

Affirming the Constitutionality of Title VII Disparate Impact Doctrine: A Response to OLC

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This essay responds to the Department of Justice’s Office of Legal Counsel (OLC) June 2026 legal opinion arguing that disparate impact doctrine, a well-established part of Title VII jurisprudence for decades, is unconstitutional as currently interpreted. Disparate impact has been an important doctrine in ensuring that employers do not engage in employment practices that arbitrarily and unjustifiably exclude members of certain groups, and this essay makes clear its continuing validity. As we explain, OLC’s Opinion is based on an incorrect characterization of how the disparate impact standard of proof functions, misconstrues the text and purpose of the statute, and manufactures a conflict with the Equal Protection Clause that does not exist. The OLC Opinion falsely claims that Title VII disparate impact requires “racial proportionality,” contrary to the statutory text, and the opinion offers no evidence to support its assertion that the doctrine forces employers to engage in discrimination. Its legal analysis ignores decades of Supreme Court jurisprudence interpreting, applying and upholding the standard. Because Title VII’s disparate impact standard is found in the express language of the statutory text, is fully consistent with the Equal Protection Clause, and falls within

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Congress’s legislative power under the Commerce Clause and the Fourteenth Amendment, it remains part of anti-discrimination law. OLC opinions are neither binding nor entitled to any special weight outside the executive branch, and courts should uphold Congress’s intent to prohibit disparate impact discrimination and to encourage employers to remove arbitrary and unjustified barriers to fair employment opportunity.

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Introduction

On June 9, 2026, the Department of Justice’s Office of Legal Counsel (OLC) published a legal opinion concluding that guidelines issued by the Equal Employment Opportunity Commission (EEOC) on employee selection and affirmative action are unconstitutional.¹ Purporting to rely on the Court’s recent

1. Const. of Disparate Impact Liab. Under Title VII, 50 Op. O.L.C. (June 9, 2026), <https://www.justice.gov/olc/media/1444871/dl> [<https://perma.cc/3GRH-EN7Y>] [hereinafter OLC Opinion].

decision in *Louisiana v. Callais*,² OLC made sweeping statements about the unconstitutionality of well-established disparate impact doctrine, relying on arguments that mischaracterize existing law and are factually unsupported. This essay aims to correct the record by responding to those arguments. It clarifies that disparate impact doctrine, which targets unjustified employment practices that arbitrarily exclude members of certain groups, is found in the explicit text of Title VII, is consistent with the values and jurisprudence of the Equal Protection Clause, and falls within Congress's legislative powers. This correction is important because of the risk that employers, litigants, and courts will mistakenly treat OLC's analysis as authoritative, undermining both the rule of law and voluntary employer efforts to avoid discrimination, which have long been understood as critical to achieving the goals of the civil rights laws.³

The OLC Opinion responds to a letter request from Andrea Lucas, Chair of the EEOC, asking “[w]hether the disparate impact provisions in Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, are constitutional as currently interpreted and applied.”⁴ The OLC Opinion concluded that the EEOC’s guidelines interpreting Title VII “embrace an unconstitutional reading of Title VII” that “contemplate liability based on disproportionately adverse effects alone, without regard to an employer’s likely intent” and that this reading “functions as a qualified racial-proportionality mandate and spurs employers to engage in race-based decision[-]making to avoid liability.”⁵ In

2. 146 S. Ct. 1131 (2026).

3. See *Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986) (“We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (“Cooperation and voluntary compliance were selected [by Congress] as the preferred means for achieving [the goals of Title VII].”); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (explaining that the risk of Title VII liability “provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices” to remove barriers to employment opportunity).

4. OLC Opinion, *supra* note 1, at 1.

5. *Id.* at 2.

particular, the opinion focused on the 1978 Uniform Guidelines on Employee Selection Procedures⁶ (Uniform Guidelines) adopted by the EEOC and other federal agencies to give employers and labor organizations a “framework for determining the proper use of tests and other selection procedures,”⁷ and the EEOC’s Affirmative Action Guidelines⁸ (AA Guidelines), which did not involve disparate impact but rather provided a legal framework for employers pursuing affirmative action to redress discrimination and occupational segregation. The OLC Opinion concludes that “disparate[] impact liability as currently interpreted by EEOC [in its guidelines] is unconstitutional.”⁹ To resolve what OLC asserts is a tension between Title VII disparate impact liability and the Equal Protection Clause,¹⁰ the opinion offers “corrections”¹¹ to the EEOC’s long-established approach, arguing for a reinterpretation of disparate impact liability that differs from the text of Title VII and judicial precedent.

In what follows, we show that OLC’s opinion rests on a faulty analysis of the constitutionality of disparate impact. As we discuss in detail below, the OLC Opinion erroneously characterizes disparate impact as requiring “racial-proportionality”¹² to claim that a constitutional collision looms. The opinion is also flawed in its doctrinal and empirical methodology: it provides no data to support its racial-proportionality conclusions; mischaracterizes or ignores leading Supreme Court opinions applying and

6. 43 Fed. Reg. 38295, 38312 (Aug. 25, 1978) (codified at 29 C.F.R. pt. 1607 (2025)). The Uniform Guidelines were adopted jointly by the EEOC, the Civil Service Commission, the Department of Labor, and the Department of Justice. *See* 29 C.F.R. § 1607.1.

7. 29 C.F.R. § 1607.1.

8. Guidelines on Affirmative Action, 44 Fed. Reg. 4422 (Jan. 19, 1979) (codified at Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. pt. 1608 (2025)). After the June 9, 2026 OLC Opinion, the EEOC rescinded the Affirmative Action Guidelines. *See* Rescission of Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended, 91 Fed. Reg. 40879 (July 6, 2026).

9. OLC Opinion, *supra* note 1, at 25.

10. U.S. CONST. amend. XIV, § 1.

11. OLC Opinion, *supra* note 1, at 2.

12. *Id.*

upholding disparate impact; ignores the clear language and statutory history of Title VII in which Congress codified disparate impact doctrine; and fails to acknowledge Congress's constitutional power to prohibit disparate impact discrimination.

We offer this analysis to correct the core claims made by the OLC Opinion. The Office of Legal Counsel serves the important role of advising the Attorney General of the Department of Justice and executive branch agencies on constitutional and statutory questions.¹³ OLC has an institutional function to produce high-quality legal analysis; OLC's opinions are binding on executive agencies unless rescinded by subsequent administrations after a thorough legal analysis.¹⁴

This essay shows how the OLC Opinion fails to meet the necessary standard of rigorous legal analysis. Our analysis is also important to protect employees, employers, and others who might incorrectly treat the OLC Opinion as controlling on questions of constitutional or statutory law. In addition, OLC opinions are not binding on courts, and no special deference is required.¹⁵ Thus, it is important to lay out an accurate and well-supported description of the law supporting disparate impact liability so that the opinion's arguments are not assumed to be persuasive.

