THE DEPARTMENT OF EDUCATION'S OBAMA-ERA INITIATIVE ON RACIAL DISPARITIES IN SCHOOL DISCIPLINE: WRONG FOR STUDENTS AND TEACHERS, WRONG ON THE LAW

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INTRODUCTION

On March 8, 2010, one year into the Obama Administration, Secretary of Education Arne Duncan stood on the Edmund Pettus Bridge in Selma, Alabama. There, on the occasion of the forty-fifth anniversary of the infamous confrontation between police and peaceful civil rights marchers known as "Bloody Sunday," he delivered an impassioned address, promising to "reinvigorate civil rights enforcement."[1]

The emotion that Secretary Duncan felt was understandable considering the site of his speech. But his words had the ring of a general rallying his troops to fight the preceding war. His strategy—a frontal attack on hidden race discrimination and disparate impact—bears little relation to the problems that schools face today, especially schools that primarily serve minority students. Instead of promising to cut through the layers of bloated bureaucracy that smother innovative schools and teachers, he promised even more federal regulation of local schools.

School discipline was to be a prime concern of the enforcement initiative unveiled that day. Duncan told the assembled crowd of civil rights activists and schoolchildren that African-American students "are more than three times as likely to be expelled as their white peers."[2] Martin Luther King "would have been dismayed," Duncan declared.[3]

Under Duncan's leadership, the Department of Education's (ED's) mission would be to change all that. One of its primary strategies would be for its Office for Civil Rights (OCR) to pore over statistical evidence from every school district, looking for evidence of racial disparate impact in discipline. When a school district was found to be disciplining African-American students at a significantly higher rate than Asian or white students, the school district could expect to be subjected to an investigation.[4]

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1. Arne Duncan, Sec'y of Educ., Crossing the Next Bridge: Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010), https://www.ed.gov/news/speeches/crossing-next-bridge-secretary-arne-duncan%E2%80%99s-remarks-45th-anniversary-bloody-sunday-edmund-pettus-bridge-selma-alabama [https://perma.cc/53RZ-TVGL].

2. *Id.*

3. *Id.*

4. An OCR attorney wrote the following to school officials at Fort Bend County, Texas, about how their district was chosen for such an investigation:

> I am providing you with a link to OCR's Civil Rights Data Collection below. Here, you will find the disciplinary numbers on which OCR relied in selecting

As one media report put it, rather than waiting for "cases [to] come in the door," the Obama Administration "plans to use data to go find [civil rights] problems."[5]

School districts wishing to avoid costly investigations would need to avoid the kind of disparate impact that would attract OCR's attention. The easiest and safest strategy would be clear: Reduce suspensions for minority students in order to make your numbers look good.

The danger should have been obvious. What if an important reason more African-American students were being disciplined than white or Asian students was that more African-American students were misbehaving? And what if the cost of failing to discipline those students primarily falls on their fellow African-American students who are trying to learn amid classroom disorder? Would unleashing OCR and its army of lawyers cause those schools to act carefully and precisely to eliminate only that portion of the discipline gap that was the result of race discrimination?[6] Or—more likely—would schools react heavy-handedly by tolerating more classroom disorder, thus making it more difficult for students who share the classroom with unruly students to learn?[7]

> the Fort Bend ISD for a proactive compliance review on the issue of discrimination against African-American students in discipline. . . . OCR's preliminary investigation to date reveals that African-American students are overrepresented in the population of students disciplined by the FBISD to a statistically significant degree. One example that I provided to you during yesterday's phone call is that, during the 2011–12 school year, African-American students represented approximately 29.5% of the District's enrollment, yet comprised 65% of students suspended out of school. This overrepresentation is statistically significant.

Email from Rachel Caum to Pam Kaminsky, 06125001 Fort Bend ISD (June 9, 2015) (obtained through FOIA request and on file with the authors).

5. Paul Basken, *Education Department Promises Push on Civil-Rights Enforcement*, CHRON. HIGHER EDUC. (Mar. 8, 2010), https://www.chronicle.com/article/Education-Department-Promises/64567 [https://perma.cc/4DX6-53BF].

6. Lest the reader think that OCR is a small office, we should point out that its Fiscal Year 2017 budget was $108.5 million and it has twelve regional offices around the country. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS FISCAL YEAR 2018 BUDGET REQUEST Z-6, Z-8 (2018), https://www2.ed.gov/about/overview/ budget/budget18/justifications/z-ocr.pdf [https://perma.cc/JG5G-6ZVD].

7. An alternative possibility is that schools will "cook the books." *See* Alejandra Matos & Emma Brown, *Some D.C. Schools Are Reporting Only a Fraction of Suspensions*, WASH. POST. (July 17, 2017), https://www.washingtonpost.com/local/education/some-dc-high-schools-reported-only-a-small-fraction-of-suspensions/2017/07/17/045c387e-5762-11e7-ba90-f5875b7d1876_story.html [https://perma.cc/KYF5-UC2A] (reporting that at least seven of D.C.'s eighteen high schools "have kicked students out of school for misbehaving without calling it a suspension and in some cases even marked them present.").

Almost everyone has had experience with distant bureaucracies. Even when their edicts are reasonably nuanced, by the time they reach the foot soldiers on the ground (in this case classroom teachers), any subtlety has disappeared. "Don't discipline minority students unless it is justified" is naturally understood by school district administrators as "Don't discipline a minority student unless you are confident that you can persuade some future federal investigator whose judgment you have no reason to trust that it was justified." In turn, this is presented to principals as "Don't discipline a minority student unless you and your teachers jump through the following time-consuming procedural hoops designed to document to the satisfaction of some future federal investigator whose judgment we have no reason to trust that it was justified." Finally, teachers hear the directive this way: "*Just don't discipline so many minority students; it will only create giant hassles for everyone involved.*"[8] This is

8. At a briefing in 2011 before the U.S. Commission on Civil Rights on Secretary Duncan's school-discipline policy, Allen Zollman, a teacher, testified that teachers in his school district already have to fill out a two-page form showing that they have exhausted all reasonable alternatives before finally referring a disruptive student to the principal's office:

> Before the student can be removed and placed in "time out," the teacher must prepare a disciplinary referral—what many of us used to call a "pink slip." This is a two-page form with space for three offenses—not just one—and a checklist of measures taken by the teacher *before* issuing this referral. These measures include a private conference with the student, a change of seat location, a lunch time or after-school detention, or a phone call to a parent. Sometimes the foregoing strategies are effective, but often they are not. What is important to note here is that in order to get a disciplinary referral for disruption in my school, there must be three infractions and they must be documented in writing BEFORE the student can be removed from the classroom.

U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT: BRIEFING REPORT 24 (2011), http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf [https://perma.cc/VB6F-7GC9].

All of this comes at a real cost: the need for documentation makes it harder for teachers to discipline students at the moment of disruption, rather than days or weeks after the fact. Meanwhile, other students must suffer while the disruptive behavior continues. As Mr. Zollman put it:

> [F]or mere disruption, it is no simple thing to have a student removed *at the time of the disruptive behavior*. This means that for extended periods of time, it can happen that very little teaching and learning will take place in a given classroom.
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> . . . .
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> [T]he need to build up a case to refer a misbehaving student and then wait for action at a higher level leaves me dealing with the problem myself for a while or, more often, persuades me to let things continue as they are without issuing a referral, in other words, teach through chaos. Indeed, because of behavior problems, there are times when very little teaching or learning takes place.
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> In such an environment, students see few meaningful consequences for their actions, so they not only continue to misbehave but the behaviors get more

in the nature of bureaucracy. Those who complain that schools overreact to governmental directives are howling at the moon. It is inevitable.

Decades ago, Edmund Janko, a high school teacher, was faced with a complaint from the federal government that his school was disciplining a disproportionate number of African-American students. He explained what happened as a result this way:

> More than 25 years ago, when I was dean of boys at a high school in northern Queens, we received a letter from a federal agency pointing out that we had suspended black students far out of proportion to their numbers in our student population. Though it carried no explicit or even implicit threats, the letter was enough to set the alarm bells ringing in all the first-floor administrative offices.
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> . . . .
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> There never was a smoking-gun memo, or a special meeting where the word got out, and I never made a conscious decision to change my approach to punishment, but somehow we knew we had to get our numbers "right"—that is, we needed to suspend fewer minorities or haul more white folks into the dean's office for our ultimate punishment.
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> What this meant in practice was an unarticulated modification of our disciplinary standards. For example, obscenities directed at a teacher would mean, in cases involving minority students, a rebuke from the dean and a notation on the record or a letter home rather than a suspension. For cases in which white students had committed infractions, it meant zero tolerance. Unofficially, we began to enforce dual systems of justice. Inevitably, where the numbers ruled, some kids would wind up punished more severely than others for the same offense.[9]

> brazen, with more and more students joining in the fun, until even the quote-unquote "good" kids are acting out. They often become cynical, reminding teachers nothing will happen to them.

Id.

9. Edmund Janko, *It Still Leaves a Bad Taste*, CITY J. (2006), https://www.city-journal.org/html/it-still-leaves- bad-taste-12963.html [https://perma.cc/6P9Q-XAXY]. Janko gave an example:

> I remember one case in particular. It was near the end of the day, and the early-session kids were heading toward the exits. . . . The boy was a white kid, tall, with an unruly mop of blond hair. He was within 200 feet of the nearest exit and blessed freedom. But he couldn't wait. The nicotine fit was on him, and he lit a cigarette barely two yards from me. I pounced, and within 20 minutes he was suspended—for endangering himself and others.
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> Surely we acted within the boundaries of our authority . . . .
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> . . . [But] [t]he kid wasn't a chronic troublemaker—indeed, until now he'd been a complete stranger to the dean's office. It was a first offense. . . .

There are two sides to the "disparate impact" coin. Duncan focused only upon the fact that, as a group, African-American students are suspended and expelled more often than other students. By failing to consider the other side of the coin—that African-American students may be disproportionately victimized by disorderly classrooms—his policy threatened to do more harm than good even for the group he was trying to help.[10] Indeed, even before Duncan's speech on the Edmund Pettus Bridge, there was already evidence that African-American students feel less safe in school than students of other races.

> . . . [M]ore than two decades later, I still can't escape the nagging thought that, though we had other choices, better suited for the boy's welfare, at bottom all of us just wanted to get our numbers right.

Id.

10. *See* Joshua Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT'L ECON. REV. 355, 382 (2013) (suggesting that "[l]osing classroom time as a result of suspension has a small negative impact on the performance, whereas exposure to disruptive behavior significantly reduces achievement"). In this respect, the controversy over disparate impact in school discipline may have parallels in the controversy over the death penalty. For many years, some opponents of the death penalty argued that it should be abolished because it has a disparate impact on African-American male offenders. According to Department of Justice figures, 34.5% of all offenders executed between 1977 and 2011 were black, 7.9% were Hispanic, and 56.5% were white. U.S. DEP'T OF JUSTICE, NCJ 242185, CAPITAL PUNISHMENT, 2011—STATISTICAL TABLES 11 (rev. Nov. 3, 2014), https://www.bjs.gov/content/pub/pdf/cp11st.pdf [https://perma.cc/L6LQ-8BWK]. This constitutes an overrepresentation of blacks, since "African-Americans/blacks" are only about 13.3% of the population now and were slightly less than that in closing decades of the twentieth century. *QuickFacts*, U.S. CENSUS BUREAU (2016), https://www.census.gov/quickfacts/fact/table/US/PST045216 [https://perma.cc/B8VP-V7WG]; Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Total By Race, 1790 to 1990, and By Hispanic Origin, 1790 to 1990, For Large Cities and Other Urban Places in the United States* (U.S. Census Bureau Population Division, Working Paper No. 76, 2005), https://www.census.gov/population/www/documentation/twps0076/twps0076.pdf [https://perma.cc/K887-NLT5]. Such an overrepresentation might seem strange until one learns that Department of Justice figures in 2013 also record that 47.1% of all murder offenders were black. Indeed, some studies have found that if there is a problem with the death penalty, it is not that black offenders appear to be discriminated against; it is that black *victims* appear to be discriminated against. Most homicides are intraracial. According to Department of Justice statistics for 2013, 43.5% of all homicide victims were black. *Murder: Race, Ethnicity, and Sex of Victims by Race, Ethnicity, and Sex of Offender*, U.S. DEP'T OF JUST. (2013), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2013.xls [https://perma.cc/UB2W-X5WD] (limiting figures to single victim/single offender). Yet only a small percentage of those executed for homicide killed black victims. Some empirical studies have attempted to explain this as a result of a lack of value placed upon black lives by prosecutors. *See* Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347 (2004) (citing studies suggesting that it is black victims who are discriminated against and arguing instead that such murders may simply be more likely to take place in jurisdictions dominated by voters who oppose the death penalty). Other than to point out the parallels in the argument between the death penalty debate and the school discipline debate, we take no position here.

Duncan's approach to the issue was likely to make things worse for them.[11]

In Part II of this Article, we discuss OCR's policy toward school discipline, its over-reliance on racial disparate impact, and how that over-reliance pushes some schools to violate Title VI's ban on race discrimination rather than honor it. In Part III, we elaborate on why school discipline is important and present evidence that OCR's policy has contributed to the problem of disorderly classrooms, especially in schools with high minority student enrollment. In Part IV, we discuss how aggregate racial disparities in discipline do not in themselves show the discrimination against African-Americans, Hispanics, and American Indians that proponents of OCR's policy claim. Rather, the evidence shows that they are the result of differences in behavior. In Part V, we change gears somewhat and explain why the OCR's disparate impact policy was not just wrongheaded, but also unauthorized by law.

Note that there is one issue we will *not* address: We will not advocate any particular discipline policy, whether tough, lenient, or somewhere in between. Our goal is not to return to an era of higher levels of suspensions and expulsions. Nor is it to retain the lower levels put in place since Duncan's speech. We express no opinion as to whether expulsion, suspension, detention, a trip to the principal, extra homework, or some other action is the best way to handle any particular offense or student. Apart from believing that actual invidious discrimination should not be tolerated, we strongly suspect there is no one-size-fits-all solution for all school districts.

Instead, we hope to highlight the need for flexibility for teachers and principals, as supervised by local school district administrators and school boards. They, not OCR attorneys, are in the best position to make sound decisions about whether and how to discipline a particular student. These decisions require detailed knowledge of the facts of each case—something OCR never has. When actual discrimination is found, it must be dealt with. But the desire to search and destroy racial disparities should not be the primary factor driving the debate over school

11. Johanna Lacoe, *Unequally Safe: The Race Gap in School Safety* (Inst. for Educ. & Soc. Pol'y, Working Paper No. 01-13, 2013), https://files.eric.ed.gov/fulltext/ED556787.pdf [https://perma.cc/W4BL-2XTP] (using data from New York Public Schools 2007–2009).

discipline policy. That debate is far too complex to be reduced to a single dimension.

Will local teachers and principals sometimes make mistakes if they are the primary decision-makers on matters of discipline? Of course, they will. At the time of Duncan's speech, it was already becoming fashionable to argue that, in order to fight racial disparities, suspensions and expulsions should be severely curtailed and so-called subjective offenses should be purged from school disciplinary codes.[12] In some sense, Duncan was simply hopping on the bandwagon. Consequently, some schools may have adopted such policies even without the threat of OCR intervention. But when decisions are made at the local level, if a strategy turns out to be a mistake, it can be quickly corrected. When the rules are set by federal officials, who are far removed from actual classrooms, they become entrenched.

When it comes to school discipline policy, the federal government has an unimpressive track record. In the past, it has pressed local schools to adopt tough "zero-tolerance" rules for guns (including things that appear to be guns), resulting in children being suspended for "guns" made out of a nibbled breakfast pastry or a stick.[13] Similarly, on too many occasions, its get-tough policies on sexual harassment have led to disciplinary actions against kindergarteners and first-graders—children

12. *See infra* Part III (discussing the School-to-Prison Pipeline meme associated with this view).

13. *Boy, 7, Suspended for Shaping Pastry into Gun, Dad Says*, FOX NEWS (Mar. 5, 2013), http:// www.foxnews.com/us/2013/03/05/boy-7-suspended-for-shaping-pastry-into-gun-dad-says [https://perma.cc/3UWM-CS9H]; Samantha Schmidt, *5-Year-Old Girl Suspended from School for Playing With "Stick Gun" at Recess*, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/30/5-year-old-girl-suspended-from-school-for-playing-with-stick-gun-at-recess [https://perma.cc/P5HK-9MMD]; *see* Elahe Izadi, *Kindergartner suspended for bringing princess bubble gun to school*, WASH. POST (May 19, 2016), https://www.washingtonpost.com/news/education/wp/2016/05/19/5-year-old-girl-suspended-for-bringing-a-bubble-blowing-gun-to-colorado-school/?noredirect=on&utm_term=.2696668952bb [https://perma.cc/GDA9-A79J]. This concern over purportedly dangerous pastries began with Congress's passage of the Gun-Free Schools Act of 1994, Pub. L. 103-382, 108 Stat. 270 (1994) (codified at 20 U.S.C. §§ 8921–23). It requires every state receiving federal funds for its schools to have in effect a state law requiring schools to expel any student caught with a "firearm." *Id.* § 8921(b)(1). It further requires school districts to have a "policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon" to school. *Id.* § 8922(a).Zero tolerance rules are not inherently bad. When a principal discovers, for example, that the teachers who report to her do not uniformly take punctuality seriously, she may wish to impose a rule that requires them to report all cases in which a student is more than five minutes late and reserve the right to use discretion in those cases to herself. She may also want to attach a small penalty to all cases, because she knows how difficult it is to separate the honest student from the straight-faced liar. But the zero tolerance rules that are the result of federal policy have been clearly out of hand.

generally too young to spell "sexual harassment," much less engage in it.[14]

More recently, we have been seeing an overcorrection. The federal government's policy developed during the Obama Administration has been to press schools to lighten up on school discipline, specifically to benefit African-Americans and other racial minorities. But both efforts to dictate broad discipline policy, while well-meaning, are wrongheaded.[15] It is time for the

14. *See* Statement of Commissioner Gail Heriot in U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT: BRIEFING REPORT 104 n.17 (2011), http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf [https://perma.cc/VB6F-7GC9]; Gitika Ahuja, *First-Grader Suspended for Sexual Harassment*, ABC NEWS (Feb. 7, 2006), https://abcnews.go.com/US/story?id=1591633 [https://perma.cc/558D-L3PB]; Yvonne Bynoe, Opinion, *Is that 4-Year-Old Really a Sex Offender?*, WASH. POST (Oct. 21, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101901544.html [https://perma.cc/S32L-2Y66]; Scott Michels, *Boys Face Sex Trial for Slapping Girls' Posteriors*, ABC NEWS (July 24, 2007), http://abcnews.go.com/TheLaw/story?id=3406214 [https://perma.cc/7BLM-NERK]; Gitika Ahuja, *First-Grader Suspended for Sexual Harassment*, ABC NEWS (Feb. 7, 2006), https://abcnews.go.com/US/story?id=1591633 [https://perma.cc/558D-L3PB]; Kelly Wallace, *6-Year-Old Suspended for Kissing Girl, Accused of Sexual Harassment*, CNN (Dec. 12, 2013), https://www.cnn.com/2013/12/11/living/6-year-old-suspended-kissing-girl/index.html [https://perma.cc/2XH3-4BXY].

According to the Maryland Department of Education, 166 elementary school students were suspended in the 2006–2007 school year for sexual harassment, including three pre-schoolers, sixteen kindergarteners, and twenty-two first graders. In Virginia, 255 elementary school students were suspended for offensive touching in that same year. Juju Chang et al., *First-Grader Labeled a Sexual Harasser*, ABC NEWS (April 4, 2008), http://abcnews.go.com/GMA/AsSeenOnGMA/story?id=4585388 [https://perma.cc/JY3B-SGC2]; *see* Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. (Jan. 19, 2001) https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html [https://perma.cc/LA6U-YWST]; see also Office of the Assistant Secretary, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (Jan. 25, 2006), https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html [https://perma.cc/HK66-F4D7] (referencing the Revised Sexual Harassment Guidance). If over forty Maryland pre-schoolers, kindergarteners and first-graders have been suspended for sexual harassment, it is difficult to avoid wondering how many middle and high-school students have been suspended for antics, real or imagined, for which they never should have been suspended. Schools cannot afford to be found out of compliance by OCR or liable to a private litigant (who might use the failure to discipline any sexually harassing student as evidence of indifference). *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999) (5-4 decision allowing school districts to be sued for student-on-student sexual harassment).

15. Another way in which the federal government may have done more harm than good to local schools' disciplinary policies is through the COPS in Schools program, which was created by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, Title I § 10003(a)(3), 108 Stat. 1796 (1994). Under that program, schools willing to hire police officers can receive a subsidy. *See* Community Oriented Policing Services, *Supporting Safe Schools*, U.S. DEP'T OF JUST. (last visited June 4, 2018), https://cops.usdoj.gov/supportingsafeschools [https://perma.cc/CT8K-V39P]. Not surprisingly, therefore, many school districts did exactly that. Rather than rely on more traditional school administrators to keep order, they hire police officers (known as "school resource officers") to do the job. As a result, a thirteen-year-old Albuquerque boy was recently arrested for burping in class, and a twelve-year-old was arrested in Forest Hills, New York, for writing "I love my friends Abby and Faith" on her desk. *See* Valerie

federal government to get out of the business of dictating broad discipline policy.[16]

I. THE DEPARTMENT OF EDUCATION'S DISPARATE IMPACT POLICY IS ENCOURAGING DISCRIMINATION RATHER THAN PREVENTING IT.

Duncan made good on his promise to aggressively regulate school discipline policy. As of this writing, OCR has open investigations into disciplinary practices in Anne Arundel County, Maryland;[17] Lafayette Parish, Louisiana;[18] Hillsborough

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Strauss, *Judge Gorsuch's Dissent in the Case of a 13-Year-Old Arrested for Making Fake Burps in Class*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/02/01/judge-gorsuchs-dissent-in-case-of-13-year-old-arrested-for-making-fake-burps-in-physical-education-class/?utm_term=.ae636aeb4039 [https://perma.cc/XA66-YRKE]; Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN (Feb. 18, 2010), http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest [https://perma.cc/HWC3-JLD9].

Money is tight everywhere. When the federal government provides subsidies to school districts that will allow them to stretch their budgets by hiring police officers, but not by hiring teachers with special expertise in discipline, they are likely to go where the money is. Once police officers are hired to deal with school discipline issues, it is inevitable that an arrest will be seen as the solution when problems arise. That is what police officers are trained to do. Funding for the COPS in Schools programs has gone up and down over the years, but it is clear that it has made school districts accustomed to idea of having police officers control misbehaving students.

Note that the COPS in Schools program in the Violent Crime Control and Law Enforcement Act of 1994 was the brainchild of former Vice President Joseph Biden. *See* Nicholas Fandos, *Joe Biden's Role in '90s Crime Law Could Haunt Any Presidential Bid*, N.Y. TIMES (Aug. 21, 2015), https://www.nytimes.com/2015/08/22/us/politics/joe-bidens-role-in-90s-crime-law-could-haunt-any-presidential-bid.html [https://perma.cc/5CC5-S4WB]. It was a thoroughly bipartisan effort from start to finish. These are the kinds of programs that can cause the greatest problems. Nobody on either end of the political spectrum thinks them through until it is too late.

16. For another potential example, see RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 5–9, 13–15 (2003). Arum argues that attorneys who were associated with the Legal Services Program of the federal government's Office of Economic Opportunity, the agency created by President Lyndon Baines Johnson to implement his Great Society program, spearheaded lawsuits in the late 1960s and 1970s that, on balance, had a deleterious effect on school discipline and education more generally. *Id.* at 144. According to Arum, among other things, the legal climate created by these lawsuits discouraged schools from using after-school detention as a means of discipline in the absence of explicit parental consent. Some schools began to substitute in-school detention or outright suspension for after-school detention. These days punishments that take students out of the classroom (and thus take them away from instruction) are precisely what advocates of more lenient discipline policies are complaining about. *See also infra* note 78.

17. The investigation of Anne Arundel County schools is the result of an NAACP complaint into racial disparities in discipline rather than OCR's own examination. Cord Jefferson, *NAACP Files Racial Disparity Charge Against Maryland Schools*, BLACK ENT. TELEVISION (July 13, 2011), http://www.bet.com/news/national/2011/07/13/naacp-files-racial-disparity-charge-against-maryland-schools.html [https://perma.cc/UKN6-M5KX].

18. Marsha Sills, *Discrimination Alleged in Lafayette Schools Discipline, Officials Confirm*, ACADIANA ADVOC. (July 12, 2014), http://www.theadvocate.com/acadiana/news/education/article_ac617b6a-c79a-5cd9-a089-4ac21bbdda71.html [https://perma.cc/P4MQ-7FW7].

County, Florida;[19] Cedar Rapids, Iowa;[20] Wake County, North Carolina;[21] Fort Bend County, Texas;[22] Waukegan, Illinois;[23] and Troy, Illinois.[24] Since OCR does not publicly post a master list of school districts that are currently under investigation, this list is incomplete.[25] Its website claims to have had over 300 school discipline investigations underway as of January 3, 2017.[26] OCR has completed investigations and entered into resolution agreements with schools in Oakland, California;[27] Christian County, Kentucky;[28] Minneapolis, Minnesota;[29] Tupelo, Mississippi;[30] Christina, Delaware;[31] Rochester, Minnesota;[32] Amherst County, Virginia;[33] and Oklahoma City, Oklahoma.[34]

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19. Marlene Sokol, *Hillsborough Approves New School Discipline Plan Over Worries from Teachers, Principals*, TAMPA BAY TIMES (July 28, 2015), http://www.tampabay.com/news/education/k12/teacher-in-duct-taping-incident-faces-school-board-vote-today/2238941 [https://perma.cc/F97C-7YUL].

20. Jordee Kalk, *Cedar Rapids School District Reform Discipline Policy*, KCRG-TV9 (Feb. 20, 2017), http://www.kcrg.com/content/news/Cedar-Rapids-School-District-reforms-discipline-policy—414289803.html [https://perma.cc/G34K-C23H].

21. Hari Chittilla, *Office for Civil Rights Investigates Potential Discrimination Policies in Wake County Public Schools*, DAILY TAR HEEL (Apr. 18, 2016), http://www.dailytarheel.com/article/2016/04/office-for-civil-rights-investigates-potential-discrimination-policies-in-wake-county [https://perma.cc/Q7H9-7FLR].

22. Leah Binkovitz, *Disciplining of Black Students at Issue in Fort Bend ISD*, HOUS. CHRON. (Jan. 17, 2015), http://www.houstonchronicle.com/neighborhood/fortbend/schools /article/Disciplining-of-black-students-at-issue-in-Fort-6023093.php [https://perma.cc/U9AT-WBNE].

23. Dan Moran, *Feds Confirm Civil Rights Investigation into Waukegan District 60*, CHIC. TRIB. (Feb. 22, 2016), http://www.chicagotribune.com/suburbs/lake-county-news-sun/news/ct-lns-district-60-investigation-st-0223-20160222-story.html [https://perma.cc/NVF2-7EYX].

24. Vikaas Shanker, *Federal Agency Finds No Discrimination in One Troy School Disciplinary Case*, HERALD-NEWS (Feb. 7, 2015), http://www.theherald-news.com/2015/01/30/federal-agency-finds-no-discrimination-in-one-troy-school-disciplinary-case/a7fapee/ [https://perma.cc/Z959-YTNX] (describing a case that was triggered by a complaint).

25. This list was compiled by scouring the Internet for news stories about such investigations.

26. *Investigation Numbers Snapshot*, U.S. DEP'T OF EDUC. (Jan. 19, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/year-end-data/2016.html [https://perma.cc/88SY-W7KF].

27. *Agreement to Resolve Oakland Unified School District OCR Case Number 09125001*, U.S. DEP'T OF EDUC. (Sept. 17, 2012), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-b.pdf [https://perma.cc/EH4N-7H6A].

28. *Voluntary Resolution Agreement Christian County Public Schools OCR Case No. 03-11-5002*, U.S. DEP'T OF EDUC. (Jan. 9, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/03115002-b.html [https://perma.cc/RY6W-LZEN].

29. *Resolution Agreement #05-12-5001 Minneapolis Public Schools*, U.S. DEP'T OF EDUC. (Nov. 11, 2014), https://www2.ed.gov/documents/press-releases/minneapolis-agreement.pdf [https://perma.cc/RB6W-E69G].

30. *Voluntary Resolution Agreement Tupelo Public School District OCR Case No. 06-11-5002*, U.S. DEP'T OF EDUC. (Sept. 15, 2014), https://www2.ed.gov/documents/press-releases/tupelo-public-schools-agreement.pdf [https://perma.cc/8LUR-LH2H].

