 U.S. 563, 566 (1974). The Court also extended Department of Health, Education and Welfare (HEW) regulations support, commenting that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed . . . [and w]hatever may be the limits of that power, they have not been reached here." *Id.* at 569.

taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[96]

In 1978, the issue resurfaced in *Regents of California v. Bakke*.[97] Noting that "[t]he language of [Title VI] . . . is majestic in its sweep," the Court first determined that the concept of discrimination has various interpretations, including disparate impact.[98] As a result, the Court looked to "whatever aid is available in determining the precise meaning of the statute."[99] The remainder of the Court's reasoning rested largely on contemporary congressional intent found in legislative history:

> Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.[100]

The Court emphasized that "supporters of Title VI repeatedly declared that the bill enacted constitutional principles."[101] For example, the opinion detailed the introduction of the bill by Representative Celler,[102] the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, as well

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96. *Lau*, 414 U.S. at 569.

97. 438 U.S. 265 (1978).

98. *Id.* at 284-87 (1978). The opinion of Justice Powell, though written only for himself, provided the fifth vote in this case and is therefore the controlling opinion.

99. *Id.* at 284.

100. *Id.* at 284-85.

101. *Id.* at 285.

102. *Id.* at 285-86. Justice Powell quoted Representative Celler, who stated,

> [T]he bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association.

Id. (emphasis omitted) (citations omitted).

as statements from other sponsors, all of whom shared the view that Title VI incorporated a constitutional standard.[103] It also cited the declarations of various senators for further evidence of constitutional principles.[104] "In view of the clear legislative intent," concluded the Court, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[105]

Five years later, in *Guardians Association v. Civil Service Commission*, black and Hispanic members of the New York City Police Department alleged that written examinations used by the Department to make hiring and layoff decisions had a discriminatory impact on minority candidates and officers.[106] The Supreme Court was deeply divided. Nevertheless, seven Justices of the *Guardians* Court agreed that proof of discriminatory purpose was required.[107] Indeed, Justice Powell, with whom Chief Justice Burger and Justice Rehnquist joined, concurred in the judgment of the Court. He concluded that, given *Bakke*'s "view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment," and noted that Justices Brennan, White, Marshall, and Blackmun's "thorough analysis of the legislative history" in *Bakke* reached the same conclusion.[108] Justice O'Connor as well as Justice Stevens, with whom Justices Brennan and Blackmun joined, agreed on *Bakke*'s construction of Title VI based on stare decisis.[109]

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103. *Id.* at 286 n.21.

104. *Id.* at 286 ("In the Senate, Senator Humphrey declared that the purpose of Title VI was 'to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.' Senator Ribicoff agreed that Title VI embraced the constitutional standard: 'Basically, there is a constitutional restriction against discrimination in the use of federal funds; and [T]itle VI simply spells out the procedure to be used in enforcing that restriction.' Other Senators expressed similar views." (citations omitted)).

105. *Id.* at 287. According to Justice Powell, "isolated statements of various legislators, taken out of context" could "be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme," *id.* at 284, thereby requiring that Title VI "be held to proscribe only those racial classifications that would violate the Equal Protection Clause," *id.* at 287.

106. 463 U.S. 582 (1983).

107. *Id.* at 610-11 (1983) (Powell, J., concurring in judgment, joined by Burger, C.J. & Rehnquist, J.); 463 U.S. at 612, 615 (O'Connor, J., concurring in judgment); 463 U.S. at 642-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.).

108. *Id.* at 610-11 (Powell, J., concurring in judgment).

109. *Id.* at 612 (O'Connor, J., concurring in judgment) ("Like Justice Stevens, I feel constrained by *stare decisis* to follow that interpretation of the statute." (internal citation omitted)); *id.* at 642 (Stevens, J., dissenting) ("Title VI must therefore mean what this Court has said it means, regardless of what some of us may have thought it meant before this Court spoke. Today, proof of invidious purpose is a necessary component of a valid Title VI claim.").

While jurisprudence on Title VI focuses on legislative history, the Court has also reasoned more broadly from the time period in seeking to determine legislators' desired reach of an antidiscrimination provision. This is evident in *Alexander v. Choate*, where the Court "assume[d] without deciding that [Section 504 of the Rehabilitation Act of 1973] reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[110] After examining the legislative landscape, the Court concluded that, given "some controversy in Congress" and other congressional actions before the Act passed, "when Congress in 1973 adopted [certain] language for [the Rehabilitation Act], Congress was well aware of the intent/impact issue and of the fact that similar language . . . consistently had been interpreted to reach disparate-impact discrimination."[111] Thus, "[i]n refusing expressly to limit [the Rehabilitation Act] to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for [the Rehabilitation Act]."[112]

This type of analysis was also critical in *Smith v. City of Jackson*'s examination of the ADEA's antidiscrimination provision. [113] But in *Smith*, a plurality of the Court reasoned from a *different* provision in the ADEA to determine Congress's understanding of the statute's antidiscrimination power. According to the *Smith* plurality, the provision "plays its principal role" in disparate-impact cases "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"[114] The plurality thus reasoned that the provision would be "simply unnecessary to avoid liability under the ADEA" if Congress had understood that liability as limited to disparate-treatment claims.[115] Therefore, the provision supported the conclusion that disparate-impact liability is available under the ADEA.

2. Congressional Objectives and Statutory Purpose

In other cases, the Court has assessed whether disparate-impact liability was necessary to combat the problem that Congress aimed to address in passing the statute. In fact, this approach represents the foundation of disparate-impact doctrine in *Griggs*. As the Court itself has described, its "opinion in *Griggs* relied primarily on the purposes of the Act"—the fact "that Congress had 'directed the

110. 469 U.S. 287, 299 (1985).

111. *Id.* at 295 n.11.

112. *Id.*

113. 544 U.S. 228 (2005).

114. *Id.* at 239 (Stevens, J., plurality section of majority opinion).

115. *Id.* at 238.

thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation.'"[116] More specifically, the Court reasoned:

> The objective of Congress in the enactment of Title VII . . . 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. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[117]

"In other words," as Justice O'Connor has observed, "the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination."[118]

Just as "[t]he objective of Congress in the enactment of Title VII" required finding that disparate-impact claims are legally cognizable under Title VII,[119] congressional objectives also inspired the Court's reasoning around the ADEA. In holding that the ADEA authorizes recovery in disparate-impact cases in *Smith*,[120] Justice Stevens described the history of the enactment of the ADEA. He emphasized the Wirtz Report, a Department of Labor study that Congress had requested on "the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[121] The report explained that, while direct animus towards older people did not account for significant discrimination, "'arbitrary' discrimination did result from certain age limits," and "discriminatory effects resulted from '[i]nstitutional arrangements that indirectly restrict the employment of older workers.'"[122] In response, Congress directed the agency

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116. *Id.* at 234-35 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)); *id*. at 261 (O'Connor, J., concurring) ("As the plurality tacitly acknowledges . . . the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose* . . . .").

117. *Griggs*, 401 U.S. at 429-30.

118. *Smith*, 544 U.S. at 262 (O'Connor, J., concurring).

119. *Griggs*, 401 U.S. at 429-30.

120. *Smith*, 544 U.S. at 240.

121. *Id.* at 232 (quoting the Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265).

122. *Id.* (quoting W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5, 15 (1965)).

head to "propose remedial legislation" and then "acted favorably on his proposal" in passing the ADEA.[123] Indeed, a plurality of the Justices even commented that "there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report."[124]

Respect for congressional goals in stemming discrimination is also evident in *Alexander v. Choate*.[125] According to the Court, "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[126] This was evident from an examination of the statute's legislative history. Indeed, the Court quoted numerous statements of representatives and senators illustrating this point.[127] The Court then determined that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent," detailing evidence in both congressional reports and, once again, statements from legislators.[128] The Court was

123. *Id.* at 232-33.

124. *Id.* at 235 n.5 (Stevens, J., plurality section of majority opinion). Both *Griggs* and the Wirtz Report, according to the plurality, "ruled out discrimination based on racial animus as a problem" and identified arbitrary obstacles with unfair impacts on the population of concern. *Id.*

125. 469 U.S. 287, 299 (1985).

126. *Id.* at 295.

127. *Id.* at 296 ("Representative Vanik, introducing the predecessor to § 504 in the House, described the treatment of the handicapped as one of the country's 'shameful oversights,' which caused the handicapped to live among society 'shunted aside, hidden, and ignored.' Similarly, Senator Humphrey, who introduced a companion measure in the Senate, asserted that 'we can no longer tolerate the invisibility of the handicapped in America . . . .' And Senator Cranston, the Acting Chairman of the Subcommittee that drafted § 504, described the Act as a response to 'previous societal neglect.' Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus." (internal citations omitted)).

