

Regulating Education: Understanding the Office for Civil Rights

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Preface

My first foray into the academic world focused on environmental law. I studied the effects of what Richard Stewart called “The Reformation of Administrative Law” on policies adopted and enforced under the Clean Air Act. Here I encountered such major administrative law issues as the requirements of notice-and-comment rulemaking under the Administrative Procedure Act (APA), the nuances and ambiguity of “scope of review,” the *Chevron* doctrine, nondiscretionary duties, the “ossification” of rulemaking, private rights of action, and much more.¹ I then turned my attention to entitlement law, specifically judicial interpretation of the Social Security Act, the Food Stamp Act, and the Education for All Handicapped Children Act. Once again, my focus was on court-agency interaction.²

More recently I have studied civil rights laws as they apply to education. In three books (one finished, one in press, and a third still in the works) I analyze what I call the “civil rights state,” that is, the complex web of statutes, rules, and practices that prohibit discrimination based on race, sex, sexual orientation, gender, disability, family status, religion, and language in the U.S.³ This is without doubt an extensive regulatory regime, but one rarely presented or studied in those terms.

Thus, without intending to do so, I found myself immersed in the field of education policy. Given my previous experience, some of the things that seemed normal to education specialists seemed strange to me. To take but one example, why is APA rulemaking so common under the

1970 Clean Air Act and so rare under Title IX of the Education Amendments of 1972 or Title VI of the Civil Rights Act? Why do we give so much attention to market failures, regulatory strategies, and cost-benefit analysis when dealing with EPA, OSHA, the FCC, and the FTC, but hardly ever think about civil rights rules as a form of regulation?

Another difference between my earlier studies of EPA and benefit-granting agencies such as the Food and Nutrition Service on the one hand and my more recent study of the Office for Civil Rights (OCR) in the Department of Education on the other is that people in the former were willing, sometimes even eager, to talk with me about their work, but officials in the latter have been almost completely inaccessible. For several years I tried repeatedly to interview officials in OCR's headquarters and regional offices. I hit a stonewall. Consequently, most of what I have to say about OCR comes from a review of primary documents and media stories. Whether this is a peculiarity of OCR or a general feature of administrative politics in an age of partisan polarization I do not know.

This paper gives me an opportunity to think about some of the peculiar features of federal regulation of education. I start, obviously, from the assumption that it is in fact a form of regulation, then inquire about the underlying purposes of this form of regulation, the peculiar features of the organizational targets of this regulation, the powers and bureaucratic capacities of the regulators, and the resulting, unusual characteristics of the regulatory process. Most of my examples will come from civil rights, especially Title IX (barring sex discrimination in federally funded programs) and Title VI of the Civil Rights Act (barring discrimination based on race or national origin in federally funded programs). I will say a bit about the Individuals with Disabilities Title I, and its latest iterations, No Child Left Behind (NCLB) and Every Student Succeeds Act (ESSA).

This paper focuses almost entirely on the Department of Education’s Office for Civil Rights, with little on other offices within that department or on civil rights offices within other departments and agencies. I encourage those familiar with these other regulatory bodies to explain to me their differences and similarities.

At the outset, I should also note that I am a political scientist by training, not a lawyer. My approach to studying regulation and bureaucracy rests on James Q. Wilson’s impressive work on those topics. That means I am particularly interested in understanding how OCR defines its “operational tasks” and “critical environmental problems.” How does it define the job its “street-level bureaucrats” must perform on a daily basis? How does this in turn shape the agency’s sense of mission and structure the options available to political executives? I do not ignore legal issues—far from it. But I try to go beyond abstract legal questions to appreciate how the competing demands placed on the agency have led it to diverge from the framework initially envisioned in the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1974, and other statutory provisions enforced by OCR.

I presented a draft of this paper at a Gray Center roundtable on “The Administration of Education.” I thank the participants in that event, Samantha Harris, Jace Lington, Jeffrey S. Lubbers, Neal McCluskey, Rebecca S. Natow, Ronald J. Pestritto, Aaron Saiger, Tevi Troy, and Adam White, as well as Kenneth Marcus, for their many helpful comments.

The Policy Context

Regulatory Purposes

We usually think of regulation as a response to market failures. Some of these market failures are relatively clear cut—externalities, imperfect information, monopoly power—even if

the best way to address them is not. Others incite more controversial and draw more scowls from economists, especially “excessive competition” and “unequal bargaining power.” As Stephen Breyer’s useful book on the topic shows, economists have given a great deal of thought to the nature of these problems and better (and worse) strategies for addressing them.⁴ Huge disagreements obviously persist on these matters. One can find economists on the right, on the left, and in many places in between. But economists, often aided by law professors, have provided a useful method for thinking about the central issues and a shared language for talking about them.

