TEXAS REVIEW of LAW & POLITICS

VOL. 22, NO. 3 SPRING 2018 PAGES 317–604

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ARTICLES

NOTE

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Founded by Adam B. Ross & Dennis W. Donley, Jr., in 1996

SUBMISSIONS

Authors may submit articles, book reviews, or notes to TROLP via submissions@trolp.org, ExpressO, or Scholastica.

Citations should conform to the 20th edition of The Bluebook.

Publication decisions for our fall issue are made in February through May. Publication decisions for our spring issue are made in August through November.

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PREFACE

As I complete my tenure with the *Texas Review of Law & Politics*, I perceive even more urgently the pressing need for conservative and libertarian scholarship that engages and challenges the full political spectrum. Furthermore, I am reminded of the necessity for journals like the *Review* to serve as platforms for conservative and libertarian scholars, whose work is often overlooked by other law reviews. In some small way, this issue addresses those needs.

In this issue, Mr. Cory Liu challenges the use of racial preferences by universities in the admission of Asian and Asian-American students. Professor John Murdock surveys the history of the Antiquities Act and analyzes the authorities and legal theories surrounding President Trump's order to shrink national monuments. Mr. Mark Pulliam confronts "judicial engagement," arguing that it is contrary to the Constitution and originalism. Professor Gail Heriot and Ms. Alison Somin thoroughly critique Obama-era initiatives on racial disparities in school discipline. Finally, Mr. Ryan Yergensen, in a student note, explores the range of possible financial benefits for potential second-income earners resulting from a refundable tax credit, nonrefundable tax credits, or tax deduction for childcare costs.

A law journal cannot flourish without diligent and thoughtful authors, intelligent readers, committed supporters, and faithful editors. As *TROLP*'s Editor in Chief, I am grateful for those in the *Review*'s network that selflessly fill these roles. Collectively, we make *TROLP* more than words on a page, but rather a bastion for conservative and libertarian legal thought and conversation. Particular thanks are due to the *Review*'s founder, Adam Ross, for his commitment to the *Review*'s longevity and his investment in me as a leader. Also, I am grateful to Brantley Starr for his patience and tact throughout the preparation of this issue. And finally, I thank the editors and editorial boards of Volumes 1–21 for laying a foundation of excellence on which Volume 22 could confidently build. It has been a true honor and privilege to serve as the Editor in Chief of Volume 22 of the *Texas Review of Law & Politics*.

Dylan William Benac
Editor in Chief

AFFIRMATIVE ACTION'S BADGE OF INFERIORITY ON ASIAN AMERICANS

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INTRODUCTION

In 1896, the Supreme Court upheld the constitutionality of racially segregated railcars in *Plessy v. Ferguson*,[1] dismissing the argument that "separation of the two races stamps the colored race with a badge of inferiority."[2] In dissent, Justice Harlan wrote that the Constitution "is color-blind, and neither knows nor tolerates classes among citizens."[3] Fifty-eight years later, in *Brown v. Board of Education of Topeka*,[4] the Supreme Court vindicated Justice Harlan's view and overturned *Plessy* in a decision ending racial segregation in public schools, writing that "[s]eparate educational facilities are inherently unequal."[5] The *Brown* Court rested its holding on the very argument that *Plessy* had rejected—that separation based on race stamps people of color with a badge of inferiority. Irrespective of the educational conditions of segregated schools, the very act of separating black students from white students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[6]

In this Article, I argue that racial preferences, sometimes referred to as race-based affirmative action, are incompatible with the logic of *Brown*. By employing racial quotas and holding Asians to a higher standard for admission solely because of their race, universities deny Asians an opportunity to earn admission "on equal terms" with students of other races.[7] By treating Asians differently from white, black, Hispanic, and Native American students, and making it more difficult for them to earn admission solely on account of their race, schools demean their accomplishments and stamp them with a badge of inferiority as to their status in the community. As a result, racial preferences are contrary to *Brown v. Board of Education of Topeka*.

In Part I, I provide a brief overview of the history of racial discrimination against Asians in the United States. In Part II, I discuss twenty-first century stereotypes against Asians, which Jane Hyun has described as part of a "bamboo ceiling" preventing

1. 163 U.S. 537 (1896).
2. *Id.* at 551.
3. *Id.* at 559 (Harlan, J., dissenting).
4. 347 U.S. 483 (1954).
5. *Id.* at 495.
6. *Id.* at 494.
7. *Id.* at 493 (holding that education is "a right which must be made available to all on equal terms").

Asians from achieving positions of leadership in the United States.[8] Part III discusses how universities employing racial preferences rely on these same stereotypes to diminish the accomplishments of Asians, stamping Asians with a badge of inferiority. Because racial preferences are demeaning toward Asians on account of their race, I conclude that racial preferences cannot be reconciled with *Brown* and its repudiation of *Plessy*.

I. A HISTORY OF DISCRIMINATION AGAINST ASIANS

One of the greatest hazards of any discussion about the Asian experience in America is the arbitrariness of that racial category. As the American-born son of Chinese immigrants, I had no conception of myself as "Asian" until I was asked to identify my race on standardized tests and college applications using America's crude and antiquated system of racial classification. Many Americans, particularly those who are biracial, have had similar experiences.[9] The arbitrariness of the racial category of Asian is a central topic of Eric Liu's book *The Accidental Asian*.[10] As I have often remarked, people in China do not consider themselves to be of the same race as people in India, but in the United States they are classified under a single race—Asian—which happens to encompass more than half the earth's population. Indeed, the 2016 National Asian American Survey showed that many Americans are confused about which groups are encompassed by the word Asian.[11] Although Chinese, Japanese, and Koreans were overwhelmingly perceived as being

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8. JANE HYUN, BREAKING THE BAMBOO CEILING: CAREER STRATEGIES FOR ASIANS (2005).

9. *See, e.g.*, Joy Resmovits, *Jordan Peele Got Inspiration for 'Get Out' from Taking Standardized Tests in Elementary School*, L.A. TIMES (Mar. 23, 2017), http://www.latimes.com/local/education/la-essential-education-updates-southern-jordan-peele-got-inspiration-for-get-1490224978-htmlstory.html [https://perma.cc/65TA-4WBJ] ("Jordan Peele said he first felt a sense of otherness and racial isolation when filling out the paperwork that came with standardized tests"); Susan Saulny & Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES (June 13, 2011), http://www.nytimes.com/2011/06/14/us/14admissions.html?ref=topics [https://perma.cc/6LF5-9ZPD] ("[T]he number of applicants who identify themselves as multiracial has mushroomed, adding another layer of anxiety, soul- (and family tree-) searching and even gamesmanship to the process.").

10. ERIC LIU, THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER (1998).

11. Karthick Ramakrishnan & Jennifer Lee, *Opinion: In the Outrage Over Discrimination, How Do We Define 'Asian American'?*, NBC NEWS (May 10, 2017), https://www.nbcnews.com/think/news/opinion-outrage-over-discrimination-how-do-we-define-asian-american-ncna757586 [https://perma.cc/88Y4-6YQ7].

Asian, Indians and Pakistanis were seen as not Asian by over 40% of whites and other Asians.[12] For clarification, I use the term Asian in this Article to refer to all Asian and Pacific Islander groups recognized in the Census or the Common Application.

As a result of the arbitrariness of the racial category of Asian, it is difficult to comprehensively discuss the history of discrimination against Asians in America. To the extent various Asian groups share a common experience in this country, it is in their similar experience of racial stereotypes and similar treatment in identity politics. As I discuss later in this Article, Asians are often stereotyped as immigrants or nerds who are book smart but lacking in social skills, creativity, and independent thought. And when it comes to public discourse about identity-based discrimination, the media and political elites tend to treat discrimination against Asians as an afterthought, focusing greater attention on discrimination against other groups, such as those who are black, Hispanic, female, lesbian, gay, bisexual, transgender, Muslim, or disabled. In the words of Michael Luo, a New York Times journalist who started the hashtag #ThisIs2016 to draw attention to discrimination against Asians: "It's resonating because Asian Americans have this feeling that racism against them is not taken as seriously as other groups."[13] The difficulties of writing about the Asian experience are further compounded by the challenges of intersectionality. Just as the stereotype of black aggression affects black men differently from black women, the stereotype of Asian effeminacy affects Asian men differently from Asian women. It is already difficult to discuss the different experiences of racism by different groups of Asians; it is even harder to discuss how those experiences differ for Asians based on other aspects of their identities. Nevertheless, having acknowledged these challenges, I will provide a brief overview of the history of discrimination against Asians in the United States.[14]

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12. *Id.*

13. Hope King, *#Thisis2016 Rallies Asian Americans Against Racist Encounters*, CNN (Oct. 10, 2016), http://money.cnn.com/2016/10/10/technology/thisis2016-michael-luo-nytimes/index.html [https://perma.cc/Z29K-B77V].

14. For a more comprehensive history of discrimination against Asians in the United States, see ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (2d ed. 2006).

A. Yellow Peril and Anti-Asian Legislation

In the mid to late 1800s, concerns that Chinese immigrants were depressing wages led many white workers to view East Asians through the lens of "yellow peril."[15] East Asians were often depicted as vast, faceless hordes of "Chinamen," with slanted eyes, braided hair, and conical hats.[16] California's legislature and Governor passed a number of anti-Chinese laws that sought to deny Chinese people equal rights and prevent them from migrating to California.[17]

One of those laws was ruled unconstitutional by the Supreme Court of the United States in *Yick Wo v. Hopkins*,[18] which invalidated an ordinance in San Francisco that made it illegal to operate a laundry in a wooden building without a permit from the Board of Supervisors.[19] There were about 320 laundries in San Francisco at the time, and about 310 of them were constructed of wood.[20] The Board was given unchecked discretion to grant or deny permits, and although the petitioner[21] and 200 other Chinese people were denied permits to continue their businesses, those who were not Chinese were all granted permits, with one exception.[22] The Court struck down the permitting scheme as unconstitutional, writing:

> No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be

15. *See id.* at 49.

16. *See generally* JOHN KUO WEI TCHEN & DYLAN YEATS, YELLOW PERIL! AN ARCHIVE OF ANTI-ASIAN FEAR (2014) (archiving anti-Asian images and writings dating back to European colonialism).

17. *See, e.g.*, In re Ah Chong, 2 F. 733 (C.C.D. Cal. 1880) (striking down ban on fishing by Chinese people in California); In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) (striking down ban on corporations from hiring Chinese or Mongolian workers); Lin Sing v. Washburn, 20 Cal. 534 (1862) (striking down "an act to protect free white labor against competition with Chinese coolie labor, and discourage the immigration of the Chinese into the State of California").

18. 118 U.S. 356 (1886).

19. *Id.* at 374.

20. *Id.* at 358–59.

21. "Yick Wo" was not the laundryman's real name; it was the name of his business. *See* CHARLES MCCLAIN, CHINESE IMMIGRANTS AND AMERICAN LAW 23 n.40 (1994) ("He, like many other Chinese businessmen during this period, used the name of his firm as his personal alias.").

22. *Yick Wo*, 118 U.S. at 359.

> Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.[23]

Yick Wo provides just one example of the multitude of anti-Asian laws that were passed in the late 1800s due to anti-Asian bigotry and xenophobia.

B. Exclusion from Immigration and Naturalization

Under the Naturalization Act of 1870, naturalization was made available to "aliens of African nativity and to persons of African descent," but not to Asians.[24] In *Ozawa v. United States*,[25] the Supreme Court held that a Japanese man was ineligible for naturalized citizenship because he was not white,[26] and in *United States v. Thind*,[27] the Court held that an Indian Sikh, who the Court described as a "high-caste Hindu, of full Indian blood," was not white, and was therefore was ineligible for naturalized citizenship.[28]

Despite the exclusion of Asian immigrants from the benefits of naturalized citizenship, white workers further marginalized Asians by blocking immigration from Asian countries. Responding to this nativist political climate, Congress enacted the Chinese Exclusion Act in 1882,[29] which completely banned Chinese immigration to the United States until the Act's repeal in 1943.[30] In the same dissent in *Plessy v. Ferguson* in which he described the Constitution as color-blind, Justice Harlan

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23. *Id.* at 374.
24. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254.
25. 260 U.S. 178 (1922).
26. *See id.* at 198 (holding that "white person" is synonymous with "a person of the Caucasian race").
27. 261 U.S. 204 (1923).
28. *See id.* at 206, 214–15 (holding that the words "free white person" are synonymous with the popular understanding of the word "Caucasian," which did not include Thind, based on the "physical group characteristics of the Hindus").
29. Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).
30. Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

summarized the exclusion of Chinese people from immigration and naturalization:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.[31]

Nativism and xenophobia in the United States continued to grow in the early 1900s, and organizations formed to advocate for the exclusion of Asians from the United States. In 1905, a group of white labor leaders formed the Japanese and Korean Exclusion League.[32] In 1907, the group renamed itself the Asiatic Exclusion League in order to include the exclusion of South Asian and Chinese immigrants in its mission.[33] Advocating for the ideal of a "white man's country," the Asiatic Exclusion League used violence and rioting to terrorize Asians.[34]

In 1917, Congress passed the Immigration Act of 1917,[35] sometimes referred to as the Asiatic Barred Zone Act. That act expressly banned immigration from South Asia, Southeast Asia, and the Middle East.[36] In addition, the Act excluded low-skilled European immigrants with a literacy test,[37] a provision championed by the Immigration Restriction League, which was founded in 1894 by three Harvard alumni, Charles Warren, Robert DeCourcy Ward, and Prescott Hall, with the goal of excluding Southern and Eastern Europeans.[38]

The Immigration Act of 1924,[39] which included the Asian Exclusion Act, completely banned immigration from all Asian countries by imposing a rule that no alien who was ineligible to become a citizen could be admitted to the United States as an

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31. 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

32. *See* KORNEL CHANG, PACIFIC CONNECTIONS: THE MAKING OF THE U.S.-CANADIAN BORDERLANDS 105–06 (2012).

33. *Id.* at 106.

34. *Id.* at 106–07.

35. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (amended by Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163).

36. 39 Stat. 876 (specifying longitudes and latitudes of immigration ban).

37. 39 Stat. 877.

38. *See Immigration Restriction League*, HARV. U., http://ocp.hul.harvard.edu/immigration/restrictionleague.html [https://perma.cc/4XGS-9W7H] ("[League Members, associated immigration with the socio-economic problems of their increasingly urban and industrialized society—crowded tenements, poverty, crime and delinquency, labor unrest, and violence.").

39. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

immigrant.[40] Because Asian immigrants could not become citizens, they were completely banned from immigration to the United States. This policy remained in effect until the Immigration and Nationality Act of 1952, which lifted the ban on Asian immigration and Asian naturalization.[41]

C. Japanese Internment

One of the most infamous chapters in Asian American history is the internment of Japanese Americans during World War II. Shortly after the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt ordered the federal government to forcibly relocate and incarcerate over 112,000 Japanese Americans.[42] The internment was challenged and appealed to the Supreme Court in 1944, resulting in one of the most infamous decisions in the history of constitutional law, *Korematsu v. United States*.[43]

By a 6 to 3 vote, the Supreme Court in *Korematsu* upheld the government's internment of Japanese Americans as a wartime necessity, even though it acknowledged that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions."[44] Writing in dissent, Justice Murphy argued that Japanese internment was racially discriminatory and violated the constitutional right to equal protection of the laws:

> I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the

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40. *See The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1921-1936/immigration-act [https://perma.cc/WK8R-U29V] (detailing the historical background of The Immigration Act of 1924, which completely excluded immigrants from Asia).

41. *See id.* (explaining that Congress did not revise The Immigration Act of 1924 until 1952); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

42. *See* Korematsu v. United States, 323 U.S. 214, 236 (1944) (referring to over 112,000 Japanese Americans).

43. *Id.*

44. *Id.* at 219–20.

> United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.[45]

It was not until 2011 that the Department of Justice formally repudiated its position in *Korematsu*.[46] Nevertheless, the Court's decision in *Korematsu* remains on the books as precedent, and it serves as a reminder of this country's history of discrimination against Asians. The anti-Asian legislation of the 1800s and early 1900s, the exclusion of Asians from immigration and naturalization until 1952, and the internment of Japanese Americans during World War II are just a few examples of the unique history of discrimination that Asian Americans have faced in the United States.

II. PERSISTENT STEREOTYPES ABOUT ASIANS

Since the 1950s, the advances of the civil-rights movement have transformed the landscape of U.S. law and culture to protect the rights of racial minorities. From *Brown v. Board of Education of Topeka*[47] to *Loving v. Virginia*,[48] the Supreme Court struck down Jim Crow laws as incompatible with the Constitution's guarantee of equality. Congress passed the Civil Rights Act of 1964,[49] which among other things, outlawed employment discrimination[50] and required places of public accommodation to serve people of all races.[51] These achievements ushered in a new era of attention and sensitivity to the discrimination that racial minorities face on a daily basis. Nevertheless, in the twenty-first century, Asian Americans continue to face persistent stereotypes that prevent them from achieving positions of leadership in the country.

One of the most enduring stereotypes about Asians in America is that we are book smart, but lacking in social skills, creativity, and independent thought. As the stereotype goes, we

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45. *Id.* at 242 (Murphy, J., dissenting).
46. *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUSTICE (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/6CG2-WC7C].
47. 347 U.S. 483 (1954).
48. 388 U.S. 1 (1967).
49. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.
50. *Id.* §§ 701–716, 78 Stat. 241, 253.
51. *Id.* §§ 201–207, 78 Stat. 241, 243–46.

may be good at grueling work and studying for exams, but we tend to keep our head down and stay quiet instead of speaking up and expressing our views. At first glance, the stereotype of academic prowess may appear to be positive, but time and time again, in the halls of elite power, the perception of Asians as one-dimensional bookworms prevents them from being taken seriously and treated on an equal basis with people of other races.

In the business world, Asians rarely occupy positions of leadership, even in industries where they are well represented among entry-level employees. According to the Equal Employment Opportunity Commission, Asians made up 47% of professional jobs at Silicon Valley tech companies in 2015, but they held only 25% of executive positions.[52] In private companies in the U.S., Asians made up 12% of professionals, and only 5% of executives.[53] Asians were similarly underrepresented in finance at the executive level of companies such as Morgan Stanley, JP Morgan Chase, Citigroup, and Goldman Sachs.[54]

Jane Hyun coined the term "bamboo ceiling" to refer to the barriers that Asians face when it comes to achieving positions of leadership in the United States.[55] In her book *Breaking the Bamboo Ceiling*, Hyun identifies four persistent stereotypes of Asians that are perpetuated by the U.S. media: (1) the techie or nerdy science whiz; (2) foreigners who can't speak English; (3) the quiet and submissive Asian; and (4) the model minority who is a diligent, loyal employee who doesn't raise any flags.[56] Buck Gee, a former Vice President of a Fortune 100 company, observed of Asians that the "stereotype of quiet, talented professional has led to the widespread assumption that they are ill-suited to be business leaders."[57]

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52. Laura Colby, *Asian Americans Climb the Corporate Ladder, but Only So High*, BLOOMBERG (Nov. 11, 2017), https://www.bloomberg.com/news/articles/2017-11-21/asian-americans-climb-the-corporate-ladder-but-only-so-high [https://perma.cc/Z3EA-2UJP].

53. *Id.*

54. *Id.*

55. *See* HYUN, *supra* note 8.

56. *Id.* at 46–47.

57. Buck Gee, Opinion, *A Bamboo Ceiling Keeps Asian-American Executives from Advancing*, N.Y. TIMES (Oct. 16, 2015), https://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/a-bamboo-ceiling-keeps-asian-american-executives-from-advancing [https://perma.cc/S7LD-FYC3].

During my first couple of years in private practice at one of the top commercial litigation boutiques in the United States, my colleagues treated me with the utmost professionalism and dignity, but some of the businesspeople I interacted with did not. The COO of a healthcare services company once asked me: "Do you have a fortune cookie that can tell me how this mediation will end?" A CEO of a Fortune 500 company once asked me: "Do you have your work papers?" A colleague of mine warned me about a representative of another Fortune 500 company who complained during a meeting that there were too many Asians at the University of Texas at Austin. And a lawyer at a brunch of the Houston Bar Association once asked me if he could call me the "Terracotta Warrior."

These are but a few examples of my encounters with the bamboo ceiling in the workplace, and they do not include the innumerable instances of racism that I have encountered in other settings throughout my life. From kids on the playground who taunted the appearance of my eyes to the retired police officer who told me that it was great to see me eating American food from McDonald's, the racism that Asians encounter on a regular basis extends well beyond the business world. As Eric Liu eloquently described:

> I was keenly aware of the unflattering mythologies that were attached to Asian Americans: that we are indelibly foreign, exotic, math and science geeks, numbers people rather than people people, followers and not leaders, physically frail but devious and sneaky, unknowable and potentially treacherous. These stereotypes of Asian otherness and inferiority were like immense blocks of ice sitting before me, challenging me to chip away at them.[58]

The media in the United States greatly amplify the power of these stereotypes. In a country where roughly 6% of the population is Asian[59] and 73% of Asian adults were born in another country,[60] Asians are able to command only the tiniest

58. LIU, *supra* note 10, at 50.

59. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045217 [https://perma.cc/C6X9-MA8F] (estimating that as of July 1, 2016, Asians make up 5.7% of the U.S. population, and Native Hawaiian and other Pacific Islanders make up 0.2% of the U.S. population).

60. Gustavo López et al., *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RES. CTR. (Sept. 8, 2017), http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/ [https://perma.cc/4E7L-V5PU].

fraction of media airtime, and there is little room for Asians to be portrayed in the media as anything more than caricatures—the uncouth immigrant, the awkward nerd, or the boring technician. Even in the rare stories from Hollywood that include Asian lead characters, white actors[61] (or mixed-race actors who can pass as white[62]) are often cast to play those roles. The practice of casting white actors to play Asians has been referred to as "yellowface"[63] or "brownface," alluding to the blackface performers in the minstrel shows of the 1800s. Mickey Rooney's portrayal of Mr. Yunioshi, with taped eyelids, buck teeth, and sibilant accent remains one of the most persistent stereotypes of East Asians in film.[64] Comedian Aziz Ansari described how dismayed he was to discover that the first Indian character he saw with a lead role in a movie—Ben Jahvri from *Short Circuit 2*—was actually played by a white actor who faked an Indian accent.[65] These examples, and others, illustrate how Asians have been systematically marginalized and excluded from American mass media.[66] "There is a bias against Asian Americans," says Professor Nancy Wang Yuen.[67] "I feel like we are invisible in society. We are

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61. *See, e.g.*, Eliza Berman, *A Comprehensive Guide to the* Ghost in the Shell *Controversy*, TIME (Mar. 29, 2017), http://time.com/4714367/ghost-in-the-shell-controversy-scarlett-johansson/ [https://perma.cc/H38P-UDRJ] (explaining the protest by fans for casting Scarlett Johansson, a white actress, as a the lead character in the English-language adaptation of a popular Japanese Manga series); David Sims, *What is Matt Damon Doing on Top of* The Great Wall?, ATLANTIC (Aug. 2, 2016), https://www.theatlantic.com/entertainment/archive/2016/08/what-is-matt-damon-doing-on-top-of-the-great-wall/494090/ [https://perma.cc/B9CU-G52V] (claiming the film Great Wall staring Matt Damon relies "on the face of well-known white American actor to sell its story").

62. For example, Keanu Reeves played Siddhartha Gautama. *Little Buddha (1993)*, IMDB, http://www.imdb.com/title/tt0107426/ [https://perma.cc/HCR8-QCY3].

63. *See, e.g.*, Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcating Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 21 (1996) (describing the misappropriation of immigrant identities by white actors in "yellowface" in minstrel shows, dime museums, circuses, early vaudeville, and early cinema).

64. Jeff Yang, *The Mickey Rooney Role Nobody Wants to Talk Much About*, WALL ST. J.: SPEAKEASY BLOG (Apr. 8, 2014), https://blogs.wsj.com/speakeasy/2014/04/08/the-mickey-rooney-role-nobody-wants-to-talk-about/ [https://perma.cc/8R7K-EJUV].

65. Aziz Ansari, *Why Is 'Everyman' a White Guy?*, N.Y. TIMES, Nov. 15, 2015, at AR10.

66. *See, e.g.*, Keith Chow, Opinion, *Why Won't Hollywood Cast Asian Actors?*, N.Y. TIMES, Apr. 23, 2016, at A19 ("[F]ilmmakers fall back on the same tired arguments. Often, they insist that movies with minorities in lead roles are gambles."); Marc Bernadin, *Hollywood's Glaring Problem: White Actors Playing Asian Characters*, L.A. TIMES (Apr. 18, 2016), http://www.latimes.com/entertainment/movies/la-et-mn-racial-erasure-essay-20160418-story.html [https://perma.cc/9KZF-JUVT] ("[W]hen in the process of adaptation, filmmakers remove the original racial identities of the characters in favor of . . . something else. Something Hollywood (wrongly, some might say) perceived to be box-office safe.").

67. Meg James & David Ng, *In Hollywood, Asian American Actors See Few Lead Roles, and*

nondescript and in a way dehumanized by not existing in scenes or having speaking roles. We are just part of the backdrop."[68]

The media's reduction of Asians to one-dimensional stereotypes has made us particularly sensitive to racial insults against Asians in the media. Although offensive jokes about stereotypes are part and parcel of any comedian's routine, it is difficult to laugh when those stereotypes are the *predominant* representation of Asians in the media. To make matters worse, many of the most notable examples of racism in the media have come from ostensibly liberal celebrities such as Rosie O'Donnell and Chris Rock, who in other contexts pride themselves on denouncing prejudice. Rosie O'Donnell, an advocate for LGBT rights, drew widespread criticism when she mocked the Chinese language as "ching chong, ching chong" on *The View*.[69] During the Oscars in 2016, Chris Rock brought three Asian children on stage to play his "accountants" as part of a racist joke *in the same performance in which he criticized the Oscars for its lack of black representation*.[70] The limits of identity politics begin where the sympathies and attention spans of so-called liberals end.

The harmful stereotypes perpetuated by the media reinforce the bamboo ceiling and make it harder for Asians to advance to positions of leadership. Indeed, the media's selective portrayal of Asians can at times make us feel like strangers in our own home, perpetual foreigners, incapable of living out the full range of human experiences. As W.E.B. Du Bois famously wrote in *The Souls of Black Folk*, racial minorities are seen by the majority through the "veil" of race, and we experience a "double-consciousness," "this sense of always looking at one's self through the eyes of others."[71]

Pay Discrepancies When They Land One, L.A. TIMES (July 8, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-hawaii-five-0-asian-actors-20170708-story.html [https://perma.cc/Y49V-L34W].

68. *Id.*

69. Sara Bonisteel, *Asian Leaders Angered by Rosie O'Donnell's 'Ching Chong' Comments*, FOX NEWS (Dec. 11, 2006), http://www.foxnews.com/story/2006/12/11/asian-leaders-angered-by-rosie-odonnell-ching-chong-comments.html [https://perma.cc/WZ24-U3H3].

70. Katey Rich, *Chris Rock's Oscars Asian Jokes Finally Prompt Academy Response*, VANITY FAIR (Mar. 15, 2016), https://www.vanityfair.com/hollywood/2016/03/chris-rock-asian-jokes-response [https://perma.cc/54NZ-ZVB6].

71. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 2 (Dover Publications 1994) (1903).

III. AFFIRMATIVE ACTION'S BADGE OF INFERIORITY

Despite the historical and present-day discrimination against Asians in the United States, universities that use racial preferences do not provide Asians with benefits in the admissions process similar to those given to other historically disadvantaged groups, such as blacks, Hispanics, and Native Americans. Instead, the statistics show that at many schools using racial preferences, Asians are *harmed* by their race, and have a harder time gaining admission than even white students.

When confronted with evidence of discrimination in the admissions process, universities employing racial preferences attempt to justify their unequal treatment of Asians by drawing directly on bamboo-ceiling stereotypes of Asians. By perpetuating these stereotypes of Asians, universities demean their accomplishments and stamp them with a badge of inferiority. By treating Asian students differently from white, black, Hispanic, and Native American students, solely on account of their race, Asians are made to feel like second-class citizens and perpetual foreigners in the only country they have ever known as their home. This stereotyping is incompatible with the logic and reasoning of *Brown*.

A. Evidence of Racial Disparities in Admissions Standards

Though defenders of racial preferences sometimes deny that Asians are disadvantaged, there is a well-established body of evidence demonstrating that Asian students are held to a higher standard for admission than students of other races. A study by Princeton University Professor Thomas Espenshade and his coauthor Alexandria Radford sought to quantify the effects of racial preferences in admissions at a number of elite universities on a 1600 SAT scale. Their study showed that white students have a 140-point advantage over Asian students, Hispanic students have a 270-point advantage, and black students have a 450-point advantage.[72] These numbers represent the effects of race alone, and do not include other factors such as

72. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92 tbl.3.5 (2009).

socioeconomic status, legacy status, or being a recruited athlete.[73]

These disparities were similarly present at the University of Texas in the *Fisher* litigation. In the 2013 *Fisher* decision, Justice Clarence Thomas noted that there were significant disparities in the grades and test scores of students admitted from outside the Top 10% plan at the University of Texas.[74] Asian students had a mean GPA of 3.07 and a mean SAT of 1991 on the 2400 scale in effect at the time, white students had a mean GPA of 3.04 and a mean SAT of 1914, Hispanic students had a mean GPA of 2.83 and a mean SAT of 1794, and black students had a mean GPA of 2.57 and a mean SAT of 1524.[75] The district court that upheld the University of Texas's admissions policy dismissed the concern that Asians were the victims of discrimination by writing that "Asian-Americans . . . are largely *overrepresented* compared to their percentage of Texas' population."[76] But as the statistics show, regardless of whether Asians are overrepresented or underrepresented relative to their population in the state of Texas, Asian students were being held to a higher standard for admission than white, black, and Hispanic students.

Sara Harberson, who worked at the University of Pennsylvania, described how Asian students must meet a higher standard for admission than students of other races by being forced to compete against other Asians for a limited number of spots in the incoming class:

> [T]here's an expectation that Asian Americans will be the highest test scorers at the top of their class; anything less can become an easy reason for a denial. And yet even when Asian American students meet this high threshold, they may be destined for the wait list or outright denial because they don't stand out among the other high-achieving students in their cohort.[77]

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73. *Id.*

74. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 331 (2013) (Thomas, J., dissenting).

75. *Id.*

76. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated*, 570 U.S. 297.

77. Sara Harberson, Opinion, *The Truth About 'Holistic' College Admissions*, L.A. TIMES (June 9, 2016), http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html [https://perma.cc/7QYC-GY8M].

Nelson Ureña, a former admissions officer at Cornell University, hosted an "Ask Me Anything" on Reddit in which he discussed his experiences as an admissions officer.[78] In response to a question from an Asian student about whether indicating his race on his application would affect his chance of admission, Ureña admitted that Cornell forces Asians to compete against other Asians:

> The honest fact is that, it is often the case that Asian and Asian American students often have relatively high test scores and so your application would fall (depending on how the individual school reading your application creates their applicant pools) in a pool with peers who have relatively high test scores. In your context your score of 28 is relatively low compared with Asian applicants to some of the more selective schools. I will let you read between the lines here and come to your own conclusions about whether or not you wish to report your race. I would also mention that if there are ways in which you stand out from others within the context of your demographic grouping then it would be smart to highlight those ways in which you stand out.[79]

Princeton professor Uwe Reinhardt remarked that "I tend to feel in my gut that there is an anti-Asian policy."[80] "There are many non-Asians with lower SAT scores admitted to the Ivy League. A lot of Asians have been rejected with far higher SATs than non-Asians who have been accepted."[81] In the law school context, David French quantified the extent to which Asians are held to a higher standard for admission than students of other races:

> [F]ew people understand how dramatic the boost is for favored minority groups. If students were black or the "right" kind of Latino, they would often receive admissions offers with test scores 20 or 30 percentile points lower than those of white or Asian students. When I expressed concern about an admissions offer to a black student with test scores in the 70th percentile—after we'd passed over white and Asian students in the 98th percentile and far higher grades—I was told that we *had* to

78. Abby Jackson, *Ex-Ivy League Admissions Officer Reveals Why It's Sometimes Tougher for Asians to Get In*, BUSINESS INSIDER (Sept. 18, 2016), http://www.businessinsider.com/race-might-affect-college-admissions-especially-for-asian-applicants-2016-9 [https://perma.cc/3L5H-M39R].

79. *Id.*

80. DANIEL GOLDEN, THE PRICE OF ADMISSION 205 (2006).

81. *Id.*

> offer admission or we'd surely lose him to our Ivy League rivals.[82]

As Harberson, Ureña, Reinhardt, and French's experiences make clear, whether Asians are "overrepresented" in the pool of admitted students relative to their population in the United States has nothing to do with whether Asians receive an equal opportunity for admission. In fact, the very description of Asians as "overrepresented" and other minority groups as "underrepresented" suggests that Asians are being viewed as representatives of their race, rather than simply as individual human beings with unique talents and experiences. The ugly truth is that universities are forcing Asians to compete against other Asians for a limited number of spots in the incoming class.

Although schools that use racial preferences often invoke the rhetoric of holistic, individualized admissions, the statistics show that in reality, they employ a quota on the number of Asians that are allowed entry into the incoming class. Table A of the Complaint in *Students for Fair Admissions v. President & Fellows of Harvard College*[83] shows that despite a significant increase in the Asian population as a share of the U.S. population for many years, the number of Asians at Ivy League universities has remained virtually unchanged:

Asian American Enrollment at Ivy League Universities[84]

	2007	2008	2009	2010	2011	2012	2013
Brown	15%	16%	15%	15%	14%	12%	14%
Columbia	17%	17%	16%	16%	16%	16%	18%
Cornell	16%	17%	17%	16%	16%	16%	16%
Dartmouth	14%	14%	15%	15%	14%	14%	14%
Harvard	15%	17%	17%	16%	17%	18%	18%
Penn	17%	17%	18%	18%	18%	18%	18%
Princeton	14%	15%	16%	17%	18%	19%	17%
Yale	14%	14%	15%	15%	15%	16%	16%

82. David French, *What Ivy League Affirmative Action Really Looks Like – from the Inside*, NAT'L REV. (May 18, 2015), http://www.nationalreview.com/article/418530/what-ivy-league-affirmative-action-really-looks-inside-david-french [https://perma.cc/BF6E-EVPS].

83. Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F. R. D. 39 (D. Mass. 2015) (No.14-cv-14176).

84. *Id.* at ¶ 222.

These numbers make it clear that universities using racial preferences are not being honest when they claim to employ an individualized admissions process. Instead, they engage in aggressive racial balancing—a numerical-results-by-any-means-necessary approach to achieving a particular racial composition—and set a much higher standard of achievement for Asians to be admitted than students of other races. When an admissions committee receives an application from an Asian student, the committee members do not simply ask whether the student's achievements and potential are outstanding. Rather, they ask whether the student's achievements and potential are outstanding *compared to the other Asians* who have applied to the school. Asians are made to compete against Asians, even though the result of the process is that Asians have a much harder time gaining admission to these schools than students with similar credentials of other races.

B. Harmful Stereotypes Perpetuated by Racial Preferences

Faced with the overwhelming evidence that Asians are held to a higher standard for admission than students of other races, schools using racial preferences nevertheless claim that the results of their admissions processes are fair to Asians because a student's ability to contribute to a campus depends on more than just test scores and grades. This argument is based on the nasty and demeaning stereotype of Asians being woefully deficient in non-academic factors, such as social skills and leadership potential. There is an "implication that Asian Americans (1) do not participate in extracurricular activities to the same extent as other groups; (2) lack interpersonal skills; or (3) inherently cannot produce diversity—beliefs that are not only inaccurate but often rooted in racism."[85] Thus, universities are sending the racist and bigoted message that on non-academic factors, Asians as a race simply don't measure up. That bamboo-ceiling stereotype is false, harmful, and demeaning to Asians, many of whom are immigrants or the children of immigrants.

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85. Chan Hee Chu, *When Proportionality Equals Diversity: Asian Americans and Affirmative Action*, 23 ASIAN AM. L.J. 99, 115 (2016); *see also* GOLDEN, *supra* note 80, at 201 ("Asians are typecast in college admissions offices as quasi-robots programmed by their parents to ace math and science tests.").

Schools using racial preferences also argue that achieving a certain racial composition in the student body has educational benefits for all students. But if racial balancing actually served an educational purpose, the implication would be that somehow, the presence of too many Asians harms the educational environment of a university's campus. Why would it be the case that having a 40–50% white campus is good for the learning environment, but having a 40–50% Asian campus is harmful? Who in the Ivy League decided to lock in the Asian share of the campus population at roughly 17%? Why did they choose that number as the desirable number of Asians to enroll?

The Ivy League's motivation in adopting an Asian quota is the same motivation that led it to discriminate against Jews in the early 1900s. Harvard President Abbott Lawrence Lowell feared a "Jewish invasion" of Harvard, and warned that enrolling too many Jewish students would "ruin the college."[86] "The summer hotel that is ruined by admitting Jews is not ruined because the Jews are bad in character but simply because other people stay away, and the Jews themselves cease to come."[87] Though Lowell was unsuccessful in pushing for a 15% cap on the number of Jews at Harvard, Harvard has for the past several decades succeeded in imposing a quota on the number of Asians that it admits. Just as the anti-Semitic President of Harvard worried in the early 1900s that having too many Jews would diminish the character of the campus,[88] the modern anti-Asian admissions committee at Harvard worries that having too many Asians would diminish the character of the campus. In their eyes, Asians are one-dimensional bookworms who know how to do little more than cram for exams; we are lacking in creativity, social skills, character, independent thought, and leadership. These are the same bigoted stereotypes about Asians that are perpetuated by the media and which form the bamboo ceiling on Asian achievement.

Asians' fears about being stereotyped are founded on more than mere speculation. In a moment of extraordinary frankness,

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86. Yascha Mounk, Opinion, *Is Harvard Unfair to Asian-Americans?*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/opinion/is-harvard-unfair-to-asian-americans.html [https://perma.cc/DXU5-NSDC].

87. Bayley Mason, *President Lowell Creates the House Plan*, HARV. U., https://lowell.harvard.edu/house-plan-creation [https://perma.cc/P3E2-ST9P].

88. *Id.*

Ron Bugarin, who served as an admissions officer at Brown and Columbia, stated that unless universities used racial discrimination, "our elite campuses would look like UCLA and Berkeley . . . . That wouldn't be good for Asians or for anyone else."[89] Hence, as Bugarin acknowledged: "The bar is different for every group. Anyone who works in the industry knows that."[90] According to Marilee Jones, the former Dean of Admissions at MIT, "it's possible that Henry Park looked like a thousand other Korean kids with the exact same profile of grades and activities and temperament . . . yet another textureless math grind."[91] Princeton University Professor Uwe Reinhardt recounted a conversation with Princeton's administration, during which a representative told him: "[I]t's useful to have different cultures represented here. You wouldn't want half the campus to be Chinese."[92]

Princeton University also made headlines in 2017 when the Department of Education revealed a trove of admissions files after Students for Fair Admissions filed a FOIA lawsuit seeking the documents.[93] Reporting on the contents of those files, Molly Hensley-Clancy of *BuzzFeed* wrote:

> Princeton's admissions officers repeatedly wrote of Asian-American applicants as being difficult to differentiate, referring to them dismissively as having "very familiar profiles," calling them "standard premeds," or "difficult to pluck out." . . .
>
> Of a Hispanic applicant, an admissions officer wrote, "Tough to see putting her ahead of others. No cultural flavor in app." Of a black student, another said, "Very few African-Americans with verbal scores like this."[94]

The clear import of these statements is that admissions officers from Princeton are making Asian students compete against Asian students, Hispanic students compete against

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89. Ethan Bronner, *Asian-Americans in the Argument*, N.Y. TIMES (Nov. 4, 2011), http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html [https://perma.cc/CE4B-3W25].

90. *Id.*

91. GOLDEN, *supra* note 80, at 201.

92. *Id.* at 205.

93. Molly Hensley-Clancy, *Asians with "Very Familiar Profiles": How Princeton's Admissions Officers Talk About Race*, BUZZFEED (May 19, 2017), https://www.buzzfeed.com/mollyhensleyclancy/asians-very-familiar-profiles-princeton?utm_term=.uwL8aWkr0#.uwL8aWkr0 [https://perma.cc/9A3G-K54R].

94. *Id.*

Hispanic students, and black students compete against black students. There are specific references to a stereotypical conception of the "familiar" Asian profile as a "standard premed." Rather than celebrating the unique achievements and interests of Asian applicants who happen to have a gift and passion for medicine, universities diminish those qualities by viewing them in light of the stereotypical Asian student.

Such a racist and bigoted process creates a perverse incentive for Asian students to hide or at least diminish the obviousness of their race. An entire industry of private consultants has emerged to coach Asian students on how to "appear less Asian" in their college applications.[95] The Princeton Review offered the following advice on how Asians can hide their racial identity in their application:

> If you are an Asian American—or even if you simply have an Asian or Asian-sounding surname—you need to be careful about what you do and don't say in your application. You need to avoid being an Asian Joe Bloggs.
>
> Asian Joe Bloggs is an Asian American applicant with a very high math SAT score, a low or mediocre verbal SAT score, high math- or science-related SAT II scores, high math and science grades, few credits in the humanities, few extracurricular activities, an intended major in math or the sciences, and an ambition to be a doctor, an engineer, or a research scientist. The more you sound like this person, the more likely admissions officers will be to treat you as part of the "Asian invasion" and reject your application, or at the very least make you compete against other Asian applicants with similar characteristics, rather than against the applicant pool as a whole.
>
> If you share traits with Asian Joe Bloggs you should probably pay careful attention to the following guidelines:
>
> If you're given an option, don't attach a photograph to your application and don't answer the optional question about your ethnic background. This is especially important if you don't have an Asian-sounding surname. (By the same token, if you do have an Asian-sounding surname but aren't Asian, do attach a photograph.)

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95. *See* Bella English, *To Get Into Elite Colleges, Some Advised to 'Appear Less Asian'*, BOS. GLOBE (June 1, 2015), https://www.bostonglobe.com/lifestyle/2015/06/01/ college-counselors-advise-some-asian-students-appear-less-asian/Ew7g4JiQMiq YNQIIwqETuO/story.html [https://perma.cc/873T-YPBV] (explaining how Asian high school students seeking admission into elite colleges are told to switch musical instruments, hobbies, and desired majors as a way to deemphasize their "Asianness").

> Work on your verbal SAT score, take some literature and history courses, and get involved in activities other than math club, chess club, and computer club.
>
> Do not write your application essay about the importance of your family or the positive/negative aspects of living in two cultures. These are Asian Joe Bloggs topics, and they are incredibly popular. Instead, write about something entirely unrelated to your ethnic background.
>
> Don't say you want to be a doctor, and don't say you want to major in math or the sciences. You don't have to lie. If you have lousy SAT verbal scores, saying you want to be an English major isn't going to help you, either. Just say you're undecided. The point is to distance yourself as much as possible from the stereotype.[96]

In other words, Asian students are advised to pass as white when possible, and to diminish their racial and cultural heritage if they cannot pass as white. Asians adopted by white families, half-Asians with white fathers,[97] and other Asians with white-sounding surnames such as Lee,[98] have names that would allow them to pass as white in the admissions process, but not every Asian can adopt this strategy. For the children of immigrants like myself, with ethnic surnames such as Liu or Patel, there is little we can do to escape from our racial prison in the admissions process. We are shackled to our racial identity by the admissions committee, enslaved as representatives of our race, with no

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96. THE PRINCETON REVIEW, CRACKING COLLEGE ADMISSIONS 174–76 (John Katzman et al. eds., 2d ed. 2004).

97. *See* Associated Press, *Some Asians' College Strategy: Don't Check 'Asian'*, USA TODAY (Dec. 4, 2011), http://usatoday30.usatoday.com/news/education/story/2011-12-03/asian-students-college-applications/51620236/1 [https://perma.cc/CJ27-54WA] ("Lanya Olmstead was born in Florida to a mother who immigrated from Taiwan and an American father of Norwegian ancestry. Ethnically, she considers herself half Taiwanese and half Norwegian. But when applying to Harvard, Olmstead checked only one box for her race: white.").

98. The confusion over whether the name "Lee" is white or Asian came to the forefront when an Asian sports announcer for ESPN named Robert Lee was removed from coverage of a football game at the University of Virginia after a violent incident at the campus involving a white nationalist rally opposing the removal of a statue of Confederate general Robert E. Lee. *See* Matthew Haag, *ESPN Pulls Announcer Robert Lee from Virginia Game Because of His Name*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/business/media/robert-lee-university-virginia-charlottesville.html [https://perma.cc/9YWH-XPC9] (detailing the circumstances surrounding ESPN's decision to pull Robert Lee as an announcer). The tragedy of race-based affirmative action is that a descendant of Robert E. Lee would benefit in the admissions process by clearly identifying himself as white so that he would not be confused for an Asian.

chance of being treated simply as individual human beings with unique talents and experiences.

Even when Asian students succeed in gaining admission by hiding their race, the process of having to airbrush evidence of their race from their application is a demeaning and dehumanizing experience. Aaron Mak, an Asian student who admits to having gained admission to Yale University by crafting his application to pass as white, reflected that he was "deeply affected" by racial preferences "in ways that have made me who I am," because "I'd held in my mind an image of Asian American identity and then ran as far away from it as I could." [99] Continuing his reflection, Mak wrote:

> I avoided participating in the future doctors' association, ping-pong club, the robotics team, and the Asian culture group. I quit piano, viewing the instrument as a totem of my race's overeager striving in America. I opted to spend much of my time writing plays and film reviews—pursuits I genuinely did find rewarding but which I also chose so I wouldn't be pigeonholed. I enrolled in a Mandarin course during my senior year of high school, never having learned a Chinese dialect as a kid, but I dropped it a few weeks in. I told people it was because I was too busy, but in actuality I didn't want Mandarin on my transcript and as a second language on my application, which I feared could be a red flag for the admissions committee. There would be plenty of time to take Mandarin in college after my acceptance.
>
> I often think about what I would say if I had a chance to speak to that teenage Aaron while he was plotting a course to gain admission to an elite college. I would sympathize with his calculus—a prestigious diploma can pay lifelong dividends that might outweigh the seemingly trivial choices of what classes to take and activities to pursue. But I'd also encourage him to consider the real weight of contorting his identity to win an Ivy League acceptance letter. I would warn him that his attempts to pass as white wouldn't be just cynically checking boxes on an application—it would involve excising most anything he deemed as superficially "Asian" or meaningfully Chinese from his high school experience. I would give my teenage self a look into his future after college, proudly informing him that I've just graduated with a Yale diploma and a wealth of

99. Aaron Mak, *The Price of Admission*, SLATE (Dec. 5, 2017), http://www.slate.com/articles/life/education/2017/12/the_price_of_college_admission_for_asian_americans.html [https://perma.cc/JP8N-PCQ2].

> opportunities before me. But I'd also confess that I may never be able to shake the thought nagging in the back of my mind: I'm a sellout.[100]

The racist and bigoted process of comparing Asian applicants to the stereotypical Asian student "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," to quote *Brown*.[101] During the college application process, I experienced fears about the consequences of my race that mirrored those of Aaron Mak, except that my obviously Chinese surname Liu made it impossible for me to deny my race. If my family name had been Mak or Lee, I may very well have been tempted to pass as white in order to avoid racial discrimination. For Asians such as Mak and myself, the experience of our nation's most prestigious universities holding our name, appearance, and cultural heritage against us is a demeaning slap in the face and a life-altering encounter with the bamboo ceiling that still affects us years after our graduation from college.

It is not surprising that anti-Asian discrimination in the college admissions process would have such a deep psychological effect on its victims. As the Supreme Court recognized in *Brown*:

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[102]

Education represents a once-in-a-lifetime opportunity for the children of Asian immigrants to forge a better life for themselves, yet we are systematically denied equal access to this opportunity, solely on account of our race. Universities rely on and perpetuate racist and bigoted stereotypes about Asians in order to justify holding us to a higher standard for admission. They assume that we have little more to contribute to campus life besides our test taking abilities, and they impose a quota on the number of Asians that they will admit. Racial preferences

100. *Id.*
101. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954).
102. *Id.* at 493.

diminish the accomplishments of Asians and stamps us with a badge of inferiority, treating us as second-class citizens in our own country. As such, it is antithetical to the logic and reasoning of *Brown*.