While this essay focuses on the constitutionality of disparate impact liability, it also has implications for the EEOC's recent moves to repeal or alter its Uniform Guidelines and AA

13. See Independent Offices Appropriation Act of 1934, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307-08; Foreword, 1 Op. O.L.C. Supp., at vii (2013) (citing Office of Legal Counsel Change in Name, Att'y Gen. Order No. 9-53, 18 Fed. Reg. 2125, 2162 (Apr. 16, 1953)) ("The name of the Executive Adjudications Division . . . is hereby changed to Office of Legal Counsel.").

14. See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1711 (2011) ("OLC's legal opinions are treated as authoritative and binding within the executive branch unless 'overruled' by the Attorney General or the President."); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 533 (2021) (OLC opinions "serve as binding precedent for OLC itself, which will depart from or overrule a previous opinion only rarely and for good reason.").

15. See *Ctr. for Biol. Diversity v. U.S. Int'l Dev. Fin. Corp.*, 77 F.4th 679, 689 (D.C. Cir. 2023) ("OLC's views are not binding, nor are they entitled to deference. We look to them for their persuasive value.").

Guidelines.¹⁶ These actions are subject to judicial review under the Administrative Procedure Act (APA) for arbitrariness and capriciousness,¹⁷ and the extent to which they rely on faulty legal analysis from OLC will be relevant to that review. Correction of OLC's legal analysis serves important public law values that are essential to the functioning and legitimacy of federal agencies. The EEOC guidelines were adopted after notice and comment, in consultation with other agencies, employers, employees, labor groups, the general public, and experts in the field.¹⁸ Agencies should regularly update and revisit their guidelines, regulations, and compliance documents in light of lower court and Supreme Court precedent and incorporate new data and expert evaluation. OLC's dramatic reinterpretation of an important civil rights statute, spurred by its unjustified broadside attack on constitutional grounds, threatens the necessary deliberative and consultative process.

In what follows, we consider each of the OLC Opinion's major claims in turn, explaining where and how they mischaracterize the law or make unfounded empirical claims. We offer this scrutiny of OLC's analysis to prevent further damage to constitutional, regulatory, and employment law and their attendant values.

16. See Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Votes to Rescind Affirmative Action Interpretive Guidelines and Related Compliance Manual (June 30, 2026), <https://www.eeoc.gov/newsroom/eeoc-votes-rescind-affirmative-action-interpretive-guidelines-and-related-compliance> [<https://perma.cc/4QZE-6TW8>]; 2026 Unified Agenda Entry of Rescission of Uniform Guidelines on Employee Selection Procedures, OFF. OF INF. & REGUL. AFFS. (2026), <https://www.reginfo.gov/public/do/eAgenda-ViewRule?pubId=202510&RIN=3046-AB43> [<https://perma.cc/MV8F-88XT>].

17. 5 U.S.C. § 706(2)(A).

18. See 43 Fed. Reg. 38290, 38292 (Aug. 25, 1978).

I. The OLC Opinion Mischaracterizes the History of Disparate Impact Doctrine and Ignores the Statutory Text of Title VII

The OLC Opinion characterizes Title VII's disparate impact standard as a "controversial" creation of the Supreme Court,¹⁹ disregarding its statutory grounding and decades of precedent supporting its legality and applying it in many employment cases.

The disparate impact doctrine has been part of Title VII jurisprudence for more than five decades.²⁰ It has been consistently recognized by the Supreme Court and expressly codified into law by Congress.²¹ The doctrine prohibits facially neutral practices that unfairly screen out certain groups and perpetuate patterns of exclusion or segregation.²² Its purpose is to remove arbitrary barriers to equal employment opportunity. As the Supreme Court has explained, "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination" and so fall within Title VII's prohibitions.²³

Congress first enacted Title VII as part of the Civil Rights Act of 1964,²⁴ a sweeping piece of legislation that addressed the problems of segregation and economic isolation of Black Americans. Although the primary impetus for Title VII was the widespread exclusion of Black workers from the labor market, the statute also prohibits discrimination based on color, religion, sex, and national origin.²⁵ The statute as enacted contained a broad definition of prohibited practices, which is found in section 703:

(a) It shall be an unlawful employment practice for an employer—

19. OLC Opinion, *supra* note 1, at 5.

20. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

21. *See* 42 U.S.C. § 2000e-2(k).

22. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

23. *Watson v. Ft. Wor. Bank & Tr.*, 487 U.S. 977, 987 (1988).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

25. 42 U.S.C. § 2000e-2.

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²⁶

In *Griggs v. Duke Power Co.*,²⁷ decided in 1971, a unanimous Supreme Court interpreted section 703(a)(2) to require “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”²⁸ It agreed with the EEOC’s interpretation that Title VII prohibits employers from relying on employment tests unless they are job related and actually measure the knowledge and skills required to perform a particular job.²⁹ In so doing, the Court held that discriminatory intent was not required to prove discrimination where arbitrary barriers were shown to deny members of one race equal access to job opportunities.³⁰ Subsequent case law made clear that disparate impact liability applies to other prohibited forms of discrimination, such as sex and religion.³¹

26. *Id.* § 2000e-2(a).

27. 401 U.S. 424 (1971).

28. *Id.* at 431. *Griggs* referenced section 703(a)(2), but its discussion focused primarily on the purposes behind Title VII. *Id.* at 426, 430–31. The Court subsequently confirmed that the disparate impact doctrine is grounded in the text of section 703(a)(2). *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 445–47 (1982); *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) (explaining that the disparate impact theory “represented the better reading of the statutory text”).

29. *Griggs*, 401 U.S. at 433–34.

30. *Id.* at 432 (“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”).

31. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (applying disparate impact liability to sex discrimination); *Bolden-Hardge v. Off. of the*

In 1989, the Supreme Court decided *Wards Cove Packing Co. v. Atonio*,³² which made it more difficult to prove disparate impact liability.³³ Congress responded to this case and several other Court decisions construing civil rights protections narrowly by passing the Civil Rights Act of 1991.³⁴ The congressional findings specifically state that *Wards Cove* had “weakened the scope and effectiveness” of Title VII and that “legislation is necessary to provide additional protections against unlawful discrimination in employment.”³⁵ Among the changes made by this legislation, Congress codified disparate impact liability in Title VII and specified the allocation of burdens of proof.³⁶ By doing so, Congress made clear its intent to prohibit employer practices that exclude certain groups and are not justified by business needs.³⁷

OLC misleadingly claims that serious equal protection concerns surrounded disparate impact liability “[s]ince its inception in *Griggs*.”³⁸ In fact, the unanimous Court in *Griggs* raised no

Cal. State Controller, 63 F.4th 1215, 1227–28 (9th Cir. 2023) (applying disparate impact liability to religious discrimination).