31. *Resolution Agreement Christina School District OCR Case No. 03-10-5001*, U.S. DEP'T OF EDUC. (Dec. 12, 2012), https://www2.ed.gov/about/offices/list/ocr/docs/

In each case, OCR's allegation against the school district was based on Title VI of the Civil Rights Act of 1964 (Title VI)[35] and its implementing regulations.[36] Title VI's sole prohibition states: "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."[37]

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investigations/03105001-b.html [https://perma.cc/95TV-GPAQ].

32. *Resolution Agreement #05-10-5003 Rochester Public School District*, U.S. DEP'T OF EDUC. (Sept. 1, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05105003-b.pdf [https://perma.cc/5QV9-XUP9].

33. *Resolution Agreement Amherst County Public Schools OCR Case No. 11-15-1306*, U.S. DEP'T OF EDUC. (Nov. 6, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151306-b.pdf [https://perma.cc/2QX4-QYUQ].

34. *Resolution Agreement OCR Docket #07141149 Oklahoma City Public Schools*, U.S. DEP'T OF EDUC. (Apr. 7, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07141149-b.pdf [https://perma.cc/38JH-FKQY].

35. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

36. An examination of the school districts that have been investigated by OCR (or made subjects of CRT lawsuits pursuant to Title IV) on account of their racial disparities in discipline reveals an unusual pattern: Jurisdictions with wider than average differences in socioeconomic status are over-represented. Put differently, it is not the relatively depressed jurisdictions that attracted attention, but rather the jurisdictions with out-sized and thriving upper-middle class or higher populations. Rochester, Minnesota (population 107,677) is a good example. The Mayo Clinic, with over 30,000 employees, is the city's largest employer, meaning there are lots of highly trained, highly compensated physicians and researchers there. They are of all races, but they are disproportionately Asian or white. At the same time, over 8% of Rochester's population lives below the poverty line. Its African-American population is small, but it is disproportionately made up of Somali refugees, whose average income is low. Wake County, North Carolina (population 1,046,791) is adjacent to Research Triangle Park, the largest research park in the United States, and has one of the very highest average levels of educational attainment in the nation. Huntsville, Alabama (population 194,057) has the Marshall Space Flight Center and hence literally is home to the nation's rocket scientists. It also is home to Cummings Research Park, the second largest research park in the United States. Jurisdictions like these are apt to appear to have higher than average racial disparities, when in reality the differences may be correlated more closely with income than with race.

Similarly, Fort Bend County, Texas, is the richest county in Texas. It contains some of Houston's most prosperous suburbs (e.g., Sugarland), but also a few pockets of poverty (e.g., Arcola). Waukegan, Illinois, is the county seat for Lake County, Illinois's richest county, and has plenty of that wealth inside the city limits; yet almost 14% of Waukegan's population lives below the poverty line. The differences in wealth between coastal areas like Palm Beach and the rest of Palm Beach County are legendary. All of this made it more likely that discipline racial disparities in these locations would be somewhat larger than average.

37. In addition, the Department of Justice's Civil Rights Division took the laboring oar in discipline-related litigation against schools in Huntsville, Alabama, Meridian, Mississippi, and Palm Beach County, Florida. *See* Hereford v. United States, No. 5:63-cv-00109-MHH, 2015 U.S. Dist. LEXIS 52068 (N.D. Ala. Apr. 21, 2015) (consent order); Barnhardt v. Meridian Mun. Separate Sch. Dist., 2013 U.S. Dist. LEXIS 44168 (S.D. Miss. Mar. 5, 2013) (United States as intervening party); *Agreement Between the United States of America and the School District of Palm Beach County*, U.S. DEP'T OF JUSTICE (Feb. 26, 2013), https://www.justice.gov/iso/opa/resources/442201322616361724384.pdf [https://perma.cc/J4UX-HGHG]. These are cases brought under Title IV of the Civil Rights Act of 1964 rather than Title VI. For more information about Title IV, see *infra*

As one might imagine, being chosen for an OCR investigation is a disaster for a school district. OCR has tremendous power over school districts because it holds the power of the purse. If OCR determines that a school district is violating Title VI of the Civil Rights Act of 1964, it can take away all of its federal funding—about 8% of the average school district's total budget.[38] In districts with many poor families, that percentage will ordinarily be higher. Few if any school districts can afford to gamble on alienating OCR.

Even if funds are never actually revoked, for a typical school district, the cost of addressing an OCR investigation—many of which drag on for years—is punishment enough. In response to our Freedom of Information Act request,[39] a representative from OCR's regional office in Philadelphia said that files from just two OCR discipline investigations would come to 30,000 pages.[40] Counsel for the Tupelo, Mississippi school district wrote in response to our request that responsive records "fill several cabinets."[41] Another initially estimated over the telephone that it would cost over $50,000 to produce responsive documents.[42]

Unsurprisingly, many school districts wanted guidance from OCR—something Duncan had promised in his speech—on how to prevent a disastrous compliance review from befalling them.

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note 171.

38. *See* U.S. DEP'T OF EDUC., 10 FACTS ABOUT K–12 EDUCATION FUNDING (2005).

39. 5 U.S.C. § 552 (2016).

40. Email on file with the authors (Jan. 27, 2016).

41. Email on file with the authors (Jan. 29, 2016).

42. It was evident from our FOIA request that many school districts were eager to settle their cases because of the prohibitive costs of long OCR investigations. A representative for the Rochester, Minnesota school district at one point wrote OCR that "[t]he fact that this matter has dragged on for five years, requiring the expenditure of enormous resources on the part of the District, without any evidence of wrongdoing is unconscionable." An OCR official acknowledged the frustration, noting that, "I recognize you have reason enough to be angry at us over the delays." Emails on file with the authors.

Similarly, OCR was eager to threaten additional cost and inconvenience for school districts unwilling to settle. *See, e.g.*, Email from Rachel Caum, Attorney, OCR, Dallas, to Pam Kaminsky, Fort Bend ISD Office (June 10, 2015) (on file with authors). Caum wrote:

> . . . I need to reconfirm the District's interest in voluntarily resolving this review prior to OCR concluding its investigation and making an investigative finding: otherwise, we need to move forward with further investigative activities, including possibly a second onsite visit. As I stated yesterday, it has been my understanding that the District wants to resolve this review voluntarily. However, if that is not the case, then I need to know as soon as possible so that OCR may continue with investigative activities and resolve this review in a timely manner. Please advise by next Tuesday, June 16, 2015, whether the District remains interested in voluntarily resolving.

Id.

With so much riding on keeping OCR happy, who wouldn't want guidance? With its January 8, 2014 Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (the Dear Colleague Letter), issued jointly with the Department of Justice's (DOJ) Civil Rights Division (CRT),[43] OCR provided it.[44]

Alas, the Dear Colleague Letter puts schools on notice that they must eliminate not just "different treatment" based on race (that is, actual discrimination, whether conscious or unconscious, in the administration of discipline), but also any "unjustified" "disparate impact" (that is, differences in rates of discipline among races, even if the reasons for the difference have nothing to do with discrimination). Of course, all of this had been implicit in OCR's thinking when it first began undertaking compliance reviews based on aggregated data showing disparate impact. But with the Dear Colleague Letter it was made explicit.

Specifically, after discussing "different treatment," the letter states: "Schools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as 'disparate impact.'"[45]

The term "unjustified" is largely undeveloped in the Dear Colleague Letter. If a policy was "not adopted with intent to discriminate," is "facially neutral," and is being "evenhandedly implement[ed]," it is not clear why a disparate impact would ever be considered "unjustified." Yet the Dear Colleague Letter makes it clear that it can be. In context, therefore, it is clear that by "unjustified" the Dear Colleague Letter means "unnecessary" in the sense that a lighter or more permissive disciplinary approach could have been taken.[46]

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43. The Civil Rights Division is traditionally abbreviated "CRT" rather than "CRD" in order to distinguish it from the Criminal Division, which was established earlier and has long been abbreviated "CRD."

44. *Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline*, U.S. DEP'T OF EDUC. (Jan. 8, 2014) [hereinafter Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html [https://perma.cc/7MHK-PPET].

45. *Id.*

46. This would make the argument for disparate impact liability under Title VI parallel to disparate impact liability under Title VII of the Civil Rights Act of 1964. In *Griggs v. Duke Power Co.*, the Supreme Court held that an employer may not select employees based on performance on a standardized aptitude test unless it could prove

In this way, the Dear Colleague Letter appears to be inconsistent with an earlier Department of Education policy. In 1981, then-Assistant Secretary of Education for Civil Rights Clarence Thomas issued an internal memorandum that stated: "Where there is evenhandedness in the application of discipline criteria, there can be no finding of a Title VI violation, even when black students or other minorities are disciplined at a disproportionately high rate."[47]

With the Dear Colleague Letter's focus on disparate impact, school districts were being reminded of how easily they could become the targets of an OCR compliance review. The implicit message was the same as it had been at the time of Duncan's speech: Keep your head down. By reducing disparities any way you can, you can minimize the likelihood that you will be investigated.

As to the Dear Colleague Letter's first theory of liability—different treatment—everybody ought to agree that teachers should not discriminate based on race in administering discipline to students. This has always been part of OCR's policy. If a student has reason to believe that he or she has been punished or punished more harshly on account of race, filing a complaint with OCR is entirely appropriate. OCR then has the responsibility to examine the complaint. If it alleges facts that would constitute a violation, OCR should investigate that complaint and determine what happened. If OCR determines the student is right, the school has violated Title VI, and remedial action should be swift and sure.

On the other hand, the latter theory of liability—disparate impact—has been explicitly rejected by the U.S. Supreme Court in connection with Title VI.[48] While OCR argues that it can

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doing so was necessary to the goal of selecting the best-performing employees. 401 U.S. 424, 436 (1971). Here, the Department of Education is requiring schools to prove that punishments it regards as harsh (such as expulsions and suspensions) are necessary to the goal of maintaining order.

47. Memorandum from Clarence Thomas, Assistant Sec'y of Educ., to Terrel Bell, Sec'y of Educ., Civil Right Aspects of Discipline in Public School 3 (Sept. 8, 1981) (on file with authors). By contrast, Thomas points out that Title VI is violated by a single instance affecting only a single student when that student is treated more harshly on account of his race. *Id.*

48. *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001) ("[I]t is similarly beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that Title VI prohibits only race discrimination that would be unconstitutional under the Fourteenth Amendment's Equal Protection Clause if practiced by a state entity); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that the

nevertheless impose liability for disparate impact based on Title VI's implementing regulations, as we will explain in Part IV, its argument is incorrect. By grounding its analysis in part on disparate impact, the Dear Colleague Letter is not just bad policy, it goes beyond the law.[49]

Perversely but unsurprisingly, as a result of the policy announced in Secretary Duncan's speech, the Dear Colleague Letter, and OCR's numerous compliance reviews, some school districts have adopted policies and procedures that either encourage race discrimination or are explicitly discriminatory. Some of the early evidence of this came even before the Dear Colleague Letter was issued as a result of efforts of the U.S. Commission on Civil Rights. Not long after Duncan's speech, the Commission conducted a study in which it sent letters to a number of school districts across the country, asking them how (if at all) they intended to change their policies in response to OCR's discipline initiative.[50] The results were interesting.

A good example is the response of the Tucson Unified School District. Under its plan, teachers and principals are expected to "*striv[e] for no ethnic/racial disparities.*" Elaborate procedures were set out requiring an "Equity Team" to ensure "social justice for all students" in discipline matters. The plan specifically sets out as its goal that the district "*will reduce the disproportionate number of suspensions of African American and Hispanic students.*" . . . It states that one of "the *expected outcomes*" of the implementation of its new procedures, which includes a requirement that all long-term suspensions be reviewed by the "Director of Student Equity," *will be a decline in out-of-school suspensions* "*especially with regard to African American and Hispanic students.*"

The Tucson Unified School District did not state why it believed that greater attention to fairness in discipline will yield a reduction in suspensions "especially with regard to African American and Hispanic students." Perhaps it is supposed to be

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Fourteenth Amendment's equal protection clause forbids only intentional discrimination); *see also infra* Part IV.

49. This Article faults the Dear Colleague Letter for its emphasis on disparate impact liability and reliance on statistical disparities to trigger massive investigations. But this is not meant to suggest that other criticisms of the letter are not also important. *See, e.g.*, Hans Bader, *Obama Administration Undermines School Safety, Pressures Schools to Adopt Racial Quotas in School Discipline*, *Competitive Enterprise Institute* (Jan. 13, 2014), https://cei.org/blog/obama-administration-undermines-school-safety-pressures-schools-adopt-racial-quotas-student [https://perma.cc/L3Q7-BLG6].

50. *See* Statement of Commissioner Gail Heriot, *in* SCHOOL DISCIPLINE AND DISPARATE IMPACT, *supra* note 14, at 111–12.

taken on faith. If, however, in moving towards its goal and expected outcome, its employees end up consciously or unconsciously doing exactly what the law forbids—doling out discipline on the basis of a student's race or ethnicity—it will be in violation of the law, not in some sort of heightened compliance with it owing to its efforts to respond to disparate impact.[51] Indeed, this seems to be the likely outcome. When supervisors "expect" certain outcomes from their subordinates, they usually get them.

In 1997, in *People Who Care v. Rockford Board of Education*,[52] the U.S. Court of Appeals for the Seventh Circuit was faced with a Magistrate's decree that "forb[ade] the school district to refer a higher percentage of minority students than of white students for discipline unless the district purges all 'subjective' criteria from its disciplinary code."[53] In a unanimous decision, the court held:

> This provision cannot stand. Racial disciplinary quotas violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty. They place race at war with justice. They teach schoolchildren an unedifying lesson of racial entitlements. And they incidentally are inconsistent with another provision of the decree, which requires that discipline be administered without regard to race or ethnicity.[54]

Telling teachers and principals that they must strive for no ethnic/racial disparities is not effectively different from simply telling them to have no ethnic/racial disparities. It will have the same predictable result: Race will be a factor in determining who gets punished and how severely. Just as the decree in *People Who Care* cannot stand, Tucson's policy should not be permitted to stand.

Imagine if the roles were reversed. Suppose, for example, in a high school at which African-Americans are "over-represented" on competitive sports teams, the teachers were told they should

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51. One of us (Heriot) made these points concerning the Tucson Unified School District (in very similar terms) in *id.* at 111–12 (emphasis added).

52. 111 F.3d 528 (7th Cir. 1997).

53. *Id.* at 538. Note that Rockford has a way out. It did not have to discriminate. It could have "purge[d] all 'subjective' criteria from its disciplinary code." *Id.* But that does not make the Magistrate's decree nondiscriminatory. Imagine if the Magistrate, concerned that more Hispanics get hired as jockeys in high-stakes horse racing, ordered racehorse owners to either stop considering body weight in deciding whom to hire as a jockey or else agree to hire white and Hispanic jockeys at the same rate.

54. *Id.*

"strive" to put more whites or Asians on the team or that its "goal" and "expectation" was proportional representation. Would anyone regard this as appropriate?

Consequently, it is hard not to view such goals and expectations as violations of Title VI in and of themselves.

The Commission received a similar response from Romain Dallemand, Superintendent of Rochester, Minnesota Public Schools: "As a result of analyzing our discipline data and the disproportionalities which exist, our schools have *implemented a number of strategies . . . to decrease the number of referrals for our black and brown students.*"[55]

Sometimes questionable policy changes have come as a direct result of OCR investigations. Consider, for example, the case of Minneapolis. OCR opened an investigation into Minneapolis schools on May 11, 2012, and officially entered into a resolution agreement on November 11, 2014.[56] But it was Minneapolis's new policies, adopted to appease OCR, not the policies that caused OCR to open the investigation, that were more likely a violation of Title VI. According to a November 9, 2014 Minneapolis *Star Tribune* article, entitled *Minneapolis Schools to Make Suspending Children of Color More Difficult*, "Minneapolis public school officials [have made] dramatic changes to their discipline practices by requiring the superintendent's office to

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55. *See* SCHOOL DISCIPLINE AND DISPARATE IMPACT, *supra* note 8, at 181–83 (emphasis added) (publishing a copy of the letter). These are not the only interesting examples brought to light by the Commission's efforts. The Winston-Salem/Forsyth County School District was also forthright in telling the Commission that it switched discipline policies specifically to reduce racial disproportionality in discipline:

> *To address the disproportionate discipline of African-American students in the district* [italics added], the [Winston-Salem/Forsyth County] discipline policies were revised this year to specifically disallow administrators from aggravating disciplinary sanctions based on prior, unrelated misconduct. Further, minor code of conduct infractions occurring in prior school years may not be considered *at all* [italics in original] when assigning disciplinary sanctions.

Id. at 113 (citation omitted) (publishing a copy of the letter). It is difficult to see why race should be allowed to drive these issues. Allowing administrators to increase disciplinary sanctions for repeat offenders is either a good idea or it is not. It is not made a bad idea simply because some race or national origin groups are more likely to be repeat offenders.

Likewise, the Superintendent of the Dorchester, South Carolina schools wrote to the Commission, "The superintendent has established a Discipline Task Force to examine and ensure that policies and procedures are equitable for all students *and* lead to reduction in racial disparities in school discipline particularly among African American males." *Id.* at 113 (emphasis added). The potential tension between those two goals—ensuring policies that are "equitable for all students" and lead to a "reduction in racial disparities"—went unacknowledged. *Id.*

56. *Resolution Agreement #05-12-5001 Minneapolis Public Schools*, *supra* note 29, at 1.

review all suspensions of students of color."[57] Under the new policy, the school district will require review by the Superintendent "or someone on her leadership team" before "every proposed suspension of black, Hispanic or American Indian students that does not involve violent behavior."[58] No such review is necessary to suspend a white or Asian student.[59]

This is not compliance with Title VI. Rather, it appears to be an elementary violation of that law. Whites and Asians are literally being treated differently.[60] While black, Hispanic, and American Indian students get an extra opportunity to convince the authorities that they should not be suspended, white and Asian students do not.

If systematic discrimination against blacks, Hispanics, and American Indians in discipline had been proven, one might be able to argue for extra precautions in the future.[61] But, as several courts have held, evidence of disparate impact in discipline is insufficient to prove actual discrimination. Among these cases is *Belk v. Charlotte-Mecklenburg Board of Education*,[62] which stated that

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57. Alejandra Matos, *Minneapolis Schools to Make Suspending Children of Color More Difficult*, STAR TRIB. (Nov. 9, 2014), http://www.startribune.com/mpls-schools-to-make-suspending-children-of-color-more-difficult/281999171/ [https://perma.cc/B22V-7RR4].

58. *Id.*

59. *Id.*

60. In addition to the Title VI prohibition on race discrimination, 28 C.F.R. § 42.104(b)(1) states that:

> A recipient . . . may not . . . on the ground of race, color or national origin . . . [t]reat an individual differently from others in determining whether he satisfies any . . . requirement or condition which individuals must meet in order to be provided any . . . service . . . or benefit provided under the program.

§ 42.104(b)(1); § 42.104(b)(1)(v). White and Asian students are being treated differently in determining whether they may continue to attend classes.

61. In an op-ed for the Washington Post, Minneapolis school district superintendent Bernadeia Johnson denied that she was "discriminating against our white students." Bernadeia Johnson, Opinion, *Critics Say My New Discipline Policy Is Unfair to White Students. Here's Why They're Wrong*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/26/critics-say-my-new-discipline-policy-is-unfair-to-white-students-heres-why-theyre-wrong [https://perma.cc/9J66-8YFN]. The problem, she said, is illustrated by the following:

> [n]ationwide, black and white children suffer different consequences for their behavior as soon as they begin school. Black students are just 18 percent of all preschoolers, but they are 48 percent of preschoolers with more than one out-of-school suspension. Minority students do not misbehave more than their white peers; they are disciplined more severely for the same behaviors.

Id. It is unclear how Johnson arrived at the conclusion that "[m]inority students do not misbehave more than their white peers." *Id.* It is not supported by any empirical evidence of which we are aware. For a further discussion of this point, see *infra* Part III.

62. 269 F.3d 305 (4th Cir. 2001)(en banc).

"disparity does not, by itself, constitute discrimination," and constituted "no evidence" that the defendant "targets African-American students."[63]

Moreover, for Minneapolis to put into place such a race-based remedial procedure, it would need more than strong evidence of systematic discriminatory treatment. As Justice Sandra Day O'Connor put it in *City of Richmond v. J.A. Croson Co.*,[64] Minneapolis would need "a strong basis in evidence for its conclusion that [discriminatory] *remedial action was necessary*."[65] If there were a problem with race discrimination in Minneapolis, it

63. *Id.* at 332 (discussing "statistics [that] show that of the . . . students disciplined from 1996-98, sixty-six percent were African-American" (citation omitted)); *see* Coal. to Save Our Children v. State Bd. of Educ., 90 F.3d 752, 775 (3d Cir. 1996) (holding that Delaware schools had achieved unitary status and rejecting the "assumption 'that [lack of discipline] or misbehavior is a randomly distributed characteristic among racial groups'"); Tasby v. Estes, 643 F.2d 1103, 1107 (5th Cir. 1981) ("Official conduct [in the administration of school discipline] is not unconstitutional merely because it produces a disproportionately adverse effect upon a racial minority.").

64. 488 U.S. 469 (1989).

65. *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)). Even if we were to assume, contrary to our discussion in Part IV, that the Dear Colleague Letter's application of disparate impact liability to school discipline is supported by law, it is unlikely that it would justify such an agreement. The Supreme Court's decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), is instructive here. Unlike Title VI, Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 42 U.S.C. § 2000e et seq., has indeed been interpreted (wrongly in our view) to outlaw actions that have a disparate impact. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Ricci*, the City of New Haven hired experts to develop a special civil service examination for firefighters seeking promotion. *Ricci*, 557 U.S. at 562. When it turned out the examination had a disparate impact on African-Americans, however, it threw out the results of the test. *Id.* When the test-takers who would have received the promotions (eight whites and one Hispanic) sued, the City argued that it had to throw out the test results out of fear that it would otherwise be liable for the test's disparate impact. *Id.* at 562–63. The Court disagreed, holding that the City may engage in activity that actually discriminates (as by throwing out test results because it did not like the racial composition of the group that did best) only when there is a "strong basis in evidence" that it would otherwise be subject to liability for disparate impact. *Id.* at 563. Note that there was no dispute that the civil service examination at issue had a disparate impact on African-Americans. It did. What was unresolved was whether the examination was nevertheless valuable as a method of discerning which firefighters should receive promotions (and thus whether the City was acting from business necessity). Similarly, there is no dispute that most school districts discipline African-American students disproportionately. What is usually unresolved is whether this is justified by differences in conduct.

It was in *Ricci* that Justice Scalia noted in concurrence concerns over the constitutionality of disparate impact liability. *Id.* at 594. Scalia wrote:

> I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?

Id. See generally Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003). We do not attempt to resolve the issue of disparate impact liability's constitutionality in this Article but note it in connection with the doctrine of constitutional avoidance; see *infra* notes 297–319 and accompanying text.

could be remedied just as well, if not better, by requiring the superintendent's office to review *all* suspensions rather than just suspension of "students of color." There is no need to give some races and national origins more procedural protections than others. It is therefore difficult to see how Minneapolis's race-specific "remedy" could be held to be "necessary." If it is not necessary, it is a violation of Title VI rather than a legitimate remedy.

Often the race-specific "remedy" is written directly into OCR's settlement agreement (called a "resolution agreement") with a school district. An example is Oakland Unified School District's Resolution Agreement. The agreement requires the school district to impose "targeted reductions in the overall use of student suspensions; suspensions for African American students, Latino students, and students receiving special education services; and African American students suspended for defiance."[66] No "targeted reductions" for white and Asian-American students are provided for. A report in the *San Jose Mercury News* stated that Oakland "administrators and teachers are frantically trying to reduce suspension numbers as part of a voluntary agreement in response to a complaint by the U.S. Department of Education's Office for Civil Rights."[67] If the efforts were indeed frantic, it is not hard to imagine how standards would end up being different for the "targeted" groups than for the "non-targeted" groups. Indeed, it is hard to imagine how they would not be.

The agreement that OCR entered into with the Oklahoma City public schools is another interesting example. It resembles Minneapolis's and Oakland's procedure in that it is explicitly race-specific. It reads in part:

> Starting January 31, 2017, each school principal will meet at the conclusion of each semester with the teachers at his/her school to discuss the data gathered by the District. . . .
>
> a. The meetings will examine how discipline referrals and disciplinary sanctions imposed at the school compare to those at other District schools and consider any data suggesting that African American and Hispanic students are disproportionately

66. *Agreement to Resolve Oakland Unified School District OCR Case Number 09125001*, *supra* note 27, at 14.

67. Doug Oakley, *Berkeley Schools Focus on Black Student Discipline Issue*, SAN JOSE MERCURY NEWS (Oct. 22, 2013), https://www.mercurynews.com/2013/10/22/berkeley-schools-focus-on-black-student-discipline-issue/ [https://perma.cc/AXP3-GFES].

> referred for discipline or sanctioned more harshly than similarly-situated students of other races;
>
> b. If the data suggests disproportion, the meeting will explore possible causes for the disproportion and consider steps that can be taken to eliminate the disproportion to the maximum extent possible; . . .
>
> d. Where the data shows that a particular teacher is responsible for a disproportionate number of referrals or disproportionately refers African American and/or Hispanic students, the principal will meet privately with that teacher to discuss the data, explore the reasons for the disproportion and examine potential solutions. If the information suggests that the teacher is failing to adhere to the District's student discipline policies, practices and procedures or is engaging in discrimination, the principal will take appropriate corrective action, including but not limited to, additional training or disciplinary action; and
>
> e. Where the data shows no disproportion or suggests that a teacher has been particularly successful in managing student discipline at the classroom level, the meetings will examine steps that are being taken at the school or by the individual teacher to ensure the fair and equitable enforcement of the District's student discipline policies, practices and procedures that might be shared as "best practices" with other teachers at the school and with other schools where disproportion exists.[68]

The settlement agreement appears to assume that disproportionality should be eliminated to the maximum extent possible.[69] As Subsection (d) shows, that means disproportionality in even a single teacher's classroom is a problem in need of "solutions." But only one kind of disproportionality—disproportionality in disciplining African-American and/or Hispanic students—will result in an individual teacher being required to participate in an awkward meeting with the principal. On the other hand, an individual teacher's strict proportionality will result in an inquiry into how others

68. *Resolution Agreement OCR Docket #07141149 Oklahoma City Public Schools*, *supra* note 34, at 18–19. In addition, the discussion of disparate impact in the Dear Colleague Letter itself indicates that ED and DOJ will not hew to the "four-fifths rule," traditionally followed in employment discrimination cases, meaning that no disparity is too small to escape DOJ and ED's notice. According to the four-fifths rule, a selection rate for any race, sex, or national origin group that is less than four-fifths (or 80%) of the rate for the group with the highest rate will generally be regarded by enforcement agencies as evidence of adverse impact. Though sometimes rightly criticized for its arbitrariness and lack of textual support, the four-fifths rule attempts to provide a limiting principle regarding the application of disparate impact, and the absence of any such attempt in the Dear Colleague Letter is telling.

69. *Id.*

might emulate that teacher—without any acknowledgement that proportionality is most easily achieved by applying different standards to students of different races.

An unjustifiable message is being sent to principals and even individual teachers: *Making your numbers look good for African-Americans and Hispanics is the only way to make your life easy. If you have to be unfair to Asians and whites to get there, so be it.* Of course, in the real world one would have to expect some natural fluctuations from teacher to teacher or classroom to classroom—perhaps one sixth-grade teacher just happened to draw two particularly badly behaved Polynesian-Americans—even in a school with generally proportional discipline rates. But OCR does not seem content to accept any such deviations, no matter how slight, from perfect racial proportionality.[70] Nor is the Oklahoma City settlement agreement an outlier: discipline-related settlement agreements between OCR and the school districts of Christian County, Kentucky;[71] Minneapolis, Minnesota; [72] Tupelo, Mississippi;[73] Christina, Delaware;[74] Rochester, Minnesota;[75] and Amherst County, Virginia,[76] contain similar provisions.[77]

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70. *See id.* (requiring action upon evidence of racial disproportionality in the classroom). It may be useful to compare this rigidity with two twin Supreme Court cases on the use of race in college admissions, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Both challenged racial preferences at the University of Michigan, *Gratz* affirmative action for undergraduates and *Grutter* preferences in law school admissions. Although both schools gave preferences to racial and ethnic minorities, the undergraduate school in *Gratz* used a rigid system that gave each racial minority student the same number of points toward admission. The law school, by contrast, also gave minorities a hand up but did not precisely quantify what racial or ethnic minority status was worth in such a mechanical, nonindividualized fashion. The Supreme Court held the latter to be constitutional but not the former.