It is harder to think about the federal government’s role in education as a response to market failure. One could say that the central problem is monopoly power, that is, the combination of government’s domination of the educational-industrial complex and the paucity of choice within it. But that is seldom how policymakers have understood the issue.

Although economists—the most successful and prestigious of social scientists— have helped us think about education policy, here they do not dominate the field. They most compete with sociologists and education school professors, who often speak a different academic dialect and, to be frank, are less rigorous in their analysis. Perhaps most importantly, these fields are not as ideologically diverse as economics: with a few notable exceptions, they lean very heavily to the left. Often policymaking has become an echo chamber, albeit one in which anti-progressive barbarians appointed by Republican presidents have occasionally tried to storm the gates.

The federal government’s role is largely regulatory. With only minor exceptions, it does not run any schools. Rather, it provides a small amount of money (less than 10% of spending on elementary and secondary education) but imposes many mandates and constraints. Some of these are strings attached to particular funding streams; others are “cross-cutting mandates” that apply

to all schools receiving federal funds; a few are constitutional (desegregation) or quasi-constitutional (IDEA) requirements.

Since the 1960s when the federal government substantially enlarged its involvement in education, it has pursued two goals: 1) providing “equal educational opportunity” to previously underserved students, and (2) improving the quality of education provided to all students. The first was the focus of the “equity regime” of 1965-2000. Both the first and the second have been the focus of the “standards and accountability regime” exemplified by NCLB.

How can we turn such general objectives into readily measurable operational goals? How can we evaluate the effectiveness of this regulation? To put the central problem more directly, how can we measure equality of opportunity or educational quality? Not easily, to say the least. We can measure expenditures, but we know that more money does not necessarily mean better results. We can compile test results, but over the past 20 years we have become all too familiar with the danger of placing too much weight on the results of particular tests.⁵ That basic problem lies at the heart of most controversies over federal regulation of education.

The Target Organizations

Most economic, health, safety, and environmental regulation targets private, for-profit business firms. The vast majority of schools are public, with most of the remainder being non-profit. We know that public institutions are often more resistant to regulatory change than private ones: the difficulty of getting the TVA to abide by emission limitations is a leading (if old) example. In organizations without a clear bottom line, professional norms and a shared sense of organizational mission loom particularly large. Moreover, those at the top often lack control over incentives that can help them change the behavior of those at the bottom.

Especially in public schools, it is often difficult to know who speaks for the organization. For example, in desegregation cases the named defendant was usually the elected school board. But it tended to be superintendents and other appointed officials who negotiated desegregation orders. Sometimes outgoing school boards and superintendents would sign agreements with federal officials in order to obligate their successors to follow their preferred policies. In these “polycentric” public law cases, it is not clear who spoke for the “school district.” Different parts of the complex organization we call “school districts” and “universities” have different interests and commitments.

Another key feature of educational institutions is that they are “coping organizations” to use James Q. Wilson’s terminology.⁶ It is hard to measure the output of the key “operators,” that is, teachers. We can try to do so using test scores, but we know that these scores don’t measure everything that is important, and that teachers are only partially responsible for how well their students perform. Moreover, in the typical American “egg crate” classroom, supervisors rarely observe what teachers are doing with their students. As Wilson explains, “coping organizations” are particularly hard to control from the top. This is why, as Rick Hess has shown, many reforms announced with great fanfare from the top are ignored or circumvented by those who actually do the work of the organization.⁷ This applies just as much—and probably more—to commands issued by outside regulators.

A central feature of public education in the US is its decentralization. Elementary and secondary schools are run by local school districts. Over the course of the 20th century, states increased their control over the locals by increasing their fiscal contribution and multiplying their rules on curricular and employment issues. Starting in 1965 federal spending and regulation

increased. But the federal contribution remains less than 10%, and the federal government continues to insist that it cannot influence curricular matters.

Not only does the political norm of local control remain strong, but since the 1990s the Supreme Court has applied a “clear statement” rule to mandates imposed by the federal government on state and local governments. To impose such mandates, Congress must make a “clear statement” regarding its intent. In 1991 the Court explained,

In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has, in fact, faced and intended to bring into issue, the critical matters involved in the judicial decision. . . . Indeed, inasmuch as this Court . . . has left primarily to the political process the protection of the States against intrusive exercises of Congress’s Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.⁸

In two important Title IX cases on sexual harassment, the Court adopted a much narrower reading of the statute than OCR or the Solicitor General, arguing that state and local officials had not been given adequate notice of those expansive administrative expectations when they accepted federal funds.⁹ Although application of the “clear statement” rule remains spotty, it highlights the political and legal barriers to federal regulation of public schools.

Private colleges and universities do not benefit from court doctrines on federalism, yet they often receive special solicitude from judges concerned about protecting academic freedom. In general, therefore, judges are less likely to defer to the mandates regulators impose on educational institutions (whether public or private) than those imposed on private businesses.