128. *Id.* at 296-97 ("For example, elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped. Similarly, Senator Williams, the chairman of the Labor and Public Welfare Committee that reported out § 504, asserted that the handicapped were the victims of '[d]iscrimination in access to public transportation' and '[d]iscrimination because they do not have the simplest forms of special educational and rehabilitation services they need . . . .' And Senator Humphrey, again in introducing the proposal that later became § 504, listed, among the instances of discrimination that the section would prohibit, the use of 'transportation and architectural barriers,' the 'discriminatory effect of job qualification . . . procedures,' and the denial of 'special educational assistance' for handicapped children." (citations omitted)).

unwilling to accept an interpretation of the Act that would make these various congressional endeavors "ring hollow."[129]

Finally, while not central to the Court's reasoning in *Inclusive Communities*, the Court commented that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose."[130] Both the overarching purpose of the Act as well as its legislative history, in the Court's view, illustrated that "[t]he FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy."[131] According to the Court, "[t]hese unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification," and "[s]uits targeting such practices reside at the heartland of disparate-impact liability."[132]

3. Subsequent Legislative Actions

The Supreme Court has also deduced congressional intent from subsequent legislative actions. Indeed, in *Inclusive Communities*, much of the Court's reasoning rested on an analysis of the FHA's 1988 amendments, which signaled that Congress approved disparate-impact liability.[133] Citing case law as well as legislative history, including congressional reports and debates, Justice Kennedy first drew meaning from the idea that "all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims" when Congress amended the FHA, and "Congress was aware of this unanimous precedent . . . [yet] retain[ed] the relevant statutory text."[134] "Against this background understanding in the legal and regulatory system, Congress' actions . . . [are] convincing support for the conclusion that Congress

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129. *Id.* at 297.

130. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2511 (2015).

131. *Id.*

132. *Id.* at 2521-22.

133. *Id.* at 2519-21; *see also* Fiss, *supra* note 37, at 1959 ("In *Inclusive Communities* as in *Ricci*, Kennedy attributed responsibility to Congress for this extension of disparate impact doctrine to housing and characterized the Court's role as merely carrying out a congressional mandate. This enabled him to reconcile his ruling with *Washington v. Davis* and to give a nod to the familiar conservative tenet that might have given rise to that decision—that political branches, not the judiciary, should be primarily responsible for the reconstruction of American society.").

134. *Inclusive Cmtys.*, 135 S. Ct. at 2519 ("If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is presumed to carry forward that interpretation." (quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012))).

accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability."[135]

Second, Justice Kennedy concluded that three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.[136] "Indeed, none of the[] amendments would make sense if the FHA encompassed only disparate-treatment claims."[137] That was the case because there generally is no disparate-treatment liability if an actor makes a decision based on the exemptions specified in the 1988 amendments. Thus, "if [disparate treatment] were the sole ground for liability, the amendments merely restate[d] black-letter law."[138] According to the Court, then, "[i]n short, the 1988 amendments signal[ed] that Congress ratified disparate-impact liability,"[139] and that ratification was "of crucial importance t[o] the existence of disparate-impact liability."[140]

Inclusive Communities is not alone. Reasoning based on subsequent legislative action was also critical in *Ricci v. DeStefano*, a recent case concerning disparate-impact liability in employment.[141] In *Ricci*'s reasoning around the requirements of Title VII, the Court repeatedly turned to the Civil Rights Act of 1991 to ascertain Congress's conception of the disparate-impact power in employment.[142]

4. Administrative Interpretation

Numerous Supreme Court cases also cite administrative interpretations of the relevant act, such as agency regulations, for additional support of disparate-impact liability. For example, the *Griggs* Court drew meaning from "[t]he administrative interpretation of the Act by the enforcing agency," emphasizing that

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135. *Id.* at 2520.

136. *Id.*

137. *Id.* at 2520–21.

138. *Id.* at 2521.

139. *Id.*

140. *Id.* at 2519.

141. 557 U.S. 557 (2009).

142. *Id.* at 580 ("That assertion, however, ignores the fact that, by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination."). As Fiss wrote, "The primary purpose of this statute . . . was to overturn a 1989 decision of the Supreme Court that, according to the sponsors of the legislation, had weakened the disparate impact doctrine of *Griggs*. The 1991 Act proceeded, not by amending the prohibition against discrimination based on race that was enacted in 1964, but by adding a separate provision governing disparate impact liability." Fiss, *supra* note 37, at 1953 (footnote omitted).

it "is entitled to great deference."[143] In addition, a plurality of the *Smith* Court arrived at its conclusion by similarly heeding the interpretation of the implementing agency.[144] Concurring, Justice Scalia found that the ADEA supported disparate-impact claims because the EEOC's endorsement of this interpretation was owed deference.[145] Administrative interpretations have also been weighed favorably in interpreting Title VI. For example, in *Lau v. Nichols*, the Court concluded that Title VI proscribed disparate impact in part by drawing meaning from the relevant agency regulations, which proscribed disparate racial effects.[146]

5. Textual Analysis

There was no analysis of Title VII's actual language underpinning the *Griggs* Court's conclusion.[147] Nevertheless, the Court has "subsequently noted that [its] holding represented the better reading of the statutory text as well"[148] and occasionally conducted textual analyses of other statutes to ascertain whether they include disparate-impact liability. In *Smith*, for example, the Court highlighted textual consistencies between Title VII and the ADEA: "Except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of . . . the ADEA is identical to [Title VII]" and "[o]ther

143. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

144. Smith v. City of Jackson, 544 U.S. 228, 239 (2005) ("Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U.S.C. § 628, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory.").

145. *Id.* at 244-45 (Scalia, J., concurring).

146. 414 U.S. 563, 566-67 (1974). In addition, in *Bakke*, "the opinion of four Justices . . . stressed that agency regulations authorizing and in some cases requiring affirmative action programs were 'entitled to considerable deference in construing Title VI.'" Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 619 (1983)(Marshall, J., dissenting) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 342 (1978)). And in Justice Marshall's *Guardians* dissent, he noted that after Congress passed Title VI, seven federal agencies and departments carrying out the mandate of Title VI soon promulgated disparate-impact regulations. "As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of Title VI," according to Justice Marshall. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting).

147. *Smith*, 544 U.S. at 261 (O'Connor, J., concurring) ("As the plurality tacitly acknowledges . . . the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose* . . . ."); *see also id.* at 235 (plurality opinion) ("[O]ur opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view . . . .").

148. *Id.*

provisions of the ADEA also parallel the earlier statute."[149] The plurality expanded upon these similarities.[150]

The Court has also taken meaning from statutes' results-oriented language. In fact, according to the Court, "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors."[151] Following this mandate in *Inclusive Communities*, Justice Kennedy began by examining the FHA's text, finding that "results-oriented language counsel[ed] in favor of recognizing disparate-impact liability."[152] It is not difficult, however, to read this analysis as strained.[153]

III. THE SAFE STREETS ACT INCLUDES DISPARATE-IMPACT LIABILITY

Employing the Supreme Court's mode of analysis in the context of the SSA leads to the conclusion that the statute covers disparate-impact liability. Supreme Court doctrine on disparate impact often focuses on whether there is a congressional mandate for disparate-impact liability. With respect to the SSA's antidiscrimination provision, this Part argues that there is in fact a congressional mandate for three independent reasons: a historically informed reading of the term

149. *Id.* at 233 (plurality opinion).

150. *Id.* at 233-34 ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. We have consistently applied that presumption to language in the ADEA that was 'derived *in haec verba* from Title VII.' Our unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is therefore a precedent of compelling importance." (citations omitted)).

151. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015); *see Smith*, 544 U.S. at 236 ("[T]he text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.").

152. *Inclusive Cmtys.*, 135 S. Ct. at 2518. "Under the FHA it is unlawful to 'refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race' or other protected characteristic, or 'to discriminate against any person in' making certain real-estate transactions "because of race" or other protected characteristic.'" *Id.* at 2511; *see also* 42 U.S.C. § 3604 (2018). According to the Court, "otherwise make unavailable" indicated result-oriented phrasing that refers to "the consequences of an action rather than the actor's intent." *Inclusive Cmtys.*, 135 S. Ct. at 2518.

153. *See, e.g.*, Fiss, *supra* note 37, at 1960 n.40. ("Justice Kennedy's reading of the 1968 statute appears as a stretch, for, in context, 'otherwise make unavailable' appears as a catch-all phrase designed to cover the multiplicity of ways in which a property owner may discriminate on the basis of race. It is noteworthy that the distinction between effect verses [sic] purpose played little or no role in the evolution of civil rights legislation in the 1960s and in fact achieved its significance in the law only after the 1976 decision in *Washington v. Davis*.").

"discrimination," the purposes of the antidiscrimination provision, and subsequent amendments to the Act all indicate a congressional conception that includes disparate-impact liability. Administrative interpretation and a textual analysis confirm this finding.

A. Congress's Understanding of "Discrimination"

The timing of the addition of the SSA's antidiscrimination provision provides strong support for a congressional understanding of discrimination that includes disparate-impact liability. The original SSA, passed in 1968, did not include a provision on discrimination. Instead, it gave DOJ a broad grant of authority for rulemaking.[154] The part of the Act in which the antidiscrimination provision currently stands, Section 518, simply included provisions noting that the Act authorizes neither federal commandeering of local law-enforcement agencies nor the conditioning of grants upon the adoption of a quota.[155] These provisions remain in the current version.[156]

Congress added the SSA's first discrimination prohibition in 1973. The antidiscrimination provision was inserted into Section 518 of the 1968 Act, following the provisions on commandeering and quotas. According to Section 518(c)(1), "No person in any state shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title."[157] Congress amended the SSA again in

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154. Pub. L. No. 90-351, § 501, 82 Stat. 197, 205 (1968) ("The Administration is authorized, after appropriate consultation with representatives of States and units of general local government, to establish such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purpose of this title.").