C. Outdated and Antiquated Classifications

In addition to perpetuating harmful and demeaning stereotypes of Asians, the use of race in university admissions also perpetuates and legitimates an arbitrary and antiquated system of racial classifications. As discussed earlier, the term Asian covers more than half the world's population and combines disparate populations that many people do not recognize as belonging to the same racial group. Similarly, the category Hispanic—which is technically an ethnicity, not a race—covers all people from Spanish-speaking countries. In other words, white Europeans from Spain are just as Hispanic as Mexicans or Venezuelans. If most Americans do not recognize or use these outdated and antiquated racial categories, why should they be used to determine our children's educational destiny?

Another problem with racial classifications is the increasing prevalence of mixed-race families. When the case involving Michigan's ban on racial preferences was at the Sixth Circuit, Judge Danny Julian Boggs noted that it is "not fanciful in today's world" that an applicant might, "in today's conventional terms, be held to be one-half Chinese, one-fourth Eastern European Jewish, one-eighth Hispanic (Cuban), and one-eight general North European, mostly Scots-Irish."[103] An acquaintance of mine similarly remarked: "I'm Indian and my girlfriend's black. If we get married and have children, how will schools treat them in the admissions process? Will they get a boost in their chances because they're black, or a penalty because they're Asian?"

A related problem is the question of how much minority ancestry is necessary for a person with white ancestry to claim minority status. When I was going through the college application process, one of my classmates who looked white and had an obviously Irish surname returned to class one day after missing class the previous day. When I asked him where he had

103. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al. v. Regents of the Univ. of Mich., 701 F.3d 466, 493 (6th Cir. 2012) (Boggs, J., dissenting).

been, he replied that he'd received an all-expense paid trip to an elite liberal arts college in the Northeast. When I asked him how he received the opportunity, he replied that he was partly Hispanic. Assuming that my classmate was telling the truth and that he was indeed part Hispanic, was it fair for someone who easily passed as white to benefit from this opportunity?

Consider also U.S. Senator Elizabeth Warren's claim of Native American ancestry as a young law professor on her job applications to law schools, despite being a blonde-haired, blue-eyed woman. A Cherokee woman, Rebecca Nagle, recently wrote in a progressive blog:

> The controversy over Warren's identity stems from the 1990s, when Warren was a professor at Harvard Law School. The university promoted her and celebrated her as the first minority woman to receive tenure. When the Boston press dug up these reports during Warren's campaign for Senate in 2012, she stated she didn't know why Harvard had promoted her as Native American. It appears that Warren categorized herself as minority when it served her career and later dropped the marker after gaining tenure.
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> . . . .
>
> Warren's misrepresentation of her heritage has major consequences for Native Americans, who have little visibility not only in politics, but in American culture at large. Warren's claims of Cherokee identity make her the only representation of Cherokees that the average American will likely ever see. I challenge non-Native readers to name another Cherokee leader in elected office. Or any Native American holding elected office in the United States. Or a contemporary Native American author. A Native American movie star. A Native American athlete. Or *any* famous Native people who are alive today. What is beyond maddening is that, as Native people, we are relegated to being invisible, while Warren is not.[104]

Native Americans are the only racial group that is arguably less represented in American public life than Asians, and Nagle's outrage at Senator Warren's opportunism is entirely understandable.[105]

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104. Rebecca Nagle, *I Am a Cherokee Woman. Elizabeth Warren is Not.*, THINK PROGRESS (Nov. 30, 2017), https://thinkprogress.org/elizabeth-warren-is-not-cherokee-c1ec6c91b696/ [https://perma.cc/ULJ7-SSS9].

105. For another example of a white person who succeeded in convincing others that she was of a different race, see the story of Rachel Dolezal, who became President of the Spokane chapter of the NAACP and a university instructor in African-American

Approaching the same issue from a slightly different angle, consider the story of Craig Cobb, a white nationalist and white separatist from North Dakota. In 2013, on an episode of *The Trisha Goddard Show*, Cobb espoused his petty and venomous views on race, explaining that he wished to buy enough properties in Leith, North Dakota, to create an all-white community.[106] At the end of the segment, the host Trisha Goddard reveals that Cobb had taken a DNA ancestry test, and the test showed that he was 14% sub-Saharan African.[107] As the audience erupts in laughter, the viewer cannot help but laugh along at the absurdity of a white nationalist discovering that he is black. Yet, if Craig Cobb is black, isn't it true that he or his children could truthfully claim the benefits of racial preferences? Is it fair for a white nationalist to benefit from racial preferences? If not, how can universities prevent this from occurring, given that they rely entirely on students' carefully manicured applications and self-identified race? Should applicants be required to take a DNA ancestry test, and if so, what percentage ancestry should be required for a student to receive a racial preference?

These problems all stem from universities' reliance on, and perpetuation of, an arbitrary and antiquated system of racial classification. Why should the children of President Trump or the Rock—the world's highest paid actor in 2016, who is black and Samoan—receive a racial preference over the children of Asian immigrants? Should the Rock's children receive a preference because they are black, or a penalty because they are Asian? Some Pacific Islanders have sought to distance themselves from being characterized as Asian in an effort to avoid anti-Asian discrimination,[108] and there is now some evidence that schools are focusing their efforts on penalizing particularly disfavored groups of Asians.[109]

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studies based on the false claim that she was black. *See* Richard Pérez-Peña, *Black or White? Woman's Story Stirs Up a Furor*, N.Y. TIMES (June 12, 2015), https://www.nytimes.com/2015/06/13/us/rachel-dolezal-naacp-president-accused-of-lying-about-her-race.html [https://perma.cc/6SSA-F4DU] (detailing the public reaction to Rachel Dolezal claiming she was African-American).

106. Matt Pearce, *White Supremacist Takes DNA Test, Finds Out He's Part Black*, L.A. TIMES (Nov. 12, 2013), http://articles.latimes.com/2013/nov/12/nation/la-na-nn-white-supremacist-dna-20131112 [https://perma.cc/3E9G-MRZT].

107. *Id.*

108. GOLDEN, *supra* note 80, at 204.

109. *See AACE Urges Common App Organization to Stop Discriminatory Subdivision of Asian*

White students with tenuous connections to minority groups and Asians who can pass as white gain preferential treatment over Asian immigrants with ethnic surnames such as Liu or Patel. These children of Asian immigrants are harmed the worst by racial preferences because they have no way to hide their race, even if they decline to self-identify as Asian. To insist that Asians accept an elevated standard for admission solely on account of their race, in order to sustain a system of racial preferences that is rife with potential for abuse, is an affront to their dignity and the equal-protection principles of our Constitution.

CONCLUSION

There are ongoing debates about the aims of education and whether a university should focus on building an academically elite student body, extending opportunities to underprivileged communities, or achieving some other goal in the admissions process. The California Institute of Technology is a famous example of a school that prioritizes elite academics.[110] The University of Texas at Austin, after the legislature enacted the Top 10% Plan, went in the opposite direction by granting automatic admissions to students graduating in the top 10% of their high-school class, even if their high school might not otherwise have fielded competitive applicants to the university.[111] Harvard seeks to recruit both academically elite students and students from underprivileged backgrounds,[112] but it also seeks to perpetuate its association with the rich and powerful through legacy preferences.[113]

American Applicants, ASIAN AM. COAL. FOR EDUC. (Nov. 8, 2017), http://asianamericanforeducation.org/pr_20171108/ [https://perma.cc/3RHN-JJXH] (announcing a letter issued by the AACE urging the Common Application Organization to "stop its dividing of Asian American applicants into 10 subcategories in the Common Application.").

110. *See* Alia Wong, *Asian Americans and the Future of Affirmative Action*, ATLANTIC (Jun. 28, 2016), https://www.theatlantic.com/education/archive/2016/06/asian-americans-and-the-future-of-affirmative-action/489023/ [https://perma.cc/K5ET-L9JZ] (noting that the California Institute of Technology "bases admission strictly on academics").

111. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 305 (2013) ("[T]he Top Ten Percent Law grants automatic admission to any public state college, including the University [of Texas at Austin], to all students in the top 10% of their class at high schools in Texas that comply with certain standards.").

112. Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F. R. D. 39 (D. Mass. 2015) (No.14-cv-14176).

113. GOLDEN, *supra* note 80, at 11–18 (discussing Charles Kushner's $2.5 million donation to Harvard and Jared Kushner's admission to Harvard despite having an academic record below Ivy League standards).

Just as the Supreme Court has chosen to stay out of the business of deciding educational policy for universities, it is beyond the scope of this Article to discuss the educational mission that best fits a particular university. It is not the purpose of this Article to argue that students must be admitted to universities based on grades and test scores alone. Rather, I have merely sought to demonstrate that, of all the possible educational goals that a university might wish to achieve, producing a particular racial composition is not a legitimate goal, and any process designed to achieve such a goal would unfairly discriminate against applicants on the basis of race. For Asians, the process of racial balancing stamps them with a badge of inferiority by diminishing their achievements, perpetuating demeaning stereotypes, and reducing them to representatives of their race. Such a policy divides Asians from not only the white majority, which benefits at the expense of Asians, but also other racial minorities.

In a case of Freudian projection, defenders of racial preferences have accused its critics of using Asians to drive a wedge between people of color, when the reality is that racial preferences themselves are driving a wedge between people of color by redistributing educational opportunity from Asians to students of other races. The defenders of racial preferences who claim that Asians are being "used" by whites are intentionally ignoring the multitude of Asians who sincerely oppose racial preferences, such as the Asian American Coalition for Education, which filed the complaint against Harvard that is being investigated by the Department of Justice.[114] By ignoring

114. *See* Melissa Korn & Nicole Hong, *Harvard Faces DOJ Probe Over Affirmative-Action Policies*, WALL ST. J. (Nov. 21, 2017), https://www.wsj.com/articles/harvard-faces-doj-probe-over-affirmative-action-policies-1511260380 [https://perma.cc/JQ9T-YVJF] (noting that the Justice Department opened an investigation "into the use of race in Harvard University's admissions practices"). Before the Department of Justice revealed that its investigation was based on the complaint of the Asian American Coalition for Education, a number of media outlets sought to portray the investigation as solely about the interests of white applicants. *See, e.g.*, Paul Waldman, *The Trump Administration Takes Up the Cause of Oppressed White People*, WASH. POST (Aug. 2, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/02/the-trump-administration-takes-up-the-cause-of-oppressed-white-people/?utm_term=.a67a9bb6224e [https://perma.cc/AWG3-J4CF] ("The idea that discrimination against whites is such a significant problem that it demands Justice Department action is positively ludicrous. But we should understand that this is exactly the kind of thing many of Trump's voters wanted him to deliver."); Elliot Hannon, *The Trump Administration is About to Fight What it Says is Discrimination . . . Against White Kids*, SLATE (Aug. 1, 2017), http://www.slate.com/blogs/the_slatest/2017/08/01/the_trump_doj_to_take_on_perce

the concerns of these Asians, it is the defenders of racial preferences themselves who are exposed as selectively giving voice to Asians only when it advances their political agenda.[115] The truth is that racial preferences are driven and sustained by racial animus towards Asian Americans. That is why California Assemblywoman Cristina Rodriguez stated that she wanted to "punch the next Asian person I see in the face" after Asians opposed an effort to repeal California's ban on racial preferences.[116]

Race is an arbitrary system of classification, and regardless of whatever connection the racial makeup of a class may have to the educational experience of a university, the harm inflicted by relying on poisonous stereotypes to classify students is contrary to the logic of our equal-protection jurisprudence as established in *Brown*. Until universities abandon their racially discriminatory admissions policies, our country will never achieve the dream that Dr. Martin Luther King Jr. famously described in 1963 at the March on Washington: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Earlier in this Article, I referred to Du Bois's concepts of the veil and double-consciousness in *The Souls of Black Folk*, which describe how race acts as a barrier to mutual understanding between racial minorities and the white majority in the United States. Perhaps the most famous passage from *The Souls of Black Folk* is Du Bois's description of how a liberal arts education in the Great Books can help us transcend those barriers:

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ived_college_admissions_discrimination_against.html [https://perma.cc/E8WH-3UGH] ("The forthcoming legal battle seems like the natural culmination of white conservative America's growing sense of aggrievement and Fox News-fueled belief that they are somehow the victims of reverse racism, particularly under the Obama administration.").

115. *See* Chu, *supra* note 85, at 128–29. Chu notes:

> [A]ffirmative action advocates have rampantly exploited Asian Americans. Integrating Asian Americans into the debate would undoubtedly raise questions not only about their 'success' but also whether they are harmed by affirmative action, as many empirical studies suggest. To avoid addressing these concerns, the left often incorporates Asian Americans only when useful, while largely excluding them from other less convenient situations.

Id. at 128.

116. Carla Marinucci, *#MeToo Movement Lawmaker Made Anti-Asian Comments*, POLITICO (Apr. 22, 2018), https://www.politico.com/story/2018/04/22/metoo-asian-garcia-california-544974 [https://perma.cc/VN4P-9ZTG].

> I sit with Shakespeare, and he winces not. Across the color line I move arm and arm with Balzac and Dumas, where smiling men and welcoming women glide in gilded halls. From out of the caves of evening that swing between the strong-limbed Earth and the tracery of stars, I summon Aristotle and Aurelius and what soul I will, and they come all graciously with no scorn nor condescension. So, wed with Truth, I dwell above the veil.[117]

Although we will never live in a perfectly color-blind society, education can help us see beyond superficial distinctions of race and embark on a collective journey to discover the universal truths about what it means to be human. Whatever the mission of the American university may be, part of that mission must surely be to help our students—and our country—transcend the racial barriers that exist between us, rather than amplify them.

117. DU BOIS, *supra* note 71, at 67.

MONUMENTAL POWER: CAN PAST PROCLAMATIONS UNDER THE ANTIQUITIES ACT BE TRUMPED?

JOHN MURDOCK*

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INTRODUCTION

President William J. Clinton stood on the rim of the Grand Canyon on September 18, 1996, and exercised one of the most sweeping unilateral powers available to a chief executive. With the mere stroke of a pen—and without the requirement of any congressional approval, formal studies, or public participation—President Clinton radically transformed the management for some 1,700,000 acres of land through his authority under the Antiquities Act.[1] While the backdrop was beautiful, the impacted area was actually hundreds of miles away in Utah. There, many locals and their political representatives felt blindsided and took the creation of the Grand Staircase-Escalante National Monument as an unwelcome attack on their way of life.[2]

In contrast, on December 4, 2017, President Donald J. Trump was warmly welcomed to the Utah State Capitol where, surrounded by other elected officials, he signed a proclamation reducing the size of the same monument by approximately 700,000 acres.[3] He also reduced the size of the Bears Ears National Monument, created by President Barack Obama in the final days of his presidency, even more dramatically.[4] That monument, also located in Utah, went from approximately 1,350,000 acres to about 202,000, or around 15% of its previous size.[5]

While the dignitaries surrounding Trump clapped, not all in Utah were smiling. Within hours, a series of lawsuits were filed in Washington, D.C. by environmental groups, Native Americans, paleontologists, archaeologists, and even Patagonia, the maker of outdoor apparel.[6] Those lawsuits pose a basic question: Does the

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1. Proclamation No. 6920, 3 C.F.R. § 64 (1997); *see also* Paul Larmer, *1996: Clinton Takes a 1.7 Million-Acre Stand in Utah*, HIGH COUNTRY NEWS (Sept. 30, 1996), http://www.hcn.org/issues/90/2795 [https://perma.cc/F4UE-6ZJN] (quoting Clinton saying, "Our parents and grandparents saved the Grand Canyon for us; today, we will save the grand Escalante Canyons and the Kaiparowits Plateau of Utah for our children.").

2. Larmer, *supra* note 1 (discussing the negative reactions of the "solemn and angry locals in Kanab, Utah" and of Utah Republican leaders including Senator Orrin Hatch, Senator Bob Bennett, and Representative James Hansen).

3. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

4. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017) (modifying the monument President Obama created through Proclamation No. 9558, 82 Fed. Reg. 1,139 (Dec. 28, 2016)).

5. *Id.*

6. *See* Travis M. Andrews, *'The President Stole Your Land': Patagonia, REI Blast Trump on National Monument Rollbacks*, WASH. POST (Dec. 5, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/12/05/the-president-

Antiquities Act grant a president the power to rescind or modify a predecessor's prior proclamation establishing a national monument?

In other words, did Congress hand the chief executive a land management toolbox for tinkering or just a one-way ratchet to establish monuments but make no changes thereafter? It may seem surprising that such a basic question regarding a statute enacted in 1906 has not been adjudicated before, but that is indeed the case. Despite the overconfident predictions from professors and pundits on both sides, the question is complex and the answer unclear.

In addition to the lawsuits filed in December, there is also ongoing litigation at the district-court level that pre-dates President Trump's proclamations and directly challenges other monuments proclaimed by President Obama.[7] Real legal risks exist all around—the kinds of risks that could set the stage for a compromise. Compromises are rare in this polarized time and may well be unobtainable here, but such could bring needed reform to a sometimes beneficial statute, the use of which has nevertheless strayed far from its original purpose.

Before proceeding further, it should be noted that national monument designations tend to produce hyperbolic responses on both ends of the political spectrum. President Trump and some conservatives have described a monument designation as a federal "land grab."[8] Some liberals offer a similar-sounding

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stole-your-land-patagonia-rei-blast-trump-on-national-monument-rollbacks [https://perma.cc/Q9BE-DTMA]; Courtney Tanner, *Here's a Breakdown of the 5 Lawsuits Filed Against Trump that Challenge His Cuts to 2 Utah National Monuments*, SALT LAKE TRIB. (Dec. 10, 2017), https://www.sltrib.com/news/politics/2017/12/11/heres-a-breakdown-of-the-5-lawsuits-filed-against-trump-challenging-his-cuts-to-two-utah-national-monuments [https://perma.cc/3U35-DBCR].

7. Vickie Aldous, *Lumber Companies File Lawsuit Over Monument Expansion*, MAIL TRIB. (Feb. 17, 2017), http://www.mailtribune.com/news/20170217/lumber-companies-file-lawsuit-over-monument-expansion [https://perma.cc/R4Z8-QQ9P] (discussing a lawsuit challenging President Obama's expansion of the Cascade-Siskiyou National Monument).

8. Todd Gaziano & John Yoo, Opinion, *Trump Can Reverse Obama's Last-Minute Land Grab*, WALL ST. J. (Dec. 31, 2016), https://www.wsj.com/articles/trump-can-reverse-obamas-last-minute-land-grab-1483142922 [https://perma.cc/MS6D-8AZ5] [hereinafter Gaziano & Yoo, *Last-Minute Land Grab*]; *Remarks by President Trump at Signing of Executive Order on the Antiquities Act*, WHITE HOUSE (Apr. 26, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-order-antiquities-act [https://perma.cc/8SH3-NXFV] ("I've spoken with many state and local leaders—a number of them here today—who care very much about preserving our land, and who are gravely concerned about this massive federal land grab. And it's gotten worse and worse and worse, and now we're going to free it up, which is what should have happened in the first place. This should never have happened.").

complaint, if for different reasons. Immediately after President Trump issued his December proclamations, Patagonia dramatically told visitors to its website that "The President Just Stole Your Land."[9]

Both reactions are flawed. Creating a national monument does not *federalize* private land, nor does modifying one *de-federalize* public lands. The acreage in a national monument is federally owned before it becomes a monument, and it remains federally owned after monument status is removed. Still, there *is* a significant difference between "multiple-use" public lands, potentially open to everything from dirt bikes to gold mines, and the quasi-wilderness status of a national monument.[10] There can also be indirect impacts on adjoining private lands, especially inholdings that are completely surrounded by public land.[11]

The direction of public-lands management is important largely because the federal government owns a lot of land, especially in the West. Federal ownership averages out to about a third of all the land nationwide but constitutes a majority of the acreage in the states of Nevada, Utah, Alaska, Idaho, and Oregon.[12] Therefore, whether public-land management leans towards development or conservation can indeed have a significant impact on ecosystems and economies.

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9. Andrews, *supra* note 6.

10. *See* Federal Land Management and Policy Act § 103(c), 43 U.S.C. § 1702(c) (defining "multiple use"); 43 U.S.C.A. § 1732 (mandating the management of public lands "under principles of multiple use and sustained yield . . . . except . . . where a tract of such public land has been dedicated to specific uses according to any other provisions of law."); *see also America's Public Lands Explained*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/blog/americas-public-lands-explained [https://perma.cc/2YDR-UGUB] (explaining the differences among national parks, national monuments, and other specially designated public lands); *What is Multiple Use?*, Bureau of Land Management, *http://mypubliclands.tumblr.com/post/75186093774/what-is-multiple-use* [https://perma.cc/9N6M-5QNL] (explaining the different ways the Bureau of Land Management meets its multiple-use mission).

11. *See, e.g.*, Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976) (addressing conflicts between national parks and private inholdings and potential regulations); Randy Tanner, *Inholdings Within Wilderness: Legal Foundations, Problems, and Solutions*, 8 INT'L J. WILDERNESS 9 (2002) (describing categories of problems posed to wilderness management by inholdings, such as motorized access to private property).

12. Jackie Hicken, *From 0.3 to 81.1: What Percentage of Each State is Owned by the Federal Government?*, DESERET NEWS (Mar. 7, 2014), https://www.deseretnews.com/top/2318/0/From-03-to-811-What-percentage-of-each-state-is-owned-by-the-federal-government.html [https://perma.cc/XFN9-U8HG] (reporting that, in 2012, the federal government owned roughly 635 million acres of the 2.27 billion acres of U.S. land, and listing the amounts of land that the government owns in each state).

This Article will first survey the history of the Antiquities Act, including President Trump's unprecedented review of past proclamations. It then addresses relevant authorities and legal theories that could influence the litigation surrounding President Trump's recent decisions to shrink monuments. This includes a discussion of the analysis offered by a number of law professors led by the University of Colorado's Mark Squillace, a former special assistant to the Solicitor of the Department of the Interior under President Clinton.[13] Addressed next are the legal issues surrounding the complete revocation of monuments, with special attention paid to the work of revocation-power proponents John Yoo, a former official in the George W. Bush Justice Department and now a professor at Berkeley Law, and Todd Gaziano of the Pacific Legal Foundation, a libertarian public interest law firm.[14] The piece argues those on the left who assert that Trump has no power to diminish the size of monuments and those on the right who advocate for even greater changes have both overestimated their chances of success. The Article closes by offering a framework for a legislative compromise.

I. OVERVIEW OF THE ANTIQUITIES ACT

A. A Brief but Boldly Applied Statute

Current controversies center on vast stretches of land in the American West, a seeming mismatch with the legal lexicon of "antiquities" and "monuments." Indeed, few, if any, voting on the proposed Antiquities Act in 1906 would have anticipated its use on tracts covering thousands of square miles. At least one congressman, Representative John Hall Stephens of Texas, seems to have voted for the measure only because he was assured that such would never be the case.[15] Legal commentators currently have divergent views regarding the powers conferred by the Antiquities Act. Nevertheless, scholars across the spectrum uniformly agree that the original impetus for the statute was not vast landscape-level conservation projects, but the protection of discreet archaeological artifacts and ruins, primarily in the

13. *See infra* Part II.
14. *See infra* Part III.
15. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 484 n.59 (2003) (citing 40 CONG. REC. 7,888 (1906)).

Southwest.[16] These were the "antiquities" at the center of the Antiquities Act. The basic idea was to give the Executive Branch the flexibility to move quickly in removing relevant areas of federal lands from the general public domain and create more protective management regimes for what would be termed national monuments.[17]

Such parcels were not expected to be large. During the legislative process, consideration was given to specific acreage limitations of 320 or 640 acres.[18] Those proposals were successfully opposed by the Department of the Interior, but the final version did include a provision stating that the physical extent of monuments "in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected."[19] That reference to "objects" also captures an expectation that the focus of a national monument would be on discreet *things* such as historic buildings or prehistoric ruins. Nevertheless, the full statutory language was far broader:

> [T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon

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16. *See, e.g.*, *id.* at 477 ("There seems little doubt that the impetus for the law that would eventually become the Antiquities Act was the desire of archaeologists to protect aboriginal objects and artifacts."). The National Parks Service agrees with this historical understanding of the Act:

> What did the sponsors of the Antiquities Act envision? They agreed that national monuments would be small in area and geographically confined to the American Southwest. . . . After the bill become law (8 June 1906) its limited scope was emphasized by Edgar Hewett and Charles Lummis, both prominent in the Archaeological Institute of America, when they wrote President Roosevelt that "the purpose of this act is absolutely plain. It is an Act for the Preservation of American Antiquities. It provides for the preservation of conspicuous ruins, as national monuments, and for the preservation of material buried in the soil by excavation and installation in public museums. The law is perfectly simple and satisfactory to every body."

Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, NAT'L PARK SERV.: HISTORY E-LIBRARY, https://www.nps.gov/parkhistory/hisnps/npshistory/righter.htm [https://perma.cc/MZ4P-6Z6S] (last updated Mar. 5, 2005).

17. *See* Righter, *supra* note 16 (explaining that advocates for the Antiquities Act sought to bypass the slow congressional process by granting presidential power to declare monuments).

18. CAROL HARDY VINCENT, CONG. RES. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 5 (2016); Squillace, *supra* note 15, at 483.

19. The Antiquities Act of 1906, Pub. L. 59-209, 34 Stat. 225 (codified as amended at 54 U.S.C. § 320301(b) (2014)); *see also* Squillace, *supra* note 15, at 483 (discussing prior drafts of the "smallest area" provision).

> the lands owned or controlled by the Government of the United States to be national monuments . . . .[20]

Numerous monuments centered on the historic landmarks and prehistoric structures, such as the Gila Cliff Dwellings National Monument in New Mexico, were created as the law's proponents expected;[21] however, the vast majority of the acreage in the national-monument system today is probably best described as protecting "other objects of historic or scientific interest." That would doubtless surprise the statute's early backers and legislators. Indeed, despite the focus on Native American ruins in the lobbying effort,[22] the first national monument proclaimed under the Antiquities Act was not primarily an archaeological site. President Teddy Roosevelt declared the Devils Tower in Wyoming "an extraordinary example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific interest" and set aside 1,152.91 acres—a modest area by today's monumental standards but still significantly more than the 640-acre limit once proposed in some bills.[23] Roosevelt would go on to use the Antiquities Act as a favored big stick and declare, not so softly, a total of eighteen monuments, including southwestern archaeological sites like Chaco Canyon.[24] But Roosevelt's largest and most controversial monument was, like his first at Devils Tower, another marvel of erosion. When, less than two years after the Act's passage, Roosevelt set aside 808,120 acres for the Grand Canyon National Monument on January 11, 1908, Congressman Stephens's fears of an expansively used power had become a reality.[25] Later presidents would follow Roosevelt's lead and set aside tracts both big and small.[26]

Thus, President Clinton's choice of backdrop for proclaiming a massive monument in Utah was not totally irrelevant. Protecting the Grand Canyon was the first epic-scale use of the

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20. The Antiquities Act, Pub. L. 59-209, 34 Stat. 225 (1906).

21. Proclamation No. 781, 35 Stat. 2162 (Nov. 16, 1907).

22. 40 CONG. REC. 7,888 (1906) (quoting Congressman Lacey, one of the proponents of the bill, reassuring Congressman Stephens that the objective of the bill was to "preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest").

23. Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906).

24. *See* Squillace, *supra* note 15, app. at 585–89.

25. *See id.* at 587.

26. *See id.* at 585–610 (listing every national monument created under the Antiquities Act during the twentieth century).

Antiquities Act, and while not without controversy at the time, that monument would eventually become a national park beloved around the world. Around a quarter of all our national parks—from Arches to Zion, from Death Valley to Glacier Bay—followed a similar path from presidentially declared monument to congressionally authorized national park.[27]

A president might issue a proclamation with an eye on a coming election, as was the case for Clinton in 1996, but more often monuments have been used as a final means of legacy building at the close of a presidency. Historians and the public have generally looked back and patted presidents of both parties on the back for their monument designations. The sometimes unsavory details surrounding a proclamation have tended to get lost in the weeds of time while the laurels grow. Some local politicians have even reversed course and later lauded what they once adamantly opposed.[28] Many in the West, though, continue to decry using the Antiquities Act for landscape conservation.

B. Limited Litigation History

President Theodore Roosevelt's Grand Canyon proclamation became a model for the future, and it also produced the first judicial test of the Antiquities Act. An entrepreneurial soul named Ralph Cameron had used a suspect but strategically located mining claim as his excuse to charge tourists for access to the popular Bright Angel Trail.[29] When the government eventually sought to invalidate the ore-less claim, the defendant

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27. Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 714 (2002) (citing GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW 307 (3d ed. 1993)); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 490 & n.27 (1999); John J. Fiakla, *Clinton Is Likely to Leave the Presidency with Record of Having Protected Lands*, WALL ST. J., Dec. 29, 2000, at A18).

28. Before becoming the Governor of Wyoming and later a U.S. Senator, Cliff Hansen was a Teton County Commissioner adamantly opposed to the Jackson Hole National Monument, even leading an illegal cattle drive across the new monument in protest. By 1967, though, the Republican would publicly state, "I want you all to know that I'm glad I lost, because I now know I was wrong." Jeremy Pelzer, *Hansen Fought Grand Teton Expansion, Then Became Supporter*, CASPER STAR-TRIB. (Oct. 22, 2009), http://trib.com/news/state-and-regional/hansen-fought-grand-teton-expansion-then-became-supporter/article_930e18f9-534f-5d39-b044-a9cc57a07c47.html [https://perma.cc/D4HF-UFMP].

29. *See* Cameron v. United States, 252 U.S. 450, 454–55 (1920) ("The tract is on the southern rim of the Grand Canyon of the Colorado, is immediately adjacent to the railroad terminal and hotel buildings used by visitors to the canyon and embraces the head of the trail . . . .").

argued that the presidential proclamation itself was unauthorized.[30] A unanimous Supreme Court dismissed that argument in a single paragraph:

> The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.[31]

Such judicial deference to the decisions made "in the President's discretion," as the law puts it, has continued to be the norm on the rare occasions that the Antiquities Act has been before the Supreme Court.[32]

After *Cameron v. United States*,[33] the Supreme Court would not address the statute again until *Cappaert v. United States*[34] in 1976. President Harry Truman had issued a proclamation in 1952 adding a 40-acre parcel containing Devil's Hole to the existing Death Valley National Monument.[35] Devil's Hole was an underground pool in the Nevada desert, home to a species of pupfish found nowhere else.[36] The controversy arose when neighboring ranchers began to pump groundwater from the same aquifer supplying the pool.[37] The ranchers argued that the Antiquities Act authority was limited to the protection of "archeologic sites."[38] As in *Cameron*, the Supreme Court affirmed the validity of the proclamation in a single paragraph, concluding that "[t]he pool in Devil's Hole and its rare

30. *Id.* at 455–56.
31. *Id.* The challenge to the monument was an alternative argument in the case, which primarily centered on mining law. *See id.* at 410–11 (describing the legal implications of the validity of Cameron's mining claim).
32. 54 U.S.C. § 320301(a).
33. 252 U.S. 450 (1920).
34. 426 U.S. 128 (1976).
35. Proclamation No. 2961, 3 C.F.R. § 147 (1949–1953).
36. *Id.*
37. *Cappaert*, 426 U.S. at 133.
38. *Id.* at 142.

inhabitants are 'objects of historic or scientific interest.'"[39] The Court spent many more lines deciding that the proclamation, by implication, also reserved the water rights necessary to effectuate the purpose of the monument.[40]

A 1978 case, *United States v. California*,[41] then addressed the ownership of submerged lands associated with the Channel Islands National Monument. While the Court ultimately held that Congress had transferred control of those submerged lands to the state through a later statute, the original validity of the monument proclamation was upheld.[42] Submerged lands were again at issue in *Alaska v. United States*.[43] There, the Supreme Court briefly discussed the possible impact of the Antiquities Act in dicta before holding on other grounds that the United States retained submerged lands in Glacier Bay.[44] The validity of the Glacier Bay proclamations was not at issue, however.[45] *Cameron*, *Cappaert*, *California*, and *Alaska* complete a rather thin catalogue of Supreme Court cases addressing the Antiquities Act.

Additionally, in 2003, the Court, without comment, refused to hear a case attempting to challenge several of President Clinton's proclamations on a variety of grounds, including that their size exceeded the statute's "smallest area" provision.[46] That legal effort was led by the Mountain States Legal Foundation, a libertarian property rights organization first headed by James Watt, who went on to a controversial tenure as Ronald Reagan's first Secretary of the Interior.[47] Like all other cases thus far challenging an Antiquities Act proclamation, *Mountain States Legal Foundation v. Bush*[48] was unsuccessful, failing even to survive a motion to dismiss.[49] Along its losing way, though, the D.C.

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39. *Id.*
40. *See id.* at 142–46.
41. 436 U.S. 32 (1978).
42. *Id.* at 36, 41.
43. 545 U.S. 75 (2005).
44. *Id.* at 102–04.
45. *See id.*
46. Mountain States Legal Found. v. Bush, 540 U.S. 812 (2003) (denying cert.).
47. *See* Iver Peterson, *Public Law Organizations are Uniting to Advocate the Conservative Cause*, N.Y. TIMES (July 28, 1985), https://www.nytimes.com/1985/07/28/us/public-law-organizations-are-uniting-to-advocate-the-conservative-cause.html [https://perma.cc/4FPK-UZP6] (detailing the creation of conservative public law centers "that would balance the rising influence of consumer, environmental and civil libertarian law organizations" following the Nixon Administration).
48. 540 U.S. 812 (2003).
49. Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003). A separate decision dismissing another case from the same

Circuit did give those opposing the proclamations a glimmer of hope. While affirming the trial court's dismissal, the appellate court suggested that judicial review of presidential actions under the Antiquities Act was possible with a proper factual predicate.[50] Still, the D.C. Circuit otherwise demonstrated a notable reluctance to review matters under a statute that "confers very broad discretion on the President" and raises "separation of powers concerns."[51]

In short, the Supreme Court has been extremely deferential to presidents regarding the creation of monuments. Lower courts have, not surprisingly, followed in step. If a president checks all the statutory boxes in a monument proclamation, no court has yet shown any real willingness to pierce the paper veil and look with a skeptical eye at the reasoning behind the stated justifications for the designation.[52] The judiciary has largely left the other two branches of government to sort out Antiquities Act disputes among themselves.

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time period, and again featuring Mountain States Legal Foundation, concisely illustrates the deep deference that courts have typically afforded presidential proclamations:

> The record is undisputed that the President of the United States used his authority under the Antiquities Act to designate the Grand Staircase Monument. The record is also undisputed that in doing so the President complied with the Antiquities Act's two requirements, 1) designating, in his discretion, objects of scientific or historic value, and 2) setting aside, in his discretion, the smallest area necessary to protect the objects. With little additional discussion, these facts compel a finding in favor of the President's actions in creating the monument. That is essentially the end of the legal analysis. Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go.

Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004).

50. *Mountain States Legal Found.*, 306 F.3d at 1137. The D.C. Circuit explained:

> To warrant further review of the President's actions, Mountain States would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act. *See* Fed. R. Civ. P. 8(a); *Papasan*, 478 U.S. at 286, 106 S. Ct. at 2944–45; Browning v. Clinton, 292 F.3d 235 (D.C. Cir. 2002). Having failed to do this, Mountain States presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority. The inadequacy of Mountain States' assertions thus precludes it from showing that the district court erred in declining to engage in a factual inquiry to ensure that the President has complied with the statutory standards.

Id.

51. *Id.*

52. In *Wyoming v. Franke*, discussed *infra* under Part I.C, a skeptical court expressed palpable frustration regarding a monument declaration, but, nevertheless, refused to invalidate it.

C. Controversies and State Exemptions

While the courts have been hands off, Congress has occasionally pushed back, though sometimes with a nudge from a judge. President Franklin Roosevelt's declaration of the Jackson Hole National Monument was met with local opposition and a lawsuit that netted at least a moral victory, if not a legal one. The district court, in *Wyoming v. Franke*,[53] allowed the case to proceed beyond the pleadings, even hearing evidence and suggesting a willingness to declare the President's action unlawful if it was arbitrary and capricious.[54] Nevertheless, because the Administration had presented *some* evidence of a scientific and historical basis for the proclamation, that was deemed enough to clear the low bar required.[55] The court was sympathetic to the "great hardship and substantial amount of injustice" that would be inflicted upon the local people, but summarized the matter as "a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere."[56]

Congress responded to the controversy by passing a bill abolishing the monument.[57] FDR countered with a veto.[58] As noted by William Perry Pendley, currently the head of the Mountain States Legal Foundation, in an Antiquities Act face-off, the President plays with a stacked deck: the President can defend

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53. 58 F. Supp. 890 (D. Wyo. 1945).

54. *Id.* at 895–96. The court wrote:

> If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion. For example, if a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act. In the proofs in this case we have evidence of experts and others as to what the area contains in regard to objects of historic and scientific interest and by that testimony this Court is bound although it may not agree that the testimony of the witnesses by the preponderance rule sufficiently supports the claim of the defendant. This is the limited scope which it seemed to the Court were issues in the case within its jurisdiction to determine.

Id.

55. *Id.*

56. *Id.* at 896.

57. H.R. 2241, 78th Cong (1943); *see also* Squillace, *supra* note 15, at 498.

58. 90 CONG. REC. 9808 (1944); 13 FRANKLIN D. ROOSEVELT, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: FRANKLIN D. ROOSEVELT 454 (Samuel I. Rosenman ed., 1950).

his unilateral action with a veto that requires two-thirds of Congress to override.[59] Congress still has important cards it can play, however. In the Jackson Hole situation, the legislative branch used its power of the purse to successfully withhold funding for the management of the monument.[60] Then, several years after its creation, a compromise was struck, and a provision that barred new monuments within Wyoming was included in a 1950 bill that incorporated Jackson Hole National Monument into Grand Tetons National Park.[61] That bill got signed, and Wyoming, for better or worse, has not seen a presidentially proclaimed monument since.[62]

Alaska has also been largely carved out of the Antiquities Act by special legislation.[63] That result was precipitated by President Jimmy Carter turning December 1, 1978 into the most monumental day in American history. On that date, Carter established seventeen monuments and expanded others, all in Alaska.[64] Those proclamations affected some 56 million acres, several times the total acreage that all of his predecessors combined had proclaimed.[65] The move came as legislation on

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59. William Perry Pendley, *Grand Staircase-Escalante National Monument: Protection of Antiquities or Preservationist Assault?*, 10 UTAH B.J. 8, 11 (1997). Pendley writes:

> [W]hile Congress, by a simple majority, may provide authority to the President, it can only reign in an abuse of that authority by a two-thirds vote of the Senate and House. . . . Obviously, in the fact of a veto by the president, Congress cannot protect itself or, more importantly, cannot protect the guarantees assured the American people by the Constitution.

Id.

60. *See* Squillace, *supra* note 15, at 498. Squillace explains:

> The controversy over the Jackson Hole National Monument also sparked what was perhaps the most successful congressional opposition to a monument proclamation. . . . In 1944, Congress actually passed legislation that would have abolished the monument, but Roosevelt pocket vetoed the bill. In response, Congress refused to appropriate money for the management of the monument for seven years after it was proclaimed.

Id.

61. *Id.* (citing 16 U.S.C. § 406d-1 (2000)).

62. *See id.* (citing 16 U.S.C. § 431a (2000)). Congress, however, did declare the Fossil Butte National Monument Act in 1972. An Act to Establish the Fossil Butte National Monument in the State of Wyoming, and for Other Purposes, Pub. L. No. 92-537, 86 Stat. 1069 (1972); *see also* Michael Margherita, *The Antiquities Act & National Monuments: Analysis of Geological, Ecological, & Archaeological Resources of the Colorado Plateau*, 30 TUL. ENVTL. L.J. 273, 282–83 (2017).

63. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in 16 U.S.C. §§ 3101–3233 (2000)).

64. President Jimmy Carter, Designation of National Monuments in Alaska Statement by the President (Dec. 1, 1978), AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=30228 [https://perma.cc/Y726-T98N].

65. *See* Lin, *supra* note 27, at 716 ("President Carter reserved approximately 56

Alaskan federal-land designations was stalled and massive but time-limited land withdrawals made under another statute were soon to expire.[66] Carter took matters into his own hands and essentially extended the status quo indefinitely via the Antiquities Act, shifting legislative leverage in the process. The Alaska National Interest Land Conservation Act (ANILCA) eventually passed on November 12, 1980, just after Carter had lost his bid for re-election, but Carter signed the bill before leaving office.[67] ANILCA rescinded all the monuments that Carter had proclaimed but largely divvied those lands among a series of national parks and reserves. Congress also removed the Antiquities Act ace-in-the-hole that the President had played by expressly requiring congressional approval for any future monuments in Alaska that exceeded 5,000 acres.[68]

D. Use of the Act After Carter

Presidents Ronald Reagan and George H. W. Bush neither invoked the Antiquities Act to declare or modify a monument nor signed any legislation amending it.[69] After that period of relative inactivity, President Clinton started another disquiet on the western front with his controversial declaration from the rim of the Grand Canyon. A number of bills seeking to reform the Antiquities Act or exclude certain states from its reach were soon introduced, but despite Republican majorities in both houses of Congress, nothing reached the Oval Office.[70] Clinton would later proclaim another eighteen new monuments during the final thirteen months of his second term.[71]

George W. Bush then became the first Republican since Dwight D. Eisenhower to establish a new national monument.[72]

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million acres through the Antiquities Act"); *id.* at 715 tbl.1.

66. *Id.* at 716.

67. 16 U.S.C. §§ 3101–233; *see also* President Jimmy Carter, President of the United States, Alaska National Interest Lands Conservation Act Remarks on Signing H.R. 39 Into Law (Dec. 2, 1980), AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=45539 [https://perma.cc/HT3M-KFZD].

68. 16 U.S.C. § 3213(a).

69. *See* Lin, *supra* note 27, at 715 (showing that no monuments were declared or modified during the terms of Presidents Reagan and H. W. Bush); Squillace, *supra* note 15, at 606–09 (same).

70. Lin, *supra* note 27, at 718–19 ("Following the designation of Grand Staircase-Escalante, several bills were proposed to repeal or limit Antiquities Act authority. . . . None of these bills became law.").

71. *Id.* at 719.

72. *Id.* at 715 tbl.1.

Bush's declaration of a historic African-American burial ground in New York City, less than one acre in size, was very much in keeping original intent of the Act.[73] However, his next proclamation, an 84,000,000-acre marine monument in federally controlled waters off Hawaii, brought about a literal sea-change for the Antiquities Act.[74] There had been some monument acres underwater before, but nothing approaching this scale. Bush would proclaim several other large marine monuments in the closing days of his presidency and specifically invoke the example of Theodore Roosevelt in doing so.[75]

President Barack Obama then took use of the Antiquities Act to a new level, creating or expanding a record thirty-four monuments on land and under the sea—additions totaling over 553,000,000 acres.[76] Congressman Stephens of Texas, who in 1906 had been assured that the monuments would be small, may have turned over in his grave when President Obama quadrupled the size of President Bush's first marine monument,

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73. *See* Proclamation No. 7984, 3 C.F.R. § 7984 (2007) (preserving the burial site of enslaved and free Africans in New York, as well as the related archaeological remains and artifacts).

74. Proclamation No. 8031, 3 C.F.R. § 8031 (2007); *see also Bush Creates World's Biggest Ocean Preserve*, NBC NEWS (June 16, 2006), http://www.nbcnews.com/id/13300363/ns/us_news-environment/t/bush-creates-worlds-biggest-ocean-preserve/ [https://perma.cc/G4EK-RCRB] (quoting Bush saying, "It's larger than 46 of our 50 states, and more than seven times larger than all our national marine sanctuaries combined. This is a big deal.").

75. President George W. Bush, Remarks on Signing Proclamations to Establish the Marianas Trench Marine National Monument, Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument (Jan. 6, 2009), AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=85415 [https://perma.cc/6QC7-TBCR]. Bush proclaimed:

> It's interesting that we're gathered a few steps from the office once occupied by a young Assistant Secretary of the Navy named Theodore Roosevelt. Not long after he left the position, he was back on these grounds as the 26th President of the United States. And exactly a hundred years ago, he embarked on his final weeks as the President—something I can relate to. President Roosevelt left office with many achievements, and the most enduring of all was his commitment to conservation. As he once said, "Of all the questions which can come before the Nation, short of the actual preservation of its existence in a great war, there is none which compares in importance with leaving this land even a better land for our descendants than it is for us."

Id.

76. Juliet Eilperin & Brady Dennis, *Obama Names Five New National Monuments, Including Southern Civil Rights Sites*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html?utm_term=.28ed278921c4 [https://perma.cc/5ARX-H6FD].

making it twice as large as the Lone Star State.[77] Then, in what Utah Senator Orrin Hatch would call an "attack on an entire way of life" and an "astonishing and egregious abuse of executive power,"[78] Obama later proclaimed the 1,350,000 acre Bears Ears National Monument a few weeks after Donald Trump's surprising triumph on Election Day.[79] Mike Lee, Utah's junior senator, vowed, "This arrogant act by a lame duck president will not stand."[80]

E. Trump Orders a Review of Monuments

Among President Trump's first-year blitz of executive orders was one directing the Secretary of the Interior to "conduct a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation covers more than 100,000 acres."[81] Those parameters put the Grand Staircase-Escalante and Bears Ears monuments squarely in the cross-hairs, much to the delight or dismay of many in Utah. A total of twenty-two land-based monuments and five marine monuments created by Presidents Bill Clinton, George W. Bush and Barack Obama were subjected to the review.[82] Additionally, the Bears Ears National Monument was singled out for a kind of expedited review, with an interim report required within forty-five days.[83]

Many conservationists decried Trump's move, and Democrats on the House Natural Resources Committee declared, "Our National Monuments Are Under Attack!"[84] Some eighty-six

77. Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016); *see also* Cynthia Barnett, *Hawaii Is Now Home to an Ocean Reserve Twice the Size of Texas*, NAT'L GEOGRAPHIC (Aug. 26, 2016), https://news.nationalgeographic.com/2016/08/obama-creates-world-s-largest-park-off-hawaii/ [https://perma.cc/95RF-J8J9] ("President Barack Obama . . . create[d] the largest protected area anywhere on Earth—a half-million-square-mile arc of remote Pacific waters known for both exceptional marine life and importance to native Hawaiian culture.").

78. Brian Maffly & Thomas Burr, *Obama Declares Bears Ears National Monument in Southern Utah*, SALT LAKE TRIB. (Dec. 29, 2016), http://www.sltrib.com/home/4675012-155/mike-lee-staffer-says-bears-ears [https://perma.cc/HSR3-37Y2].

79. Proclamation No. 9558, 82 Fed. Reg. 1,139 (Dec. 28, 2016).

80. Maffly & Burr, *supra* note 78.

81. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

82. Memorandum from Ryan K. Zinke, Sec'y of the Interior, to President Donald Trump, *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act* 5–6 (publicly released Dec. 5, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf [https://perma.cc/F99F-7C85] [hereinafter Zinke Final Monuments Report].

83. Exec. Order No. 13792, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

84. *Our National Monuments Are Under Attack!*, NAT. RES. COMM. DEMOCRATS RANKING

House Democrats then sent Secretary of the Interior Ryan Zinke a letter asserting, "The Constitutional authority to revoke or shrink a national monument lies with the Congress."[85] The President, they contend, "does not possess" such powers.[86] That legal claim was backed by an analysis from attorneys at the law firm of Arnold & Porter Kaye Scholer.[87] The Attorney General of California, a state home to some of the monuments under review, also weighed in on the matter, asserting that the Antiquities Act only "gave the President a one-way ratchet in favor of conservation."[88] University of Colorado Professor Mark Squillace, who was an aide to the Department of the Interior's top lawyer in 2000,[89] led a list of several academics who quickly published an online essay supporting the "one-way" theory.[90]

MEMBER RAUL M. GRIJALVA (May 16, 2017), http://democrats-naturalresources.house.gov/media/newsletters/this-week-in-committee-our-national-monuments-are-under-attack [https://perma.cc/V8XQ-7BAZ].