The features of education described above make regulation of educational institutions particularly difficult. But it is also the case that federal regulators can find allies within these

institutions. All “educators” (an annoying term that puts real teachers and school bureaucrats who do no teaching into the same box) claim to support both equal educational opportunity and educational quality, and many have a deep commitment to these objectives. The key to regulators’ success therefore depends on the extent to which they can make common cause with elements within educational institutions, augmenting their resources and increasing their autonomy.

One example of regulators’ success in developing allies within educational institutions is the huge expansion of special education staff that came in the wake of the 1975 Education for All Handicapped Children Act. Although special education personnel are often frustrated by the endless paperwork generated by federal law, they also understand that their authority, their jobs, and the quality of care they provide to students with disabilities are based on the rights created by civil rights statutes. Another example is the rapid growth of Title IX offices within universities after 2011. OCR made a concerted effort to develop large, autonomous units within colleges and universities, and to develop close ties between Title IX personnel and their OCR overseers. The result is the “sex bureaucracy” so colorfully described by and Jacob Gerson and Jeannie Suk in their 2016 article with that title.¹⁰

The Department of Education’s Office for Civil Rights

Consider this contrast: The Environmental Protection Agency employs about 15,000 staff members. The entire Department of Education employs fewer than 4,500. The primary regulatory office in that department, the Office for Civil Rights, employs about 550. Now consider the context: OCR is responsible for ensuring that the 18,000 local educational institutions and 6,000 post-secondary schools that serve nearly 80 million students comply with an extensive web of rules related to discrimination based on race, sex, disability, religion, age, and language. In recent

years that staff has been expected to investigate and resolve 9,000-10,000 complaints annually. In early January, 2023, OCR announced that during the previous fiscal year it had received nearly 19,000 complaints.¹¹ These complaints target not just school policy, but the individual actions of the millions of teachers, students, and administrators within them. Finding a way to make this overwhelming job manageable has preoccupied the small agency for decades.

A remarkable feature of OCR is the divergence between the regulatory process announced in its authorizing statutes and its actual operating practices. Those underlying statutes—Title VI of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments, §504 of the Rehabilitation Act, the Age Discrimination Act, and the IDEA—give federal regulators two powers. The first is rulemaking. Title VI, the model for all the rest, authorizes agencies to issue “rules, regulations, and orders of general applicability” to carry out the purposes of the statute. It added the unusual provision that “No such rule, regulation, or order shall become effective unless and until approved by the President.”

The second is enforcement. Here, too, the statutes follow the pattern set in Title VI, which provides that compliance with the statute and rules issued under it “may be effected (1) by the termination of or refusal to grant or to continue [financial] assistance . . . or (2) by any other means authorized by law.” The latter usually means referring the case to the Department of Justice for prosecution. These laws also specify the procedures agencies must follow before terminating funding. In both rulemaking and enforcement, the powers granted to federal administrators were accompanied by substantial procedural guardrails.

OCR has almost never issued “rules, regulations, and orders of general applicability,” and it has almost never used the funding cut-off. For decades APA rulemaking was a rarity, with OCR relying instead on “guidance documents,” “technical assistance,” “interpretive” memos, and “Dear

Colleague” letters. Termination of federal funding has been even rarer. Instead, enforcement has relied on litigation through private rights of action (“implied” by courts because they were not mentioned in the statutes) and lengthy, intrusive investigation.

While largely ignoring these provisions of the law, OCR has devoted most of its resources to a task not mentioned in its statutes: investigating and resolving complaints filed by students, parents, school employees, and advocacy groups. Prompt response to these complaints has been the agency’s principal bureaucratic objective. This was the consequence of *Adams v. Richardson*,¹² a long-running case that continues to shape OCR’s task structure decades after its dismissal.

Rulemaking: The Dog that Seldom Barks

Most civil rights laws that apply to education are extremely vague. What constitutes discrimination on the basis of race, sex, national origin, or disability? What constitutes an “appropriate education”? We know that in the process of interpreting such open-ended statutes administrators make policy, often on highly contentious issues. The APA established rulemaking procedures to ensure that this policymaking process will be open to the public, that policymakers will be forced to evaluate crucial evidence and provide reasons for their decisions, that the resulting rules are known to all, and that courts will have an adequate record for reviewing them. As the scope of federal regulation increased in the 1960s and 1970s, federal courts added more and more elements to the APA’s bare-bones procedures. As Richard Stewart explained in his famous 1975 article, “The Reformation of American Administrative Law,”

Faced with the seemingly intractable problem of agency discretion, the courts have changed the focus of judicial review (in the process expanding and transforming traditional

procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusion on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.¹³

The most notable feature of APA rulemaking by the Department of Education on civil rights issues is its nearly complete absence. The first and most important guidelines OCR ever issued on school desegregation were published not in the Federal Register, but in the Saturday Review of Literature. (I am not making this up.) Between the first set of Title IX rules produced by the Ford administration and the 2020 rules promulgated under Trump, no major Title IX issues went through the APA rulemaking process.