155. *Id.* at 208 ("(a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof. (b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.").

156. 34 U.S.C. § 10228 (2018).

157. Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197. Congress passed the Crime Control Act of 1973 "[t]o amend title I of the Omnibus Crime Control and Safe Streets Act of 1968." *Id.*

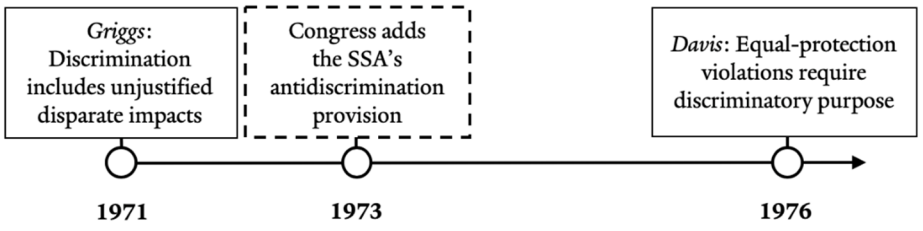
1976 to include employment within the antidiscrimination provision; Section 518(c)(1) then read:

> No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *or denied employment in connection with* any program or activity funded in whole or in part with funds made available under this title.[158]

The timing of the addition of the antidiscrimination provision in 1973 is crucial in light of the state of constitutional law. In 1971, the Supreme Court in *Griggs* interpreted Title VII as proscribing an unjustified disparate impact on racial groups. And, as noted above, while *Griggs* technically implicated only Title VII, the opinion appeared to define discrimination under the Constitution. Accordingly, from 1971, the time of *Griggs*, until 1976, when the Court decided *Davis*, *Griggs* governed both statute *and* the Constitution.[159]

Given this historical backdrop, the timing of the SSA's antidiscrimination provision suggests a disparate-impact interpretation stemming from the statute's text itself. Congress wrote the antidiscrimination provision into the SSA in 1973—two years after *Griggs*, but three years before *Davis*. Thus, it falls squarely within the period in which disparate-impact liability was encompassed within the legal understanding of discrimination.

FIGURE 1.
TIMING OF THE SSA'S ANTIDISCRIMINATION PROVISION



158. Crime Control Act of 1976, Pub. L. No. 94-503, § 122, 90 Stat. 2407, 2414 (emphasis added). Congress passed the Crime Control Act of 1976 "[t]o amend title I of the Omnibus Crime Control and Safe Streets Act of 1968." *Id.*

159. *See supra* Section II.A on The Legislative Mandate.

B. Congressional Objectives and Statutory Purpose

The goals of Congress in adding the antidiscrimination provision, as evident from legislative history, support this effects-based interpretation. For example, Representative Jordan, who drafted the provision, described the problem that the provision aims to correct:

> One need go no further than the reports of decided Federal cases to obtain evidence of the persistence and prevalence of racism in law enforcement. For example, a Federal district court in Mississippi found in 1971 that the Mississippi Highway Patrol had never employed a single black officer. Of 743 persons employed by the department of public safety in 1971, only 17 were blacks and they were all employed as cooks or janitors. *Morrow v. Crisler*, 4 E.P.D. paragraph 7541 (S.D. Miss. 1971); *aff'd.* F.2d (5th Cir.; April 18, 1973). While the situation in Mississippi is perhaps the most blatant, similar problems of discrimination have been found by Federal courts to exist in Alabama, Massachusetts, and Bridgeport, Conn. *See NAACP v. Allen*, 340 F Supp. 703 (M.D. Ala. 1972); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972); *Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission* 5 CCH E.P.D. 8502 (D. Conn. 1973).[160]

Representative Jordan's description "of the persistence and prevalence of racism in law enforcement" centers on situations with a disparate racial impact—not situations limited to intentional discrimination. Indeed, in the main example relied upon, *Morrow*, the court specifically made a "finding of an absence . . . of proof by a preponderance of the evidence of a conscious or intentional discrimination on the part of the defendants or that they acted from ill will or evil motives or lacked good faith."[161] Nevertheless, the court concluded that the "policies and practices of the defendants, as revealed by the statistical evidence, constitute a pattern and practice of racial discrimination in hiring and employment practices, albeit unintentional."[162] Similarly, according to the court in *Castro*, the "case epitomize[d] the classic, clumsy and yet unavoidable attempt to rectify, through the courts, long standing though not consciously intended discriminatory selection policies."[163] Again, "the discrimination was not intended"; the First Circuit dealt with practices that "ha[d] been discriminatory in effect."[164] *Bridgeport*

160. 119 CONG. REC. 20,070 (1973) (statement of Rep. Jordan).

161. Morrow v. Crisler, No. 4716, 1971 WL 184, at *13 (S.D. Miss. Sept. 29, 1971).

162. *Id.* at *14.

163. Castro v. Beecher, 459 F.2d 725, 727 (1st Cir. 1972).

164. *Id.* at 727-28.

Guardians also concerned policies that had "the effect of denying plaintiffs their constitutional right to the equal protection of the laws,"[165] and there are no references to intent or purpose in *NAACP v. Allen*, in which the court characterized the "discriminatory conduct by state officials" as "unexplained and unexplainable."[166] Thus, it was precisely because of the *consequences* of police-department practices — not their motivations — that legislators drafted the SSA's antidiscrimination provision.

According to Representative Jordan, it was DOJ's responsibility "to develop an effective civil rights enforcement program" in order to curb this type of conduct — conduct defined by its racial disparate impact.[167] "The civil rights provisions in th[e] bill g[a]ve [the agency] the necessary powers and require[d] the establishment of an effective civil rights program."[168] In other words, the provision was intended to imbue DOJ with the power to curb discriminatory effects. Additional statements support the notion that DOJ has a broad civil-rights responsibility to ensure that its funds are not distributed to entities that will use them in a discriminatory manner,[169] a responsibility that should even go beyond traditional pathways in courts.[170]

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165. Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 354 F. Supp. 778, 798 (D. Conn. 1973).

166. 340 F. Supp. 703, 705 (M.D. Ala. 1972).

167. 119 CONG. REC. 20,070 (1973) (statement of Rep. Jordan).

168. *Id.* at 20,071.

169. *Id.* at 22,059 (statement of Sen. Bayh) (commenting on the state of affairs eliciting the addition of the discrimination provision and stating that DOJ "still makes little effort to examine possible discriminatory distribution of services"); *see also id.* at 20,097 (statement of Rep. Jordan) ("[DOJ] has the responsibility to see to it that the funds, these great, tremendous Federal resources are not dispensed in a manner that will discriminate against the populace on the basis of race, color, national origin, or sex."); *id.* at 20,070 (statement of Rep. Jordan) ("The existing [] statutes contain no provisions designed to prevent discrimination in benefits or employment on the basis of race, color, national origin, or sex. As a result, [DOJ] has been particularly slow to develop an effective civil rights enforcement program. In fact, it was not until 2 years after its establishment that [DOJ] admitted it has a civil rights enforcement responsibility and created a civil rights compliance office and implementing regulations.").

170. *Id.* at 20,070 (1973) (statement of Rep. Jordan) ("This amendment was necessary to reverse [DOJ]'s traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements. Despite this declared preference for judicial remedies, which is not the procedure used for any other violation of [DOJ] guidelines or statutes, [DOJ] has not initiated a single action in court and has intervened in only a limited number of cases brought by private groups. Even these interventions were begun long after the suits were filed and usually as the result of external pressures of court order. In effect, [DOJ] has had no civil rights enforcement program.").

Discussions over the aforementioned quota provision also support the conclusion that the SSA's antidiscrimination power—as envisioned by Congress—reaches disparate impact. When the 1973 bill first left the House Committee on the Judiciary on June 5, 1973, the House Report noted:

> For the first time the Act itself contains provisions protecting civil rights and civil liberties. In addition to deleting prohibitions against conditioning a grant on the adoption by an applicant of a quota system or other program to achieve racial balance, the bill reiterates the anti-discrimination requirements of title VI of the Civil Rights Act of 1964, but also prohibits discrimination on the basis of sex.[171]

In essence, the original addition of the antidiscrimination provision was accompanied by the removal of the quota provision clarifying that the SSA did not authorize the conditioning of grants upon the adoption of a quota.[172]

Legislators eventually reinstated the quota provision during the final debate in the House; however, their exchange is relevant because it helps illustrate why the SSA's drafters added the antidiscrimination provision. The drafters wanted to initiate a positive, comprehensive approach for stemming civil-rights abuses. Such an approach potentially conflicted with the quota provision. For example, Representative Seiberling, arguing against re-adding the quota provision, commented:

> If we left [the quota provision] in the statute we would have retained a narrow, negative approach toward the civil rights problem, and we were substituting a positive, comprehensive approach and therefore it was no

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171. H.R. REP. NO. 93-249, at 7 (1973); *see* 119 CONG. REC. 19,702 (1973) (statement of Rep. Rodino) ("For the first time the act itself contains provisions protecting civil rights and civil liberties. In addition to deleting prohibitions against conditioning a grant on the adoption by an applicant of a quota system or other program to achieve racial balance, the bill reiterates the antidiscrimination requirements of title VI of the Civil Rights Act of 1964, but also prohibits discrimination on the basis of sex. The bill strengthens the ban on discrimination by making clear that the fund cutoff provisions of section 509 of the act and of title VI of the Civil Rights Act of 1964 both apply, and that appropriate civil actions may be filed by the administration, and that 'pattern and practice' suits may be filed by the Attorney General.").