85. Letter from Congressman Raul M. Grijalva, et al., House Comm. on Nat. Res., to Ryan Zinke, Sec'y of the Interior (May 25, 2017), http://democrats-naturalresources.house.gov/house-democratic-letter-to-sec-zinke-on-national-monuments-may-25 [https://perma.cc/Q9WA-9J28].

86. *Id.* Other Democrats have, in the past, been far less declarative in their public assertions. In 1999, when asked at a press briefing if later presidents had the power to rescind a proclamation, Clinton Administration Secretary of the Interior Bruce Babbitt responded, "It's not clear. All I can say is, for 100 years it has never been done. What a court would say, in interpreting the Antiquities Act I wouldn't even guess at." Bruce Babbitt, Press Briefing by Secretary of the Interior Bruce Babbitt and Chair of Council on Environmental Quality George Frampton (Dec. 14, 1999), AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=47873 [https://perma.cc/3T5M-XU33].

87. ROBERT ROSENBAUM, ET AL., THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH A NATIONAL MONUMENT UNDER THE ANTIQUITIES ACT OF 1906 (Feb. 8, 2017), http://democrats-naturalresources.house.gov/download/arnold-and-porter-legal-memo-on-revocation-of-national-monuments [https://perma.cc/N5PP-MNKZ] [hereinafter Arnold & Porter February 2017 Memorandum]. A May 3, 2017 modified version of this same memo is described as being the result of the National Parks Conservation Association retaining Arnold & Porter. ROBERT ROSENBAUM, ET AL., THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH A NATIONAL MONUMENT UNDER THE ANTIQUITIES ACT OF 1906 (May 3, 2017), https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments [https://perma.cc/3W2G-M58K] [hereinafter Arnold & Porter May 2017 Revised Memorandum].

88. Letter from Xavier Becerra, Cal. Att'y Gen., to Hon. Ryan Zinke, Sec'y of the Interior (June 8, 2017), https://oag.ca.gov/news/press-releases/attorney-general-becerra-trump-administration-protect-california's-national [https://perma.cc/ZT32-TMF4].

89. *Mark Squillace*, UNIV. OF COLO. BOULDER: SCH. OF THE ENV'T & SUSTAINABILITY, https://www.colorado.edu/ses/mark-squillace [https://perma.cc/8CUE-Z8TC] ("In 2000, Professor Squillace took a leave from law teaching to serve as Special Assistant to the Solicitor at the U.S. Department of the Interior. In that capacity he worked directly with the Secretary of the Interior, Bruce Babbitt, on variety of legal and policy issues.").

90. Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 68, 71 (2017), http://www.virginialawreview.org/sites/virginialawreview.org/files/Hecht%20PDF.pdf [https://perma.cc/MYW5-U7Z2].

One hundred and twenty-one law professors, including Professor Squillace, later submitted a letter to the Department of the Interior during a public-comment period associated with the review process.[91] They concluded that a President does not have the power under the Antiquities Act "to abolish or diminish a national monument after it has been established."[92]

Proponents of scaling back national monuments could point to their own legal eagles, though. John Yoo—now a Berkeley law professor but best known for advising President George W. Bush on what some called *enhanced interrogation* and others called *torture*—and Todd Gaziano of the Pacific Legal Foundation tag-teamed a series of hard-punching pieces appearing on the opinion pages of major newspapers.[93] They also penned a lengthy analysis for the American Enterprise Institute.[94]

The public, prodded along by environmental groups, engaged by submitting approximately 76,500 expedited comments about Bears Ears and some 2.8 million comments on the overall review process.[95] Secretary of the Interior Ryan Zinke noted that the feedback was "overwhelmingly in favor of maintaining existing monuments."[96] That was not the Secretary's recommendation, however.

F. Recent Recommendations, Proclamations, and Lawsuits

In his final report to the President, Secretary Zinke recommended modifications to the boundaries and/or

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91. Letter from 121 Law Professors to Sec'y of the Interior Zinke and Sec'y of Commerce Ross (July 6, 2017), https://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf [https://perma.cc/HXE7-LPUL] [hereinafter 121 Law Professors Letter].

92. *Id.* at 1.

93. *See, e.g.*, Todd Gaziano & John Yoo, Opinion, *It's Magical Legal Thinking to Say Trump Can't Reverse Obama's National Monuments*, L.A. TIMES (July 6, 2017), http://www.latimes.com/opinion/op-ed/la-oe-yoo-gaziano-revoking-national-monuments-20170706-story.html [https://perma.cc/DDF6-DHWH] [hereinafter Gaziano & Yoo, *Magical Legal Thinking*]; Gaziano & Yoo, *Last-Minute Land Grab*, *supra* note 8.

94. John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, AM. ENTERPRISE INST. (March 2017), http://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf [https://perma.cc/Q5LP-KG6K] [hereinafter Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*].

95. Memorandum from Ryan K. Zinke, Sec'y of the Interior, to President Donald Trump, *Interim Report Pursuant to Executive Order 13792* 4 (June 10, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/final_interim_report_about_monuments.pdf [https://perma.cc/4CPW-RY6X]; Zinke Final Monuments Report, *supra* note 82, at 6.

96. Zinke Final Monuments Report, *supra* note 82, at 3.

management regimes for eleven monuments.[97] Zinke did not, however, recommend the complete revocation of any existing national monument proclamations. Additionally, though not requested by the President's executive order, three areas were also noted as potential new monuments.[98] President Trump then began turning the Secretary's recommendations into actions by issuing the proclamations that reduced the size of the Grand Staircase-Escalante and Bears Ears monuments in Utah. To no one's surprise, those December 4, 2017 proclamations quickly prompted several lawsuits.[99] Those cases could bring to a head fundamental questions about the Antiquities Act that have never before been answered in court despite over a century of periodic controversy.

II. CAN MONUMENT BOUNDARIES BE MODIFIED?

A. Trump Shrinks Monuments, As Predecessors Have Done

Some wanted President Trump to announce the full revocation of the proclamations made by Presidents Clinton and Obama.[100] Nevertheless, in his first round of actions in response to the recommendations, Trump only made modifications to the controversial Utah monuments. The size reductions were quite

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97. *Id.* at 9–20. Unspecified boundary revisions and management changes were recommended for the following national monuments: Bears Ears, Cascade-Siskiyou, Gold Butte, Grand Staircase-Escalante, Pacific Remote Islands, and Rose Atoll. Management changes, without changes to boundaries, were recommended for Katahdin Woods and Waters, Northeast Canyons and Seamounts, Organ Mountains-Desert Peaks, Rio Grande Del Norte, and Castle Mountains. *Id.*

98. *Id.* at 18–19. The recommended new monuments were (1) a 4,000-acre Civil War site in Kentucky tied to African-American Civil War regiments, (2) the Mississippi home of slain civil rights advocate Medgar Evers, and (3) a 130,000-acre portion of the Lewis and Clark National Forest in Montana, sacred to the Blackfeet Nation. *Id.*

99. Nat. Res. Def. Council, Inc. et al v. Trump, No. 1:17-cv-02606 (D.D.C. filed Dec. 7, 2017); Utah Dine Bikeyah v. Trump, 1:17-CV-02605 (D.D.C. filed Dec. 6, 2017); Hopi Tribe v. Trump, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017); Grand Staircase Escalante Partners et al v. Trump, No. 1:17-cv-02591 (D.D.C. filed Dec. 4, 2017); Wilderness Soc'y v. Trump, No. 1:17-cv-02587 (D.D.C. filed Dec. 4, 2017).

100. *See* Hannah Duus, *Of Monumental Importance: Coalitions Amass to Defend and Oppose Obama's New Monument Designations*, GEO. ENVTL. L. REV. ONLINE (2017), https://gelr.org/2017/01/27/of-monumental-importance-coalitions-amass-to-defend-and-oppose-obamas-new-monument-designations [https://perma.cc/XLQ5-ALVE] (stating that ranchers and conservative politicians were some of those most against Obama's monument designations); Thomas Gerwick, *Federal Lands Under the Trump Administration*, 94 DENV. L. REV. ONLINE (2017), http://www.denverlawreview.org/dlr-onlinearticle/2017/2/17/federal-lands-under-the-trump-administration.html [https://perma.cc/SUW6-JBN4] (including the energy industry and people living near national parks among those supporting Trump's plans to open up national parks for further development).

significant, but the President could truthfully say that the namesake geological formations known as the Bear Ears, Grand Staircase, and Escalante Canyons remained in revised monuments that, especially by east coast standards, still encompassed vast amounts of land.[101] Perhaps more importantly for those who want to see Trump's proclamations upheld in court, the historical and legal support for a boundary modification is much stronger than that for a total revocation.

Trump's proclamations treated the Antiquities Act provision mandating that the parcels of land around national monuments "shall be confined to the smallest area compatible with proper care and management of the objects to be protected" as authorizing an ongoing duty, rather than just serving as a guideline for the initial declaration.[102] Under this theory, new information or simply a later president's differing view about the value of the protected objects or the adequacy of existing statutory protections can serve as reasons to modify monument boundaries. Thus, in his proclamation that reduced the Grand Staircase-Escalante National Monument by almost 40%, Trump stated,

> Especially in light of the research conducted since designation, I find that the current boundaries of the Grand Staircase-Escalante National Monument established by Proclamation 6920 are greater than the smallest area compatible with the protection of the objects for which lands were reserved and, therefore, that the boundaries of the monument should be reduced . . . .[103]

Regarding the Bears Ears National Monument, President Trump struck a similar chord before reducing its size to 15% of what it was before:

> Given the nature of the objects identified on the lands reserved by Proclamation 9558, the lack of a threat of damage or destruction to many of those objects, and the protection for those objects already provided by existing law and governing land-use plans, I find that the area of Federal land reserved in

101. The size of the modified monuments "are still on par in size with Utah's famed national parks." Brian Maffly, *What's In, What's Out of Utah's New Monuments*, SALT LAKE TRIB. (Dec. 4, 2017), https://www.sltrib.com/news/environment/2017/12/04/trump-leaves-some-places-in-new-monuments-but-strips-out-cedar-mesa [https://perma.cc/95S4-CNTA].

102. 54 U.S.C. § 320301(b).

103. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

> the Bears Ears National Monument established by Proclamation 9558 is not confined to the smallest area compatible with the proper care and management of those objects. The important objects of scientific or historic interest can instead be protected by a smaller and more appropriate reservation of 2 areas . . . . Revising the boundaries to cover these 2 areas will ensure that, in accordance with the Antiquities Act, it is no larger than necessary for the proper care and management of the object to be protected within the monument.[104]

As Secretary Zinke took pains to point out in his final report to the President, reducing the size of a national monument was not without precedent:

> [The Antiquities Act] has also been used at least 18 times by Presidents to reduce the size of 16 national monuments, including 3 reductions of the Mount Olympus National Monument by Presidents Taft, Wilson, and Coolidge that cumulatively reduced the size of the 639,200-acre Monument by a total of approximately 314,080 acres, and a reduction of the Navajo National Monument by President Taft from its original 360 acres to 40 acres.[105]

As Zinke implies, the most historically analogous past reduction was President Wilson's large-scale boundary change at the Mount Olympus National Monument.[106] The reductions by Presidents Taft and Coolidge that Zinke notes were made to resolve issues with homesteaders and together totaled less than 1,000 acres.[107] However, President Wilson's 313,280-acre reduction, which led to a massive timber harvest, was not without controversy. Horace Albright, at the time a close aide to the National Park Service Director Stephen Mather whom he would eventually succeed, later remembered, "Someone called it 'the rape of Olympus.'"[108] While Park Service leaders might have grumbled, there was no lawsuit. President Wilson's proclamation was short and to the

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104. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

105. Zinke Final Monuments Report, *supra* note 82, at 4.

106. *See id.*

107. *Appendix A: A Chronology of the Public Domain*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/online_books/olym/hrs/appa.htm [https://perma.cc/M3BR-N5LK] (describing monument reductions by Presidents Taft and Coolidge to preserve the claims of individual homesteaders).

108. HORACE M. ALBRIGHT & MARIAN ALBRIGHT SCHENCK, CREATING THE NATIONAL PARK SERVICE: THE MISSING YEARS 232 (1999).

point, offering no elaborate justification beyond a simple citation to the statute.[109]

President Wilson's brief proclamation was not outside the norms of the era. President Taft was the first to make a major reduction to the size of a national monument. In 1911, President Taft proclaimed a 42% reduction to the Petrified Forest, a national monument that had been established by President Theodore Roosevelt just months after the Antiquities Act was passed.[110] The heart of President Taft's official explanation was as follows:

> WHEREAS, The Petrified Forest National Monument, Arizona, created by proclamation dated December 8, 1906, has been found, through a careful geological survey of its deposits of mineralized forest remains, to reserve a much larger area of land than is necessary to protect the objects for which the Monument was created, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments . . .[111]

The President simply concluded that the monument was "larger . . . than [was] necessary.". The "requirements of the act" to which the President referred were undoubtedly the statutory direction to limit the size of the reserved area to the "smallest area compatible with proper care and management of the objects to be protected."[112] In short, President Taft offered essentially the same rationale for the first reduction of a monument that President Trump has offered for the most recent. President Taft's precedent-setting diminishment was followed by reductions from Woodrow Wilson, Calvin Coolidge, Franklin Delano Roosevelt, Dwight Eisenhower, and John F. Kennedy.[113]

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109. Proclamation No. 1293, 39 Stat. 1726 (May 24, 1915).
110. Proclamation No. 1167, 37 Stat. 1716 (July 31, 1911).
111. *Id.*
112. 54 U.S.C. § 320301(b).
113. *See Antiquities Act 1906–2006: Maps, Facts, & Figures*, NAT. PARK SERV., https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm [https://perma.cc/9EBC-PEB9] (showing that President Wilson and President Coolidge both reduced the size of Mount Olympus; President Roosevelt reduced the size of the Grand Canyon, Craters of the Moon, Wupatki, and White Sands; President Eisenhower reduced the size of Colorado, Hovenweep, Glacier Bay, Arches, Great Sand Dunes, and Black Canyon of the Gunnison; and President Kennedy reduced the size of the Natural Bridges and Bandelier).

In the most recent reduction, President Kennedy sliced a nearly 3,925-acre piece out of New Mexico's Bandelier National Monument in 1963.[114] The President's explanation was based on an assessment of the archeological value of the area and succinctly stated:

> *Whereas*, it appears that it would be in the public interest to exclude from the detached Otowi section of the monument approximately 3,925 acres of land containing limited archeological values which have been fully researched and are not needed to complete the interpretive story of the Bandelier National Monument . . . .[115]

Similar to President Taft, President Kennedy simply made conclusory statements about the value of the previously protected objects and declared the land "not needed."[116]

None of the boundary modifications from Presidents Taft to Kennedy were ever challenged in court. Thus, from a legal perspective, the recent lawsuits against President Trump present a question of first impression but address a practice that extends back over a century. To avoid that problematic history, the current plaintiffs are, to varying degrees, seeking to recast Trump's recent action as a revocation rather than a modification. One group of plaintiffs is led by the Native American group Utah Dine Bikeyah and includes other interests from the historical to the corporate.[117] Their complaint repeatedly refers to Trump's Bears Ears proclamation as the "Revocation Proclamation."[118] Another group of exclusively Native American tribal nations says the following in the first paragraph of its complaint challenging the Bears Ears modification:

> [T]he President was plainly aware that he lacked the authority to revoke a monument and is thus transparently attempting to evade that strict limitation by purporting to reduce it but, as described herein, the President's action must be viewed as a

114. Proclamation No. 3539, 28 Fed. Reg. 5,407 (May 27, 1963). In the same proclamation, Kennedy also added 2,882 acres to another part of the monument. *Id.*

115. *Id.*

116. *Id.*

117. Utah Dine Bikeyah v. Trump, No. 1:17-CV-02605 (D.D.C. filed Dec. 6, 2017).

118. *See* Complaint for Declaratory and Injunctive Relief at 2, *Utah Dine Bikeyah*, No. 1:17-CV-02605.

> revocation, particularly with respect to all objects not included in the two "new" monuments.[119]

Yet another lawsuit, this one focused on the Grand Staircase-Escalante and filed by a group of environmental groups led by The Wilderness Society, alleges that "the Trump Proclamation revoking monument status from nearly half of the Grand Staircase-Escalante National Monument exceeds the scope of the President's authority, is *ultra vires* and unlawful."[120] All of these plaintiffs clearly prefer the language of revocation over modification, and for good reason—because while no court has ever rejected a proposed revocation, an attorney general has.

B. 1938 Attorney General Opinion Opposed Revocation but Supported Modification

While the President's power to revoke a national monument has never been the subject of a judicial decision, it is a question that an Attorney General of the United States has answered. In 1938, President Franklin Roosevelt's Administration considered abolishing the Castle Pinckney National Monument, a military fort located on a small South Carolina island that had been proclaimed a monument some fourteen years before by President Calvin Coolidge.[121] The fort faced restoration costs that did not seem proportionate to its limited historical value.[122] Could the President make this decision unilaterally? In a formal opinion of the Attorney General made in response to a draft

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119. Complaint for Injunctive and Declaratory Relief at 1, Hopi Tribe v. Trump, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017).

120. Complaint for Injunctive and Declaratory Relief at 51, Wilderness Soc'y v. Trump, No. 1:17-cv-02587 (D.D.C. filed Dec. 4, 2017).

121. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938). The Attorney General's opinion explains:

> [T]he Bureau of the Budget forwarded for my consideration a proposed proclamation by the Acting Secretary of the Interior abolishing the Castle Pinckney National Monument, at Clarleston [sic], S.C., and transferring the land included in the monument to the control and jurisdiction of the Secretary of War. . . . The Castle Pinckney National Monument was established by the President by proclamation of October 15, 1924 . . . .

Id. at 185–86.

122. *Id.* at 186. The opinion continues:

> It is stated that the old fort located on the land, for the protection of which the monument was established, is badly in need of repair, that the public has not manifested itself any great interest in it as an object of historical importance, and that restoration of the fort for future preservation would entail an unjustifiable expense.

Id.

revocation proclamation, the Justice Department said that the President could not.[123]

Attorney General Homer Cummings noted that because the statute itself "does not in terms authorize the President to abolish national monuments," any such authority could only exist "by implication."[124] Looking back to previous opinions addressing other land reservation statutes, Cummings noted that Attorney General Bates had, in 1862, taken a very limited view of the power delegated to the President by Congress under the Property Clause:

> Attorney General [Bates] expressed the view that the reservation made by the President under the discretion vested in him by the statute was in effect a reservation by the Congress itself, and that the President thereafter was without power to revoke or rescind the reservation, and so return the land to the public domain . . . .[125]

Cummings then quoted at length from the 1862 opinion by Attorney General Bates, an opinion that Cummings noted had been cited with approval on two other occasions.[126] Bates had concluded that the power Congress specifically granted the President to withdraw land for a military installation could work in only one direction and did not bring with it an implied revocation power.[127] Bates did so based on the following general principle:

> A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.[128]

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123. *Id.* at 189 ("For the reasons stated above, I am of the opinion that the President is without authority to issue the proposed proclamation.").

124. *Id.* at 186.

125. *Id.* at 187.

126. *Id.* at 187–88 (quoting Rock Island Military Reservation, 10 Op. Att'y Gen. 359 (Nov. 8, 1862)); *see also* Transfer of National Monuments to National Park Service in the Department of the Interior, 36 Op. Att'y Gen. 75, 79 (July 8, 1929); Military Reservation at Fort Fetterman, 17 Op. Att'y Gen. 168 (July 20, 1881).

127. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 187–88 (1938)

128. *Id.* at 187 (quoting Rock Island Military Reservation, 10 Op. Att'y Gen. 359

In short, Bates read the congressional grant of power to the President narrowly. Cummings applied the same logic to the Antiquities Act and concluded that "the President is without authority to issue the proposed [revocation] proclamation."[129] There was no express revocation provision in the Antiquities Act and Attorney General Cummings refused to imply one. President Franklin Roosevelt followed the guidance of his Attorney General and did not issue the revocation proclamation.[130] Congress eventually removed Castle Pinckney from the national monument system through legislation enacted in 1956.[131]

Arguably, the basic logic of the Cummings opinion—namely that the President can exercise only the duties Congress has specifically delegated—could also apply to more than just revocations. If the Antiquities Act gives the President only the ability to "declare" monuments,[132] then how could presidents ever make even the slightest modification to previously established boundaries?

Cummings, however, did not forbid any changes, and he found the basis for monument modifications in the same provision on which President Trump would later rely. The 1938 opinion states:

> While the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments 'in all cases shall be confined to the smallest area comptible [sic] with the proper care and management of the objects to be protected,' it does not follow from his power so to confine that area that he has the power to abolish a monument entirely.[133]

President Roosevelt would later make a sizable reduction to the Grand Canyon National Monument of some 71,854 acres in 1940.[134]

(Nov. 8, 1862)).

129. *Id.* at 189.

130. *See Antiquities Act 1906–2006: Maps, Facts, & Figures*, NAT. PARK SERV., https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm [https://perma.cc/9BTJ-Q2XW].

131. Act of Mar. 29, 1956, Pub. L. No. 84-447, 70 Stat. 61.

132. 54 U.S.C. § 320301(a).

133. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

134. *See* NAT. PARK SERV., *supra* note 130.

By stopping short of full revocation and resting his reductions on the "smallest area" provision in the Antiquities Act,[135] President Trump has turned the 1938 Attorney General opinion from a legal obstacle into an asset. Such opinions are, of course, not binding on the courts, and the Cummings opinion could potentially be overruled by a subsequent determination from the Department of Justice. Currently, however, the 1938 opinion represents the most authoritative governmental decision addressing the extent of post-declaration presidential power under the Antiquities Act.

C. Divergent Department of the Interior Opinions

The Department of the Interior's top legal counsel, the Solicitor, and other high-ranking officials have also opined on the Antiquities Act. These documents demonstrate a range of views on the post-declaration powers granted under the statute. The last opinion in the series, however, firmly holds that the President may reduce the boundaries of monuments and offers a justification that is consistent with President Trump's December 2017 proclamations.[136]

Interior's inquiry into the topic began in 1915 when Solicitor Preston West authorized President Wilson's reduction of the Mt. Olympus National Monument.[137] Solicitor West noted, but chose not to follow, the reasoning of Attorney General Bates, logic that would later be relied upon in 1938 when Attorney General Cummings addressed the distinct question of revocation.[138] Instead, Solicitor West found an implied power to modify prior proclamations, relying partially on an 1855 district court case that Bates had distinguished and discounted, *United States v.*

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135. 54 U.S.C. § 320301(b).

136. *See* U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of July 21, 1947.

137. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915.

138. *Id.* at 3–4. Solicitor West reasoned:

> It is true that in the case of the Rock Island Military Reservation, Attorney-General Bates rendered an opinion (10 Op. Atty. Genl., 359), that the President had no power to restore to the public domain lands previously reserved for military purposes in the absence of specific authority to that effect from Congress. . . . This position is no longer tenable in view of the recent decision of the Supreme Court of the United States in United States v. The Midwest Oil Company et al, date February 23, 1915.

Id. For a further discussion of *Midwest Oil*, see *infra* notes 148–49 and accompanying text.

Railroad Bridge Company,[139] and a subsequent opinion of an Assistant Attorney General.[140] Solicitor West did not directly address the question of revocations, but his logic would lead to such actions being authorized. No mention was made of the "smallest area" provision of the Antiquities Act that Attorney General Cummings would later use to justify modifications.[141]

Next, in 1924, the First Assistant Secretary of the Interior reversed course and refused a request from the Director of the National Park Service to pursue the reduction of a monument.[142] The letter essentially espoused a one-way ratchet approach that would allow the President to proclaim and expand boundaries but required congressional action for any diminishments.[143] No prior legal authorities were discussed.

A 1932 opinion from Solicitor E.C. Finney, co-signed by Assistant Secretary John H. Edwards, addressed the ability of a proclamation to create a monument with special stipulations.[144] Specifically, could the President continue to allow the mining laws to operate in a new monument, Death Valley, that he was considering proclaiming?[145] The Solicitor and Assistant Secretary advised that he could not and that such an anomalous use so out of character for a national monument would require legislation.[146] No case law or other opinions were cited.

By 1935, questions about Mount Olympus were again facing the Solicitor. Were the proclamations from Presidents Taft, Wilson, and Coolidge that reduced the size of the monument

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139. 27 F. Cas. 686, 690 (C.C.N.D. Ill. 1855).

140. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915, at 1–3 (following the opinion of Assistant Attorney-General Shields and the court in *Railroad Bridge*).

141. *See generally id.*

142. U.S. Dep't of the Interior, First Assistant Sec'y , Opinion Letter (June 3, 1924).

143. *See id.*

144. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of May 16, 1932.

145. *Id.* at 1–2. The opinion quoted the memorandum from the Acting Director of the National Park Service, which inquired

> whether special legislation for the establishment of [the Death Valley National Monument] would be necessary or whether the President may, under the authority of the Act of June 8, 1906, proclaim the area a national monument and by express provision in the proclamation continue the mining laws in the monument area[.]

Id.

146. *Id.* at 6–7 ("I am of the opinion that the establishment of the national monument as proposed with special provisions for the operation of the mining and mineral leasing laws should be accomplished by special legislation designed to meet the peculiar conditions prevailing within the area sought to be reserved.").

valid?[147] Solicitor Nathan Margold noted that seemingly contradictory guidance had been issued by his predecessors after the original 1915 Solicitor's Opinion authorizing the reduction.[148] He also acknowledged that Congress's lack of clarity on the issue in the Antiquities Act itself exacerbated the confusion.[149] Ultimately, Solicitor Margold opined that the reductions were authorized.[150] He relied in part on the Supreme Court's ruling in *United States v. Midwest Oil Company*[151] wherein the Court found implied land-management powers in light of a pattern of practice by the Executive Branch and the associated acquiescence of Congress.[152] The Solicitor determined that the practice here of reducing monument sizes, as seen in eight proclamations between 1909 and 1929, were similarly validated in light of Congress continuing to appropriate funds for the management of the diminished monuments.[153]

Solicitor Margold also noted an alternative basis from which the power to reduce the size of national monuments could be implied, namely the "smallest area" provision within the Antiquities Act itself.[154] Looking back at the record surrounding the 1915 reduction, Margold found that the decision was actually made in accordance with the "smallest area" theory of reduction.[155] This "smallest area" basis would prove to be

147. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, at 1.

148. *Id.* at 1–2 (contrasting the Solicitor's Opinion of April 20, 1915 with the Opinion Letter June 3, 1924 and the Solicitor's Opinion of May 16, 1932).

149. *Id.* at 3 ("Congress has neither negatived the existence of the implied power of the President to reduce the area of Executive order reservations, nor provided specific means for accomplishing this.").

150. *Id.* at 8.

151. 236 U.S. 459 (1915).

152. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, at 3–4 (citing *Midwest Oil*, 236 U.S. 459 (1915)). The President's power to withdraw lands from the public domain under the Congressional acquiescence doctrine put forward in the case was invalidated by Section 704(a) of the Federal Land Policy and Management Act of 1976. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976) (codified at 43 U.S.C. § 704(a)). FLPMA, as will be discussed more below, is an important statute that rewrote the way much of public land management is conducted, but it did not repeal the Antiquities Act. *Id.* §§ 1701–82.

153. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, at 4–5.

154. *Id.* at 6.

155. *Id.* As Solicitor Margold explains:

> The record shows that Mount Olympus National Monument was set apart as an area having peculiar scientific interest because of its numerous glaciers and because it was the summer range and breeding ground of Olympus elk *cervus roosevelti*. The record shows that it was the opinion of this Department and the

consistent with Attorney General Cummings opinion three years later, and the theory would then be reiterated again at Interior a dozen years after Solicitor Margold's 1935 opinion.

In 1947, the potential draining of oil-and-gas resources from the controversial Jackson Hole National Monument prompted another Solicitor's opinion.[156] Asked whether "the area of the monument may be reduced by Executive action," Solicitor Mastin White responded affirmatively and without equivocation by referring to "smallest area" provision and the prior opinions of Solicitor Margold and Attorney General Cummings:

> The answer to the first question may be found in an opinion of Solicitor Margold, dated January 30, 1935 (M-27657), in which he held that the President was authorized to reduce the area of a national monument. This authority has its source in the provision of the statute authorizing the establishment of national monuments, which states that their limits "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U. S. C. sec. 431. The President has in fact exercised this authority in a number of instances. See 39 Op. Atty. Gen. 185, 188.[157]

Thus, the two most recent opinions from the Office of the Solicitor, as well as the most recent opinion of the Attorney General, support the later reduction of boundaries based on the "smallest area" rationale.

Overall, the fluctuating opinions from the Department of the Interior demonstrate that high-level government lawyers have, at times, espoused a narrow one-way ratchet reading and, at other times, have found implied modification powers under multiple theories. This shows that reasonable legal minds have disagreed in the past and suggests that the court cases of today may face an

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> Department of Agriculture in recommending the area reduction in question that the area set apart was larger than necessary for the protection of the summer range (report of H. S. Graves, 1915) and existing maps indicate that the glaciers are all well within the present area of the monument (Olympic National Forest Map, 1930). The action of the President, on the recommendation of this Department and the Department of Agriculture, was therefore only made in accordance with the requirement of the act that the area set apart should be confined to the smallest area compatible with the proper care of the objects sought to be protected.

Id.

156. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of July 21, 1947.

157. *Id.* at 1.

uncertain future. Despite that uncertainty, the fact that the "smallest area" theory upon which President Trump's proclamations now rely is supported by the most recent, if decades old, opinions from both the Department of Justice and the Department of the Interior should give the current Administration some justifiable hope as matters head to the courts.

D. Academic Opposition to Modification

President Trump's decision to modify, rather than rescind, the Bears Ears and Grand Staircase-Escalante monuments greatly improved his chances of courtroom success. History, including the 1938 Attorney General opinion,[158] became an ally rather than an obstacle. As previously noted, litigants are now trying to frame his actions as revocations, but this tactic may well be seen as being too cute by half.[159] Nevertheless, in instances where President Trump has completely removed monument status from previously named "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," as opposed to merely reducing the amount of protected land surrounding such objects, the argument could receive some consideration.[160] Most likely, though, President Trump's boundary changes, sizable though they may be, will be judged as modifications rather than revocations.[161] Given the long history of monument modifications, this likelihood presents a challenge for Trump's opponents.

A group of 121 law professors have taken up the challenge and declared that the President does not have the power to

158. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938).

159. *See infra* notes 117–20 and accompanying text.

160. 54 U.S.C. § 320301(a). For example, while the modified Bears Ears monument still includes the geologic formations known as the Bears Ears, other objects that were named in President Obama's proclamation, such as the Moon House Ruin on Cedar Mesa and the towering sandstone spires in the Valley of the Gods, are no longer included within the boundaries of the monument. *Compare* Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017), *with* Proclamation No. 9558, 82 Fed. Reg. 1,139 (Dec. 28, 2016). *See also* Maffly, *supra* note 101.

161. Removing named objects would not be without historic precedents. In the last reduction proclamation prior to President Trump's, President Kennedy removed monument status from the entirety of a parcel separated from the rest of the Bandelier National Monument because he judged the archaeological value of the objects there were "not needed to complete the interpretive story of the Bandelier National Monument." Proclamation No. 3539, 28 Fed. Reg. 5,407 (May 27, 1963).

diminish the boundaries of a national monument.[162] They rely (1) on comparisons with other land management statutes of the era, and (2) upon an oddly worded provision in the 1976 Federal Land Management and Policy Act (FLPMA), a major statute which reorganized the stewardship of public lands.[163]

1. Comparisons with Other Statutes

In their comment letter to the Secretaries of Commerce and the Interior, the professors summarize their first point as follows:

> The Act vests the President with the power to create national monuments but does not authorize subsequent modification. Moreover, other contemporaneous statutes, such as the Pickett Act of 1910 and the Forest Service Organic Act of 1897, include provisions authorizing modification of certain withdrawals of federal lands. The contrast between the broader authority expressly delegated in these statutes—to withdraw or reserve land, and then subsequently, to modify or abolish such reservations or withdrawals—and the lesser authority delegated in the Antiquities Act underscores that Congress intended to give the President the power only to create a monument.[164]

Specifically, the 1910 Pickett Act gave the President the broad power to "temporarily withdraw from settlement" any public lands needed for water projects and other public purposes and stated that such reservations should remain in force "until revoked by him or an act of Congress."[165]

The other highlighted statute, the Forest Service Organic Act of 1897, closed with the following provision:

> The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.[166]

Earlier in the same statute, Congress included another relevant

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162. 121 Law Professors Letter, *supra* note 91, at 1 ("Most fundamentally, EO 13792 and the Bears Ears Interim Report imply that the President has the power to abolish or diminish a national monument after it has been established by a public proclamation that properly invokes authority under the Antiquities Act. This is mistaken.").

163. *Id.* at 2.

164. *Id.*

165. Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976).

166. Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 475 (2006)).

provision specifically referring to forest reservations made under an already existing statute:

> [T]o remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests[.][167]

That prior statute was known as the Forest Reserve Act of 1891.[168]

The professors argue that because Congress demonstrated the ability to expressly specify revocation and modification powers both before and after passing the Antiquities Act, then one can read the exclusion of such powers in the Antiquities Act as intentional.[169] That is a reasonable argument and could prove persuasive to a court.[170] Yet, one should not try to build an iron rule here because, as common sense and *Sutherlands Statutory Construction* counsel, "it is unrealistic to assume that a legislature has in mind all prior acts relating to the same subject whenever it enacts a new statute."[171]

The level of similarity and the particular circumstances surrounding each statute also matter. The Pickett Act, passed four years after the Antiquities Act, was, by its own terms, dealing with *temporary* withdrawals, perhaps prompting the drafters to clarify just how these withdrawals were to come to a close.[172] Whether or not individual monuments could be revoked under special circumstances, the broad class of national monuments

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167. *Id.*

168. Forest Reserve Act of 1891, 26 Stat. 1095 (1891).

169. *See* 121 Law Professors Letter, *supra* note 91, at 2. The professors contend:

> The contrast between the broader authority expressly delegated in these statutes—to withdraw or reserve land, and then subsequently, to modify or abolish such reservations or withdrawals—and the lesser authority delegated in the Antiquities Act underscores that Congress intended to give the President the power only to create the monument.

Id.

170. *See* 2B Sutherland Statutory Construction § 51:2 (Norman J. Singer & Shambie Singer eds., 7th ed. 2017) ("[W]here a legislature inserts a provision in only one of two statutes that deal with a closely related subject, courts construe the omission as deliberate rather than inadvertent."). Additionally, there were at least two other land withdrawal statutes of the era that also included specific revocation authorization, strengthening the argument further. *See* Carey Act of 1894, ch. 301, § 4, 28 Stat. 422 (1894) (codified at 43 U.S.C. § 641 (1994)); Reclamation Act of 1902, 32 Stat. 388 (1902) (codified at 43 U.S.C. § 416).

171. 2B Sutherland Statutory Construction § 51:1.

172. *See* Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976).

was certainly designed to provide permanent, not merely short-term, protections to historic artifacts and other covered objects.[173]

The more relevant 1897 provisions actually clarified language from 1891 that was quite similar to the later Antiquities Act. The Forest Reserve Act had stated that "the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."[174] The claim that in 1891 Congress intended this power to "declare" to serve as a one-way authorization does not, however, mesh well with Congress's explanation six years later. In 1897, Congress clearly stated that the specific authorizations to "revoke, modify, or suspend" were intended merely "to remove any doubt which may exist pertaining to the authority of the President."[175] In normal speech, when one seeks to "remove any doubt" and states *x*, the implication is that *x* was always intended.

Additionally, Congress was reacting to President Grover Cleveland's creation of thirteen massive forest reserves on February 22, 1897.[176] The new legislation placed more restrictions on the President's ability to create forest reserves in the future, temporarily suspended what were by then known as the "Washington's Birthday Reserves," and, as just shown, made doubly sure that future presidents knew they could unilaterally reduce the size of forest reserve that a predecessor had proclaimed.[177]

Arguably, concerns over the need to reduce reservation size were not as pressing during the debate over the Antiquities Act, primarily because those reserves were expected to be quite small. This could have lessened the imperative to specifically state that the President could modify them, even if that was the unstated intent and expectation. Certainly, those who remembered, what to them seemed, the past abuses under the Forest Reserves Act

173. In practice, the Pickett Act withdrawals were often for purposes that appeared rather permanent, but Congress nevertheless included the word "temporary" in the statute. *Id.*

174. Forest Reserve Act of 1891, 26 Stat. 1095 (1891).

175. Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 475 (2006)).

176. *See* GERALD W. WILLIAMS, THE USDA FOREST SERVICE—THE FIRST CENTURY 9–10 (2005) ("The furor of opposition to these forest reserves was unprecedented, and the outcry resulted in Congress passing certain amendments to the 1897 Sundry Civil Appropriations bill.").

177. *Id.*

were not seeking to protect these new reserves from future reductions. Congressman John Stephens of Texas specifically raised his concern about the "forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up."[178] He was assured by Congressman John Lacey, the chief sponsor in the House, that this would "[c]ertainly not" be the case because "[t]he bill provides that it shall be the smallest area" necessary.[179]

While that prophecy proved incorrect, the "smallest area" clause would at least later be seen by the Attorney General and the Solicitor as authorizing after-the-fact reductions. If it does not, as the professors argue, then the "smallest area" clause is a virtual nullity, serving as a mere suggestion from Congress that can be easily ignored—as indeed it often has been. It would, under this view, provide neither a basis for third parties to dispute the size of a president's initial proclamation, nor the means for a later president to disagree and make reductions.[180]

If Congress has ever been concerned that a president was making unauthorized reductions to previously proclaimed monuments, it has given no clear public indication. Within a decade of the enactment of the Antiquities Act, there would be reductions both small and large, but Congress made no changes to the law to prohibit post-proclamation reductions, nor does it appear to have even considered such a bill. Some congressmen, perhaps flummoxed by the expansive use that they were assured would not happen, likely welcomed such reductions. Neither did the Supreme Court demonstrate any concerns in 2005 in *Alaska v. United States,* when it noted two modification proclamations affecting the Glacier Bay National Monument, Franklin Roosevelt's addition and Dwight Eisenhower's reduction.[181]

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178. 40 CONG. REC. 7,888 (1906); *see also* Squillace, *supra* note 15, at 484 n.59 (quoting same).

179. *Id.* While the Republican Lacey had throughout his career championed conservation legislation, it does not appear that he was here seeking to be deceptive in his response to Stephens. Lacey previously advised the Department of the Interior to modify its proposal to specify "small reservations, not exceeding 320 acres each," but eventually settled on the "smallest area" provision as sufficient. Squillace, *supra* note 15, at 481–83.

180. In the professors' view, no modifications are allowed unless a future President believes that the initial assessment of the "smallest area" was too small and seeks to *expand* the monument's boundaries. *See* 121 Law Professors Letter, *supra* note 91, at 2.

181. 545 U.S. 75, 101–02 (2005).

Nevertheless, the differences in statutory phrasing from other land laws of the era are certainly relevant, as Attorney General Cummings noted in 1938.[182] Cummings opined that the specific clauses "distinguished" those other statutes from the general rule against implying a revocation power, a rule Cummings applied to the Antiquities Act when he denied the proposed revocation proclamation.[183] With that, the professors agree.[184] They, however, go farther and assert that modifications are not allowed either.[185] Cummings, instead, chronicled how

> the President from time to time has diminished the area of national monuments . . . under that part of the act which provides that the limits of the monuments "in all cases shall be confined to the smallest area comp[a]tible with the proper care and management of the objects to be protected."[186]

The professors admit that Cummings "noted" previous diminishments but claim that "the opinion did not analyze the legality of such prior actions," which seems a disingenuous reading of the text.[187] The Attorney General's analysis was brief, but he clearly pointed to the relevant provision in the statute in an affirming manner and concluded "it does not follow from his power so to confine that area that he has the power to abolish a monument entirely."[188] That characterization of "his power so to confine" does not read like a mere neutral notation of past practices but, rather, a clear conclusion that such a power legally exists. The Department of the Interior Solicitor would also cite to the Attorney General's opinion on this point in 1947.[189] That 1947 opinion also cited a 1935 Solicitor's opinion that had justified monument modifications on the "smallest area" provision just as the Attorney General would later do in 1938.[190]

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182. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

183. *Id.*

184. *See* 121 Law Professors Letter, supra note 91, at 2.

185. *Id.*

186. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

187. 121 Law Professors Letter, *supra* note 91, at 3.

188. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

189. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of July 21, 1947, at 1 (citing 39 Op. Att'y Gen. 185, 188 (1938)).

190. *Id.* (citing U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of Jan. 30, 1935).

In an article that is the lead attachment to the professors' letter, Professor Squillace and his co-authors are notably mute on these the most recent opinions from the Solicitor's Office.[191] They note only the *Midwest Oil*-based justification for modifications noted in the 1935 Solicitor's opinion, a theory that was invalidated by FLPMA in 1976.[192] Squillace and company completely ignore the alternative "smallest area" theory also offered in 1935, a theory later cited by Solicitor White as the *sole* justification for monument modifications in 1947.[193]

Such tap-dancing around uncomfortable executive branch authority is just the warm-up to the main event. The professors next present a statutory argument that relies heavily on legislative history to redefine the actual legislated text.

2. Oddly Drafted FLPMA Provision

A FLPMA provision forms the core of the professors' argument against presidential monument modifications. The professors say this in their public comment period letter:

> Congress confirmed this [no modifications] understanding of the Antiquities Act when it enacted the Federal Land Policy and Management Act (FLPMA) in 1976, which included provisions governing modification of withdrawals of federal lands. Those provisions indicate that the Executive Branch may not "modify or revoke any withdrawal creating national monuments." And the legislative history of FLPMA demonstrates that Congress understood itself to have "specifically reserve[d] to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."[194]

The provision in question is section 204(j) of FLPMA,[195] a clause that some in Congress may well have intended to do just what the professors suggest, but the words as actually enacted into law were far less clear.

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191. *See* 121 Law Professors Letter, *supra* note 91, at 15–31 (including in the appendix Squillace et al., *supra* note 90).

192. Nat'l Mining Ass'n v. Zinke, 877 F.3d 845, 856 (9th Cir. 2017) ("FLPMA eliminates the implied executive branch withdrawal authority recognized in *Midwest Oil*, and substitutes express, limited authority."); *see also* Squillace et al., *supra* note 90, at 59.

193. *See* U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of July 21, 1947, at 1. *See generally* Squillance et al., *supra* note 90.

194. 121 Law Professors Letter, *supra* note 91, at 2.

195. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 204(j), 90 Stat. 2743 (1976) (codified at 43 U.S.C. § 1714(j) (2002)).

FLPMA repealed a host of piecemeal statutes that had authorized land management previously, but it noticeably did not repeal the Antiquities Act. Nevertheless, FLPMA directed, "The Secretary shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act]."[196] A House committee report described this section as being designed to "specifically reserve to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."[197]

The complication is that the President, not the Secretary of the Interior, is the person to whom power is specifically delegated under the Antiquities Act. The professors, however, make a somewhat dubious attempt to couch the statute as binding the entire "Executive Branch," but clearly the Secretary of the Interior is only a small part of that branch and is not the same as the President.[198] The professors do acknowledge this textual distinction in a footnote and point the reader to Professor Squillace's lengthy apologia on why what he supposes to be a "drafting error" is ultimately irrelevant.[199] In short, the attitude is that it "does not really matter" what Congress wrote because we know what they meant.[200] To some lawyers and judges, though, the enacted words of the statute do still matter.

The designation of the President, as opposed to his or her Secretary of the Interior, is not a distinction without a difference. Indeed, the fact that Congress specifically gave the President this power to declare national monuments is crucial to keeping that decision beyond the reach of the National Environmental Policy Act (NEPA).[201] The exemption from the time-consuming process

196. *Id.*

197. H.R. Rep. No. 94-1163, at 9 (1976).

198. *See* 121 Law Professors Letter, *supra* note 91, at 2 ("Those provisions [of FLPMA] indicate that the Executive Branch may not 'modify or revoke any withdrawal creating national monuments.'").

199. *Id.* at 2 n.11; *see* Squillace et al., *supra* note 90, at 60, 64 n.37 ("The most plausible interpretation of the reference to the Secretary in the text is that there was a drafting error on the part of the Subcommittee in failing to update the reference . . . when it dropped the parallel language transferring monument designation authority from the President to the Secretary.").

200. Squillace et al., *supra* note 90, at 64 n.37.

201. *See* 40 C.F.R. § 1508.12 (2018) (defining the term "federal agency" as not including Congress, the judiciary, or the President); Tulare Cty. v. Bush, 306 F.3d 1138, 1143 (D.C. Cir. 2002) (finding that NEPA provides no cause of action against the President); Alaska v. Carter, 462 F. Supp. 1155, 1159–60 (D. Alaska 1978) (finding the President not subject to the environmental impact statement requirements of NEPA because he is not a federal agency).

of crafting an environmental impact statement (EIS) has allowed presidents to act quickly and without prior formal public notice, making possible end-of-term monuments and surprise proclamations like Carter's in Alaska and Clinton's at the Grand Canyon. Further, while it seems quite likely that some committee members intended FLPMA to prevent the President from modifying or revoking national monuments,[202] that language is not what Congress as a whole voted on and the President signed.[203] A differently drafted provision that specifically mentioned "the President" might have drawn more attention from the White House, possibly even a veto.

The legislative history that Squillace highlights also suggests that those focused on the issue in Congress felt they *needed* to make this change.[204] Arguably, there would be no need for such a provision if Congress firmly believed that the President did not have the power to modify or revoke monuments under the Antiquities Act as it then stood.[205]

While the legislative history is certainly not irrelevant and does present a basis upon which some judges might rule against President Trump, another important inquiry relates to the *post*-legislative history. If, in the end, "Congress understood itself to have 'specifically reserve[d] to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act'" as the professors assert, how then may we explain what came next?[206] President Jimmy Carter clearly believed that he still had the power to modify monuments because he did so in 1978, making two sizable enlargements of existing monuments amid his flurry of new declarations for Alaska.[207]

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202. *See* Squillace et al., *supra* note 90, at 61 ("[T]he Subcommittee on Public Lands drafted Section 204(j) in order to constrain executive branch discretion in the context of national monuments. The Subcommittee frequently discussed the issue during its detailed markup sessions in 1975 and early 1976 on its version of the bill that would eventually become FLPMA.").

203. *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701–82).

204. Squillace et al., *supra* note 90, at 63 n.36 (citing H.R. Rep. No. 94-1163, at 9 (May 15, 1976)).

205. On the other hand, Congress (regardless of any prior view about the President's power to modify or revoke existing monuments) might have simply wanted to clarify the matter in the process of creating a centralized land management statute.

206. 121 Law Professors Letter, *supra* note 91, at 2 (quoting H.R. Rep. No. 94-1163, at 9 (1976)).

207. Glacier Bay was expanded by 550,000 acres. Proclamation No. 4618, 3 C.F.R. 84

The political firestorm that ensued led to Congress largely removing Alaska from the reach of the Antiquities Act. Interestingly, Congress did not, as it could have, use this legislation as a means to correct any potential misperception about the presidential power to modify monuments, suggesting that Carter perceived his capacity to do so correctly. Later, Presidents Clinton and Obama would also modify existing monuments.[208]

In short, if FLPMA was truly meant to express a legislative intent that presidents no longer modify national monuments, then Congress has done a poor job of making its will known. The professors try to avoid this reality by implicitly defining "modification" to mean only "diminish" but not "enlarge."[209] Those familiar with the English language will likely find this odd.[210] The professors engage in verbal gymnastics,[211] and they

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(1978). Katmai was expanded by 1,370,000 acres. Proclamation No. 4619, 3 C.F.R. 86 (1978).

208. Lin, *supra* note 27, at 717 ("President Clinton wielded Antiquities Act authority aggressively. He designated more new monuments than any other president . . . and he expanded three others . . ."); Barnett, *supra* note 77 ("Obama more than quadrupled Papahanamokuakea's size, to 582,578 square miles, an area larger than all the national parks combined.").

209. *See* 121 Law Professors Letter, *supra* note 91, at 2 n.11 (detailing the law professors' understanding of congressional authority under FLPMA).