Reasons for avoiding rulemaking abound, and they are hardly limited to OCR.¹⁴ Rulemaking takes a very long time. It subjects the agency to criticism not just from public commenters, but from OMB, the White House, other units within the department, other departments, and Congress. The rule is then subject to judicial review, with reviewing courts often taking a “hard look” at the agency’s rationale and supporting documentation.

In 1979-80 the fledgling Department of Education was forced by a federal judge to use APA rulemaking to establish its policy on schools’ treatment of English learners. Its proposal was subject to so many conflicting pressures and so much criticism that the Department eventually gave up. That experience reinforced OCR’s distaste for APA rulemaking. Since then, it has relied entirely on memos and “Dear Colleague” letters to give directives to state and local education authorities.

In fact, on many issues, OCR has avoided issuing any statements of general policy at all, preferring to resolve the thousands of complaints it receives each year in an ad hoc, under-the-radar fashion. For many years the most common complaints lodged against OCR was that it failed

to give educational institutions a clear idea of what they must do to comply with federal mandates. The General Accounting Office offered this criticism in 1977.¹⁵ A few years later Jeremy Rabkin described OCR's leadership as "almost pathologically cautious about clarifying particular requirements."¹⁶ In the final year of the Reagan administration a House staff report faulted OCR for the "dearth of written substantive enforcement policy."¹⁷ This did not change during the Clinton administration. After conducting a comprehensive review of OCR's records in 1996, the U.S. Commission on Civil Rights concluded that its "restrained approach to issuing policy" failed to provide "definite policy guidance for school districts detailing the various program requirements they must address in ensuring equal educational opportunity for all students."¹⁸ Three years later, another report of the Commission on Civil Rights found that although "OCR has placed a high priority on issues related to ability grouping practices," it "has not issued a single, coherent, and cohesive policy guidance document or investigative manual" on the topic.¹⁹ A 2004 report by the Commission repeated this complaint, noting that OCR had announced that "girls' access to advanced mathematics and science education" should be a "high priority," but still had "not finalized the draft investigative manual" on the subject.²⁰

As Table 1 indicates, this reluctance to provide policy guidance began to change under the administration of George W. Bush. Most of the Bush administration's policy statements, though, were relatively small bore. A couple were part of an ultimately unsuccessful effort to relax Title IX rules on college athletics.²¹

The big change came with the Obama administration, which issued an unusually large number of "Dear Colleague" Letters (DCLs)—thirty-four in all, more than all previous administrations combined. Many of these letters spelled out in great detail how OCR interprets Title IX and Title VI. The Obama OCR also made public many of the agreements it had signed

with public schools (especially on athletics and English-language learners) and with colleges (especially on sexual harassment), describing some of them as models that other schools should follow. A good example was the 31-page agreement OCR and DOJ negotiated with the University of Montana in 2013. OCR and DOJ initially claimed that it would “serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.”²² OCR demonstrated the flexibility of this approach to policymaking when it later backed away from this “blueprint” claim, stating that the agreement “represents the resolution of that particular case and not OCR or DOJ policy.”

Table 1: Number of policy guidance documents issued by OCR, by category

| President | Title VI, race | Title IX | Disability | Language | Multiple | Other | Total |
|----------------|----------------|----------|------------|----------|----------|-------|-------|
| Nixon/Ford | 0 | 1 | 0 | 1 | 0 | 0 | 2 |
| Carter | 0 | 1 | 2 | 0 | 1 | 0 | 4 |
| Reagan | 0 | 0 | 1 | 0 | 1 | 0 | 2 |
| G. H. W. Bush | 0 | 0 | 1 | 2 | 0 | 0 | 3 |
| Clinton | 3 | 3 | 1 | 0 | 1 | 0 | 8 |
| G. W. Bush | 6 | 7 | 3 | 0 | 1 | 3 | 20 |
| Obama | 10 | 8 | 15 | 1 | 5 | 0 | 39 |
| Trump | # | 1, # | 0 | 0 | 0 | 5 | 6 |
| Biden (1 year) | 0 | 3 | 1 | 0 | 0 | 1 | 4 |

#Between 2017 and 2020, OCR withdrew multiple guidance documents under Titles VI and XI.

Source: These figures are based on material available on the Office for Civil Rights’ “Policy Guidance Portal,” (www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/index.html?perPage=100), accessed May 20, 2022, and supplemented by the author’s knowledge of a few additional policy documents. Given the variety of forms such policy statements take, deciding what to include required a few judgment calls

The Trump administration responded to the Obama administration’s flurry of guidance documents in two ways. One was simply to withdraw the documents, which it did with two key letters on sexual harassment; the 2016 DCLs on transgender students and the status of Title IX offices; the 2014 DCL on school discipline; and several guidance documents on use of race in college admissions and school assignments.