Many have criticized the reasoning in these cases, holding that rejecting what is essentially a "rigid quota" but upholding a "flexible quota" makes no sense. Still, insofar as the distinction has some legal or moral relevance, it is worth noting that OCR here is requiring certain racial outcomes in a mechanical and non-individualized way and without the flexible consideration for individualized circumstances present in *Grutter*.

71. *Voluntary Resolution Agreement Christian County Public Schools OCR Case No. 03-11-5002*, *supra* note 28, at 15.

72. *Resolution Agreement #05-12-5001 Minneapolis Public Schools*, *supra* note 29, at 17–18.

73. *Voluntary Resolution Agreement Tupelo Public School District OCR Case No. 06-11-5002*, *supra* note 30, at 16.

74. *Resolution Agreement Christina School District OCR Case No. 03-10-5001*, *supra* note 31, at 15.

75. *Resolution Agreement #05-10-5003 Rochester Public School District*, *supra* note 32, at 13.

76. *Resolution Agreement Amherst County Public Schools OCR Complaint No. 11-14-1224*, U.S. DEP'T OF EDUC., 14–15 (2015), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11141224-b.pdf [https://perma.cc/7W2D-VQA9].

77. Meanwhile the Indiana Advisory Committee to the U.S. Commission on Civil Rights has recommended that ED "require that states impose mandatory reforms to

II. THE DEPARTMENT OF EDUCATION'S POLICY IS LEADING TO INCREASED DISORDER IN SCHOOLS.

OCR's job is to enforce Title VI. If instead its policies are encouraging or even requiring schools to violate Title VI, that is a serious problem. But arguably there is an even more serious problem: OCR's policies are leading to more chaotic schools.

Maintaining good order in the classroom is not always easy, but it is necessary if students are to learn. The problem is often especially acute in the inner-city and other low-income areas.[78] A 2007 article in the *San Francisco Chronicle*, entitled *Students Offer Educators Easy Fixes for Combatting Failure*, had this to say on the topic:

> As thousands of learned men and women gathered in Sacramento this week to chew over the vexing question of why black and Latino students often do poorly in school, someone had a fresh idea: Ask the students.
>
> So they did. Seven struggling students—black, brown and white—spent an hour Wednesday at the Sacramento Convention Center telling professional educators what works and doesn't work in their schools . . . .
>
> "If the room is quiet, I can work better—but it's not gonna

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disciplinary policies for schools that demonstrate significant disparities in disciplinary actions." Ind. Advisory Comm. to the U.S. Comm'n on Civil Rights, Civil Rights and the School-to-Prison Pipeline in Indiana 48 (2016), http://www.usccr.gov/pubs/Civil-Rights%20and-the-School-to-Prison-Pipeline-in%20Indiana.pdf [https://perma.cc/9E74-PWGW]. "School discipline interventions should not be neutral in nature, but should take into consideration approaches that address race, color, sex, national origin, and disability disparities." *Id.* This appears to be a call to violate Title VI rather than to enforce it.

Indiana SAC member, Notre Dame law professor Richard Garnett, indicated his reservations concerning the Indiana SAC report:

> [T]he report states that United States Department of Education should "require that states impose mandatory reforms" that "may be based on the Department's 2014 Guiding Principles Resource Guide for Improving School Climate and Discipline." I am not convinced, however, that all of the elements of and recommendations in the Resource guide and the accompanying "Dear Colleague Letter" of January 8, 2014 will or should be regarded as reflecting accurately the requirements of the relevant civil-rights laws. . . . And, I have questions about the advisability and legality of requiring, "as a condition of receiving federal funding," that state and local funding recipients adopt "school discipline interventions [that are] not . . . neutral in character.

Id. at App. C.

78. In 2003, one careful scholar—sociologist Richard Arum—reported that there is "little evidence supporting the contention that the level of disorder and violence in public schools has [generally] reached pandemic proportions." *See* Arum, *supra* note 16, at 2. But, he writes, it is "indeed the case in certain urban public schools," various factors have combined "to create school environments that are particularly chaotic, if not themselves crime producing." *Id.* This book was, of course, written well before OCR's current school discipline policy went into effect. *See also id.*

> happen," said Nyrysha Belion, a 16-year-old junior at Mather Youth Academy in Sacramento County, a school for students referred for problems ranging from truancy to probation.
>
> She was answering a question posed by a moderator: "What works best for you at school to help you succeed?"
>
> Simple, elusive quiet.
>
> Nyrysha said if she wants to hear her teacher, she has to move away from the other students. "Half our teachers don't like to talk because no one listens."
>
> The others agreed. "That's what made me mess up in my old school—all the distractions," said Imani Urquhart, 17, a senior who now attends Pacific High continuation school in the North Highlands suburb of Sacramento.[79]

So what happens when schools are pressured to reduce suspensions of African Americans and other minorities? The most likely result is that those schools will face increased classroom disorder. And there is evidence that is exactly what is happening.[80]

Consider the case of the Oklahoma City School District, one of many jurisdictions investigated by OCR. As a result of that investigation, in 2015, the district instituted a new discipline policy. That policy led to a 42.5% reduction in the number of suspensions.[81]

If the newspaper reports are to be believed, teachers hate it. According to an article in *The Oklahoman*, "[m]any describe chaotic classroom settings and said they feel like baby sitters who spend more time trying to control defiant students than planning and teaching."[82] The article continues:

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79. Nanette Asimov, *Students Offer Educators Easy Fixes for Combatting Failure*, S.F. CHRON. (Nov. 15, 2007), https://www.sfgate.com/education/article/Students-offer-educators-easy-fixes-for-3301337.php [https://perma.cc/LYP8-M67X]. These students' stories match up well with complaints that students gave in response to a 1998 study. ALEXANDER VOLOKH & LISA SNELL, STRATEGIES TO KEEP SCHOOLS SAFE, POLICY STUDY NO. 234 (1998), http://reason.org/files/60b57eac352e529771bfa27d7d736d3f.pdf [https://perma.cc/KND5-HLC3]. "Some of my classes are really rowdy," a student from Seattle told the researchers, "and it's hard to concentrate." *Id.* at 11. "They just are loud and disrupting the whole class," a student from Chicago similarly said about some of her classmates. *Id.* "The teacher is not able to teach. This is the real ignorant people." *Id.*

80. *See* Paul Sperry, *How Liberal Discipline Policies Are Making Schools Less Safe*, N.Y. POST (Mar. 14, 2015), https://nypost.com/2015/03/14/politicians-are-making-schools-less-safe-and-ruining-education-for-everyone/ [https://perma.cc/P5NA-W2BE] (surveying the situation in multiple cities).

81. Tim Willert, *Many Oklahoma City School District Teachers Criticize Discipline Policies in Survey*, OKLAHOMAN (Oct. 31, 2015), http://newsok.com/article/5457335 [https://perma.cc/8XZN-XGUM].

82. *Id.*

> "Students are yelling, cursing, hitting and screaming at teachers and nothing is being done but teachers are being told to teach and ignore the behaviors," another teacher reported. "These students know there is nothing a teacher can do. Good students are now suffering because of the abuse and issues plaguing these classrooms."[83]

Why was this happening? "'Most of the teachers, if they write a referral nothing will happen,' [high school teacher Benjamin] Bax said. 'Either the administrator won't process the referral or they will be told that it's their fault due to lack of classroom management.'"[84]

But the school administrators appeared to be simply following orders from higher up.

> "It is clear principals are receiving the message to hold down referrals and suspensions as evidenced by numerous teachers reporting their principal saying their 'hands are tied' by direction of district-level administrators," [Ed Allen, president of the Oklahoma City American Federation of Teachers,] said. "The district can deny all they want that they are not telling principals to ignore discipline issues, but principals are reporting this across the district."[85]

What could motivate the Oklahoma City School District to be so lax on discipline? Allen spelled it out: "I believe the district's main reason for wanting to develop a new code of conduct is simply to *get the civil rights complaints off the table.*"[86]

The Oklahoman ran an editorial on the issue entitled *Survey Shows Disconnect Between OKC School District and Its Teachers* in which still more teachers were quoted. "'We were told that referrals would not require suspension unless there was blood,' one teacher said. 'Students who are referred . . . are seldom taken out of class, even for a talk with an administrator.'"[87]

Tellingly, 60% of those teachers surveyed stated that the amount and frequency of offending behavior had increased.

In Indianapolis, as in Oklahoma City, it is not just individual teachers, but also local teachers' union leaders who are upset.[88]

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* (emphasis added).
87. The Oklahoman Editorial Board, *Survey Shows Disconnect Between OKC School District and Its Teachers*, OKLAHOMAN (Nov. 4, 2015), http://newsok.com/article/5457999 [https://perma.cc/75JR-DQEC].
88. Florida's Hillsborough County public schools, which were made the subject of an

In response to the Dear Colleague Letter, Indianapolis adopted a new discipline policy designed to reduce suspensions and expulsions, especially for African-American students, in mid-2015.

"'I am hearing from a lot of places that the teachers don't feel safe,' said Rhondalyn Cornett, head of the [Indianapolis Public Schools] teacher union. 'I'm getting a lot of calls (and) a lot of emails.'"[89] According to *Chalkbeat*, a nonprofit news website covering education issues, a handful of newer teachers left one high school in the middle of the year, because they felt unsafe there. Another teacher told the school board: "Suspensions are down. But why? At the beginning of the year, a student assaulted a teacher in broad daylight in a hallway of our school . . . . He was back the next day."[90]

Lafayette Parish, Louisiana, did not wait for the Dear Colleague Letter to change its policy.[91] It adopted and implemented the Positive Behavioral Interventions and Supports (PBIS) approach beginning in the 2012–13 school year (i.e., two years after Secretary Duncan's speech).[92] Superintendent Patrick

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OCR investigation that began in 2014 and is still ongoing, are another example. The *Tampa Bay Times* reported:

> As more than 200,000 Hillsborough County children return to school today, they will experience a well-intended discipline policy that, according to some teachers, still needs work.
>
> Reforms that took effect last year are keeping more students in class instead of home on suspension.
>
> But two-thirds of teachers who responded to a union survey said the new policies did not make schools more orderly. Some say principals discourage them from taking action out of pressure to keep their numbers down. Only 28 percent agreed with the statement, "I feel supported by my administration when I write a referral."

Marlene Sokol, *Some Hillsborough Teachers Say New Discipline Policies Aren't Making Schools More Orderly*, TAMPA BAY TIMES (Aug. 9, 2016), http://www.tampabay.com/news/education/k12/many-hillsborough-teachers-say-new-discipline-policies-arent-making/2288777 [https://perma.cc/ARQ3-Y54F].

89. Dylan Peers McCoy, *Effort to Reduce Suspensions Triggers Safety Concerns in Indianapolis Public Schools*, CHALKBEAT (Mar. 23, 2016), http://www.chalkbeat.org/posts/in/2016/03/23/effort-to-reduce-suspensions-triggers-safety-concerns-in-indianapolis-public-schools/#.V6I76zUsBFt [https://perma.cc/378K-2CEP].

90. Andrew Polley, *Speech to the IPS School Board*, YOUTUBE (Feb. 28, 2016), https://www.youtube.com/watch?v=KNVDUdVzYcg [https://perma.cc/8HUA-7G7Q].

91. LAFAYETTE PARISH SCHOOL SYSTEM TURNAROUND PLAN 15, 17 (2012), http://www.lpssonline.com/uploads/TurnaroundPlan.pdf [https://perma.cc/SA68-8BT8].

92. Many of OCR's resolution agreements required school districts that had been under investigation for the disparate impact of their disciplinary practice to adopt PBIS. *See, e.g.*, *Resolution Agreement OCR Docket #07141149 Oklahoma City Public Schools*, *supra* note 34; *Resolution Agreement #05-10-5003 Rochester Public School District*, *supra* note 32; *Agreement to Resolve: Oakland Unified School District OCR Case Number 09125001*, *supra* note 27. The Dear Colleague Letter similarly "emphasiz[es] positive interventions over student removal." Dear Colleague Letter, *supra* note 44 at App. II(C).

Cooper said the new policy would eliminate essentially all out-of-school suspensions and expulsions in the 30,500-student district.[93]

Things did not go well. By January, the local school board was discussing purchasing a new alarm system and security cameras because there had been an increase in "discipline issues."[94] A few months later, a teacher-intern felt so strongly about the disorder in the classroom that he appeared before the school board. His oral statement went like this:

> . . . I had a recent meeting with my fellow interns at UL-Lafayette, and I can tell you the atmosphere in that [classroom] was disgust, *absolute disgust* with . . . enforcement of discipline in school. . . .
>
> . . . I came from parents that were dirt poor. We had nothing. Growing up, I got my cousins' clothes. I graduated high school with honors.
>
> I had a student the other day that I told, "Go home, do a project, get on the computer." And he looked at me and he said, "Mr. Comeaux, I don't even have a home to go to. My . . . mother and brother live in a shelter." That student in my class, from my working with him, has an A average. So it can be done. . . .
>
> And it is just so disheartening—that when you ask a student to do something, they look at you and, with all due respect, say, "Shut the [expletive] up." Or "Go to hell, you [expletive]." Or "Who the [expletive] do you think you are?" And the administration does nothing.
>
> I had a student threaten me physically in my classroom, to put his hands on me and, he would have been back in the classroom the very next morning had I not said, "I will get an attorney and I will get a restraining order against this student." Otherwise, the administration would have done nothing. And it's sickening. . . .
>
> I have also come across warning notes from guidance counselors that have said, "Possible physical harm from this student against faculty members." And these children are still in our schools. I have students who have had 40, 50, 60

93. Nirvi Shah, *Groups Ask Districts to Stop Using Out-of-School Suspensions*, NOVO FOUND. (Aug. 22, 2012), https://novofoundation.org/newsfromthefield/groups-ask-districts-to-stop-using-out-of-school-suspensions-2/ [https://perma.cc/4L2Y-49VD] ("At a recent conference . . . , Lafayette Parish, La., Superintendent Patrick Cooper said that his district has eliminated essentially all out-of-school suspensions and expulsions in his 30,500-student district.").

94. Bernadette Lee, *Lafayette Parish School System Approves School Safety Package*, KPEL RADIO (Jan. 24, 2013), www.kpel965.com/Lafayette-parish-school-system-approves-school-safety-package/ [https://perma.cc/V4Y2-5S7Z].

> referrals, who sit next to students, fart in class, curse in class, talk about pornography, what they did to this girl, what they did to this boy. *And they don't do anything*. And that's why we are having the problems we're having in education, not because the kids come from a poor background, because I made it. And that young man is making it. He has a 96 average in my class. *And he lives in a shelter*.
>
> So unless Jesus Christ himself comes down before us . . . and tells me differently, poverty is not it. Or ineffective teaching is not it. It's the discipline. It's the disruptions. It's having to stop your class and go write somebody up 40 and 50 times over a grading period.
>
> I've had to leave my class, just today, eight times for three different students . . . . [O]ne [was] dangling a student over the balcony at school by the shirt collar. And another teacher, witnessing it and saying, "Hey, stop that!" And he turned and said, "You back the [expletive] up. Who the [expletive] you think you are, correcting me?" And that student is still at our school.
>
> Now why can't anybody on this board address this? Why? . . .[95]

Mr. Comeaux's statement was met with applause. But as a result of his statement, in less than 24 hours, he was fired by the Lafayette Parish School District.[96] Recordings of his statement made it onto YouTube, Facebook, and Twitter, and an online petition to rehire him was circulated.[97] From the record, it appears that he continued his student teaching elsewhere.[98]

St. Paul, Minnesota, did not need direct pressure from OCR in order to change its disciplinary policies based on concerns about racial equity. St. Paul began to modify its policies in 2011, just a year after Duncan's speech on the Edmund Pettus Bridge.[99]

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95. The Independent, *Derrick Comeaux*, YOUTUBE (Mar. 22, 2013), https://www.youtube.com/watch?v=6ixbVSpvvrQ [https://perma.cc/8HY4-U5WY] (emphasis added).

96. Marsha Sills, *Student-Teacher Loses Post*, ACADIANA ADVOC. (Apr. 2, 2013), http://www.theadvocate.com/acadiana/news/education/article_12e0f9a3-d243-5e78-bc4e-8044a11a7c0b.html [https://perma.cc/MW55-25FR].

97. Lee, *supra* note 94; KATC-TV 3: Acadiana's Newschannel, *Derrick Comeaux Speech to the Lafayette Parish School Board*, FACEBOOK (Mar. 22, 2013), https://www.facebook.com/katctv3/videos/10101377252187530/ [https://perma.cc/9EG4-RNYL]; Laura Lavergne, *Reinstate Student Teacher Derrick Comeaux*, CHANGE.ORG, https://www.change.org/p/lafayette-parish-school-board-reinstate-student-teacher-derrick-comeaux [https://perma.cc/AU4U-5HU6]; @LYBIOnews, TWITTER (Dec. 23, 2015), https://twitter.com/LYBIOnews.

98. Laura Lavergne, *Petition Update: Derrick Comeaux Has Found Another Student Teacher Site*, CHANGE.ORG (Mar. 26, 2013), https://www.change.org/p/lafayette-parish-school-board-reinstate-student-teacher-derrick-comeaux/u/3314205 [https://perma.cc/7V4B-Y5H8].

99. Anthony Lonetree, *Loaded Gun Found in Backpack at St. Paul's Harding High*, STAR

Among the changes it instituted was the removal of "continual willful disobedience" from the list of offenses punishable by suspension—a change that led to an "alarming increase" in student-to-staff violence there, according to the local county attorney.[100] One teacher was choked and body-slammed by a high school student and hospitalized with a traumatic brain injury, and another caught between two fighting fifth-grade girls was knocked on the ground with a concussion.[101]

One African-American teacher with fourteen years of classroom experience resigned his teaching job in response to the rise in disciplinary problems in St. Paul. He explained his reasons in an op-ed in the *Twin Cities Pioneer Press*:

> On a daily basis, I saw students cussing at their teachers, running out of class, yelling and screaming in the halls, and fighting. If I had a dollar for every time my class was interrupted by a student running into my room and yelling, I'd be a rich man. It was obvious to me that these behaviors were affecting learning, so when I saw the abysmal test scores this summer, I was not surprised. . . .
>
> I diligently collected data on the behaviors that I saw in our school and completed behavior referrals for the assaults. These referrals were not accurately collected. The school suspended some students, but many more assaults were ignored or questioned by administrators to the point where the assaults were not even documented. I have since learned that this tactic is widely used throughout the district to keep the numbers of referrals and suspensions low.
>
> The parents who complained to the school board last year about behavior at Ramsey Jr. High know all too well about behaviors being ignored. The students of [St. Paul public schools] are being used in some sort of social experiment where they are not being held accountable for their behavior. This is only setting our children up to fail in the future, especially our black students. All of my students at [John A. Johnson Elementary] were traumatized by what they experienced last year—even my black students. Safety was my number one concern, not teaching.

TRIB. (Oct. 21, 2015), http://www.startribune.com/loaded-gun-found-in-backpack-at-st-paul-s-harding-high/335274371/ [https://perma.cc/86QS-VRLY].

100. *See, e.g.*, Anthony Lonetree & James Walsh, *Charges: Student Choked, Body Slammed Teacher at St. Paul Central High*, STAR TRIB. (Dec. 9, 2015), http://www.startribune.com/st-paul-student-charged-with-assaulting-teacher/360964461/ [https://perma.cc/5UFQ-2X6X].

101. Katherine Kersten, *Mayhem in the Classroom*, WKLY. STANDARD (Apr. 8, 2016), http://www.weeklystandard.com/mayhem-in-the-classroom/article/2001892 [https://perma.cc/558P-LQQD].

> . . . .
> Racism and white privilege definitely exist . . . . But to blame poor behavior and low test scores solely on white teachers is simply wrong. However, it's the new narrative in our district . . . .
> . . . We now have "Cultural Specialists" and "Behavior Specialists" throughout our schools. . . . [I]t's not clear to me what their qualifications are. Their job seems to be to talk to students who have been involved in disruptions or altercations and return them to class as quickly as possible. Some of these "specialists" even reward disruptive students by taking them to the gym to play basketball (yes, you read that correctly). This scene plays out over and over for teachers throughout the school day. There is no limit to the number of times a disruptive student will be returned to your class. The behavior obviously has not changed, and some students have realized that their poor behavior has its benefits.[102]

Another teacher, Theo Olson, was placed on administrative leave after he complained on Facebook about the lack of support St. Paul teachers were receiving in discipline matters.[103] Members of the local Black Lives Matter chapter complained to the superintendent of the district that his remarks were "white

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102. Aaron Benner, *St. Paul Schools: Close the Gap? Yes. But Not Like This*, TWIN CITIES PIONEER PRESS (Oct. 2, 2015), http://www.twincities.com/2015/10/02/aaron-benner-st-paul-schools-close-the-gap-yes-but-not-like-this [https://perma.cc/EA3F-LSL4]. Benner later filed suit in federal court alleging that he had been targeted by the school district on account of his criticism. Anthony Lonetree, *Outspoken Teacher Sues St. Paul Schools, Alleges Retaliation*, STAR TRIB. (May 11, 2017), http://www.startribune.com/outspoken-teacher-sues-st-paul-schools-over-hostile-work-environment/422031563/ [https://perma.cc/5HJF-ZLAK]. The *Star Tribune* later reported that Benner had an ally in the St. Paul NAACP:

> The St. Paul NAACP is raising concerns about the case of a black teacher who alleges the St. Paul Public Schools retaliated against him for criticism of its discipline policies. . . .
> In a written statement, Joel Franklin, first vice president of the St. Paul NAACP, said it was "very disturbing" that the district would go after Benner for "simply voicing the concern, that not holding black students accountable for misbehavior sets them up for failure in life.
> St. Paul, like many districts, is aiming to diversify a mostly white teaching corps, and its treatment of Benner complicates that goal, Franklin said in a recent interview.
> "This is going to hamper any efforts to recruit other African-American teachers," he said.
> . . . .
> Benner's view—shared by Franklin—is that the push to reduce racial imbalance in suspensions fails to help kids who might benefit for discipline.

Anthony Lonetree, *St. Paul NAACP Enters Fray in Teacher's Court Case*, STAR TRIB. (May 31, 2017), http://www.startribune.com/st-paul-naacp-enters-fray-in-teacher-s-court-case/425497853/ [https://perma.cc/948V-83S5].

103. Dave Huber, *Teacher on Leave After Black Lives Matter Complains About His Student Discipline Comments*, COLLEGE FIX (Mar. 12, 2016), http://www.thecollegefix.com/post/26604/ [https://perma.cc/5U9H-WBSG].

supremacist."[104] But if Olson is a white supremacist, he has an odd way of showing it, as he himself has marched in Black Lives Matter protests.[105]

By late 2015, St. Paul teachers were threatening to strike if something was not done about student violence.[106] Ultimately, because of public unhappiness with St. Paul's discipline policies, three school board members lost their seats, and Superintendent Valeria Silva stepped down two years before her contract was set to expire.[107]

Perhaps the most extensive empirical data we have on the deterioration of discipline at schools adopting OCR's approach comes from New York City public schools.[108] We have no evidence that OCR applied direct pressure to New York to reduce its suspension rates. Instead, reforms appear to have been undertaken at the initiative of two different mayors—Michael Bloomberg and Bill de Blasio. Nevertheless, as Max Eden, a senior fellow at the Manhattan Institute and author of *School Discipline Reform and Disorder: Evidence from New York City Public Schools, 2012–16*, reports, the primary rationale behind them was to reduce racial disparities. This is in line with the policies promoted by OCR. And the motivation behind them may well have been in whole or in part to avoid coming in OCR's crosshairs.

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104. *Id.*

105. *Id.*

106. James Walsh, *St. Paul Teachers Threatening To Strike over School Violence*, STAR TRIB. (Dec. 10, 2015), http://www.startribune.com/silva-to-address-questions-of-teacher-safety-and-union-s-request-for-mediation/361318431/ [https://perma.cc/Y8F9-7R5D].

107. Doug Grow, *Why the DFL Blew Up the St. Paul Board of Education*, MINNPOST (Apr. 22, 2015), https://www.minnpost.com/education/2015/04/why-dfl-blew-st-paul-board-education [https://perma.cc/57VU-TPLH]; Alejandra Matos, *Silva To Step Down As St. Paul Schools Chief July 15*, STAR TRIB. (June 17, 2016), http://www.startribune.com/silva-to-step-down-as-st-paul-schools-chief-july-15/383412961 [https://perma.cc/9V3B-XJMZ].

108. In his written testimony before the U.S. Commission on Civil Rights, Eden discussed whether students feel less safe in major school districts that implemented district-level reforms and had before-and-after school-climate surveys asking the same safety-related questions (in major school districts in addition to New York City's). According to his tally, schools that became less safe in the eyes of the students are in Baltimore, Washoe County, Virginia Beach, Chicago, and Los Angeles. Max Eden, *Testimony before the U.S. Commission on Civil Rights on the "School-to-Prison Pipeline"*, MANHATTAN INST. (Dec. 8, 2017), https://www.manhattan-institute.org/html/testimony-us-civil-rights-commission-school-prison-pipeline-10829.html [https://perma.cc/LU3C-5BTN], (transcript with citations and sources available at https://www.manhattan-institute.org/sites/default/files/Eden_USCCR_1217.pdf. [https://perma.cc/7SKZ-4RF2]). According to Eden, "They appear to be stable in Washington, D.C., and Miami, but both districts have been accused of rigging the suspension numbers." *Id.*

Unlike most school systems, New York City collects data each year as part of a "school survey." Alas, the de Blasio Administration removed most of the questions about school order from the survey, thus making it difficult to trace changes in school climate relating to that issue. But a few questions have continued to be asked in the same form over the past several years. That allowed Eden to make some comparisons.

In September of 2012, the Bloomberg Administration ended the use of suspensions for certain first-time, low-level offenses (including being late for school) and shortened the maximum suspension for certain mid-level offenses (including shoving a fellow student) for kindergarten through third-grade from ten days to five days. These changes were essentially uncontroversial and received little attention. The de Blasio Administration's 2015 policy changes were much more controversial, because they were much more extensive. The most significant of them was that principals would no longer have the authority to suspend a student for "uncooperative/noncompliant" or "disorderly" behavior without first obtaining written approval from the Office of Safety and Youth Development (OSYD). That office required that "[e]very reasonable effort . . . be made to correct student behavior through guidance interventions and other school-based strategies such as restorative practices."[109] As a result, such suspensions became rare.

Four survey questions were related to school order and requested students to strongly agree, agree, disagree, or strongly disagree. They were as follows:

Student Questions

1. *At my school, students get into physical fights.*
2. *Most students at this school treat each other with respect.*
3. *At my school students drink alcohol, use illegal drugs or abuse prescription drugs.*
4. *At my school there is gang activity.*

One survey question for teachers concerning school order requested responses of strongly agree, agree, disagree, or strongly disagree. It read as follows:

109. MAX EDEN, SCHOOL DISCIPLINE REFORM AND DISORDER: EVIDENCE FROM NEW YORK CITY PUBLIC SCHOOLS, 2012–16, at 14 (Manhattan Institute, 2017).

Teacher Question

1. At my school, order and discipline are maintained.

Eden looked at the responses for each school and determined whether responses had gotten substantially worse, worse, similar, better, or substantially better between 2012 and 2014. That comparison operated as a "before and after" test for the Bloomberg-era policy changes. Eden then went back and performed the same comparison between 2014 and 2016, which allowed him to get at the de Blasio-era changes.

Not surprisingly, the relatively modest Bloomberg-era changes in policy seemed to have little effect on school climate. Some schools appeared to get somewhat better; others appeared to get somewhat worse, but there was no discernible pattern. The situation was essentially stable.

Not so with the de Blasio-era changes. Some schools showed improvement in school climate between 2014 and 2016. But many more showed deterioration. This was especially true for schools with the highest (90%+) minority enrollment and for schools with the highest enrollment of students below the poverty line. For example, at 50% of schools with the highest minority enrollment, students indicated that fighting in school had gotten worse between 2014 and 2016. At only 14% did students indicate it had gotten better. Similarly, at 58% of schools with the highest minority enrollment, students indicated that mutual respect among students had deteriorated. At only 19% did students indicate an improvement. Eden commented:

> [S]chools where an overwhelming majority of students are not white saw huge deteriorations in climate during the de Blasio reform. This suggests that de Blasio's discipline reform had a significant disparate impact by race, harming minority students the most.[110]

Given all this, it is not surprising that teachers generally oppose OCR's policies. In 2015, Education Next—Program on Education Policy and Governance conducted a survey of teachers. The question on school discipline asked:

> Do you support or oppose federal policies that prevent schools from expelling or suspending black and Hispanic students at higher rates than other students?