32. 490 U.S. 642 (1989).

33. *Id.* at 650–53, 655–57, 659.

34. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981).

35. *Id.* § 2(3).

36. *Id.* §§ 3, 105.

37. 42 U.S.C. § 2000e-2(k)(1)(A) (establishing that an unlawful employment practice exists when “a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”).

38. OLC opinion, *supra* note 1, at 7. Confusingly, the memo cites specific passages in two relatively recent law review articles that make no mention of any constitutional concerns about disparate impact liability. *Id.* at 7–8. The first passage is from Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 31 (2020), where she discusses how EEOC leaders came to endorse the disparate impact theory. The second passage is from Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 528 (2003), where he discusses whether disparate impact claims can be brought by white males. Elsewhere in those articles, Heriot argues for the doctrine’s

hint of any constitutional concerns, nor did it suggest the existence of a constitutional conflict in subsequent cases applying the doctrine. Even when the Supreme Court declined to make disparate impact claims available under the Equal Protection Clause in *Washington v. Davis*,³⁹ it expressed no constitutional concerns about Congress's power to create such liability, writing that doing so was a matter of "legislative prescription."⁴⁰

In 2009, Justice Scalia in *Ricci v. DeStefano*⁴¹ first raised a possible constitutional concern about disparate impact liability in a concurring opinion that was joined by no other Justices.⁴² The following year, he authored a unanimous opinion that permitted a Title VII disparate impact class action case to proceed with no mention of any constitutional concerns.⁴³

The Court next considered the theory a few years later in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*⁴⁴ In holding that the Fair Housing Act prohibits disparate impact discrimination, the Court put aside the constitutional concerns raised in Justice Scalia's *Ricci* concurrence and the petitioner's brief.⁴⁵ The Court explained that because disparate impact liability is not based solely on a showing of statistical disparity, the constitutional concerns were avoided.⁴⁶ Rather, the doctrine is properly limited because the plaintiff must point to a specific policy or practice that causes the disparity, and defendants are not liable when they show business

unconstitutionality, see Heriot, *supra*, at 165–66, 170, but Primus concludes that disparate impact doctrine as currently interpreted under Title VII is not unconstitutional. Primus, *supra*, at 494; see also *id.* at 585 ("The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection suggests that only a very uncompromising court would issue such a decision.").

39. 426 U.S. 229 (1976).

40. *Id.* at 248.

41. 557 U.S. 557 (2009).

42. *Id.* at 594–95 (Scalia, J., concurring).

43. *Lewis v. City of Chicago*, 560 U.S. 205 (2010).

44. 576 U.S. 519 (2015).

45. *Id.* at 540, 545–46. See also Brief for the Petitioners at 43–46, *Inclusive Cmty's.*, 576 U.S. 519 (No. 13-1371).

46. *Inclusive Cmty's.*, 576 U.S. at 540.

necessity.⁴⁷ The Court also stated that race-neutral efforts to address segregation and entrenched disadvantage do not raise constitutional concerns merely because they entail an awareness of race.⁴⁸

II. Title VII's Text and Well-Established Case Law Make Clear that Discriminatory Intent Is Not Required for Disparate Impact Liability

OLC's broad claim that Title VII liability requires a discriminatory motive⁴⁹ is simply untrue and finds no support in either the statutory text or the case law.

Disparate-treatment liability is often characterized as turning on discriminatory intent, and yet even section 703(a)(1), which is the basis for disparate-treatment liability, makes no mention of motive or intent.⁵⁰ The text simply prohibits employers from treating an applicant or employee worse "because of" certain personal characteristics,⁵¹ indicating that what matters is the connection between an individual's personal characteristics and the loss of an employment opportunity, not whether the employer had a specific intent to discriminate. For example, Title VII requires an employer to accommodate its employees' religious practices even if its policies that burden those practices were not motivated by religious discrimination.⁵² Similarly, workplace sexual or racial harassment that creates unequal terms and conditions of employment can violate Title VII even if the employer did not intend to discriminate.⁵³ Thus, even under

47. *Id.* at 541–42.

48. *Id.* at 545 (explaining that "race may be considered in certain circumstances and in a proper fashion. . . . [L]ocal housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race . . . does not doom that endeavor at the outset").

49. OLC Opinion, *supra* note 1, at 4.

50. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)(1)).

51. 42 U.S.C. § 2000e-2(a)(1).

52. *See, e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 453, 461 n.9 (2023).

53. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998).

section 703(a)(1), Title VII is not limited to prohibiting intentional discrimination but also reaches some employer actions (or inactions) where the employer was not motivated by discrimination.

Disparate impact liability also does not require discriminatory intent. OLC's claim that disparate impact is merely "an evidentiary mechanism to smoke out intentional discrimination"⁵⁴ lacks any textual support. Section 703(k)(1), which describes the burdens of proof in disparate impact cases, does not mention discriminatory intent or motive as an element of liability.⁵⁵ The only textual reference to intent reinforces the conclusion that it is not required. Section 703(k)(1)(C)(2) states that a "demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination."⁵⁶ If disparate impact liability were only a means of proving intentional discrimination, as the OLC Opinion asserts, then this subsection would be completely at odds with section 703(k)(1)(A)(i), which allows an employer to defend against a claim of disparate impact based on business necessity.⁵⁷ The only coherent reading that makes sense of both provisions is that disparate impact liability does not require any showing of intent.

If the statutory text were not clear enough, the Supreme Court has consistently held that intent is not required for disparate impact liability. The *Griggs* case, which the Civil Rights Act of 1991 codified, made clear that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."⁵⁸

54. OLC Opinion, *supra* note 1, at 2.

55. See Civil Rights Act of 1964 § 703(k)(1), 78 Stat. at 255, as amended by Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)).

56. *Id.* § 703(k)(1)(C)(2).

57. *Id.* § 703(k)(1)(A)(i) (stating that disparate impact liability is established *only* if the complainant has shown a disparate impact *and* the employer has not satisfied the business necessity defense).

58. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). This has been confirmed multiple times. See, e.g., *Watson v. Ft. Wor. Bank & Tr.*, 487 U.S.

Most recently, in a unanimous opinion by Justice Scalia in *Lewis v. City of Chicago*,⁵⁹ the Court unambiguously stated that a charge of disparate impact “does not require discriminatory intent.”⁶⁰

III. The OLC Opinion Mischaracterizes Disparate Impact Doctrine and How It Operates in Practice

The OLC Opinion asserts that disparate impact doctrine works as a “racial-proportionality mandate” and “compels” racial discrimination, suggesting that employers will adopt racial quotas to comply with the law.⁶¹ These claims are false as a matter of the statutory text and unsupported as an empirical matter.