210. Modify is defined as "to change something such as a plan, opinion, law, or way of behavior slightly, usually to improve it or make it more acceptable." *Modify*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/dictionary/english/modify [https://perma.cc/6H3G-EY9C]. Changes to something can, of course, involve additions or subtractions.

211. The professors subtly perform their redefinition in the following sentences:

> [T]he Antiquities Act is a limited delegation: it gives the President authority only to identify and reserve a monument, not to diminish or abolish one.[8] Congress retained that power for itself.The plain text of the Antiquities Act makes this clear. The Act vests the President with the power to create national monuments but does not authorize subsequent modification.

121 Law Professors Letter, *supra* note 91, at 1–2. Footnote 8 then reads in full: "The President has authority to enlarge a national monument to protect additional objects of historic or scientific interest—and frequently this has occurred—by exercising the power delegated by the Antiquities Act." *Id.* at 2 n.8. No authority, except the witness of history is supplied. Of course, history also has witnessed numerous diminishments of monuments. Because the only delegated power, under their reading, is the power to declare monuments, then a national monument that has been expanded twice should actually be seen as three separate and independent, though overlapping, monuments. The conceptual absurdity of this theory—along with the fact that the relevant presidential proclamations have simply used the language of modification, diminishment or enlargement—may suggest why the professors left the matter rather cryptic. It is notable, though, that Professor Squillace did previously equate enlargements with modifications, writing in 2003, "After Franklin Roosevelt and until Jimmy Carter, presidents continued to expand and otherwise modify existing monuments, but new monuments slowed to a trickle." Squillace, *supra* note 15, at 499.

do so to support what they claim to be the "clear" meaning of the statutory text regarding modifications.[212]

Other opponents of the Trump diminishments have been more equivocal. The February 2017 Arnold & Porter Kaye Scholer memo, available through the House Democrats Natural Resources web page, was firm in its resolve that, as the title proclaims, "The President Has No Power to Unilaterally Abolish a National Monument Under the Antiquities Act of 1906."[213] Regarding modifications, however, these attorneys concluded that "[i]t is not clear whether such a change would be legally authorized."[214] The *New York Times*, not widely known as a mouthpiece for President Trump, summarized the matter this way: "Most legal scholars and historians agree that the Antiquities Act does not give the president the authority to revoke previous national monument designations, but a president can change the boundaries of a national monument."[215]

Civil servants who looked at the issue prior to the current Trump-induced controversies were generally supportive of modification powers. The Congressional Research Service (CRS) is a public entity within the Library of Congress that is tasked with providing nonpartisan information to all members of Congress on a wide range of topics.[216] Responding to a request triggered by President Clinton's monument proclamations, a CRS analyst examined the ability of the President to revoke or modify prior proclamations in 2000.[217] After examining the

212. *See* 121 Law Professors Letter, *supra* note 91, at 2 ("The plain text of the Antiquities Act makes this clear. The Act vests the President with the power to create national monuments but does not authorize subsequent modification."). Again, here "modification" is used in a peculiar manner to signify diminishments only.

213. Arnold & Porter February 2017 Memorandum, *supra* note 87.

214. *Id.* at 7 n.32. This footnote would later be removed in the May version and the tone of the memo was more in line with the professors' reliance on FLPMA and a new section was added subtitled "For the Same Reasons, No President May Unilaterally Materially Reduce the Size of a National Monument." Arnold & Porter May 2017 Revised Memorandum, *supra* note 87, at 15. Any uncertainty about modifications was reduced to the following: "It is unclear whether a President could make non-material adjustments to monument boundaries without congressional authorization." *Id.*

215. Tatiana Schlossberg, *What is the Antiquities Act and Why Does President Trump Want to Change It?*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/climate/antiquities-act-federal-lands-donald-trump.html [https://perma.cc/6JUE-J9HH].

216. *About CRS*, LIBR. OF CONG., https://www.loc.gov/crsinfo/about/ [https://perma.cc/2RLT-M2KK].

217. PAMELA BALDWIN, CONG. RES. SERV., REP. NO. RS20467, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT (Aug. 3, 2000).

relevant areas of dispute, including the 1938 Attorney General opinion and FLPMA, the analyst concluded, "That a President can modify a previous Presidentially-created monument seems clear."[218] (The opinion did not see the same clarity regarding revocation, however.)[219] An updated CRS report from 2016 is not quite as declarative but remains generally supportive of a modification power.[220]

Among academics, at least one of the 121 professors now making firm-sounding assertions was, when writing alone in a pre-Trumpian time, "uncertain" about the ability of the President to reduce the size of a monument.[221] Outside of that group, one commentator simply looked to the long history of practice and concluded that the President has the power to create, expand, and reduce monuments.[222] Another has theorized that diminishment powers could exist based on implied powers unrelated to the "smallest area" clause.[223] Yet

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218. *Id.* at 5.

219. *Id.* Baldwin writes:

> We have found no cases deciding the issue of the authority of a President to revoke a national monument. While in FLPMA Congress expressly limited the authority of the Secretary of the Interior to revoke monument withdrawals and reservations, that language arguably does not affect the President's authority under the 1906 Act, which FLPMA neither amended nor repealed. No President has ever revoked a previously established monument. That a President can modify a previous Presidentially-created monument seems clear. However, there is no language in the 1906 Act that expressly authorizes revocation; there is no instance of past practice in that regard, and there is an attorney general's opinion concluding that the President lacks that authority.

Id.

220. ALEXANDRA M. WYATT, CONG. RES. SERV., REP. NO. R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 5 (Nov. 14, 2016). The CRS writes of modification:

> [D]espite some potential ambiguity in the phrasing of the Antiquities Act, there is precedent for Presidents to reduce the size of national monuments by proclamation. Such actions are presumably based on the determination that the areas to be excluded represent the President's judgment as to "the smallest area compatible with the proper care and management of the objects to be protected." It remains undetermined whether removal of a high enough proportion of a monument's acreage could be viewed as effectively amounting to an abolishment of the monument.

Id. (citations omitted).

221. Lin, *supra* note 27, at 711–12 ("Once the President establishes a monument, he is without power to revoke or rescind the reservation, although it remains uncertain whether the President may reduce a monument in size.").

222. Peter H. Morris, *Monumental Seascape Modification Under the Antiquities Act*, 43 ENVTL. L. 173, 192 (2013) (providing numerous examples of presidents both expansively modifying and reducing the size of existing monuments).

223. James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 691 (2001). Rasband writes:

another surveyed the divergent views and was noncommittal, simply noting that "this discussion may continue."[224] A more recent analysis judged the existence of a modification power "unclear."[225]

Unclear seems a fair assessment. While the discussion has been merely theoretical for decades, [226] President Trump has now reinvigorated it through his concrete actions. By choosing to modify rather than revoke, he has chosen the most legally defensible action path. Nevertheless, that does not mean that the way is free of perils. The legislative history of FLPMA and the relative silence of the Antiquities Act regarding modification powers during an era when several other statutes were much more specific represent real legal landmines. In a case of first impression, every step is a gamble.

III. THE DISPUTED POWER TO REVOKE MONUMENTS

President Trump's December 2017 boundary modifications and Secretary Zinke's focus on the same in his recommendations signal the Administration's likely strategy going forward, but that in no way precludes the more extreme option of revocation. Indeed, eliminating several monuments completely is still favored by many in the West.[227] The legal strength or weakness of the revocation option could also be a factor in any future negotiations regarding potential legislative reforms. Thus, the

> [T]here would be a certain symmetry to affording the executive broader authority to diminish rather than revoke an existing monument. . . . [P]residents have traditionally had power to modify or revoke prior executive withdrawals that were accomplished pursuant to authority *implied* from congressional silence and acquiescence. . . . Reducing the acreage of landscape monuments would thus be akin to modifying a withdrawal based on implied executive authority rather than on a specific act of Congress.

Id. at 627–28.

224. Kelly Y. Fanizzo, *Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act*, 40 ENVTL. L. 765, 823 (2010).

225. Margherita, *supra* note 62, at 323.

226. For example, President George W. Bush chose to do nothing at all after exploring his options. *See Monument Designations Likely to Stand*, L.A. TIMES (Feb. 21, 2001), http://articles.latimes.com/2001/feb/21/news/mn-28240 [https://perma.cc/6AG7-PCZ9] ("As the White House and congressional Republican leaders explored ways to turn back the environmental rule-making, however, they concluded that it would be difficult, if not impossible, to undo many of the orders."); *see also* Lin, *supra* note 27, at 742–46 (discussing "Where the Antiquities Act Fits in the Democratic Picture").

227. *See supra* note 100 and accompanying text.

question of whether the President can completely revoke a previously declared monument remains relevant.

A. Yoo and Gaziano Advocate Revocation

Prior to Trump's December 2017 proclamations, conservative scholars John Yoo and Todd Gaziano were very critical of the 1938 Cummings opinion, while those with liberal ties generally lauded it.[228] Both camps, to be fair, paid more attention to the question of full revocation rather than modification.[229] Even so, one cannot help but wonder if their respective positions have changed since the President made his decision to modify monuments along the very lines laid out by Cummings. Setting that question aside, let us explore the arguments surrounding revocation as presented thus far.

Yoo and Gaziano have been persistent proponents for a revocation power under the Antiquities Act,[230] but they have sometimes let their rhetoric get ahead of their reasoning. For example, the duo contends that it is "simply unrealistic to pretend" that the Antiquities Act in its silence did anything other than create an implied power for a president to reverse his predecessors.[231] As discussed already, the Attorney General of the United States did more than just pretend; he put a contradictory opinion in writing.[232] That internal precedent has held for decades, and no president has since attempted to unilaterally rescind a monument.

This is not to say that there are no reasonable arguments on the side of Yoo, Gaziano, and others who advance a revocation power. There are. But the answer is far from the obvious conclusion they sometimes imply. Gaziano previously addressed

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228. *Compare* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 5 ("In all events, the 1938 attorney general opinion is poorly reasoned, and we think it is erroneous as a matter of law."), *with* Arnold & Porter February 2017 Memorandum, *supra* note 87, at 4 ("In 1938, President Franklin Roosevelt asked the Attorney General for a formal Legal Opinion as to whether the President could rescind former President Coolidge's designation . . . . After careful study, Attorney General Homer Cummings explained that the answer was 'no.'").

229. *See generally* Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94; Arnold & Porter February 2017 Memorandum, *supra* note 87.

230. *See* Gaziano & Yoo, *Last-Minute Land Grab*, *supra* note 8; Gaziano & Yoo, *Magical Legal Thinking*, *supra* note 93; Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94.

231. Gaziano & Yoo, *Magical Legal Thinking*, *supra* note 93.

232. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938).

President Clinton's controversial national monument proclamations in these very pages and was considerably more restrained in his assessment: "Though he may be able to modify or narrow the boundaries of an existing national monument," concluded Gaziano, "the President's authority to rescind a proclamation is less clear."[233]

Now, a seemingly more confident Gaziano and his partner Yoo declare that those who believe that a president cannot undo what a predecessor has done are engaged in "magical legal thinking."[234] They point to the "general principle" that "the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation."[235] In short, *if the act is silent, assume that a revocation power exists.* The analogies they raise to support this position are (1) the executive power to revoke regulations after being granted the power to make them initially, (2) the legislative power to repeal statutes through the same means as were used to create them, (3) the judicial power to overrule prior precedent, (4) the ability to repeal constitutional amendments through the same process that created them, (5) the President's ability to remove executive branch officers without Senate approval, and (6) the President's ability to unilaterally terminate treaties.[236]

B. The Best Case for Revocation: Analogy to Revoking Regulations

The strongest analogy in support of an implied revocation power is made to the vast regulatory powers that the Executive Branch exercises. Congress has often given the Executive Branch the power to create regulations.[237] Rarely, if ever, though, does a statute providing the power to *make* regulations include a specific power to *revoke* regulations.[238] Nevertheless, such a power is

233. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 300 (2000).

234. Gaziano & Yoo, *Magical Legal Thinking*, *supra* note 93.

235. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 7.

236. *Id.* at 7–9.

237. *See The Legislative Branch*, WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/1600/legislative-branch [https://perma.cc/HX9J-HF5V] ("Executive Branch agencies issue regulations with the full force of law, but these are only under the authority of laws enacted by Congress.").

238. *See, e.g.*, 42 U.S.C § 7601(a)(1) ("The [EPA] Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."); 43 U.S.C. § 1740 ("The Secretary [of the Interior], with respect to the public

regularly implied and an executive agency will simply remove regulations via the same process used to promulgate them.[239]

The Antiquities Act itself includes a provision authorizing the creation of regulations.[240] No regulations addressing monument creation or modification have yet been promulgated under that provision, but any argument that a future president could not modify or remove a predecessor's regulations would sound odd indeed. If a presumption of reversibility applies to part of the Antiquities Act (rulemaking), why should it not apply to another (monument-making)?

Here, one could counter with a textual argument. The power *to regulate* more easily meshes with an ongoing duty requiring changes over time than does the power *to declare.* To regulate requires vigilance throughout the lifespan of an endeavor. However, it is quite possible (though not necessarily required) to read the power to declare as being completely exercised upon the establishment of the enterprise.

Interestingly, while the Arnold & Porter memo highlighted by House Democrats addresses many of the points made by Yoo and Gaziano at length, the regulation analogy is only noted in a footnote.[241] That footnote attempts to wave away the argument by saying, "[T]hey ignore the fact that the Supreme Court has made clear that rescinding a regulation is the equivalent of adopting an [sic] new regulation and requires the same process."[242] Far from ignoring this, Yoo and Gaziano want to

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lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands . . . ."); 43 U.S.C. § 1733(a) ("The Secretary [of the Interior] shall issue regulations necessary to implement the provisions of this Act [FLPMA] with respect to the management, use, and protection of the public lands, including the property located thereon.").

239. *See, e.g.*, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,049 (Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (citing 42 U.S.C § 7601, which authorizes the EPA Administrator to "prescribe" regulations as "Statutory Authority" for the repeal of the Obama Administration's Clean Power Plan).

240. 54 U.S.C. § 320303.

241. Arnold & Porter February 2017 Memorandum, *supra* note 87, at 3 n.10. That footnote reads in part:

> [Yoo and Gaziano] also point to the Executive Branch's power to rescind agency regulations, but they ignore the fact that the Supreme Court has made clear that rescinding a regulation is the equivalent of adopting an [sic] new regulation and requires the same process. *See Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

Id.

242. *Id.*

embrace the idea. The duo notes the procedure used to enact the 21st Amendment, which repealed Prohibition established under the 18th Amendment, and concludes: "When the Constitution is silent about a method for repeal, it is assumed that we are to use the same process as that of enactment. The executive branch operates under the same rule."[243] All of the Yoo and Gaziano examples essentially make the point that the power to *do* normally comes with the power to *undo* through the same means. No doubt, they would be happy if the Arnold & Porter attorneys and the House Democrats agreed that "rescinding a [national monument] is the equivalent of adopting a new [national monument] and requires the same process."[244] The process for both would simply be a unilateral decision by the President.

The Arnold & Porter memo's attempt to bury this weak counterargument in a footnote may be telling. Comparing the revocation of a monument proclamation to agency regulations is the strongest analogy that Yoo and Gaziano present. Other of their examples highlight powers given directly to the President under Article II of the Constitution—such as cabinet staffing and treaty formation.[245] In those instances, finding an implied power seems generally consistent with the original grant of power to the Executive. Conversely, both monument revocation and the revoking of previously promulgated regulations involve drawing implications from powers the Constitution first assigns to Congress.[246]

The argument for an implied revocation power associated with the Antiquities Act is certainly within the realm of reason. As Yoo and Gaziano demonstrate, the basic logic has been applied with some regularity in other circumstances. And even if these two are relative neophytes to the world of public-land law, a similar viewpoint has been noted by at least one giant in the field. Professor George Coggins suggested in the wake of the

243. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 8.

244. Arnold & Porter February 2017 Memorandum, *supra* note 87, at 3 n.10.

245. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 9.

246. Specifically, the Antiquities Act is authorized by the Property Clause. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

Clinton designations that there may indeed be an implicit power to "de-withdraw" a national monument.[247]

C. The Treaty Analogy Is of Limited Value

While plausible, the case for revocation is far from clear. Problematically, Yoo and Gaziano's support their preferred interpretation of the statutory silence with examples that are not without controversy themselves. Consider their invocation of the President's unilateral power to withdraw from treaties, despite the Senate's role in originally ratifying them.[248] This implied power, however, is neither longstanding nor a particularly well established. Indeed, President Carter's decision to unilaterally withdraw from a mutual defense treaty with Taiwan in 1978 sparked a legal battle that, at its unusual conclusion, still left the answer unclear.

In *Goldwater v. Carter*,[249] a case highlighted by Yoo and Gaziano as supporting their Antiquities Act position,[250] the Supreme Court's resolution of a lawsuit led by Senator Barry Goldwater was far from typical. As one student of the case summarizes, "In an unusual disposition, the Court, in a single order, granted certiorari, vacated the judgment of the D.C. Circuit [which had held that unilateral executive termination was constitutional] and remanded the case to the district court 'with directions to dismiss the complaint.'"[251] The procedural oddities, which denied the parties oral arguments and briefing on the merits, were matched only by the jumble of opinions that followed.

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247. Lin, *supra* note 27, at 711 n.23 (citing Jim Woolf, *Monuments Rescindable, Says Expert*, SALT LAKE TRIBUNE, Sept. 3, 2000, at B1 (reporting comments by Professor George Coggins that power to "de-withdraw" national monument may be implicit in Antiquities Act)).

248. *See* Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 9 ("Although the power to unilaterally abrogate a treaty flows from a grant of constitutional authority to the president to manage foreign relations, Congress is also constitutionally prohibited from delegating a statutory power to the president and then micromanaging the discretion granted."). This is something of a hybrid example because the Constitution gives both the Executive and the Legislative branches roles in the overall process. U.S. CONST. art. II, § 2.

249. 444 U.S. 996 (1979).

250. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 9 n.27 (citing Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, Goldwater v. Carter, 444 U.S. 996 (1979)).

251. David A. Schnitzer, Note, *Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination*, 101 GEO. L.J. 243, 271 (2012) (summarizing *Goldwater*).

Yoo and Gaziano overstate matters when they write that "a four-justice plurality of the Supreme Court . . . found . . . the president retains the traditional executive authority to unilaterally terminate treaties."[252] Rather, *Goldwater* produced four opinions,[253] with only Justice Brennan prepared to affirm the constitutionality of Carter's actions, and even his reasoning was not directly related to an interpretation of the Treaty Clause.[254] The four-justice plurality that Yoo and Gaziano note—Justice Rehnquist concurring in the judgment and joined by Chief Justice Burger and Justices Stewart and Stevens—instead characterized the situation as follows:

> [T]he controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. . . . In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case in my view also "must surely be controlled by political standards."[255]

A matter that was called a "nonjusticiable political dispute" by Justice Rehnquist hardly seems a solid foundation upon which to erect an implied power under the Antiquities Act, which, like the Treaty Clause, is another imprecise piece of legal drafting that raises its own separation of powers issues.

The outcome in *Goldwater* was a legal muddle that a leading treatise described as "highly unique" and "def[ying] general categorization."[256] Even President George W. Bush's later decision to unilaterally unsign a treaty that had not yet been voted upon by the Senate was not without controversy.[257] Far

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252. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 9.

253. *See Goldwater*, 444 U.S. at 996.

254. *Id.* at 1006 (Brennan, J., dissenting from denial of cert.) (stating that he would "affirm the judgment of the Court of Appeals insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments").

255. *Id.* at 1003 (Rehnquist, J., concurring in the judgment) (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (three-judge court)).

256. Schnitzer, *supra* note 251, at 272 (quoting EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 345 (9th ed. 2007)).

257. *See generally* Luke A. McLaurin, *Can the President "Unsign" a Treaty? A Constitutional Inquiry*, 84 WASH. U. L. REV. 1941 (2006) (discussing the controversy that

from clearly supporting Yoo and Gaziano's underlying thesis that "a presumption of revocability is often implied if the grant is silent,"[258] the treaty power example instead points to the sometimes maddening legal confusion that can result from attempts to read implied powers into the blank spaces of the law.

D. Attorney General Opinions Are Misread

The largest obstacle that proponents of an implied revocation power face is the 1938 opinion of the Attorney General, and Yoo and Gaziano focus much of their fire on this target. To them, Cumming's opinion has "many holes in its reasoning" and chief among those is its "mistaken reliance on an 1862 attorney general opinion that... reached a conclusion contrary to Cummings' position."[259] While the bold claim that an Attorney General got things backwards was left unsupported in their *Los Angeles Times* opinion piece, the two elsewhere flesh out their criticism: "Perhaps most importantly, the 1862 opinion acknowledges that the military reservation itself could be abandoned by the War Department, which is the equivalent of revoking a land reservation under the Antiquities Act."[260] That conclusion, however, is itself based on a misreading of the 1862 opinion. Properly read, the 1862 opinion is quite consistent with the position Cummings took in 1938.

The 1862 opinion by Attorney General Edward Bates addressed the status of lands at Rock Island, Illinois that had previously been removed from the public domain for military purposes.[261] Through an 1809 statute, Congress statutorily authorized the President to withdraw lands from the public domain for military purposes.[262] The President, acting through the military, did so during the War of 1812 and established Fort Armstrong.[263] Then in 1848, the Secretary of War purported to end the reservation from the public domain and transfer the now unused site to another government agency for the potential

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ensued after President George Bush unsigned a multilateral treaty called the Rome Statute of the International Criminal Court).

258. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 6.
259. Gaziano & Yoo, *Magical Legal Thinking*, *supra* note 93.
260. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 5–6.
261. Rock Island Military Reservation, 10 Op. Att'y Gen. 359 (1862).
262. Act of June 14, 1809, ch. 2, 2 Stat. 547.
263. Rock Island Military Reservation, 10 Op. Att'y. Gen. 359, 361 (1862).

disposition to settlers.[264] The question before the Attorney General was whether that action by the Executive Branch was valid. Attorney General Bates clearly concluded that it was not, because while Congress had authorized the establishment of such military reservations, it had not expressly authorized the Executive Branch to dispose of such reservations after their usefulness for the military was no more. Bates wrote,

> Had the President, then, power, by the act of his minister, to transfer to the body of the public lands a tract which had been lawfully and regularly reserved under the authority of an act of Congress for military purposes, and so subject it to entry and pre-emption by settlers under the laws of the United States? I think the statement of this question compels a negative answer. We have seen that the President derived his authority to appropriate this land to military purposes, not from any power over the public lands inherent in his office, but from an express grant of power from Congress to erect fortifications which he might deem necessary for the protection of the northern and western frontiers. It is true that, as the executive head of the nation, he was vested by law with ample power to supervise and control the fortifications so erected, and the lands reserved for their use. He might even, if he deemed it proper, cease to use the fort and lands for purposes of protection or defence, and withdraw from them the forces and military property of the United States. But, in my opinion, he had no power to take them out of the class of reserved lands, and restore them to the general body of public lands. It is certain that no such power is conferred on the President in the act under which the selection of a site for Fort Armstrong was made.[265]

The Attorney General, in short, would not imply a power to revoke a military reservation from an act of Congress that only explicitly granted the President the power to make the initial reservation. This, clearly, is the same basic logical progression that Attorney General Cummings applied in 1938: the Antiquities Act had granted the President the authority "to declare" national monuments but it had not granted him the power to revoke that declaration once made.[266]

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264. *Id.* at 362.

265. *Id.* at 363.

266. *See* Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186–87 (1938) ("My predecessors have held that if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the

Upon what basis do Yoo and Gaziano then claim that "the 1862 opinion acknowledges that the military reservation itself could be abandoned by the War Department"?[267] While they give no citation, it is likely that they relied on Bates's statement that "[t]hese forts and stations have been abandoned, from time to time."[268]

True, there is a legal use of the word *abandon* that can be connected to a change in the underlying title,[269] but that was most certainly not the way that Bates was using the word in this instance. Read in context, it is clear that Bates was referring to the evacuation of military personnel and equipment but *not* a legal abandonment of the land's underlying reserved status. That point was made clear in the passage quoted above when Bates declared,

> [The President] might even, if he deemed it proper, cease to use the fort and lands for purposes of protection or defence, and withdraw from them the forces and military property of the United States. But, in my opinion, *he had no power to take them out of the class of reserved lands, and restore them to the general body of public lands.*[270]

The same point is made again in the very paragraph that includes the "abandoned" reference that Yoo and Gaziano likely rely upon for their contrary conclusion:

> These forts and stations have been abandoned, from time to time, because the increase of population around them, removing frontier dangers, and converting them into centres of prosperity and wealth, have seemed to render them useless for military purposes. But the same cause has given, in many instances, immense value to the lands attached to them. It is the appropriate function of the Executive to decide how far such military posts may be needed for the public service at the time, and to use or disuse them accordingly. *But it by no means follows that it is or ought to be competent for the Executive, or, as it may happen in practice, his War Minister, without the consent of Congress, to decide that the lands reserved for those posts are and will be no longer needed for the public service, and destroy the reservation by making sale*

President is thereafter without authority to abolish such reservation.").

267. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 5–6.

268. Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 365 (1862).

269. *See Abandoned Property*, BLACK'S LAW DICTIONARY (9th ed., 2009).

270. Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 363 (1862) (emphasis added).

> *of them or opening them to pre-emption like other public lands.* It is quite possible that such lands, for reasons already suggested, may have become much more valuable than they were when reserved, and it is not to be supposed that Congress would consent to their conversion to private use through the operation of the pre-emption laws.[271]

Bates was clearly speaking of a *practical* abandonment of the site by the military, but not an abandonment of its legal status as reserved lands separated from the public domain. Yoo and Gaziano here make what one can only be characterized as a surprising misread of the Bates and Cummings opinions.

Yoo and Gaziano also seek to emphasize the factual differences between the 1862 and 1938 situations, suggesting that there was no underlying principle to pull forward to the Antiquities Act question.[272] While the Bates opinion certainly pre-dates the Antiquities Act, the Attorney General in 1862 felt that he was dealing with a fundamental issue that transcended any particular statute:

> If I have thus far treated this question more fully upon general considerations than with reference to the special facts of the case in hand, it is because the principle it involves seemed to me to require a fair examination and discussion. Claiming for the Executive a power, as I think, subversive of the Constitution, this principle, if it be correct, must extend far beyond the case in which it is now invoked, and if it be erroneous, ought to be rejected as a rule of administration.[273]

It is certainly possible to disagree with the conclusion that Attorney General Bates reached, but it does not appear possible to assert that his conclusion was based on a narrow set of facts and law that was utterly irrelevant to the Antiquities Act in 1938. Neither can one plausibly assert that Attorney General Cummings misunderstood the principles upon which Bates based his earlier decision.

E. Case Law Support for an Implied Power to Revoke

While the logic employed in 1938 by Attorney General Cummings was based on a clear understanding to the 1862

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271. *Id.* at 365–66 (emphasis added).

272. *See* Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 5–6 (asserting that the Cummings' opinion does not address the factual differences).

273. Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 368 (1862).

opinion from Attorney General Bates, it *is* possible to disagree with Cumming's conclusion on other grounds. As previously noted, in 1915, Solicitor West did not follow Attorney General Bates' opinion when he authorized the reduction of the Mount Olympus National Monument.[274] Instead, he highlighted a different, but geographically related dispute, *United States v. Railroad Bridge Company*, which held as follows:

> The President, under a general power given him by the Act of 1808 [2 Stat. 496], selected a part of the land on Rock Island for a military site, on which Fort Armstrong was built. And when he finds the place no longer useful as a military post, or for any other public purpose, he has a right to abandon it, and notify the land offices where the reservation was entered.[275]

In other words, the court there based its decision on an implied revocation power. The case was brought in 1855 in reaction to the company initiating construction of a bridge, authorized by state law, across the Mississippi River via Rock Island.[276] The United States sought to enjoin construction based on the federal power to regulate commerce and because the entire island had been reserved for military purposes.[277] The United States claimed that reservation remained in place, making the island unavailable under federal statutes authorizing railroad rights-of-ways across public lands.[278]

The paper trail was mixed and confusing. In 1847, the Secretary of War had reported to the United States Senate that "the interest of the government does not require that said site be longer reserved from sale for military purposes."[279] A year later, the Secretary forwarded the report he had drafted for the Senate to the Secretary of the Treasury with the instruction that Rock Island "is therefore hereby relinquished and placed at the disposal of the department which has charge of the public lands."[280] While Attorney General Bates would later not agree that this supposed relinquishment was authorized and effective,

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274. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915.
275. *Id.* (quoting United States v. R.R. Bridge Co., 27 F. Cas. 686, 690 (C.C.N.D. Ill. 1855)).
276. *R.R. Bridge*, 27 F. Cas. at 687–88.
277. *Id.*
278. *Id.*
279. *Id.* at 688.
280. *Id.*

the *Railroad Bridge* court held otherwise: "Rock Island cannot be considered as a military reserve. The possession of it was abandoned, and the right of government released through the same authority, by which it was appropriated."[281] Here, unlike the use of the term in the Bates opinion, the court was indeed speaking of a legal abandonment.

The district court in *Railroad Bridge* held that the power to reserve the land for military purposes came with an implied power to revoke the reservation, and it found that this power had been exercised.[282] After a lengthy examination of other issues related primarily to the federal power to regulate commerce, this federal trial court denied the requested injunction in 1855, refusing to treat Rock Island as the military reservation that the United States claimed it to be.[283]

Nevertheless, eight years later Attorney General Bates did not read the court's denial of the United States' request for an injunction as legally binding with regard to the overall legal status of the island.[284] Bates believed the military reservation remained effective. He noted the consistent legal position of the United States in the *Railroad Bridge* case and an 1854 opinion by a predecessor Attorney General who had reviewed the convoluted records and found that no order purporting to return the military reservation to the public domain was ever fully executed.[285] The 1854 opinion by Attorney General Cushing never stated clearly whether such an order would have been legally authorized had it actually existed.[286]

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281. *Id.* at 690.

282. *Id.*

283. *Id.* at 694.

284. Rock Island Military Reservation, 10 Op. Att'y Gen. 359 (1862).

285. *Id.* at 369–71 (discussing Rock Island Military Reservation, 6 Op. Att'y Gen. 670 (1854) and *R.R. Bridge*, 27 F. Cas. 686).

286. *See* Rock Island Military Reservation, 6 Op. Att'y Gen. 670 (1854). This 1854 opinion by Attorney General Cushing was a fact-centered examination of the relevant documents. Finding no document that directly purported to reverse the military reservation, Cushing did not delve deeply into whether such a document would actually be effective if it had existed. Cushing, instead, only offers the following ambiguous passage in the opinion's penultimate paragraph:

> The *order* to sell, not executed, did not divest the President and Secretary of War of their power and jurisdiction over [the Rock Island reservation], if they had any. That order was itself revoked. How, and when, is this reservation of Rock Island for sale? Not until the President and Secretary of War, if they have the power, shall order it for sale; and then such order may be countermanded at the discretion of the President. Such authority, jurisdiction and duties as the President and Secretary of War may have in regard to the military reservation of Rock Island, cannot be divested but by an actual sale and conveyance by the

In 1862, Bates, while straining to show respect to a recently deceased judge, expressed his disagreement with the *Railroad Bridge* result and directly instructed government officials to ignore the possible implications of its holding and instead continue to treat Rock Island as a military reservation.[287]

Despite Attorney General Bates's efforts to marginalize it, the decision in *Railroad Bridge* can still provide support to those who advocate for an implied revocation power. It also demonstrates the volatility of thought surrounding implied powers. The 1855 district court decision was first distinguished and ignored by Attorney General Bates in 1862.[288] Then, in 1915, *Railroad Bridge* was approvingly noted by Solicitor West (in an opinion that distinguished and largely ignored the Bates opinion as West

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Secretary of War or by special act of Congress.

Id. at 679. While that last sentence above seems to suggest that the Secretary of War possessed the ability to sell the reservation, that conclusion is clouded by the prior caveats that the Secretary of War and the President might well not "have the power" to order it for sale. Again, Cushing focuses almost all of his six pages on the complex factual situation and does not, except in the cryptic and noncommittal paragraph quoted above, address the underlying legal question regarding the extent of the Executive Branch's power.

287. Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 370–71 (1862). The opinion concludes:

> In conflict with this almost unbroken current of legislative and executive action and opinion, stands the opinion of Judge McLean, in the case of the United States *vs.* The Railroad Bridge Company. With the highest respect for the opinions of that distinguished and lamented judge, I am compelled to believe that, if he had given to the question under consideration a more careful and thorough examination than that opinion indicates. [H]e would have been led to a different conclusion. As the case is presented, this point seems to have been but incidentally before him, and without a complete view of the facts. On page 525, he declare[d] that "the abandonment of Rock Island as a military post, and for all public purposes, was as complete as its reservation had been," and he distinguishe[d] it, (page 527–8,) from the Fort Dearborn reservation, litigated in Wilcox *vs.* Jackson, upon the ground that the possession of that reservation "for public purposes had never been abandoned."It is hard to say what effect might have been produced on the mind of Judge McLean, if the well ascertained fact had been in evidence in the case—that the Rock Island reservation had remained in the possession of the War Department, and was actually in its possession by its authorized agent—when his decision was pronounced. If that decision had been reviewed by the Supreme Court of the United States, I am not without reason for believing that an opinion more in accordance with the current of its decisions in similar cases, would have been the result. It is worthy of remark that the United States, by the Attorney General, in that case controverted the conclusions which Judge McLean adopted, thereby showing that prior to April, 1857, the Executive Department considered the island a military reservation. And, as nothing has occurred since that time to change its status, a firm adherence to that position is, in my opinion, the plain duty of those who administer the Government.

Id.

288. *Id.*

authorized the reduction of a monument on implied power grounds).[289] The West opinion, however, would eventually be superseded by Solicitor opinions in 1935 and 1947 that effectively reached the same result as that reached in 1915—opining that the President is authorized to reduce the size of a monument—but through different means.[290] That means was the "smallest area" theory that is advanced in the 1938 opinion from Attorney General Cummings, an opinion that, as discussed previously, also understands and agrees with the 1862 opinion by Attorney General Bates.[291]

Railroad Bridge can either be viewed as an anomalous trial court decision that was rather quickly disregarded by the Attorney General or as a judicial decision that is important in a legal landscape largely devoid of case law. At a minimum, *Railroad Bridge* and its later reception demonstrate that legal minds have long disagreed about the extent of the President's implied powers under statutes rooted in the Property Clause.

F. Case Law Support for the One-Way Ratchet Approach

While *Railroad Bridge* provides case law support for implied revocation powers, those reticent to imply powers not expressly noted in legislation can point to a decision as well. The Indiana Supreme Court applied the principle that the power to *do* does not bring with it the implied power to *undo* in a 1926 dispute over the construction of a school. In *Cress v. State*,[292] a newly elected township trustee sought to stop a school construction project initiated by his predecessor. The court, though, held as follows:

> The statute which confers upon the trustee of a township . . . authority to establish a high school or a joint high school and elementary school, if in his discretion he shall determine to do so, does not purport to give him a like discretion to nullify his determination on that subject after it has once been made, or

289. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915, at 3–4.

290. U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of July 21, 1947; U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935.

291. *See supra* Part II.B.

292. 152 N.E. 822 (Ind. 1926).

> to set aside and nullify the establishment of such a school once determined upon.[293]

The court in *Cress v. State* elaborated saying, "[P]ower to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act."[294]

Thus, under circumstances similar to those surrounding national monuments, if on a smaller scale, the Indiana Supreme Court imposed a one-way ratchet approach. Once the discretionary power to select a site and establish a controversial school was exercised, the decision could not be undone, even by a duly elected official seeking to act before construction had begun.[295] This is the same basic principle upon which Attorney General Cummings, quoting Attorney General Bates from 1862, relied: "'The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed.'"[296]

While *Cress* and *Railroad Bridge* each provide something of a judicial proof of concept for their respective theories, neither a federal district court decision from 1855 nor a 1926 state supreme court opinion will provide anything but potential persuasive authority should President Trump, or a later occupant of the White House, attempt to fully revoke an existing Antiquities Act proclamation.

Yoo and Gaziano may overstate the case for an implied revocation power, but there is a case that can be made. Significant legal support also exists for a one-way ratchet theory based on the express words of the statute and the logic of the 1938 Attorney General opinion. The outcome of a case challenging the revocation of a national monument would be uncertain.

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293. *Id.* at 826.

294. *Id.* The court also expressed the same sentiment at greater length:

> [A] township trustee will not be held to possess implied power to disestablish a high school whenever he may wish to do so merely because the statute expressly gives him power in his discretion to establish such a school, where nothing is said in the statute about conferring a discretionary power to undo what he may have done.

Id.

295. While construction had not begun, bonds had been issued and various contracts had been signed. *Id.* at 827.

296. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 187 (1938) (quoting Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 364 (1862)).

IV. TOWARDS A LEGISLATIVE SOLUTION

A. Uncertainty and Risk Abound

Compromises of any sort usually happen only when each side has a real and imminent fear of losing something precious and/or the hope of gaining something long desired. Overconfidence in one's ability to win *everything* is the enemy of compromise. Regarding the current Antiquities Act litigation, the elements for a compromise should be in place but risk being overlooked if the protagonists on both sides gaze through rose-colored glasses.

On the side of those who oppose the ever-expanding use of the Antiquities Act, President Trump has provided an unprecedented surge of enthusiasm and optimism. Trump has *actually* shrunken the boundaries of the Bears Ears and Grand Staircase-Escalante national monuments, and this constituency has a legitimate hope for more reductions based on Secretary Zinke's recommendations. Before Trump, no reductions of any kind had occurred since 1963, and many of the reductions that occurred before then were undertaken merely to address relatively small-scale local issues.[297] Trump's bold actions represent a new day and one that few ever thought would come.

Near the turn of this century, one legal scholar critical of the Grand Staircase-Escalante National Monument lamented as follows:

> Given this history, it seems legitimate to ask whether anyone will be as concerned about the Antiquities Act twenty years from now. . . . To give an affirmative answer . . . would seem to be blind optimism. If history is any guide, it seems most likely that twenty, or even ten, years from now most will look out upon the dramatic western landscapes that have been set aside and be grateful. The dubious means of their designation will be unknown and forgotten to all but a few and the Antiquities Act will return to the president's shelf and be a subject of discussion primarily among law professors who teach in the public lands area.[298]

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297. *See* NAT. PARK SERV., *supra* note 130 (showing that the most recent reduction was President Kennedy's diminishment of the Bandelier monument in New Mexico). Before 1963, presidents had made small-scale reductions to monuments such as Hovenweep in Utah and Colorado (40 acres), Wupatki in Arizona (52,27 acres), Natural Bridges in Utah (320 acres), and Navajo in Arizona (320 acres). *Id.*

298. Rasband, *supra* note 223, at 619–20.

Such seemed a reasonable prognostication at the time, but few except *The Simpsons* ever foresaw a President Trump.[299]

The late Professor David Getches, long a leading figure in natural resources and public land law, characterized the history of the Antiquities Act as largely one of executive expansion confirmed by congressional acquiescence.[300] President Trump, conversely, is now attempting an executive contraction, triggering many liberals to rise up in defense of the previous status quo. Trump's election and his willingness to follow through so quickly with executive orders and proclamations fills those who favor the active development of public lands with confidence. But a lawsuit could take it all away.

A sadly politicized judiciary often makes things, at least at the district court level, the equivalent of a judge lottery. Judges have blocked other actions taken by President Trump that, whatever one thought of the policy choice, seemed securely within the discretion of the executive branch. The President's travel ban and his plan to end the Deferred Action for Childhood Arrivals (DACA) program come quickly to mind.[301]

The luck of the judicial draw presents a real risk, but the President's recent proclamations face an uncertain future even before a fair-minded judge. As discussed at length already, the legal authorities are mixed and none are clearly controlling. Reading the power "to declare" monuments as the power to *only* declare them is a logical and far from ridiculous conclusion to reach. Not every presidential power comes with the ability to undo what a predecessor, or even oneself, has done. Once a pardon is given, even if controversial and granted in the final

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299. In Season 11, Episode 17, first airing March 11, 2000, President Lisa Simpson "inherited quite a budget crunch from President Trump." *The Simpsons: Bart to the Future* (FOX television broadcast Mar. 11, 2000), http://www.simpsonsworld.com/video/302835267686 [https://perma.cc/LW28-EW48].

300. *See* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982). Getches writes:

> [T]he executive branch is given wide discretion to interpret its own statutory authority for withdrawals. . . . It is not practical for Congress, charged by the Constitution with ultimate responsibility for management and disposal of extensive public lands, to do any more than to set broad policies. Consequently, Congress must entrust the executive with responsibility for implementing those policies.

Id. at 289.

301. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017); In re United States, 875 F.3d 1200 (9th Cir. 2017), *vacated*, 138 S. Ct. 443 (2017).

hours of a presidential term, future presidents have no power to revoke it or modify it.[302]

Arguably, a narrow reading of the Antiquities Act as providing only the power to declare monuments could be seen as the most conservative interpretation.[303] If Congress wants to give the President additional flexibility, one might argue, let it be clearer, as it was in the Pickett Act where the power to revoke was specifically spelled out.[304] Certainly, the current Trump Administration strategy of modifying rather than revoking monuments has a better chance of surviving a court challenge, but this remains a question of first impression and the answer is far from certain.

Proponents of President Trump's recent proclamations thus face a significant level of legal risk, and even a legal victory brings no permanence. What President Trump has diminished, a future president could expand again (and in even grander proportions). The boundaries of national monuments could become the public-lands law equivalent of the Mexico City policy, the ban on foreign aid dollars going to organizations that promote abortion. That political football has, since it was first put in place by President Ronald Reagan, been removed in the first few days of a Democrat administration and then reinstated whenever a Republican enters the White House.[305]

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302. *See* Bruce Fein & W. Bruce DelValle, *Distorting the Antiquities Act to Aggrandize Executive Power—New Wine in Old Bottles*, CONSERVATIVES FOR RESPONSIBLE STEWARDSHIP 14 (Nov. 30, 2017) http://www.conservativestewards.org/wp-content/uploads/2017/11/Illegal-Distortion-of-the-Antiquities-Act.pdf [https://perma.cc/A6AV-VY3P] (noting that "[t]he Constitution itself does not enshrine a principle that any branch of government can undo its earlier actions using the same process as originally used" and providing examples in which presidents were prevented from undoing prior presidential pardons).

303. Not all who oppose President Trump on this issue are liberals. Conservatives for Responsible Stewardship (CRS) is one right-of-center group opposing Trump's monument reductions. CRS commissioned a legal analysis co-authored by Bruce Fein, once the Assistant Deputy Attorney General under Ronald Reagan. The memorandum makes many of the same arguments for a narrow reading of the express words in the Antiquities Act as the 86 Democratic members of Congress and 121 professors do. Fein and Del Valle, however, have a stronger record of consistently arguing against executive overreach, which is how they characterize President Trump's assertion of the power to modify past proclamations. *See* Fein & DelValle, *supra* note 302; *see also* T.R. Goldman, *In the Snowden Case, Bruce Fein Finds the Apex of a Long Washington Legal Career*, WASH. POST (Aug. 11, 2013), https://www.washingtonpost.com/lifestyle/style/in-the-snowden-case-bruce-fein-finds-the-apex-of-a-long-washington-legal-career/2013/08/11/82ad187a-011b-11e3-9a3e-916de805f65d_story.html?utm_term=.69f34de30c9a [https://perma.cc/K7DQ-SW2A] (discussing Fein's deep-seated aversion to government overreach).

304. Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976).

305. Kevin Jones, *Mexico City Policy Ensures US Funds Won't Force 'Abortion Ideology,' Backers Say*, CATHOLIC NEWS AGENCY (Jan. 22, 2018), https://www.catholic

Opponents of the original Bears Ears and Grand Staircase-Escalante monuments are well aware of this potential for their current victories to yo-yo in the future. Republican Rob Bishop of Utah, the current chairman of the House Natural Resources Committee, is pushing a series of bills including one called the "National Monument Creation and Protection Act" to lock in current changes because he fears "everything Trump is doing now can be changed by the next president."[306]

Those who supported the monuments as President Obama proclaimed them must have faced mixed feelings when President Trump issued his later proclamations. Despite the large reductions, sizable areas of land remained as national monuments, including the namesake formations.[307] That could be seen as something of a victory for preservation, even as the reductions undoubtedly stung. Nevertheless, had President Trump completely rescinded the previous proclamations, their legal case would have been much more straightforward. They could have relied on the 1938 Attorney General opinion and the express language of the statute itself to argue that no revocation power existed. Instead, the modifications that came force them to make the more difficult argument that either (1) all prior modifications made by numerous presidents—including Franklin Roosevelt's reduction of the Grand Canyon made after receiving the 1938 opinion—were actually invalid at the time, or (2) that the size of the current reductions somehow makes them *de facto* revocations that can be distinguished from prior diminishments.

While the second argument is suggested by the plaintiffs' complaints,[308] proving it will be difficult in light of the large

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newsagency.com /news/mexico-city-policy-ensures-us-funds-wont-force-abortion-ideology-backers-say-58991 [https://perma.cc/ZLD8-WHRR]. Jones reports:

> The Reagan-era Mexico City Policy takes its name from the location of the 1984 United Nations conference on population and development, where the funding ban was announced. The policy was repealed by Bill Clinton in 1993, reinstated by George W. Bush in 2001, repealed by Barack Obama in 2009, and again reinstated by President Trump when he took office.

Id.

306. Josh Siegel, *Rob Bishop: Congress Must Cement Trump's Public Lands Agenda into Law*, WASH. EXAMINER (Dec. 26, 2017), http://www.washingtonexaminer.com/rob-bishop-congress-must-cement-trumps-public-lands-agenda-into-law/article/2644187 [https://perma.cc/K5AJ-EYCP].

307. *See, e.g.*, Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017) (retaining the namesake "Bears Ears" formation).

308. Complaint for Injunctive and Declaratory Relief at 41, Hopi Tribe v. Trump,

reductions imposed by Presidents Wilson and Franklin Roosevelt. The President can now simply argue that his actions are consistent with longstanding practice and the 1938 Attorney General's opinion. In addition to those historical hurdles, the monument proponents find themselves in the odd place of advancing a narrow reading of the statute and defending the legislative prerogatives of Congress in order to achieve aims that clearly would not match the intent of many lawmakers in 1906.

Added to all this is the possibility that—especially should favorable precedent be established in the first round of cases—the Justice Department might issue a new opinion that disagrees with Attorney General Cummings on the issue of revocation. The President might then begin revoking monuments completely. Nothing that the Administration has yet done so far takes that option off the table. The often-impetuous President Trump has moved with a level of strategic caution on this issue, but that caution might later be thrown to the wind. In short, from the pro-monument perspective, there is a real risk that President Trump's actions could be judicially upheld and become even more extreme in the future. Risk is present all around.

B. The Politics of 2018

The political landscape of 2018, with its midterm elections, could potentially help to foster compromise. Republicans are not expected to achieve a sixty-vote supermajority in the Senate. Thus, through the filibuster, Democrats will likely maintain the ability to block most legislation from reaching the Oval Office.[309] Additionally, a Democrat takeover of the House of Representatives is a very real possibility.[310] Nevertheless, even if a

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No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017); Complaint for Injunctive and Declaratory Relief at 49, Wilderness Soc'y v. Trump, No. 1:17-cv-02587 (D.D.C. filed Dec. 4, 2017).

309. *See* Eric Bradner, *The 10 Senate Seats Most Likely to Switch Parties in 2018: October Edition*, CNN (Oct. 17, 2017), https://www.cnn.com/2017/10/17/politics/senate-2018-midterms-race-rankings-october/index.html [https://perma.cc/WC7E-NUH4]; Deirdre Shesgreen et al., *These 12 Races Will Be Key to Who Controls the Senate After the 2018 Midterms*, USA TODAY (Sept. 7, 2017), https://www.usatoday.com/story/news/politics/2017/09/07/2018-midterm-elections-senate-races-to-watch/597965001 [https://perma.cc/XHZ8-WH3W].