110. *Id.* at 22.

A healthy majority of teachers—59%—reported that they opposed the policy. Only 23% supported it (with 18% answering that they neither supported nor opposed). Interestingly, most of the teachers who opposed the policy were not the least wishy-washy in their opposition. Of the 59% who opposed the policy, 34% said that they "completely oppose the policy" while only 25% "somewhat oppose." Supporters on the other hand were more lukewarm. Of the 23%, 16% said they "somewhat support" the policy, while only 7% "completely support the policy."[111]

Members of the general public responded similarly. A majority (51%) opposed the policy, while only 21% supported (with the 29% answering that they neither supported nor opposed). The same pattern of strong opposition and weak support emerged.[112]

III. RACIAL DISPARITIES IN SCHOOL DISCIPLINE HAVE NOT BEEN SHOWN TO BE THE ROOT CAUSE OF RACIAL DISPARITIES IN ADULT LIFE, NOR HAVE RACIAL DISPARITIES IN SCHOOL DISCIPLINE BEEN SHOWN TO BE CAUSED BY RACE DISCRIMINATION.

The "school-to-prison pipeline" meme has become familiar to those who follow school discipline policy.[113] It underlies much of OCR's approach to school discipline. In the argument's purest form, it runs like this: A disproportionate number of African-Americans get in trouble with the law and wind up in prison *because* as students they got suspended from school and thus had their schooling disrupted.[114] Their lives essentially spun out of

111. Michael B. Henderson, *Education Next—Program on Education Policy and Governance—Survey 2015*, EDUC. NEXT, at 22 (2015), http://educationnext.org/files/2015ednextpoll.pdf [https://perma.cc/PMM7-SAT5].

112. *Id.*

113. In 2016, two state advisory committees to the U.S. Commission on Civil Rights produced reports that incorporate "school-to-prison pipeline" into their titles. IND. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *supra* note 77; OKLA. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS AND THE SCHOOL-TO-PRISON PIPELINE IN OKLAHOMA (2016), http://www.usccr.gov/pubs/Oklahoma_SchooltoPrisonPipeline_May2016.pdf [https://perma.cc/6EGD-HHF4].

114. Three members of the U.S. Commission on Civil Rights have argued exactly along these lines: "One thing is painfully clear about the disparate state of school discipline imposed on students of color: it *creates* a highway from the schoolhouse to the jailhouse." Statement of Chairman Martin R. Castro and Commissioners Roberta Actenberg and Michael Yaki, *in* U.S. COMM'N ON CIVIL RIGHTS, REPORT ON SCHOOL DISCIPLINE AND DISPARATE IMPACT 84 (2012) (emphasis added), http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf [https://perma.cc/GVP2-968J]. Their proof was as follows:

> Studies have shown that students suspended in 6th grade are far more likely to be suspended again and research indicates that suspensions and expulsions are, in turn, correlated to an increased risk of dropping out. A research study has shown that students who are suspended three or more times by the end of

control as a result of the suspension. Suspensions are thus the root problem.

Curiously, those who promote the "school-to-prison pipeline" meme pay far less attention to school absences due to truancy. The latter accounts for far more schooling disruptions than suspensions. Yet the very large racial gap in truancy is seldom mentioned as a problem to be solved.[115] To the contrary, some school systems have reduced penalties for truancy as part of the campaign to lighten up on discipline.[116]

The notion that suspensions are the root cause of problems in adulthood runs headlong into Occam's Razor. A far simpler explanation focuses on the underlying conduct that led to the suspension: The same individuals who misbehave as children, no matter what their race, sex, religion, or national origin, often continue to misbehave as they get older.[117]

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their sophomore year of high school are five times more likely to drop out or graduate later than students who have never been suspended.

Id. at 83; *see* Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities and Consequences of Being Suspended in the Ninth Grade*, CIV. RTS. PROJECT 8 (2012), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/sent-home-and-put-off-track-the-antecedents-disproportionalities-and-consequences-of-being-suspended-in-the-ninth-grade/balfanz-sent-home-ccrr-conf-2013.pdf [https://perma.cc/5W4N-U2WW] (finding that one suspension doubles the risk that a student will drop out in the ninth grade).

115. Among California students in kindergarten through fifth grade, the African-American rate of chronic truancy (i.e., eighteen or more unexcused absences) is approximately five times the rate of white students. For example, former California Attorney General Kamala Harris (who is not among those who ignore the truancy issue) reports that, among kindergarteners, the rates are 7.9% (African-American), 2.1% (Latino), 1.4% (white), and 1.1% (Asian); in the fifth grade the rates are 4.9% (African-American), 1% (Hispanic), 1% (white), and 0.3% (Asian). KAMALA D. HARRIS, IN SCHOOL + ON TRACK 2014: ATTORNEY GENERAL'S 2014 REPORT ON CALIFORNIA'S ELEMENTARY SCHOOL TRUANCY AND ABSENTEEISM CRISIS 5 (2014), https://oag.ca.gov/sites/all/files/agweb/pdfs/tr/truancy_2014.pdf [https://perma.cc/YQ4W-EGK4]. If later criminal problems in life can be traced back to missing school earlier in life, one would think that combatting truancy in all its forms would receive more attention than it does.

116. In Washington, D.C., concerns about racial disparities led to repeals of policies that prohibited students from receiving credit for courses if they were absent from class too frequently. In the view of Jamie Frank, a teacher witness at the school discipline briefing before the U.S. Commission on Civil Rights, rescinding this policy actually disproportionately harmed minority students by taking away a previously strong incentive to attend class. Without such incentive, Ms. Frank said, too many minority students give in to the temptation not to attend class and miss out on valuable learning. Statement of Ms. Frank. *in* U.S. COMM'N ON CIVIL RIGHTS, Transcript of School Discipline Briefing at 19–21 (2011), http://www.usccr.gov/calendar/trnscrpt/BR_02-11-11_School.pdf [https://perma.cc/CVT5-LH6B].

117. A significant body of evidence indicates that early behavioral problems often continue over long periods of time. *See, e.g.*, Avshalom Caspi et al., *Children's Behavioral Styles at Age 3 Are Linked to Their Adult Personality Traits at Age 26*, 71 J. PERSONALITY 495 (2003); Andrea G. Donker et al., *Individual Stability of Antisocial Behavior from Childhood to Adulthood: Testing the Stability Postulate of Moffitt's Developmental Theory*, 41 CRIMINOLOGY

Does that mean every student who gets himself suspended in middle school will wind up a drop-out or a felon? Or that every model student will go on to be a model adult? Of course not. It only says something about the odds. Indeed, that is a significant part of why schools administer discipline in the first place. While we cannot say that it is always effective or always done in the best way possible, part of the point is to try to get students back on the right track and hence prevent future trouble.

Why isn't the simpler explanation obvious? Alas, an important premise behind the "school-to-prison-pipeline" way of thinking is that the figures Secretary Duncan referred to in his Edmund Pettus Bridge speech have only one explanation: If it is really true that African-American students "are more than three times as likely to be expelled as their white peers,"[118] the reason must be race discrimination. The teachers who are making the discipline referrals must be acting unfairly toward African-American students—or so the argument runs.[119] Indeed, this view is maintained even in the face of evidence that schools with African-American principals and mainly African-American teachers are just as likely as schools with white principals and mainly white teachers to have a large "discipline gap."[120]

593, 594–95 (2003).

Meanwhile, in a well-designed study, the authors found a very small benefit on reading and math scores for students who had lost instructional time due to suspension in the preceding year versus similarly situated students. Kaitlin P. Anderson, Gary W. Ritter & Gema Zamarro, *Understanding a Vicious Cycle: Do Out-of-School Suspensions Impact Student Test Scores?* 13 (Univ. of Ark. Dep't of Educ. Reform, Working Paper 2017-09, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944346 [https://perma.cc/CAE8-4GQY].

The one thing that can be stated with confidence is that extravagant claims about the negative effects of suspensions by those pointing to a simple association between suspensions and bad outcomes are confusing cause with correlation. Those claims require the reader to assume that disciplinary sanctions are essentially random and that students who are disciplined in school are no more likely to have misbehaved than students who were not disciplined. Any such assumption would be defamatory to the nation's teachers. While no doubt there are bad eggs in the teaching profession, just as there are bad eggs in every profession, any notion that they are all bad can be safely disregarded.

118. *See* Duncan, *supra* note 1.

119. The heated "school-to-prison-pipeline" rhetoric of the American Civil Liberties Union, the Children's Defense Fund, and the NAACP Legal Defense and Educational Fund has been singled out by empirical scholars as especially ill-considered and without proper foundation. *See* John Paul Wright et al., *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUSTICE 257, 263 (2014) (stating that "great liberties have been taken in linking racial differences in suspensions to racial discrimination" and citing the websites of the American Civil Liberties Union, the Children's Defense Fund, and the NAACP Legal Defense and Educational Fund as particularly egregious examples).

120. *See* TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY ON

Perhaps the strongest version of this argument was made by Minneapolis school district superintendent Bernadeia Johnson, who wrote in a *Washington Post* op-ed, "Minority students do not misbehave more than their white peers; they are disciplined more severely for the same behavior."[121] By her reckoning, two out of three of the suspensions of African-American students referred to by Secretary Duncan must be for either nothing at all or something for which a white or Asian student would not be have suspended. That would indeed be extraordinary if it were true.

But it is highly unlikely. Rates of misconduct almost certainly differ—although it is sometimes difficult to pinpoint exactly how much they differ.[122] A 1982 article entitled *Student Suspension: A Critical Reappraisal* is sometimes cited as proof of Ms. Johnson's claim that the African-American students, on average, do not misbehave in school any more than the white students. Instead, they are simply punished more aggressively.[123] But that is a misreading of the article's findings. It did not attempt to examine actual behavior (which to be fair to all those who attempt to research this sensitive issue is difficult to observe directly). Rather, its authors asked both black and white students eight questions designed to measure their *propensity* for antisocial behavior. A typical question was "Would you cheat on a test (if you could get away with it)?" Instead of finding that the average black student and the average white student had the same attitudes, it compared the frequency at which black and white students *who gave similar answers* got suspended from school. It

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HOW SCHOOLS DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 6–12 (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [https://perma.cc/UNF3-GXEQ]; *see also* Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCH. 508, 512–13 (2010).

121. Johnson, *supra* 61.

122. Similar arguments have been made about crime rates, but they have been effectively rebutted. *See* HEATHER MAC DONALD, THE WAR ON COPS 151–62 (2016); Heather Mac Donald, *Is the Criminal Justice System Racist?*, CITY J. (2008), https://www.city-journal.org/html/criminal-justice-system-racist-13078.html [https://perma.cc/8JC8-DYFY]. *See generally* BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA (2016).

Since African-Americans are also disproportionately the victims of crimes (and we would submit the victims of disorderly classrooms), traditionally African-Americans have advocated for more police protection rather than less. Only in fairly recent years has this appeared to change.

123. Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URBAN REV. 245 (1982).

found black students were more likely to have been suspended than white students *with similar attitudes*.

If there were reason to believe that attitudes and behavior consistently coincide, that finding might well be taken as evidence of discrimination (though it would not demonstrate equal rates of misbehavior and would not reveal whether discrimination is a small, medium, or large factor in explaining overall racial disproportionalities). But there is no such reason. The findings in *Student Suspension: A Critical Reappraisal* were exactly what one would expect if, on average, African-American children have less opportunity than white children to learn discipline at home and hence may be more likely to act on a bad attitude.

Progressives and conservatives tend to emphasize different reasons, but the conclusions they reach are the same: On average, African-American children face more obstacles to success than white children in their early years. It would be extraordinary if this had no effect whatsoever on behavior.

Progressives often emphasize that African-American children are more likely to be poor, and that these differences in resources at home negatively affect behavior at school and elsewhere. A concrete item of evidence supporting the theory that low-income, low-socioeconomic-status students tend to have high rates of misconduct is then-Attorney General of California (now-Senator) Kamala Harris's report on school truancy. She estimates that in the State of California almost 90% of elementary school students with severe attendance problems (defined as missing 36 days or more out of a school year) are low income.[124] Since according to the U.S. Census 27.4% of blacks live below the poverty line, while 26.6% of Hispanics, 9.9% of whites, and 12.1% of Asians do,[125] it should be unsurprising that

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124. *See* HARRIS, *supra* note 115; *see also* RACHEL DINKES ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2009 (2009), which reported:

> In 2007–08, the percentage of schools reporting discipline problems was generally smaller for schools where 25 percent or less of the students were eligible for free or reduced-price lunch than for schools where 76 percent or more of the students were eligible. For example, 13 percent of schools where 76 percent or more of the students were eligible for free or reduced-price lunch reported the daily or weekly occurrence of student verbal abuse of teachers compared to 3 percent of schools where 25 percent or less of the students were eligible. The percentage of students eligible for free or reduced-price lunch programs is a proxy measure of school poverty.

Id. at 28.

125. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN

African-American truancy rates are higher than white rates.[126] Indeed, if living below the poverty line were the sole determinant of who misbehaves inside or outside of the classroom (which it definitely is not), one would expect African-American students to be disciplined at rates roughly two to three times the rate for white students—which happens to be what Duncan's figures showed.[127]

Conservatives are more likely to point to out-of-wedlock birth rates that are higher for African-Americans and Hispanics than for whites and Asians and to note that not having both parents at home can make it harder for children (perhaps boys especially) to learn good behavior. They point to the fact that about 72% of African-American and 53% of Hispanic children are now being born outside of wedlock, as opposed to 29% of white and 17% of Asian/Pacific Islander children.[128] Given that much research has found that children born outside of wedlock or living in single-parent households are more likely to engage in antisocial behavior than other children, they argue that it would be naïve to expect rates of misbehavior to be equal across races.[129] (And

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THE UNITED STATES: 2010, at 14 (2011), https://www.census.gov/prod/2011pubs/p60-239.pdf [https://perma.cc/YU2M-2NZY].

126. HARRIS, *supra* note 115, at 3–4; Farah Z. Ahmad & Tiffany Miller, *The High Cost of Truancy*, CTR. FOR AM. PROGRESS: PROGRESS 2050, at 7 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/07/29113012/Truancy-report4.pdf [https://perma.cc/4F3T-YAEH].

127. Non-Hispanic white and Asian households also have higher median incomes than black and Hispanic households. According to the Census Bureau, in 2010 non-Hispanic white households had a median income of $54,620 and Asian households $64,308; black households had a median income of $32,068 and Hispanic households $37,759. U.S. CENSUS BUREAU, *supra* note 125, at 6. *See generally* Ellen Brantlinger, *Social Class Distinctions in Adolescents' Reports of Problems and Punishments in School*, 17 BEHAV. DISORDERS 36 (1991).

128. *Births to Unmarried Women*, CHILD TRENDS DATA BANK (2013), https://www.childtrends.org/indicators/births-to-unmarried-women/ [https://perma.cc/AB4E-8NRQ].

129. *See generally, e.g.*, Amy L. Anderson, *Individual and Contextual Influence on Delinquency: The Role of the Single Parent Family*, 30 J. CRIM. JUST. 575 (2002); Marcia J. Carlson & Mary E. Corcoran, *Family Structure and Children's Behavioral and Cognitive Outcomes*, 63 J. MARRIAGE & FAM. 779 (2001); William S. Comanor & Llad Phillips, *The Impact of Income and Family Structure on Delinquency*, J. APP. ECON. 209 (2002); Stephen Demuth & Susan L. Brown, *Family Structure, Family Processes and Adolescent Delinquency: The Significance of Parental Absence Versus Parental Gender*, 41 J. RES. CRIME & DELINQ. 58 (2004); Susan C. Duncan et al., *Relations Between Youth Antisocial and Prosocial Activities*, 25 J. BEHAV. MED. 425 (2002); Todd Michael Franke, *Adolescent Violent Behavior: An Analysis Across and Within Racial/Ethnic Groups*, 8 J. MULTICULTURAL SOC. WORK 47 (2000); Lela Renee McKnight & Ann Booker Loper, *The Effects of Risk and Resilience Factors in the Prediction of Delinquency in Adolescent Girls*, 23 SCH. PSYCHOL. INT'L 186 (2002). *But see* Mallie J. Paschall, et al., *Effects of Parenting, Father Absence, and Affiliation with Delinquent Peers on Delinquent Behavior Among African-American Male Adolescents*, 38 ADOLESCENCE 15 (2003) (finding no delinquency difference in a nonrandom sample of 260 African-

again, if the lack of a father at home were the sole determinant of who misbehaves (which it is not) one would not be surprised by Secretary Duncan's statistics.)

Both are resource arguments. For the progressive, it is monetary resources; for the conservative, it is parental time. In any case, both sides agree that the average white or Asian child and the average African-American child arrive at school having had quite different experiences at home.[130] Nobody should be shocked that these different home experiences translate into different behavior at school.[131]

When a child is brought up in a single-parent household, he may be more apt to believe that he can get away with bad behavior, no matter what his race. His mother has her hands full dealing with his more immediate needs. Similarly, if he is brought up in a neighborhood with a higher-than-average crime rate (as poorer neighborhoods tend to have), again no matter what his race, he sees examples of adults getting away with crimes and may thus be more likely to see the risk of getting caught as an acceptable one. He may therefore act on whatever

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American adolescent males between those who reported living with a father or father figure and those who did not).

130. Grace Kao, *Asian Americans as Model Minorities?: A Look at Their Academic Performance*, 103 AM. J. EDUC. 121 (1995); Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOCIO. 417 (2003); Katherine A. Magnuson & Jane Waldfogel, *Early Childhood Care and Education: Effects on Ethnic and Racial Gaps in School Readiness*, 15 FUTURE CHILD. 169 (2005); Richard J. Murname et al., *Understanding Trends in the Black-White Achievement Gaps During the First Years of School*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 97 (2006); M. Sadowski, *The School Readiness Gap*, 22 HARV. EDUC. LETTER 4 (2006); Barbara Schneider & Yongsook Lee, *A Model for Academic Success: The School and Home Environment of East Asian Students*, 21 ANTHROP. & EDUC. Q. 358 (1990).

131. At the school discipline briefing of the U.S. Commission on Civil Rights held on February 11, 2011, teacher Patrick Walsh acknowledged these factors and made it clear that it was his opinion the disparities in school discipline are not related to race per se. He stated:

> It's not the African American girls on their way to UVA or William & Mary [who disproportionately present disciplinary problems at school]; it's not the black girls from Ghana or Sierra Leone or Ethiopia who come here to live the American dream, but it's the black girls who are products of what [*Washington Post* columnist] Colbert King . . . called an inter-generational cycle of dysfunction. Girls who have no fathers in their homes, who often are born to teen mothers. . . . [I]t's the same with the boys."

Statement by Mr. Walsh in U.S. COMM'N ON CIVIL RIGHTS, *supra* note 116, at 26–27. Walsh openly acknowledged that this cycle of dysfunction may have roots in a history of racial discrimination. But that does not mean it can be solved by pretending it does not exist. Walsh was not optimistic that the disparity would disappear before "the problems of poverty and teen pregnancy and lack of fathers can be reduced or solved." *Id.* at 27; *see* Colbert I. King, *Celebrating Black History as the Black Family Disintegrates*, WASH. POST (Feb. 5, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/04/AR2011020406557.html [https://perma.cc/G2DQ-XLB6].

antisocial attitudes he might have more often than a child who is equally at risk given his attitudes, but who has double the parental supervision and is living in a more orderly neighborhood.[132] Nothing in *Student Suspension: A Critical Reappraisal* indicates anything to the contrary.

If all this seems unfair, that is because in the grand scheme of things, it is unfair. Some children are brought up in places where the neighborhood association imposes a $500 fine if you leave your garage door open longer than five minutes. Those children learn different lessons about the need to follow rules than children brought up in a neighborhood where even violent crimes can go unpunished.

But responding to this problem by giving a pass to those who have less opportunity to learn discipline at home may be precisely the wrong thing to do. If the problem the child is facing is a parent who is stretched too thin to provide the kind of guidance that is needed at home, nothing would be more disastrous than to prevent teachers and principals from trying to make up for that lack of discipline at home. The availability of public education has been called the "great equalizer" in American life. But it only works if we let it work.

There is no serious debate about whether there are any differences at all in rates of misbehavior. What can be legitimately debated is whether racial differences in rates of misbehavior—no matter what their root cause—account for *all* of the difference in rates of school discipline and, if not, whether conscious or unconscious race discrimination might be playing a significant role.

While there is little hard evidence of it, we believe there is almost certainly some race discrimination in schools that works to the detriment of African-American, Hispanic, and American Indian students. And there is almost certainly some discrimination against Asian and white students too.[133] The world

132. If we are lucky, we will never learn how many of our well-behaved fellow human beings would be criminals if they had learned early in life that they could get away with it. Fortunately, almost all of us learn at a fairly young age that we cannot get away with it. Most of us manage to internalize the norms that have been imposed upon us by civilized society before we leave school. But it is not obvious that that internalization is equally likely to happen in a well-disciplined environment or a not-so-well-disciplined environment.

133. *See, e.g.*, G.W. Miller III, *Asian Students Under Assault: Seeking Refuge from School Violence*, PHILA. WKLY. (2009), http://www.philadelphiaweekly.com/news/asian-students-under-assault/article_8404a344-3e9b-50fa-a040-aa060adc04c5.html [https://perma.cc/ETG4-WGM4] (detailing allegations that Asian students in inner-city

is large and complicated; old habits are hard to kill off entirely and nearly everything that can happen does happen somewhere.[134] But that only opens up more complex questions.

The fact that there *might be* some race discrimination is not enough to justify the kind of aggressive enforcement policy that has serious counterproductive consequences for its intended beneficiaries and their classmates (as described in Parts II and III). To justify such a policy (as opposed to the more traditional method of investigating allegations of actual discrimination), OCR would need much more. At the very least it would need a showing that race discrimination was a substantial phenomenon. But there is precious little in the way of proof that it plays a significant role in the race disproportionalities identified by Secretary Duncan.

The Dear Colleague Letter cites six studies for the proposition that "research suggests" that "substantial racial disparities of the kind reflected in the [Civil Rights Data Collection] data are not explained by more frequent or more serious misbehavior by students of color."[135] But if OCR officials believe that the cited

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Philadelphia high schools had been subject to racially motivated, student-initiated violence about which high school administrators did little or nothing); *see also* Asha Beh, *Attacks Against Asian Students Prompt Private Meeting*, NBC-10 (2009), https://www.nbcphiladelphia.com/news/local/City-Principal-South-Philly-Students-to-Meet-in-Private-Monday-79162377.html [https://perma.cc/YPX2-TLPT] ("The students—and adult advocates—claimed that staff allowed this to happen on their watch and added taunts of their own."). In this case, both the U.S. Department of Justice and the Pennsylvania Human Relations Commission eventually stepped in. *See Justice Department Reaches Settlement with Philadelphia School District on Anti-Asian Harassment*, ASIAN AM. LEGAL DEF. AND EDUC. FUND (2010), http://aaldef.org/press-releases/press-release/justice-department-reaches-settlement-with-philadelphia-school-district-on-anti-asian-harassment.html [https://perma.cc/PVJ9-E59W].

134. At the aggregate level the different kinds of discrimination may or may not cancel each other out. But the point of Title VI is not to ensure the elimination of aggregate racial disparities, but to prohibit discrimination. Title VI protects individuals, not groups. A student who is discriminated against on account of his race is not vindicated when a member of his race is given preferential treatment.

135. Dear Colleague Letter, *supra* note 44, at n.7 (citing FABELO ET AL., *supra* note 120; Anne Gregory & Aisha R. Thompson, *African American High School Students and Variability in Behavior Across Classrooms*, 38 J. COMMUNITY PSYCH. 386 (2010); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?*, 116 AM. J. EDUC. 557 (2010) [hereinafter *Rocque I*]; Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School to Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011) [hereinafter *Rocque II*]; Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011) [hereinafter *Skiba II*]; Russell J. Skiba et al, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. L. REV. 317 (2002) [hereinafter *Skiba I*]).

One of them—*African American High School Students and Variability in Behavior Across Classrooms*—does not purport to prove that point and does not offer evidence that tends to support it. It looks at the disciplinary records of thirty-five African-American students

studies demonstrate that disproportionalities are caused by discrimination, they are mistaken. The weight of the evidence goes the other way.[136]

The central problem with all of the research in this area is that is impossible to observe the behavior that caused the teachers to refer the students for discipline. A researcher who is trying to establish whether the teachers are acting impartially and in good faith cannot begin by assuming impartiality and good faith. That is the issue. At the same time, however, researchers must remember that declining to assume impartiality and good faith for the teacher is not the same thing as demonstrating that the teacher was acting improperly. The fact remains that the best (and only direct) evidence of whether any given student has misbehaved is that the teacher said he did. Especially when, as here, race disproportionalities exist all over the country, even in schools where African-American teachers predominate,[137] it takes something more than an unwillingness to assume that teachers were acting appropriately to show that they were not.

Consider, for example, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (*Skiba I*).[138] It is useful in confirming that African-American students are in fact disciplined more often than white students and that boys are

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with a history of low achievement. *Id.* at 387. It found only that an individual student may be perceived differently by different teachers and that students are more likely to view a teacher who has referred him or her for discipline as "unfair" than they are a teacher who has not. Documenting such things is part of what educational psychologists should do. *Id.* at 399. But it is not a surprising result.

More important, there is no reason to believe that the same would not be true of similarly situated students of all races. We live in a fallen world. Some teachers may underestimate the degree to which a student generally misbehaves because they see that student only some of the time. For the same reason, others may overestimate the degree to which he misbehaves. Not only is that insufficient to create an inference of race discrimination, it is insufficient to create an inference of racial disproportionalities.

136. *See infra* notes 137–70.

137. *See* Bradshaw, *supra* note 120, at 514–15 (finding disproportional discipline results for African-American students even in classrooms led by African-American teachers).

138. *Skiba I*, *supra* note 135, at 318–19, 323 (discussing data drawn from 11,001 students from nineteen middle schools in an urban midwestern public school district, which showed that eligibility for the free or reduced-price lunch program did not account for all or even most of the racial disproportionalities). In other words, African-American students who are eligible for the free lunch program are referred more often for discipline than white students who are eligible for the free lunch program. Then again, eligibility for free lunch is a very restricted measure of socioeconomic class. No attempt was made here to control for out-of-wedlock birth or low scholastic performance, both factors known to correlate with school discipline referrals. The latter, of course, is difficult to measure in that the same bias researchers are trying to measure in school discipline could conceivably infect school grades.

disciplined more often than girls.[139] But as the authors concede, "disproportionality is not sufficient to prove bias."[140]

139. *Skiba I*, *supra* note 135, at 319, 330–35.

140. *Id.* at 333. A second study in which Dr. Skiba is the primary investigator is also cited in the Dear Colleague Letter as evidence of race discrimination in discipline. Dear Colleague Letter, *supra* note 44, at n.7.

Skiba II reported that black children on average get disciplined more severely than white children for what appears from the paperwork to be same general categories of misbehavior. *Skiba II*, *supra* note 135, at 85. There were many problems with this study's methodology, starting with the mistake of assuming that when a teacher at a wealthy suburban school notes that a student was "disruptive" or "noncompliant" that she means the same thing as a teacher at an inner-city school. This is a common failing in studies involving an abundance of statistical information intended to encapsulate the motivations and actions of a diverse group of individuals acting in different settings. Something gets lost in the translation. But there is a difference between a student who is suspended for wearing a prohibited street gang insignia and a student who is told to put on a sweater and given a warning for wearing a revealing blouse. Yet both acts will be recorded as a "dress code violation." (One much-cited study conducted by UCLA's Civil Rights Project and the University of Colorado's National Education Policy Center reports data showing African-American first-time offenders are suspended for dress code violations more often than their white counterparts. Daniel J. Losen, *Discipline Policies, Successful Schools, and Racial Justice*, NAT'L EDUC. POL'Y CTR. 7 (2011)). But the only way to do justice within the broad category of dress code violations is to pay close attention to the particular facts of each case.