172. H.R. REP. NO. 93-249 (1973). More specifically, while the 1973 bill's section 518(a) included the 1968 Act's anti-commandeering provision, the quota provision (originally section 518(b)) was replaced by the antidiscrimination provision, which became section 518(b)(1). H.R. 8152, 93d Cong. (1973); H.R. REP. NO. 93-249 (1973).

> longer appropriate to put in negative language. [The Committee was] emphasizing that this bill should promote civil rights . . . .[173]

It is difficult to believe that, if the goal of the provision was to create a "positive" and "comprehensive" approach for promoting civil rights in the time period following *Griggs*, Congress intended that this approach be limited to an intent standard—especially without defining it as such.[174]

The ultimate readdition of the quota provision does not change that conclusion. Indeed, legislators re-added it because they feared its removal might suggest that Congress planned to require quotas. In doing so, they did not want to mitigate the statute's antidiscrimination power.[175] Thus, discussions of the quota provision as well as other parts of the antidiscrimination provision's legislative history provide strong evidence that Congress's purpose in codifying the provision was to stem disparate racial impacts.

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173. 119 CONG. REC. 20,098 (1973) (statement of Rep. Seiberling).

174. In response, one could argue that Congress was wholly unaware of Supreme Court doctrine, thus invalidating this line of reasoning. However, as the Supreme Court has documented, "Congress in 1973 . . . was well aware of the intent/impact issue" facing courts. Alexander v. Choate, 469 U.S. 287, 295 n.11 (1985).The quota debate supports this notion. Representatives were dedicated to ensuring that the antidiscrimination provision was not misconstrued in light of recent legal activity. For example, Representative Hutchinson commented, "The reason I think we should leave the present [quota-prohibition] language in the law . . . is that every time we make any change in [statutes], somebody goes into a court and argues, quite persuasively and effectively sometimes, that the Congress intended to make some change." 119 CONG. REC. 20,097 (1973). His concern was echoed by other legislators. 119 CONG. REC. 20,098 (1973) (statement of Rep. Waggonner) ("It is equally crystal clear that if we want to open the doors to question and make possible quotas—and when we make them possible they are going to come to be—then vote this amendment down. Please do not make that mistake. Do not give the courts the chance to say, as they will surely do, that Congress is no longer opposed to quotas.").

175. The quota provision was added back into the SSA on June 18, 1973, right before the Act passed the House. Legislators feared:

> If on the one hand we vastly strengthen the civil rights provisions, but on the other hand we are taking out what is part of the current law, . . . there can be no other reception for this by the administration, or by any, group of persons around the country, than that we intend to require quotas or percentage ratios, and we ought to condition grants upon the adoption of such a system by a prospective grantee.

119 CONG. REC. 20,096 (1973) (statement of Rep. Flowers). Notably, there was no intention of weakening the civil rights promises of the amendment. *Id.* at 20,097 (1973) (statement of Rep. Hutchinson) ("For the life of me, I cannot see where those two provisions are at all conflicting with each other. They can stand together."); *see also id.* at 20,097 (1973) (statement of Rep. Jordan) ("If we were to approve that amendment it would be tantamount to the House of Representatives today adopting a rule that no rhinoceroses should be admitted to the floor of the House of Representatives when no rhinoceroses are trying to get in.").

C. Subsequent Legislative Actions

Since the Court has also looked to subsequent legislative action to determine whether there is a legislative mandate for disparate-impact liability, the next two Sections analyze amendments to the SSA and subsequent legislation in the realm of policing. These subsequent legislative actions support the conclusion that the SSA creates disparate-impact liability.

1. Amendments to the SSA

As noted, the antidiscrimination power of the SSA only increased as time passed. Congress amended the antidiscrimination provision in 1976 to include a clause on employment.[176] The 1976 changes, again spearheaded by Representative Jordan, also included modifications to the Act's enforcement mechanism. Congress created a mandatory procedure that DOJ must follow in the event that a fund recipient is found to discriminate.[177] A subsequent Senate Report explained the purpose of the new subsection:

> [It was] added to the Crime Control Act in 1976 in response to the concern expressed by several members of Congress that [DOJ] had to improve its efforts to secure the civil rights compliance of its recipients. Subsection (c) of Section 815, the Jordan Amendment, is considered one of the most comprehensive and effective civil rights enforcement statutes. The Jordan Amendment is the administrative mechanism used for enforcing titles VI and VII of the 1964 Civil Rights Act. It provides for automatic funding cutoff procedures upon a finding of noncompliance . . . .[178]

These changes to the antidiscrimination provision are notable given the Supreme Court's disparate-impact jurisprudence. Congress's explicit designing of a mechanism for enforcing Title VI and VII in the SSA suggests that legislators reviewed those provisions, as well as the conduct they proscribed, in designing

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176. Crime Control Act of 1976, Pub. L. No. 94-503, § 122(b), § 518(c), 90 Stat. 2407, 2418 (codified as amended in scattered sections of 42 U.S.C.) ("(b) Section 518(c) of [42 U.S.C. § 3766] is amended to read as follows: '(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *or denied employment in connection with* any program or activity funded in whole or in part with funds made available under this title.'" (emphasis added)).

177. H.R. REP. NO. 94-1155, at 25 (1976).

178. S. REP. NO. 96-142, at 56-57 (1979).

the SSA. *Griggs* in 1971 had firmly established that Title VII proscribed unjustifiable disparate impacts.[179] Then, three years after *Griggs* in 1974, the Supreme Court held in *Lau v. Nichols*[180] that Title VI also proscribed unjustifiable disparate impacts.[181] Congress reconsidered the SSA and made changes to the antidiscrimination provision in 1976, but legislators did not alter the text in a manner that curtailed its strength.[182] Instead, they decided to *strengthen* the provision, making the enforcement mechanism for both Titles even more forceful than that of Title VI, which does not require automatic funding cuts for noncompliance.[183] Thus, Congress's decision to make the SSA "one of the most comprehensive and effective civil rights enforcement statutes"[184] in light of the precedent defining the disparate-impact standards under Title VI and Title VII—and one with a more aggressive enforcement mechanism than Title VI—suggests approval for disparate-impact liability within the SSA.

Next, DOJ made clear its definition of the SSA's antidiscrimination provision through regulations in 1977. Those regulations included disparate-impact liability:

> A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination under section 518(c)(1) of the Crime Control Act or section 262(b) of the Juvenile Justice Act, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, sex, national origin, or religion.[185]

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179. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

180. 414 U.S. 563 (1974).

181. *Id.* at 568.

182. *See* Crime Control Act of 1976, Pub. L. No. 94-503, § 122(b), § 518(c), 90 Stat. 2407, 2418-21 (codified as amended in scattered sections of 42 U.S.C.).

183. *Id.*

184. S. REP. NO. 96-142, at 56-57 (1979).

185. 42 Fed. Reg. 9492, 9498 (Feb. 16, 1977) (emphasis added).

Then, in 1979, Congress undertook a significant restructuring of the SSA.[186] The 1979 restructuring changed various portions of the Act, including the section in which the antidiscrimination provision lies, but left the antidiscrimination provision itself untouched.[187] Indeed, the provision has remained largely untouched since its establishment in 1973 and strengthening in 1976.

At the most basic level, it is notable that Congress never altered the antidiscrimination provision or undercut the administrative interpretation of the SSA. Congress could have made its understanding of discrimination clear, limiting executive-branch discretion if it disagreed with the explicit disparate-impact approach that DOJ had implemented two years prior through its 1977 regulations.

More significantly, however, Congress evinced approval of DOJ's disparate-impact interpretation in its 1979 restructuring of the Act. A 1979 Senate Report noted that "enforcement regulations and procedures established by federal agencies with civil rights enforcement responsibilities . . . should continue to determine the type of remedial action which is appropriate in discrimination cases."[188] This not only suggests that Congress was aware of DOJ's implementing regulations on discrimination when it chose to maintain the SSA's antidiscrimination

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186. Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (codified as amended in scattered sections of 42 U.S.C.).

187. *Id.* at 1206.

188. S. REP. NO. 96-142, at 57 ("[T]he Committee believes that titles VI and VII and the precedents thereunder, as well as enforcement regulations and procedures established by Federal agencies with civil rights enforcement responsibilities, such as the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, should continue to determine the type of remedial action which is appropriate in discrimination cases.").

One could argue that a reference to Title VI precedent in 1979 does not show approval for disparate-impact principles in the SSA's antidiscrimination provision because *Bakke*, decided in 1978, constrained the reach of Title VI to that of the Equal Protection Clause. However, *Bakke* did not explicitly overrule *Lau*—indeed *Bakke* dealt with an entirely different issue. As Justice White explained,

> The issue in *Bakke*, however, was whether Title VI forbids intentional discrimination in the form of affirmative action intended to remedy past discrimination, even though such affirmative action is permitted by the Constitution. Holding that Title VI does not bar such affirmative action if the Constitution does not is plainly not determinative of whether Title VI proscribes unintentional discrimination in addition to the intentional discrimination that the Constitution forbids. . . . [T]he holdings in *Bakke* and *Lau* are entirely consistent.