Nothing in the text of Title VII requires a racially proportionate workforce, nor does it suggest that employers should engage in race-based decision-making. The statute simply says that liability is established when a complainant demonstrates that an employment practice causes a disparate impact based on a protected characteristic *and* the employer fails to show that the practice is “job related for the position in question and consistent with business necessity.”⁶² An employer is not liable simply because there are racial disparities in its workforce, but *only* when it relies on arbitrary employment practices that it is unable to justify. Disparate impact doctrine thus operates primarily to incentivize employers to eliminate practices that have no business justification but perpetuate patterns of segregation or exclusion. In doing so, the doctrine can benefit *all* workers, of whatever background, who have been unfairly screened out of jobs for which they are qualified.

977, 988 (1988) (“This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent.”); *see also* Civil Rights Act of 1991 § 3(2), 105 Stat. at 1071.

59. 560 U.S. 205 (2010).

60. *Id.* at 215. *See also id.* at 216 (“Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer’s motives . . .”).

61. OLC Opinion, *supra* note 1, at 2, 9.

62. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

OLC relies on *Ricci* to argue that avoiding disparate impact liability requires employers to take race-based employment actions. This argument confuses unlawful disparate treatment with lawful efforts to remove practices that create unfair disadvantages. Disparate treatment occurs when an employer treats a “*particular person* less favorably than others because of” a protected characteristic.⁶³ The court in *Ricci* found that the employer had engaged in disparate treatment because it discarded the results of a promotional exam based on the race of the successful test takers after the test had been administered.⁶⁴ This scenario differs markedly from the typical one in which an employer avoids disparate impact by eliminating a practice prospectively that would otherwise arbitrarily exclude members of certain groups. Such an action is race-conscious to the extent it is taken with an awareness of the unjustified racial impacts of the prior practice, but it does not entail adverse actions against specific individuals and so no disparate treatment occurs.

Anti-discrimination law forbids disparate treatment. It does not prohibit employers from taking steps to ensure the fairness of their practices,⁶⁵ but instead encourages them to voluntarily remove arbitrary barriers to equal opportunity.⁶⁶ The remedy for unjustified disparate impact is to eliminate a discriminatory practice and replace it with a fairer, race-neutral one that actually measures ability to do the job.⁶⁷ Because the revised practice is

63. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added) (quoting *Watson v. Ft. Wor. Bank & Tr.*, 487 U.S. 977, 985–86 (1988)).

64. *Id.* at 579.

65. *Id.* at 585 (“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”). See also *id.* (“Nor do we question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made.”).

66. See, e.g., *Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975).

67. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate

race-neutral, no decision about any applicant or employee is made based on that person's race. Thus, contrary to OLC's claims, the doctrine does not "compel racial discrimination," but rather targets discriminatory practices that lack any business justification.⁶⁸

Because remedying unjustified disparate impact discrimination does not entail making employment decisions based on an individual's race, the Supreme Court's affirmative action cases are wholly inapposite. Those cases challenged policies that used racial preferences—specifically, they sometimes took into account an applicant's race in deciding whether or not to admit that person.⁶⁹ By contrast, disparate impact doctrine requires employers to use criteria that are job related, not race-based.⁷⁰ The revised facially neutral practices entail no discrimination because they are applied uniformly to all applicants alike. Numerous cases have found that when employers implement race-neutral policies intended to remove unfair discriminatory barriers, they have not engaged in discrimination.⁷¹

Perhaps recognizing that nothing in the statutory text mandates racial proportionality, the OLC Opinion suggests that as a practical matter, employers will be forced to make race-based decisions due to the "threat of liability."⁷² This argument echoes objections raised to the Civil Rights Act of 1991, which were specifically rejected when Congress passed that legislation and

on the basis of racial or other impermissible classification."); *id.* at 436 ("What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.").

68. *See id.* at 431 ("If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited.").

69. *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 374–75 (1978); Grutter v. Bollinger, 539 U.S. 306, 318–19 (2003); Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 230–31 (2023).

70. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

71. *See, e.g.,* Duffy v. Wollé, 123 F.3d 1026, 1038–39 (8th Cir. 1997); Mlynczak v. Bodman, 442 F.3d 1050, 1058–59 (7th Cir. 2006); Hayden v. County of Nassau, 180 F.3d 42, 54 (2d Cir. 1999).

72. OLC Opinion, *supra* note 1, at 8.

President George H.W. Bush signed it.⁷³ The OLC Opinion offers no empirical support for its claim, and there are many reasons to be skeptical of it.

For starters, disparate impact claims are not easy to bring or prove under current doctrine. In order to establish a *prima facie* case, plaintiffs typically need statistical evidence about employer practices, which is difficult to obtain. In addition, simply pointing to the existence of a statistical disparity between groups does not establish disparate impact discrimination.⁷⁴ Employers can easily defend against these claims if their requirements are actually jobrelated and have often been successful in doing so in court.⁷⁵ Only when an employer's practice lacks a business justification does it give rise to disparate impact liability.⁷⁶

The risk of facing a disparate impact enforcement suit by the EEOC was quite low even when the agency prioritized systemic litigation.⁷⁷ With little serious risk of facing an enforcement action, it is implausible that employers would choose to

73. President Bush vetoed an earlier version of the legislation in 1990, citing concerns about quotas. *Message from the President of the United States Returning Without My Approval S. 2104, the Civil Rights Act of 1990*, S. DOC. NO. 101-35, 2 (1990). The following year when he signed the Civil Rights Act of 1991 into law, he stated that “[t]his law will not lead to quotas.” *Statement on Signing the Civil Rights Act of 1991*, 2 PUB. PAPERS 1504, 1504 (Nov. 21, 1991).

74. *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1) (requiring plaintiffs to show that “a particular employment practice . . . causes a disparate impact”).

75. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 739–40 (2006). *See also* Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 257–58 (2005).

76. *See* Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J. COLL. & UNIV. L. 547, 551 (2007).

77. *See* Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1563 (2014). The EEOC under the second Trump administration has stated that it will not pursue disparate impact claims. U.S. EQUAL EMP. OPPORTUNITY COMM’N, NAT’L ENFORCEMENT PLAN (FY2025 – FY2029) 2 (2026), https://www.eeoc.gov/sites/default/files/2026-06/NEP_signed.pdf [<https://perma.cc/7M6R-RYTB>].

comply with disparate impact law by making race-based hiring decisions rather than relying on job-related selection criteria.

Labor market data provide no empirical support for the claim that employers resort to racial quotas out of fear of disparate impact liability. The doctrine has been part of the law for over fifty-five years, and while racial segregation is somewhat reduced since the 1960s, it persists in many occupations and industries.⁷⁸ In the absence of any empirical, or even anecdotal, evidence, OLC's assertion that disparate impact doctrine compels employers to engage in racial discrimination lacks plausibility.