310. Ben Jacobs, *A Year After Trump's Election, What Are Democrats' Chances in 2018?*, GUARDIAN (Nov. 9, 2017), https://www.theguardian.com/us-news/2017/nov/09/democrats-congress-2018-election [https://perma.cc/WC96-MAJF]; Jordan Larson & Matt Stieb, *What's at Play in the 2018 House of Representatives Races*, N.Y. MAG. (Nov. 16, 2017), http://nymag.com/daily/intelligencer/article/2018-midterm-election-tracker-house.html [https://perma.cc/CD8M-HBKB].

wave election were to unexpectedly give Democrats both the House and 60 votes in the Senate, the President's veto pen still looms large. Neither party is likely to be able to impose its will after these elections.

Chairman Bishop has pushed legislation through his committee that seeks to limit national monuments to actual "objects of antiquity" and imposes a series of procedures before a monument of over 640 acres could be declared.[311] The bill would also bar the President from unilaterally declaring monuments of over 10,000 acres and completely bar any declarations over 85,000 acres.[312] On the flip side, the bill would authorize unilateral diminishments of up to 85,000 acres without such procedures.[313] While this may be the Antiquities Act that Chairman Bishop dreams of, it is a dream that is very unlikely to come true. This legislation, if it could pass the House, would almost certainly die in the Senate where sixty votes are needed and Republicans only have fifty-one.[314] Still, this bill could be vehicle for compromise legislation later. Further, Bishop might be motivated to cut a deal if he believes he soon could lose his chairman's gavel. The current Congress may be his best and last chance to reform the Antiquities Act.

For their part, Democrats should realize that if the legal battles confirm the President's power to reduce monument boundaries, their interest groups face significant risks. Even assuming gains in Congress, Democrats would not be able to push any changes to the Antiquities Act past the President's veto. Assuming the Democrats take at least one chamber, President Trump would have few prospects for major legislative victories. Yet, with time on this hands and a desire to produce results for his political base, President Trump couldembrace his unilateral powers under the Antiquities Act all the more. President Trump might have two full years to reduce the size of monuments at will and take administrative actions such as mineral leasing that

311. National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017); Brian Maffly, *Is the Antiquities Act Broken? Utah Congressman Thinks So*, SALT LAKE TRIB. (Oct. 24, 2017), https://www.sltrib.com/news/environment/2017/10/24/is-the-antiquities-act-broken-utah-congressman-thinks-so [https://perma.cc/L6M7-AYQJ].

312. *Id.*

313. *Id.*

314. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/C5FT-AKEE] (showing that the Republicans currently hold 51 seats in the 2017–2019 115th Congress's Senate).

could change the legal and physical character of these public lands dramatically.

Negotiating a deal before Election Day could also help to neutralize a relevant issue in the West that would otherwise likely be a net plus for Republicans. That might marginally help to secure victories in the Republican held swing states of Arizona and Nevada. Such could also assist in saving the vulnerable seat of Jon Tester, the Democrat Senator from Trump-friendly Montana, a state which has a sizeable constituency opposed to the expansion of national monuments.[315] Democrats, like Republicans, have legal and political motivations to avoid the uncertainty of the current litigation.

C. Ingredients for a Compromise

What would a compromise look like? Granted, one person's fair deal may seem like highway robbery to another. Nevertheless, one can at least suggest some potential ingredients for the legislative sausage-making machine. The broad topics for potential reform include (1) the boundaries of existing monuments, (2) the President's ability to declare and modify or revoke monuments in the future, (3) the status of Alaska and Wyoming, states currently excluded from normal monument procedures, and (4) the disputed authority to create massive marine monuments.

Both sides have reasons to agree on a set of statutorily set boundaries for the existing national monuments. Doing so would, from the perspective of conservationists, protect the

315. Simone Pathé, *Montana's Jon Tester Breaks with 2018 Red-State Democrats*, ROLL CALL (Jan. 22, 2018), https://www.rollcall.com/news/politics/montanas-jon-tester-breaks-red-state-2018-democrats [https://perma.cc/M5FX-KMCQ] ("Tester has never earned more than 50 percent of the vote in his previous Senate races. He ranked No. 6 on Roll Call's list of the most vulnerable Senate incumbents last November, a year out from the midterms."). President Trump sparred with Senator Tester over the failed nomination of Dr. Ronny Jackson to head the Department of Veterans Affairs. Personal animus and a desire for electoral victory could make Republicans slower to work with centrist Democrats like Tester. On the other hand, the Trump Administration has shown some desire to craft bipartisan bills. *See* Paul Bedard, *Jared Kushner Scores First Major Bipartisan Deal for Trump in Congress*, FOX NEWS (May 11, 2018) http://www.foxnews.com/politics/2018/05/11/jared-kushner-scores-first-major-bipartisan-deal-for-trump-in-congress.html [https://perma.cc/N5RC-VXWD] ("An effort led by senior White House adviser Jared Kushner to both increase prison security and provide a pathway out for some 4,000 well-behaved prisoners has scored a major, and lopsided, victory, the first major bipartisan deal for the Trump White House."). That underdeveloped skill set will be needed to accomplish any legislative victories prior to the 2020 election should the Democrats gain control of the House in 2018.

monuments from unilateral presidential reductions. If coupled with a "no-monument" buffer zone—for example, banning new presidential proclamations within 100 miles of existing monuments—statutory boundaries would also give local pro-development interests protection against unilateral expansions in the future.

Numerous controversial monuments offer a wide variety of options for legislative *horse trading*. To reach a consensus, the most controversial monuments such as Bears Ears and the Grand Staircase-Escalante would likely require final boundaries that encompass more acres than President Trump's versions but fewer than President Obama's. New monuments, including those suggested in Secretary Zinke's report, could also be statutorily created as part of the deal-making process.

Assuming that some version of the current monument system could be memorialized in a statute and, thus, protected from unilateral expansion or reduction, how would future monuments be created, if at all? Chairman Bishop's wish to limit new monuments to "objects of antiquity" is likely a non-starter.[316] Such may well be closer to the original expectation of the 1906 Congress, but conservationists are unlikely to agree to any deal that takes away the President's Supreme Court-affirmed power to protect landscapes via the "other objects of historic or scientific interest" clause.

Instead, Congress should consider officially allowing factors like scenic beauty and wildlife protection to be used to justify monument designations. Such concerns are often the real, if unstated, motivations behind proclamation texts that cobble together various geologic oddities, prehistoric fire pits, and pioneer trails to justify the conservation of vast vistas. It would improve the functioning of the Act to let the real reasons come out into the open.[317] Broadening the declaration criteria would be only a minor concession by pro-development interests.[318]

316. *See* Maffly, *supra* note 311.

317. Even President Trump has officially described past proclamations as "means of stewarding America's natural resources [and] protecting America's natural beauty" despite those not being statutorily authorized purposes. Exec. Order No. 13792, 82 Fed. Reg. 20,429 (Apr. 26, 2017). Also, Secretary Zinke informed the President that the broad use of the Act "has largely been viewed as an overwhelming American success story," despite the controversies over its history. Zinke Final Monuments Report, *supra* note 82, at 1.

318. Relying on the purpose statement for the National Park Service which manages the vast majority of national monuments, the Supreme Court has noted, albeit in dicta,

Because of the courts' longstanding deference to the decisions made "in the President's discretion," the existing legislative limitations on the objects to be protected, and even the "smallest area" clause, pose no practically enforceable limit on monument boundaries.[319]

These paper tigers should be replaced with an actual acre-based limitation for each presidential term, along with consultation procedures that effectively prevent last-minute monument designations. True historical monuments rarely require extensive acreage. Those could be captured through an unlimited number of unilaterally declared monuments of 1,280 acres or less that together total no more than 10,000 acres during a four-year span.[320] This approach would give the President a high level of flexibility to commemorate things ranging from the birthplace of an important figure[321] to the final resting place for a giant mammoth.[322] Such small sites are rarely a source of major controversy.

Regarding larger monuments, each presidential term could be allotted a maximum of, for example, 1,500,000 acres that could

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that

> [a]n essential purpose of monuments created pursuant to the Antiquities Act . . . is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

Alaska v. United States, 545 U.S. 75, 103 (2005) (quoting 16 U.S.C § 1 (repealed by Pub. L. No. 113-287, 128 Stat. 3272 (2014))).

319. *See, e.g.*, Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004), *appeal dismissed*, 455 F.3d 1094 (2006). The court found:

> With little additional discussion, these facts compel a finding in favor of the President's actions in creating the monument. That is essentially the end of the legal analysis. Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go.

Id.

320. One square mile is 640 acres, and this is also a common measure for the township and range surveying system that mapped much of the West. PETER VINCENT & IAN WHYTE, UNIFYING GEOGRAPHY: COMMON HERITAGE, SHARED FUTURE 38 (John A. Matthews & David T. Herbert eds., 2004). Thus, 1,280 acres could allow for a two square mile monument. This is also roughly the size of Devil's Tower, the first national monument that President Theodore Roosevelt declared. Charles S. Robinson, *Geology of Devils Tower National Monument Wyoming*, *in* GEOLOGICAL SURV. BULLETIN 289, 289 (1956), https://pubs.usgs.gov/bul/1021i/report.pdf [https://perma.cc/CM58-L96Q].

321. *George Washington Birthplace*, NAT'L PARK SERV., https://www.nps.gov/gewa/index.htm [https://perma.cc/D7VG-WEGW].

322. *Waco Mammoth*, NAT'L PARK SERV., https://www.nps.gov/waco/index.htm [https://perma.cc/X3NP-CFPS].

be added to the national monument system through monuments greater than 1,280 acres. This is approximately the same amount of acreage that Theodore Roosevelt declared as monuments.[323] These monuments could be subject to a mandated consultation process that extends at least 90 days and includes a public-comment period. This process, which could be linked to NEPA requirements or stand on its own,[324] would eliminate the possibility of "surprise" monuments during the final days of an administration.

The concentration of large national monuments in areas where there is local opposition is an issue that would likely require attention. To safeguard against that possibility, the law could require the approval of the state's governor under certain circumstances. For instance, any single monument over 250,000 acres or a monument that when combined with others previously declared during the same four-year term would exceed 500,000 total monument acres in a particular state could trigger this approval provision.

Should some pro-development Westerners object that this proposed system still serves as a one-way ratchet over the long term, another alternative could be a tiered approach that steps down to an even lower level or phases out the large monuments completely. Any bill that eventually eliminates the ability of the President to declare landscape level monuments under the Antiquities Act seems unlikely to draw the needed support from Democrats, though.

A possible tiered approach to consider could start with two million acres per presidential term. After eight years, that cap is then reduced to one million acres for every four years; then 500,000 acres after eight more years; and then finally stops at a

323. *See* NAT. PARK SERV., *supra* note 130.

324. *See* National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified as amended 42 U.S.C. § 4321–70 (1969)). As a legislative drafting matter, subjecting monuments to the NEPA process would be the easiest solution. NEPA, though, brings with it expectations for lengthy environmental impact statements addressing multiple alternatives, a large catalogue of sometimes contradictory case law, and a history of judicially imposed delays. *See* COMM. ON RES., U.S. HOUSE OF REPS., TASK FORCE ON IMPROVING THE NAT'L ENVTL. POLICY ACT AND TASK FORCE ON UPDATING THE NAT'L ENVTL. POLICY ACT 4 (2005) (addressing in initial findings and draft recommendations "delays in the process," "litigation issues," etc.). This could be seen as either a benefit or a detriment depending on one's perspective. Crafting a new more streamlined process could allow for a reasonable level of public input while still maintaining the President's ability to make this discretionary decision in a timely manner.

permanent baseline of 250,000 acres. All of the numbers, of course, would be subject to the give and take of negotiations, but an approach like this would recognize the fact that the quantity of landscapes worthy of monument designation is essentially known. There is no equivalent of the Grand Canyon waiting for Lewis-and-Clark-type explorers to discover it. Yet, a "use-it-or-lose-it" deadline might actually encourage the creation of monuments at a faster pace, a plus for conservationists.

The President could also be authorized to reduce the new presidentially proclaimed monuments by a set amount—perhaps, 25,000 acres per four-year term. This would provide a modest level of flexibility to deal with boundary disputes, road rights-of-way and other factors that have led to small scale changes in the past, without authorizing large scale diminishments that could destabilize the overall monument system. Reductions that exceed this level would require congressional involvement.

Wyoming and Alaska currently fall beyond the President's regular proclamation reach due to special statutes added in the wake of past Antiquities Act controversies.[325] The possibility of future monuments in these states that feature vast areas of public lands could be a major inducement for conservationists to agree to other concessions. While some constituents doubtless disagree, the all-Republican delegations from these two states probably view their special status as a statutory gem to be closely guarded. These two outliers, immune from the burdens and benefits of the Antiquities Act, could either become key to a deal or simply be left outside of it altogether.

Finally, the greatest area of national monument system expansion in recent years has occurred offshore. The marine monument concept was first executed by President George W. Bush[326] and then expanded by President Barack Obama.[327] While the complicated disputes over marine monuments are beyond the scope of this article, it is worth noting that this particular use of the Antiquities Act is far from what its drafters ever

325. *See* 54 U.S.C. § 320301(d); Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101–233 (2012)).

326. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006) (designating the Northwestern Hawaiian Islands, then the largest marine-protected area, as the United States' 75th national monument).

327. Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016) (quadrupling the size of the Northwestern Hawaiian Islands monument).

envisioned. The current marine monuments float on a questionable sea of legal logic that has not been fully tested and approved by the courts.[328] Solidifying the statutory basis for the marine monuments could be seen as an important victory by the environmental community. Such would likely arouse little opposition from landlocked conservative western states like Utah and Idaho, while gaining support from coastal liberals. Fishing groups and others opposed to the marine monuments might be willing to embrace those monuments more if they were subject to some sort of caps on their area, as previously discussed for terrestrial monuments.[329] These elements and potentially others could help to remake the Antiquities Act in a way that reduces controversies in the future.

CONCLUSION: A CONTRADICTORY CRISIS NOT TO BE WASTED

The current debate over the Antiquities Act presents a host of political ironies. Some conservatives, discounting the likes of Barry Goldwater and William Rehnquist along the way, have advocated for implied powers that they see lurking in the penumbras of the statutory scheme. Conversely, some liberals have now become strict textualists.

On other topics such as DACA, progressives like Congressman Raul Grijalva have loudly supported the expansion of implied executive powers, even to the point of being arrested to protest President Trump's decision to wind down what President Obama created via a controversial executive order.[330] On monuments, however, Grijalva vociferously defends congressional authority and advocates for reading the Antiquities Act closely and

328. *See generally* Morris, *supra* note 222, at 173.

329. One approach could be to have a single acreage cap but apply an offshore multiplier to account for the greater area needed to protect a fluid ocean environment. For example, if the overall cap were two million acres, then ten underwater acres would only count as a single acre against the cap, allowing up to twenty million acres of marine monuments.

330. *See* Ronald J. Hansen, *Rep. Raul Grijalva Arrested While Protesting Outside Trump Tower in New York City*, AZ CENT. (Sept. 19, 2017), https://www.azcentral.com/story/news/politics/arizona/2017/09/19/rep-raul-grijalva-arrested-while-protesting-outside-trump-tower-immigration/681895001 [https://perma.cc/XK3R-GCT4] (discussing arrest of Raul Grijalva); *Grijalva Responds to DACA Termination*, CONGRESSMAN RAUL M. GRIJALVA (Sept. 6, 2017), https://grijalva.house.gov/press-releases/grijalva-responds-to-daca-termination [https://perma.cc/NA9B-GAM3] (denouncing President Trump and Attorney General Jeff Sessions on day of Trump's DACA announcement).

narrowly.[331] Of course, that close and narrow reading regarding the power to "declare" monuments is made in service of declarations that have gone far beyond what most lawmakers in 1906 envisioned. It seems the preferred ends justify the interpretive means all around.

This is an odd moment for the Antiquities Act but one pregnant with possibility. As a local critic of President Obama's Bears Ears monument put it when told by a reporter that there was little precedent for overturning a national monument: "Yes, and there's no precedent for Donald Trump, either."[332] Trump has now set in motion events that will alter the course of the Antiquities Act, one way or another. This statute at a crossroads might continue on its expansive journey but now with the explicit blessing of the judiciary. With the one-way ratchet theory confirmed, future presidents looking to create a national monument legacy would be even more emboldened. On the other hand, Trump's modifications might well be upheld, setting the stage for additional dramatic acreage cuts or even an attempt to completely revoke existing monuments.

Will Congress leave this matter to the courts? There, the final decision will likely give one side extreme pleasure and the other extreme pain. The case for a modification power is stronger than Professor Mark Squillace and friends care to admit, while the chances of any later revocations being upheld are less than Professor John Yoo and Todd Gaziano let on. There is a fair chance that the courts will see the middle way that Attorney General Cummings paved in 1938 as the right path. That outcome is far from certain, though, and one can see plausible justifications for taking the Antiquities Act down either more extreme road.

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331. *See* Letter from Congressman Raul M. Grijalva et al., House Comm. on Nat. Res., to Ryan Zinke, Sec'y of the Interior (May 25, 2017), http://democrats-naturalresources.house.gov/imo/media/doc/House%20Democratic%20Letter%20to%20Sec.%20Zinke%20on%20National%20Monuments%20May%2025.pdf [https://perma.cc/R82P-CFU8] (Grijalva, as the ranking Democrat on the House Natural Resources Committee, was also the lead signature on the May 25, 2017 letter to Secretary Zinke that declared, "The Constitutional authority to revoke or shrink a national monument lies with the Congress."); *The President is Quietly Taking Aim at Our National Monuments*, CONGRESSMAN RAUL M. GRIJALVA (Oct. 4, 2017), https://grijalva.house.gov/recent-opeds1/the-president-is-quietly-taking-aim-at-our-national-monuments [https://perma.cc/EY7P-UPLN].

332. Maffly & Burr, *supra* note 78.

Rather than leaving the matter to the courts, the other option is to craft a solution through the messy but flexible legislative process—producing an updated Antiquities Act that would moot the current lawsuits and provide legal stability and new opportunities for the monument system going forward. A decade ago, Rahm Emanuel said, "You never want a serious crisis to go to waste," because such moments provide both sides with "the opportunity to do things that you could not do before."[333] "Our nation's most enduring policies," note Yoo and Gaziano, "emerged as the product of compromise and deliberation between the political parties."[334] Regarding the Antiquities Act, each side is facing a significant possibility of failure in the courts. The case for uncertainty that has been made here is also the case for compromise. Additionally, there is the chance for both sides to reap benefits that extend beyond the reach of litigation alone. Perhaps, even during this polarized time, the end result will be the kind of success that only a crisis can bring about.

333. Wall Street Journal, *Rahm Emanuel on the Opportunities of Crisis*, YOUTUBE (Nov. 19, 2008), https://www.youtube.com/watch?v=_mzcbXi1Tkk [https://perma.cc/82PL-TGV3].

334. Yoo & Gaziano, *Presidential Authority to Revoke or Reduce*, *supra* note 94, at 2.

UNLEASHING THE "LEAST DANGEROUS" BRANCH: QUIS CUSTODIET IPSOS CUSTODES?*

MARK PULLIAM**

* Or, "Who will guard the guardians themselves?" JUVENAL, SATIRE 6 196 (Cambridge Univ. Press 2014).

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> [I]n a government in which [the different branches] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution[.]***

INTRODUCTION

In recent years, a schism has developed on the Right between libertarian and conservative legal scholars regarding the role courts should play in conducting judicial review of laws challenged as unconstitutional.[1] Many libertarians have coined the term "judicial engagement" to describe the heightened scrutiny they advocate.[2] Many conservatives, in contrast, embrace a more limited approach to judicial review: the traditional doctrine of "judicial restraint" espoused by Robert Bork[3] and Justice Antonin Scalia,[4] among others.[5] These phrases and labels

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***THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

1. *See, e.g.*, Eric J. Segall, *Judicial Engagement, New Originalism, and the Fortieth Anniversary of "Government by Judiciary"*, 86 FORDHAM L. REV. ONLINE (forthcoming 2018); Clark Neily & Mark Pulliam, *Judicial Engagement v. Judicial Restraint: What Should Conservatives Prefer?*, CITY J. (Feb. 8, 2017), https://www.city-journal.org/html/judicial-engagement-v-judicial-restraint-15009.html [https://perma.cc/9C6G-2ZD8]; Mark Pulliam, *Broken Engagement?*, L. & LIBERTY (June 22, 2016), http://www.libertylawsite.org/2016/06/22/broken-engagement/; Mark Pulliam, *Grounds for Concern?*, L. & LIBERTY (Sept. 15, 2016), http://www.libertylawsite.org/2016/09/15/grounds-for-concern/ [https://perma.cc/56QU-AJJS]; Mark Pulliam, *Libertarian Judicial Activism Isn't What the Courts Need*, AM. GREATNESS (Jan. 3, 2017), https://amgreatness.com/2017/01/03/libertarian-judicial-activism-isnt-courts-need/ [https://perma.cc/U8QL-2CWS] [hereinafter Pulliam, *Libertarian Judicial Activism*]; Mark Pulliam, *The Trump Court: SCOTUS Could Stand Some Disruption*, AM. GREATNESS (Dec. 22, 2016), https://amgreatness.com/2016/12/22/trump-court-scotus-stand-disruption/ [https://perma.cc/94XV-65LL]; Richard Reinsch, *The Book of Judges*, L. & LIBERTY (Jan. 30, 2015), http://www.libertylawsite.org/2015/01/30/the-book-of-judges/ [https://perma.cc/BS99-MHFF].

2. *See, e.g.*, CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 129–30 (2013) [hereinafter NEILY, TERMS OF ENGAGEMENT]; Clark Neily, *Judicial Engagement Means No More Make-Believe Judging*, 19 GEO. MASON L. REV. 1053, 1053–54 (2012); Clark Neily, *Rules of Engagement*, CITY J. (Feb. 8, 2017), https://www.city-journal.org/html/rules-engagement-15010.html [https://perma.cc/5NPB-MVF6] ("Judicial engagement calls for judges to decide cases by determining what ends the government is actually pursuing when it infringes someone's liberty—and ensuring that those ends are constitutionally permissible."); Ilya Shapiro, *Against Judicial Restraint*, NAT'L AFF. (Fall 2016), https://www.nationalaffairs.com/publications/detail/against-judicial-restraint [https://perma.cc/LCE3-YQ3E] ("But well-meaning judicial restraint has increasingly led to failures to check the other branches of government . . . .").

3. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 133–269 (Simon & Schuster 1991).

4. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–47, 138–43 (1997).

tend to obscure the real issue, which is, "What role did the Framers envision for the federal judiciary in our system of government?" Or, more fundamentally, "Who determines public policy in our constitutional republic?"

Debates regarding the role of the courts used to be waged primarily between conservatives, who were opposed to judicial activism, and liberals, who contended that the Constitution was a "living" document susceptible of a flexible and "evolving" interpretation.[6] The Left favored an expansive judicial role as a way to circumvent the "unenlightened" political process.[7]

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5. *See generally* GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION (1995) (critiquing modern judicial review as anti-democratic); MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE (Univ. of Kansas Press 1996) (stressing the importance of textualism and originalism in constitutional interpretation); ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989) (arguing that the proposition that *Marbury* established judicial review is ahistorical); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (Basic Books 1986) (stating that originalism is the most prudent philosophy of constitutional interpretation); Lino A. Graglia, *Constitutional Law without the Constitution: The Supreme Court's Remaking of America*, *in* A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES 1 (Robert Bork, ed. 2005) (condemning modern constitutional law for undermining traditional American self-governance); Lino A. Graglia, *But the Constitution Is Not the Problem*, 20 TEX. REV. L. & POL. 157 (2015) (reviewing LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012)) (rebuking the proposal that judges can rationally overturn laws on the basis of anything other than the Constitution); Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331 (1985) (reviewing SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984) and JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984), and criticizing modern judicial review); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019 (1992) (defending originalism and federalism in constitutional interpretation); Lino Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293 (1996) (arguing that judicial activism undermines America's constitutional system); Lino A. Graglia, Lawrence v. Texas: *Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1138 (2004) [hereinafter Graglia, *Traditional Morality*] (contending the adoption of libertarianism as a basis for judicial review undermines constitutional government); Mark Pulliam, *The Nihilist Challenge to Constitutional Law*, 14 SW. U. L. REV. 417 (1984) (reviewing ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982) and HENRY MARK HOLZER, SWEET LAND OF LIBERTY? (1983), and lamenting the trend of nihilistic constitutional interpretation in legal academia).

6. *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (chronicling the development, and pointing out the flaws, of the living-constitution philosophy). *See also* Mark Pulliam, *The Quandary of Judicial Review*, NAT'L REV. (Apr. 8, 2015), https://www.nationalreview.com/2015/04/quandary-judicial-review/ [https://perma.cc/7TSL-FJY4]. Judicial activism "can most usefully be defined in constitutional law as a court disallowing as unconstitutional a policy choice that the Constitution does not clearly prohibit." Lino A. Graglia, *A Restrained Plea for Judicial Restraint*, 29 CONST. COMMENTARY 211, 214 (2014).

7. *See, e.g.*, Graglia, *Traditional Morality*, *supra* note 5, at 1141–42 ("The nightmare of the cultural elite is that control of public policymaking should fall into the hands of the American people."). The inimitable Professor Graglia described the motivation for

Writing in the *Texas Law Review* in the mid-1970s, Justice William H. Rehnquist aptly described the notion of a "living Constitution" as

> the proposition that federal judges, perhaps judges as a whole, have a role of their own, quite independent of popular will, to play in solving society's problems. Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people *with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers* concerning what is best for the country.[8]

In his influential 1971 article, *Neutral Principles and Some First Amendment Problems*,[9] Bork directly challenged this "noninterpretive" theory of constitutional law, declaring that the judiciary's power is legitimate only to the extent that its decisions are rigorously derived from the text of the Constitution.[10] If the Supreme Court is merely imposing its own predilections, as Bork argued the Court did in *Griswold v. Connecticut*[11] by recognizing an unenumerated (i.e., unwritten) right to sexual privacy, "the Court violates the postulates of the Madisonian model that alone justifies its power."[12]

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judicial activism as "[t]he assumption, almost universal among academics, . . . that the American people are not to be trusted with self-government and are much in need of restraint by their moral and intellectual betters." Lino A. Graglia, *Was the Constitution a Good Idea?*, NAT'L REV., July 13, 1984, at 34, 39.

8. Rehnquist, *supra* note 6, at 698 (emphasis added).

9. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

10. *Id.* at 3–4; *see* RAOUL BERGER, GOVERNMENT BY JUDICIARY 290–99, 364–67 (1977).

11. 381 U.S. 479 (1965).

12. Bork, *supra* note 9, at 3. The "Madisonian model" refers to the fact that our system of government is not completely democratic. *Id.* at 2–3. The Constitution itself denies certain political choices to simple majorities of voters, and judicial review—decision-making by unelected judges—poses what Alexander Bickel termed "the counter-majoritarian difficulty." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962). The judicial restraint advocated by Bork *could* be described as "Madisonian originalist review," but in the interest of clarity, I will stick with the more conventional term: "judicial restraint." *Cf. infra* note 21 (explaining the libertarians' attempt to conflate judicial restraint with "abdication"). "Judicial restraint" does not mean reflexively deferring to the political branches; it connotes, rather, strict adherence to the text of the Constitution, which can lead to either upholding *or* invalidating a challenged law, depending on the circumstances. *See* Pulliam, *supra* note 6. As Carson Holloway explains,

The proponent of judicial restraint does not deny that the Court should vindicate our

Bork's critique of judicial activism formed the basis for the now-dominant theory of originalism, and his call for fidelity to constitutional text inspired conservatives to embrace the cause of judicial restraint in the 1980s and 1990s.[13] Ironically, despite the rise of the conservative legal movement, the Supreme Court's opinions have continued to recognize rights that are not grounded in the text or history of the Constitution, such as the rights to obtain an abortion,[14] to engage in homosexual sodomy,[15] and to marry persons of the same sex.[16]

Even as the Supreme Court has disappointingly deviated from constitutional text, in recent years libertarian scholars, such as Georgetown Law professor Randy Barnett[17] and the Cato

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constitutional rights; he agrees that this is the Court's duty. But the Court can do that and also observe a duty to defer to the majority. It does this by striking down laws *only when they clearly violate the Constitution.*

Carson Holloway, *Conservatism and Judicial Restraint*, NAT'L REV. (Mar. 23, 2015), https://www.nationalreview.com/blog/bench-memos/conservatism-and-judicial-restraint/ [https://perma.cc/XCC5-GS9S] (emphasis added).

13. *See* BERGER, *supra* note 10. Originalism was strengthened by the formation of The Federalist Society in 1982, as well as the election of President Ronald Reagan in 1980. *See* Joel Alicea, *Originalism and the Rule of the Dead*, NAT'L AFFAIRS (Spring 2015), https://www.nationalaffairs.com/publications/detail/originalism-and-the-rule-of-the-dead [https://perma.cc/2J9M-5D7G] [hereinafter Alicea, *Rule of the Dead*] (noting that the Reagan Administration "had adopted originalism as its jurisprudential guide"); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (noting that "Ronald Reagan had changed the complexion of the Court"); Christopher Wolfe, *From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America*, HERITAGE FOUND. (March 3, 2006), https://www.heritage.org/the-constitution/report/constitutional-interpretation-judicial-activism-the-transformation-judicial [https://perma.cc/M3BZ-X552] ("Justice Antonin Scalia, appointed [by President Reagan] in 1986, was the first recent Supreme Court Justice to adopt squarely a traditional approach . . . to judging"). Originalism has evolved from a model of "original intent" to one of "original public meaning," but the full progression of the theory and the emergence of the so-called new originalism are beyond the scope of this article. *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 19–20, 160 (2015) ("[A]ll our activities have fostered [Originalism] to a great degree and I don't think the debate and discussion would be where it is were it not for us." (quoting the Federalist Society's Executive Director, Eugene Meyer)). *See generally* Antonin Scalia, *Foreword* to STEVEN G. CALABRESI, ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007) ("The upcoming generation of judges and lawyers will have been exposed to originalist thinking . . . if not through their law professors then through lectures and symposia sponsored by the Federalist Society . . . .").

14. Roe v. Wade, 410 U.S. 113, 153 (1973).

15. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

16. Obergefell v. Hodges, 135 S.Ct. 2584, 2604–05 (2015). The Court has also effectively created a right to commit certain crimes, such as the rape of a child, without receiving the death penalty. *See* Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that the Eighth Amendment prohibits imposing the death penalty for the rape of child when the act does not result in death to the child); Roper v. Simmons, 543 U.S. 551, 575 (2005) (banning the execution of minors).

17. *See generally* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION (2016) (chronicling how courts have remade the Constitution into a democratic, as opposed to a

Institute's Roger Pilon,[18] have shifted the course of the debate over judicial review by arguing (with some ingenuity) that the Constitution contains both enumerated *and* unenumerated rights, which federal courts have the obligation to enforce against both the federal and state governments. Barnett, and like-minded libertarians at the Cato Institute and the Institute for Justice, claim that laws should enjoy no presumption of constitutionality and that the government should have the burden of justifying *all* challenged laws as necessary and appropriate.[19] Libertarians, in other words, believe that the federal judiciary is too passive and should play a more active role in policymaking.

The theory of judicial engagement ultimately rests on the premise that ratification of the Constitution and the Bill of Rights (especially the Ninth Amendment) left individuals with all their "natural rights," except those expressly delegated to the federal government, and that these unenumerated rights enjoy full constitutional status. The Bill of Rights is therefore not an exclusive enumeration of rights; individuals inherently possess all rights—whether enumerated or not—unless specifically surrendered to the federal government in the Constitution. Then, with the ratification of the Fourteenth Amendment in 1868, all of the rights embodied in the Constitution, including "unenumerated rights," became judicially enforceable against the states. Accordingly, any state or federal law that impinges on individuals' "natural" (or unenumerated) rights is presumptively invalid. Federal courts should strike down such laws if the government cannot justify those laws under a standard of review closer to strict scrutiny than the rational-basis test.[20]

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republican, one); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2014) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION] (advocating for a judicial philosophy that construes the Constitution's open-ended text in favor of protecting the rights retained by the people).

18. *See generally* Roger Pilon, *Foreword—Judicial Confirmations and the Rule of Law*, CATO SUP. CT. REV., ix, xi-xv (2016-2017); Roger Pilon, *Foreword—Justice Scalia's Originalism: Original or Post-New Deal?*, CATO SUP. CT. REV., vii (2015-2016); Roger Pilon, *Lawless Judging: Refocusing the Issue for Conservatives*, 2 GEO. J.L. & PUB. POL'Y 5 (2001) [hereinafter Pilon, *Lawless Judging*]; Roger Pilon, *On the Folly and Illegitimacy of Industrial Policy*, 5 STAN. L. & POL'Y REV. 103, 111–13 (1993).

19. *See* Evan Bernick, *The Supreme Court Needs a New Judicial Approach: The Case for Judicial Engagement*, CATO UNBOUND (Sept. 12, 2016), https://www.cato-unbound.org/2016/09/12/evan-bernick/supreme-court-needs-new-judicial-approach-case-judicial-engagement [https://perma.cc/EUU5-H3TE] (arguing that "judicial restraint has demonstrably failed to produce constitutionally constrained government.").

20. *See supra* notes 2, 17–19; Kimberly C. Shankman & Roger Pilon, *Reviving the*

Of the two competing models, judicial restraint has an older pedigree, and once was the dominant theory in center-right legal circles.[21] In the past twenty years or so, however, judicial engagement has grown in influence and seeks to displace judicial restraint as the prevailing approach.[22] As a theoretical matter, the two models are diametrically opposed in the most

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Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government, CATO INST. POL'Y ANALYSIS No. 326 (Nov. 23, 1998), *reprinted in* 3 TEX. REV. L. & POL. 1, 40–48 (1998); Roger Pilon, *Coming to Mr. Trump's Aid in the Matter of Judicial Selection*, CATO LIBERTY (Jan. 6, 2017), https://www.cato.org/blog/coming-mr-trumps-aid-matter-judicial-selection [https://perma.cc/P247-22CR]. I am not alone in finding the premises of this argument "peculiar." *See* Kevin Gutzman, *Not Your Founders' Constitution*, AM. CONSERVATIVE (July 21, 2016), http://www.theamericanconservative.com/articles/not-your-founders-constitution/ [https://perma.cc/YP46-N4E6] (arguing that Randy Barnett's contention that sovereignty resides in the people individually is wrong).

21. *See generally* Segall, *supra* note 1; Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal [https://perma.cc/2BZT-QRK5?type=image]. Libertarians such as Damon Root seek to discredit the concept of "judicial restraint" by purporting to trace its origins to big-government Progressives favoring legislative solutions to social problems, citing as an example Harvard law professor James Bradley Thayer, who authored an article, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), advocating a highly deferential scope of judicial review. *See* DAMON ROOT, OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT 50–54 (2014). Devotees of judicial engagement also seek to equate "restraint"—not inventing constitutional rights—with "abdication" or "passivism." *See* Bernick, *supra* note 19; Randy Barnett, *Ed Whelan vs George Will on "Judicial Restraint"*, WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/23/ed-whelan-vs-george-will-on-judicial-restraint/?utm_term=.67be2fa81e10 [https://perma.cc/49JX-D5EZ] ("Historically, 'judicial restraint' was typically invoked precisely to urge judicial passivism."). These contentions fail to acknowledge that the doctrine of judicial restraint dates to the Founding era, *and* that modern proponents of judicial restraint such as Bork and Scalia did not embrace Thayer's crabbed conception of the judicial role. Indeed, it's not clear that Thayer had any influence at all on modern judicial conservatives. *See* Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 533–34 (2012); Carson Holloway, *No, Judicial Restraint Isn't 'Progressive,'* HERITAGE FOUND. (Apr. 3, 2015), https://www.heritage.org/political-process/commentary/no-judicial-restraint-isnt-progressive [https://perma.cc/2BMF-5ZF5] (disputing Thayer and contending that his overly deferential approach departed from the jurisprudence of John Marshall). Judge J. Harvie Wilkinson, author of the 2012 book *Cosmic Constitutional Theory*, is sometimes cited as an exemplar of Thayerian restraint. *See* Posner, *supra*, at 534–35; *cf.* Barnett, *supra* ("J. Harvie Wilkinson is no slouch, and his views used to be the dominant strain in conservative circles."). Even Professor Lino Graglia, the most outspoken critic of judicial activism, disagrees with Judge Wilkinson. *See* Graglia, *supra* note 6, at 225–27. To be clear, modern proponents of "judicial restraint" are committed to the active enforcement of rights actually set forth in the Constitution (*enumerated* rights), but would abjure the recognition and enforcement of *unenumerated* rights. *See generally* Pulliam, *supra* note 6.

22. *See, e.g.*, ROOT, *supra* note 21; Barnett, *supra* note 21 (noting how judicial restraint used to be the dominant judicial philosophy in the Federalist Society). *See generally* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT OF LIBERTY 121–56 (2014) [hereinafter SANDEFUR, CONSCIENCE]; Clark Neily, *Against Arbitrary Government and the Amoral Constitution*, 19 TEX. REV. L. & POL. 81 (2014); Timothy Sandefur, *Disputing the Dogma of Deference*, 18 TEX. REV. L. & POL. 121 (2013) [hereinafter Sandefur, *Dogma of Deference*].

important respects, especially regarding the existence and enforcement of unenumerated constitutional rights. Moreover, in application, the two models dictate fundamentally divergent roles for reviewing courts. Under judicial engagement, judges would examine the necessity and efficacy of challenged laws, and overturn them if they find the laws unnecessary or unwise.[23] This transforms judges into policymakers—de facto legislators. In contrast, proponents of judicial restraint believe that judges should not overturn laws unless they violate a clear (i.e., enumerated) provision of the Constitution, leaving policy determinations—evaluating the wisdom of laws—to the political branches.

The two competing models are clearly in tension with one another. If judicial engagement is accepted (at least in the form propounded by its advocates), traditional notions of judicial restraint must be rejected, and vice versa.

Judicial engagement purports to be an "originalist" theory, meaning that it is supposedly consistent with the original public meaning of the Constitution. I strongly disagree. Judicial engagement is faux originalism.[24] The theory of judicial engagement is unsound as a matter of history and contrary to the original understanding of the Framers. Moreover, it is flawed in theory and practically unworkable. Critics have accused judicial engagement of being an invitation for libertarian judicial

23. *See* NEILY, *supra* note 2, at 128–30 ("In all cases, not just some, judges should candidly seek to determine what ends the government is pursuing and ensure that both its ends and its means are constitutionally legitimate."); SANDEFUR, CONSCIENCE, *supra* note 22, at 135, 153–55; Sandefur, *Dogma of Deference*, *supra* note 22, at 142–46 ("Proper judicial engagement," according to Sandefur, means that "limits on freedom [i.e., laws] must be justified by some genuine public purpose and must be no greater than necessary to accomplish that goal," in the subjective estimation of *judges* rather than *legislators*); Randy Barnett, *Least Dangerous Branch*, WALL ST. J., Nov. 20, 2013, at A11 ("Judges need to ask the government to explain why a restriction on liberty is both necessary and proper and then realistically examine the proffered explanation."). Moreover, some proponents of judicial engagement contend that judges should also scrutinize the legislature's *motive* for passing laws. *See* Holloway, *supra* note 21 (stating that Bernick would want the Court to say in *Lochner* "that the legislature went too far, and to make this judgment in part on the basis of the political motives of the legislators.").

24. *See* Pulliam, *Libertarian Judicial Activism*, *supra* note 1 ("At best, it represents wishful thinking by inventive libertarian scholars. At worst, it would unmoor constitutional law from the text of the Constitution and empower unelected judges to be society's Platonic Guardians."); *see also* Mark Pulliam, *Plain Talk about Law School Rot*, AM. GREATNESS (May 7, 2017), https://amgreatness.com/2017/05/07/plain-talk-law-school-rot/ [https://perma.cc/T47V-Q4GJ] ("Law professors are the courtiers to the imperial judiciary, and 'constitutional theory' is the vehicle for counter-majoritarian social change."); Segall, *supra* note 1. Conversely, judicial restraint—properly understood—*is* consistent with originalism. *See infra* notes 107–37 and accompanying text.

activism,[25] but given the overwhelmingly liberal orientation of the legal academy, the organized bar, and the federal courts, the theory will likely just encourage more mischief by progressive judges seeking to impose their personal predilections on the polity—continuing (or accelerating) a trend that began in the 1960s with the notorious activism of the Warren Court.[26]

Judicial engagement is a radical—and untenable—theory. The vast reservoir of unenumerated rights makes *Griswold*'s[27] "penumbras, formed by emanations"[28] and *Planned Parenthood v. Casey*'s[29] notorious "mystery passage"[30] seem restrained in comparison. Perhaps coincidentally, the theory of unenumerated rights bears an amazing resemblance to Ayn Rand's Objectivism, or John Stuart Mill's "harm principle," which of course were unknown to the Framers.[31]

The libertarian theory of constitutional law is clever and, undoubtedly, well-intentioned. The theory of judicial engagement posits that all nonharmful conduct is a protected liberty, so courts should safeguard these individual "rights" from "majoritarian" interference.[32] The real problem, proponents insist, has been judicial passivity—even abdication—especially since the New Deal. Libertarians believe the government has grown because courts have not held Congress and state legislatures in check. All we need to tame the governmental Leviathan, libertarians assure us, is "better judging."[33] Enter "judicial engagement," which sounds innocuous but actually

25. *See* Ed Whelan, *Let's Break Off the Engagement*, CATO UNBOUND (Sept. 20, 2016), https://www.cato-unbound.org/2016/09/20/edward-whelan/lets-break-engagement [https://perma.cc/26NZ-KZE6] ("[I]s judicial engagement anything more than camouflage for libertarian judicial activism—an effort to smuggle in the back door what can't be formally established by straightforward and persuasive arguments about original meaning?").

26. BORK, *supra* note 3, at 69–100; *see infra* notes 166–89 and accompanying text.

27. Griswold v. Connecticut, 381 U.S. 479 (1965).

28. *Id.* at 484.

29. 505 U.S. 833 (1992).

30. *Id.* at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life").

31. *See generally* JOHN STUART MILL, ON LIBERTY (1859).

32. *See, e.g.*, Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 509–11 (1993); Devin Watkins, *The Original Understanding of Substantive Due Process*, L. & LIBERTY (Oct. 25, 2016), http://www.libertylawsite.org/2016/10/25/the-original-understanding-of-substantive-due-process/ [https://perma.cc/U2DN-4PLW] ("A person's liberty is the right to do those acts which do not harm others.").

33. *See* Pilon, *supra* note 20 ("[T]he answer to bad judging is not judicial abdication. It's better judging."); Pilon, *Lawless Judging*, *supra* note 18, at 22 ("[O]ur system, with a weakened judiciary, is a dangerous institution.").

reorders the way our government would operate in fundamental ways.

By severely constraining the states' police power, and presuming all laws to be unconstitutional, the libertarian theory both centralizes decision-making at the national level (i.e., the federal courts) at the expense of the states, *and* confers enormous power on the least democratically accountable branch (life-tenured, unelected judges). Conservative legal scholar Ed Whelan has called this theory "a fantasy libertarian constitution,"[34] and it is. But worse than that, it is a dangerous, utopian fantasy—based on a theoretical sleight of hand—that ignores the premises of the Constitution, dramatically weakens the states as political entities, and disregards human nature by presuming wisdom and honesty on the part of judges.

The traditional conservative view proceeds from an altogether different premise. The Declaration of Independence was not a libertarian manifesto, but a proclamation justifying freedom from King George III's tyrannical rule. A new form of representative self-government would replace submission to an unelected monarch. In 1776, the thirteen colonies became separate sovereign states,[35] and each state adopted a constitution that became the Lockean "social contract" for its inhabitants. Each of the states exercised general police power over its inhabitants, subject to whatever individual rights the state constitutions reserved. The states entered into the ill-fated Articles of Confederation, and eventually the Constitution, not to dissolve themselves and revert to an anarchic state of nature,[36] but to form an *additional* (albeit limited) layer of government at the federal level.

The Founders presumed that popular sovereignty remains with the people at all times and that governments—including courts—have no authority other than that which the people expressly delegate to them. Judicial interference with an otherwise properly functioning government exercising the

34. Ed Whelan, *Randy Barnett's* Our Republican Constitution—*Part 2*, NAT'L REV. (Aug. 12, 2016), https://www.nationalreview.com/blog/bench-memos/barnett-republican-constitution-2/ [https://perma.cc/6PHW-E5VA].

35. The Declaration, while referring in the Preamble to "one People," makes clear in the body that "these United Colonies are, and of Right ought to be, Free and Independent States." THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

36. THE FEDERALIST NO. 45 (James Madison). The Constitution itself is explicitly a compact among the ratifying states. U.S. CONST. art. VII.

delegated powers of the people thwarts this principle of popular sovereignty, but courts must interfere in cases where governments have clearly exercised powers not granted or expressly forbidden. The Ninth and Tenth Amendments were intended to clarify that the states (and the people, to the extent they had reserved individual liberties in the state constitutions) did not relinquish any rights or powers not expressly delegated to the federal government.[37]

To conservatives, as a matter of federal constitutional law, there are no judicially enforceable unenumerated rights and no unenumerated powers. Therefore, judges must construe the Constitution in accordance with its express terms, not by reading between the lines or divining "invisible" rights. Most conservatives believe that originalism necessarily entails a degree of judicial restraint, imposed by the discipline of interpreting the constitutional text.[38] Abandon the text and you abandon restraint. Moreover, when judges depart from the text (other than to enforce the Constitution's original public meaning), they exceed the limited powers delegated to them. Judicial engagement would empower courts to an even greater degree than the theory of the "living Constitution" because unenumerated rights are essentially unlimited in scope. Judicial engagement is simply the "living Constitution" on steroids.[39]

I. THE MORAL AUTHORITY OF THE CONSTITUTION

A threshold question in any discussion of judicial review concerns the Constitution itself: What is the source of its moral authority? Why do we regard a document written 230 years ago

37. *See* BORK, *supra* note 3, at 183–85; Kurt T. Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. ONLINE 219, 229 (2013); *supra* note 5; *see also* KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 285 (2009) ("[T]he founders adopted the Ninth and Tenth Amendments in order to reserve the right of each state 'to determine for itself its own political machinery and its own domestic policies.'") (quoting Hawke v. Smith, 126 N.E. 400, 403 (Ohio 1919)).

38. *See generally* BORK, *supra* note 3, at 251–65. In Bork's famous words, "The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else." *Id.* at 242.

39. *Cf.* Alicea, *Rule of the Dead*, *supra* note 13 ("Barnett's philosophical assumptions leave him but a step away from a libertarian version of living constitutionalism."). Pilon insists that "no one who takes the Constitution seriously is asking judges to 'make up and enforce' the law." Pilon, *Lawless Judging*, *supra* note 18, at 22. Yet, by contending that the federal judiciary is the enforcer of unwritten, omnipresent "unenumerated" rights, Pilon gives unelected judges unlimited power over the political branches, something no "living constitutionalist" ever proposed.

as law—indeed, our *supreme* law? How can we be ruled by the "dead hand" of history? These are important (albeit easily answered) questions. Anarchists such as Lysander Spooner delighted in challenging the authority of the Constitution, but their objections apply to any form of written law, or to state power in general.[40] Democratic self-government rests on the premise of a social compact.[41] State constitutions are our social compacts, and the U.S. Constitution is a separate covenant among the states.

The legitimacy of our government is based on popular sovereignty. The Declaration of Independence acknowledges that governments derive "their just powers from the consent of the governed."[42] Prior to entering into civil society, man possessed absolute freedom in the "state of nature"—his rights having been conferred by his Creator.[43] As the Declaration of Independence recites, to secure their God-given rights, men form governments. In 1787, the Framers met in Philadelphia to "form a more perfect Union,"[44] and produced a compact among the states that was ratified by the states (representing "[w]e the people"[45]) in 1788 (with the Bill of Rights following in 1791). The Constitution professes to be "the supreme Law of the Land."[46] As citizens, the Constitution binds us as law in the same way that we are subject to legislation enacted before we were born.

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40. *See* LYSANDER SPOONER, *No Treason: The Constitution of No Authority* (1870), *reprinted in* THE LYSANDER SPOONER READER 77 (1992); Alicea, *Rule of the Dead*, *supra* note 13. Tellingly, Randy Barnett dedicated *Restoring the Lost Constitution* to Lysander Spooner (in addition to James Madison).