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 590 (1983). It was not until *Guardians* in 1983 that Title VI was held to be entirely coextensive with the Constitution. *Id.*

provisions[189] but also indicates support for DOJ's approach to enforcing the statute—an approach that included disparate-impact liability.[190]

The same Senate Report provides even more support for a congressional endorsement of disparate-impact liability in the SSA. The Report explains that legislators left the provision unaltered in 1979 because the antidiscrimination amendments in 1976 already made the SSA "one of the most comprehensive and effective civil rights enforcement statutes."[191] From this explanation, two points are relevant. First, after DOJ implemented its discriminatory-effects regulation interpreting the SSA's antidiscrimination provision, Congress *intentionally left the antidiscrimination provisions unchanged* to preserve the ostensibly expansive power of the statute. Given that representatives likely reviewed the manner in which the antidiscrimination requirements were enforced in choosing not to alter them, this type of inaction again suggests congressional approval for DOJ's clear interpretation of disparate-impact liability under the Act. Second, the Report's description of the statute is instructive. For a statute to be considered one of the "most comprehensive" and "effective" antidiscrimination measures, in the wake of *Griggs* and *Davis*, the statute would likely include by its own power a more expansive understanding of discrimination than one based on intent. While caution must be exercised when drawing conclusions from congressional inaction, it is appropriate to attribute significance to such inaction when it is intentional and comes with explanatory statements.[192] Thus, the record on subsequent amendments to the SSA points to congressional support for disparate-impact liability.

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189. *Cf. Guardians*, 463 U.S. at 620 (Marshall, J., dissenting) (examining the disparate-impact power of Title VI and placing significance in the fact that "th[e] administrative interpretation of Title VI has never been altered by Congress, despite its awareness of the interpretation").

190. *Cf.* United States v. Rutherford, 442 U.S. 544, 554 (1979) (affording deference to administrative interpretation when an administrative interpretation "involves issues of considerable public controversy, and Congress has not acted to correct any misinterpretation of its statutory objectives" despite its continuing concern with the subject matter).

191. S. REP. NO. 96-142, at 57. While Congress left the text of the antidiscrimination provision untouched, it changed the title of the relevant section to "Prohibition of Federal control over State and local criminal justice agencies." *Id.* at 67.

192. *Guardians*, 463 U.S. at 620–21 (Marshall, J., dissenting); *cf.* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519-22 (2015) (drawing meaning from the fact that, during the process that led to the 1988 FHA amendments, Congress did not repudiate the circuit court decisions that had extended disparate-impact liability to housing); Alexander v. Choate, 469 U.S. 287, 295 n.11 (1985) (drawing meaning from Congress's failure to expressly limit a statute's antidiscrimination language to intentional discrimination when Congress was well aware of the intent/impact issue).

2. Subsequent Lawmaking on Police Reform

Subsequent legislative action in the domain of policing—in particular Section 14141 of the Violent Crime Control Act of 1994 (VCC)—also suggests congressional support for disparate-impact liability.[193] Congress crafted the VCC section in response to the Rodney King incident[194] and an independent commission's findings that linked King's beating to institutional failures within the Los Angeles Police Department.[195] Congress, however, recognized that police misconduct went far beyond Los Angeles and that such misconduct often had racial dimensions. It noted that "minority residents 'were disrespected, disregarded, [and] physically and verbally abused' by police"; that "police officers routinely conducted unconstitutional, harassing stops and searches of minority individuals, including requiring youths to submit to strip searches in public"; and that "a special unit within [a] police department called itself the S.N.A.T. squad, for 'Special Nigger Arrest Team.'"[196] According to Congress, such systemic misconduct involved systemic causes, stemming from "particular policies or practices that [are] reflected in a pattern of misconduct."[197] Yet "[i]f an officer was poorly trained, or was acting pursuant to an official policy . . . Justice ha[d] no authority to sue [a] police department itself to correct the underlying policy."[198] The reason was a pair of recent Supreme Court holdings pursuant to which DOJ appeared to lack standing to seek equitable relief against law-enforcement agencies.[199] Legislators wanted to enable DOJ to "sue to bring the [department's] policy . . . in line with practices accepted in most other cities."[200]

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193. 42 U.S.C. § 14141 (2012) (recodified at 34 U.S.C. § 12601 (2018)).

194. A video of Los Angeles police officers beating Rodney King caused public outrage in 1991. The officers were acquitted on state criminal charges in 1992. This triggered riots in Los Angeles and protests across the country. CIVIL RIGHTS DIV., PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 59, at 3.

195. *Id.*

196. H.R. REP. NO. 102-242, at 135-36 (1991).

197. *Id.* at 136.

198. *Id.* at 137.

199. *See* Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 743 (2017). Thus, responding directly to the Rodney King video, Congress considered legislation that would provide the federal government with a stronger role in reforming policing. This legislation was called the Police Accountability Act of 1991. H.R. 2972, 102d Cong. (1991). While the Accountability Act did not gain widespread support, its pattern-or-practice section was later incorporated in the VCC as section 14141. *Id.* at 741-44.

200. H.R. REP. NO. 102-242, at 137; *see also id.* at 138 ("The Police Accountability Act would close this gap . . . . ").

Congress used the VCC to imbue the federal government with the power to do just that. Section 14141 empowers the Attorney General to file a civil action for injunctive or declaratory relief if the Attorney General has "reasonable cause to believe" that law-enforcement officers have engaged in "a pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[201] Notably, the phrase "laws of the United States" allows DOJ to protect federal rights, like those associated with the SSA, in addition to rights created by the Constitution.

Congress's decision to enact the VCC without repudiating DOJ's disparate-impact construction of the SSA suggests Congress's willingness to assume responsibility for disparate-impact liability. In 1994, when legislators crafted the VCC, DOJ's implementing regulations on disparate-impact liability had been in existence for decades. The SSA was therefore clearly associated with disparate-impact liability.[202] Given the issues motivating Congress—that is, the racialized nature of police abuse as well as a desire to bring police departments in line with acceptable professional standards—legislators likely considered the ban on discriminatory policing in the SSA when they empowered DOJ to protect federal rights. Thus, after the Court explicitly deferred to Congress on the question of disparate impact in *Davis*, the VCC can be read as an encouraging signal for congressional approval of disparate impact under the SSA.

D. Administrative Interpretation

Agency regulations serve as an additional factor supporting disparate-impact liability. DOJ, which was involved in drafting various parts of the legislation and is the agency charged by Congress with responsibility for implementing the statute, has consistently interpreted the SSA to authorize relief on a disparate-impact theory. In fact, before Congress added the SSA's antidiscrimination provision, DOJ promulgated federal regulations prohibiting discrimination in early 1973. While these regulations only addressed employment discrimination, they required fund recipients to "conduct a continuing program of self-evaluation to ascertain whether any of their . . . policies . . . directly or indirectly ha[d] the effect of denying equal employment opportunities to minority individuals and women."[203] In other words, DOJ's interpretation of the statute has been so

201. 42 U.S.C. § 14141 (2012) (recodified at 34 U.S.C. § 12601 (2018)).

202. *See* 28 C.F.R. §§ 42.104, 42.203 (2018).

203. Equal Employment Opportunity Guidelines, 38 Fed. Reg. 6388, 6388-89 (Mar. 9, 1973) (codified at 28 C.F.R. §§ 42.301, 42.306).

deeply imbued with disparate-impact principles that its understanding of the SSA's antidiscrimination power involved an impact theory of discrimination even before Congress amended the SSA to explicitly prohibit discrimination.

DOJ expanded its definition of the SSA's discrimination prohibition through regulations in 1977—beyond its employment-focused regulations—to include broad disparate-impact liability. According to these regulations, a recipient of federal funding may not

> utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination under Section 518(c)(1) of the Crime Control Act or Section 262(b) of the Juvenile Justice Act, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, sex, national origin, or religion.[204]

Therefore, from the beginning, by focusing on the effects of programs, DOJ's regulations promulgated under the Act illustrate a clear disparate-impact interpretation of the antidiscrimination provision. This remains consistent with the regulation in effect today:

> A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any program, or the class of individuals to whom, or the situations in which, such will be provided under any program, may not directly or through contractual or other arrangements, utilize criteria or methods of administration which

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At least one court has drawn conclusions about congressional intent for employment discrimination based on these regulations. *See* United States v. Virginia, 454 F. Supp. 1077, 1083 (E.D. Va. 1978), *aff'd in part, rev'd in part*, 620 F.2d 1018 (4th Cir. 1980) ("Plaintiff points as well to the regulations promulgated under the Crime Control Act on 18 August 1972, almost a year before § 3766(c) became effective. These regulations impose on recipients a duty to 'conduct a continuing program of self-evaluation to ascertain whether any of their . . . policies . . . directly or indirectly have the effect of denying equal employment opportunities to minority individuals and women.' This provision seems to contemplate remedies based on an adverse impact theory of discrimination. Congress did nothing to require a change in this regulation in 1973 when the anti-discrimination amendments were adopted nor in 1976 when the legislation was re-enacted. Therefore, the plaintiff argues, Congress must have meant for the *Griggs* adverse impact standard to apply to cases under § 3766(c)." (quoting 28 C.F.R. § 42.306(a))).