Another at least as important problem was this: The authors readily admitted that their data did not take into consideration whether black children were on average more likely to be repeat offenders—a variable the authors admitted "might well be expected to have a significant effect on administrative decisions regarding disciplinary consequences." *Skiba II*, *supra* note 135, at 103. This is no mere hypothetical possibility. Elsewhere in the same study, the authors found that "students from African American families are 2.19 (elementary) to 3.78 (middle) times as likely to be referred to the office for problem behavior as their White peers." *Id.* at 85. In other words, one would have to expect the black students in the study to be repeat offenders more often than white students. The study's finding that on average black students are punished more harshly for the same general categories of misbehavior is thus hardly a surprise. It is exactly what one should expect given the facts. *Id.* at 103. In this sense, *Skiba II* can be said to have been superseded by *Problem Behavior Accounts for the Racial Gap in School Suspension. See generally* Wright, *supra* note 119, at 257 (reporting for the first time findings that take into students' prior problem behavior).

A study published after the issuance of the Dear Colleague Letter, in which Russell Skiba was the primary investigator, is also extremely interesting. Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RES. J. 640 (2014) [hereinafter *Skiba III*]. *Skiba III* looked at a data set that included 104,445 incidents involving 43,320 students at 730 public schools (including charter schools) in a single Midwestern state in the 2007–2008 school year. *Id.* at 649. It controlled for the kind of misbehavior on the part of the students (in descending order of perceived severity on the part of the authors, misbehavior was classed "use/possession," "fighting battery," "moderate infractions," and "defiance/disruption/other"). *Id.* at 651. In addition, it controlled for a variety of school-level characteristics, such as the principal's attitude toward exclusionary sanctions, the percentage of students passing math and English, the percentage of students receiving free or reduced-price lunch, and the percentage of students enrolled who are black. It found that once those school-level factors are taken into account, the significance of the race of the individual student receiving an out-of-school suspension disappears altogether (though the significance of the race of the individual student being expelled does not).

Interestingly, *Skiba I* finds that schoolboys get disciplined much more often than schoolgirls and that sex disproportionalities are much greater than race disproportionalities in discipline. But while the authors stretch to find discrimination as the cause of racial disproportionalities, they are quick to dismiss the possibility of discrimination against boys.

Their effort to tease race discrimination out of the data runs this way: Whites are (within the population of students referred for discipline in *Skiba I*'s small database) more likely to be referred for "smoking," "le[aving] without permission," "vandalism," and "obscene language," while African-Americans are more likely to be referred for "threat[s]," "disrespect," "excessive noise," or "loitering."[141] The latter offenses, by the authors' reckoning, are more judgment calls than the former. They posit that this shows that African-American students *could* be the victims of bias in the sense that they could be referred for discipline for something that would not be regarded as a "threat" or as "disrespect" if it had come from a white student.[142]

Even if this were true, it could explain no more than a small part of the racial gap in discipline.[143] But it is simply not true that the largest disproportionalities are found only with offenses that are judgment calls.[144] For example, among kindergarten through fifth grade students in California, the African-American rate of chronic truancy (defined as eighteen unexcused absences or more) is approximately five times the white rate. Yet, for the most part, a student has either had eighteen absences or not, and a parent has sent a note of excuse or has not.[145] While there may be a tiny bit of discretion in what constitutes "an unexcused" versus "an excused" absence beyond whether a parent has sent a note, those differences could not come close to accounting for

141. *Skiba I*, *supra* note 135, at 332. Note that this does not mean, for example, that whites are more likely to be referred for discipline for "smoking" than African-American students. Rather it means that *within the population of students who have been referred for discipline*, whites are disproportionately likely to be referred for discipline for "smoking" instead of other causes such as "loitering."

142. *Id.* at 334 (stating that white students' reasons for discipline "would *seem* to be based on an objective event," while African-American students' reasons for discipline "would *seem* to require a good deal more subjective judgment on the part of the referring agent" (emphasis added)).

143. *See id.* at 332.

144. We note that at least "obscene language" is also a judgment call.

145. *See* HARRIS, *supra* note 115, at 5 (defining "chronic truancy" as having eighteen or more "unexcused absences").

the gap between a 1% rate for white and a 4.9% rate for African-American fifth graders.[146] If the African-American chronic truancy rate can be approximately five times the white rate in fifth grade,[147] then the disproportionalities in middle school for other forms of misbehavior are not so anomalous as to raise a presumption of improprieties on the part of the teacher.[148]

The fundamental problem with *Skiba I* is just what one would expect: Its authors have no data (apart from the teacher referrals themselves) about students' actual behavior. They obviously view the size of the disproportionality as inherently suspect. But given that similar racial disproportionalities are ubiquitous, it is unconvincing.[149]

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146. *Id.*

147. *Id.*

148. The same point can be made about crime rates: If crimes that are unlikely to be judgment calls show significant disproportionalities, then disproportionalities in other crimes are less anomalous. For example, the most serious of crimes—murder—is also very difficult to hide or to fake. It is seldom a judgment call. Yet according to 2013 FBI statistics, 43.6% of all murder victims are African-American or black, and 46.6% of all murder offenders are African-American or black. *See* FED. BUREAU OF INTELL., *Murder: Race, Ethnicity, and Sex of Victim by Race, Ethnicity, and Sex of Offender 2013*, *in* CRIME IN THE UNITED STATES 2013 (2013), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2013.xls [https://perma.cc/K3VF-6WYH] (reporting that of the 5,723 total murder victims in 2013 2,491 were black or African-American). According to the 2016 Census estimates, however, African-Americans/blacks are only 13.3% of the population. *QuickFacts*, U.S. CENSUS BUREAU (2016), https://www.census.gov/quickfacts/fact/table/US/PST045216 [https://perma.cc/B8VP-V7WG]. The "school to prison pipeline" meme appears to acknowledge that these numbers are more or less accurate when it takes the position that they are caused by unfair discipline earlier in life. The simpler explanation, however, is that the same individuals who engage in violent behavior as adults, often also engaged in misconduct as children and teenagers. The fact that the researchers did not have the opportunity to catch them in the act and cannot explain why this particular student misbehaved in school does not prove the teacher did not have good reason to refer the students for discipline.

149. Another report cited in the Dear Colleague Letter is *Breaking Schools' Rules: A Statewide Study on How Schools Discipline Relates to Students' Success and Juvenile Justice Involvement*—a report issued by the Justice Center of the Council of State Governments and the Public Policy Research Institute of Texas A&M University. *See* Dear Colleague Letter, *supra* note 44, at n.7 (citing FABELO ET AL., *supra* note 120). That study purports to find that even after eighty-three different variables are taken into account, African-American students are still 31.1% more likely than white students to have been the subject of discretionary disciplinary action in the ninth grade. FABELO ET AL., *supra* note 120, at 12, 45. The inference that the authors appear to want the reader to draw is that perhaps some teacher reports of misbehavior by African-American students were false or misleading. But even if one assumes that misbehavior rates would be exactly equal if all factors are taken into account, the presence of both parents in the student's home was not taken into account. Nor were high school grades (although participation in the "gifted" program as well as a few other bits of information designed to pick up students at the extremes of the distribution were). *Id.* at 74. Moreover, the method used to control for socioeconomic disadvantage was rudimentary. Rather than control for household income, parents' educational attainment or other markers of socioeconomic status (most

Another study relied upon in the Dear Colleague Letter as "suggest[ive]" of race discrimination is *Office Discipline and Student Behavior: Does Race Matter?* (*Rocque I*).[150] But it is extremely quirky, and its results were mixed. *Rocque I* correctly recognized that a major difficulty faced by researchers is that they have no opportunity to observe independently the behavior the student is being disciplined for.[151]

Rocque I's attempted "fix" was to introduce an independent variable for a "teacher assessment" of each student's tendency to misbehave.[152] Such an assessment functions as a proxy for actual past misbehavior. Specifically, teachers were asked to rate each student on a scale of 0 to 3 on eight items: (1) Defies teachers or other school personnel; (2) Argues or quarrels with others; (3) Teases or taunts others; (4) Takes others[‘] property without permission; (5) Is physically aggressive or fights with others; (6) Gossips or spreads rumors; (7) Is disruptive; and (8) Breaks

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of which would have been unavailable), the study controlled only for whether the student is eligible for free or reduced-price lunch or other public assistance. *Id.* at 25–34. A binary classification system of this type does not come close to conveying the whole picture. It treats a student whose parents earns a penny more than the eligibility cut-off the same as a student whose parents are both wealthy, well-educated professionals. Similarly, it treats a student whose parents earn less than the maximum allowable for reduced-price lunch benefit ($40,793 for a family of four in 2010), because they are both attending graduate school, the same as a homeless child being shuffled from one shelter to another. It is not clear from the Texas A&M study that students of different races with truly similarly-situated family and socioeconomic status will have differing rates of school discipline problems.

More important, nothing in the report comes close to rebutting the ordinary presumption that teachers were acting properly and that the African-American students (and the students of other races) committed the infractions for which they were disciplined. The only evidence presented by the authors as suggestive is the data on what the report calls "mandatory" versus "discretionary" violations. *Id.* at 19. While ninth grade African-American students are 31.1% more likely than white students to be the subject of referrals that can lead to discretionary discipline, they are only 23.3% more likely to be the subject of referrals that lead to mandatory discipline. *Id.* at 45. Hispanics had an equal chance as whites for discretionary violations and 16.4% higher chance for mandatory violations. *Id.* The authors appear to suggest that given the lower number for African-American mandatory referrals, the higher number for discretionary referrals may be questionable. Note, however, that only a tiny percentage of referrals fall into the "mandatory" category, so one would have to expect more variability there. Moreover, the "mandatory" category is neither the same as a hypothetical category of cases that are not "judgment calls" nor is it the same as a hypothetical category of cases that are particularly serious. Instead it is the category of cases that Texas law requires a referral for. It includes serious crime. *Id.* at 95–98. But it also includes indecent exposure (judgment call) or possession of an alcoholic beverage (not necessarily serious). *Id.* The report does not disclose what the composition of the category looks like apart from telling the reader what Texas law is on the matter. Are 80% of these cases about a beer can in a locker? Or only 2%? The reader has no way of knowing.

150. Dear Colleague Letter, *supra* note 44, at n.7 (citing *Rocque I, supra* note 135).

151. *Rocque I, supra* note 135, at 562.

152. *Id.* at 567.

rules.[153] With a sample of nearly 29,000 students taken from forty-five elementary schools in a single Virginia county, he attempted to shed light on the question of whether race discrimination by teachers may account for race disproportionalities in school discipline.[154]

Rocque I first conducted its analysis without accounting for teacher assessments. It found that after controlling for free-lunch status, age, sex, grade-point average, and special education status, race was still a predictor of which students were likely to be referred for discipline (although sex was a more potent predictor).[155] The next step was to try to control for school-to-school differences in policy by controlling for school characteristics. Since at least one previous study had found that racial disproportionalities in discipline were largely a matter of such school-to-school differences and not a matter of treating individual students differently, it was important to try to account for them. When controls for school characteristics were added, the predictive power of race was diminished somewhat (and sex continued to be much more predictive than race).[156]

Then *Rocque I* added the teacher assessments, which once taken into account shrank the racial disproportionalities dramatically.[157] But they did not disappear altogether (nor did the sex disproportionalities). African-American students were still disciplined more often than white students, just as boys were still disciplined more often than girls.[158] From this, *Rocque I* drew two somewhat conflicting conclusions: First, "these data show that previous work without measures of student behavior *grossly overestimated the extent to which racial disparity in school discipline is based upon illegitimate factors.*"[159] The very large disproportionalities that Secretary Duncan had spoken of and

153. *Id.* at 577.
154. *Id.* at 564–65.
155. *Id.* at 569.
156. *Id.* at 572.
157. *Rocque I* found an odds ratio of 2.47 for "African American" in its pooled logistic regression of race on office referrals, which also took into consideration free-lunch status, age, sex, GPA, and special education status. Sex turned out to be a more important factor with a 3.08 odds ratio for "Male." *Id.* at 571. When *Rocque I* added a control for certain "school effects," the odds ratio for "African American" reduced to 2.27 while the odds ratio for "Male" increased to 3.35. *Id.* at 572. When *Rocque I* added teacher assessments into the mix, it became the most important factor, with a poor score associated with an odds ratio of 5.48. Once teacher assessments are taken into account, the odds ratio for "African American" shrank to 1.58 and for "Male" to 2.89. *Id.*
158. *Id.* at 571–72.
159. *Id.* at 572–73 (emphasis added).

that *Skiba I* found inherently implausible disappeared. Second, *Rocque I* nevertheless concluded that, because it had attempted to control for actual behavior and for differing school policies and still race mattered, it results were more "suggestive of bias" than previous studies.[160]

But what kind of bias? Why would anyone conclude that "teacher assessments" done at the behest of a curious sociologist are more trustworthy than actual referrals for discipline by those some teachers? Actual referrals are made more or less contemporaneously with the bad behavior that triggers them. Teacher assessments are based a teacher's recollection of a student's bad behavior and may be subject to failures of memory. Actual referrals will have actual consequences and hence will increase the teacher's incentive to get the facts right. A teacher who makes a referral that shouldn't have been made has acted wrongfully towards the student at issue and will be subject to reprimand if it becomes clear that the referral was wrongful. Failure to make a referral that should have been made will have consequences in the form of making the classroom in which the teacher tries to teach more chaotic. On the other hand, nothing concrete turns on getting the teacher assessment right. Under the circumstances, one would have to expect bias to rear its head more commonly on the teacher assessments than with the actual referrals.

We suspect that this is what happened. This can happen innocently enough—even unconsciously. In evaluating a boy, teachers may be inclined to assess him as well-behaved "for a boy." Similarly, if African-American students are (as Rocque found) in fact more likely to engage in misbehavior, then a teacher may be inclined to assess such a student "on the curve" for African-American students rather than on a universal scale. The same can be true of students in the special education program, students in the free-lunch program, or students with poor grades. They may be assessed as well-behaved "for a special education student," "for a student who comes from an underprivileged background," or "for a student whose grades are not what we like to see."[161]

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160. *Id.* at 573–74.

161. The Dear Colleague Letter cites a second study by Michael Rocque—this one with Raymond Paternoster. Dear Colleague Letter, *supra* note 44, at n.7 (citing *Rocque II, supra* note 135). It is largely more of the same kind of analysis. *Rocque II, supra* note 135, at 664.

It may even be conscious effort to confer a benefit of sorts. In the age of affirmative action, some teachers may feel an urge to assess African-American students with the belief in mind that these students have overcome more than most. It may seem unkind or churlish to fail to take those obstacles into account.[162] Alternatively, a teacher being asked by a sociologist to rate students' behavior may be careful not to do anything that be viewed as politically incorrect.

Seen in this light, it is much more likely the teacher assessments are biased rather than the actual discipline referrals. Under the circumstances, one would have to expect that

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Like *Rocque I*, *Rocque II* examines data from forty-five elementary schools. Since the racial demographics of the sample are almost identical, it appears to study the same county as was studied in *Rocque I*, although we cannot definitively show this. Methods and controls varied somewhat from *Rocque I*, but the results were essentially consistent: Teacher assessments of each student's tendency toward "bad behavior" were far more predictive of whether that student would have a discipline referral on his record than anything else. Next most predictive was being "male." Third was getting poor grades.

But being African-American still had some limited predictive power. So did being in the free-lunch program, being in the special education program, and being an extrovert. Asian students were also significantly less likely to be referred for discipline than white students. And students in the English as a Second Language program were less likely to be referred than students in the regular program. *Id.* at 653–64.

Rocque II concedes that "[i]t is possible that our finding of racial disparity in punishment is linked to past behavior, not cultural stereotypes." *Id.* at 664. But it takes the position that its findings "suggested that disproportionality in discipline is not explained by differential behavior and is thus unjustified." *Id.* at 662. This assumes that *Rocque II* was working with a reliable measure of actual behavior against which to test teacher referrals. But it was not. For the reasons given in the text, the teacher assessments of an individual student's propensity for misbehavior are hardly the gold standard for determining whether a student has engaged in misconduct. A reasonably well-behaved boy may be rated more highly than a better-behaved girl on the ground that he is "good for a boy." Similarly, teachers may rate African-American and Asian-American students on a kind of racial curve.

Given how little attention *Rocque II* gives to disproportionalities affecting groups other than African-Americans, it is difficult to credit its analysis. The authors do not take seriously the notion that teachers may be discriminating against boys in school discipline or against students who get poor grades. Yet the evidence is stronger for those conclusions than it is for discrimination against African-Americans. Nor do the authors appear to be concerned that teachers might be discriminating against whites vis-à-vis Asian-Americans.

The authors wrote, "If [our findings] stand [after efforts of replication] . . . , they . . . suggest that the actions of school officials themselves may be at least partially responsible for the academic failure all too often experienced by black students." *Id.* at 664. Ultimately, however, *Rocque II*'s findings were not replicated. The authors of *Prior Problem Behavior Accounts for the Racial Gaps in School Suspensions* worked with a database that allowed them to compare problem behavior of students in kindergarten through third grade with problem behavior in eighth grade and found that once they considered teacher referrals in the early years, race no longer was a statistically significant factor. Wright, *supra* note 119, at 262.

162. In *Rocque II*, the authors argue that the notion that black students may be rated by their teachers as better behaved than they would have if they had been white "strains credulity." *Rocque II*, *supra* note 135, at 664. We respectfully disagree.

controlling for teacher assessments would not account for all race disproportionalities in discipline referrals.

Shortly after the Dear Colleague Letter was released in 2014, a different set of researchers examined the same kinds of questions raised in *Skiba I* and *Rocque I* as well as the other articles cited in the Dear Colleague Letter (and addressed in the footnotes in this article). Unlike previous researchers, the authors of this later article—*Prior Problem Behavior Accounts for the Racial Gap in School Suspension*—had a database that gave them good evidence of whether particular students had been in disciplinary trouble before.[163]

The authors employed the Early Childhood Longitudinal Study, Kindergarten Class of 1998–1999 database, which includes data on over 21,000 students.[164] Prior behavior measures came from the fall of kindergarten (1998), the spring of kindergarten (1999), the fall of first grade (1999), the spring of first grade (2000), and the spring of third grade (2002).[165] In addition, the authors used parent-reported data from the eighth grade in response to questions whether the student cheats, steals, or fights. The disciplinary "outcome" data came from the spring of the eighth grades (2007).[166]

In the abstract to the article, the authors put their findings modestly, stating that "the use of suspensions by teachers and administrators may not have been as racially biased as some scholars have argued."[167] In fact, as the title to the article suggests, their findings are devastating for those who argue that disproportionality in discipline signals discrimination.[168]

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163. Wright, *supra* note 119, at 260.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 257.
168. Yet a more recent study examined school discipline disparities between Hispanic, Asian and white students. Mark Alden Morgan & John Paul Wright, *Beyond Black and White: Hispanic, Asian and White Youth*, CRIM. JUST. REV., July 21, 2017, at 1. Using the Early Childhood Longitudinal Study-Kindergarten Class, it had measures of socioeconomic status, school environment variables, and data on parent-reported behavior of each student. *Id.* The authors found that white students were significantly more likely to be suspended than either Hispanic or Asian students. *Id.* Interestingly, after controlling for available measures of student misbehavior, the disparity between whites and Hispanics was eliminated. *Id.* at 9–11. But the gap between whites and Asians was not. *Id.* at 12. The authors wrote:

> Our findings provide reasonable evidence that student misbehavior is a relevant explanatory factor in school disciplinary processes and that racial differences in suspension, in part or in total, differences in racial or ethnic groups in their levels of problem behavior.

In the body of their article, the authors explain their findings more completely:

> Capitalizing on the longitudinal nature of [our database], and drawing on a rich body of studies into the stability of early problem behavior, we examined whether measures of prior problem behavior could account for the differences in suspension between both whites and blacks. The results of these analyses were straightforward: The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspensions between black and white youth. Thus, our results indicate that odds differentials in suspension are likely produced by pre-existing behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and trigger disciplinary measures by teachers and school officials. Differences in rates of suspensions between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in the classroom.[169]

Put differently, they found that once prior misbehavior is taken into account, the racial differences in severity of discipline melt away.

Can it be that the kindergarten and primary school teachers were engaging in race discrimination too? It cannot be proven they were not. But even if they were, that wouldn't account for the study's results. The eighth-grade teachers would have to target the very same African-American students for discipline (and not different African-American students) as the kindergarten and primary school teachers. It is much more likely that they were simply targeting the students who actually misbehave.

In the "Discussion" portion of the paper, the authors unleashed in a way we had never seen in the social science literature before:

> [W]hile our results await replication we believe it important to raise a disturbing possibility. As we pointed out in the introduction to this paper, numerous authors, interest groups, and government agencies including the Department of Justice, have used the racial differential in suspension rates as *prima facie* evidence of teacher or school district bias against black

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Id. at 13.

169. Wright, *supra* note 119, at 263.

> youth. Indeed, great liberties have been taken in linking racial differences in suspensions to the racial discrimination. . . . Yet it is entirely possible that the body of evidence and the conclusions drawn from the evidence on racial differences in school suspensions represents not the sum total of rigorous scientific analysis but the process of confirmation bias.[170]

IV. IN CLAIMING THAT FEDERAL LAW PROHIBITS DISPARATE IMPACT IN SCHOOL DISCIPLINE, THE DEAR COLLEAGUE LETTER EXCEEDS OCR'S AUTHORITY.

A. Title VI Itself Is Not a Disparate Impact Statute (Nor Does OCR Claim Otherwise).

The Dear Colleague Letter is not just bad policy. It is bad law, exceeding OCR's authority. The letter purports to prohibit both different treatment and disparate impact in school discipline.[171] Its authority to prohibit the former is obvious from the text of Title VI. But to prohibit the latter it needs legal authority, and that authority must come from somewhere. That is why on the day after the issuance of the Dear Colleague Letter, the National School Boards Association issued an advisory that was critical of the letter. Most important, it stated, "NSBA . . . is concerned that part of the Education and Justice departments' legal framework may constitute an expansive interpretation of the law."[172]

One thing that can be said with confidence is that the authority to prohibit disparate impact does not come directly from Title VI itself. The Supreme Court has held in *Alexander v. Sandoval*,[173] that § 601 of Title VI (the only prohibition in the

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170. *Id.* at 263–64.

171. The Dear Colleague Letter states that it was issued pursuant to two different parts of the Civil Rights Act of 1964—Title IV and Title VI. Since this Article focuses mainly on efforts to force school districts to stamp out disparate impact in school discipline via Title VI and its implementing regulations, it will not discuss Title IV at any length. The Dear Colleague Letter makes no claim that Title IV is a disparate impact statute and it is correct not to make that claim. Nonetheless, a few words about Title IV, which is enforced by CRT rather than OCR, are in order.

Title IV is all about basic school desegregation—a hugely important subject back in 1964 in the era of massive resistance to *Brown v. Board of Education*. The three cases cited supra note 37 in which CRT rather than OCR was the initiator, are Title IV cases. Two of them—Huntsville, Alabama, and Meridian, Mississippi—were originally filed half a century ago as traditional Title IV cases in which the defendants had literally operated separate school systems for whites and African-Americans. The third case, Palm Beach County, Florida, was filed much more recently and appears to employ a nontraditional approach to Title IV.

172. *NSBA: School Discipline Guidance Is a Local Governance Issue*, NAT'L SCH. BOARDS ASS'N (Jan. 2014), https://www.nsba.org/newsroom/press-releases/nsba-school-discipline-guidance-local-governance-issue [https://perma.cc/SU7E-QA5J].

173. 532 U.S. 275 (2001).

title) prohibits only different treatment and not disparate impact.[174] Indeed, it puts the point in exceptionally strong language: "[I]t is similarly beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination."[175] OCR does not claim otherwise.

Alexander v. Sandoval merely made explicit what had already been implicit since *Regents of the University of California v. Bakke*.[176] In *Bakke*, the Court held that Title VI did not ban all race discrimination by federally funded entities.[177] Rather, it banned only that portion of race discrimination that would have violated the Fourteenth Amendment's Equal Protection Clause if it had been committed by a state.[178] Since the Court had already held in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[179] that state action that has only disparate impact (and not discriminatory intent) does not violate the Equal Protection Clause, it has followed since *Bakke* that mere disparate impact without discriminatory intent does not violate Title VI.[180]

In so holding, the Supreme Court avoided creating for the Fourteenth Amendment (and for Title VI) the conceptual morass it made inevitable for Title VII of the Civil Rights Act of 1964's prohibition on discrimination in employment when it

174. *Id.* at 275. Section 601 states: "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." 42 U.S.C. § 2000d.

175. *Alexander*, 532 U.S. at 280; *see also* Alexander v. Choate, 469 U.S. 287, 293 (1985) ("Title VI itself directly reache[s] only instances of intentional discrimination."); Guardians Ass'n v. Civ. Serv. Comm'n of N.Y.C., 463 U.S. 582, 610–11 (1983) (Powell, J., concurring in the judgment); *id.* at 613 (O'Connor, J., concurring in the judgment).

176. 438 U.S. 265 (1978).

177. *Id.* at 287–88.

178. As a result of this holding, a majority of the Court's members agreed, in dictum, that there are circumstances under which race-preferential admissions policies will be upheld. *Id.* at 337. This later accorded with the holdings of *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) and *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214–15 (2016) (*Fisher II*).

179. 429 U.S. 252 (1977); *see also* Washington v. Davis, 426 U.S. 229, 241–42 (1976) (refusing to adopt a more rigorous process for challenges of promotion practices "where special racial impact, without discriminatory purpose, is claimed" in Fifth Amendment case).

180. *Lau v. Nichols*, 414 U.S. 563, 568 (1974), is sometimes said to have applied a disparate impact theory of liability to Title VI. *See, e.g.*, Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 247, 266 (2013) (stating that the Court in *Lau* concluded that Title VI prohibited disparate impact discrimination). Insofar as this is true, it was overruled by the combination of *Village of Arlington Heights*, 429 U.S. at 270–71, and *Regents of the University of California*, 438 U.S. at 320. There may, however, be other ways to look at *Lau*. *See infra* note 289.

decided *Griggs v. Duke Power Co.*[181] in 1971.[182] As one of us (Heriot) has written in the past, one problem with liability for disparate impact is that all job qualifications have a disparate impact on some protected group. Since *Griggs* makes job qualifications with a disparate impact a violation of Title VII unless the employer can show they are justified by "business necessity," it makes all job qualifications presumptively illegal:

> It is no exaggeration to state that there is always some protected group that will do comparatively poorly with any particular job qualification. As a group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinent Indian Americans are disproportionately more likely to have experience in motel management than Norwegian Americans, who are more likely have experience

181. 401 U.S. 424 (1971).

182. Given that Title VI has been authoritatively interpreted not to ban disparate impact, criticism of the *Griggs* decision and its deference to the Equal Employment Opportunity Commission's (EEOC) interpretation of Title VII is beyond the scope of this Article. Suffice it to say that congressional leaders repeatedly assured their colleagues in 1964 that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex, and national origin were not among them. For example, Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill's co-managers on the Senate floor, had this to say in an interpretative memorandum:

> There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

Case & Clark Memorandum, 110 CONG. REC. 7213 (1964). To Case and Clark, the issue was whether the employer chose a particular job qualification *because* he believed it would bring him better employees or *because* he believed it would help him exclude applicants based on their race, color, religion, sex, or national origin. *See id.* at 7247 (Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.").

For a more sustained treatment of the unusually clear legislative history on this point, see HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 387 (1990) ("Burger's interpretation in 1971 of the legislative intent of Congress would have been greeted with disbelief in 1964."); Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1423–30 (2003); *see also* Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brook. L. Rev. 62, 71 (1964) ("Discrimination is by its nature intentional . . . . To discriminate 'unintentionally' on grounds of race . . . appears a contradiction in terms."). Berg was a key staff member involved in the passage and early implementation of the Act. Berg, *supra*, at n.* (working as part of the Department of Justice's Office of Legal Counsel).