IV. The OLC Opinion Manufactures a Constitutional Conflict Where None Exists

As explained above, no serious concerns about the constitutionality of disparate impact doctrine were entertained by the Court for decades after *Griggs*, and when they were raised in *Inclusive Communities*, the Court found that they did not apply to existing doctrine.⁷⁹ Now, OLC argues that a conflict exists between disparate impact liability and equal protection which requires abandoning the EEOC's long-established interpretation of Title VII.

In so arguing, the OLC Opinion relies heavily on the reasoning in *Louisiana v. Callais*.⁸⁰ That case, however, addressed a different statute—the Voting Rights Act—which was enacted under a different constitutional power and involved a factual situation completely different from the Title VII context. Specifically,

78. See Marina Zhavoronkova, Rose Khattar & Matthew Brady, *Occupational Segregation in America*, CTR. FOR AM. PROGRESS (Mar. 29, 2022), <https://www.americanprogress.org/article/occupational-segregation-in-america/> [<https://perma.cc/A468-GU2S>]; Robin Stryker, *Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies*, 42 SOCIO. Q. 13, 36 (2001). See generally KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, *Desegregation in the Neoliberal Era, 1980 to 2005*, in DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT, 155–77 (2012).

79. See *supra* notes 44–48 and accompanying text.

80. OLC Opinion, *supra* note 1, at 8–9, 13, 16–18, 23–24 (citing *Louisiana v. Callais*, 146 S. Ct. 1131 (2026)).

Callais involved a state’s decision to create two majority-Black congressional districts, not an employer’s decision to change a practice with unjustified discriminatory effects.⁸¹ And it interpreted Section 2 of the Voting Rights Act, which contains statutory language bearing no resemblance to the relevant Title VII provisions.⁸² The distinct sources of congressional power for enactment of Title VII are discussed in the next section. This section challenges the claim that disparate impact liability conflicts with the Equal Protection Clause.

OLC asserts that disparate impact doctrine incentivizes or “coerces” employers to make race-based decisions, thereby compelling racial discrimination in violation of the Constitution.⁸³ That claim rests on a mischaracterization of both disparate impact doctrine and equal protection law.

On its face, nothing in Title VII requires employers to make discriminatory decisions. The burden on the employer is not to have a racially balanced workforce, but rather to justify any

81. *Callais*, 146 S. Ct. at 1142.

82. The language at issue in *Callais* reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

83. OLC Opinion, *supra* note 1, at 8–9.

practice that deprives some groups of equal opportunity as job related and required by business necessity. As explained above, an employer can avoid disparate impact liability by removing arbitrary requirements and instead using fairer, race-neutral criteria that apply equally to all. If a public employer does so, it does not raise any equal protection concerns because it is not making any race-based decisions about individual employees or applicants.

OLC, however, suggests that disparate impact liability “allows the government to engage in race discrimination indirectly” by “pressuring employers to take race-based actions.”⁸⁴ It is unclear what OLC means by “indirect” discrimination. OLC offers no supporting evidence to establish its claim that the government pressures employers to discriminate or that disparate impact liability causes employers to engage in race discrimination when nothing in the doctrine calls for them to do so. OLC appears to rely on Justice Scalia’s comment in *Ricci* that disparate impact doctrine may lead employers to make decisions based on racial outcomes.⁸⁵ However, as explained in Part III, the facts in *Ricci* were unusual because the employer sought to undo the outcomes of an established process that individual employees had relied on.⁸⁶ In contrast, changing policies *prospectively* to avoid unjustified disparate impacts does not entail disparate treatment of any individuals and is consistent with the Court’s repeated emphasis on “voluntary compliance . . . as the preferred means” of eliminating discriminatory practices and devices.⁸⁷

OLC may be suggesting that merely considering racial effects in order to diagnose and prevent unjustified exclusionary practices somehow violates the Constitution. This argument also mischaracterizes the law. The OLC Opinion incorrectly suggests that the Constitution imposes a requirement of colorblindness on all government action. This claim fails to distinguish between

84. *Id.* at 9.

85. *Id.* at 8; see also *supra* note 42 and accompanying text (discussing Justice Scalia’s opinion).

86. See *supra* notes 63–65 and accompanying text.

87. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

racial classifications, which are subject to strict scrutiny,⁸⁸ and actions taken with an awareness of race, which do not inherently violate the Equal Protection Clause. Racial classifications entail the use of racial information by the government to make decisions about individuals and are unconstitutional unless their use is “narrowly tailored” to meet “compelling governmental interests.”⁸⁹ However, when the government acts in a race-neutral manner for a permissible purpose, strict scrutiny does not apply, even if its actions are race-conscious.⁹⁰

Permissible purposes include promoting integration and undoing the effects of past discrimination. Even conservative Justices have repeatedly found that policies aimed at reducing segregation and promoting more equitable access to opportunities do not raise equal protection concerns so long as the means used do not involve racial classifications.⁹¹ In *City of Richmond v. J.A. Croson Co.*,⁹² Justice O’Connor wrote that government has “many legislative weapons at their disposal . . . to remove arbitrary barriers to minority advancement,”⁹³ and Justice Scalia acknowledged that a state can act ““to undo the effects of past

88. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

89. *Id.*

90. See, e.g., Pauline T. Kim, *Race-Aware Algorithms: Fairness, Nondiscrimination and Affirmative Action*, 110 CAL. L. REV. 1539, 1543 (2022); Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 169 (2024).

91. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (explaining that government has “many legislative weapons at their disposal . . . to remove arbitrary barriers to minority advancement”); *id.* at 526 (Scalia, J., concurring in the judgment) (“A State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race.”); *Fisher v. Univ. of Tex. at Aus.*, 579 U.S. 365, 379, 381–82 (2016) (citing favorably a policy intended to help increase racial diversity at universities without relying on the race of individual students for admissions); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (explaining that the government may pursue race-conscious goals such as reducing school segregation through mechanisms that do not rely on racially classifying individual students).

92. 488 U.S. 469 (1989).

93. *Id.* at 494.

discrimination’ in many permissible ways that do not involve classification by race.”⁹⁴ Justice Kennedy stated the point clearly in *Inclusive Communities*: “[R]ace may be considered in certain circumstances and in a proper fashion” and “mere awareness of race in attempting to solve [problems of racial inequity and isolation] does not doom that endeavor.”⁹⁵ Thus, the Equal Protection Clause does not prohibit race-conscious purposes, such as promoting greater integration and equal opportunity, where the means used do not involve racial classifications.