The other, more consequential action was to use APA rulemaking to establish rules on how schools must handle the sexual harassment issue. This experience demonstrated both the risks and the advantages of using notice-and-comment rulemaking. The process was long and resource-intensive. The Department withdrew the Obama administration's guidelines in 2017, issued its proposal in 2018, and published its final regulations in 2020. It received nearly 125,000 comments on its proposal and issued a 2,000-page explanation of how it arrived at its final position. The rule was immediately challenged in four federal courts, but survived with only minor adjustments.

Despite statements from the Biden White House on the importance of reversing these policies, and despite vehement denunciations of the 2020 rules by past and future Assistant Secretary for Civil Rights Catherine Lhamon, the Biden administration was relatively slow to take counter-measures. One strategy was to forego general statements and, in effect, reinstate its previous policy through its investigation of and negotiations with individual school districts. This seems to have been its approach on the controversial issue of racial discrimination in school discipline.²³

Since the Supreme Court has held that agencies can rescind or amend rules established through APA rulemaking only by going through another round of rulemaking, the Department had no choice but to commence rulemaking on the sexual harassment issue. It did not issue its proposal until June, 2022. That package combined detailed instructions on sexual harassment with rules on how schools must treat pregnant and transgender students. The proposed rules were accompanied by a 700-page explanation. On the hottest of hot-button issues—which sports teams transgender athletes can join--the Department punted, putting the issue off until after the midterm elections. (By January of 2023, there was still no proposed regulation on sports.) What the final rule will look like and whether it will survive judicial review remain anybody's guess. An even bigger

question is whether the 2020 regulation and the 2022 proposal represent the beginning of greater use of APA rulemaking or cautionary tales about the difficulty of going through this lengthy process.

Are Guidelines, Interpretations, and DCLs “Legally Binding”?

The barrage of controversial DCLs issued during the Obama administration raised questions about their legal status. Are they legally binding even if they did not go through notice-and-comment rulemaking and bear the signature of the president? Or are they just advice on what the Department considers “best practices”? Will OCR initiate enforcement proceedings against schools that fail to comply?

Senator Lamar Alexander, the former Secretary of Education, raised this issue with the Assistant Secretary of Education Catherine Lhamon in a 2014 hearing. The result was an illuminating exchange:

Senator Alexander. Ms. Lhamon, you talk about something called “Guidance” and I have here about 66 pages of guidance [on sexual harassment] under title IX. Do you expect institutions to comply with your title IX guidance documents?

Ms. Lhamon. We do.

Senator Alexander. You do. What authority do you have to do that? Why do you not then go through the same process of public comment and rule and regulation that the same department over there is going through under the Cleary Act?

Ms. Lhamon. We would if there were regulatory changes.

Senator Alexander: Why were they not regulatory changes? You require 6000 institutions to comply with this, correct?

Ms. Lhamon. We do.

Senator Alexander: Who is responsible for this? You?

Ms. Lhamon. I am, yes. But those are not just my opinion. That is actually what the law is, and its guidance about the way we enforce.

Senator Alexander. All right. Then why do you say this is what the law is?

Ms. Lhamon. Because it's an explanation of what title IX means.

Senator Alexander. Who gave you the authority to do that?

Ms. Lhamon. With gratitude, you did when I was confirmed.

Needless to say, Senator Alexander was not convinced.

In a subsequent letter to Senator Lankford, Lhamon managed simultaneously to back away from and to repeat the claim that OCR considers its guidance documents legally binding. On the one hand,

The Department does not view such guidance to have the force and effect of law. Instead, OCR's guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces.

On the other hand,

OCR issues guidance documents—including interpretive rules, general statements of policy, and rule of agency organization, procedure and practice—in order to further assist schools in understanding what policies and practices will lead OCR to initiate proceedings to terminate Federal financial assistance.

The clear implication of this is that failure to follow guidance documents “will lead OCR to initiate proceedings to terminate” federal funds—certainly a draconian punishment.

This approach has several advantages for OCR when it is in its manic phase. It limits the opportunities for judicial review, since its statements allegedly just offer educational advice. At the same time, OCR threatens schools with the enforcement sanctions described below. And it provides the agency with flexibility when investigating complaints and negotiating with school districts. It can move back and forth between helpful advisor and stern taskmaster.