41. *See* CAREY, *supra* note 5, at 127 (exploring the notion that the Constitution is a contract between the government and the governed); ST. GEORGE TUCKER, *View of the Constitution of the United States* (1803), *reprinted in* VIEW OF THE UNITED STATES WITH SELECTED WRITINGS 91–123 (1999) ("The constitution of the United States of America, then, is an original, written, federal, and social compact. . . ."); JOHN TUCKER, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 36–65 (1820) (discussing the dangers a strong centralized government poses to self-government). The existence of a written Constitution, with a fixed meaning, binding on government officials, is the foundation for the rule of law. *See* BERGER, *supra* note 10, at 290–99.

42. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

43. *See id.* ("all Men are . . . endowed by their Creator with certain unalienable Rights").

44. U.S. CONST. pmbl; *see* U.S. CONST. art. VII ("The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.").

45. U.S. CONST. pmbl.

46. U.S. CONST. art. VI, cl. 1.

In an important essay entitled *The Notion of a Living Constitution*,[47] Justice Rehnquist explained the rationale of the Founding:

> The ultimate source of authority in this Nation . . . is not Congress, not the states, not for that matter the Supreme Court of the United States. *The people are the ultimate source of authority*; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it.[48]

Thus, the Constitution, as written, is an expression of popular sovereignty; it both binds us and protects us in the nature of a social compact. The Constitution represents the states' limited delegation of their citizens' freedom. As long as the various branches of government act in accordance with the Constitution, they have the consent of the governed. When the respective branches—including the courts—depart from their authorized roles, they forfeit their legitimacy. In this respect, judges are no different than the political branches. In *Marbury v. Madison*,[49] Chief Justice John Marshall acknowledged the authority of a written constitution, binding on all branches of government, and, in fact, justified the exercise of judicial review on the need for courts to enforce its terms as fundamental law.[50]

Supreme Court decisions overturning democratically enacted laws are legitimate *only to the extent* that they enforce the Constitution itself, rather than impose the Justices' own moral views. When the Court issues rulings that are not firmly grounded in the original public meaning of the Constitution, it perpetrates, in Bork's memorable phrasing, "limited coups d'état."[51]

The question then becomes, what does the Constitution mean? And how should we interpret it?

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47. Rehnquist, *supra* note 6.

48. *Id.* at 696 (emphasis added); *see also* ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM 107–08 (1997); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 280, 287–89 (1985); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 545–47 (1969); *cf.* THE FEDERALIST NO. 39 (James Madison) (explaining that ratification of the U.S. Constitution by the states, on behalf of the people, constitutes a federal, and not a national, act—creating a federal, and not a national, constitution).

49. 5 U.S. (1 Cranch) 137 (1803).

50. *Id.* at 177–79.

51. Bork, *supra* note 9, at 6; *see* BORK, *supra* note 3, at 143–60.

II. THE FRAMERS DID NOT ENVISION AN "ENGAGED" JUDICIARY

Due in large part to Bork's trail-blazing scholarship,[52] and the tenacity of Justice Antonin Scalia during his remarkable tenure on the Court, originalism has become the dominant force in constitutional theory on the Right. Originalism requires that the Constitution be interpreted according to its original public meaning. The Constitution is *a text.* Judges should try to ascertain the meaning of that text, which is binding on future generations as the charter of our federal union. Judges serve a different role than legislators. This is why the Framers created a Constitution with separate powers for the legislative (Article I), executive (Article II), and judicial (Article III) branches. All legislative powers were vested in Congress, the executive powers were vested in the President, and—in the shortest of the three Articles—the judicial power of the United States was vested in a supreme court (details unspecified) and "in such inferior courts as the Congress may from time to time ordain and establish."[53]

Some fundamental conclusions are apparent from reading the Constitution and its accompanying commentary, the *Federalist Papers.*

None of the branches is "in charge" of the other branches. This is because the Framers deliberately separated the powers of each branch and created checks and balances among them. The President can veto laws passed by the Congress.[54] The "advice and consent" of the Senate is required for certain presidential actions.[55] Federal judges serve for life and cannot have their compensation reduced.[56] And so forth. The Framers did not create, in any of the branches, a Monarch, a Philosopher-King, Platonic Guardians, or Delphic oracles.

That is because the Framers viewed the best protection of liberty to be a republican form of government—filtered self-rule in which the power of "faction" and passions of unbridled democracy would be tempered by a bicameral legislature with

52. *See, e.g.*, Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 701 (1979); Bork, *supra* note 9; John McGinnis, *Robert Bork: Intellectual Leader of the Legal Right*, 80 U. CHI. L. REV. ONLINE 235 (2013).

53. U.S. CONST. art. III, § 1.

54. U.S. CONST. art. I, § 7.

55. *See, e.g.*, U.S. CONST. art II, § 2 (requiring the advice and consent of the Senate for the President's appointment of "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States . . . .").

56. U.S. CONST. art. III, § 1.

different terms, equal representation of states in the Senate (whose members were originally selected by the state legislatures), and limited federal powers delegated by the sovereign states. In *Federalist* No. 10, James Madison explained that the republican form of government is the best antidote to the "dangerous vice" of faction: "In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."[57]

The 1787 Constitution created a federal government with limited and enumerated powers but did not diminish the power of the states. Indeed, Article IV, section 4 of the Constitution guarantees "to every state in this union a republican form of government."[58] The Bill of Rights was added to the Constitution expressly to assuage fears that the federal government would have too much power over the states.[59]

The Framers did not disdain self-government; they insisted on it. They feared the power of faction but mitigated the dangers of democracy by diffusing it, not eliminating it. The Framers were not opposed to popular government; they regarded accountability to the voters as essential to the maintenance of freedom and the avoidance of tyranny. The "consent of the governed" was a familiar theme in the *Federalist Papers*. James Madison talks about the importance of "republican principles" in *Federalist* No. 39: No other form of government, he stated, "would be reconcilable with the genius of the people of America; [or]

57. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

58. U.S. CONST. art. IV, § 4.

59. *See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (noting that the Bill of Rights applies only to the federal government, and not the states); BORK, *supra* note 3, at 93 ("[T]he state constitutions had explicit declarations of rights, and the Anti-Federalists attempted to block ratification on the ground that, without such guarantees, the Constitution was fatally defective."); JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT 401–09 (3d ed. 2000); STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 162 (1994). As Hamilton explained in *Federalist* No. 84, the greatest protection against federal government power is a *limited grant* of such power, not an express reservation of "rights." THE FEDERALIST NO. 84 (Alexander Hamilton). Such rights were more important to *subjects of a monarch*, as the beneficiaries of the Magna Carta were, than to self-governing citizens in a republic. What made the American experiment (launched by the Declaration) unique was the notion that freedom could be attained (and preserved) through citizens' participation in their own government, subject to checks and balances, the separation of powers, and the principles of federalism. The division of power between the states and the federal government—the bedrock principle of federalism—was seen as yet another example of the "separation of powers." *See* THE FEDERALIST NOS. 39, 45 (James Madison).

with the fundamental principles of the Revolution . . . ."[60] What did the Framers believe to be the "distinctive characters of the republican form"? In *Federalist* No. 39, Madison cites several "essential" features: The government must derive "all its powers directly or indirectly from the great body of the people," and government officials must be accountable to the voters by holding their offices "for a limited period."[61]

The Framers were not libertarians; they were realists about human nature and deeply distrustful of it. What they feared most was the concentration of power in a single government official or branch of government. In *Federalist* No. 51, Madison explained the importance of, and rationale for, the republican form of government:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; *and in the next place oblige it to control itself.* A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[62]

Modern-day libertarians who disdain "majoritarianism"[63] must accept that the Framers felt otherwise. In *Federalist* No. 51, Madison stated, "it is not possible to give each department [of government] an equal power of self-defense. In republican government, *the legislative authority necessarily predominates.*"[64] Thus, it is not surprising that the most critical federal powers—to tax, to declare war, to impeach, to create inferior federal courts, to regulate the jurisdiction of the judicial branch, and to select

60. THE FEDERALIST NO. 39, at 236 (James Madison) (Clinton Rossiter ed., 1961).
61. *Id.* at 237.
62. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).
63. *See, e.g.*, NEILY, TERMS OF ENGAGEMENT, *supra* note 2, at 107–09; Pilon, *Lawless Judging*, *supra* note 18, at 8–10; Neily, *supra* note 22, at 97; Sandefur, *Dogma of Deference*, *supra* note 22, at 127–30.
64. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

the president in the event of an Electoral College deadlock—were assigned to Congress in Article I or elsewhere.

Unlike modern-day libertarians, the Framers did not conceive of liberty as the absence of external constraints, but as the ability to govern themselves through representative self-government.[65] By giving unelected federal judges carte blanche to second-guess all federal, state, and local laws, the theory of judicial engagement effectively eviscerates state sovereignty and makes the American people wards of the federal courts—similar to being subjects of King George III. The overriding theme of the *Federalist Papers,* in contrast, is ensuring that the federal government has enough power to do its job, while preventing any department or official from having too much power.[66] Putting unelected, life-tenured federal judges in charge of the other two branches and the states is not consistent with the republican form of government, the Framers' conception of the judiciary (discussed in *Federalist* No. 78[67]), or the overall constitutional design.

The Framers were realistic enough to recognize that the political consensus of the founding era might change and that circumstances in the future might require modifying the Constitution. To deal with this eventuality, they provided a mechanism for the people, either through their elected representatives or at a convention of the states, to amend the Constitution.[68] Article V was their version of "the living Constitution" to address the changing needs of an evolving society—*not* inventive judges.

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65. U.S. CONST. art. IV, § 4.

66. THE FEDERALIST NO. 51 (James Madison). The Founders were heavily influenced by Baron de Montesquieu's treatise, *The Spirit of the Laws,* originally published in 1748 and translated into English in 1750. Montesquieu is credited with originating the concept of "separation of powers." In the *Federalist Papers,* Madison referred to "the celebrated Montesquieu" as "[t]he oracle who is always consulted and cited on this subject." THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). According to Max Farrand's account of the Constitutional Convention, "Montesquieu, *whose writings were taken as political gospel,* had shown the absolute necessity of separating the legislative, executive, and judicial powers." MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 49–50 (1913) (emphasis added).

67. THE FEDERALIST NO. 78 (Alexander Hamilton) (noting that even though courts are charged with the duty of interpreting law, this duty does not mean that courts are justified in substituting their will for that of Congress).

68. U.S. CONST. art. V.

III. NATURAL LAW

All agree that express provisions of the Constitution, to the extent their meaning can be ascertained, should be enforced. The controversy between libertarians and conservatives centers around what is missing from the Constitution. Unenumerated rights are the Holy Grail of libertarian constitutional theory, supposedly lurking between the lines waiting to be enforced. Without these invisible rights, the Constitution is just another text, and is reduced to the status of "positive law" defined by its written terms. Libertarians sometimes view this as "amoral,"[69] "relativistic,"[70] or "nihilistic"[71]—but texts are agnostic. Justice Scalia described the Constitution as "a practical and pragmatic charter of government."[72]

Libertarian theorists discover the "unenumerated rights" thought to inhabit the Constitution in the notion of "natural law" or "natural rights"—a common thread in 18th-century political philosophy and jurisprudence. To libertarians, "natural rights" serve the same role as the open-ended "penumbras, formed by emanations" that Justice William O. Douglas used to recognize a constitutional right to "marital privacy" in *Griswold v.*

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69. Neily, *supra* note 22, at 84.

70. SANDEFUR, CONSCIENCE, *supra* note 22, at 129. *But see* Kevin Gutzman, *Shall We Be Ruled By Libertarian Philosopher-Judges?*, TENTH AMENDMENT CTR. (Dec. 2, 2013), http://blog.tenthamendmentcenter.com/2013/12/shall-we-be-ruled-by-libertarian-philosopher-judges/ [https://perma.cc/C9JH-6TD2] (thoroughly critiquing Sandefur's analysis).

71. Barnett, *supra* note 21 ("Bork was a majoritarian and moral nihilist (the two are related)"). To the contrary, Bork strongly believed in morals but felt that it was up to the *community*, and not *unelected judges*, to make moral judgments. Forbidding the majority to express its moral judgments through law imposes moral relativism. *See* Robert Bork, *Tradition and Morality in Constitutional Law, reprinted in* ROBERT BORK, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 397 (2008). As Bork explained:

> Our constitutional liberties . . . do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning.

Id. at 401. The notion that majoritarianism and moral nihilism are related, as Barnett contends, illustrates the contempt libertarians have for democracy. As Bork notes,

> In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances.

Id. at 403.

72. SCALIA, *supra* note 4, at 134.

Connecticut,[73] and the "mystery passage" that Justice Anthony Kennedy used in *Planned Parenthood v. Casey*[74] to extend the holding of *Roe v. Wade*,[75] banning any restrictions that placed an "undue burden" on abortion access. That is, so-called natural rights are used as an artifice to allow activist judges to ignore the text of the Constitution and instead make rulings based on their personal policy preferences.

Most originalists properly scoff at the search for "penumbras"[76] and Justice Kennedy's navel-gazing masquerading as constitutional law, but resorting to "natural rights" is just as subjective—and therefore equally prone to abuse. More importantly, as the renowned political scientist Walter Berns explained, the doctrine of natural rights plays no role in American constitutionalism. Natural rights exist only in nature—i.e., prior to man's entry into civil society (or organized government). When man enters civil society, he leaves his natural rights behind and, together with other self-interested men, forms a sovereign that exercises legislative power on his behalf. In a civil society, men rely on democratic self-government and positive law to secure their rights.[77] Accordingly, natural rights cannot override positive law.

True, the Declaration of Independence explicitly refers to natural rights; indeed, it relies on the concept of "certain unalienable rights" endowed by our Creator.[78] But the Declaration is not the same as the Constitution. The Declaration was a proclamation justifying secession, not a social compact or a governing document. The Declaration was never ratified by the states. And even the Declaration acknowledges that men institute

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73. 381 U.S. 479, 483–84 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

74. 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

75. 410 U.S. 113 (1973).

76. *Griswold*, 381 U.S. at 484.

77. *See* Walter Berns, *Judicial Review and the Rights and Laws of Nature*, SUP. CT. REV. 49, 57–66 (1982) [hereinafter Berns, *Judicial Review*]; *see also* Walter Berns, *The Illegitimacy of Appeals to Natural Law in Constitutional Interpretation*, *in* WALTER BERNS, DEMOCRACY AND THE CONSTITUTION 17 (2006). As Professor Michael McConnell explains, "The essence of the Lockean social compact is that we relinquish certain of our natural rights and we receive, in return, more effectual protection for certain of our rights, plus the enjoyment of positive rights, that is, rights created by the action of political society." Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, CATO SUP. CT. REV. 13, 15–16 (2009-2010) ("[N]atural rights do not necessarily survive into civil society").

78. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

governments "to secure these rights"[79]—as the Founding Fathers did in state constitutions and in later compacts among the states. The legitimacy of such governments derives from the "consent of the governed."[80] The colonies declared themselves independent from Great Britain, not just because of "taxation without representation,"[81] but also because King George III denied the colonists the ability to pass laws they desired. To the colonists, a fundamental aspect of their grievances lay in the denial of popular sovereignty—the very right of self-rule that libertarians sometimes disparage as "majoritarianism."

So, following the Declaration of Independence, the colonies, now organized as sovereign states with separate state constitutions, entered into the ineffective Articles of Confederation, approved by the Continental Congress in 1777 and ratified in 1781. And when the Articles failed as a federal charter, the states went back to the drawing board and, more than a decade after the Declaration, adopted the Constitution at the Convention held in Philadelphia in 1787. The Constitution, loaded with compromises, was eventually ratified by the states in 1788, along with a Bill of Rights in 1791. With subsequent amendments, the same Constitution governs us today. It begins with the words, "We the people," and contains no reference to natural law or the Declaration of Independence.

In response to arguments that the Constitution must be interpreted in accordance with the terms of the Declaration, Justice Scalia properly dismissed the lofty sentiments expressed in the Declaration as mere "aspirations."[82] Scalia also rejected the notion that the Declaration lurks invisibly in the Constitution: "There is no such philosophizing in our Constitution. . . ."[83] How can there be a legally enforceable natural law? Where is it written down? Who ratified it? What makes it binding on succeeding generations? If the meaning of "natural law" is in the eye of the beholder, why is one person's interpretation more valid than another? And why should courts be in charge of deciding that? If natural law connotes moral reasoning, judges are no better equipped than ordinary citizens (or legislators) to

79. *Id.*
80. *Id.*
81. *See id.* at para. 19 (embodying the 1700s slogan for revolution: "no taxation without representation").
82. SCALIA, *supra* note 4, at 134.
83. *Id.*

determine what is "just" or "fair." Robert Bork concluded that "[t]he prospect of 'correct' natural law judging is a chimera."[84] Berns concurs: "Natural law in this modern sense is not a legal discipline. Lawyers, simply as lawyers or even as judges, have no competence in it, and courts have no jurisdiction over it."[85]

With some sleight of hand involving the Ninth and Tenth Amendments (discussed *infra*), followed by the resort to the long-moribund privileges-or-immunities clause of the Fourteenth Amendment (relegated to irrelevance by the *Slaughter-House Cases*[86]), libertarian theorists claim that most natural rights survive our entry into civil society, override positive law, and create a right of unfettered personal autonomy that allows every citizen to engage in any conduct that does not cause harm to another.[87] (Interestingly, this derivation of natural rights is quite similar to John Stuart Mill's liberty principle, which he derived in 1859 from utilitarianism and not natural rights.)

This theory is wishful thinking and is not based on the original public understanding of the Constitution. The *Federalist Papers* and other contemporaneous commentary do not reveal such a libertarian state of nature, either prior to or after the formation of the United States of America. Eighteenth-century attitudes would have regarded such a proposition as nonsensical. As reflected by President George Washington's 1796 *Farewell Address*, the founding generation believed there could be no law without morality, no morality without religion, and no legal order if individual rights were all that mattered.[88] The Founding Fathers were not libertines.

In any event, it has always been assumed that the people have delegated to their state governments considerable police power to regulate the health, safety, and morals of the community. The threshold proposition of political philosophy is that citizens leave the "state of nature" and enter into civil society with the explicit

84. Robert H. Bork, *Natural Law and the Constitution*, FIRST THINGS (March 1992), https://www.firstthings.com/article/1992/03/natural-law-and-the-constitution [https://perma.cc/NZ9P-VYJ7].

85. Berns, *Judicial Review*, *supra* note 77, at 66; *see* McConnell, *supra* note 77, at 18 ("The historical evidence indicates that natural rights in the pre-constitutional world did not have the status we now ascribe to constitutional rights—meaning supreme over positive law.").

86. 83 U.S. (16 Wall.) 36 (1873).

87. *See* Watkins, *supra* note 32 ("A person's liberty is the right to do those acts which do not harm others.").

88. *See* PRESSER, *supra* note 59, at 12–13, 84–86.

understanding that they surrender their natural rights—however conceived—to enjoy the benefits of living in a community. While individuals enjoy complete freedom prior to entering into civil society, they must also cope with a perilous state of nature that renders life, in Thomas Hobbes's memorable description, "solitary, poor, nasty, brutish, and short."[89] Civil society is necessary to secure our natural rights from the hazards and predations that exist in a state of lawless anarchy.

What did the Framers believe they were doing by enacting the Constitution? They were certainly not eliminating the states as political units. Madison's explanation in *Federalist* No. 45 is illuminating:

> The powers delegated by the proposed Constitution to the federal government are few and defined. *Those which are to remain to the State governments are numerous and indefinite.* The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*[90]

It is thus apparent that the Constitution was regarded as a compact *among* the states, not an abrogation *of* the states, and certainly not the establishment of a new compact directly between the people and the federal government. Accordingly, the powers of the state, and the concomitant rights of the individual living in the state, are defined by the terms of the state *and* federal constitutions. It is oxymoronic to argue that the U.S. Constitution creates a libertarian state of nature. To the contrary, the state and federal constitutions collectively define the relationship between man and state and set forth the terms of that relationship.

Professor Barnett argues in *Restoring the Lost Constitution* that inherent "natural rights" exist unless the state can prove (to a judge's satisfaction) that it has a legitimate basis for abridging them.[91] This contention is untenable.[92] As explained below,

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89. THOMAS HOBBES, LEVIATHAN, OR THE MATTER, FORME, AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL 84 (Cambridge Univ. Press 1904).

90. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

91. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 17, at 262.

92. According to Professor McConnell, "Some scholars, among them Professor

judges divining the current meaning of "natural law" (i.e., their subjective interpretation of it) are not construing the text of the Constitution: they are either playing moral philosopher (a role the Constitution doesn't recognize), engaging in policymaking (illegitimately imposing their personal predilections on the polity), or channeling "the living Constitution" in séance-like fashion. None of these roles is a proper judicial function or an exercise in originalism. The Constitution either has a fixed, ascertainable meaning, or it is indeterminate.

IV. The Significance of the Ninth and Tenth Amendments

Libertarians place a great deal of stock in the Ninth and Tenth Amendments, which they contend preserve to individuals, and not just the states, all rights not specifically granted to the federal government, including the undefined and unenumerated "natural rights" libertarians want federal judges to enforce against state and federal elected officials. In the 226 years since the Bill of Rights was ratified, however, the Supreme Court has never embraced such an interpretation. Nor should it.

The Tenth Amendment is fairly straightforward: any powers not specifically delegated to the national government are retained by the respective states (and, to the extent that the state constitution protects certain rights, to the people).[93] The Ninth Amendment, which almost certainly was intended to be read as a companion to the Tenth Amendment, is more enigmatic: "The enumeration in the Constitution of certain rights *shall not be construed* to deny or disparage others retained by the people."[94]

Scholars differ regarding the meaning of those amendments. Robert Bork earned the eternal ire of libertarians by allegedly stating during his 1987 Supreme Court confirmation hearing that the Ninth Amendment was as inscrutable as an inkblot. That's not quite what he said,[95] but his point is sound: if a judge

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Barnett, argue that unenumerated natural rights are now constitutional rights, with the same status as rights spelled out by the First through Eighth Amendments." McConnell, *supra* note 77, at 18. McConnell disagrees: "[T]he founding generation . . . believed that in the absence of express constitutional protections, legislatures had the power . . . to infringe those natural rights." *Id.* at 20.

93. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

94. U.S. CONST. amend. IX (emphasis added).

95. *See* Ramesh Ponnuru, *Judge Bork's Ink Blot*, NAT'L REV. (Dec. 20, 2012), https://www.nationalreview.com/2012/12/judge-borks-ink-blot-ramesh-ponnuru/

can't ascertain the meaning of a text, from either its wording or contemporaneous understanding, he shouldn't guess.

Note that the Ninth Amendment is a rule of *construction*, not a conferral of rights. Recent scholarship (by Professor Kurt Lash[96] and others) has confirmed that the Ninth Amendment was a companion to the Tenth Amendment to protect the retained powers and rights of the states. This is consistent with popular concern over the Constitution as granting too much power to the federal government at the expense of the states. Ameliorating that concern was the primary purpose of the Bill of Rights. In the context of the two amendments read together, as they were intended to be, "people" meant nothing more than the retained right of local self-government—the "representative form of government" so important to the Framers.[97] "People" and "states" were interchangeable.[98] Some scholars dispute this, but if the Framers had intended to import open-ended unenumerated rights into the Constitution—with momentous implications—surely they would have said so explicitly.[99] Indeed, the Framers could have dispensed with the three branches and simply proclaimed that the Supreme Court shall be responsible

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[https://perma.cc/GSZ5-Q4G9] (noting that Robert Bork's confirmation testimony, in context, suggests that Bork merely meant he did not know what the Ninth Amendment meant with "any degree of certitude.").

96. *See* Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J.L. & PUB. POL'Y 467, 471 (2008) (noting that Judge Bork's view that the "Ninth Amendment might well be viewed as a companion to the Tenth" has been "vindicated").

97. *See* Kurt T. Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. ONLINE 219, 224–33 (2013) (discussing historical evidence supporting the view of the Ninth and Tenth Amendments as limiting federal power to protect the reserved powers of the people and the states); *see also* Kevin R.C. Gutzman, *Limited or Decentralized Government?*, 55 MODERN AGE 85 (Fall 2013), https://home.isi.org/sites/default/files/MA55.4_97Reviews_LimitedOrDecentralizedGovernment.pdf [https://perma.cc/47Q7-G89J]. Gutzman notes:

> [T]he Preamble that the First Congress attached to the twelve amendments it referred to the states for their ratification in 1789 . . . says that the reason Congress is referring the twelve proposed amendments is because "a number of the States, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added."

Id.; *see also* Kevin Gutzman, *Bill of Rights Day: A Day of Mourning*, TENTH AMENDMENT CTR. (Dec. 14, 2015), http://tenthamendmentcenter.com/2015/12/14/bill-of-rights-day-a-day-of-mourning/ [https://perma.cc/8T3Z-P9S8] ("[I]n the First Congress, the people insisted that the principle of local self-government . . . be made explicit through the Tenth Amendment and the other nine.").

98. BORK, *supra* note 3, at 183–85.

99. *Id.*

for identifying and enforcing citizens' unenumerated rights, or for overturning unwise laws.

Not until *Griswold v. Connecticut* in 1965—the precursor to *Roe v. Wade*—did any Justice on the Supreme Court suggest that the Ninth Amendment was a source of unenumerated rights. Such dubious revelations, coming 175 years after the Ninth Amendment was ratified, at the hands of one of the Court's most notorious activists (Justice William O. Douglas, along with the equally fatuous concurring opinion of Justice Arthur Goldberg), smacks of revisionist history. Professor Lash has literally written the book on the Ninth Amendment.[100] He concludes, "Together with the Tenth Amendment, the Ninth Amendment was meant to prevent federal intrusion (including federal judicial intrusion) into the affairs of the states except in regard to those matters 'expressly mentioned in the Constitution.'"[101]

V. RATIFICATION OF THE FOURTEENTH AMENDMENT WAS NOT AN "ABRACADABRA" MOMENT FOR UNENUMERATED RIGHTS

I have described the libertarian constitutional theory of "judicial engagement" as a sleight of hand—the equivalent of a card trick. It is more like a magician pulling a rabbit out of a hat. The libertarians' act of prestidigitation has several parts: conjuring "natural rights" in the Constitution; erroneously interpreting the Ninth Amendment to vest those rights directly in the people (instead of the states); and, finally ("nothing up my sleeve!"), treating ratification of the Fourteenth Amendment in 1868 as giving the federal courts power to enforce those rights against the states. The specific vehicle for the third step is the privileges-or-immunities clause of section 1 of the Fourteenth

100. *See generally* KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (Oxford Univ. Press 2009). Other scholars concur that Lash has amassed "overwhelming historical evidence" in support of his position. Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1592 (2004).

101. Lash, *supra* note 97, at 232. Other scholars concur that the Ninth Amendment does not confer constitutional status on unenumerated rights, at least as against state governments. *See, e.g.*, Lund & McGinnis, *supra* note 100, at 1591–93 (terming Barnett's position "quite untenable" and "absurd"); McConnell, *supra* note 77, at 23 (the Ninth Amendment "did not elevate those [unenumerated natural] rights to the status of constitutional positive law, superior to ordinary legislation"); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011).

Amendment[102] (which has never been interpreted in the manner upon which the proponents of judicial engagement rely).[103]

Again quoting Professor Kurt Lash, who has also written the book on the privileges-or-immunities clause:

> By the time of the Civil War, the Ninth Amendment had a long history of being associated with states' rights, to the point that the seceding states relied on the federalist understanding of the Ninth and Tenth Amendments in support of their right to leave the Union. Although the Fourteenth Amendment required the states to respect the "privileges or immunities of citizens of the United States," its proponents described these privileges and immunities as including the rights listed in *the first eight amendments*. . . . During the debates of the Thirty-Ninth Congress, the drafter of section 1 of the Fourteenth Amendment, John Bingham, announced, "this dual system of national and State government under the American organization is the secret of our strength and power. I do not propose to abandon it."[104]

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102. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

103. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The majority in the *Slaughter-House Cases* warned that a broad interpretation of the privileges-or-immunities clause would make the judiciary "a perpetual censor upon all legislation of the States." *Id.* at 78. Many libertarians, including Roger Pilon, believe that the Fourteenth Amendment was "meant to radically change the relationship between the federal government and the states." Pilon, *Lawless Judging*, *supra* note 18, at 18. They believe that the intent of the Thirty-Ninth Congress went beyond merely extending equal rights to the newly freed slaves. *Id.* at 19. They believe that the privileges-or-immunities clause of the Fourteenth Amendment guaranteed to *all* citizens, not just the freed slaves, rights that they did not previously possess: "the privileges or immunities of citizens of the United States," purportedly derived from Article IV's "privileges *and* immunities" clause, as interpreted by Justice Bushrod Washington sitting as a district judge in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). Pilon, *Lawless Judging*, *supra* note 18, at 20–21; *see* Shankman & Pilon, *supra* note 20, at 28 ("The Civil War generation *meant* to rewrite . . . the relationship between the federal government and the states."); *id.* at 33 ("Their larger purpose . . . was to reorder fundamentally the relationship between the federal and state governments."); *cf.* Toomer v. Witsell, 334 U.S. 385, 395 (1948) (stating that Art. IV's privileges-and-immunities clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."). The Fourteenth Amendment, in other words, allegedly gutted the states' "police powers" and made the federal courts the guardians of all citizens' natural rights, with unbridled authority over the other branches and the states. Pilon, *Lawless Judging*, *supra* note 18, at 21. Thus, an obscure decision involving the gathering of oysters and clams by an out-of-state citizen becomes the centerpiece for the transformation of our entire system of government. Nelson Lund and John McGinnis scoff at this contention, correctly concluding that "[i]t makes no sense at all." Lund & McGinnis, *supra* note 100, at 1593. Elsewhere I have said that "this tale sounds more like an overwrought Dan Brown novel than serious constitutional history." Pulliam, *Libertarian Judicial Activism*, *supra* note 1.

104. Lash, supra note 97, at 228–29 (footnotes omitted; emphasis added).

Lash concludes: "[T]here is no evidence the framers of the Fourteenth Amendment drafted a clause that fundamentally altered the basic federalist system of constitutional government or altered the basic original understanding of the Ninth and Tenth Amendments."[105] In other words, no "abracadabra."

Given the tenuous basis for each step of this fanciful argument, and the lack of any Supreme Court precedent for any of it, I submit that judicial engagement cannot be taken seriously as constitutional law, or even "theory." It is the stuff of lore or legend—or myth.[106]

VI. "BETTER JUDGING" IS NOT JUDGING; IT IS LEGISLATION

Judicial engagement is ultimately based on the premise that judges are better suited to judge the wisdom or necessity of laws than are legislators. This egregiously misconceives the role of judges. What proponents refer to as "better judging" is more accurately a form of legislation.

At the most basic level, the three branches of government play separate but complementary roles: the legislature makes the law, the executive applies (or implements) the law, and the judiciary interprets the law. Now, it gets a bit more complicated because "the law" includes both legislative enactments (statutes, ordinances, etc.) and "fundamental" law that overrides legislation—i.e., state and federal constitutions. Moreover, courts often add a common-law gloss to statutory and constitutional text through judicial interpretation, and this body of decisional law is sometimes accorded precedential weight through the doctrine of stare decisis. Relevant case law supplements—but does not substitute—the ultimate source of law: text.[107] Pursuant to Article VI, the Constitution is "the supreme law of the land," paramount to conflicting federal and state laws.[108]

So one of the things courts do is "judicial review"—determining whether particular legislation conflicts with a constitution. As Chief Justice John Marshall famously declared in

105. *Id.* at 229; *accord* Lund & McGinnis, *supra* note 100, at 1593 ("[T]he evidence indicates that this incorporation theory was not applied to the Ninth Amendment").

106. *See* Gutzman, *supra* note 20 ("I would prefer [Barnett] admit that he is making policy arguments, not constitutional ones.").

107. *See* Allen Mendenhall, *The Corrective Careers of Concurrences and Dissents*, 8 FAULKNER L. REV. 49, 51–57 (2016) (noting that judicial opinions "were considered evidence of what the law was, but not the law itself.").

108. U.S. CONST. art. VI.

Marbury v. Madison,[109] "It is emphatically the province and duty of the judicial department to say what the law is."[110] This was clearly not an open-ended license to make law, but to enforce the express terms of the Constitution. Marshall relied on the fact that the United States has a written Constitution, binding as law on all the branches, which is paramount to conflicting statutes enacted by Congress. If the Court is presented with a case in which legislation directly contravenes the Constitution, Marshall held that the Court is duty-bound to enforce the Constitution.

Marshall rejected the argument that the Court must defer to the Congress in determining whether a conflict exists:

> This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. *It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.* It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.[111]

This is hardly a charter for judicial policymaking, but merely an acknowledgment that courts, acting as courts, must sometimes decide whether two competing texts are in direct conflict. When a statute is challenged as being expressly contrary to the Constitution, the judicial branch is best equipped to determine if there is a conflict.

Marshall's rationale for judicial review in *Marbury v. Madison* presupposes that the "laws" in question are texts capable of discernment: "If two laws conflict with each other, the courts must decide on the operation of each."[112] This is by nature an objective role: Does text A conflict with text B? It is also a task to be undertaken with a degree of humility. As Marshall later explained in *Fletcher v. Peck*,[113] determining whether a law violates the Constitution "is, at all times, a question of much delicacy,

109. 5 U.S. (1 Cranch) 137 (1803).

110. *Id.* at 177.

111. *Id.* at 178 (emphasis added). In *Federalist* No. 78, Hamilton explained the power of judicial review, not on the basis of the judiciary being superior to the legislature, but because "the power of the people is superior to both." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

112. *Marbury*, 5 U.S. (1 Cranch) at 177.

113. 10 U.S. 87 (1810).

which ought seldom, if ever, to be decided in the affirmative in a doubtful case."[114] The existence of a conflict should not be based "on slight implication and vague conjecture."[115] Rather, "The opposition between the Constitution and the law should be such that the judge feels a *clear and strong conviction of their incompatibility with each other.*"[116]

In general, courts are not supposed to (and are ill-equipped to) evaluate the necessity, wisdom, or efficacy of legislation. Legislators are elected by the people, are expected to weigh competing social and political interests, be receptive to public input, in theory investigate facts before acting, and ultimately strike the "correct" compromise since all laws will burden some and benefit others. Legislation is policymaking, usually involving compromises and trade-offs—the stuff of politics.

What courts are supposed do is quite different. Judges are ordinarily not elected; they weigh the arguments of the parties before them, generally not the interests of the public at large; they are not permitted to entertain ex parte communications; and only decide the actual dispute presented to them. When judges interpret laws, they typically strive to reach "the" correct answer, not to "split the baby" in Solomonic fashion by fashioning an expedient compromise. Judges who make policy (by deciding cases based on their own subjective opinion of what outcome is preferable as a policy matter) are correctly accused of "legislating from the bench." When judges do this, they overstep their role and usurp the authority of the other branches. This is basic civics, and it also comports with the Framers' view of the appropriate judicial role, which was quite conventional.

In *Federalist* No. 78, Alexander Hamilton (citing Montesquieu) said that "incontestably . . . the judiciary is beyond comparison the weakest of the three departments of power."[117] Many readers are familiar with the passage from No. 78 in which Hamilton describes the judiciary as "the least dangerous" branch.[118] Hamilton explained that this is because the judiciary exercises "neither force nor will, but merely judgment."[119] In the course of

114. *Id.* at 128 (emphasis added).
115. *Id.*
116. *Id.* (emphasis added).
117. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
118. *Id.*
119. *Id.*

this discussion, Hamilton contrasts the judiciary with the role of the legislature, which "not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated."[120] In contrast to the legislative branch, the judiciary is essentially passive: "The judiciary . . . can take no active resolution whatever."[121]

Regarding judicial review—the power to declare legislative acts void—Hamilton described a modest role for the courts:

> A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. *If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute. . . .*[122]

If we stopped there, I think we would be left with the firm impression that the Framers did not conceive of a judicial role that would permit—let alone obligate—courts to second-guess the wisdom or efficacy of legislation, as contemplated by judicial engagement. But Hamilton went on to warn against the dangers of blurring the lines between the branches. Again citing Montesquieu, in *Federalist* No. 78 Hamilton was quite emphatic that

> "there is no liberty if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that *as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . .*[123]

Now, given the Framers' devotion to separation of powers and checks and balances, Hamilton was as concerned with legislative encroachment on the judiciary as he was with judicial encroachment on the legislature. The separate branches of government were three silos of federal power, carefully balanced against one another. This is why Article III of the Constitution adopted life tenure for federal judges and prohibited the reduction in compensation for sitting judges.[124] But the Framers

120. *Id.*
121. *Id.*
122. *Id.* at 466 (emphasis added).
123. *Id.* at 465 (emphasis added).
124. U.S. CONST. art. III, § 1 ("The judges . . . shall hold their offices in good

were clear about the role of judges, granting them the power of judicial review (defended in *Federalist* No. 78), but explicitly denying them an expanded role in law-making, which would encroach on the power of the legislature. In particular, at the Constitutional Convention in 1787, the Framers specifically rejected the example of New York's Council of Revision, which made New York state courts part of the law-making process.[125] In New York, all bills passed by the legislature were reviewed by the Council (a majority of which were judges) "for their revisal and consideration" before they took effect.[126] Madison's Virginia Plan contained this feature, which the convention ultimately rejected in lieu of the presidential veto power over legislation.[127] This background is recounted in *Federalist* No. 69[128] and Justice Felix Frankfurter's 1943 dissent in *West Virginia State Board of Education v. Barnette*.[129]

As Professor Lino Graglia has noted, "there can be no doubt that the Founders did not intend the Supreme Court to be a policymaking institution, much less the primary decisionmaker for the nation as a whole on matters of domestic social policy that it has become."[130]

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behaviour, and shall, at stated time, receive for their services a compensation, which shall not be diminished during their continuance in office.").

125. Randy Barnett, *In Defense of Judicial Equality*, WASH. POST (June 3, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/03/in-defense-of-judicial-equality/?utm_term=.ad4c6a8c4be7 [https://perma.cc/LE38-885W] (acknowledging that "the Convention's rejection of the proposed council of revision" has led critics of judicial review to infer "an intention of the framers that the judiciary defer to judicial will").

126. N.Y. CONST. of 1777, art. III.

127. *See* THE FEDERALIST NO. 69, at 415 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "the power of the President would exceed that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges . . . .").

128. *See generally id.* (discussing the powers of the president with respect to legislation).

129. 319 U.S. 624, 649–50 (1943); *see also* BERGER, *supra* note 10, at 300–11; FARRAND, *supra* note 66, at 70–79, 202, 227. Convention delegate Luther Martin presciently objected to the judiciary's involvement in reviewing the wisdom of legislation, calling it a "dangerous innovation." THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 123 (Ralph Ketcham ed., 1986). He explained: "A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature." *Id.*; *see also* CLINTON, *supra* note 5, at 57–60.

130. Graglia, *Traditional Morality*, *supra* note 5, at 1142; *accord* Segall, *supra* note 1. While it is true, as proponents of judicial engagement like to point out, that in the early 20th century, Progressives supported judicial restraint (*see supra* note 21), but that does not necessarily discredit the doctrine. As Carson Holloway points out, "Besides judicial deference, American progressives advocated, among other things, political party primaries, the right of women to vote, and civil service reform. All of these things should be evaluated on their merits." Holloway, *supra* note 12.

Modern-day originalists did not invent objections to judicial policymaking. Writing in 1931, constitutional scholar Benjamin Fletcher Wright, Jr. criticized *Lochner*-era[131] judges' resort to substantive due process in order to overturn legislation alleged to interfere with the unenumerated "liberty of contract."[132] The author of *Lochner v. New York*,[133] Justice Rufus Peckham, denied that the Court was substituting its judgment for that of the legislature, insisting that the justices were simply measuring the law against the protections of Fourteenth Amendment.[134] The problem, of course, is that when a court purports to enforce an *unwritten*—and therefore amorphous—constitutional provision, it cannot make the type of objective determination contemplated by *Marbury v. Madison*. As Wright explained:

> But since there is no standard by which the reasonableness of the state's interference with the liberty of contract may be measured except the opinion of the court, *it is clear that the court's judgment is substituted for that of the legislature.* The Constitution affords no test that is applicable; *the court must, therefore, discover its standards of reasonableness in the principles of right and justice.*[135]

This is policymaking, pure and simple. Judicial review, in the view of the Framers, involved an objective comparison of texts to determine if a legislative enactment was in "irreconcilable variance" with an express provision of the Constitution.[136]

In sum, judicial engagement—in effect, authorizing substantive due process across the board—would blur the lines between the legislature and the judiciary, constituting a modern-day Council of Revision, and creating the very danger Hamilton warned against in *Federalist* No. 78. Moreover, as Justice Scalia pointed out, the presuppositions of judicial review do not apply to aspirational principles of natural law (which are purportedly the source of unenumerated rights):

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131. *See* Lochner v. New York, 198 U.S. 45 (1905) (beginning an era in which the Court interpreted "due process" broadly to encompass certain economic rights promoting laissez-faire economics). *See generally* BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT (1931).

132. *See* WRIGHT, *supra* note 131, at 299–306.

133. 198 U.S. 45 (1905).

134. *Id.* at 56–57.

135. WRIGHT, *supra* note 131, at 303 (emphasis added).

136. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> The perception underlying the holding of *Marbury v. Madison* is that judges are naturally appropriate expositors of the law—that "[i]t is emphatically the province and duty of the judicial department to say what the law is." [5 U.S. (1 Cranch) 137, 177 (1803)] Judges are *not*, however, naturally appropriate expositors of the aspirations of a particular age; that task can be done better by legislature or plebiscite.[137]

There is a reason why—for over a century following ratification of the Constitution—the Supreme Court rarely struck down state or federal laws. The power of judicial review was correctly understood to be limited in scope, not a warrant for second-guessing the policy decisions made by the other branches.

VII. THE MYTH OF THE PERFECT CONSTITUTION

Wishful thinking is a powerful impulse. Many constitutional theorists have fallen prey to the temptation of imagining that the Constitution, properly understood, creates an "ideal" society—and that judges are authorized to intervene as necessary to produce such "ideal" outcomes. Invariably, the "ideal" results dictated by the Constitution comport with the theorists' (or judges') own policy preferences. Professor Henry Monaghan termed this form of wishful thinking the pursuit of "our perfect Constitution."[138] Judicial engagement is a manifestation of this well-intentioned delusion. Thus libertarians, and classical liberals who believe in the importance of free markets and contractual autonomy, can gaze into the Constitution and manage to find those values protected as rights. (Liberals tend to do the same thing, regarding abortion rights and same-sex marriage.) Monaghan concludes with the wise observation that "perhaps the

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137. SCALIA, *supra* note 4, at 136; *cf.* Evan Bernick, *Judicial Engagement and Its Discontents: A Modest Proposal for Constitutionalists*, HUFFINGTON POST (Oct. 14, 2016), https://www.huffingtonpost.com/evan-bernick/judicial-engagement-and-i_b_12489202.html [https://perma.cc/SL38-A6ER] ("[C]onstitutional constructions must be consistent not only with the text *but with the spirit* of the Constitution's provisions—their functions, as ascertained by careful study of the relevant evidence at the time of their enactment.") (emphasis added).

138. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). I must confess that, as a young man, I succumbed to the temptation to "discover" in the Constitution the economic liberties I hoped to find there. *See, e.g.*, Mark Pulliam, *Siegan—Economic Liberties and the Constitution*, 18 WAKE FOREST L. REV. 971 (1982). Robert Bork knew better. *See, e.g.*, BORK, *supra* note 3, at 110–26 (discussing the Burger and Rehnquist Courts' extreme individualistic philosophy); Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (arguing that judges should be bound by the original intentions of the Framers).

constitution guarantees only representative democracy, not perfect government."[139]

Proponents of judicial engagement frequently invoke certain past judicial decisions now regarded as wrongly decided, such as *Plessy v. Ferguson*,[140] *Buck v. Bell*,[141] or *Korematsu v. United States*,[142] and argue that those mistakes could and would have been prevented had courts employed "judicial engagement" instead of the standard of review used in those cases. This is a fallacious argument. Reasoning backward from *Buck v. Bell* or other decisions proves nothing beyond the benefits of hindsight and the conceit that all of history must be judged by the enlightened attitudes of the present. Mankind is imperfect. History is rife with injustice and tragedy. Modern notions of equality and justice have evolved over time. All branches of government have been culpable at some point.

The parade of historical "mistakes" and injustices in America—while typical of all societies at the time[143]—includes the treatment of Native Americans, slavery, secession, the Civil War, the treatment of Chinese immigrants, the denial of suffrage to women, child labor, Prohibition, American Imperialism, eugenics, lynchings, Jim Crow, the internment of Japanese-Americans, and the list goes on. As a nation, we have made mistakes, eventually realized our mistakes, and generally corrected those mistakes, sometimes by amending the Constitution. Progress—not perfection—is the hallmark of a civilized society. The notion that a more "engaged" judiciary could have avoided history's mistakes is a risible fantasy.

In *Buck v. Bell*, the Court upheld a compulsory sterilization law for the "feeble-minded."[144] In his decision for the Court, Justice

139. Monaghan, *supra* note 138, at 396.

140. 163 U.S. 537 (1896). Yet libertarian hero Justice Stephen Field, who dissented in the *Slaughter-House Cases*, joined the notorious majority opinion in Plessy v. Ferguson, 163 U.S. 537 (1896), proving that "engagement" is not the same as omniscience or infallibility. *See Plessy*, 163 U.S. at 543.

141. 274 U.S. 200 (1927).

142. 323 U.S. 214 (1944).

143. For example, in the colonial period, slavery was common throughout the world, as was the denial of women's suffrage. *See* PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 3–9, 63–89, 656–59 (1997) (noting that European colonists from many different nations subjugated indigenous peoples); *see also* W.H. Hutt, *The Factory System of the Early Nineteenth Century*, *in* CAPITALISM AND THE HISTORIANS 156 (F.A. Hayek, ed. 1954) (noting that child labor was a feature of the Industrial Revolution wherever the factory system was introduced).

144. Buck v. Bell, 274 U.S. 200, 205–08 (1927).

Oliver Wendell Holmes pungently declared that "[t]hree generations of imbeciles are enough."[145] Eugenics was wrong, but in 1927 it didn't seem so. Only one justice (Pierce Butler, a Catholic) failed to join in Justice Holmes's memorable decision, and Butler wrote no dissenting opinion.[146] Even liberal Justice Louis Brandeis, the first Jewish justice to serve on the Court,[147] and—ironically—a pioneer in developing the right to privacy,[148] joined Holmes' 8-1 opinion.[149] The ACLU and the founder of Planned Parenthood supported eugenics.[150] I don't say this in defense of eugenics, but to point out that there was an overwhelming intellectual consensus in favor of the practice *at the time*. It is absurd to imagine that the result would have been different if only the justices—at the peak of the *Lochner* era—had been more "engaged." That is simply wishful thinking.

And the mistake of eugenics was corrected democratically via a change in the law[151]—an outcome that would have been made difficult or impossible if the original decision had been carved in constitutional stone.

The same is true with *Korematsu*, which involved the internment of Japanese-Americans in World War II. Internment was ordered by President Franklin D. Roosevelt, supported by California Governor Earl Warren, and upheld by the U.S. Supreme Court by a 6-3 vote with Justice William O. Douglas joining Justice Hugo Black's opinion.[152] I'm not defending the practice, just pointing out that in wartime the perceived exigencies of national security understandably carried a great

145. *Id.* at 207.

146. *See id.* at 208 (Butler, J., dissenting).

147. Rabbi Berel Wein, *Louis Brandeis, The First Jewish Justice*, JEWISHHISTORY.ORG (Feb. 8, 2010), https://www.jewishhistory.org/louis-brandeis/ [https://perma.cc/R9TW-BVVE] ("[I]t is worth remembering the first Jewish Justice, Louis D. Brandeis, who was appointed by President Wilson in 1916.").

148. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

149. *See Bell*, 274 U.S. at 205 (Brandeis, J., joining in the opinion of the Court).