204. Nondiscrimination in Federally-Assisted Programs—Implementation of Section 518(c) of the Crime Control Act of 1976 and Section 262(b) of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 Fed. Reg. 9498 (Feb. 16, 1977) (codified at 28 C.F.R. § 42.203(e)) (emphasis added).

> have the effect of subjecting individuals to discrimination under section 815(c)(1) of the JSIA, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, sex, national origin, or religion.[205]

These interpretations are meaningful. Indeed, according to *Griggs*, "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."[206] At the very least, the regulations serve as sources of legal understanding with "indirect democratic accountability and good governance by administrators," who are experts.[207]

E. Textual Analysis

As previously noted, a plain reading of the SSA's text does not reveal whether the statute comprehends a disparate-impact standard, and there is no effects-oriented language focusing on the effects of practices rather than their motivation.[208] The text of the SSA's antidiscrimination provision, however, serves as a meaningful interpretive tool insofar as it mirrors that of Title VI. The two statutes read as follows:

> [Safe Streets Act:] No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title.[209]

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205. 28 C.F.R. § 42.203(e) (2014). The JSIA refers to the Justice System Improvement Act of 1979.

206. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); *see also id.* at 434 ("Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."); *cf.* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

207. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 29 (2016).

208. *See supra* note 79.

209. Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 815(c)(1), 93 Stat. 1167, 1206 (codified at 34 U.S.C. § 10228(c)(1)).

> [Title VI:] No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[210]

Legislative history supports the connection between the SSA and Title VI. Indeed, the House Report describing the introduction of the SSA's antidiscrimination provision states:

> For the first time the Act itself contains provisions protecting civil rights and civil liberties. . . . [T]he bill reiterates the anti-discrimination requirements of title VI of the Civil Rights Act of 1964, but also prohibits discrimination on the basis of sex. The bill strengthens the ban on discrimination by making clear that the fund cut-off provisions of section 509 of the Act and of title VI of the Civil Rights Act of 1964 both apply, and that appropriate civil actions may be filed by the Administration, and that "pattern and practice" suits may be filed by the Attorney General.[211]

Representatives' statements support an intentional adherence to Title VI.[212]

When Congress uses the same language in two statutes having similar purposes, it can be appropriate to presume that Congress intended that the text have the same meaning in both statutes;[213] therefore, the meaning of discrimination in Title VI might inform an understanding of discrimination in the SSA. Supreme Court decisions addressing disparate impact and Title VI, however, have produced a confusing body of law. The Court's first major case to address

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210. 42 U.S.C. § 2000d (2018).

211. H.R. REP. NO. 93-249, at 7 (1973).

212. For example, Representative Barbara Jordan, who drafted Title VI's antidiscrimination language, commented, "These provisions parallel the language of title VI of the Civil Rights Act 1964 with an added prohibition of discrimination on the basis of sex, but they also specify special procedures for enforcing those provisions." 119 CONG. REC. 20,071 (1973) (statement of Rep. Jordan); *see also id.* at 20,097 (statement of Rep. Hutchinson) ("[T]he committee has taken title 6 of the Civil Rights Act of 1964 and lifted it and transplanted it verbatim into the LEAA Act, and that is all right. As a matter of fact, LEAA has been governed by that provision of the law from the start. This just makes it clear, no question about it, that title 6 of the Civil Rights Act of 1964 applied to LEAA just like it applies to any other agency of government."); *id.* at 22,075 (statement of Sen. Javits) ("I am also pleased to note that recently LEAA has undertaken new efforts in carrying out its civil rights responsibilities. The administration has suggested strengthening LEAA's civil rights enforcement powers and responsibilities. These provisions parallel the language of title VI of the Civil Rights Act of 1964 with an added prohibition against discrimination on the basis of sex.").

213. Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

whether Title VI allows disparate-impact claims, *Lau v. Nichols* decided in 1974, held that proof of discriminatory impact could establish a violation of Title VI.[214] Next, in 1978, "five Justices concluded that Title VI does not prohibit a recipient of federal aid from taking race into account in an affirmative action program designed to eradicate the vestiges of past discrimination" in *Regents of the University of California v. Bakke*.[215] Perhaps because of the difference in circumstances, *Bakke* did not explicitly hold that *Lau* was no longer good law. Just five years later, however, *Guardians Association v. Civil Service Commission* held that Title VI itself directly reaches only instances of intentional discrimination.[216]

Nevertheless, the Court's *Guardians* holding on Title VI does not preclude disparate-impact liability stemming from the SSA for three reasons: distinct legislative histories, the peculiar factors surrounding Title VI, and the purpose of the SSA's antidiscrimination provision. First, a close reading of Title VI jurisprudence reveals that the Supreme Court's reasoning rests largely on congressional intent. The conclusion that Title VI itself only reaches intentional discrimination rests not on a plain reading of the text, which is ambiguous,[217] but on a reading of legislative history. The Court looked to what legislators had in mind in 1964, the year in which the Title passed, and concluded that "[e]xamination of the voluminous legislative history of Title VI" required holding that Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause."[218] In other words, following the mandate outlined in *Davis*, the

214. 414 U.S. 563, 566, 568 (1974).

215. Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582, 617 (1983) (Marshall, J., dissenting) (discussing Regents of the University of California v. Bakke, 438 U.S. 265, 284-87, 309 (1978)); *Bakke*, 438 U.S. at 325, 328 (Brennan, J., concurring in part and dissenting in part).

216. 463 U.S. 582, 591-93 (1983); *see also infra* Section II.B.1 (explaining the Court's major cases on Title VI).

217. Justices have continuously commented that the text of Title VI is ambiguous. *See, e.g.*, *Guardians*, 463 U.S. at 592. For this reason, the Court's reasoning in *Smith* on the ADEA and Title VII cannot be replicated. In considering whether the ADEA covers disparate-impact liability, the Court relied not only on the premise that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes," *Smith*, 544 U.S. at 233 (2005), but also on the fact that the *Griggs* holding on Title VII "represented the better reading of the statutory text." *Id.* at 235. The "better reading of the statutory text" of Title VII allowed the presumption to stand. There is no comparable statutory reading that would allow the logic of Title VI to carry over to the SSA.

218. *Bakke*, 438 U.S. at 284, 287.

Court determined that there was not, in fact, a congressional mandate for disparate impact in Title VI.[219]

The SSA's legislative history, however, is distinct from Title VI's legislative history; and, unlike those debating Title VI, legislators discussing the SSA showed no desire to tie the Act's use of the word "discrimination" to the Equal Protection Clause. Thus, rulings on the reach of Title VI's text do not foreclose an interpretation of the SSA's text that includes disparate-impact liability. Instead, as counseled by *Davis*, one must consider whether Congress understood the SSA to prohibit disparate-impact discrimination. Sections III.A-D argue that it did.

The second reason relates to the unstable nature of the holding in *Guardians*: the Court itself has commented that *Guardians*'s reasoning around Title VI is so peculiar that it does not control similar inquiries. The Court explained this in *Alexander v. Choate*.[220] In *Choate*, the Court was reluctant to extend *Guardians*'s intent requirement under Title VI to the Rehabilitation Act of 1973—despite very textually similar antidiscrimination provisions. According to the Court:

> [F]or seven Justices, the outcome in . . . *Guardians* was settled by their view that a majority of the Court in *University of California Regents v. Bakke* had already concluded that Title VI reached only intentional discrimination. Although two of the five Justices who were said to have reached such a conclusion in *Bakke* wrote in *Guardians* to reject this interpretation of *Bakke*, in the view of the seven Justices *Bakke* controlled as a matter of stare decisis. Had these Justices not felt the force of this constraint, it is unclear whether they would have read an intent requirement into Title VI. For that reason, the conclusion that, in response to factors peculiar to Title VI, *Bakke* locked in a certain construction of Title VI would not seem to have any obvious or direct applicability to [the Rehabilitation Act].[221]

The construction of Title VI locked in by *Bakke* based on "factors peculiar to Title VI" would have no more applicability to the SSA than to the Rehabilitation Act and thus should not be extended.

A third and final reason for declining to extend *Guardian*'s holding to the SSA relates to the purpose of the SSA's antidiscrimination provision. Again,

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219. *See supra* Section II.B.1 (explaining in greater detail the Court's reasoning in cases on Title VI).

220. 469 U.S. 287 (1985); *cf.* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 632 n.13 (1984) (recognizing distinctions between Title VI and § 504 of Title IX).

221. *Choate*, 469 U.S. at 294 n.11 (internal citations omitted).

Choate serves as a guide. In that case, the Court examined floor debates and other forms of legislative history on the Rehabilitation Act, determining that Congress was concerned about discrimination due to thoughtlessness and neglect, not invidious discrimination. The Court then concluded that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[222] The Court was disinclined to allow this distortion of the statute by adhering to *Guardians*. This exact reasoning applies to the SSA. The nature of the problem with which Congress was concerned was discriminatory effects. Similar to the Rehabilitation Act, legislators commented on troubling discrimination within police departments that was clearly disparate impact. Thus, construing the SSA to proscribe only conduct fueled by intentional discrimination would unacceptably distort the statute.