To be sure, the issue of whether guidance documents, “interpretations,” and other forms of administrative interpretation should be considered “legally binding” is a contentious one in legal and administrative circles.²⁴ Not only is some degree of interpretation of administrative rules and statutory provisions inevitable in virtually every enforcement action, but organizations subject to regulation often crave guidance on what is allowable and what is not. But Lhamon’s expansive claims are unconvincing because the authority she asserts for herself and OCR is so far-reaching and the statutory texts upon which she bases this authority so brief and open-ended. Title IX, for example, simply states

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

When Congress enacted this language in 1972, the terms “sexual harassment” and “transgender” had yet to enter the political lexicon. (In fact, it did not even occur to the principal sponsors of the bill that it would have a major effect on college sports.). To spin this language into lengthy and detailed rules on these and many more subjects involves far more than a matter of interpretation. It is a major policymaking undertaking of exactly the sort for which APA rulemaking was created.

If these detailed and controversial directives do not qualify for rulemaking, it is hard to see what would.

Enforcement: Private Rights of Action

What does “legally enforceable” mean in this context? OCR does not have authority to fine or imprison school officials or to impose administrative penalties on educational institutions. Its authority is limited to terminating federal funding to educational institutions that violate federal mandates, and to asking the Department of Justice to file suit against them. Although OCR routinely threatens to terminate federal funds to those who fail to follow its commands, it never does. With only one tiny exception it has never terminated funding to enforce Title IX. It has not used the funding cut-off to enforce Title VI since it took that action against a small number of especially recalcitrant southern school districts during the height of the desegregation effort in the late 1960s.

There are several reasons for this. One is that the laws establish such elaborate procedures for terminating funds: agencies must first give the funding recipient an opportunity to come into compliance voluntarily; termination can proceed only after the agency has made an “express finding on the record after opportunity for hearing”; the funding cutoff shall not take effect until thirty days after the agency has made a full report to the committees in Congress with jurisdiction over the program in question; and any person, organization, or political subdivision adversely affected by the termination shall have the opportunity to challenge it in federal court. Not only can targeted institutions drag things out for months or years, but they can put political pressure on OCR to relent.

Although Title VI, Title IX, and section 504 were originally viewed as speedy alternatives to litigation, the opposite has proved to be the case. Judge John Sirica (of Watergate fame) explained in 1978,

the fund termination procedure involves a tedious series of notice, hearing and review steps at the various levels within HEW's hierarchy followed by separate review in the courts. By contrast, the litigation technique bypasses the most cumbersome of the administrative steps and allows the Justice Department to initiate appropriate legal action promptly upon the referral of case from HEW. This streamlined enforcement approach promises as great if not greater promptness in limiting aid to deserving recipients than does the alternate fund termination process.²⁵

While it might be an exaggeration to describe such litigation as "streamlined," it can proceed more quickly than termination of funding.

Second, termination often leaves the complainant and the people OCR are trying to help worse off. Less federal money usually means less support for minority and female students, English learners, and students with disabilities. The United States Commission on Civil Rights identified the central dilemma: "Although funding termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Funding termination may eliminate the benefits sought by the victim."²⁶

Third, the funding cutoff threatens to damage relations between the federal agency and those state and local officials with whom they worked on a regular basis—not to mention antagonizing members of Congress upon whom administrators rely for appropriations.²⁷ In short, the cut-off offers only a blunderbuss when OCR needs a scalpel. Or, as former HEW Secretary

Joseph Califano once put it, terminating funds to enforce nondiscrimination laws is like “opting for decapitation instead of plastic surgery to eliminate facial disfiguration.”²⁸

This is not to say that the threat of termination is not frequently bandied about, both by OCR officials and by compliance offices within educational institutions. Experienced administrators within these regulated institutions will know that these are empty threats. But they also realize that others are unlikely to understand that. As a result, academic administrators can use the threat to impel others within their institutions to comply with their directives. (Most faculty members have been the target of this strategy. For example, I was once told that if I did not get my book orders into the book store six months before the start of the new semester Boston College would lose its federal funding. I didn’t, and BC didn’t.)

The weakness of administrative enforcement mechanisms was on full display once the deadlines for meeting No Child Left Behind’s ambitious and largely unmet objectives had passed. What sanctions did the Department impose? It did not terminate funding under the law. Rather, it offered bribes to schools willing to comply with the Obama administration’s priorities. It also issued waivers—essentially “get out of the federal doghouse free” cards—to those that complied with standards the Obama administration would have liked to embed in the statute if it had had sufficient congressional support. All administrations make regular use of waivers to encourage partial compliance with unrealistic or politically unappealing statutory requirements. But the federal government’s lack of credible sanctions reduces the value of these waivers and its ability to command compliance with subsequent agreements.