*Students for Fair Admissions v. President and Fellows of Harvard College*⁹⁶ (*SFFA*) did not alter this distinction. In *SFFA*, the challenged policies involved consideration of applicants’ race in deciding whether to admit them to college, and the Court found that they involved racial classifications.⁹⁷ In contrast, Title VII on its face does not create racial classifications, nor does it require employers to make employment decisions based on an individual’s race or to have racially proportionate workforces. Instead, it calls for employers to abandon arbitrary policies and replace them with fairer, job-related criteria.⁹⁸ Any new, race-neutral standard will apply to all applicants and employees, thereby treating them all equally. Because remedying disparate impact does not involve the use of racial classifications, strict scrutiny does not apply.

Race-neutral government policies *can* violate equal protection if they are motivated by invidious discrimination.⁹⁹ However, the Court has never found that race-neutral policies that are *not* motivated by a desire to harm or exclude a group violate equal protection merely because the government is aware of a racial impact. When an employer removes practices with unjustified

94. *Id.* at 526 (Scalia, J., concurring in the judgment).

95. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015).

96. 143 S. Ct. 2141 (2023).

97. *Id.* at 2175.

98. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971).

99. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Gomillion v. Lightfoot*, 364 U.S. 339, 342, 347–48 (1960).

disparate impacts—practices that have the effect of excluding certain groups without any business justification—it is not acting with invidious racial motivation because it is not trying to exclude members of one racial group or to segregate its workforce. To suggest that race-neutral government efforts to remove discriminatory barriers and promote greater equality of opportunity violate the Constitution is completely at odds with the core meaning of the Equal Protection Clause.

The Equal Protection Clause does not apply to nonstate actors, so the Constitution would not prohibit a private employer from taking steps to remove arbitrary practices with racial effects. OLC’s argument here is that Title VII’s disparate impact provisions violate the Constitution because Congress cannot constitutionally mandate that private employers discriminate based on race.¹⁰⁰ As seen, Title VII does not mandate private discrimination but simply requires employers to avoid arbitrarily depriving certain groups of equal employment opportunities. Because avoiding unjustified, exclusionary practices does not entail discrimination against any individual, nothing in the Equal Protection Clause prohibits Congress from requiring employers to do so.

The OLC Opinion’s equal protection analysis is also flawed in that it does not address religion or sex, which are also covered by Title VII. In concluding that the disparate impact standard is unconstitutional, the opinion draws on cases such as *Callais* and *SFFA* which are about race-based classifications rather than about religion or sex.¹⁰¹ Yet equal protection analysis is different for religion and sex. Saliently, sex-based classifications are not subject to strict scrutiny, but to intermediate scrutiny.¹⁰² Even if the claim that disparate impact produces or encourages quotas or

100. OLC Opinion, *supra* note 1, at 9.

101. See *Louisiana v. Callais*, 146 S. Ct. 1131, 1162 (2026); *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2175.

102. See *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

relies on sex-based classifications were true, it could be justified if it served an important governmental interest.¹⁰³

V. The OLC Opinion Disregards Congress's Constitutional Authority to Enact Title VII Disparate Impact Liability

The OLC Opinion purports to apply “constitutional avoidance,” making it necessary, it claims, to reinterpret the statute to conform to the requirements of *Callais*.¹⁰⁴ As noted above, this misreads the *Callais* decision and fails to distinguish the statutory language and implementation history of the Voting Rights Act from Title VII. It also manufactures a conflict between disparate impact and the Equal Protection Clause that does not exist. In addition to these deficits, OLC's constitutional analysis entirely ignores the authority that the Constitution provides Congress to enact Title VII.

Title VII's coverage of private employers is an exercise of Congress's power under the Commerce Clause.¹⁰⁵ Congress invoked the Commerce Clause power as authority for the Civil Rights Act.¹⁰⁶ Drawing on that constitutional authority, the text of Title VII explicitly extends coverage to employers in an “industry affecting commerce,”¹⁰⁷ using language similar to that in the National Labor Relations Act and the Fair Labor Standards Act, both of which the Court found valid under the Commerce Clause.¹⁰⁸ To the extent that the OLC Opinion means to suggest

103. *See id.* at 533 (explaining that sex-based classifications require the State to show that the “classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives” (internal quotation marks omitted)).

104. OLC Opinion, *supra* note 1, at 14.

105. *See* U.S. CONST. art. I, § 8, cl. 3 (providing Congress the power to “regulate Commerce . . . among the several States”).

106. *See Omnibus Civil Rights*, 21 CONG. Q. WKLY. REP. 1131 (1963); REBECCA E. ZEITLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 113–15 (2006).

107. 42 U.S.C. § 2000e.

108. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30–31 (1937) (finding that Congress had power under the Commerce Clause to enact the National Labor Relations Act, which prevents any person from engaging in unfair labor practices “affecting commerce”); *United States v. Darby*, 312 U.S.

that Congress lacks power under the Commerce Clause to prohibit disparate impact by private employers, it fails to elaborate that argument. In any event, there would be no merit to such an argument as Congress has broad power to enact legislation affecting employers and businesses engaged in interstate commerce that impact the national economy.¹⁰⁹ There is no serious argument that employers and labor unions are not engaged in interstate commerce and economic activity within the meaning of the Commerce Clause.¹¹⁰

Callais does not alter the Commerce Clause analysis. *Callais*'s constitutional-avoidance argument rests on what the majority saw as the limits of Congress's authority to enforce the Fifteenth Amendment against government actors.¹¹¹ But those limits have no applicability to private sector employers as the Supreme Court has long held that the Fourteenth Amendment—the relevant Amendment in the Title VII context—extends only to state action.¹¹² Since, as discussed in the prior Parts, the disparate impact standard does not otherwise violate the Equal Protection Clause,¹¹³ Congress has broad authority to prohibit disparate impact discrimination using its Commerce Clause power. For this reason, the OLC Opinion has no bearing on the constitutionality of disparate impact as applied to private sector employers and employees.

OLC's constitutional avoidance argument also disregards Congress's power to prohibit disparate impact discrimination

100, 117, 121–22 (1941) (finding Commerce Clause authority to enact the Fair Labor Standards Act, which sets minimum wages and maximum hours for workers in production “for interstate commerce”).

109. *See* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249, 255, 261 (1964) (upholding Congress's power to enact Title II of the 1964 Civil Rights Act and noting that the “determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest”).

110. *See* *Jones & Laughlin Steel*, 301 U.S. at 30–31 (finding the National Labor Relations Act a proper exercise of Congress's Commerce Power).

111. *See* *Louisiana v. Callais*, 146 S. Ct. 1131, 1155 (2026).

112. *See* *Shelley v. Kraemer*, 334 U.S. 1, 13–14 (1948).