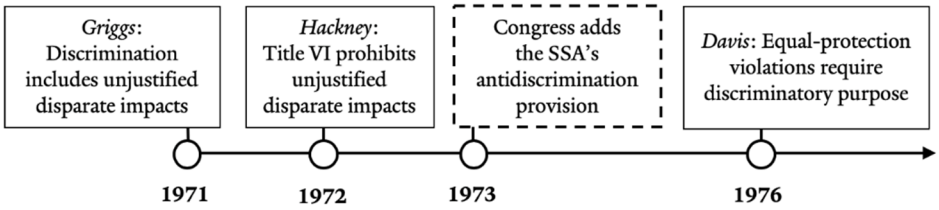
In contrast, Congress's use of Title VI's language—specifically in 1973—could actually signify *approval* for a disparate-impact standard in the SSA for two reasons. First, when the SSA adopted the language of Title VI, the dominant legal understanding was not simply that discrimination reached disparate impact after *Griggs*, but that *Title VI specifically* proscribed unjustifiable disparate impacts. Indeed, when Congress added the SSA's discrimination clause in 1973, a Supreme Court case had considered the reach of Title VI, and it interpreted Title VI as proscribing unjustifiable disparate impacts. In *Jefferson v. Hackney*, the Court determined that certain computational procedures used by Texas in its federally-assisted welfare program did not violate Title VI.[223] But in coming to this conclusion, it used the *Griggs* standard as a measure. The Court maintained that "[i]n *Griggs*, the employment tests having racially discriminatory effects were found not to be job-related, and for that reason were impermissible under the specific language of Title VII," but "[s]ince the Texas procedure . . . [was] related to the purposes of the welfare programs, it [was] not proscribed by Title VI simply because of" its disparate racial impact.[224] This interpretation is consistent with the understanding that, as of *Griggs* in 1971, the meaning of discrimination was tied to disparate impact and business necessity. Thus, when legislators adopted the language of Title VI for the SSA, they adopted text that—according to available authority—included disparate-impact liability.

222. *Id.* at 295-97.

223. 406 U.S. 535 (1972).

224. *Id.* at 550 n.19. The Court's analysis indicates that while the Texas procedure passed *Griggs*'s first prong (it had a racially disproportionate impact), it failed *Griggs*'s second prong (it had the equivalent of "business necessity") and thus was permissible. *Id.*

FIGURE 2.
***HACKNEY* SUPPORTS A DISPARATE-IMPACT UNDERSTANDING OF THE SSA**



The second reason that Congress's adherence to Title VI supports a disparate-impact standard arises from the well-documented legislative and regulatory landscape in 1973. As the Court reasoned in *Choate*,

> [B]y the time Congress enacted the Rehabilitation Act in 1973, nearly a decade of experience had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII. By this time, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, and every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. . . . These regulations provoked some controversy in Congress, and in 1966 the House of Representatives rejected a proposed amendment that would have limited Title VI to only intentional discrimination. . . . Thus, when Congress in 1973 adopted virtually the same language for [the Rehabilitation Act] that had been used in Title VI, Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination. In refusing expressly to limit [the Rehabilitation Act] to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for [the Rehabilitation Act].[225]

The year of the addition of the SSA's antidiscrimination provision—1973—is the exact same year that Congress passed the Rehabilitation Act. Thus, Congress's failure to expressly limit the SSA's antidiscrimination provision to an intent standard during this time period similarly suggests approval of a disparate-impact standard.

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225. *Choate*, 469 U.S. at 295 n.11 (citations omitted).

IV. IMPLICATIONS

The SSA provides a new route towards accountability in policing. Access to a disparate-impact standard — rather than a constitutional standard — for discrimination claims matters greatly. Proof of discriminatory purpose under the Equal Protection Clause is extremely difficult to obtain.[226] Augmenting the power of this legal standard is the SSA's private right of action. That right creates a pathway for everyday individuals to hold police departments accountable for the disparate racial impacts of their law-enforcement practices, making it the only statute to provide private access to a disparate-impact standard for policing. Indeed, while DOJ has access to such a standard through Title VI's regulations, everyday individuals do not have a private right to enforce these regulations. In this and other ways, the SSA emerges as a notable tool for changing law enforcement that can — in certain circumstances — be more powerful than Title VI.

A. The SSA's Private Right of Action

Sometimes federal statutes that confer regulatory responsibilities on agencies also explicitly give a private right of action to individuals who have been injured by conduct within the agency's regulatory jurisdiction.[227] The SSA is one of those statutes. Specifically, the SSA states that a person "aggrieved" by discrimination prohibited under the SSA can institute a civil action in court to enforce the statute "after exhaustion of administrative remedies."[228] Private citizens can exhaust administrative remedies by filing an administrative complaint with DOJ. Exhaustion is presumed sixty days after filing the complaint or when DOJ determines the merits of the complaint — whichever is earlier.[229] Then, individuals can turn to the courts.

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226. Fan, *supra* note 13, at 99-100, 111.

227. *See, e.g.*, KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 2111 (2019).

228. 34 U.S.C. § 10228(c)(4)(A) (2018) ("Whenever a State government or unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this subsection, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction.").

229. *Id.* ("Administrative remedies shall be deemed to be exhausted upon the expiration of sixty days after the date the administrative complaint was filed with the Office of Justice Programs or any other administrative enforcement agency, unless within such period there has been a determination by the Office of Justice Programs or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.").

Since the SSA includes disparate-impact liability, a private suit can ask for relief based on disparate racial impacts. The cause of action allows private enforcement when a relevant entity (e.g., a police department) engages in practices prohibited by the entire "subsection." The "subsection" includes both the SSA's antidiscrimination provision and the provision empowering DOJ to make regulations to effectuate that provision. In other words, after exhausting administrative remedies, aggrieved individuals can file a lawsuit to enforce the antidiscrimination provision, which includes a disparate-impact standard, and likely DOJ's implementing regulations as well.[230]

More specifically, plaintiffs can allege that a law-enforcement agency's policies, procedures, or practices have the effect of discriminating against individuals because of their race. To illustrate a disparate impact in policing practices, a plaintiff might show, for instance, how a police department "has employed policing strategies in certain . . . neighborhoods that emphasize officers making large numbers of stops, searches, and arrests" and how "[t]hese tactics disproportionately impact African Americans."[231] A policy assigning foot patrols to different neighborhoods might also be problematic, for example, when neighborhoods comprised primarily of members of particular racial or national-origin groups are served differently as compared to other neighborhoods.[232] Alternatively, a practice of failing to respond promptly to 9-1-1 calls in a minority neighborhood, when the law-enforcement agency responds promptly to 9-1-1 calls in nonminority neighborhoods, might also violate the SSA. If plaintiffs allege that a practice has a disparate impact on minorities, the practice may be permissible

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The Act refers to "any other administrative enforcement agency," but this has been interpreted as referring to subdivisions of DOJ. Nash v. City of Oakwood, 541 F. Supp. 220, 223 (S.D. Ohio 1982) ("The legislative history of the Act is, apparently, silent on the meaning of the phrase. However, the EEOC is nowhere mentioned in the Act, or in the regulations interpreting same. Instead, the phrase probably refers to the Law Enforcement Assistance Administration (LEAA), the Department of Justice, the National Institute of Justice, and other entities mentioned in the provisions of the Act.").

230. Notably, this means that the private power to sue on an effects-based standard remains even if a court were to—erroneously, according to this Note's analysis—find that the SSA's text itself reaches only intentional discrimination, as private litigants would still have the option of enforcing DOJ's disparate-impact interpretation.

231. Complaint at 7, United States v. Police Dep't of Balt. City, 249 F. Supp. 3d 816 (D. Md. 2017) (No. 1:17-cv-00099-JKB), https://www.justice.gov/crt/case-document/file/933296/download [https://perma.cc/EJD3-Y3AV].

232. *Nondiscrimination on the Basis of Race, Color, National Origin, Sex, Religion, or Age in Law Enforcement Programs, Services, and Activities Receiving Assistance from the United States Department of Justice*, U.S. DEP'T JUST. (Aug. 6, 2015), https://www.justice.gov/crt/nondiscrimination-basis-race-color-national-origin-sex-religion-or-age-law-enforcement-programs [https://perma.cc/74SK-M7BY].

only if the police can demonstrate that it has a legitimate law-enforcement-related necessity for the use of the practice at issue.[233]

If a police department does not reform a practice after a court finds discrimination, the SSA then *requires* that DOJ withdraw funding from the police department. More specifically, the SSA states that

> [w]henever there has been . . . receipt of notice of a finding . . . by a Federal court (other than in an action brought by the Attorney General) or State court, or by a Federal or State administrative agency, to the effect that there has been a pattern or practice of discrimination in violation of[234]

the SSA's antidiscrimination requirements, DOJ "shall" notify the chief executive of the State about the noncompliance and "shall" request that executive to secure compliance. After such notification, if the chief executive fails or refuses to secure compliance, DOJ "shall" exercise its funding-termination powers.[235] This mandatory language means that DOJ would be left with no choice but to withdraw federal funding.