Under NCLB, the Department of Education lacked a key enforcement tool: the private right of action, that is, the right of private citizens to sue state and local education officials for failing to comply with federal laws, regulations, and (sometimes) guidelines. For decades private rights of

action have been the most important mechanism for enforcing civil rights mandates. None of these nondiscrimination laws explicitly provided for private enforcement suits when they were initially enacted. But federal courts discovered an “implied private right of action” in each. (The IDEA, in contrast, *does* explicitly authorize suits by students and their parents.) NCLB did not include an explicit private right of action, and in the years since its enactment the Supreme Court has been reluctant to recognize implied private rights of action, especially when the targets are state and local governments.²⁹

From an enforcement perspective, suits brought by private parties have at least two distinct advantages. First, courts can impose injunctions that tell schools exactly what they must do. “Specific performance” is the operative term. Individual officials who fail to comply open themselves to the possibility of fines, and even imprisonment—an unlikely threat, but one that tends to focus the mind of those under court order. Often these injunctions remain in place for years or even decades, with many modifications along the way. As Ross Sandler and David Schoenbrod show in their detailed case study of special education in New York City, these injunctions can create a powerful “controlling group” that dominates educational policymaking for years.³⁰

Second, courts can award monetary damages to those who bring private suits. This provides a strong incentive for private parties (and their lawyers) to devote their resources to the investigation and enforcement process. It also creates strong incentives for schools to avoid actions that can result in huge settlements.

The civil rights lawyers who spent years prosecuting the pivotal *Adams v. Richardson* case believed that close judicial supervision of OCR would force the agency to use the funding cut-off, and that this in turn would substantially increase its (and their) bargaining power with school

officials. Nearly two decades later, *Adams* had failed to have this effect. Instead, for reasons explained below, it focused OCR's attention on processing complaints. In the decision that spelled the end of the *Adams* litigation, D.C. Circuit Judge Ruth Bader Ginsburg pointed to the private right of action as a superior enforcement tool. The Supreme Court's decision to recognize "implied private rights of action" in Title VI and its clones, she argued, "suggests that Congress considered private suits to end discrimination not merely adequate but in fact the proper means for individuals to enforce title VI and its sister antidiscrimination statutes."³¹ After 1990, her approach prevailed: private rights of action replaced the threat of termination of federal funds as the primary enforcement tool for Title VI, Title IX, and §504. Federal courts refused to supervise OCR's macro-level enforcement efforts, preferring to focus on particular instances of alleged misconduct by educational institutions. This was most readily apparent in the proliferation of cases on intercollegiate sports and sexual harassment under Title IX.

The result was a productive division of labor between federal courts and civil rights agencies: agencies would provide specific guidelines and monitoring capability; courts would provide the enforcement muscle along with the aura of legal authority. In *Alexander v. Sandoval* (2001) Justice John Paul Stevens offered this ode to the "integrated remedial scheme" that had slowly developed over the preceding decades:

This legislative design reflects a reasonable -- indeed inspired -- model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination the statute does not establish a static approach but instead empowers the relevant agencies to evaluate

social circumstances to determine whether there is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.³²

Under this “inspired model,” civil rights agencies would investigate complaints, slowly develop general policies, occasionally institute broader compliance reviews, and rely on private suits rather than funding cut-offs to impose sanctions on institutions that failed to comply.

This potent division of labor first appeared in the years following enactment of Title VI. In 1965 and 1966 the Department of Health, Education, and Welfare announced desegregation guidelines setting numerical targets for the number of black students that must be assigned to formerly white schools in order for school districts to qualify for funding under the Elementary and Secondary Education Act. (True to form, these seminal guidelines never went through APA rulemaking; the 1965 guidelines were published in the *Saturday Review of Literature* rather than the *Federal Register*.) These guidelines were embraced by the Fifth Circuit Court of Appeals, which at that time had jurisdiction over much of the South. The result was what Gary Orfield has called “the reconstruction of southern education” and Steven Halpern has described as “the synergistic power of the bench and bureaucracy’s working together.”³³ Soon the same division of labor reappeared in the expansion of federal bilingual education mandates associated with the Supreme Court’s 1975 decision in *Lau v. Nichols*.³⁴ A similar pattern—which I have described as institutional “leapfrogging”—led to the expansion and enforcement of federal mandates on women’s collegiate sports.³⁵

During the heated battle over southern school desegregation, U.S. Commissioner of Education Francis Keppel noted that this institutional alliance required courts and agencies to remain “on parallel tracks running at about the same speed.”³⁶ In the instances described above,

they did. But in recent decades, their tracks have often diverged. The Supreme Court has grown increasingly skeptical of “disparate impact analysis” under the Equal Protection clause and civil rights statutes, and has made it more difficult for educational institutions to institute affirmative action programs or to use racial criteria for assigning students to particular schools. In 1998 and 1999, the Court adopted an interpretation of Title IX significantly narrower than OCR’s guidelines on sexual harassment.

What was most surprising about the *Sandoval* opinion quoted above was that Justice Stevens and his liberal allies *lost*. Justice Scalia’s majority opinion refused to acknowledge a private right of action to enforce disparate impact guidelines issued by the Department of Justice. This was a direct repudiation of the position the Court had adopted decades before in *Lau v. Nichols*. No longer on “parallel tracks,” the Supreme Court and OCR now often find themselves on a collision course.