113. *See supra* notes 19–22, 26–30 and accompanying text.

pursuant to its Fourteenth Amendment enforcement power.¹¹⁴ This power is relevant because Congress amended the statute in 1972 to cover state and local employers, abrogating states' Eleventh Amendment immunity from suit using its Section Five enforcement power.¹¹⁵ When adopted in the wake of the Civil War, the Enforcement Clause of the Fourteenth Amendment represented a vast "enlargement[] of the power of Congress,"¹¹⁶ endowing it with extensive powers to enforce the substantive provisions of the Reconstruction Amendments.

Title VII, including the statute's disparate impact provisions, is also a valid exercise of Congress's power to enforce the Fourteenth Amendment. To be valid Fourteenth Amendment enforcement legislation, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹¹⁷ Congress need not limit itself to legislating on what is prohibited by the substantive provisions of the Fourteenth Amendment. Instead, the Supreme Court has repeatedly made clear that Congress has "the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."¹¹⁸ The disparate impact provisions of Title VII are designed to remedy and deter unfair discrimination. As discussed above, these provisions prohibit policies and practices that disproportionately harm certain groups and cannot be justified by business necessity. That

114. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

115. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48 (1976); H.R. REP. NO. 92-238, at 18–19 (1971); S. REP. NO. 92-415, at 10–11 (1971); see also *Bitzer*, 427 U.S. at 453 n.9 ("There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the State as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.").

116. *Bitzer*, 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)).

117. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). See also *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

118. *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)); see also *Boerne*, 521 U.S. at 536; *Morgan*, 384 U.S. at 658.

rigorous standard is aimed at eliminating practices that unfairly screen out qualified applicants or employees and perpetuate patterns of exclusion and segregation. Disparate impact liability thus operates to remedy and prevent the central problems of discrimination, exclusion, and segregation that are the object of the Equal Protection Clause.¹¹⁹

Congress's prohibition of disparate impact discrimination thus falls within its Section Five power to deter, prevent, and remedy intentional discrimination and its continuing effects in several ways.¹²⁰ Specifically, prohibiting unjustified disparate impact helps reach hidden intentional discrimination, deter intentional discrimination disguised behind neutral policies, prevent the perpetuation of past intentional discrimination, and block the use of new proxies for discriminatory treatment. As in *Nevada Department of Human Resources v. Hibbs*,¹²¹ which upheld the Family and Medical Leave Act as an exercise of Congress's power to remedy and address gender discrimination, the disparate impact provision satisfies the constitutional test.¹²²

As noted above, the Supreme Court has long affirmed statutory disparate impact provisions without calling into question Congress's constitutional authority to create such a standard. In *Washington v. Davis*,¹²³ in which the Supreme Court interpreted the Equal Protection Clause to cover only intentional

119. See, e.g., *Ex parte Virginia*, 100 U.S. at 346 (explaining that purpose of the Thirteenth and Fourteenth Amendments is “to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws”); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 255 (2011) (“[The Equal Protection Clause’s] duty of protection included protecting the equal natural rights to life, liberty, and property of every person, an equality of rights that was inconsistent with the recognition of any ‘caste, such as white, or black, male or female.’” (quoting CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859))).

120. See *In re Emp. Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1323–24 (11th Cir. 1999) (finding that disparate impact provisions serve as preventive measures against intentional discrimination in public employment).

121. 538 U.S. 721 (2003).

122. *Id.* at 735.

123. 426 U.S. 229 (1976).

discrimination, it made clear that Congress—given its institutional capacities which differ from the judiciary’s—could create such standards legislatively.¹²⁴

If the OLC Opinion is arguing that *Callais* creates a different test for Congress’s enforcement power, this would be incorrect. While we disagree with how the Court applied the *Boerne* test in the Fifteenth Amendment context,¹²⁵ *Callais* does not overturn Fourteenth Amendment enforcement power decisions such as *Hibbs*.¹²⁶ In addition, the Court’s application of the enforcement power in *Callais* depended on the different structure of the VRA.¹²⁷ Section 2 of the VRA, unlike Title VII, is not limited to unjustified disparate impacts. The *Callais* Court’s conclusion that Section 2 of the VRA was not a proper exercise of Congress’s enforcement power is based on the Court’s concern that: (a) Section 2 of the VRA required racial proportionality in districting and (b) as applied by the lower court, did not take into account partisan gerrymandering as a legitimate “neutral” state interest.¹²⁸ But neither of these is true as to Title VII. Title VII disparate impact does not require racial proportionality or quotas on its face or in its implementation.¹²⁹ And, further, the disparate

124. *Id.* at 248 (noting that “extension of” disparate impact provisions “should await legislative prescription”).

125. *See* *Louisiana v. Callais*, 146 S. Ct. 1131, 1155 (2026) (applying the *Boerne* congruence-and-proportionality test to Congress’s Fifteenth Amendment enforcement power and holding that § 2 of the Voting Rights Act cannot constitutionally prohibit practices with merely disparate impact because such a prohibition would “fail to enforce a right that the Amendment secures”).

126. *See id.* at 1155 (reaffirming that the *Boerne* congruence-and-proportionality framework applies equally to Congress’s enforcement power under both the Fourteenth and Fifteenth Amendments, while basing its restrictive holding solely on the substantive content of the Fifteenth Amendment’s prohibition of purposeful voting discrimination).

127. *Id.* at 1156–57 (holding that because Section 2 of the VRA is structured as a “results in” effects test that could be read to prohibit “mere disparate impact” in voting, the statute had to be construed narrowly to avoid exceeding Congress’s Fifteenth Amendment enforcement power—an analysis driven by the VRA’s particular statutory design rather than by enforcement power doctrine generally).

128. *See id.* at 1156–57, 1161.

129. 42 U.S.C. § 2000e-2(j). That provision reads:

impact liability standard (requiring statistical significance, causation, and lack of business necessity) requires analysis of the neutral factors that could otherwise justify a practice prior to a finding of liability.¹³⁰

VI. OLC’s Proposed “Necessary Corrections” Are Contrary to the Statutory Text and Established Case Law and Impermissibly Rewrite the Statute

After creating a constitutional conflict where none exists, the OLC Opinion argues for three “corrections” to avoid any constitutional problems.¹³¹ These “corrections,” however, are unnecessary and are an attempt to rewrite Title VII by ignoring the actual text passed by Congress.

The first proposed “correction” would read out of the statute the burden placed on defendants of showing that practices with exclusionary effects are justified. The text is clear: a defendant bears the burden of “demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity.”¹³² If it fails to do so, then no justification exists for the practice and it should be eliminated.

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.

Id.

130. 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (establishing that a disparate impact claim requires the plaintiff to demonstrate that a “particular employment practice . . . causes a disparate impact,” and permitting the employer to defend by demonstrating the practice is “job related for the position in question and consistent with business necessity,” after which the plaintiff must show the employer refused to adopt an equally effective “alternative employment practice” with less disparate impact).