> growing durum wheat. African Americans are [disproportionately represented] in many professional athletics . . . . Unitarians are more likely to have college degrees than Baptists.
>
> Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more likely to have experience in that industry when it is called for by an employer. The reasons behind other disparities may be more obvious: Non-Muslims are more likely than Muslims to have an interest in wine and hence develop qualifications necessary to get a job in the winemaking industry, because Muslims tend to be non-drinkers.
>
> The result [of a rule that makes all job qualifications with disparate impact presumptively illegal] is that the labor market is anything but free and flexible. All decisions are subject to second-guessing by the EEOC or by the courts. This is a profound change in the American workplace—and indeed in American culture.[183]

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183. Brief of Gail Heriot & Peter Kirsanow as Amici Curiae Supporting Petitioners, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (No 13-1371), at 19–21; *see also* PAWAN DHINGRA, LIFE BEHIND THE LOBBY: INDIAN AMERICAN MOTEL OWNERS AND THE AMERICAN DREAM 1 (2012) (observing that Indian-Americans own about half of all motels in the United States); Chuansheng Chen & Harold Stevenson, *Motivation and Mathematics Achievement: A Comparative Study of Asian-American, Caucasian-American, and East Asian High School Students*, 66 CHILD DEV. 1215 (Aug. 1995), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-8624.1995.tb00932.x [https://perma.cc/9GX7-K9MU] (finding that Asian-Americans outperformed Caucasian-Americans on a standards mathematics exam); Darrell Y. Hamamoto, *Kindred Spirits: The Contemporary Asian American Family on Television*, 18 AMERASIA J. 35, 49 (1992), http://www.uclajournals.org/doi/pdf/10.17953/amer.18.2.7985n703t017k066?code=ucla-site [https://perma.cc/7B78-C899] (observing and considering the high number of Cambodians in the doughnut industry); Richard Lapchick & Leroy Robinson, *The 2015 Racial and Gender Report Card: National Football League*, U. CENT. FLA. C. BUS. ADMIN.: INST. FOR DIVERSITY & ETHICS SPORT (2015), http://nebula.wsimg.com/b04b442e160d0ff65cb43f72ca2aa67e?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1 [https://perma.cc/4PPQ-744F] (noting that over 68% of National Football League athletes are African-American); Laurence Michalik et al., *Religion and Alcohol in the U.S. National Alcohol Survey: How Important Is Religion for Abstention and Drinking?*, 87 DRUG & ALCOHOL DEPENDENCE 268, 275 (2007), https://www.drugandalcoholdependence.com/article/S0376-8716(06)00299-7/pdf [https://perma.cc/JMX6-JG26] (finding relatively high levels of abstention from alcohol among Muslims); A.E. Miller et al., *Gender Differences in Strength and Muscle Fiber Characteristics*, 66 EUR. J. APPLIED PHYSIOLOGY & OCCUPATIONAL PHYSIOLOGY 254 (1993), https://www.ncbi.nlm.nih.gov/pubmed/8477683 [https://perma.cc/3U4T-PML3] (demonstrating that men are generally stronger than women); M. Peters et al., *Marked Sex Differences on a Fine Motor Skill Task Disappear When Finger Size Is Used as a Covariate*, 75 J. APPLIED PSYCHOL. 87 (1990), https://www.ncbi.nlm.nih.gov/pubmed/2307635 [https://perma.cc/LZF2-SQ8A] (finding that women performed significantly better than men on a fine motor skill test); *compare Unitarians*, PEW RES. F., http://www.pewforum.org/religious-landscape-study/religious-denomination/unitarian/ [https://perma.cc/G4BD-22XG] (finding that 67% of Unitarians have completed a college degree) *with Baptists in the Mainline Tradition*, PEW RES. F., http://www.pewforum.org/religious-landscape-study/religious-

Similarly, if Title VI had been held to ban disparate impact, it would have made an extraordinary range of decisions by funding recipients presumptively a violation.[184] For example, in the education context, a university that considers the Math SAT score of an applicant for admission gives Korean-Americans and Chinese-Americans an advantage while disadvantaging many other racial and national origin groups.[185] A college that raises its tuition has a disparate impact on Cajun-Americans, Haitian-Americans, and Burmese-Americans, all groups that have below-average median household incomes.[186]

Similarly, a high school that decides to invest in a basketball team rather than a baseball team has a disparate impact on Latinos, who, on average, are shorter than African-Americans and whites, given that height is an indicator of success for male youth basketball players.[187] And if a "Little Beirut" neighborhood

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family/baptist-family-mainline-trad/ [https://perma.cc/5HAL-557P] (finding that 13% of Baptists in the mainline tradition have completed college).

Disparate impact liability reached its zenith in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In the ensuing years, disparate impact's sweeping nature became increasingly evident. In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (plurality opinion), and *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989), the Court began to limit and clarify its applicability. While *Watson* and *Wards Cove* appeared to overrule *Albemarle Paper*, the Civil Rights Act of 1991 restored the law to its pre-*Wards Cove* condition (without specifying what that pre-*Wards Cove* condition was). Phillips v. Cohen, 400 F.3d 388, 397–98 (6th Cir. 2005). The law remains unclear.

184. As shown above, in the past we have stated that all job qualifications have a disparate impact on some race, color, religion, sex, or national origin group. We note, for example, that left-handedness is found in men more than women, and in some national origin groups it is extremely rare, because it is actively discouraged in children. One of us (Heriot) has publicly offered a $10,000 check to the favorite charity of whoever can specify a job qualification that actually has excluded some job candidates that would not have a disparate impact on some group (and has never had to pay a penny). We do not at this point make the same claim for decisions subject to Title VI. Title VI covers only race, color, and national origin and covers a range of issues that we have not yet had a full opportunity to consider. But we suspect we are putting our point too modestly when we write that "an extraordinary range of decisions" would have a disparate impact on some group covered by Title VI.

185. *See Fast Facts*, NAT'L CTR. FOR ED. STAT. (2016), https://nces.ed.gov/fastfacts/display.asp?id=171 [https://perma.cc/2EJM-V83X] (showing that Asian/Pacific Islanders score consistently higher on SAT Math than other racial groups).

186. *2014 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU (2014), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/MXJ4-ZA3F] (providing data regarding the income of Cajun-American, Haitian-American, and Burmese-Americans).

187. *See* Cynthia L. Ogden et al., *Mean Body Weight, Height, and Body Mass Index, United States 1960–2002*, 347 CTRS. FOR DISEASE CONTROL: ADVANCE DATA 15 (Oct. 2004), https://www.cdc.gov/nchs/data/ad/ad347.pdf [https://perma.cc/P8DZ-SQDX] (showing that Hispanic men/women are on average three inches shorter than non-Hispanic counterparts); Erik Strumbelj & Frane Erculj, *Analysis of Experts' Quantitative Assessment of Adolescent Basketball Players and the Role of Anthropometric and Physiological Attributes*, 42 J. HUM. KINETICS 267, 270 (2014) (showing that height is a significant

is further from a given high school campus than most neighborhoods, and that school decides to build a tennis court where part of the parking lot used to be, the loss of that parking may have a disparate impact on the Lebanese-American students who have to drive to school, as it would any community far from the school campus.

There is no end to it. A university that gives college credit to students who can pass a foreign language exam has a disparate impact on Irish-Americans, Scottish-Americans, and Anglo-Americans, since they are unlikely to have a language other than English spoken in the home. Even a teacher who decides to seat students in alphabetical order will have a disproportionate effect on Chinese-American students. Chinese surnames are more likely to start with W, X, Y, or Z, which would place such students disproportionately toward the back of the classroom.[188]

There is nothing more contrary to the American spirit than the notion that everything is presumptively illegal and that one must therefore hope that a federal bureaucrat will agree that one's actions were "necessary" and hence permissible. It is incompatible with the rule of law.

B. For Two Independent Reasons, OCR's Claim that the Dear Colleague Letter's Ban on Disparate Impact in School Discipline Is Authorized by Regulations Issued Pursuant to Title VI Is Incorrect.

Section 601 may be Title VI's only statutory prohibition, but OCR's authority under Title VI does not end there. The Act also confers authority on federal agencies to promulgate substantive rules to assist in carrying out its mandate.[189] OCR purports to rely on regulations issued pursuant to this power to justify its Dear Colleague Letter's prohibition on disparate impact in school discipline.

Section 602 of Title VI states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or

indicator of success for male and female youth basketball players).

188. *See* Joshua Comenetz, *Frequently Occurring Surnames From the 2010 Census*, U.S. CENSUS BUREAU 5 (Oct. 2016), https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf [https://perma.cc/C8F4-YAKL] (showing that Wong, Xiong, Yang, and Zhang, are among the more common surnames among the "non-Hispanic two or more races" and "non-Hispanic Asian and native Hawaiian and other Pacific Islander alone" categories).

189. 42 U.S.C. § 2000d.

> activity . . . is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.[190]

Department and agencies may therefore, in appropriate circumstances, impose duties on regulated entities that go beyond the requirements of Title VI itself. No one doubts, for example, that ED has the authority to issue rules that require federally funded educational institutions to report information that will assist ED in carrying out its mandate to enforce Title VI. But in addition to that obvious power, *Alexander v. Sandoval* leaves open the question whether a department or agency charged with rulemaking authority until Title VI may promulgate substantive prophylactic rules that employ a disparate impact standard.[191] Nevertheless, for the purpose of this Article, we assume that it does.

To illustrate, suppose that OCR learned that many selective colleges give preference to students who play lacrosse (a sport more popular with whites than with minorities) as a covert method of giving preference to whites. Call this "Lacrosse Hypothetical #1." There is no doubt that OCR would be within its authority under Title VI to investigate and eventually withdraw federal funds from colleges found to be so discriminating. No resort to disparate impact liability is necessary for this, since the discrimination is intentional. Now suppose instead that while some colleges prefer lacrosse players as a subterfuge for racial discrimination, other colleges do so because they want a strong lacrosse program for nonracial reasons, and OCR has trouble figuring out which colleges fall into which category. Call this "Lacrosse Hypothetical #2." In *Alexander v. Sandoval*, the Supreme Court left open the question whether, in that circumstance, OCR would be justified in issuing a preventive disparate impact regulation prohibiting lacrosse preferences, knowing that this would ensnare some innocent colleges with no

190. *Id.* § 2000d-1. President Jimmy Carter delegated the requirement that the President sign all such regulations to the Attorney General. Exec. Order No. 12250, 45 FED. REG. 72995 (Nov. 2, 1980). Whether that delegation is authorized by law is a topic beyond the scope of this article.

191. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001).

discriminatory intent along with guilty ones whose professed interest in lacrosse is merely a pretext for race discrimination.[192]

OCR argues in the Dear Colleague Letter that both DOJ and ED have already issued disparate impact regulations.[193] It cites these regulations (technically two regulations, but they are virtually identical) in the Code of Federal Regulations, originally promulgated in 1966, as the basis for its assertion that "[s]chools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race."[194]

There are two reasons for rejecting OCR's argument. First, even assuming that DOJ and ED have the power to issue particularized disparate impact rules like the hypothetical lacrosse regulation discussed above, that does not give it the authority to issue an all-purpose meta-regulation swallowing Title VI's prohibition on intentional discrimination with an immensely broader prohibition. To do so is not to enforce Title VI but rather to vastly enlarge its scope. Second, even if ED and DOJ have that authority, they have not used it. Neither of the two regulations cited in the Dear Colleague Letter purport to impose a general ban on disparate impact. We elaborate on both arguments below.

1. Title VI Does Not Confer on Federal Agencies the Authority to Issue All-Purpose Meta-Regulations Effectively Transforming Title VI into a Disparate Impact Statute.

The Administrative Procedure Act commands the courts to "hold unlawful and set aside agency action" found to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
> (B) contrary to constitutional right, power, privilege, or immunity; [or]
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .[195]

What makes a given regulation "arbitrary"? One place to look would be the dictionary definition of that word. The Oxford

192. *See id.* at 282 (assuming, without deciding, that federal agencies can prohibit certain facially neutral activities under a disparate-impact theory).
193. Dear Colleague Letter, *supra* note 44.
194. *Id.* (citing 28 C.F.R. § 104(b)(2) (2014) and 34 C.F.R. § 100.3(b)(2) (2014)).
195. 5 U.S.C. § 706(2)(A)–(C) (West 2018).

Dictionary of English defines "arbitrary" in the sense "of power or a ruling body" as "unrestrained and autocratic in the use of authority."[196] Few regulations could be more "unrestrained" in their use of authority than a regulation that generally forbids federal-funding recipients to take actions that have a disparate impact on some racial, color, or national origin group. Since all or nearly all actions by such recipients will have a disparate impact, that leaves a federal agency boundless discretion to determine when the regulation will be enforced and when it won't. This time OCR focused in on disparate impact in school discipline.[197] Next time, it may be choice of athletic programs, admissions qualifications, or choice of curricular offerings. OCR is in a position to strike any education policy it pleases. This is enough power to make the most autocratic potentate blush.

Congress had no such intent, which makes the regulations "in excess of statutory, jurisdiction, authority or limitations" as well.[198] In 1964, with the passage of Title VI, federal departments and agencies dispensing funds subject to Title VI were "authorized and directed to effectuate [Title VI's prohibition on race, color, and national origin discrimination in federally-funded programs]."[199] They were not authorized to use that power to expand Title VI's reach except insofar as its ultimate purpose was to effectuate Title VI's actual prohibition rather than expand its reach for its own sake.

There has to be a limit. And there is. While *Alexander v. Sandoval* leaves open whether ED may promulgate substantive prophylactic regulations employing a disparate impact theory, it was contemplating specific regulations tailored to fit a particular situation, like that posed by Lacrosse Hypothetical #2.[200] There is a huge difference between a regulation that a school cannot give preferential treatment to lacrosse players if OCR has evidence that some (though not necessarily all) colleges are doing so as a subterfuge for race discrimination and a meta-regulation that bans all disparate impact.

How do we define the limit? Here, the analogy to the Fourteenth Amendment and its Equal Protection Clause (upon

196. *Arbitrary*, THE OXFORD DICTIONARY OF ENGLISH (2018).
197. *See generally* Dear Colleague Letter, *supra* note 44.
198. 5 U.S.C § 706(2)(C) (West 2018).
199. Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241, 252 (1964).
200. *See* Alexander v. Sandoval, 532 U.S. 275, 282 (2001) (assuming, without deciding, that federal agencies can prohibit certain facially neutral activities under a disparate-impact theory); *see also supra* Part IV(A).

which Title VI was held in *Bakke* to be based) is important. Like § 601 of Title VI, the Equal Protection Clause bars discrimination. It states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[201] Just as § 602 confers power on federal agencies to enforce § 601, Section 5 confers on Congress the power to enforce the Equal Protection Clause (among other clauses).[202] It states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[203] It makes sense to apply the law limiting congressional power under Section 5 to agency power under Title VI. If anything, one would expect agency power to be more limited, certainly not more expansive than Congress's power.

Section 5 is not a blank check to Congress, just as § 602 is not a blank check to federal agencies charged with the enforcement of Title VI. In *City of Boerne v. Flores*,[204] the Supreme Court laid out the scope of Congress's enforcement power under Section 5, making it clear that it is an *enforcement* power and not the power to remake the Constitution.[205]

The underlying dispute in *City of Boerne* concerned the Archbishop of San Antonio's efforts to secure a building permit to enlarge a church located within a historic district.[206] When local authorities denied the permit, the Archbishop brought a

201. U.S. CONST. amend XIV, § 1.
202. U.S. CONST. amend XIV, § 5.
203. *Id.*
204. 521 U.S. 507 (1997).
205. *Id.* at 518–29. We believe that *City of Boerne*, which as discussed *infra* note 221 and accompanying text lays out a "congruent and proportional" test, makes the most sense here, because Title VI has been authoritatively interpreted in *Bakke* by the Supreme Court to be co-extensive with the Fourteenth Amendment's Equal Protection Clause. *See* Boske v. Comingore, 177 U.S. 459, 470 (1900) ("an administrative regulation's conformity to statutory authority [is] to be measured by the same standard as a statute's conformity to constitutional authority"). But any plausible standard would yield the same result. In *Shelby County, Alabama v. Holder*, the Court was faced with a challenge to the 2006 re-authorization of § 4(b) of the Voting Rights Act of 1965. 570 U.S. 529 (2013). Petitioners argued that Congress's use of Section 2 of the Fifteenth Amendment was unconstitutional. *Id.* Although Section 2 of the Fifteenth Amendment is very nearly identical to Section 5 of the Fourteenth Amendment, the Court did not employ the *City of Boerne* test. Rather, it used a rational basis test. *Id.* at 546. But the Court's analysis was nevertheless similar. It held that "'current burdens' must be justified by 'current needs'" and that Congress's failure to adjust the coverage formula failed to do that. *Id.* at 550. The burden of an all-purpose meta-regulation transforming Title VI into a disparate impact statute is immense, given that everything or nearly everything has a disparate impact. In no way can that burden be said to be justified by current needs. Disparate impact regulations, when they are used to enforce statutes that outlaw only intentional discrimination, must be targeted to particular situations.
206. *Boerne*, 521 U.S. at 507.

lawsuit pursuant to the Religious Freedom Restoration Act (RFRA), passed by Congress just a few years before.[207] He argued that forcing the congregation to remain in a church building too small for its activities was a "substantial burden" on the free exercise of religion and was not justified by a "compelling state interest" as required under RFRA.[208]

To understand *City of Boerne*, one must understand the backstory on RFRA. RFRA had been a response to the Supreme Court's decision in *Employment Division v. Smith*.[209] In *Smith*, the Court had held that an Oregon statute providing penalties for the use of peyote was not a violation of the First Amendment's Free Exercise Clause (as incorporated into the Fourteenth Amendment and thus made applicable to the states), despite the fact that certain Native American religious ceremonies required the use of peyote.[210] Since the Oregon law was a law of "general applicability" and there was no hint that it was passed for the purpose of restricting the free exercise of religion by Native Americans, Oregon had no constitutionally imposed duty to accommodate religious exercise.[211]

Put only somewhat differently, in *Smith*, the Supreme Court had held that the Free Exercise Clause (as incorporated) is not violated unless the purpose of the state law at issue is to obstruct the free exercise of religion.[212] A "neutral law of general applicability" that just happens to disadvantage religious exercise is not a violation. In this respect, *Smith* starts to sound very familiar. It parallels *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which held that the Equal Protection Clause is not violated unless the discrimination at issue was intentional.[213]

If *Smith* was Round 1, then RFRA was Round 2. With it, Congress intended to overrule *Smith*.[214] It required that both

207. The Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 42 U.S.C. §§ 2000bb–bb-4 (107 Stat.) 1488, *invalidated in part by Boerne*, 521 U.S. at 529.

208. *Boerne*, 521 U.S. at 512–16.

209. 494 U.S. 872 (1990); *see Boerne*, 521 U.S. at 515 (discussing the passage of RFRA).

210. *Smith*, 494 U.S. at 879–82.

211. *Id.* at 882, 890.

212. *Smith* effectively overruled cases like *Sherbert v. Verner*, which found state interest in enforcing eligibility provisions for unemployment compensation law insufficiently compelling to justify infringement of religious freedom. *Sherbert*, 374 U.S. 398, 406–9 (1963).

213. *See Smith*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

214. *Boerne*, 521 U.S. at 515 (explaining that Congress's stated purpose was to

federal and state legislation refrain from placing a "substantial burden" on the free exercise of religion in the absence of a compelling purpose.[215]

City of Boerne was then Round 3. In it, the Supreme Court made it clear that it is the province of the Court and not Congress to decide what the Constitution prohibits.[216] Its decision in *Smith* thus stood. Congress cannot turn a state statute that does not violate the Free Exercise Clause (as incorporated) into one that does violate that clause simply by passing a statute. As Justice Kennedy, writing for the majority, put it:

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[217]

The more nuanced question in *City of Boerne* was whether Congress could, pursuant to its Section 5 enforcement power,

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"restore" *Sherbert*'s "compelling interest" test, which *Smith* "virtually eliminates").

215. 42 U.S.C. § 2000bb-1. The statute states:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
> (c) Judicial relief
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Id.

216. *See Boerne*, 521 U.S. at 518–19 ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

217. *Id.* at 519.

require the City of Boerne to demonstrate a compelling purpose for its refusal to grant the church a permit, even though that failure was not a constitutional violation. Just as ED has the authority to pass effectuating regulation via its rulemaking power granted by § 602 of Title VI, Congress has the authority to pass enforcement legislation via its Section 5 power.[218] In discussing the limits of that power, the Supreme Court did not rule preventive legislation inherently unconstitutional (just as it did not rule preventive rulemaking under Title VI inherently outside the scope the federal agencies' authority in *Alexander v. Sandoval*).[219] But it made it clear that any such legislation must be aimed at enforcing the prohibitions of the Fourteenth Amendment, not simply at remaking those prohibitions to Congress's liking.[220]

How do we know when an otherwise overinclusive preventive measure is a proper enforcement measure and not an improper effort to expand congressional power? The Court held that measures must be *congruent* and *proportional* to the Fourteenth Amendment violations Congress is attempting to remedy.[221] As Justice Kennedy wrote for the majority:

> While preventive rules are sometimes appropriate remedial measures, there must be a *congruence* between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.
>
> . . . RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of *proportion* to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.[222]

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218. *See id.* at 517 (". . . [Section] 5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations.").

219. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001) (avoiding a holding on whether preventative legislation is inherently unconstitutional).

220. *See Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is.").

221. *Id.* at 520.

222. *Id.* at 530–32 (emphasis added) (citations omitted).

In applying this "congruence and proportionality" test, Kennedy contrasted RFRA with the Voting Rights Act of 1965 (VRA),[223] the temporary preclearance provisions of which had been approved by the Court in *South Carolina v. Katzenbach*.[224] There were reasons the latter statute survived the Court's scrutiny, while the former did not.

The reason was not that the VRA interfered less with state and local functions. In creating the VRA, President Lyndon Baines Johnson notoriously requested Attorney General Nicholas deB. Katzenbach to write "the g[*]d-d[*]mnedest, toughest Voting Rights Act" they could.[225] And he got what he asked for. The statute subjected certain jurisdictions (in the original version, exclusively in the South) to onerous "pre-clearance" requirements before anything could be changed in their election procedures, no matter how small or insignificant.[226] If a local election board wanted to move the voting precinct from the Presbyterian church to the Methodist church across the street, because the room at the Methodist church was a little larger, the change would need approval by the United States District Court for the District of Columbia or by the Department of Justice.[227] And an uncooperative jurisdiction could have its voting procedures taken over by federal examiners.

But it was clear that gross violations of the voting rights of African-American citizens were occurring. Obviously qualified African-Americans were being denied the vote in violation of their Fifteenth Amendment rights.[228] Congress had ample evidence of this.[229] By contrast, with RFRA, Congress heard plenty of evidence of incidental burdens on religion (i.e., disparate impact) created by various state laws, but it had very little evidence of actual violations of the Free Exercise Clause,

223. Pub. L. 89-110, 79 Stat. 437 (1965) (codified at 52 U.S.C. §§ 10301–10702).

224. 383 U.S. 301 (1966).

225. HARRY S. ASHMORE, CIVIL RIGHTS AND WRONGS: A MEMOIR OF RACE AND POLITICS 1944–1996, at 174 (1997).

226. Voting Rights Act, 52 U.S.C. § 10303(b) (West 1965).

227. *See* 152 CONG. REC. pt. 11, 14715 (July 18, 2006) (describing situation in which DOJ objected to a county moving a polling place from a black club to a Presbyterian church); Letter from Bill Lann Lee, Acting Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Benjamin W. Emerson, Sands, Anderson, Marks, Miller (Oct. 27, 1999) (same).

228. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 30–32 (5th ed., 2012) (detailing various ways African-American voting rights were restricted in the post-Reconstruction South).

229. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, REPORT ON VOTING (1961).

which require some element of intent.[230] If state actions seldom, if ever, violate the Free Exercise Clause, it is hard to argue that RFRA is congruent and proportional to the constitutional wrongs Congress claimed to be remedying.

Just as important, the VRA was careful to pinpoint the problem. Its most onerous provisions applied only to those jurisdictions in the South where violations of the voting rights of African-Americans were known to be occurring frequently.[231] Moreover, the burdens being placed on those jurisdictions were intended to be temporary—lasting only five years.[232] By contrast, in *City of Boerne*, there was no effort to pinpoint the constitutional wrongs along any dimension.

The congruence and proportionality test was not intended to apply only to cases involving the Free Exercise Clause. In *Board of Trustees of the University of Alabama v. Garrett*,[233] the Supreme Court had occasion to consider the Americans with Disabilities Act, which required employers to make reasonable accommodations for disabled job applicants. The Court held that the ADA was not a valid exercise of Congress's Fourteenth Amendment Section 5 power.[234] According to the Court, the Equal Protection Clause is violated when a state treats a disabled person differently from a nondisabled person only if the distinction drawn is unreasonable.[235] Failing to accommodate a disabled person is not in itself a violation of the Equal Protection Clause. A federal statute requiring such accommodations of state employers thus is a benefit conferred on disabled persons rather

230. *See* H.R. Rep. No. 103-88, at 5–6; S. Rep. No. 103-111, at 7–8, 8 n.13.

231. Voting Rights Act, 52 U.S.C. § 10303(b) (1965).

232. The period of time was extended on several occasions. The last extension (in 2006) was held by the court to be unconstitutional in *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013).

233. 531 U.S. 356, 365 (2001). The Court noted that:

> *City of Boerne* also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Id. at 365 (citations omitted).

234. *Id.* at 374. This did not mean that the ADA was itself unconstitutional, since Congress relied on its Article I powers in passing the ADA. What it meant was that the ADA was subject to the Eleventh Amendment's limitations on lawsuits against states. See *id.* at 389 (Breyer, J., dissenting) (acknowledging that the ADA may or may not be valid under the Commerce Clause).

235. *See id.* at 367 (acknowledging that it does not violate the Equal Protection Clause "if there is a rational relationship between disparity of treatment and some legitimate governmental purpose") (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

than remedial legislation responding in a congruent and proportional manner to a violation of the Equal Protection Clause.

Consider the parallels between the way the Court dealt with congressional power in these cases and the way we are suggesting it would likely deal with agency power in connection with Title VI:

(1) *Smith* determined that a violation of the Free Exercise Clause (as incorporated in the Fourteenth Amendment) requires intent to interfere with the free exercise rights of some person or group, not just an incidental effect on free exercise.[236] Similarly, *Village of Arlington Heights* determined that for a violation of the Equal Protection Clause, an intent to discriminate, not just incidental disparate impact, is required.[237] *Bakke* then determined that Title VI essentially applies the Equal Protection Clause; hence, for a violation of Title VI an intent to discriminate, not just incidental disparate impact, is required.[238] *Alexander v. Sandoval* confirmed that an intent to discriminate must be shown for violation of Title VI.[239]

(2) Section 5 of the Fourteenth Amendment confers on Congress the authority to enforce Section 1, including the Equal Protection Clause, through appropriate legislation.[240] Similarly § 602 confers on federal agencies, subject to approval by the President, the authority to "effectuate" the prohibition on race, color or national origin discrimination found in § 601 of Title VI "by issuing rules, regulations, or orders of general applicability."[241]

(3) In *City of Boerne*, the Supreme Court made clear that Congress's Section 5 power must be aimed at "enforcing" Section 1 and not at expanding it.[242] Similarly, federal agencies are given the responsibility for "effectuat[ing]

236. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877–78 (1990).
237. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).
238. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).
239. Alexander v. Sandoval, 532 U.S. 275, 280 (2001).
240. U.S. CONST. amend. XIV.
241. 42 U.S.C. § 2000d-1 (1964).
242. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

the provisions of section 2000d of [Title VI]," not for broadening it.[243]

(4) In *City of Boerne*[244] and in *Garrett*,[245] the Supreme Court recognized that Section 5 granted Congress some authority to promulgate preventive or remedial legislation that may prohibit some state action that is not a violation of Section 1, so long as Congress's aim is to prevent or remedy actual violations of Section 1. Similarly, in *Alexander v. Sandoval*, the Supreme Court acknowledged that federal agencies might have the authority to issue regulations that go somewhat beyond Title VI's prohibition of intentional discrimination, so long as the agency's aim remains to root out actual violations of Title VI.[246]

(5) Nevertheless, in *City of Boerne*[247] and in *Garrett*,[248] the Supreme Court made clear that any legislation promulgated pursuant to Section 5 must be congruent and proportional to the Section 1 injury to be prevented or remedied. It therefore follows that any "disparate impact" regulation issued by a federal agency pursuant to Title VI must be congruent and proportional to the Title VI injury to be prevented or remedied. A shepherd may use hand shears or electric shears to fleece the sheep. But if he chooses to use a chain saw, it is difficult to believe that fleecing is what he has in mind.

(6) The Supreme Court held in *City of Boerne* that the RFRA provisions that were applicable to the states were not congruent or proportional to any real threat of Free Exercise Clause violations by states.[249] Rather, RFRA was designed to expand the concept of Free Exercise Clause violations. In *Garrett*, the Supreme Court held that Title I of the ADA, as applied to employment by the states, was not congruent and proportional to any real threat of state violations of the rights of equal protection of disabled persons.[250] Rather, the purpose of the Act was to confer a

243. 42 U.S.C. § 2000d-1 (1964).
244. *Boerne*, 521 U.S. at 532.
245. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001).
246. Alexander v. Sandoval, 532 U.S. 275, 289 (2001).
247. *Boerne*, 521 U.S. at 520.
248. *Garrett*, 531 U.S. at 365.
249. *Boerne*, 521 U.S. at 533.
250. *Garrett*, 531 U.S. at 374.

