



Disparate Impact Indeed

Court's latest ruling will hurt minority students

by JOSHUA DUNN

Strangely, one day before the U.S. Supreme Court ruled that the Fourteenth Amendment's Equal Protection Clause requires states to recognize gay marriage, it refused to rule that the clause forbids racial discrimination, its original purpose. For education, that means the continuation of pernicious

policies imposed by the Office of Civil Rights (OCR), along with litigation destructive to schooling.

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Court decided that the Fair Housing Act allows for plaintiffs to bring disparate impact claims. The Fair Housing Act clearly forbids intentional discrimination in housing sales or rentals. But left undecided, until June 2015, was whether it forbids policies that are designed and implemented without discriminatory intent but have some disproportionate effect (i.e., "disparate impact") based on race or some other legally protected class. In short, "disparate impact theory" allows government agencies to prove racial discrimination without showing that anyone actually did anything with the intent to discriminate. Critics of disparate impact have long pointed out that it inherently violates the Fourteenth Amendment's guarantee of equal protection. Rectifying disparities caused by neutral policies forces the government to impose racial classifications and quotas that require intentional discrimination against other citizens.

In his 5-4 opinion for the majority, Justice Kennedy aimed for the profound and Solomonic but instead hit the bull's-eye of confusion. Ignoring the statute's clear language, he wrote that the Fair Housing Act does allow for some disparate impact claims. At the same time, he emphasized that any disparate impact remedies cannot violate the Constitution and worried that the application of disparate impact doctrine might lead to the "pervasive injection of race" into policy decisions. But that has always been the problem with disparate impact: its remedies require racial classifications and quotas, which equal protection forbids.

While the Court's decision does try to limit the indiscriminate use of disparate impact analysis, those who abuse it to reshape education policy will interpret the ruling as a green light to carry on. Over the past two years, OCR has been a one-agency wrecking crew against sound policy and good sense. Most importantly, in 2014 it issued profoundly misguided policies on school discipline. Relying on disparate impact analysis, OCR's guidelines demand racial parity in rates of punishment. But that encourages schools to tolerate disruptive and dangerous

behavior lest they have too many students of one race being punished. Perversely, the students most harmed by these guidelines will be minority students in urban districts. Minority students who want to learn will see their education hijacked by troublemakers, and the troublemakers will learn that they can misbehave, with limited consequences.

Not content with undermining school discipline, a few months later OCR used disparate impact to invade school finance, declaring that it would evaluate things like the provision of carpets and graphing calculators to investi-

gate and punish school districts and states. Its guidelines are so vague and incoherent that no school is safe from OCR's reach.

The pernicious use of disparate impact analysis has not been confined to OCR. Last June federal judge Kimba Wood struck down a New York State test for prospective teachers because African American and Latino candidates in New York City had a lower passage rate than white candidates. The exam, called the Liberal Arts and Sciences Test (LAST-2), was designed to ensure that all teachers have at least a high-school-level knowledge of the liberal arts and sciences. But in *Gulino v. The Board of Education of the City School District of the City of New York*, Judge Wood said that because the passage rate for African American and Latino candidates was between 54 and 75 percent, city and state officials had to prove that the skills measured by the test were actually related to the job.

If basic literacy is in fact necessary for a teacher to be effective in the classroom, the victims of this policy will be the students; in New York City, minority students will be its primary victims, as most students taught by minority teachers are of the same background. Thus, disparate impact doctrine, which is supposed to help minority groups, will, once again, inflict punishment on minority students, who will be forced to learn from teachers who demonstrate lower levels of literacy or who perhaps even lack basic knowledge—just one more reason the Supreme Court should have sent disparate impact to the dustbin of legal history.

The decision means the continuation of pernicious policies imposed by the Office of Civil Rights.

Joshua Dunn is associate professor of political science at the University of Colorado-Colorado Springs.