B. Circumventing Title VI

Title VI prohibits discrimination in programs and activities receiving federal financial assistance. While Title VI itself prohibits intentional discrimination, most funding agencies, including DOJ, "have regulations implementing Title VI that prohibit recipient practices that have the effect of discrimination."[236] The SSA's coverage is more limited—it prohibits discrimination by law-enforcement agencies that receive financial assistance under the Act. Given this state of affairs, one might wonder why, in practice, the SSA is important. First, in light of the

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233. *Id.* Litigation might follow the contours of Title VII lawsuits. In other words, once the plaintiff shows that some policing practice causes a disparate impact on minorities, the burden would then shift to the law-enforcement agency to show that the challenged practice is justified by law-enforcement needs, such as public safety. Even if the agency makes such a showing, the plaintiff could then show that the agency has alternative ways to meet its needs with less of an adverse impact. *See supra* note 37 (explaining the burden-shifting framework under Title VII); *see also Title IX Legal Manual*, U.S. DEP'T JUST. (Aug. 6, 2015), https://www.justice.gov/crt/title-ix#2.%C2%A0%20Disparate%20Impact [https://perma.cc/32LD-SFZV] (detailing disparate-impact frameworks more generally).

234. 34 U.S.C. § 10228 (2018).

235. *Id.*

236. *Overview of Title VI of the Civil Rights Act of 1964*, U.S. DEP'T JUST. (Jan. 22, 2016), https://www.justice.gov/crt/fcs/TitleVI-Overview [https://perma.cc/G3VY-SYFM].

Supreme Court doctrine limiting the disparate-impact power of Title VI, the SSA emerges as the *only* route for privately enforcing a disparate-impact regime against police departments, expanding the playing field for halting discrimination. Second, because that playing field includes *mandatory* fund termination, the SSA can provide more potent relief than that available through Title VI.

After the Supreme Court's holding in *Alexander v. Sandoval*, the SSA stands as the only legal tool that everyday citizens can use to hold police departments accountable for unjustified disparate impacts.[237] In *Sandoval*, the Court held that there is no private right of action in Title VI to enforce agencies' disparate-impact regulations.[238] Since "the private right of action," according to the Court, "does not include a private right to enforce [the] regulations," and Title VI itself reaches only intentional discrimination, private plaintiffs attempting to use Title VI to change policing practices must prove discriminatory purpose, just as they might with a claim under the Equal Protection Clause.[239]

Justice Scalia's reasoning on Title VI, however, does not hamper the SSA. *Sandoval*'s "judicial task . . . to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private right"[240] involved an *implied* private cause of action. There is no explicit text in Title VI conferring upon private citizens a right to enforce the statute. Private individuals may sue to enforce Title VI's antidiscrimination provision because the Supreme Court determined in a case in 1979 that the "rights-creating" language of Title VI's antidiscrimination provision, which decrees that "[n]o person . . . shall . . . be subjected to discrimination," created an implied private right of action, and "Congress has since ratified [that case's] holding."[241] According to Justice Scalia, "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."[242] Justice Scalia concluded, however, that the agency's "disparate-impact regulations d[id] not simply apply [Title VI's ban]—since they indeed forbid conduct that [Title VI's ban] permits" given that Title VI itself proscribes only

237. 532 U.S. 275 (2001).

238. *Id.*; *see also* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 2:7 (3d ed. 2018) ("Under Title VI and the Safe Streets Act, a plaintiff may state a claim for damages under the statutes themselves by proving intentional discrimination. Whether a private cause of action is available to enforce the disparate-impact regulations promulgated by the Department of Justice was addressed by the Supreme Court in *Alexander v. Sandoval*.").

239. *Sandoval*, 532 U.S. at 276.

240. *Id.* at 286.

241. *Id.* at 278, 280.

242. *Id.* at 284.

intentional discrimination.[243] "[T]herefore . . . the private right of action to enforce [Title VI's ban] does not include a private right to enforce [the] regulations."[244]

Crucial to *Sandoval*'s holding was that Title VI itself does not proscribe unjustified disparate impacts and thus the regulations forbid conduct that the Title allows. Unlike Title VI, however, the SSA itself proscribes disparate-impact discrimination, as this Note has argued. Thus, Title VI's disjuncture preventing private access to a disparate-impact regime is not relevant for the SSA. Private plaintiffs should not even have to rely on the SSA's regulations to file a disparate-impact claim.[245]

Nevertheless, even if a court were to hold that the SSA only proscribes intentional discrimination—despite all evidence to the contrary that this Note presents—private plaintiffs should still be able to enforce DOJ's disparate-impact regulations under the SSA due to the SSA's explicit private right of action. *Sandoval* dictates that the "rights-creating" language of Title VI's antidiscrimination provision, which gives rise to the implied private cause of action, can only reach conduct proscribed by that same provision. But the SSA's private right of action does not come from the antidiscrimination provision itself—it is in an entirely separate provision, and it is *express* rather than implied. One need not look further than the text of that provision to ascertain the extent of the right. As noted, the private right to enforcement includes "any act or practice prohibited by th[e] subsection," and the subsection contains the section authorizing DOJ to implement regulations to effectuate the antidiscrimination provision.[246] Therefore, a lawsuit enforcing a prohibition made through SSA regulations should remain valid even if a court erroneously determines the reach of the statute.

But the SSA does not simply fill a private enforcement void in criminal-justice reform created by Title VI after *Sandoval*. Instead, it can offer a stronger lever for change. Unlike Title VI, which allows but does not oblige DOJ to withdraw funding upon finding violations, the SSA *requires* DOJ to withdraw funding if police departments do not correct a practice found to be discriminatory.[247] Indeed, "[t]he broad discretion over enforcement methods provided by Title VI is

243. *Id.* at 285.

244. *Id.*

245. In any event, if plaintiffs choose to invoke DOJ's regulations, they should be able to do so because the SSA's regulations do not forbid conduct that the statute itself allows since the SSA itself does not allow disparate-impact discrimination.

246. 34 U.S.C. § 10228(c)(4)(A) (2018).

247. Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575-76 (D.C. Cir. 1983) ("On its face, however, [Title VI's] statutory language is not mandatory. Section 2000d-1 allows the funding agency to effect compliance through funding termination or 'any other means authorized

in sharp contrast to the mandatory language of the [SSA]."[248] Thus, the SSA can provide a more forceful route for police reform than Title VI.

Most broadly, the SSA provides a stable and independent tool for change in the field of police reform when the future of Title VI's disparate-impact regime appears precarious. Indeed, Justice Scalia's opinion in *Alexander v. Sandoval* casts doubt on whether the Justice Department can validly prohibit disparate-impact discrimination through Title VI regulations,[249] and the current presidential administration seems hostile to these same regulations.[250] If the disparate-impact power of Title VI falls, this Note argues that there are convincing, independent reasons to maintain disparate-impact power under the SSA. Despite similar texts, the two statutes are not tied together in meaning. Therefore, a constraining of the SSA should not follow a constraining of Title VI. In this unfortunate scenario, we would lose a disparate-impact tool in fields ranging from state educational services[251] to local welfare benefits.[252] But the SSA would at least allow

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by law.' . . . Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient. The choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination. Faced with this statutory discretion, we cannot say that appellees' failure to terminate funding violated a clearly established statutory duty under Title VI.").

248. *Id.* at 577. This drastic departure from Title VI is intentional, according to the D.C. Circuit. Indeed, according to *Velde*,

> Congress enacted this statutory command in 1973, when it reviewed LEAA's initial grant of funds . . . . Congress created a set of more stringent enforcement requirements addressed specifically to LEAA's civil rights obligation. Congress explicitly rejected President Nixon's version of the bill, which merely stated that Title VI applies to [DOJ through the SSA]. Instead, Congress adopted sections 509 and 518(c)(2), which outlined a mandatory enforcement scheme that relies on funding termination. By doing so, Congress explicitly prevented [DOJ] from relying on the Title VI option of "any other means authorized by law."

Id. at 577-78.

249. 532 U.S. 275 (2001).

250. Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules*, WASH. POST (Jan. 3, 2019), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/L6MU-4NY3].

251. *See* Office for Civil Rights, *Education and Title VI of the Civil Rights Act of 1964*, U.S. DEP'T EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html [https://perma.cc/4NWQ-2VDD] (discussing the applicability of Title VI protections to educational activities).

252. *See Civil Rights Requirements-Title VI of the Civil Rights Act*, U.S. DEP'T HEALTH & HUM. SERV. (July 26, 2013), https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html [https://perma.cc/VS86-ZXKN] (discussing the applicability of Title VI protections to programs, including welfare, administered by the Department of Health and Human Services).

litigants, including but not limited to DOJ, to hold police departments accountable for a disparate racial impact.

CONCLUSION

This Note builds upon and expands traditional understandings of disparate-impact liability by presenting a new domain of application: policing. We should not simply accept that the principles underlying *Griggs* are confined to arenas like employment and housing. Policing is an arena generally considered untouched by effects-based discrimination theories. But as this Note has shown, we can and should use disparate-impact liability to push for change in policing. The Note aspires to contribute to a larger project of limiting the reach of *Washington v. Davis*. Its hope is that those committed to civil rights will continue looking for additional pathways for doing the same. Vigorously seeking out these pathways may help us find unrealized tools, like the SSA, that can circumvent the difficulties posed by more conventional avenues for reform and help promote racial equality.