150. *See* Amita Kelly, *Fact Check: Was Planned Parenthood Started to 'Control' The Black Population?*, NAT'L PUBLIC RADIO (Aug. 14, 2015), https://www.npr.org/sections/itsallpolitics/2015/08/14/432080520/fact-check-was-planned-parenthood-started-to-control-the-black-population [https://perma.cc/A58C-SGRN] (reporting that Margaret Sanger spoke at eugenics conferences to talk about using birth control as a mechanism to weed out the "unfit").

151. *See, e.g.*, ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 319 (Penguin Press 2016) ("It was only in the 1960s, when popular attitudes toward marginalized groups, including the developmentally disabled, changes, that sterilization began to lose favor.").

152. *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

deal of weight, even among civil libertarians. Historic injustices prove nothing other than that mistakes were made. Hindsight is always 20/20.

And if one wants to play this game, one can blame *Dred Scott v. Sandford*[153]—and the Civil War it arguably caused—on Chief Justice Roger Taney's use of substantive due process to recognize a slave owner's constitutional right to own human chattel, declaring the Missouri Compromise unconstitutional in the process.[154] Taney was an "engaged" jurist who got it wrong.

In short, it is a sophomoric reverie to imagine that enlightened judges will always be on the right side of history. Judges are human, just like legislators and other government officials. The legislators and judges from prior eras sometimes made bad decisions reflecting the ethos and mores of the times. It will ever be so, and it is pointless to pretend otherwise. Humans struggle behind a veil of ignorance. Waving a wand called "judicial engagement" does not make mortal judges omniscient. It is precisely because of human foibles and the inevitability of error that the Framers carefully distributed federal government power among the different branches with a system of checks and balances. The states are a critical safeguard. Concentrating power in the hands of one branch, and especially at the federal level, merely increases the likelihood of error and reduces the chance of it being recognized and corrected.

It is also simplistic to assume that the Constitution will, if correctly applied, *always* produce a just result. The Constitution is not a utopian document. Not all social problems are addressed (or solved) by it, and it does not invariably compel the "best" or philosophically/morally "correct" result.[155] Wishing this to be

153. 60 U.S. 393 (1857). Professor Gutzman has described *Dred Scott* as "paradigmatic of a regime in which unelected, unaccountable judges are free to let their policy whims run riot. As Justice Iredell warned in 1798, that is what allowing judges to enforce their own ideas of goodness and truth will entail." Gutzman, *supra* note 70 (referring to Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)).

154. *Dred Scott*, 60 U.S. at 396.

155. As Bork explained, the activist judge contaminates constitutional decision-making by introducing extra-constitutional beliefs into the process:

> This abstract, universalistic style of legal thought has a number of dangers. For one thing, it teaches disrespect for the actual institutions of the American polity [that are] are designed to achieve compromise, to slow change, to dilute absolutisms. They embody wholesome inconsistencies. They are designed, in short, to do things that abstract generalizations about the just society tend to bring into contempt.

Bork, *supra* note 71, at 401.

true doesn't make it so. The institution of slavery took the Civil War and several constitutional amendments to abolish. The competing interests in complex societies often lead to compromises that are unsatisfactory to many people. Disappointment is an inevitable feature of democracy.

Judges applying laws enacted by the political branches—including the Constitution itself—must accept the possibility of an unsatisfactory result. As Justice Scalia once said, "If you are going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."[156]

VIII. THE IMPORTANCE OF FEDERALISM

One feature of judicial engagement that is often overlooked is that it essentially disregards the states, treating the Constitution as a compact directly between the citizens as individuals and the federal government. The states essentially disappear.[157] Respecting the integrity of states as sovereign political entities is vitally important for two reasons. First, that is what the Framers of the Constitution intended.[158] The states existed *prior to* the federal government. The federal government was created to exercise certain functions that could not be performed as well (or at all) by the states individually or locally: providing for the national defense, regulating interstate commerce, maintaining a national currency, operating a post office, conducting diplomacy with foreign nations, maintaining uniform bankruptcy laws,

156. *See* Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016). This is not an argument for judicial "deference," or "abdication," or "passivism"—just modesty: some much-needed honesty about the judge's limited role. Scalia also compared the "living Constitution" to Prego tomato sauce. ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH AND LIFE WELL LIVED 3 (C. Scalia & E. Whelan, eds., 2017) ("We got that kind of a Constitution now. You want a right to an abortion? It's in there! You want a right to die? It's in there! Whatever is good and true and beautiful, it's in there! Never mind the text, it's irrelevant.").

157. As one critic of judicial engagement has noted, "it is hardly consistent with states' rights to have unelected, life-tenured federal judges exercising strong control over thousands of state laws governing the complex universe of local business relationships." Eric Segall, *The Past Isn't Always Prologue*, THE NEW RAMBLER (June 20, 2016), http://newramblerreview.com/book-reviews/law/the-past-isn-t-always-prologue [https://perma.cc/3PU8-QXP8].

158. *See* THE FEDERALIST NO. 45, at 289 (Clinton Rossiter ed., 1961) ("The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .").

regulating immigration, etc. The states continued to exist as the basic unit of government, responsible for all other public functions felt necessary or appropriate, such as providing for roads, schools, laws and law enforcement (courts, police, prisons), fire protection, maintaining health and safety (water and sewer systems), etc. The Ninth and Tenth Amendments were intended to protect the power and authority of the states, not to abrogate them.[159]

The other reason for preserving the autonomy of states qua states is that decentralization of government functions creates numerous ancillary benefits: increasing responsiveness of elected officials, improving accountability, reducing dangerous concentrations of power (per Lord Acton's dictum), discouraging rent-seeking on a national scale, and promoting what Justice Brandeis called "laborator[ies of democracy],"[160] which minimize the risk of misguided laws and allow residents of states unhappy with the political choices made by a majority of the voters therein to "vote with their feet" by moving elsewhere. Public policy mistakes are inevitable, but if decision-making is decentralized to the state level, the consequences of such errors are ameliorated by the option to move from one state to another. If public policy were concentrated at the national level, as would be the case with judicial engagement by the federal courts, the ability to seek relief by relocation would be substantially reduced.

IX. THE SPIRIT OF LIBERTY

Judge Learned Hand, sometimes regarded as the most consequential jurist never to serve on the Supreme Court, gave a patriotic speech in 1944, at the height of World War II, which paid tribute to the spirit of democracy—something now denounced in some circles as "majoritarianism."[161] For

159. *See generally* KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009). *See also* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 11–12 (2006) (discussing Russell Caplan's thesis that the Ninth Amendment function is to ensure the maintenance of rights guaranteed by the law of the states).

160. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); Petrella v. Brownback, 787 F.3d 1242, 1268 (10th Cir. 2015) (noting Justice Brandeis "explained that within our federal system, states are laboratories of democracy.").

161. Judge Learned Hand, Fed. Judge for the S. Dist. of N.Y., The "Spirit of Liberty"

democracy to work, we have to have faith in the ability of our fellow citizens to make sound decisions. Hand's point was that the "spirit of liberty" ultimately lives in people's hearts, not in courtrooms:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[162]

Recall that the Articles of Confederation lacked a judicial branch altogether. The Bill of Rights was a concession demanded by the Anti-Federalists. The Framers, although suspicious of direct democracy, ultimately relied on the people to exercise self-government. The Constitution begins with the words, "We the people . . . ."[163] Professor McConnell reminds us that "[e]ven after the ratification of a written constitution, Americans expected that Congress and the president, and ultimately an alert and engaged citizenry, would be the principal

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Speech (1944). Hand, who served on the Southern District of New York (1909–24) and the Second Circuit (1924–51) "is numbered among a small group of truly great American judges of the twentieth century." GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE xv (1994). Hand, at the time a relatively unknown federal judge, was one of the speakers on May 21, 1944, at the annual "I Am an American Day" ceremony in New York City's Central Park, where he was asked to make a few remarks before leading the crowd—150,000 newly-naturalized citizens and more than a million others—in the Pledge of Allegiance. Hand's speech was heard, biographer Gerald Gunther reports, "by the largest audience ever gathered in New York City." *Id.* at 548. Hand's brief remarks, although not quoted by the newspapers in attendance, were broadcast over the radio by station WNYC. One radio listener, who happened to be a staff writer for *The New Yorker*, heard Hand's speech and, deeply impressed by its eloquence, wrote about it in *The New Yorker*. This prompted the *New York Times* to print the speech in full in its Sunday magazine a few weeks later. *Life* magazine and *Reader's Digest* quickly followed suit. The public reaction was overwhelming, and Hand suddenly found himself a folk hero, his speech having been compared to Abraham Lincoln's Gettysburg Address. *See id.* at 547–52.

162. LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 144 (1952). "In defending substantive due process," George Carey remarked, "it is fashionable to speak of legislatures passing unreasonable, evil, and oppressive laws, laws that are offensive to our sense of justice or decency." CAREY, *supra* note 5, at 140. Yet, Professor Carey adds, if there is a sufficient consensus of moral values that would allow a court to overturn a law on that basis, why would we assume that the people's elected representatives would act contrary to that consensus? CAREY, *supra* note 5, at 140; *cf.* Pilon, *Lawless Judging*, *supra* note 18, at 6 ("The courtroom, after all, is often the only institution that stands between us and the barbarians, however garbed those barbarians may be."). In the *Anti-Federalist Papers*, Brutus's Essay IV began with this: "There can be no free government where the people are not possessed of the power of making the laws by which they are governed, either by their own persons, or by others substituted in their stead." THE FEDERALIST: WITH LETTERS OF "BRUTUS" 459 (Terrance Ball ed., Cambridge Univ. Press 2003).

163. U.S. CONST. pmbl.

bulwarks against violations."[164] Libertarians, ironically, have little faith in the people whose "rights" they extoll. In the economic field, Friedrich Hayek scorned the conceit of central planners who presumed to make better decisions than individuals in the marketplace.[165] Libertarians who would presume to substitute the judgment of federal judges for the polity as a whole display a similar conceit. In the name of protecting individual rights, the theory of judicial engagement effectively disenfranchises "we the people."

X. WHY SHOULD WE TRUST JUDGES?

The naïvest element of judicial engagement is the belief that unelected judges are more likely to reach intellectually honest and principled decisions than are the political branches. The activist legacy of the Warren Court, beginning in the 1960s and continuing today, strongly suggests otherwise.[166] Proponents of

164. McConnell, *supra* note 77, at 20–21 (emphasis added). McConnell continues: "I see no reason to presuppose that courts are wiser (or even necessarily more libertarian) than legislatures when it comes to controversial moral questions; they certainly are less representative." *Id.* at 27. Before the Supreme Court anointed itself the exclusive guardian of the Constitution in the 20th century (*see, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958)), the other branches were more conscientious about their oaths to uphold the Constitution. For example, the patently unconstitutional Sedition Act of 1798 was never challenged in the Supreme Court and instead was repealed by Congress following the election of 1800, in which the controversial law was an important issue.

165. *See generally* FRIEDRICH HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (1998); Joseph Tartakovsky, *Zero Shades of Gray*, CLAREMONT REV. OF BOOKS (Spring 2017), http://www.claremont.org/crb/article/zero-shades-of-gray/ [https://perma.cc/C26E-EY8Y] (observing that Timothy Sandefur's *The Permission Society* (2017) is "a plea for more aggressive court intervention," even though the "judicialization of American life" is "an evil that would shrivel our spirit of self-governance." Tartakovsky concludes that "Sandefur's cure [for bad laws], to my mind, entails a yet worse ill: a free society that needs judges to save it from itself."). Ironically, disdain for democracy and the desire to place decision-making in the hands of well-educated "experts" were hallmarks of Progressivism—another libertarian *bête noire*.

166. As Professor Kevin Gutzman notes:

> For several decades now, conservatives have looked on in dismay as the country has suffered under a veritable onslaught of judicial lawmaking in the name of "emanations of penumbras" of the Bill of Rights and other constitutional provisions supposedly entitling courts, particularly federal courts, to substitute their ever-changing Progressive-nationalist vision for the states' preferences. Thus, millions of kids were slapped into buses and sent to distant schools in the name of a supposed right to racial balance in public-school enrollments; the entire state of Missouri had its taxes raised for many years by a solitary federal judge in pursuit of the same; anodyne prayer was banished from public schools; abortion, sodomy, and gay marriage were declared to be rights; capital punishment was banned, then re-legalized, then banned in cases of rape (including rapes of small children, which the Supreme Court said was not a very important crime); pornography, nude dancing, and flag burning were declared to be "speech," and thus constitutionally protected; due process was

judicial engagement apparently believe that elective politics is hopelessly corrupted by rent-seeking, but they fail to recognize that judges are also subject to bias, and are influenced by an equally powerful group of special interests: e.g., trial lawyers, civil rights groups, legal academia,[167] the organized bar, labor unions, and the liberal media.

When bona fide constitutional rights are at stake, judicial review is sometimes necessary to protect them from legislative infringement, in accordance with *Federalist* No. 78.[168] But that doesn't alter the fact that judges are just government officials wearing robes, not High Priests whose rulings are infallible or divinely inspired. Judges can and do make mistakes, sometimes intentionally. After all, judges are drawn from the most highly politicized and lopsidedly partisan spheres of our society: primarily from left-leaning law faculties and the increasingly monolithic ranks of elite law firms. William F. Buckley famously pronounced that he would rather be governed by the first 2,000 names in the Boston phone book than by the faculty of Harvard.[169] Even in the progressive environs of higher education, the legal academy stands out as overwhelmingly—even shockingly—unbalanced in favor of the Left. According to a 2015 study reported in the *Harvard Crimson*, an astounding 98 percent of political contributions from members of the Harvard Law School faculty during the period 2011 through 2014 went to Democrats.[170]

What values does the progressive "legal establishment" embrace? Here are just a few examples: California has adopted a code of judicial ethics that forbids state judges to serve as adult

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declared to include taxpayer-financed legal counsel; due process was declared to include a preemptive warning that one need not confess; and on, and on.

Gutzman, *supra* note 20.

167. *See* Mark Pulliam, *Those Ever-Moving Goalposts*, L. & LIBERTY (May 10, 2017), http://www.libertylawsite.org/2017/05/10/those-ever-moving-goalposts/#comments [https://perma.cc/W8SV-44XB] ("My ultimate concern is not with activist judges, but with the larger legal culture (shaped significantly by the legal academy), whose attitudes greatly influence judicial decisions.").

168. *See* THE FEDERALIST NO. 78 (noting that courts have an intermediary role between the legislature and the people to ensure legislators stay within constitutional limits).

169. Legal Insurrection, *William F. Buckley Jr. Harvard Faculty Quote*, YOUTUBE (Dec. 16, 2015), https://www.youtube.com/watch?v=2nf_bu-kBr4 [https://perma.cc/L3FX-D9X2].

170. Karl M. Aspelund & Meg P. Bernhard, *Harvard Faculty Donate to Democrats by Wide Margin*, THE CRIMSON (May 1, 2015), http://www.thecrimson.com/article/2015/5/1/faculty-political-contributions-data-analysis/ [https://perma.cc/N9ML-44ZV].

leaders in the Boy Scouts of America due to BSA's disapproval of homosexuality.[171] The Wyoming Supreme Court censured Judge Ruth Neely, a 21-year municipal court veteran, for merely expressing religious objections to same-sex marriage, even though she never refused to perform one (and had no authority to do so as a municipal court judge).[172] And a prominent Harvard Law School professor, Mark Tushnet, advocates that the U.S. Supreme Court, upon attaining a liberal majority, immediately approve race-based affirmative action, campaign finance restrictions, and abortion on demand, while eliminating any religious objections to LGBT rights, easing class-action litigation, and expanding the so-called disparate-impact doctrine (which treats statistical imbalances the same as intentional discrimination).[173] It is highly doubtful that any of these policy positions—far out of the American mainstream—could ever gain popular approval in elective politics, yet they are fairly typical of beliefs held by members of the elite legal culture.

Thus, it is hardly surprising that judicial rulings often reflect this peculiar milieu. For example, consider some decisions issued in recent years by the U.S. Supreme Court, at a time when Republican appointees predominated and the Justices were supposedly constrained by an originalist interpretation of the Constitution: flag burning[174] constitutes protected "free speech";

171. *See* Mark Pulliam, *Blacklisting the Boy Scouts*, CITY J. (Feb. 6, 2015), https://www.city-journal.org/html/blacklisting-boy-scouts-11510.html [https://perma.cc/9EED-VQVE] (noting that California judges wanting to be BSA leaders "will soon have to abandon their First Amendment rights as condition of employment" as a result of a new rule from California's judicial advisory committee).

172. Judge Ruth Neely v. Wyoming Commission on Judicial Conduct and Ethics, 390 P.3d 728 (Wyo. 2017); *see also* Jonathan Lange, *Wyoming Judge Appeals to Nation's Highest Court After Losing Job for Being a Christian*, FEDERALIST (Aug. 15, 2017), http://thefederalist.com/2017/08/15/wyoming-judge-appeals-nations-highest-court-prevent-losing-job-christian/ [https://perma.cc/G5YA-NVAN] (noting that Neely merely said she was unable to perform same-sex weddings because of her religion; Neely never took any official action toward same-sex marriage); Holly Scheer, *Wyoming Judge Censured for Beliefs About Marriage that Have Nothing to Do with Her Job*, FEDERALIST (Mar. 20, 2017), http://thefederalist.com/2017/03/20/wyoming-judge-censured-beliefs-marriage-nothing-job/ [https://perma.cc/T3HC-T5XE] (explaining that Judge Neely was censured strictly for her religious beliefs).

173. *See* Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/ZV6X-WQW7] (asserting that liberal judicial activism has won the day, and liberal judges no longer must fear conservative retaliation). Unfortunately, Tushnet's agenda reflects a common point of view among legal academics at elite law schools.

174. United States v. Eichman, 496 U.S. 310, 315 (1990); Texas v. Johnson, 491 U.S. 397, 420 (1989).

and abortion rights,[175] homosexual sodomy,[176] and same-sex marriage,[177] all unmentioned in the Constitution, are enshrined as "fundamental rights" by judicial fiat. And this is just the tip of the iceberg. Bear in mind that the U.S. Supreme Court—which decides relatively few cases—is a centrist body compared to the Ninth Circuit Court of Appeals (which in 2002 famously declared the Pledge of Allegiance unconstitutional for mentioning the words "under God"),[178] and that the Ninth Circuit is moderate compared to the California Supreme Court, which once conjured the right of minors to obtain abortions without parental consent out of a nondescript reference to "privacy" in the state constitution.[179]

If judges behave this way when they are expected to be moored to the text of the Constitution, it is difficult to imagine how much worse their decisions would be if the proponents of judicial engagement succeeded in giving them a license to freely second-guess every law passed throughout the United States.

Libertarians apparently believe that judicial engagement will only result in the protection of individuals' "negative rights"—the right to be "left alone."[180] However, activist judges can, and often do, invent "positive rights" requiring the expenditure of taxpayer funds. For example, in 2015, federal district court judge Jon Tigar (appointed by President Barack Obama) based in San Francisco, ruled that Jeffrey Norsworthy, a convicted murderer serving a life sentence in a California state prison, was entitled to a sex-change operation *at taxpayer expense* because Norsworthy was diagnosed with "gender dysphoria."[181] Judge Tigar concluded that forcing the "transsexual" Norsworthy to retain his

175. Roe v. Wade, 410 U.S. 113, 153–54 (1973).

176. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

177. Obergefell v. Hodges, 135 S.Ct. 2584, 2604–05 (2015).

178. *See* John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES (April 24, 2010), http://www.nytimes.com/2010/04/25/us/25sfninth.html [https://perma.cc/4GXX-CBJR] (noting that Jeff Sessions called the 9th Circuit "an activist court that has handed down decisions striking down 'under God' from the Pledge of Allegiance . . . .").

179. American Acad. of Pediatrics v. Lungren, 940 P.2d 797, 817 (Cal. 1997).

180. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (noting that Judge Cooley had coined the phrase "the right to be let alone").

181. *See* Mark Pulliam, *Jurismania: When Identity Politics Intersect with Liberal Judicial Activism, Expect Bizarre Results*, CITY J. (April 9, 2015), https://www.city-journal.org/html/jurismania-11553.html [https://perma.cc/8KE6-SYHX] (noting that "a prison psychiatrist diagnoses Norsworthy with 'gender dysphoria,' meaning that he would like to a woman instead of a man.").

male genitalia while behind bars violated the Eighth Amendment's prohibition of "cruel and unusual punishment" and necessitated a medical procedure estimated to cost the taxpayers $100,000.[182]

Unfortunately, in cases involving public education, government employee pensions, the administration of state prisons, and other government functions, judges frequently impose obligations—sometimes quite onerous—on taxpayers. Writing in *City Journal*, Steven Malanga has warned that "liberal judges and legal scholars are calling for state courts to push the positive-rights agenda even further by guaranteeing minimum welfare payments and government subsidies for food, clothing, housing, and medical care to every citizen."[183]

Libertarians credulously assume that the judges who will exercise the sweeping powers contemplated by the theory of judicial engagement will share their libertarian values. Proponents fervently hope to turn back the constitutional clock to pre-New Deal jurisprudence, overruling the libertarian bête noire decision in *United States v. Carolene Products Co.*,[184] and restoring the *Lochner*[185] line of cases. Perhaps proponents subconsciously believe that Randy Barnett (or someone like him) will play the role of Ronald Dworkin's Judge Hercules (from his 1986 book *Law's Empire*).[186] Alas, libertarians are in short supply in legal academia (and in the legal establishment generally). And the Left will never allow economic liberties to be resurrected; *Carolene Products* buried them on purpose.[187]

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182. *See* Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1117 (N.D. Cal. 2015) (holding that prison officials violate their Eighth Amendment obligation by intentionally denying or delaying access to medical care); *see also* Lindsey Bever, *California Prison Ordered to Grant Inmate's Sex Change Surgery*, WASH. POST (April 3, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/03/california-prison-ordered-to-grant-inmates-sex-change/?utm_term=.910b182eff90 [https://perma.cc/6NZP-ZWWG] (noting that "[t]he procedure could cost the state as much as $100,000 . . . .").

183. Steven Malanga, *Brennan's Revenge*, CITY J. (Spring 2014), https://www.city-journal.org/html/brennan's-revenge-13645.html [https://perma.cc/9TA6-8Q9V].

184. 304 U.S. 144 (1938).

185. Lochner v. New York, 198 U.S. 45 (1905).

186. *See* Lund & McGinnis, *supra* note 100, at 1591 ("[W]e are willing to assume that a Supreme Court staffed with nine Randy Barnetts might well produce an intellectually coherent . . . set of social policies. But we cannot claim that our policy views are self-evidently embodied in the Constitution.").

187. Progressives have antipathy for economic liberties (and the free market in general); that is the main reason they are progressives. Just look at the recent imbroglio over the mendacious treatment of Nobel Prize-winning economist James M. Buchanan by Duke University historian Nancy MacLean in her new book, *Democracy in Chains*. *See*

Long ago, the famed jurist Learned Hand lamented that it would be "most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[188] Realistically, the unaccountable judges that would rule us under judicial engagement are not going to be libertarians or even a cross-section of the community, but a cadre of secular left-wing intellectuals resembling Massachusetts Senator Elizabeth Warren (who was, fittingly, a Harvard law professor prior to her election), Justice Ruth Bader Ginsburg, or the late Ninth Circuit Judge Stephen Reinhardt. It is simply naive to deny that judges frequently make bad, result-oriented decisions, influenced by considerations of political correctness, identity politics, and rigid ideological conformity. Granting judges even more power would surely embolden them to greater heights of activism.[189] It is foolish to surrender self-government to an ideological clique that has contempt for the very values the Constitution represents.

CONCLUSION

The libertarian theory of constitutional law is unsound from an originalist standpoint. It is historically untenable. It requires doctrinal leaps of Olympic caliber. It would eviscerate federalism. Instead of increasing individual liberty, it would destroy the republican form of government by concentrating

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Phillip W. Magness, *A Note on Democracy in Chains*, MODERN AGE (Fall 2017), https://home.isi.org/note-"democracy-chains" (noting that MacLean's book advances a "historically unfounded belief that the segregationist resistance to *Brown v. Board of Ed.* provided something of an intellectual wellspring for Buchanan's ideas and career."). As Mary McCarthy said about Lillian Hellman, "every word she writes is a lie, including 'and' and 'the.'" ALAN ACKERMAN, JUST WORDS: LILLIAN HELLMAN, MARY MCCARTHY, AND THE FAILURE OF PUBLIC CONVERSATION IN AMERICA 41 (Yale Univ. Press ed., 2011). So it is with progressive judges. If judicial engagement were adopted, we would end up with the worst of both worlds: an open-ended theoretical justification for the Left's positive rights agenda, *and* a continuation of the *Carolene Products* subordination of economic liberties. Expecting liberal judges to strike down economic regulations is like believing in unicorns. Mark Tushnet believes that the Left has won the culture war, and he may be right. Tushnet, *supra* note 173. Certainly they control the academy.

188. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

189. For example, environmental activists are suing in federal court in Oregon to compel the federal government to take action to address climate change. In *Juliana v. United States*, the plaintiffs assert a substantive due process right to a stable climate. The federal district judge denied a motion to dismiss, ruling that there is an "unenumerated fundamental right" to "a climate system capable of sustaining human life." Andrew R. Varcoe, *Does the Constitution Provide a Substantive Due-Process Right to a Stable Climate System?*, WLF LEGAL BACKGROUNDER (Oct. 6, 2017), http://www.wlf.org/publishing/publication_detail.asp?id=2680 [https://perma.cc/HUE3-CQLA].

power in one branch of government—and the least democratically accountable branch of government at that. In addition to all its other defects, the independently fatal flaw of judicial engagement is that it assumes judges—drawn from the overwhelmingly leftist ranks of the legal academy and organized bar—will behave neutrally, honestly, and responsibly.

In other words, judicial engagement ignores reality and assumes that the same federal judges who have hamstrung law enforcement,[190] wrested control of many prison systems,[191] micromanaged school districts,[192] meddled in the administration of the death penalty,[193] compelled tax increases to fund education,[194] redefined marriage,[195] created a right to abortion,[196] and generally acted as the enforcement arm of the ACLU, will, if entrusted with sweeping powers of judicial review over the political branches, make us freer.

In light of this atrocious track record, it is truly nonsensical to contend that we have "a weakened judiciary."[197] Judicial activism is real. Even Roger Pilon agrees.[198] In fact, gorged with power, and unmoored to the Constitution, the Supreme Court has arguably become the most powerful—and therefore the most *dangerous*—branch of government.[199] In my estimation, it would

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190. *See, e.g.*, Bond v. United States, 529 U.S. 334, 335–36 (2000) (holding a law-enforcement officer squeezing a passenger's bag in plain view during a search at an immigration checkpoint violates the Fourth Amendment).

191. *See* Brown v. Plata, 563 U.S. 493, 527 (2011) (holding that a court order requiring a California prison to reduce its prison population did not violate the Prison Litigation Reform Act).

192. *See, e.g.*, Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 441–42 (1968) (requiring a school district to adopt a desegregation plan within specific parameters determined by the court).

193. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 412 (2008) (holding that the Eighth Amendment bars states from imposing the death penalty for the rape of a child where it does not result in the death of the child).

194. *See* Missouri v. Jenkins, 495 U.S. 33, 56–57 (1990) (acknowledging the power of a district court to mandate tax increases to enforce federal policy under the supremacy clause).

195. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (holding that same-sex couples have the right to marry).

196. Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that a woman's right to privacy encompasses the right to an abortion).

197. Pilon, *Lawless Judging*, *supra* note 18, at 22.

198. *See* Pilon, *Lawless Judging*, *supra* note 18, at 14 ("Over the years, judicial activists have expanded the list of 'fundamental rights,' often finding rights that were nowhere to be found in the Constitution . . . ."); *see also* Roger Pilon, *Coming to Mr. Trump's Aid in the Matter of Judicial Selection*, CATO AT LIBERTY (Jan. 6, 2017), https://www.cato.org/blog/coming-mr-trumps-aid-matter-judicial-selection [https://perma.cc/KRZ5-P7U6] ("Is there judicial activism? Of course there is.").

199. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2604–05 (2015) (recognizing a constitutional

be folly to grant the courts even greater power in the guise of judicial engagement.

I'll take my chances with the republican form of government.

right to same-sex marriage). Significantly, Roger Pilon and his Cato colleagues applauded the decision in *Obergefell*. Roger Pilon, *Foreword—Roberts' Rules: Deference Trumps Law*, CATO SUP. CT. REV. vii, xiii-xxi (2014-2015). As Lord Acton famously stated, "Power tends to corrupt; absolute power corrupts absolutely." Letter from John Emerich Edward Dalgerg-Acton, Lord Acton, to Bishop Mandell Creighton (April 5, 1887), *in* FAMILIAR QUOTATIONS 521 (Justin Kaplin ed., 16th ed. 1992). Without checks and balances, unbounded by the separation of powers, and unleashed from the constraints of constitutional text, an "engaged" judiciary not accountable to the voters would resemble nothing so much as an all-powerful black-robed oligarchy, inevitably prone to tyranny.

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:

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]

> 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 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

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

misbehaving without calling it a suspension and in some cases even marked them present.").

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.
>
> . . . .
>
> [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

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.
>
> . . . .
>
> 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.
>
> 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]

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behavior problems, there are times when very little teaching or learning takes place.

In such an environment, students see few meaningful consequences for their actions, so they not only continue to misbehave but the behaviors get more 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,

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]

> and he lit a cigarette barely two yards from me. I pounced, and within 20 minutes he was suspended—for endangering himself and others.
>
> Surely we acted within the boundaries of our authority . . . .
>
> . . . [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. . . .
>
> . . . [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_victim_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

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. 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

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school discipline debate, we take no position here.

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).

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 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

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

get-tough policies on sexual harassment have led to disciplinary actions against kindergarteners and first-graders—children 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

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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.

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),

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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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 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=.ae636acb4039 [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

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,

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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].

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/a7fapce/ [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-

Mississippi;[30] Christina, Delaware;[31] Rochester, Minnesota;[32] Amherst County, Virginia;[33] and Oklahoma City, Oklahoma.[34]

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

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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/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.

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[37]

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]

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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* 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

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. 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

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> 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.

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.*

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]

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

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 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.*

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 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

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 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.

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 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

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.

> 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 "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]

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54. *Id.*

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

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 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

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disparities"—went unacknowledged. *Id.*

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

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

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 "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

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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).

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

there were a problem with race discrimination in Minneapolis, it 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

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"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.

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].

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 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]

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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

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 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

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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.*

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

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]

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.

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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 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.

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 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

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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.*

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.*

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:

> "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

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.*

83. *Id.*

84. *Id.*

> 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] 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

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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 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].

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 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

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/#.V6l76zUsBFt [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).

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].

[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 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] 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

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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 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].

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.
>
> . . . .
>
> 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 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

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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].

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].

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.

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

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.*

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:

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.

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

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?

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

110. *Id.* at 22.

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

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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 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).

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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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 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].

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]

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 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).

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 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

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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).

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 African-American truancy rates are higher than white rates.[126]

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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 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*

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 again, if the lack of a father at home were the sole determinant

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

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 antisocial attitudes he might have more often than a child who is

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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. Murnane 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].

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

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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 Bch, *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

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

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to support it. It looks at the disciplinary records of thirty-five African-American students 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 white students and that boys are disciplined more often than girls.[139] But as the authors concede, "disproportionality is not sufficient to prove bias."[140]

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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

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

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individual student being expelled does not).

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").

note, those differences could not come close to accounting for 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_victim_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

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

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for socioeconomic disadvantage was rudimentary. Rather than control for household income, parents' educational attainment or other markers of socioeconomic status (most 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 14, at n.7 (citing *Rocque I*, *supra* note 135).

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

152. *Id.* at 567.

permission; (5) Is physically aggressive or fights with others; (6) Gossips or spreads rumors; (7) Is disruptive; and (8) Breaks 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*

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.

based upon illegitimate factors."[159] The very large disproportionalities that Secretary Duncan had spoken of and 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

159. *Id.* at 572–73 (emphasis added).
160. *Id.* at 573–74.

underprivileged background," or "for a student whose grades are not what we like to see."[161]

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

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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.

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.

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 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

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

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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.

Id. at 13.

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

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 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

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.

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 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]

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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).

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

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 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

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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.

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).

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 growing durum wheat. African Americans are [disproportionately represented] in many professional athletics . . . . Unitarians are more likely to have college degrees than Baptists.
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> 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.
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> 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/b04b442c160d0ff65cb43f72ca2aa67e?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1 [https://perma.cc/4PPQ-744F] (noting that over 68% of National Football

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]

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-PMLJ] (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-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),

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 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.

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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 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).

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 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

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189. 42 U.S.C. § 2000d.

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).

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 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

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)).

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 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-

195. 5 U.S.C. § 706(2)(A)–(C) (West 2018).
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).

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 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,

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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).

201. U.S. CONST. amend XIV, § 1.

202. U.S. CONST. amend XIV, § 5.

203. *Id.*

204. 521 U.S. 507 (1997).

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 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

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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.

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.

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

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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 "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.

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, 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

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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.

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).

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.
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> . . . 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]

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

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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).

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).

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, 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,

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).

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).

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 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

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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)).

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] 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

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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).
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).

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 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]

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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.
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

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 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

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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.

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).

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 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]

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).

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).

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

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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 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.

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 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

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.

267. *Id.* § 42.104(b)(1)(ii)–(vi).

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 sense, therefore, our reading is consistent with cases that suggest disparate impact liability can be found in the regulation.[271] But,

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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.

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

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 to the issue at hand and by inserting numerals:

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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.*

> 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 disadvantaging one racial group or another. In our Lacrosse

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).

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

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.

not include the word "discrimination."[285] The exclusion of that 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

285. 28 C.F.R. § 42.104(b)(2) (2018).
286. *Id.*
287. U.S. CONST. amend. XV.

> 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 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

288. 28 C.F.R. § 42.104(b)(2) (2018).

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.

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]

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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

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-

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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 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).

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.

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

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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.

earlier occasions, OCR appears not to have interpreted those regulations in the same way; and (2) the doctrine of 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*

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).

296. Memorandum from Clarence Thomas, *supra* note 47, at 2.

297. 485 U.S. 568 (1988).

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 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]

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298. *Id.* at 574; 467 U.S. 837 (1984).

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).

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:

> 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

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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.

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*

court to address the issue squarely also agreed in *Livingston v. Roadway Express, Inc.*[306] that disparate impact theory is unavailable 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]

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)

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).

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 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

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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 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).

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," 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

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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").

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 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

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).

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)).

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]

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.

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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, 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

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 "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

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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).

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.

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.

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

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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.
>
> 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").

might not have the best chance to learn school discipline at home. The Dear Colleague Letter makes that less likely to happen.

CHILDCARE CREDITS VERSUS DEDUCTION: AN EFFICIENCY ANALYSIS

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United States politicians have been advocating for a tax break geared at alleviating the rising cost of childcare for some time. In fact, the idea of a childcare tax break became a hot issue during the 2016 presidential election and continued thereafter. Republican Donald Trump proposed a tax break in the form of a tax deduction, while Democrats Hillary Clinton and Barack Obama proposed a refundable tax credit. There are many reasons and motivations to provide a tax break focused on childcare. One, in particular, is that a tax break would lower potential secondary earners' cost of entering the workforce, which would encourage secondary earners to enter the workforce and increase the labor supply. This Note analyzes the difference between a refundable tax credit, a nonrefundable tax credit, and a tax deduction. It argues that a childcare tax deduction or a nonrefundable childcare tax credit would be the more economically efficient proposals because the deduction or the nonrefundable tax credit would impact a greater number of potential second-income earners for whom the change in the after-tax income has a greater effect on the decision between market work and untaxed activities.

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INTRODUCTION

A major policy issue during the 2016 presidential election was the idea of a tax break centered on childcare.[1] Furthermore, in December 2017, the Tax Cuts and Jobs Act of 2017 narrowly passed after concessions were made to expand the childcare tax break to appease Republican Senators Marco Rubio and Mike Lee.[2] The cost of childcare is rising steadily.[3] Consequently, the political candidates of the major political parties have proposed tax breaks focused on alleviating the cost of raising children.[4] Distributional benefits, economic efficiency, and market optimization, among other things, are factors often discussed as goals of the tax break. Policymakers have three options at their disposal in granting a tax break. They can institute a refundable tax credit, a nonrefundable tax credit, or a tax deduction. The fundamental difference between each political affiliations' preference of tax break depends on the goal desired. Republican President Donald Trump has advocated for a tax deduction,[5] whereas Democrats Barack Obama and Hillary Clinton have preferred a refundable tax credit.[6]

Childcare is a cost to potential second-income earners who desire to enter the workforce. The rising cost of childcare has created a disincentive for certain individuals, namely potential secondary earners, to enter the marketplace. This disincentive can be inefficient because individuals who would otherwise enter

1. *See* Leigh Ann Caldwell, *Comparing Trump and Clinton's Child Care Plans*, NBC NEWS (Sept. 13, 2016) https://www.nbcnews.com/politics/2016-election/comparing-trump-clinton-s-child-care-plans-n647711 [https://perma.cc/V574-EHAY] (providing an overview of each candidate's childcare plans).

2. Jeff Stein, *What Marco Rubio Got for His Tax Vote*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/19/what-marco-rubio-got-for-his-tax-vote/?utm_term=.33c082ff1b85 [https://perma.cc/GTH6-FZVW].

3. Eric Morath, *Soaring Child-Care Costs Squeeze Families*, WALL ST. J. (Jul. 1, 2016), http://www.wsj.com/articles/soaring-child-care-costs-squeeze-families-1467415411 [https://perma.cc/3PTC-U8AT].

4. *See* Jean H. Baker, *Child Care: Will Uncle Sam Provide a Comprehensive Solution for American Families?*, 6 J. CONTEMP. HEALTH L. & POL'Y 239, 275 (1990) ("It is evident that only a comprehensive federal effort will insure uniformity as well as an effective child care system.").

5. Julie Hirschfeld Davis & Alan Rappeport, *Trump Proposes the Most Sweeping Tax Overhaul in Decades*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/us/politics/trump-tax-cut-plan-middle-class-deficit.html [https://perma.cc/X28J-6F9H].

6. Amanda Becker, *Clinton Plan to Cut Health Costs Includes Tax Credits, More Sick Visits*, REUTERS, (Sept. 23, 2015), https://www.reuters.com/article/us-usa-election-clinton/clinton-plan-to-cut-health-costs-includes-tax-credits-more-sick-visits-idUSKCN0RN1ZU20150923 [https://perma.cc/JP8R-ZPZM].

the workplace are choosing to participate in other untaxed activities. The market misses out on those individuals who have the skills and abilities better suited for work in the marketplace but chose to engage in other activities instead. A tax break for childcare would lower the disincentive to workplace entry by lowering the cost of childcare for the parents who can best utilize their skills and abilities in the marketplace. Thus, a childcare tax break would induce more individuals to enter the workplace. Economic models show that an increase in the labor supply stemming from a lower disincentive to marketplace entry would increase the labor supply outward, which would increase productivity and boost gross domestic product.[7]

Before the Tax Cuts and Jobs Act of 2017, parents could claim a partially refundable tax credit for two dependent children under the age of seventeen, with a less generous additional child credit for subsequent children.[8] The credit was worth $1,000 per child.[9] However, the credit phased out by $50 for every $1,000 of adjusted gross income over $75,000 for single filers and $110,000 for joint filers.[10] Furthermore, the taxpayer was eligible for a refundable credit if the childcare tax credit exceeded the taxpayer's tax liability.[11] Nevertheless, the refundable portion of the credit was limited to 15% of earned income in excess of $3,000.[12]

As a candidate, Donald Trump's childcare tax break proposal was centered on a tax deduction.[13] The deduction would permit parents to deduct their childcare expenses up to the average cost of childcare in their respective state of residence based on their child's age, for up to four children.[14] For example, parents in the state of Texas would be able to deduct a maximum of $8,759 per

7. *See* Susan L. Averett et al., *Tax Credits, Labor Supply, and Child Care*, 79 REV. ECON. & STAT. 125, 133 (1997) (finding that child care tax credits increase labor supply substantially); Zvi Eckstein & Osnat Lifshitz, *Dynamic Female Labor Supply*, 79 ECONOMETRICA 1675, 1676 n. 6 (2011) (finding that an increase in the female labor supply boosted gross domestic product).

8. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2018), https://waysandmeansforms.house.gov/uploadedfiles/tax_cuts_and_jobs_act_section_by_section_hr1.pdf.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Child Care*, DONALD J. TRUMP, https://www.donaldjtrump.com/policies/child-care [https://perma.cc/CB36-Z9VH].

14. *Id.*

child.[15] The deduction would phase out for single filers when taxable income is $250,000 and when taxable income is $500,000 for joint filers.[16] The tax break would have been available for all families regardless of whether both spouses worked.[17]

Hillary Clinton's proposal for a childcare tax break was centered on a refundable tax credit.[18] However, Clinton did not expand on many of the specific details of her plan aside from stating that no American family should pay more than ten percent of its income for childcare.[19] Her plan would have most likely resembled fellow Democrat Barack Obama's childcare proposal. Obama proposed a detailed plan focused on a refundable tax credit.[20] Obama's second-earner tax credit would increase the child and dependent care credit that would begin to phase out as $120,000 was reported as taxable income.[21] Taxpayers with young children would be able to claim a childcare credit of up to 50% of child-related expenses, up to $6,000 for one child or $12,000 for those with more than one child.[22] Obama's proposed tax break was conditioned on whether the potential second-earning spouse was working or looking for work.[23]

This Note analyzes the difference between the effect that a refundable tax credit, a nonrefundable tax credit, and a tax deduction has on inducing stay-at-home parents to enter the workforce. Furthermore, this Note suggests that a childcare tax deduction is the most efficient tax break to utilize for

15. CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILD CARE: 2015 53 (2015), http://usa.childcareaware.org/wp-content/uploads/2016/05/Parents-and-the-High-Cost-of-Child-Care-2015-FINAL.pdf [https://perma.cc/7RTA-J8VR].

16. *Fact Sheet: Donald J. Trump's New Child Care Plan*, DONALD J. TRUMP, https://assets.donaldjtrump.com/CHILD_CARE_FACT_SHEET.pdf [https://perma.cc/8KEK-2TES].

17. Lily L. Batchelder et al., *Who Benefits from President Trump's Child Care Proposals?*, TAX POL'Y CTR. 3 (2017), https://www.taxpolicycenter.org/sites/default/files/publication/138781/2001170-who-benefits-from-president-trumps-child-care-proposals.pdf [https://perma.cc/Y2KE-GB6C] (stating that dual-earner married parents would deduct their actual expenses, subject to the cap).

18. *Early Childhood Education*, HILLARY CLINTON, https://www.hillaryclinton.com/issues/early-childhood-education/ [https://perma.cc/QR99-MDNK].

19. *Id.*

20. U.S DEP'T OF TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 1, 130–31 (2016), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2017.pdf [https://perma.cc/EG62-UXF9].

21. *Id.* at 131.

22. *Id.* at 120.

23. *Id.* at 130.

encouraging current stay-at-home parents to enter the workforce if the labor supply elasticity is higher for stay-at-home parents in upper-income households because those stay-at-home parents are more responsive to changes in the take-home pay after taxes.

Part I outlines the current situation of potential secondary earners under our existing income tax system. Specifically, Part I examines the rising cost of childcare, the income-stacking disadvantage of secondary earners, and the labor supply elasticity of potential secondary earners. Part II considers which form of tax break would be more efficient at getting second-income earners into the workforce. This section compares each of the three tax breaks in a simplified analysis by holding a governmental budget constraint to determine which tax break is most effective at getting stay-at-home parents to work. Part IV details the Tax Cut and Jobs Act of 2017.

I. UNDERSTANDING SECONDARY EARNERS' DECISIONS TO WORK

It is essential to understand the current situation of typical secondary earners in order to understand how a tax break in either the form of a refundable tax credit, a nonrefundable tax credit, or a tax deduction can be utilized to encourage those potential secondary earners to enter the labor force. The potential cost barriers of working, the tax structure of the United States, and the labor supply elasticity of secondary earners each play a role in the decision of secondary earners to enter the workforce.

A. The Rising Cost of Childcare

Parents have considerable factors to weigh in determining whether both spouses should work. In a family unit, the spouse who contributes the lesser portion of the family income is commonly referred to as the secondary earner, while the spouse who contributes the greater portion of the family income is referred to as the primary earner. Often the family finds that it is more economical for one spouse to earn all the income necessary for the family while the other spouse attends to the needs of the children. This stay-at-home spouse is known as the potential second-income earner because this individual has the potential to utilize his or her human capital in the workforce rather than at home. The decision of one spouse to either work in the marketplace or stay at home has many variables. Personal

preference, work relationships, employment opportunities, parenting ability, and the desire to be a more integral part of a child's life can play immense roles in the decision of the potential second-income earner to work or stay at home.

The family unit also must take into account the cost of childcare if the non-working spouse wants to enter the workforce. Moreover, the family must account for the tax treatment of the potential market wages. This Note focuses on these two factors. The issue of the cost of childcare is described first below.

The cost of childcare is rising steadily.[24] The Department of Agriculture projected that the cost of raising a child born in 2003 until the age of eighteen was $226,108.[25] Comparatively, the Department of Agriculture has now projected that the cost of raising a child born in 2013 until the age of eighteen is $245,340, adjusted for inflation.[26] This increase has a dramatic effect on the important expenditures of a family.

Additionally, the cost of childcare can account for a substantial portion of a family's finances. The cost of childcare fluctuates noticeably from state to state. Based on 2015 data, the District of Columbia, Massachusetts, and New York are three of the most expensive places for childcare with an annual cost of care for one infant child at $22,631, $17,062, and $14,144, respectively.[27] Other notable childcare costs include: California with an annual cost of care for one infant child at $11,817, Texas at $8,759, and Illinois at $12,964.[28] These significant expenses can eat up 15% of a family's budget based on the average income of married couples per state.[29] Hence, the couple may find it more economically beneficial for the potential secondary earner to stay at home to take care of the children, depending on the family's financial situation.

B. The Tax Treatment of Secondary Earners

The decision of nonworking parents to enter the workforce is greatly influenced by taxes. Potential secondary earners typically

24. Morath, *supra* note 3.
25. *Id.*
26. *Id.*
27. CHILD CARE AWARE OF AMERICA, *supra* note 15, at 53.
28. *Id.*
29. *See id.* at 27 (showing that the cost of care as a percentage of median income is approximately 15% for seven states).

base their decision to work on an analysis of the net income that will be available to the family after taxes and other expenses from the cost of working are paid.[30] Therefore, a comprehension of the current United States tax system is necessary in order to analyze the decision potential secondary earners have in entering the labor force.

In the United States, individuals are not taxed on gross income, but rather on their taxable income. Taxable income is calculated by subtracting allowed deductions from gross receipts.[31] Once an individual has his or her taxable income calculated correctly, that amount is subjected to taxation based on the United States marginal and progressive tax rate structure.[32] The idea behind the progressive tax rate structure is that different portions of taxable income are taxed at different rates.[33] Thus, in 2017, a married filer who has a taxable income of $150,000 would not be taxed at 25% for the entire $150,000. Rather, the government would tax the first $18,650 at 10%; the difference between $18,650 and $75,900 at 15%; and the difference between $75,900 and $150,000 at 25%.[34] The income ranges between the different tax rates are known as tax brackets.

In applying the tax brackets, the incomes of married couples are aggregated together.[35] This aggregation is known as the stacking effect, which creates the marriage penalty.[36] A marriage penalty exists because each spouse is not able to take advantage of the lower progressive rates as their income increases from zero; rather, the government taxes the couple's income as if the entire amount is made by a single economic unit.[37] The

30. Kevin M. Walsh, *The Marriage Penalty: How Income Stacking Affects the Secondary Earner's Decision to Work*, 39 SETON HALL LEGIS. J. 83, 87–88 (2015).

31. *See* Schedule A (Form 1040), DEP'T TREAS. (2013), http://www.irs.gov/file_source/pub/irs-pdf/f1040sa.pdf [https://perma.cc/UZ7R-CKZM].

32. *See* Kyle Pomerleau, *2017 Tax Brackets*, TAX FOUND. 1, 1–2 (Nov. 10, 2017), https://files.taxfoundation.org/20170123140911/TaxFoundation-FF534.pdf [https://perma.cc/46WU-YFRY] (charting the taxable income bracket and rates for 2017).