> right to reasonable accommodations on disabled persons—a commendable purpose, just not a purpose rooted in the desire to enforce the Equal Protection Clause—who seek employment.[251] It is difficult to avoid the conclusion that 24 C.F.R. § 104(b)(2) and 34 C.F.R. § 100.3(b)(2), assuming arguendo that they prohibit unjustified disparate impact rather than just intentional discrimination at the "wholesale" level, fail the congruence and proportionality test as well.[252]

If 34 C.F.R. § 100.3(b)(2) and 24 C.F.R. § 104(b)(2) are disparate impact regulations, collectively they cover every kind of federally funded program—not just education programs, not just

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251. *Id.*

252. In Tennessee v. Lane, 541 U.S. 509 (2004), Justice Scalia in dissent expressed some skepticism over the "congruent and proportional" test. He was concerned that whether a given item of legislation is "congruent and proportional" will too often depend on the judge's own policy preferences and stated that in the future he would approach Section 5 issues somewhat differently. For non-race issues, he would severely constrict Congressional power by disallowing prophylactic measures altogether. Under his preferred approach, therefore, Congress would have no power under Section 5 to legislate prophylactically on matters of sex or age discrimination. It could only prohibit or punish actual discrimination. On matters of race, however, Justice Scalia agreed that he should bow to earlier precedent, which tended to accord Congress more discretion under Section 5 than what he thought appropriate for non-race matters. For Congressional measures designed to remedy race discrimination, he wrote that he would apply a standard like that in *McCulloch v. Maryland*, 17 U.S. 316 (1819), subject to "the requirement that Congress may impose prophylactic § 5 legislation only upon the particular States in which there has been an identified history of relevant constitutional violations." *Id.* at 564 (Scalia, J. dissenting).

If the regulations at issue here were to be interpreted as general disparate impact regulations, they would fail Scalia's standard as much as they would the *City of Boerne* standard. To begin with, they fail "the requirement that Congress may impose prophylactic § 5 legislation only upon the particular states in which there has been an identified history of relevant constitutional violations." *Id.* at 564. Instead, they apply generally. Second, they would fail even the *McCulloch* standard. That case stated: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional." *McCulloch*, 17 U.S. at 421.

But the end must *be* legitimate. And the means must be "plainly adapted to that end." The only legitimate end for regulations issued pursuant to Title VI is the enforcement of Title VI. But one would have to be very naïve to believe that *if* the regulations at issue are correctly interpreted to cover all disparate impact that the promulgator's purpose (or end) was to enforce Title VI rather than to expand its scope. Since everything or nearly everything has a disparate impact based on race, color, or national origin, such regulations would prohibit everything or nearly everything. It is not simply that the means are not congruent and proportional to the problem. They are so monumentally outsized relative to the problem that they betray the fact that the promulgators' motive was not simply to enforce Title VI's ban on intentional discrimination.

This is not necessarily to say that those who assumed that the regulations should be interpreted to prohibit disparate impact generally during the 1970s and to a certain degree later were wrongdoers. Many likely assumed that *Griggs v. Duke Power Co.* would be interpreted to apply to Title VI as well. But ultimately it was not.

medical programs, not just cultural programs, and not just law enforcement programs. In contrast to the preclearance requirements of the Voting Rights Act of 1965, which were approved in *South Carolina v. Katzenbach*,[253] they apply indefinitely and all over the country, not just for a limited time in an area of the country with a history of discrimination.[254]

Just as important, these regulations cover an extraordinary range of decisions. Included are decisions "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 situation in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program."[255] If those decisions "utilize criteria or methods of administration" that have a disparate impact on some race or some national origin group (and, given the large number of races and national origins, an extraordinary number of them, if not all of them, will do so), they are violations unless and until the funding recipient can "justify" them.[256]

If these regulations are, as OCR claims, indeed disparate impact regulations, their effect is not primarily to strengthen the federal government's ability to enforce Title VI's ban on intentional discrimination. Their primary effect is to vastly expand the potential liability of recipients of federal funds.

We need not decide whether OCR could, after notice and comment, have promulgated regulations that would have applied some form of disparate impact analysis specifically to school discipline issues at the K–12 level or specifically to school discipline for so-called "subjective offenses." Would such regulations have been found to be congruent and proportional to actual Title VI injuries in need of remedy? Would such regulations survive a "hard look" in the tradition of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*?[257] The fact is that OCR has not pursued that option. It claims instead that does not need to. It claims it has all-purpose disparate impact regulation already in place, which

253. South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).
254. 34 C.F.R. § 100.3(b)(2) (2018); 24 C.F.R. § 104(b)(2) (2018).
255. 34 C.F.R. § 100.3(b)(2) (2018).
256. Dear Colleague Letter, *supra* note 44.
257. 463 U.S. 29 (1983) (holding that the decision by the National Highway Traffic Safety Administration to rescind the requirement that automobile manufacturers design and manufacture automobiles with passive restraints was arbitrary and capricious).

presumptively outlaws all disparate impact (despite the fact that means essentially *everything or nearly everything*).[258] For the reasons we outlined in this subsection, that argument does not work.[259]

2. Even if the Departments of Education and Justice Have the Authority to Issue All-Purpose Meta-Regulations of that Kind, They Have Not Done So. The Two Regulations OCR Purports to Rely on—34 C.F.R. § 100.3(b)(2) and Its Twin 24 C.F.R. § 42.104(b)(2)—Do Not Impose Liability for Mere Disparate Impact. Rather, They Impose Only a Very Limited Prohibition on Extreme Cases of Disparate Impact.

On July 29, 1966, President Lyndon Baines Johnson approved a set of regulations issued pursuant to Title VI.[260] They contain a number of prohibitions, only one of which does OCR purport to rely on for its conclusion that disparate impact in school discipline is presumptively a violation of the federal law.[261] Nevertheless, in order to understand OCR's argument (and to see why it is in error), it is important to see that prohibition in context.[262]

The first prohibition in the set generally tracks the language of Title VI's broad ban on race, color, and national origin discrimination.[263] Since this regulation simply parrots Title VI

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258. *See generally* 34 C.F.R. § 100.3(b)(2); 24 C.F.R. § 104(b)(2); Dear Colleague Letter, *supra* note 44.

259. *See supra* Part IV(B)(1).

260. *See* 28 C.F.R.§ 42.104(b)(2).

261. *See* Dear Colleague Letter, *supra* note 44, at nn.21, 27.

262. One piece of evidence that the regulations are not disparate impact regulations is simply their timing. The fact that § 42.104(b)(2) was issued in 1966 is worth noting. This was before even the EEOC had claimed to be the first agency to apply disparate impact liability. Writing for the NAACP's *The Crisis* magazine in 1968, EEOC Commissioner Samuel Jackson proudly observed of the EEOC's proto-disparate impact policy:

> [The] EEOC has taken its interpretation of Title VII *further than other agencies have taken their statutes*. It has reasoned that in addition to discrimination in employment, it is also an unlawful practice to fail or refuse to hire, to discharge or to compensate unevenly . . . on criteria [that] prove to have a demonstrable racial effect without a clear and convincing business motive.

Samuel Jackson, *EEOC v. Discrimination, Inc.*, CRISIS 16–17 (Jan. 1968) (emphasis added). Even by 1968, the EEOC's policy was still not *Griggs*-style disparate impact. In *Griggs*, a job qualification that has a disparate impact based on race must be justified by "business necessity." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). As Commissioner Jackson describes EEOC policy, there need only be clear and convincing evidence of a "business motive." Jackson, *supra*. A "business motive" and "business necessity" are very different things.

263. Originally published at 31 FED. REG. 10265 (July 29, 1966) and codified as 28 C.F.R. § 42.104(a), it tracked the language of Title VI itself: "*General*. No person In the United States shall, on the ground of race, color, or national origin be excluded from

itself, it obviously cannot impose disparate impact liability. Title VI requires intent.[264] OCR does not disagree.[265]

Next in the set came a group of prohibitions that apply to very specific acts of discrimination against an individual. OCR does not purport to rely on these regulations for its conclusion either:

> (b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
> (i) Deny *an individual* any disposition, service, financial aid, or other benefit provided under the program;
> (ii) Provide any disposition, service, financial aid, or benefit to *an individual* which is different, or is provided in a different manner, from that provided to others under the program;
> (iii) Subject *an individual* to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;
> (iv) Restrict *an individual* in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, function or benefit under the program;
> (v) Treat *an individual* differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, or benefit provided under the program; or
> (vi) Deny *an individual* an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).[266]

Note the consistent pattern here: Each prohibition contains the words "an individual." For each subsection, in order for a

participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies." 28 C.F.R. § 42.104(a).

264. *See supra* at Part IVA.

265. Dear Colleague Letter, *supra* note 44.

266. 28 C.F.R. § 42.104(b)(1)(ii)–(vi) (2018) (italics added). In 1972, an additional subsection was added to the list: "(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program." 28 C.F.R. § 42.104(b)(1)(vii). Note that this subsection fails to follow the otherwise consistent pattern of using the term "an individual" in the list of specific discriminatory actions prohibited in § 42.104(b)(1). It does, however, use "a person," so the focus on individualized "retail" acts of discrimination remains.

federally funded entity to be in violation, it must treat "an individual" differently from another "on the ground of race, color, or national origin."[267] Put only slightly differently, a federally funded program or activity will be in violation if it can be shown that it would have treated that individual differently if he had been of a different race, a different color, or a different national origin. One might therefore say these regulations operate at the "retail" level. Each time an individual is treated differently based on his race, color, or national origin is a separate, discrete act of discrimination, even if it is also part of a pattern or practice of discrimination.[268]

The only other prohibition from the original Title VI regulations is § 42.104(b)(2). This is the provision that OCR relies on in the Dear Colleague Letter as the source of the prohibition on disparate impact. It reads:

> *Specific discriminatory actions prohibited*. . . . (2) 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 situation in which, such will be provided under any such program, or *the class of individuals* to be afforded an opportunity to participate in 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 because of *their* race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects *individuals* of a particular race, color, or national origin.[269]

In the period following *Griggs*, many likely assumed that Title VI would ultimately been similarly interpreted to prohibit disparate impact in the same way as Title VII. Under the circumstances, it is unsurprising that they might be inclined to read *Griggs*-style liability into this regulation too. But we believe such a reading would be incorrect as a matter of the drafters' actual intent (though we believe a much lesser kind of disparate impact liability does indeed seem to be intended).[270] In some

267. *Id.* § 42.104(b)(1)(ii)–(vi).
268. 28 C.F.R. § 42.104(a)(1) (2018).
269. *Id.* § 42.104(b)(2) (emphasis added).
270. *See infra* note 284–92 and accompanying text. Note that under our analysis, it will be unnecessary for a court to find the regulations are beyond the scope of the rulemaking authority of federal agencies. It therefore saves the regulations from being invalidated.

sense, therefore, our reading is consistent with cases that suggest disparate impact liability can be found in the regulation.[271] But, as we will explain below, our text analysis yields a much narrow kind of disparate impact liability—one that will not support the Dear Colleague Letter.

To demonstrate all this, first, allow us to focus attention on the essentials of the regulation by stripping it of verbiage irrelevant

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271. In his dissent in the fractured case of *Guardians Association v. Civil Service Commission of the City of New York*, Justice Marshall took the position that the regulations promulgated in 1966 pursuant to Title VI were intended to cover disparate impact. 463 U.S. 582, 615, 619 (1983) (Marshall, J., dissenting). From there he argued that Title VI should therefore be interpreted to prohibit disparate impact on the ground that the agencies that promulgated these near-in-time regulations should be deferred to in their interpretation of Title VI (thus implicitly conceding that all-purpose meta-regulations imposing disparate impact liability would be unauthorized if Title VI is not a disparate impact statute). *Id.* at 619; *see also id.* at 593 n.14 (White, J., announcing the judgment of the Court) (agreeing with Marshall, J.) (dictum). *But see* Alexander v. Sandoval, 532 U.S. 275 (2001) (coming to the opposite conclusion on the proper interpretation of Title VI itself).

Marshall did not explain why the regulations should be interpreted to impose any kind of disparate impact liability. *See, e.g.*, Villanueva v. Carere, 685 F.3d 481 (10th Cir. 1996) (following Marshall's view that the regulations are in some sense disparate impact regulations) (dictum); Larry P. by Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (also following Marshall's view that the regulations are in some sense disparate impact regulations). More important for the purposes of this Article, he did not explain what he means when he writes that the regulations impose liability for disparate impact. He did not state why or even if they should be construed as all-purpose meta-regulations prohibiting disparate impact as opposed to something more limited than that (such as the interpretation we believe a textual reading requires, see *infra* notes 284–92 and accompanying text). Given that everything or nearly everything has a disparate impact on some protected group, interpreting the regulations, contrary to their text, as all-purpose, meta-regulations imposing liability for disparate impact should be assiduously avoided. Such an interpretation creates serious rule of law issues. It gives executive agencies complete discretion over which "violations" they will go after and which they will not. Nothing or practically nothing is off limits to them.

On the issue of Title VI itself, Marshall also argued that a rejected amendment to the proposed Civil Rights Act of 1966 demonstrated that Congress approved of interpreting Title VI to prohibit disparate impact. *Guardians Ass'n*, 463 U.S. at 620–21. But that amendment's rejection supports neither (1) the theory that Congress approved of interpreting Title VI to prohibit disparate impact, nor (2) the theory that Congress understood 34 C.F.R. § 100.3(b)(2) and 28 C.F.R. § 42.104(b)(2) to adopt broad-based disparate impact liability and approved of it. Indeed, the amendment was introduced and discussed in the Senate before the earliest version of those regulations were promulgated on July 29, 1966. Instead, the main thrust of the amendment was to deal with the agency "guidelines" that had never been subject to notice and comment or to presidential approval. *See infra* notes 277–83 and accompanying text. A good example of this is the Department of Justice's Guidelines for the Enforcement of Title VI, 28 C.F.R. § 50.3 (Apr. 2, 1966), which allowed agencies to "defer action" on whether to cut off funds. Supporters of the proposed amendment objected to this. The proposed amendment would have required executive branch agencies to work only through rulemaking and not through informal guidances. 112 CONG. REC. 10062 (May 9, 1966). Several members of Congress were complaining that ad hoc decision-making by low-level bureaucrats was creating an enforcement patchwork in which different hospitals and schools were being held to very different standards—often standards that were inconsistent with Congress's intent. Requiring generally applicable regulations was suggested as a cure. The proposed amendment was voted down. *Id.*

to the issue at hand and by inserting numerals:

> A recipient, in determining . . . the class of individuals to whom . . . [services] will be provided . . . , may not . . . utilize criteria . . . which **[1]** have the effect of subjecting individuals to discrimination because of their race . . . , or **[2]** have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race.

Two things are worth noting at the outset: (1) the regulation repeatedly refers to "individuals" in the plural; (2) it has two parts, and neither part can be a subset of the other without rendering that part mere surplusage.

So let us start with the first part—that a "recipient . . . may not . . . utilize criteria . . . which have the effect of subjecting individuals to discrimination because of their race . . . ."[272] Unlike § 42.104(b)(1), § 42.104(b)(2) operates at the "wholesale" level. To explain what we mean by that, we refer back to our lacrosse hypotheticals. In Lacrosse Hypothetical #1,[273] we supposed a college gives preferential treatment to lacrosse players because it wants to admit more white students without being too obvious at it. In that case, it will be false that if a rejected African-American student had been white, he would have been treated differently. At the level of individual decisions, it is ability to play lacrosse, not race, that matters. Consequently, there may be no violation of § 42.104(b)(1). Instead, the act of race discrimination occurs at the wholesale level when the decision is made to give preferential treatment to lacrosse players as a subterfuge to benefit white applicants, hence violating the first part of § 42.104(b)(2). The policy itself would not have been adopted if it had not been expected to disproportionately rule out African-Americans. On the other hand, the *effect* is not felt until the retail decisions are made, and an African-American individual who would have made the cut in the absence of the lacrosse policy is rejected for admission.

This is not a "disparate impact" provision. The clause specifically requires that the recipient's choice of criteria must "have the effect of subjecting individuals *to discrimination because of their race*."[274] It is not enough if they simply have the effect of

272. 28 C.F.R. § 42.104(b)(2) (2018).
273. *See supra* Part IV(A).
274. 28 C.F.R. § 42.104(b)(2) (2018).

disadvantaging one racial group or another. In our Lacrosse Hypothetical #1, the school is indeed motivated by a desire to discriminate on the basis of race. Applying the lacrosse criterion in a way that results in fewer African-Americans being admitted does indeed have the effect of subjecting them to race discrimination. On the other hand, if the school were truly concerned about getting more lacrosse students, no matter how silly we might think that concern was, it would not have the effect of subjecting African-Americans to discrimination because of race and thus would not violate the first part of the regulation.

How can we say that with confidence? First, that is what the language says. Second, if the first part of § 42.104(b)(2) were interpreted to cover disparate impact generally, there would be no need for the second part of § 42.104(b)(2), which prohibits the use of criteria that "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race . . . . " The presumption must be against the use of surplus language.[275] Third, if the provision is really a prohibition on disparate impact, where is the exception for "justified" disparate impact? By prohibiting, without exception, all criteria that "have the effect of subjecting individuals to discrimination because of their race, color, national origin," the regulation makes it clear that it could not be referring to mere disparate impact since everyone agrees that there are many criteria that have disparate impact yet are perfectly appropriate.

Suppose a court were to infer that an exception for justifiable disparate impact must have been intended. Where would that put the law? It would mean that the federal bureaucracy has made an extraordinary range of decisions—maybe every decision a federally funded program or activity could make—presumptively a violation of Title VI's regulations.[276] No federally funded program or activity can possibly avoid actions that have a disparate impact based on race, color, or national origin. Even something as simple as grading a math quiz, selecting a football team, or deciding whether to turn a badminton court into a parking lot is likely to have a disparate impact on some group. This means funding recipients are dependent on the federal

275. *See* Gustafson v. Alloyd Co., 513 U.S. 561 (1995) (invoking principle against redundancy in the interpretation of the word "communication" in statutes).

276. *See supra* Part IV(A).

government to tell them what will get them in trouble and what will not. The bureaucracy would have reserved for itself extraordinary power to decide whether particular actions are justified or whether stamping out particular actions should be an enforcement priority. Such power could (and likely would) be wielded without notice or comment, since the basic prohibition would have been already contained within a regulation that was itself subject to notice and comment.

This would have raised the hackles of members of the 88th Congress, who passed Title VI only two years before the regulations were issued. As Stephen C. Halpern reported in *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act*, many were concerned that Title VI itself, quite apart from its regulations, granted unaccountable bureaucrats too much discretion.[277] Some of them, like Representative William Jennings Bryan Dorn (D-SC), were opponents of Title VI. He commented that there "is no end to where this type of power could lead . . . in the hands of unelected, empire-building government bureaucrats."[278] Others, like Senator Al Gore, Sr. (D-TN), a Southern moderate who had voted for the Civil Rights Acts of 1957 and 1960 and went on to vote for the Voting Rights Act of 1965, were potential swing voters. But Gore, too, was concerned the withholding of funds under Title VI could be used as a political reprisal.[279] And so was Representative Emanuel Celler (D-NY), chairman of the House Committee on the Judiciary and a strong supporter of Title VI. As Celler put it, one "wouldn't want to have this tremendous power involving so many

277. President Kennedy expressed concerns about even granting the President the kind of power conferred by Title VI. Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 32–35 (1995). According to Halpern, both the Kennedy Administration and the Johnson Administration saw Title VI "as a relatively unimportant part of the civil rights bill." *Id.* at 32.

> Nicholas Katzenbach, who worked for [Attorney General] Robert Kennedy at the Justice Department in 1963 [before becoming Attorney General himself during the Johnson Administration], expected that Title VI was one of the provisions intended to be "traded away" by the administration because "it had the most symbolic significance to the South and the least practical significance of anything in the bill."

Id.

278. *Id.* at 34 (citing *Civil Rights, Part 3: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. at 1583).

279. *Id.* (citing John D. Morris, *Gore Finds Flaws in Rights Measure*, N.Y. TIMES, Apr. 26, 1994).

billions and billions of dollars to be in the control of someone who would turn the spigot on or off with whim or caprice."[280]

A number of changes were thus made to guard against the problem of runaway discretion in the hands of bureaucrats. For example, Representative John V. Lindsay (R-NY) secured the passage of an amendment that stated, "No such rule, regulation, or order shall become effective unless and until approved by the President."[281] Another amendment passed providing that before an agency's decision to terminate funds could go into effect, the agency would have to provide a detailed, written report to the appropriate oversight committees in both houses of Congress and wait for thirty days.[282]

Only through the distorted lens of time could one imagine that the federal bureaucracy could cleverly sidestep all these concerns by issuing a regulation that makes an enormous swath of human activity presumptively illegal and then pick and choose when and if to enforce the law.

But what about the second part of § 42.104(b)(2)? It states that a funding recipient "may not . . . utilize criteria . . . [that] have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race . . ."[283] Is that a broad-based prohibition on disparate impact?

The short answer is no. But this part of the regulation has a lot more in common with disparate impact liability than the first part of § 42.104(b)(2) does—so much so that we believe it should be viewed as a limited form of disparate impact liability.[284] Note, for example, that unlike the first part, this provision does not include the word "discrimination."[285] The exclusion of that

280. *Id.* at 34–35 (citing *Civil Rights, Part 3: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. at 1583).

281. 20 U.S.C. § 1682 (2018); *see also* HALPERN, *supra* note 277, at 36–37 ("The [Johnson Administration 1965 Title VI desegregation Guidelines], which governed the enforcement of Title VI in southern school districts, were not approved by the president, and the absence of a presidential approval became a legal and political issue.").

282. 20 U.S.C. § 42.104(b)(2) (2018) (requiring federal departments that terminate financial assistance for recipient noncompliance to file reports with the relevant congressional committees and wait thirty days before the termination takes effect).

283. 28 C.F.R. § 42.104(b)(2) (2018).

284. We therefore believe that not only is our textual analysis of the regulation correct, it is consistent with the notion found in several cases that it prohibits disparate impact. But (as discussed *infra* notes 290–91 and the accompanying text), it is not the kind of disparate impact liability that would justify the Dear Colleague Letter, *supra* note 44.

285. 28 C.F.R. § 42.104(b)(2) (2018).

term was almost certainly intentional. But so was the inclusion of the strongly worded phrase "defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race. . . ."[286] This was not a relative standard. It is not a question of whether the value of the program is defeated or substantially impaired for one racial group *compared* to the value of the program to some other group. The standard is absolute.

Here is the problem the regulation is trying to deal with: There are certain characteristics that are so overwhelmingly identified with race, color, or national origin as to be virtual stand-ins for them. Note, for example, that the Fifteenth Amendment bans not just race discrimination in the right to vote, but also discrimination on the basis of "color or previous condition of servitude."[287] One might think this would be unnecessary. If a state discriminates on the basis of color, it is more than just likely that it is really motivated by race. But it may not be always the case. And even when it is the case, for a victim or someone charged with a duty to enforce the law, marshaling proof of a racial motivation is likely to be regarded as a nuisance.

So consider the following hypotheticals:

* A local park district prefers not to allow Italian-Americans to use its swimming pool, which is located in the park on the north side of town. The pool was built and is maintained with federal funds. Almost 93% of Italian-Americans in this city reside in the Little Italy neighborhood, which is very nearly 100% Italian-American and makes up the south side of town. The park district issues a rule that residents may only use the park on the side of town in which they reside.
* The mayor of a town has a deep bias against anyone who is descended from slaves. In order to discourage such persons from living in the town, he has decreed that no one who is descended from slaves going back seven generations or fewer may ride the town's federally subsidized bus. About 98% of the town's blacks are descended from slaves within the relevant number of generations, but 2% are not—mostly Ethiopian-Americans and a few African-Americans whose ancestors escaped slavery more than seven generations ago. On the other hand, a small number of Korean-American

286. *Id.*
287. U.S. CONST. amend. XV.

> residents of the town are descended from Korean "Comfort Women of the Japanese Military" during World War II and one middle-aged Greek-American had a mother who was abducted and pressed into involuntary service during the Greek Civil War. The mayor has banned all those with relevant slave ancestry, regardless of race, and none of those without.

The first hypothetical is a case of intentional discrimination on the basis of race or national origin. It would be a violation of the first part of § 42.104(b)(2). But because the neighborhoods involved are so closely identified with national origin, to the point where using them "defeat[s] or substantially impair[s] accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin," their use violates the second part of § 42.104(b)(2) too.[288] With only tiny exceptions, Italian-Americans will not get to use the swimming pool. Given that there are a few exceptions, it may or may not be enough to say that the use of the neighborhood criterion "defeat[s]" the objectives of the swimming pool programs as respects Italian-Americans. But the case for "substantially impair[s]" seems strong. Consequently, there is no need to prove intent to discriminate.

Suppose, however, that only 20% of Italian-Americans residing in the town live in the Little Italy neighborhood, and they make up only 40% of Little Italy residents. And there are other neighborhoods on the south side of town. Suppose further that the upshot of the rule that residents must use the park on the side of town where they reside will cause 45% of Italian-Americans to be excluded from the swimming pool, but only 30% of other groups. If the reason for the rule is to exclude Italian-Americans, it remains a violation of the first part of § 42.104(b)(2). But it is no longer a violation of the second part of § 42.104(b)(2), since "residence on the south side of town" is not closely identified with being Italian-American. Put in the language of the regulation, excluding Southsiders from the pool does not "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." It is therefore a violation only because it was intended to have the disparate impact that it had.

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288. 28 C.F.R. § 42.104(b)(2) (2018).

The second hypothetical is different. Here—strangely enough—there really is no intent to discriminate on the basis of race, color, or national origin. Instead, the intent is to discourage the descendants of slaves from living in town. Consequently, there is no violation either of Title VI itself or of the first part of § 42.104(b)(2). But the case for a violation of the second part of § 42.104(b)(2) is strong. With only tiny exceptions, the mayor's criterion shuts out African-Americans entirely. If it does not "defeat[] . . . the objectives of the [bus] program as respects [African-Americans]," it "substantially impair[s] the objective of the program as respects" African-Americans. The fact that a few individuals are incidentally swept into the ban (and few escaped it) does not change that fact that slave ancestry and African-Americans are closely associated with one another (just as residing in Little Italy and being Italian-American are closely associated in the hypothetical town in the first example).[289]

289. The situation in *Lau v. Nichols*, 414 U.S. 563 (1974), arguably fits the second part of § 42.104(b)(2). *Lau* involved the failure of the San Francisco school system to provide either English language instruction or bilingual instruction to 1,800 students of Chinese national origin who did not speak English. *Lau*, 414 U.S. at 564. Instead, these students were placed in classes with native English speakers and expected to sink or swim. *Id.* The five-member majority (with the remaining members concurring only in the result) reversed the U.S. Court of Appeals for the Ninth Circuit, which had held that "[e]very student brings to the starting line of his educational career different advantages and disadvantages" and that the school system was not obligated to compensate students for these differences pursuant to Title VI. *Id.* at 565. While the Supreme Court disagreed with the Ninth Circuit's conclusion, it was vague about its theory of liability and about the appropriate remedy. *Id.* at 569.