131. OLC Opinion, *supra* note 1, at 2.

132. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also* *Lewis v. City of Chicago*, 560 U.S. 205, 213 (2010) (explaining that section 2000e-2(k)(1)(A)(i) “sets forth a business-necessity defense employers may raise”).

The OLC Opinion would interpret “business necessity” to mean nothing more than that a challenged practice is “convenient” or “helpful.”¹³³ This interpretation would view hiring requirements such as knowledge-based tests, SAT scores, and high school graduation requirements as “presumptively job-related” regardless of the job being hired for.¹³⁴ By making virtually any hiring criteria chosen by the employer presumptively valid, OLC seeks to effectively shift the burden of proof to plaintiffs to overcome that presumption in direct contravention of Congress’s clear intent to place the burden of demonstrating job relatedness and business necessity on employers.

This proposed “correction” is also directly contrary to the holding in *Griggs*. That case specifically held the employer liable for disparate impact discrimination where it relied on general aptitude tests and a high school diploma requirement that had no relevance to the power plant jobs in question.¹³⁵

The second proposed “correction” would impose a “robust causality” requirement on plaintiffs,¹³⁶ going beyond what the statutory text requires. Title VII simply states that a complaining party must demonstrate that “a particular employment practice . . . causes a disparate impact” without imposing any heightened standard of proof or pleading burden.¹³⁷ To the contrary, because proof of causation can be difficult for applicants or employees to obtain, the statute states that an employer’s decision-making process “may be analyzed as one employment practice” when the plaintiff demonstrates that “the elements of [its] decision[-]making process are not capable of separation for analysis.”¹³⁸

The third “correction” proposed by OLC would place a burden on plaintiffs in all cases to demonstrate the availability of a less discriminatory alternative practice that is “equally effective”

133. OLC Opinion, *supra* note 1, at 2, 15.

134. OLC Opinion, *supra* note 1, at 14.

135. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

136. OLC Opinion, *supra* note 1, at 2.

137. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

138. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

in achieving the employer's goals.¹³⁹ This formulation misconstrues Title VII in two ways.

First, it suggests that proving the availability of a less discriminatory alternative is a required part of the plaintiff's burden,¹⁴⁰ when, in fact, it is an alternative route to liability¹⁴¹ that is generally pursued only *after* an employer has succeeded in demonstrating that its practice is required by business necessity.¹⁴² If the employer has not established that defense, the plaintiff bears no burden of showing the availability of a less discriminatory practice.

OLC's proposed reading also increases the burden on the plaintiff of showing a less discriminatory alternative beyond what Congress intended. As support for its "equally effective" standard, OLC cites a passage in *Wards Cove*, which heightened the burden on plaintiffs to show the availability of an alternative practice.¹⁴³ The Civil Rights Act of 1991, however, specifically

139. OLC Opinion, *supra* note 1, at 2, 17.

140. OLC Opinion, *supra* note 1, at 16.

141. Title VII states that an unlawful employment practice can be established by showing that it causes a disparate impact and the defendant cannot demonstrate business necessity, 42 U.S.C. § 2000e-2(k)(1)(A)(i), *or* by showing the existence of a less discriminatory alternative employment practice, § 2000e-2(k)(1)(A)(ii).

142. *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."); *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

143. OLC Opinion, *supra* note 1, at 17 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989)) ("And, of course, any proposed alternative must be 'equally effective' in achieving the employer's legitimate goals, including with respect to 'the cost or other burdens.'"); *see Albemarle*, 422 U.S. at 425 (requiring only that the plaintiff show "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest," without reference to equal effectiveness or cost). That portion of *Wards Cove* had relied on a portion of Justice O'Connor's opinion in *Watson v. Fort Worth Bank* that failed to garner the support of a majority of the Justices. *Wards Cove*, 490 U.S. at 661 (*quoting* *Watson v. Ft. Wor. Bank & Tr.*, 487 U.S. 977, 998 (1988) (O'Connor, J., joined by Rehnquist, C.J., White & Scalia, JJ.)); *see also* *Watson*, 487 U.S. at 1000 (Blackmun, J., concurring in part and concurring in the judgment) (declining to join Parts II-C and II-D). It was only in *Wards Cove* that four other Justices joined in the formulation

states that “with respect to the concept of ‘alternative employment practice’” the plaintiff’s burden “shall be in accordance with the law as it existed on June 4, 1989”¹⁴⁴—the day *before* the Supreme Court issued the *Wards Cove* opinion. Although Congress failed to articulate an alternative standard, by setting the law back to the day before *Wards Cove* was decided, it clearly intended at least to abrogate the inflexible “equally effective” requirement articulated in that case.¹⁴⁵ In proposing its three “corrections” to Title VII, OLC essentially attempts to rewrite the statute to match its preferred policies. As Justice Scalia cautioned when confirming that disparate impact does not require intent: “It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”¹⁴⁶

Conclusion

In signing the Civil Rights Act of 1991, which codified disparate impact doctrine, President George H.W. Bush declared that “[t]his Act promotes the goals of ridding the workplace of discrimination” and “will not lead to quotas.”¹⁴⁷ This essay has shown how the OLC Opinion dishonors the clear text and purpose of the 1991 Act, and instead engages in a sweeping and misleading attack on the constitutionality of disparate impact using spurious arguments. OLC’s opinion depends on specious claims about the operation of disparate impact doctrine, distorts judicial precedent, and disregards constitutional authority to address and remedy discrimination in the public and private sectors. Since the enactment of Title VII in 1964 and the codification of disparate

that any alternative employment must be “equally effective” taking into account numerous factors such as cost. *Wards Cove*, 490 U.S. at 661 (White, J., joined by Rehnquist, C.J., O’Connor, Scalia & Kennedy, JJ.).

144. 42 U.S.C. § 2000e-2(k)(1)(C).

145. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (stating Congress’s purpose to restore the concepts of business necessity and job-relatedness from “Supreme Court decisions prior to *Wards Cove*”).

146. *Lewis v. City of Chicago*, 560 U.S. 205, 215–16 (2010).

147. President’s Statement on Signing the Civil Rights Act of 1991, 1991 II PUB. PAPERS 1504 (Nov. 21, 1991).

impact in 1991, this country has made great progress in promoting fair and inclusive workplaces and eliminating arbitrary barriers to employment, thereby promoting workplace practices that benefit workers and employers alike. OLC's views, if left unchecked, threaten to subvert the rule of law values that the Department of Justice is meant to promote, and to undermine Title VII's vision of integrated, fair, and equitable workplaces. As Congress and prior Court decisions have long recognized, that vision is best advanced by a legal framework that encourages employers to remove arbitrary and unjustified barriers and to ensure fair opportunities for all qualified workers.