33. *Id.* at 2 (charting how the progressive rates differ depending on the taxpayer's income filing status).

34. *Id.* at 2–3. As mentioned earlier, the tax brackets differ depending on the individual's filing status, whether that is married, unmarried, or head of household. This Note only analyzes married individuals.

35. *See* Walsh, *supra* note 30, at 85–86 ("When a couple marries and decides to jointly file their tax returns their incomes are essentially 'pooled' together.").

36. *Id.* at 86, 89.

37. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1025–26 (1993).

secondary earner becomes the marginal earner because each dollar made by the secondary earner is taxed at the primary earner's highest rate.[38] Thus, in 2017, if the primary earner makes $250,000, then each dollar the secondary earner makes will be taxed at a beginning rate of 33%.[39]

Once the secondary earner takes into account the income stacking effect—along with the other payroll, local, and state taxes—the take-home pay could be less than 50% of the promised gross pay.[40] Childcare costs must be paid on top of that. A careful analysis of the potential secondary earner's tax situation without any sort of tax break can make the decision to substitute other tax-free activities for taxed work easier to appreciate.

The idea behind a tax break in the form of a tax credit is that a taxpaying household will receive a dollar-for-dollar reduction in the total tax liability due.[41] The credit is applied after the taxable income is calculated and the appropriate tax rate applied to determine the total amount of tax liability.[42] In other words, tax credits are subtracted directly from the tax liability amount that a household owes to the government.

Credits can be refundable or nonrefundable. A refundable tax credit can reduce a household's tax liability below zero, which results in a lump sum payment from the government.[43] For example, if a household has a tax liability of $1,000 and qualifies for a refundable tax credit of $2,000 then the household would owe nothing to the government and get a refund payment from the government of $1,000 after filing the return. In contrast, a nonrefundable tax credit cannot reduce a household's taxable income below zero.[44] For example, if a household qualifies for a nonrefundable tax credit of $2,000 and the household has a tax liability of $2,000, the credit would offset the tax liability dollar-for-dollar and the household would owe nothing to the

38. *Id.* at 1002.

39. 26 U.S.C. § 1 (2016); *see also* Kyle Pomerleau, 2017 Tax Brackets, TAX FOUND. (Nov. 10, 2017), https://taxfoundation.org/2017-tax-brackets/ [https://perma.cc/7K8M-AJ9Q] (charting that the 33% rate applies to taxable income from $233,350 to $416,700).

40. McCaffery, *supra* note 37, at 989.

41. *Tax Credits vs. Tax Deductions*, U.S. TAX CTR., https://www.irs.com/articles/tax-credits-vs-tax-deductions [https://perma.cc/G38B-27GL] [herinafter *Tax Credits*].

42. *Id.*

43. *Id.*

44. *Id.*

government. If the same household has a tax liability of $1,000 and qualifies for a $2,000 nonrefundable tax credit then the household would still owe nothing to the government but the excess credit amount would expire at the end of the tax year. This household only gains a benefit of $1,000 from the $2,000 nonrefundable credit.

The idea behind a tax break in the form of a tax deduction is that a household will have their taxable income reduced by a nominal amount of money before the calculation of the total tax liability.[45] The deduction is applied in calculating taxable income but before the tax rates determine the total amount of tax liabilities that will be due to the government.[46] A tax deduction does not result in a dollar-for-dollar reduction in tax liabilities because it is applied before the tax rates establish the amount of taxes due. For example, if a household is in a 25% tax bracket and receives a $2,000 tax deduction then the household would save $500 in taxes (0.25 x $2,000 = $500).

The refundable tax credit is distinguishable from the nonrefundable tax credit and the tax deduction because qualifying taxpayers of a refundable tax credit can take advantage of the entire tax benefit even if the taxpayer owes no federal income tax. Any amount of refundable tax credit in excess of the taxpayer's liability will result in a government payment. However, the nonrefundable tax credit can only reduce a taxpayer's liability to zero, meaning that a taxpayer who owes no federal income tax will not benefit from a nonrefundable tax credit. Similar to the nonrefundable tax credit, a tax deduction can only reduce a taxpayer's overall tax liability owed to the government.[47] Thus, a taxpayer who owes no federal income tax will likewise not benefit from a tax deduction. Currently, more than 35% of households in the United States have no income tax liability, so tax deductions and nonrefundable tax credits are commonly worthless to those households.[48]

Fewer refundable tax credits exist in the United States tax code as compared to nonrefundable tax credits and tax

45. 26 U.S.C. § 62 (2012).
46. *Id.*
47. Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24–29 (2006).
48. *Id.* at 28.

deductions because refundable tax credits are a dollar-for-dollar reduction that can result in large expenditures of federal government funds.[49] Three common refundable tax credits in the United States tax code include the Earned Income Tax Credit, Health Coverage Tax Credit, and Premium Tax Credit.[50] Nonrefundable tax credits are more palatable because they do not result in large amounts of government spending. Some common nonrefundable tax credits include the Adoption Tax Credit, Child Tax Credit, and Mortgage Interest Tax Credit.[51] Furthermore, numerous tax deductions exist in the United States tax code, which include the Personal Exemption, Standard Deduction, Charitable Contribution Deduction, Home Mortgage Interest Deduction, and other itemized deductions.[52]

The impact between the different tax breaks applied to encourage potential second-income earners to enter the workforce will vary depending on the income level of the household. If a childcare tax deduction is chosen, higher-income households, who are in higher marginal tax brackets, will receive a larger incentive to enter the workforce than lower-income households. Alternatively, if a refundable childcare tax credit is chosen then both qualifying high-income households and qualifying low-income households will receive the same dollar-for-dollar credit. Moreover, it is important to account for the income level of the household because proposed tax breaks often have a phase-out where a household that reports more than a certain amount of income will not receive the tax benefit.

C. Elasticity

1. A Framework for Understanding Elasticity

The interaction between childcare costs, tax treatment, and the decision of potential secondary earners to enter the labor force also depends on secondary earners' labor elasticity. Elasticity is defined as "[t]he ratio between the proportional change in one variable and the proportional change in another."[53] In this context, then, elasticity measures how

49. *Tax Credits*, *supra* note 41.

50. *Credits & Deductions for Individuals*, U.S. TAX CTR., https://www.irs.gov/credits-deductions/individuals [https://perma.cc/VX9F-ZH52] [hereinafter *Credits & Deductions*].

51. *Tax Credits*, *supra* note 41.

52. *Credits & Deductions*, *supra* note 50.

53. *Elasticity*, OXFORD DICTIONARY OF ECONOMICS (John Black et al. eds., 3d ed.

responsive people are to changes in the costs or benefits of that activity.[54] The idea is that people may substitute a certain activity for something else as the costs of that activity increase.[55] If an activity is highly elastic, a change in the cost of the activity will result in larger substitutions.[56] On the other hand, if an activity is rather inelastic, a change in the cost of the activity will result in small substitutions or no substitutions of that activity.[57]

Measurements of labor supply elasticity are typically presented as a ratio of percentage change in work hours or labor-force participation in response to a percentage change in after-tax income.[58] This reflects the correlation between labor choices and after-tax income rather than pre-tax gross income.[59] The labor supply elasticity ratio measured in accordance with labor force participation imputes the correlational effect between after-tax income and marketplace entry. That is, a positive labor supply elasticity would mean that an increase in after-tax income would result in an increase in the number of people who decide to work.[60] For example, suppose the labor supply elasticity for a given population is 0.1 and there are 1,000 individuals working with an after-tax wage rate of $10 an hour. If the after-tax wage rate were to increase from $10 to $15, based on the labor supply elasticity there would be an increase in the number of individuals working from 1,000 to 1,005.

On the flipside, a negative labor supply elasticity indicates that an increase in after-tax income would result in a decrease in the number of individuals working.[61] In our example, if the population of individuals had a labor supply elasticity that was really -0.1 and originally 1,000 individuals decided to work based on an after-tax wage rate of $10 an hour then an increase in the after-tax wage rate from $10 to $15 would result in only 995 total individuals working.

2009).

54. JAMES R. KEARL, ECONOMICS AND PUBLIC POLICY: AN ANALYTICAL APPROACH 785 (Pearson 6th ed. 2011).

55. *Id.*

56. *Id.*

57. *Id.*

58. Chris William Sanchirico, *Optimal Tax Policy and Symmetries of Ignorance*, 66 TAX. L. REV. 1, 21 (2012).

59. *See* Walsh, *supra* note 30, at 87–88 (describing the influence of after-tax income on determining a secondary earner's entry into the labor force).

60. *Id.* at 89–93 (explaining the elasticity of secondary earners' income).

61. *See id.* (showing how an increase in tax rates produces an "elastic labor supply curve with less people willing to enter or remain in the workforce").

The difference between a positive and a negative labor supply elasticity can be explained by the balance of the substitution effect and the income effect.[62] The substitution effect theory holds that as the after-tax income increases, the taxpayer will substitute work for other activities because working time has become more financially rewarding.[63] Additionally, the substitution effect theory holds that a decrease in the after-tax income rate would cause the taxpayer to substitute other activities for work. In contrast, the income-effect theory holds that as a household's after-tax income decreases, the taxpayer will decide to work more in order to maintain the same level of household income as before the decreased pay.[64] Thus, the substitution effect reveals a positive correlation between changes in after-tax income and changes in the decision to work, while the income effect reveals a negative correlation between changes in after-tax income and changes in the decision to work.[65] Since the substitution effect and income effect generally work in opposite directions, the overall labor supply elasticity will change in relation to the magnitude of the substitution effect as compared to the magnitude of the income effect. When the substitution effect outweighs the income effect the result yields a positive labor supply elasticity. In practice, when the labor supply elasticity is positive the supply of labor will increase when the after-tax pay is increased. Hence, an increase in the wage rate, a subsidy for working, or a reduction in the labor-tax rate would result in more individuals working.

An understanding of labor supply elasticity is essential in considering the effects of a tax break geared at increasing the labor supply. In this Note, the substitution effect will be the key factor considered because we will want to determine the effect that each tax break will have at inducing stay-at-home parents to enter the workplace. If the labor supply elasticity is negative then a tax break may be counterproductive in getting more individuals into the workforce. Ultimately, the substitution elasticity should bring stay-at-home parents into the workplace as long as the labor supply elasticity is positive. Thus, it is important

62. KEARL, *supra* note 54, at 359.
63. *Id.*
64. *Id.*
65. *Id.*

to review the current status of potential second-income earner's labor supply elasticity based on contemporary research.

2. The Elasticity of Secondary Earners Over Time

The historical perception of the primary earner in a family unit has been the husband.[66] Thus, the wife has generally been considered the secondary earner, or potential secondary earner (if one spouse is not participating in the labor force).[67] Cultural norms and inequality of pay may help explain this historical perception.[68] There are gender biases in the historical perspective, but the use of the term secondary earner does not presume a lesser ability of the secondary earner, regardless of gender. Nevertheless, most of the studies on second-income earner elasticities have focused on married women's work preferences and responsiveness.[69]

Studies on the labor supply elasticities of primary earners are typically found by analyzing the behavior of men and single women. Generally, this is done because the labor force participation rates of men and single women are relatively high.[70] The compilation of research reveals that male and single-female labor supply elasticities are close to zero.[71] In a 2009 study, Bishop, Heim, and Mihaly found that single women had a labor substitution elasticity of about 0.19.[72] In a similar study, Heim found that married men had a labor substitution elasticity ranging between 0.04 and 0.07.[73] In fact, Congressional Budget Office (CBO) experts reviewed a number of studies on the

66. Tonya Major Gauff, *Eliminating the Secondary Earner Bias: Lessons from Malaysia, the United Kingdom, and Ireland*, 4 NW. J. L. SOC. POL'Y 424, 424 n.2 (2009).

67. *Id.*

68. *Id.*

69. *See, e.g.*, Francine D. Blau & Lawrence M. Kahn, *Changes in the Labor Supply Behavior of Married Women: 1980-2000* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 11230, 2007), https://eml.berkeley.edu/~webfac/moretti/e251_sp07/blau.pdf [https://perma.cc/7A3M-UVEK] ("[F]ocus[ing] on married couples in light of a long tradition in labor supply research that emphasizes the family context in which work and consumption decisions are made . . . .".

70. Robert McClelland & Shannon Mok, *A Review of Recent Research on Labor Supply Elasticities* 14 (Cong. Budget Office, Working Paper No. 2012-12, Oct. 2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/workingpaper/10-25-2012-recentresearchonlaborsupplyelasticities.pdf [https://perma.cc/R4SF-YZB9].

71. *Id.*

72. Kelly Bishop, Bradley Heim & Kata Mihaly, *Single Women's Labor Supply Elasticities: Trends and Policy Implications*, 63 INDUS. & LAB. RELATIONS REV. 146, 154 fig.4 (2009).

73. Bradley Heim, *Structural Estimation of Family Labor Supply with Taxes: Estimating a Continuous Hours Model Using a Direct Utility Specification*, 44 J. HUMAN RES. 350, 375 tbl.5 (2009).

subject and reported that male and single females had labor substitution elasticities ranging between 0.1 and 0.3.[74] Based on this information, males and single females are not very responsive in terms of entering or exiting the workforce as after-tax incomes change.

In terms of the elasticity of married females, researchers in the past exposed a census that the married-female labor supply was more elastic than that of males and single females.[75] Based on these past studies, married females had a labor supply elasticity that ranged from 0.8 to 0.7 in the 1980's and 1990's, respectively.[76] However, recent studies have shown that the married-female labor supply elasticity has actually declined and converged towards the elasticity of males and single females.[77] Notably, a contemporary report discovered the labor supply elasticity of married women declined from 0.8 in the early 1980's to around 0.4 in the 2000's.[78] Specifically, a 2007 study by Blau and Kahn on the labor substitution elasticity of married women with a working husband reported the labor substitution elasticity ranged between 0.34 and 0.39.[79] Similarly, Heim's 2009 study estimated that married women with working husbands had a labor substitution elasticity ranging between 0.25 and 0.34.[80] The CBO experts compiled more findings that concurred with the notion that married-female labor supply elasticity has been converging to that of males and single females, and determined that current married-female labor substitution elasticity was slightly higher than males and single females with a range of 0.2 to 0.4.[81]

Putting this into perspective, tax policies still impact married females' decisions to enter the workforce more than males or single females, but the impact is now less distortionary than in the past. New tax policy would only produce a relatively small change in the number of males and single females entering the labor force because male and single-female labor supply

74. McClelland & Mok, *supra* note 70, at 3.
75. Anil Kumar & Che-Yuan Liang, *Declining Female Labor Supply Elasticities in the U.S. and Implications for Tax Policy: Evidence from Panel Data*, 69 NAT'L TAX J. 481, 481–82 (2016).
76. *Id.* at 496 n.20.
77. *Id.* at 482.
78. *Id.* at 511.
79. Blau & Kahn, *supra* note 69, at 30.
80. Heim, *supra* note 73, at 376.
81. McClelland & Mok, *supra* note 70, at 2.

elasticities were low and remain low. However, the higher labor supply elasticity of married females from several years ago allowed the government to significantly prop up the labor force through tax policies by inducing married females to enter the workforce. This technique is still available but not as impactful as it was in the past because the labor-supply responsiveness of married females has declined. Married women are less responsive to entering the labor force based on increased after-tax income. However, consistent with research on positive substitution elasticities, a tax policy can still be counted on to stimulate an increase in labor supply by inducing married females to enter the workforce.

The current research shows that most potential second-income earners have positive labor supply elasticities. Therefore, if the married-female-labor-supply elasticity is used as a proxy for the potential second-income earner substitution elasticity then tax policies that increase second-income earners' after-tax income should be able to encourage some stay-at-home parents to enter the workforce.

3. Elasticity Among Income Levels

An important distinction in the analysis of which form of tax break to enact when the goal is to incentivize individuals to enter the labor force is the distinction between the labor supply elasticities of the upper-income, middle-income, and lower-income households. Refundable tax credits, nonrefundable tax credits, and tax deductions affect people at different income levels in immensely different ways. A refundable credit will be more welcomed by the lower-income households because every qualifying household can receive the benefit whether the household owes federal income tax or not. But a nonrefundable tax credit or tax deduction may be more welcomed by the upper-income households because the offsetting tax reductions may result in lower overall tax liabilities for those households. In deciding which form of tax break to enact, policymakers will need to account for the labor supply elasticities between the upper-income, middle-income, and lower-income households.

The labor supply elasticity rates between the different income distinctions are important to look at because individuals at the various income levels may have a greater magnitude of responsiveness to after-tax income changes in deciding to enter

the workforce. This Note focuses on this elasticity data. The important trend discovered is that the labor supply elasticity of stay-at-home parents seems to rise as a household's income level rises. Studies confirmed this trend. For example, Heim published a report in 2009 revealing that second-income earners in higher-income households have higher labor supply elasticities.[82] Additionally, CBO experts reported on a number of studies that concluded that the labor supply elasticities of married women increase as household income rises.[83] Thus, the relevant research suggests that increases in after-tax income would presumably impact the labor force more predominately among upper-income households than lower-income households.

II. WHICH DESIGN IS MOST EFFICIENT?

In deciding between enacting a refundable tax credit, a nonrefundable tax credit, or a tax deduction it is important to determine which tax break will most efficiently optimize the labor market by incentivizing potential second-income earners to work. A keen understanding of market efficiency will provide insight regarding what exactly is efficiency and help explain how the differing tax proposals can be utilized to obtain the desired effect with a relatively low cost.

A. Measuring "Efficiency"

Efficiency, as applied to tax features, is often couched in terms of an optimization of some goal. The free-market norm underlying the U.S. tax system requires neutrality, meaning tax provisions should not encouraging or discouraging particular economic activities.[84] The goal of neutrality is to not change people's decisions based on tax laws. But realistically, because some activities will always be more or less taxed than others, a tax system cannot be completely neutral; there will always be some

82. Bradley T. Heim, *The Effect of Recent Tax Changes on Taxable Income: Evidence from a New Panel of Tax Returns*, 28 J. POL'Y ANALYSIS & MGMT. 147, 156 tbl.4 (2009) (estimating gross taxable income elasticities greater than 1.0 for taxpayers with annual incomes over $500,000);

83. Robert McClelland et al., *Labor Force Participation Elasticities of Women and Secondary Earners Within Married Couples* 18 (Cong. Budget Office, Working Paper 2014–06, Sept. 2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/workingpaper/49433-LaborForce_1.pdf [https://perma.cc/3L3W-CHV4].

84. JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 78–81 (Matthew Bender 4th ed., 2012).

effect on behavior.[85] The only feasible way to implement a uniform tax on all activities would be to levy no taxes at all, but this is also unrealistic because modern governments rely on taxes.[86] Thus, the ideal tax policy would balance the need for providing the necessary revenue for a functional government while also ensuring that behavior is as least modified as possible.

In some instances, market inefficiencies occur and behavior needs to be adjusted to fix the market. A market is inefficient when supply and demand are out of equilibrium.[87] This often occurs when externalities are present. An externality is a social cost or benefit that an actor does not internalize from undertaking an activity.[88] A negative externality is when an actor's undertaking generates a cost to others that is not realized by the actor.[89] An example of a negative externality could be pollution by a manufacturer. A positive externality is when an actor's undertaking generates a benefit to others that is not realized by the actor.[90] For example, stay-at-home parents who do not realize the social benefit they could produce to others by joining the labor force. Externalities create a deadweight loss to the economy because the total cost (or benefit) of the activity is actually higher (or lower) than the internalized cost (or benefit) of the activity. The deadweight loss is a cost to society because activities with positive externalities are undersupplied and activities with negative externalities are oversupplied.[91] The tax code can be used to fix these externalities by more accurately fixing the benefits or costs of the activity with the actor.[92] A tax on behavior with negative externalities would force the actor to more appropriately internalize the cost of his or her behavior. And a subsidy on behavior with positive externalities would force the actor to more appropriately internalize the benefits of his or her behavior.

Tax credits and deductions are often used to correct positive externalities by granting the actor additional funds for the desired behavior so the market price more accurately reflects the

85. *Id.*
86. *Id.*
87. KEARL, *supra* note 54, at 404–05.
88. *Id.* at 271.
89. *Id.* at 271–72.
90. *Id.* at 272.
91. *Id.* at 276.
92. *Id.* at 279.

social value of the action.[93] Credits and deductions are often used as tax expenditures, which are special tax breaks built into the tax code that encourage or discourage certain behaviors.[94] In other words, tax expenditures are government spending programs "run through" the tax system.[95] The tax credit is government spending in the form of an offset of tax liabilities to a taxpayer, whereas the tax deduction is government spending in the form of forgone taxable income. These tax expenditures are really subsidies because they provide a financial benefit to taxpayers. As explained above, the use of a subsidy can be economically beneficial when an action has positive externalities. Subsidies, such as childcare tax credits or deductions are designed to help finance certain behaviors, such as encouraging individuals to enter the workforce.[96]

The most efficient childcare tax subsidy designed to encourage potential second-income earners to enter the workforce is the tax break that most focuses on those individuals who have larger labor supply elasticities. An efficient subsidy should promote the desired behavior in the greatest manner possible but do so in a way that expends the least amount of government funds.[97] Thus, the government should implement the form of childcare tax break that achieves the goal of encouraging the most potential second-income earners to enter the labor market given the government's budget constraint. The government's budget constraint is the minimum necessary allotment the government needs to operate. The reason to focus the tax break on the most elastic stay-at-home parents is that the subsidy will only influence behavior at the margin—that is, at the point where the individual is actually choosing between paid work and other activities.[98] When a subsidy applies to an individual's sub-marginal level, the subsidy expends funds without the substitution effect motivating the individual to

93. *Id.* at 280 fig.3.
94. *Id.* at 280.
95. Leonard E. Burman, *Pathways to Tax Reform Revisited*, 41 PUB. FIN. REV. 755, 767 (2013).
96. Batchelder, *supra* note 47, at 35.
97. *See* Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 Tax L. Rev. 51, 51–69 (1999) (laying the foundation for a study optimizing income taxation by focusing on marginal rate progressivity).
98. *Id.* at 54.

perform the desired activity.[99] The subsidy becomes nothing more than a gift to individuals who receive the subsidy at a sub-marginal level. The desired behavior does not occur and the government has spent valuable funds that could have been used more efficiently.

B. The Key: Target the Tax Break at Potential Secondary Earners with a Higher Elasticity

An analysis of the tax breaks in accord with available empirical data on elasticity reveals that a tax deduction or a nonrefundable tax credit is more efficient than a refundable tax credit. The reason is the most efficient tax break should target potential second-income earners with higher elasticities, and the secondary earners with higher elasticities belong to upper-income households. If the tax break is focused on these upper-income individuals who are on the margin of deciding to enter the workforce or not then the tax break should cause a higher substitution effect and more stay-at-home parents should enter the workforce.

The tax proposals of the political parties are incorporated in a stylized model for analysis. The Democrats favor tax credits, while the Republicans favor tax deductions.[100] Hence, we can utilize the plans proposed by Barack Obama and Donald Trump to examine a situation in which a refundable tax credit, a nonrefundable tax credit, and a tax deduction are compared in order to determine which tax policy would be more efficient at bringing stay-at-home parents into the economy.

A simplified analysis will help provide a comprehension of how each tax break would work and influence the labor participation of potential second-income earners. To make the analysis a bit easier, a few assumptions that are consistent with contemporary research are required. The assumptions and a table depicting the assumptions in a more visual form follow below:

Assume a progressive income tax similar to the United States where the lower-income household has a tax rate of zero, the middle-income household has a tax rate of 10%, and the upper-

99. *Id.*

100. *See* Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2018); *The 2016 Democratic Platform*, DEMOCRATIC NAT'L COMM., https://www.democrats.org/party-platform#ending-poverty [https://perma.cc/8KHM-S67Y].

income household has a tax rate of 30%.

Assume a household has two children.[101]

Assume the cost of childcare for a household with two children is $30,000 per year.[102]

Assume the stay-at-home parent could make $50,000 a year by entering the workforce.[103]

Assume the labor supply elasticity of the stay-at-home parent in the lower-income household is 0.2, the labor supply elasticity of the stay-at-home parent in the middle-income household is 0.4, and the labor supply elasticity of the upper-income household is 0.7.

Table 1: Assumed Secondary Earner Situation

	Labor Supply Elasticity	Income Tax Rate	Cost of Childcare	Secondary Earner Salary
Lower	0.2	0%	$30,000	$50,000
Middle	0.4	10%	$30,000	$50,000
Upper	0.7	30%	$30,000	$50,000

The most efficient tax break will induce the greatest number of stay-at-home parents to enter the workforce while spending the least amount of government funds. To best see which tax break is most efficient we will hold the government's budget constraint constant at $12,000. Therefore, the tax break chosen should be the one that is most likely to encourage the greatest number of stay-at-home parents to enter the workforce given the limited $12,000 budget constraint.

The implementation of the stylized refundable tax credit can be construed from Barack Obama's proposal for a refundable tax credit. President Obama proposed a refundable tax credit

101. The average U.S. household with children under 18 has 1.9 children. *Average Number of Own Children Under 18 in Families with Children in the United States*, STATISTA, https://www.statista.com/statistics/718084/average-number-of-own-children-per-family/ [https://perma.cc/9U2R-2F5F].

102. The average cost of childcare for two children ranges substantially between states, from $8,819 to $40,473. CHILD CARE AWARE OF AMERICA, *supra* note 15, at 61.

103. The median household income in the United States across all jobs is $51,939; this figure averages together all households regardless of whether there are single or multiple earners. *Average Salaries for Americans – Median Salaries for Common Jobs*, FOX BUS. (Mar. 4, 2016), http://www.foxbusiness.com/features/2015/07/09/average-salaries-for-americans-median-salaries-for-common-jobs.html [https://perma.cc/82VD-D8Y3]. Common jobs that reasonably meet the $50,000 figure include police officer, electrician, sales or marketing manager, and office manager. *Id.*

that would max out at $6,000 per household and phase out for incomes over $120,000.[104] Therefore, we will assume that the upper-income household would not qualify for the refundable tax credit. The refundable tax credit would only apply to the lower-income and middle-income households. These households would be able to utilize the entire credit because the refundable credit will offset the household's overall income tax liability dollar-for-dollar and any excess amount above the household's tax liability will come to the household in the form of a payment from the government. Hence, the refundable tax credit will generate a $6,000 tax benefit to the lower-income household, a $6,000 tax benefit to the middle-income household, but no benefit to the upper-income household.

Neither politician proposed a nonrefundable tax credit; therefore, we will assume the nonrefundable tax credit is similar to Barack Obama's refundable tax credit but without a phase out. The reason that we will not apply a phase out to the nonrefundable tax credit is that we want to keep the government's budget constraint consistent and because the nonrefundable tax credit will only offset a household's tax liabilities. The nonrefundable tax credit will never generate a government payment in excess of the tax liabilities due. Thus, the household must actually owe income taxes to benefit from the dollar-for-dollar nonrefundable tax credit. As mentioned above, over 35% of households in the United States do not owe federal income taxes. Therefore, we will assume that even though the lower-income household probably qualifies for the tax credit, the lower-income household would not benefit from the nonrefundable tax credit because the lower-income household would not owe any income tax. Thus, the nonrefundable tax credit would result in a $6,000 tax benefit to the middle-income household and a $6,000 tax benefit to the upper-income household. Any excess benefit above the tax liabilities owed would expire at the end of the tax year.

Finally, Donald Trump's proposed tax deduction is more straightforward to apply in our stylized model. One key difference between our stylized model and Trump's proposal is

104. Office of the Press Secretary, *FACT SHEET: A Simpler, Fairer Tax Code That Responsibly Invests in Middle Class Families*, WHITE HOUSE (Jan. 17, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/17/fact-sheet-simpler-fairer-tax-code-responsibly-invests-middle-class-fami [https://perma.cc/2KDY-MPE2].

that Trump called for a phase out at $500,000 for married filers,[105] but we will assume the upper-income household will not be phased out from the tax deduction. We do this in order to hold the budget constraint constant between the three forms of tax breaks analyzed and because we want to get a more thorough view of the households who may be in the upper-income range but not phased out of the tax benefit. A deduction offsets a household's taxable income before the tax rates apply. Therefore, the deduction will generate a tax benefit equivalent to the cost of the exclusion multiplied by the marginal tax rate. The deduction does not help the lower-income household in our scenario because the lower-income household does not owe taxes. The taxable income reported is already too low. The middle-income household is taxed at 10% and the deduction accounts for a $30,000 write off before the tax rate applies. Thus, the middle-income household will receive a tax benefit of $3,000. The tax deduction helps the upper-income household the most by virtue of being in a higher tax bracket. The upper-income household is taxed at 30% and the deduction amounts to a $30,000 write off. Therefore, the upper-income household will receive a tax benefit of $9,000.

In each scenario the government expends the same amount of money. The lower-income household only benefits from the refundable tax credit. The middle-income household benefits in each form of tax break, but benefits more from the refundable tax credit and the nonrefundable tax credit than the deduction. The upper-income household does not benefit from the refundable tax credit but receives the largest benefit from the tax deduction. A table depicting the resulting tax benefits from the three stylized tax policies follows below:

105. *See* Tom Anderson, *Trump's Plan to Help Middle Class Uses Child-Care Tax Breaks*, CNBC (Dec. 1, 2016), https://www.cnbc.com/2016/12/01/trumps-plan-to-help-middle-class-using-child-care-tax-breaks.html (describing Trump's campaign proposal regarding child-care tax deductions).

Table 2: The Benefits from the Stylized Tax Policies

	Refundable Tax Credit Benefit	Nonrefundable Tax Credit Benefit	Tax Deduction Benefit
Lower	$6,000	$0	$0
Middle	$6,000	$6,000	$3,000
Upper	$0	$6,000	$9,000
TOTAL COST	$12,000	$12,000	$12,000

The overall tax benefit each household receives from the three tax breaks is important to view in the context of the after-tax salary because we are trying to determine the change in the secondary earner's labor supply stemming from a change in the after-tax salary. To analyze the difference we will need to compare the after-tax salary before a tax break is given to the after-tax salary after the tax break is given.

As explained above, the stay-at-home parent can enter the workforce and receive a starting salary of $50,000. For simplicity, we will presume the additional salary of the secondary earner will not move any of the household's income into a higher tax bracket. The secondary earner will be taxed at the highest marginal tax rate of his or her spouse because of the income stacking effect. Tables depicting each household's situation before any tax breaks are applied follow below:

Table 3: Lower-Income Household Take-home Salary

	Secondary Earner Salary	Take-home Rate Without Tax Benefit	Take-home Salary Without Tax Benefit
Lower (0% tax)	$50,000	100%	$50,000

The take-home salary rate of the potential secondary earner in the lower-income household will be 100% because that household does not pay any income taxes. The after-tax salary of the stay-at-home parent in the lower-income household who enters the workforce before any tax breaks are applied will be $50,000.

Table 4: Middle-Income Household Take-Home Salary

	Secondary Earner Salary	Take-home Rate Without Tax Benefit	Take-home Salary Without Tax Benefit
Middle (10% tax)	$50,000	90%	$45,000

The take-home salary rate of the potential secondary earner in the middle-income household will be 90% because that household pays a 10% income tax rate. Consequently, the after-tax salary of the stay-at-home parent in the middle-income household who enters the workforce before any tax breaks are applied will be $45,000.

Table 5: Upper-Income Household Take-home Salary

	Secondary Earner Salary	Take-home Rate Without Tax Benefit	Take-home Salary Without Tax Benefit
Upper (30% tax)	$50,000	70%	$35,000

Finally, the take-home salary rate of the potential secondary earner in the upper-income household will be 70% because that household pays a 30% income tax rate. Therefore, the after-tax salary of the stay-at-home parent in the upper-income household who enters the workforce before any tax breaks are applied will be $35,000. The income stacking effect substantially lowers the secondary earner's take-home pay. Thus, stay-at-home parents with a spouse making a higher annual income have a greater economic disincentive to enter the workforce.

The first tax break analyzed in our stylized model is the refundable tax credit. As shown in Table 2, the refundable tax credit will result in a $6,000 tax benefit to the lower-income household and the middle-income household. The upper-income household will receive no tax benefit. A table depicting the after-tax effects of the refundable tax credit follows below:

Table 6: Refundable Tax Credit Analysis

	Secondary Earner Labor Supply Elasticity	Before-tax Salary	After-tax Take-home Rate Before	Take-home Salary Before[106]
Lower	0.2	$50,000	100%	$50,000
Middle	0.4	$50,000	90%	$45,000
Upper	0.7	$50,000	70%	$35,000
	After-tax Refundable Credit Take-home Salary[107]	After-tax Take-home Rate with Refundable Credit[108]	Change of After-tax Percentage Points[109]	Change in Labor Force Participation Rate[110]
Lower	$56,000	112%	12%	2.4%
Middle	$51,000	102%	12%	4.8%
Upper	$35,000	70%	0%	0%

The take-home salary of the secondary earner in the lower-income household will be $56,000. The after-tax salary rate of the secondary earner will be 112% because the secondary earner will have a starting salary of $50,000 but take home $56,000 after the refundable credit is applied. The net change in the percentage points between the after-tax rate before the credit and after the credit is 12%. Therefore, if we apply the labor supply elasticity of the lower-income secondary earner then the labor force participation rate will change one percent for every percentage change in the after-tax salary. Hence, the refundable tax credit results in an increase of 2.4% in the labor force

106. For the calculation of take-home salary before the tax benefit, the before-tax salary is multiplied by the after-tax take-home rate before any tax benefit is applied (ex: $50,000 x 90% = $45,000).

107. For the calculation of the after-tax take-home salary when the tax break is applied, the tax benefit amount is added to the take-home salary before any tax benefit (ex: $45,000 + $6,000 = $51,000).

108. For the calculation of the after-tax rate with a tax benefit, the after-tax take-home salary after the tax benefit is divided by the after-tax take-home salary before the tax benefit (ex: ($51,000 / $50,000) x 100 = 102%).

109. For the calculation of the change of after-tax percentage points, the after-tax take-home rate before the tax benefit is subtracted from the after-tax take-home rate with the tax benefit (ex: 102% - 90% = 12%).

110. For the calculation of the change in the labor force participation rate, the change in the after-tax percentage points is multiplied by the secondary earner's labor supply elasticity (ex: 12% x .4 = 2.4%).

participation rate among stay-at-home parents in the lower-income households. The middle-income secondary earner also receives a $6,000 tax benefit so the take-home salary of the secondary earner in that household will be $51,000. The resulting after-tax salary rate of the secondary earner in the middle-income household after the refundable tax credit is 102% with a net change of percentage points between the after-tax rate before the credit and after the credit of 12%. The secondary earner's labor force participation rate in the middle-income household changes by 4.8%. The upper-income household receives no tax benefit from the refundable credit so there is no expected change in the labor force participation rate among those stay-at-home parents.

The second tax break analyzed in our stylized model is the nonrefundable tax credit. The nonrefundable tax credit results in a $6,000 tax benefit to both the middle-income household and the upper-income household, but no tax benefit to the lower-income household. A table depicting the after-tax effects of the nonrefundable tax credit follows below:

Table 7: Nonrefundable Tax Credit Analysis

	Secondary Earner Labor Supply Elasticity	Before-tax Salary	After-tax Take-home Rate Before	Take-home Salary Before
Lower	0.2	$50,000	100%	$50,000
Middle	0.4	$50,000	90%	$45,000
Upper	0.7	$50,000	70%	$35,000
	After-tax Nonrefundable Credit Take-home Salary	After-tax Rate Take-Home With Nonrefundable Credit	Change of After-tax Percentage Points	Change in Labor Force Participation Rate
Lower	$50,000	100%	0%	0%
Middle	$51,000	102%	12%	4.8%
Upper	$41,000	82%	12%	8.4%

The take-home salary of the secondary earner in the lower-income household after the nonrefundable tax credit is applied remains the same at $50,000, so there is no change in the labor

force participation rate among those households. The take-home salary of the secondary earner in the middle-income household increases by $6,000 after the nonrefundable tax credit is applied, which results in an after-tax salary rate of 102%. The secondary earner in the middle-income household has a net change in the after-tax salary rate of 12%. The effect is a change in the labor force participation rate of 4.8%, which is the same as the refundable tax credit. The take-home salary of the secondary earner in the upper-income household also increases by $6,000 after the nonrefundable tax credit is applied. The take-home salary increases to $41,000 and the after-tax salary rate increases from 70% to 82%. The net percentage change in the after-tax salary rate of the secondary earner in the upper-income household after the nonrefundable tax credit is applied is 12%. Applying the labor supply elasticity rate to the secondary earner's percentage change in after-tax salary rate results in a labor force participation rate change of 8.4%. The nonrefundable credit generates a larger change in the labor force participation rate for the upper-income household because we are assuming that the labor supply elasticity rate of the secondary earner in the upper-income household is larger than the other households.

The final tax break analyzed in our stylized model is the tax deduction. As explained earlier, the tax deduction results in a tax benefit of $3,000 for the middle-income household and a benefit of $9,000 for the upper-income household. The lower-income household receives no tax benefit from the tax deduction. A table depicting the after-tax effects of the tax deduction follows below:

Table 8: Tax Deduction Analysis

	Secondary Earner Labor Supply Elasticity	Before-tax Salary	After-tax Take-home Rate Before	Take-home Salary Before
Lower	0.2	$50,000	100%	$50,000
Middle	0.4	$50,000	90%	$45,000
Upper	0.7	$50,000	70%	$35,000
	After-tax Deduction Take-home Salary	After-tax Take-home Rate With Deduction	Change of After-tax Percentage Points	Change in Labor Force Participation Rate
Lower	$50,000	100%	0%	0%
Middle	$48,000	96%	6%	2.4%
Upper	$44,000	88%	18%	12.6%

The secondary earner in the lower-income household does not benefit from the tax deduction, so there will be no change in the labor force participation rate among those individuals. The secondary earner in the middle-income household will have a take-home pay of $48,000 after the tax deduction is applied. This equates to a change in the after-tax salary rate from 90% to 96%. The labor force participation rate of secondary earners in the middle-income household increases by 2.4%. The secondary earner in the upper-income household will have a take-home pay of $44,000 after the tax deduction is applied. The tax benefit results in an increase of the after-tax salary rate from 70% to 88%. Applying the 18% net change to the labor supply elasticity of the secondary earner in the upper-income household results in a 12.6% increase in the labor force participation rate among those stay-at-home parents.

The stylized model reveals that a tax deduction or a nonrefundable tax credit is more efficient than a refundable tax credit at inducing stay-at-home parents to enter the workforce.

C. Why a Deduction or a Nonrefundable Credit Will Bring More Secondary Earners into the Workforce.

A tax deduction or nonrefundable tax credit will bring more secondary earners into the workforce because those tax breaks

focus on individuals who are more responsive to changes in after-tax salaries.[111] The change in the labor force participation rate is dependent upon the labor supply elasticity of the potential second-income earners. The positive correlation between the labor supply elasticity of second-income earners and household income results in a situation where a tax deduction or nonrefundable tax credit will be more efficient than a refundable tax credit.[112]

The analysis of this Note confirms the conclusion that the tax deduction and nonrefundable tax credit are more efficient than the refundable tax credit. The tax deduction provides a larger tax break to those stay-at-home parents in upper-income households. The lower-income households do not receive as much of a benefit from a tax deduction because the tax deduction only applies before the tax rates are utilized to calculate household tax liabilities. The individuals who already owe no income tax do not receive any benefit from the tax deduction. Hence, the tax deduction would be most favorable to the upper-income families. Policymakers should utilize tax deductions or nonrefundable tax credits if the goal of the tax policy is to induce stay-at-home parents to enter the workforce because the research shows that stay-at-home parents in upper-income households are more elastic.

As preferences and markets change, continual research of the labor supply elasticities of stay-at-home parents between upper-income, middle-income, and lower-income households should be undertaken to certify the responsiveness of stay-at-home spouses' decisions to enter the workforce based on after-tax salary changes. For instance, if the labor supply elasticity of stay-at-home parents were actually higher among the lower-income households then the refundable credit would be the more efficient tax policy for inducing stay-at-home parents to enter the workforce.

This conclusion is subject to a number of caveats. One important caveat not addressed in this Note is the difference between the total number of potential second-income earners

111. *See supra* subpart II.B (analyzing tax breaks based on empirical data and showing that a tax deduction or nonrefundable credit will impact certain secondary earners more than others).

112. *Cf.* Heim, *supra* note 81, at 161 (explaining the difference in elasticities meant higher-income groups responded more to tax changes).

that are not currently participating in the workforce among the upper-income households, middle-income households, and lower-income households.

The total number of stay-at-home parents between the upper-income households, the middle-income households, and the lower-income households is important to look at because there may be a greater total number of individuals who would enter the workforce at a given income distinction. For example, if there are more stay-at-home parents in the lower-income level as compared to the upper-income level then the response of the stay-at-home parents in the lower-income level to a reduction in tax rates could bring more people into the workforce even if the labor supply elasticities between the upper-income households and the lower-income households were equal. This study is focused on the effect that a tax break in the form of a refundable tax credit, a nonrefundable tax credit, and a tax deduction could have on encouraging potential second-income earners to enter the workforce. Thus, the applicable workforce participation numbers to explore would be that of upper-income stay-at-home parents, middle-income stay-at-home parents, and lower-income stay-at-home parents. A compilation of recent economic research published by the Center for American Progress revealed that the total number of stay-at-home parents seems to be the highest for middle-income households.[113] This is consistent with other contemporary findings to presume that the total number of stay-at-home parents who could enter the workforce is largest among the middle class. A common explanation for the lower total number of stay-at-home parents in lower-income households is that both parents are forced to work to support the family.[114] A rational explanation for the lower total number of stay-at-home parents in upper-income households is that both parents have high opportunity costs of not working in the forgone income.[115]

113. *See* Sara Jane Glynn, *Breadwinning Mothers Are Increasingly the Norm.*, CTR. FOR AMER. PROGRESS (2016), at 8 tbl.2, https://cdn.americanprogress.org/content/uploads/2016/12/19065819/Breadwinners-report.pdf [https://perma.cc/P64J-E3PP] (showing the percentage of women earning less than 25% of household income is lowest for the second lowest and middle quintiles of household income).

114. Ayana Douglas-Hall & Michelle Chau, *Most Low-Income Parents Are Employed*, NAT'L CTR. FOR CHILDREN IN POVERTY, http://www.nccp.org/publications/pub_784.html [https://perma.cc/GU4R-QS9M].

115. *See* Glynn, *supra* note 113, at 8 (reasoning that women who earn higher incomes are more likely to work).

One other important caveat not addressed is the scenario in which the after-tax take-home pay changes as a household's income level changes. For example, the secondary earner may push the household into a higher marginal tax bracket. This scenario would result in a larger dollar benefit to the household from the childcare deduction. The result would not substantially change the after-tax take-home rate because the income in the denominator would be larger.

CONCLUSION: TAX CUT AND JOBS ACT OF 2017

Tax proposals by the major political parties have been introduced to help subsidize the rising cost of childcare. One of the primary reasons for the tax proposals is to encourage potential second-income earners to enter the workforce. Hillary Clinton and Barack Obama proposed refundable childcare tax credits, while Donald Trump proposed a childcare tax deduction.[116] Recent research on the labor supply elasticity shows that potential second-income earners are less responsive to tax policies than in the past. If the goal of the policy is to encourage secondary earners to enter the market workforce, the most efficient tax policy is the policy that focuses on the individuals whose work decision is most elastic. This analysis supports choosing the childcare deduction because the childcare deduction benefits potential second-income earners who have higher labor supply elasticities. In other words, secondary earners in upper-income households are more influenced by tax rates when deciding whether to enter the workforce or to stay at home. The childcare deduction is more efficient than the refundable tax credit or the nonrefundable tax credit because the childcare deduction motivates more stay-at-home parents to enter the labor force while expending less government money.

On December 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act of 2017, which included a childcare tax

116. Steve Holland, *Donald Trump to Propose Childcare Tax Deductions*, MONEY (Sept. 13, 2016), http://time.com/money/4489177/donald-trump-childcare-tax-deduction-proposal/ [https://perma.cc/389M-UG8A]; Laura Meckler & Richard Rubin, *Hillary Clinton Proposes a New Tax Break*, WALL ST. J., (Oct. 11, 2016) https://www.wsj.com/articles/hillary-clinton-proposes-a-new-tax-break-1476158462 [https://perma.cc/9DJF-TUKX]; Office of the Press Secretary, *FACT SHEET: Helping All Working Families with Young Children Afford Child Care*, WHITE HOUSE (Jan. 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2015/01/21/fact-sheet-helping-all-working-families-young-children-afford-child-care [https://perma.cc/SV9N-Z9RH].

break reform.[117] Ironically, the change in the childcare tax break closely resembled Barack Obama's proposal more than Donald Trump's proposal. The Act involved a number of overhauls to the tax code including changes in the individual income tax rates, the corporate tax rates, treatment of state and local taxes, and the standard deduction and personal exemption. As with almost any major bill, a number of compromises and concessions were required to enact the bill into law. Particularly, Senators Marco Rubio, Republican-Florida, and Mike Lee, Republican-Utah, refused to endorse the bill until the childcare tax credit was expanded.[118] Lee and Rubio had been working with President Trump and his daughter, Ivanka Trump, about a childcare tax break since January.[119]

The resulting law increased the childcare tax credit from $1,000 to $2,000, with $1,400 being refundable.[120] The refundable portion is indexed to inflation.[121] Furthermore, the 2017 law created a $500 credit for other dependents that are ineligible for the childcare tax credit.[122] The credit begins to phase out at $400,000 for joint filers and $200,000 for single files.[123]

As explained above, the refundable tax credit will likely bring fewer potential second-income earners into the labor force if the lower-income households are less elastic than the middle and upper-income households to after-tax changes in income. However, the goal of the increased refundable tax credit may be for another purpose, such as easing the burden of rising childcare costs. Alternatively, if new research were to show that

117. Veronica Stracqualursi, *President Trump Signs Tax Bill into Law*, ABC NEWS (Dec. 22, 2017), http://abcnews.go.com/Politics/president-trump-signs-tax-bill-law-leaving-holidays/story?id=51954035 [https://perma.cc/6KLV-JZJR].

118. Bob Bryan, *Marco Rubio Threatens to Vote Against the GOP Tax Bill Unless Leaders Meet Demands*, BUSINESS INSIDER (Dec. 14, 2017), http://www.businessinsider.com/marco-rubio-vote-no-tax-bill-child-credit-2017-12 [https://perma.cc/5G2N-G6UP].

119. Dennis Romboy, *Sens. Mike Lee, Marco Rubio Push for Expanded Child Tax Credit in Reform Plan*, DESERET NEWS (Oct. 24, 2017), https://www.deseretnews.com/article/900002774/sens-mike-lee-marco-rubio-push-for-expanded-child-tax-credit-in-reform-plan.html [https://perma.cc/GJB4-PXMQ].

120. Tax Cut and Jobs Act of 2017, H.R. 1, § 1104, 115th Cong. (2018); Jared Walczak, Joseph Bishop-Henchman & Nicole Kaeding, *Details of the Conference Report for the Tax Cuts and Jobs Act*, TAX FOUND. (Dec. 15, 2017), https://taxfoundation.org/conference-report-tax-cuts-and-jobs-act/ [https://perma.cc/GNW7-CFSL].

121. Tax Cut and Jobs Act of 2017, H.R. 1, § 1104, 115th Cong. (2018).

122. *Id.*

123. *Id.*

lower-income households are more responsive to after-tax incomes when it comes to the decision of whether a stay-at-home parent should enter the workforce or not, then the increased refundable tax credit would not only provide a greater redistribution effect but also increase the labor supply with secondary earners.[124] But if existing econometric research showing higher labor elasticity for higher-income-household secondary earners is correct, and the goal is to encourage efficient labor participation, a childcare tax deduction is the preferable government policy.

124. Bradley Heim & Jacob Mortenson, *The Effect of Recent Tax Changes on Taxable Income: Correction and Update*, POL'Y. ANALYSIS AND MGMT. (Dec. 21, 2016) http://onlinelibrary.wiley.com/doi/10.1002/pam.21907/abstract (later research showing the elasticity of second-income earners among high-income households may not be statistically significant, meaning that Heim cannot definitively prove second-income earners among high-income households have higher labor supply elasticities).


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