One way to look at *Lau* is to recognize that in the San Francisco of the late 1960s and early 1970s, the inability to speak English was overwhelmingly identified with Chinese national origin (and to a lesser extent with a few other national origins). For decades, on account of the Chinese Exclusion Act, Pub. L. 47-126, 22 Stat. 58 (1882), no Chinese immigrants had been allowed in the country. This was reversed by the Magnuson Act, Pub. L. 78-199, 57 Stat. 600 (1943), but that act made available only 100 visas per year. It was thus not until the Immigration and Nationality Services Act, Pub. L. 89-236, 79 Stat. 911 (1965), that twentieth-century Chinese immigration to the United States began in earnest. *See Region and County or Area of Birth of Foreign-Born Population: 1960 to 1990*, U.S. CENSUS BUREAU (Mar. 9, 1999), https://www.census.gov/population/www/documentation/twps0029/tab03.html [https://perma.cc/9AZK-BZ46] (showing that the Chinese foreign-born population grew five times from 99,735 in 1960 to 529,837 in 1990, whereas the foreign-born total grew two times). Consequently, when the Chinese population of San Francisco nearly doubled between the 1960 and 1970 Censuses, it was overwhelmingly on account of newly arrived immigrants and not of internal migration of long-established Chinese Americans. *Id.*

The San Francisco school system was essentially providing an appropriate education to native English speakers, but not those who did not already speak English. In failing to do so, it could arguably be described as having "utilize[d] criteria . . . [that] have the effect of . . . substantially impairing the objective of the program as respects individuals of a particular race." Why? Because everybody knew in San Francisco in the late 1960s and early 1970s who would be disadvantaged by such a practice: It would overwhelmingly be

How closely must the characteristic at issue have to be identified with race in order to come under this provision of § 42.104(b)(2)? Where does one draw the line? All we can say is that the level of disparate impact in school discipline found in schools today does not come close to qualifying. No one would say that being disciplined in school is closely identified with being African-American. Indeed, it would rightly be regarded as offensive for anyone to argue that it is. Secretary Duncan said in his Edmund Pettus Bridge speech that African-Americans are more than three times as likely to be expelled as their white peers.[290] But the truth is that few students of any race are expelled from school.[291] The fact that disproportionate numbers of African-Americans are disciplined does not defeat or substantially impair the objectives of education for African-Americans. If all races were expelled or suspended at the same rates as African-Americans were being expelled or suspended at the time of Duncan's speech, many might criticize the policy as unduly harsh, but we would not say the objectives of education had been defeated or even substantially impaired.

Chinese-American children and almost never San Francisco's Irish-American, Italian-American, Anglo-American, or African-American children, almost of all whom had a firm grasp of English. This is thus arguably the kind of activity the second part of § 42.104(b)(2) was aimed at, so proof of intent to discriminate would not be necessary. *See* Campbell J. Gibson and Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850–1990*, U.S. CENSUS BUREAU (Feb. 1999), https://www.census.gov/population/www/documentation/twps0029/twps0029.html [https://perma.cc/PDM7-968M] (showing that in 1970 roughly 20% of foreign-born Americans spoke English as their mother tongue).

Insofar as *Lau* should be interpreted as a decision based on a violation of the second part of § 42.104(b)(2), it has been overruled by *Alexander v. Sandoval*, which held that no private right of action exists under regulation promulgated pursuant to Title VI. *Alexander v. Sandoval*, 532 U.S. at 293.

As an aside, the backstory on *Lau* is interesting. Just a few years earlier, African-American students had brought a lawsuit seeking a remedial injunction integrating San Francisco schools. Such an injunction was issued and it included provisions for busing students to schools. Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315, 1340–42 (1971). Some parents of Chinese national origin, whose children had been attending identifiably Chinese public schools opposed the injunction and sought a stay on grounds that included their preference that their children attend schools where they would learn more about their Chinese cultural heritage. Justice William O. Douglas, however, rejected their application and the district court's injunction was carried out. Guey Heung Lee v. Johnson, 404 U.S. 1215, 1218 (1971). *Lau* was thus in some sense the second round for parents of Chinese national origin who were concerned that the educational interests of their children were not getting sufficient attention.

290. Duncan, *supra* note 1.

291. *See* Susan Aud et al., *Status and Trends in the Education of Racial and Ethnic Groups*, INST. OF EDUC. SCI. (July 2010), https://nces.ed.gov/pubs2010/2010015.pdf [https://perma.cc/KG9Q-NRUS] (noting that 3% of public school students are expelled).

What was bothering Duncan was the fact that the expulsion and suspension rates were unequal. But what drives the second part of § 42.104(b)(2) is whether the rates are so extraordinarily high, quite apart from whether they got there by discrimination, that members of a particular race are virtually shut out from participation.[292]

To be sure, OCR and CRT are jointly interpreting 34 C.F.R. § 100.3(b)(2) and 24 C.F.R. § 104(b)(2) to be general disparate impact regulations, and under *Auer v. Robbins*,[293] courts defer to agencies in interpreting their "own" regulations if that interpretation is reasonable.[294] But the problem for OCR and CRT is not just that *Auer* is in doubt, [295] but also that (1) on earlier occasions, OCR appears not to have interpreted those regulations in the same way; and (2) the doctrine of

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292. *See* 28 C.F.R. § 42.104(b)(2) (prohibiting criteria "hav[ing] the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin").

293. 519 U.S. 452 (1997).

294. *Id.* at 458.

295. The notion that courts should defer to an agency's interpretation of its own regulations has come under considerable criticism and is in tension with the common law doctrine that legal documents should be construed against the drafters. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. J. AM. U. 1, 11–12 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654–80 (1996). *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (analyzing the history of judicial review and its applications); *Contra Proferentem Doctrine*, USLEGAL, https://definitions.uslegal.com/c/contra-proferentem-doctrine/ [https://perma.cc/C69G-CZM6]; Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

In *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), Justice Scalia, the author of the *Auer* decision, called in his dissent for the Court to abandon the doctrine:

> *Auer* deference encourages agencies to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power. . . .
>
> In any case, however great may be the efficiency gains derived from Auer deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.

Id. at 620–21. Scalia was not alone in his concern over the *Auer* doctrine. Chief Justice Roberts, joined by Justice Alito, filed a concurring opinion explaining that it would have been inappropriate to reconsider *Auer* deference in *Decker*, because the litigants had not argued the point. The Chief Justice nevertheless made it clear that the Court should be prepared to do so in a subsequent case. *Id.* at 615–16.

In Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015), Justice Scalia again called for the Court to abandon *Auer*. As he put it there, "there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means." *Id.* at 1212–13 (Scalia, J., concurring).

constitutional avoidance cuts in the opposite direction. For both reasons, *Auer* is inapplicable.

In issuing the September 8, 1981 Memorandum on the Civil Rights Aspects of Discipline in Public Schools, Assistant Secretary of Education for Civil Rights Clarence Thomas took the position that OCR had no authority to act under then-existing Title VI law to move against a school district whose school discipline policy simply had a disparate impact on particularly racial groups:

> It is difficult to generalize about a particular set of facts that would trigger a violation of Title VI and require corrective action. It is accurate to say, however, that at a minimum there must be clear evidence that the minority child has been treated differently on the basis of race and that the different treatment has resulted in harm to the student.[296]

Both 34 C.F.R. § 100.3(b)(2) and 24 C.F.R. § 104(b)(2) were already in effect in 1981, and Thomas obviously knew about them. Yet his memorandum does not mention them at all, much less refer to them as all-purpose meta-regulations transforming Title VI into a prohibition on disparate impact. It seems that he did not interpret them as such; otherwise he would have discussed them, since they surely would have been relevant to the subject matter of his memorandum if his interpretation had matched the Dear Colleague Letter's. *Auer* deference is therefore inappropriate, since OCR's interpretation of these regulations has not been consistent over the years.

Even if the interpretation of the regulations had been consistent, there is the matter of constitutional avoidance. In *Edward J. DeBartolo Corp. v. Florida Gulf Building and Construction Trades Council*,[297] the Supreme Court decided that in a case involving statutory interpretation, the doctrine of constitutional avoidance trumps deference to agency expertise under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[298] It seems likely the same priority to the doctrine of constitutional avoidance would apply to *Auer* deference, thus making *Auer* deference irrelevant to the disparate impact issue.

The fact that the constitutionality of disparate impact liability has been drawn into question over the last decade or so thus

296. Memorandum from Clarence Thomas, *supra* note 47, at 2.
297. 485 U.S. 568 (1988).
298. *Id.* at 574; 467 U.S. 837 (1984).

provides an extra reason to decline to interpret 34 C.F.R. § 100.3(b)(2) and 24 C.F.R. § 104(b)(2) as disparate impact meta-regulations. In *N.L.R.B. v. Catholic Bishop of Chicago*,[299] applying the doctrine of constitutional avoidance, the Supreme Court declined to interpret a statute in a way that would require it to resolve "difficult and sensitive" constitutional questions.[300]

The question of disparate impact liability's constitutionality is certainly "difficult and sensitive." In his concurrence in *Ricci v. DeStefano*,[301] Justice Scalia said almost exactly that:

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299. 440 U.S. 490 (1979).

300. *Id.* at 507. *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) was a 5-4 decision that interpreted the more narrowly drawn Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81 (as amended in 1988 and codified at 42 U.S.C. §§ 3601–3619) (the Fair Housing Act or FHA) to allow lawsuits based on a form of disparate impact liability. Justice Kennedy, writing for the majority, acknowledged "*the serious constitutional questions* that might arise under the FHA" if "liability were imposed based solely on a showing of statistical disparity." *Tex. Dep't of Housing*, 135 S. Ct. at 2522 (emphasis added). He nevertheless took the position that at the time of the 1988 amendments, Congress was aware of *Griggs* and of the fact that some courts were applying *Griggs*'s disparate impact liability to the FHA. *Id.* at 2518. He therefore concluded that the FHA should be interpreted to allow for some limited form of disparate impact liability—one that steers clear of the constitutional questions he saw. *Tex. Dep't of Housing*, 135 S. Ct. at 2518.

Unlike the FHA, 34 C.F.R. § 100.3(b)(2) and 28 C.F.R. § 42.104(b)(2) were both passed prior to *Griggs* and never amended in light of *Griggs*. As a matter of interpretation, therefore, Justice Kennedy's opinion does not in any way control this case.

Also unlike the FHA, 34 C.F.R. § 100.3(b)(2) and 28 C.F.R. § 42.104(b)(2) are valid only insofar as they are proper efforts to enforce Title VI (which *Alexander v. Sandoval* has made clear is not a disparate impact statute). *See supra* Part IVA–B(1). The FHA was promulgated under the authority of the Commerce Clause as well as the Thirteenth Amendment. *City of Boerne* is thus not directly applicable. *See supra* notes 204–32 and accompanying text.

Neither of the basic arguments being made in this Article would have been applicable to *Texas Department of Housing & Community Affairs*. The case has a bearing on the interpretation of 34 C.F.R. § 100.3(b)(2) and 28 C.F.R. § 42.104(b)(2) only insofar as Justice Kennedy's opinion acknowledged "serious constitutional questions," but nevertheless went on to interpret the FHA as a disparate impact statute. *Tex Dep't of Housing*, 135 S. Ct. at 2512. The four dissenting justices were apparently as surprised as we are. Judge Alito's lengthy opinion on behalf of the dissenters concludes with surprise that the majority opinion would acknowledge the seriousness of the constitutional issues and yet come out as it did. "We should avoid, rather than invite, such 'difficult constitutional questions,'" Justice Alito wrote. "By any measure, the Court today makes a serious mistake." *Id.* at 2551 (Alito, J., dissenting) (citations omitted) (internal quotations to majority opinion).

See Roger Clegg, *Silver Linings Playbook: "Disparate Impact" and the Fair Housing Act*, 2015 Cato Sup. Ct. Rev. 165 (2015).

301. 557 U.S. 557 (2009). *Ricci* was a Title VII case. In it, the City of New Haven had gone to great length to develop a fair examination for deciding which firefighters should be promoted. After the test was administered, the results favored white and Hispanic applicants for promotion over African-American applicants. As a result of the racial identity of the successful test-takers, New Haven threw the results out, thus intentionally discriminating against the successful test-takers on the basis of race. *Id.* at 562. The City's defense was that it needed to do this in order to avoid liability for disparate impact. The Court, however, was unconvinced and held that an employer's belief that it will otherwise be liable must have a substantial basis in evidence. *Id.* at 563.

> I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one.[302]

The argument for unconstitutionality tends to begin this way: For decades it was assumed by lawyers that disparate impact liability in employment under Title VII was available only to women and minorities and not to white males. This view followed naturally from the Supreme Court's decision in *Griggs*. In that case, the Court repeatedly noted that the purpose of disparate impact liability was to assist African-Americans or nonwhites in particular. One of the "objective[s] of Congress in the enactment of Title VII," it wrote, was to "remove barriers that have operated in the past to favor an identifiable group of *white* employees over other employees."[303] It concluded that if "an employment practice which operates to exclude *Negroes* cannot be shown to be related to job performance, the practice is prohibited."[304]

By the 1980s, the notion that liability for disparate impact could only be applied for the benefit of women and minorities was part of the zeitgeist. In 1981, the U.S. Commission on Civil Rights issued a report that flatly stated that disparate impact liability "cannot sensibly be applied to white males."[305] The only court to address the issue squarely also agreed in *Livingston v. Roadway Express, Inc.*[306] that disparate impact theory is unavailable

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302. *Id.* at 594 (Scalia, J., concurring).

303. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (emphasis added).

304. *Id.* at 431 (emphasis added).

305. Brief of Gail Heriot & Peter Kirsanow as Amici Curiae, *supra* note 183, at 30 (quoting U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination 17 n.20 (1981)); *see also* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. Rev. 305 (1983). Chamallas writes:

> In sum, disparate impact analysis has been inherently one-sided. Blacks and women may object to a test that tends to reduce job opportunities for them. . . . It is probable that the courts, in an effort to reduce the intrusion on employer discretion, will continue to limit disparate impact challenges to those brought by minorities.

Id. at 366–69. *See generally* David Strauss, *The Myth of Color Blindness*, 1986 Sup. Ct. Rev. 99 (1986) (arguing that affirmative action and disparate impact theory are conceptually related).

306. 802 F.2d 1250 (10th Cir. 1986)

to white males.[307] And in the 1990s, it was the received wisdom. When Congress considered amending Title VII, one member after another took to the floor with statements that made it clear that they agreed that only women and minorities could take advantage of disparate impact liability.[308]

More recent scholars have agreed that "[w]hat authority there is supports the view that employment practices with disparately adverse impacts on historically dominant classes are, as a matter of law, not actionable under Title VII."[309] There is, however, also

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307. *See id.* at 1252. ("[I]n impact cases . . . a member of a favored group must show background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination.") While a few white, male private litigants have attempted to employ a disparate impact theory in Title VII cases, to our knowledge none has ever secured a judgment in his favor.

308. Charles A. Sullivan, *The World Turned Upside Down: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1539–40 n.169 (2004); *see, e.g.*, Statement of Sen. Metzenbaum, 137 CONG. REC. 33,483 (1991) (stating that the 1991 amendments provide "that employment practices which disproportionately exclude women or minorities are unlawful, unless employers prove both that these practices are 'job related . . .' and that they are 'consistent with business necessity'"); Statement of Sen. Glenn, 137 CONG. REC. 29,064 (1991) ("The Civil Rights Act of 1991 would reverse . . . *Wards Cove v. Atonio* and restore . . . *Griggs* . . . . In *Griggs*, the Supreme Court held that practices which disproportionately exclude qualified women and minorities . . . are unlawful unless they serve a business necessity."); Statement of Sen. Kohl, 137 CONG. REC. 29,048 (1991) ("Under this proposal employers must justify work rules if . . . the rules have a disparate impact on women and minorities."); Statement of Sen. Dodd, 137 CONG. REC. 29,026 (1991) ("[I]n *Wards Cove Packing Co. v. Atonio*, the Supreme Court overturned an 18-year precedent set by the *Griggs* . . . decision regarding . . . discrimination based upon the disparate impact of business hiring of minorities."); Statement of Rep. Fish, 137 CONG. REC. 13,539 (1991) ("The complaining party in a disparate impact case carries the heavy burden of linking adverse impact on women or members of minority groups to a specific practice or practices unless the employer's own conduct essentially forecloses the possibility of establishing such linkage."); Statement of Rep. Stenholm, 137 CONG. REC. 13,537 (1991). Rep. Stenholm stated:

> The substitute creates a new standard of 'business necessity' that a business must meet to defend an employment practice whose result is a 'disparate impact'—meaning the percentage of the employer's work force comprising women, minorities, or a given religious group, does not almost identically match that group's percentage in the available labor pool.

Id.; Statement of Rep. Ford, 137 CONG. REC. 13,530 (1991) ("The *Griggs* standard worked well . . . . Under *Griggs*, employers who chose to use selection practices with a significant disparate impact on women or minorities had to defend the practices by showing business necessity."). *See generally* Sullivan, *supra*, at 1539–40 (outlining additional examples of Members of Congress stating that only women and minorities can take advantage of disparate impact claims).

Contemporaneous media reports also support the understanding that the amendments' disparate impact provisions apply only to women and minorities. *See, e.g.*, Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*, N.Y. TIMES (Nov. 18, 1991), http://www.nytimes.com/1991/11/18/us/with-rights-act-comes-fight-to-clarify-congress-s-intent.html?pagewanted=all [https://perma.cc/NQ2F-E6E4] (noting that under the amendments, "[i]f workers show that a particular practice tends to exclude women or minority members, then the employer must show that the practice is 'job-related . . . and consistent with business necessity.'").

309. Primus, *supra* note 65, at 528; *see also* John J. Donohue III, *Understanding the*

an increasing recognition that this raises thorny constitutional issues. One scholar—Charles A. Sullivan—has argued that he used to "firmly announce" to his students that disparate impact theory "was not available to whites and males."[310] But that was before *City of Richmond v. J.A. Croson Co.*,[311] *Adarand Constructors, Inc. v. Peña*,[312] and *Grutter v. Bollinger*.[313] Those cases put to rest the belief on the part of some that strict scrutiny need only be employed on behalf of member of minority races. After *Croson*, *Adarand*, and *Grutter*, Sullivan began to realize that applying disparate impact theory only on behalf of women and racial minorities would raise serious constitutional difficulties.

He therefore urged a reinterpretation of disparate impact liability so that it would also apply to white males. His proposed solution, however, does not work. Applying disparate impact to white males would not rescue disparate impact liability from the constitutional thicket. It would still be racially discriminatory.

Consider Frank Ricci, the lead plaintiff who was seeking a promotion at the New Haven Fire Department in the *Ricci* case. It wouldn't make a white fire fighter like Mr. Ricci feel better to know that, since whites are underrepresented in the National Basketball Association, the playing field would be tilted in his favor were he applying for a job as a power forward for the Los Angeles Lakers. He isn't qualified to play for the Lakers even if given preferential treatment. On the other hand, he is amply qualified to be a Lieutenant with the New Haven Fire Department. He is an experienced firefighter who studied for the officer exam and did well. But the playing field was tilted against him in order to benefit African-American applicants.

If disparate impact theory is applied to help African-Americans where they are underrepresented and whites where they are underrepresented, the result is more race discrimination, not color-blindness. Before Sullivan's "solution,"

Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers, 53 Stan. L. Rev. 897 (2001). Donohue writes:

> I conclude that disparate impact analysis will not protect white males as a matter of theory. . . . The first prong of a disparate impact case—finding a practice that adversely affects a member of a protected class—will not be met since white males will not be deemed to be 'protected' under this doctrine.

Id. at 898 n.2.

310. Sullivan, *supra* note 308, at 1506.
311. 488 U.S. 469 (1989).
312. 515 U.S. 200 (1995).
313. 539 U.S. 306 (2003).

white men like Frank Ricci who tried to get a promotion at the New Haven Fire Department were victimized.[314] Once disparate impact liability is applied to white males too, African-American applicants for jobs with the Lakers or with the U.S. Postal Service will be at a disadvantage too.[315]

It is not just that Frank Ricci is unlikely to feel good about the application of disparate impact liability to white males for jobs he is not applying for and is not qualified for. As a nation, the last thing we should want to promote is for individuals to identify with their "group." The Constitution protects individuals from race discrimination, not groups. We need to endeavor to keep it that way. That means recognizing that even if white males are covered by disparate impact liability, it is still racially discriminatory.

The only way to preserve disparate impact liability therefore should be for it to survive strict scrutiny. To put it differently, a racially discriminatory law is permissible only if it serves a compelling purpose and is narrowly tailored to fit that purpose.[316] Some scholars have attempted to suggest plausible compelling purposes served by broad-based, *Griggs*-style disparate impact liability.[317] But there is no proof that imposing disparate impact liability on employers actually benefitted anyone, and some evidence that at least in some circumstances it may actually

314. *See* Ricci v. DeStefano, 557 U.S. 557, 561–63 (2009) (explaining that the city did not certify a promotion test after certain candidates claimed that "the results showed the tests to be discriminatory," resulting in white and Hispanic firefighters "who likely would have been promoted based on their good test performances" suing the city); Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES (June 29, 2009), http://www.nytimes.com/2009/06/30/us/30scotus.html [https://perma.cc/7DJ4-NZJ3] ("The lead plaintiff, Frank Ricci, who is dyslexic, said he studied for 8 to 13 hours a day, hiring an acquaintance to tape-record the study materials.").

315. According to the U.S. Postal Service website, 21% of Postal Service employees are African-American. *See Workforce Diversity and Inclusiveness*, U.S. POSTAL SERVICE, https://about.usps.com/strategic-planning/cs09/CSPO_09_087.htm [https://perma.cc/SWN3-QWKM]. That is almost twice the proportion found in the general population. *See QuickFacts*, U.S. CENSUS BUREAU (July 1, 2016) https://www.census.gov/quickfacts/fact/table/US/PST045216 [https://perma.cc/3WGA-ADZH] (indicating that 13.3% of the U.S. population is "Black or African American alone").

316. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013). At no point did Congress attempt to provide a compelling purpose or argument for narrow tailoring. Part of the reason is that at no point did Congress adopt disparate impact liability. *Griggs* was almost certainly a misinterpretation of Title VII. *See* Graham, *supra* note 182, at 387 ("Burger's interpretation in 1971 of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964."). Even if Members of Congress had intended disparate impact liability it is not clear that they would have anticipated the need for a compelling purpose and narrow tailoring to fit that purpose.

317. *See* Primus, *supra* note 65, at 528; Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2159 (2013).

cause harm.[318] Even less is there reason to believe that disparate impact liability is narrowly tailored to achieve some compelling purpose. Indeed, it is almost impossible to believe this roundabout method of conferring a benefit on underrepresented groups is narrowly tailored in any way.

It would be even more difficult for the Title VI regulations—as interpreted by OCR—to survive strict scrutiny. There is no proof—or even reason to believe that they have increased diversity in federally funded activities. But even if they have done so and even if diversity is a compelling purpose in this context, it is impossible to argue that these regulations are narrowly tailored. If OCR's interpretation of the regulations is held to be correct, the regulations make *everything* presumptively a violation.[319]

C. The Dear Colleague Letter May Not Place Duties on Recipients of Federal Funds Found Neither in Title VI Itself nor any Regulation Validly Issued Thereunder. The Letter Cannot Be the Source of Its Own Authority to Prohibit Disparate Impact.

The Dear Colleague Letter purports to be a mere "guidance."[320] That term, which is not found in the Administrative Procedure Act, is used informally to refer to what the Act refers to as "interpretative rules" and "general statements of policy."[321] Those two sorts of agency statements are explicitly exempt from the notice and comment and other requirements imposed by the Administrative Procedure Act (and implicitly from the requirement of a presidential signature imposed by Title VI itself).[322]

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318. *See* STATEMENT OF COMMISSIONER GAIL HERIOT, IN U.S. COMMISSION ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY 332–33 (Dec. 2013), http://www.eusccr.com/EEOC_final_2013.pdf. [https://perma.cc/FR77-2C2Q] ("[T]he EEOC's attempt to prevent the 'disparate impact effect' creates an incentive for a 'real discrimination effect.'").

319. *See supra* Part IV(A).

320. Dear Colleague Letter, *supra* note 44 ("The U.S. Department of Education and the U.S. Department of Justice (Departments) are issuing this *guidance* . . ." (emphasis added)).

321. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958267 [https://perma.cc/TT5U-EY8X] (referring to the "emerging tendency among administrative lawyers to refer to interpretive rules and policy statements collectively as 'guidance'").

322. 5 U.S.C. § 553(b)(3)(A) (1966). The exemptions are generally narrowly construed. *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("In light of the importance of these policy goals of maximum participation and full information,

But if the Dear Colleague Letter is an interpretative rule, it must conform to the requirements for interpretative rules. Put simply, it must really be an interpretation of the existing statute or rule and not an extension of it. As the court in *American Mining Congress v. Mine Safety & Health Administration*[323] put it, whether an agency guidance qualifies as an "interpretative rule" depends on the "prior existence or non-existence of legal duties and rights."[324] An interpretive rule cannot add duties—like disparate impact liability—not already contained within the statute (or rule) being interpreted. It can only tell us what is already there.[325]

As we have demonstrated, neither Title VI nor any valid regulations impose general liability for disparate impact. The Dear Colleague Letter therefore cannot rely on them in imposing disparate impact liability.

Similarly, if the Dear Colleague Letter is a general statement of policy, it must actually take that form. A general statement of policy is undefined in the statute.[326] But Professors John F. Manning and Matthew C. Stephenson have this to say about the concept: "An agency 'policy statement' . . . is an agency memorandum, letter, speech, press release, manual, or other official declaration by the agency of its agenda, its policy priorities, or how it plans to exercise its discretionary authority."[327]

An agency cannot have as part of its "agenda" an intention to push the meaning of a statute beyond its meaning as interpreted by the Supreme Court.[328] Nor can it have "policy priorities" that have not been chosen from among the things the statute authorizes the agency to do. Similarly, it can have no

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we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive.").

323. 995 F.2d 1106 (D.C. Cir. 1993).

324. *Id.* at 1110.

325. *Id.* at 1112 (stating that rules having "legal effect" by providing a basis for agency action are legislative rules, not interpretive rules); *see* Fertilizer Institute v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991) ("[A]n agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment").

326. *See* 1 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) (offering the following "working definition" of "general statements of policy": "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power").

327. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 677 (2010).

328. *See* Marbury v. Madison, 5 U.S. 137 (1803).

"discretionary authority" to make the statute say things it doesn't say.[329] In essence, a general statement of policy should inform regulated persons which kinds of cases an agency is most likely to pursue from among the many statutory violations that might exist. Consequently, an agency cannot use the exemption for "general policy statements" to impose new duties.[330]

Might ED and CRT have been able to build a record that there is actual, but hidden, race, color, or national origin discrimination going on in school discipline and then, after notice and comment promulgate a targeted regulation applying a disparate impact theory of liability designed to rein in that actual discrimination? That is a question we do not address in this Article. We note simply that is not what those agencies have done.

Reading through the literature that attempts to justify the Dear Colleague Letter we are struck by how much of it simply argues that out-of-school suspensions and expulsions are a bad thing that must be stopped.[331] In our view, this may or may not be so; it is far outside our areas of expertise. But it is irrelevant to whether OCR should be acting as policymaker in this area. OCR's job in this context is to enforce Title VI's ban on race discrimination, not dictate "best practices" to local school districts. Any argument that out-of-school suspensions and expulsions are counterproductive should be addressed to local school districts, not to the federal government.

CONCLUSION

History is full of well-meaning but ultimately harmful policies imposed by bureaucracies that are far-removed from the individuals who must live under those policies.[332] OCR's school discipline policy is one in a long line.

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329. *See, e.g.*, Chamber of Commerce v. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999).

330. *See id.*

331. *See, e.g.*, Eden, *supra* note 108.

332. In his written testimony before the U.S. Commission on Civil Rights, Max Eden put it this way with regard to the Dear Colleague Letter:

> If I were a policymaker tasked with *creating* a school-to-prison pipeline, I would do three things.
>
> First, I would popularize and legitimize that term from the bully pulpit. That would help bring the resentment and distrust brewing between minority communities and the criminal justice system down to our schools. I would promote the notion that teachers engage in mass racial-discrimination, fostering suspicion of and alienation from their teachers.

Schools discipline must always be very fact specific. It is not an issue that lends itself well to bureaucratic control. Zero-tolerance rules have not worked out well. Neither has the Dear Colleague Letter. Rather than discourage race, color, and national origin discrimination, it promotes it. At the same time, it promotes more disorderly classrooms.

One of the most disturbing aspects of the Dear Colleague Letter is its perverse effect on minority students, who are trying to learn, but are more likely than the average student to share a classroom with an unruly student.[333]

Then there is the unruly student himself or herself. No one would claim that local schools have always made the right decisions about how to discipline a particular student. But tying the hands of teachers and administrators through bureaucratic controls has not been making things better. The public schools—and all schools—are a second chance for students who might not have the best chance to learn school discipline at home. The Dear Colleague Letter makes that less likely to happen.

> Second, I would pressure school administrators to undercut teacher authority by making suspension reduction an explicit policy goal. This would change classroom dynamics, providing far more bandwidth for student misbehavior.
>
> Third, I would pressure school administrators to systematically cheat on suspension and safety statistics. This would suggest to students that the system is, in fact, rigged.
>
> Which is to say, if I were to set out to create a school-to-prison pipeline, I would have done exactly what Arne Duncan and the Obama Administration did with the 2014 school discipline guidance.

Id. at 2–3.

333. *See* EDEN, *supra* note 109, at 20–22 (observing that it is predominantly minority-student-inhabited schools that are most negatively affected by downsides of "reform").