During the Clinton and Obama years OCR did not defer to the Supreme Court’s narrower interpretations of civil rights statutes. On the sexual harassment issue, it claimed authority to enforce administratively rules more stringent than those the courts would enforce through private rights of action.³⁷ It endorsed an aggressive form of disparate impact analysis in its Dear Colleague Letters on school resources and school discipline.³⁸ It issued a number of DCLs explaining how colleges could continue using affirmative action in admissions within the parameters of the Court’s several decisions on that topic, and how they could continue to promote racial integration of public schools within the parameters of the Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle*.³⁹ Almost all of these DCLs were withdrawn by the Trump administration; some are being revived by the Biden administration.

It is one thing for OCR to announced guidelines that diverge from court rulings. It is quite another to enforce them. Given the extent to which OCR has relied on judicial enforcement through private rights of action, what can it do when this option is no longer available? It might threaten to terminate federal funds, but everyone knows it will never exercise that “nuclear option.” The more OCR’s interpretations of civil rights statutes diverged from that of the courts, the greater became it needed to come up with an alternative enforcement strategy.

Enforcement: Investigations

During the Obama administration, it did. Part I of the new enforcement strategy was launching expensive, institution-wide, reputation-damaging investigations against individual schools that would last for months, even years. This tactic was first used to force universities to comply with its guidelines on sexual misconduct. Previously OCR would only announce an investigation publicly after it had reached an agreement with the institution. It made an exception for sexual harassment investigations. Here it would use publicity to pressure colleges to settle. Most schools subject to these investigations fell into line. OCR soon applied this strategy to its controversial guidelines on racial discrimination in school discipline. Call it the “process is the punishment” strategy.

Part II of the new strategy was using settlement agreements to build strong compliance organizations within schools and to forge close, continuing relations with OCR. Building large, autonomous Title IX offices within universities subject to regular OCR oversight was a key part of the sexual harassment agreements signed during the Obama years. In 2016 OCR devoted a separate DCL to the topic. I have elsewhere described these twin elements as the “investigate and colonize” strategy.⁴⁰

In announcing Part I of this strategy in 2015, Assistant Secretary Lhamon explained that OCR would view every sexual harassment complaint as “an opportunity for a broader assessment of a school’s overall compliance.” She conceded that it could take years to complete such investigations: “A review is onerous. I don’t love how much time it takes for my staff, and I don’t love how much time it takes for schools. But I do love ensuring safety for all students on campus.”⁴¹

Lengthy and onerous they certainly were. Over the next two years OCR opened 410 investigations, but resolved only 65. The average duration of completed investigations grew from about one year in 2010-12 to nearly five years by the time Lhamon left office. An October, 2015 article in the *Chronicle of Higher Education* reported, “The latest settlements show that the federal inquiries into how colleges handle sexual assault are growing longer, tougher, and more demanding.”⁴²

A 2014 internal enforcement document on the school discipline issue offered a candid description of OCR’s enforcement strategy during the Obama years.⁴³ It explained that even in “complaints alleging *only* individual discrimination in discipline, OCR will investigate both the individual allegation *and* will open a class-based investigation” of the school or the entire school district. This “class-based” investigation must continue, “regardless of whether the relief provided” by the district “fully addresses the individual complaint.” The investigation must include “an examination and analysis of *all* components of the disciplinary process; the investigations are broad-based and systemic.” They must cover not just “disciplinary actions of a substantial nature,” but “other types of minor disciplinary responses.” OCR will interview teachers, students, administrators, and law enforcement personnel. Schools must provide three years of data on fifteen different items. The resolution letters closing the investigations must contain include 14

separate items, including data collection on 22 pieces of information that must be reported on each disciplinary action taken by the school district subsequent to signing the agreement. This agreement must be followed by “ongoing interactions with the recipient.” “It is essential for OCR to be proactive in establishing and maintaining a productive working relationship with the recipient . . . it requires on-going communications not only with administrators, but also with teachers, other staff, students and parents/guardians in order to determine whether the remedies are effective in addressing discrimination.” This supervision will continue indefinitely: “OCR will review any changes that a district proposes”; “if OCR is not satisfied with them, we will require further correction.” Although the Trump administration withdrew the document, the Biden administration appears to be following the same playbook.⁴⁴

A 2018 study by School Superintendents’ Association indicated that this strategy succeeded in putting enormous pressure on school districts, but at the same time generated resentment and opposition among teachers—the group most directly responsible for carrying out the written agreement. In interviews designed to illuminate the nature of the pressure generated by OCR’s investigations, the Association’s staff heard the following statements “expressed multiple times”: “Investigations into individual complaints quickly morphed into district-wide investigations that required school personnel to compile information on discipline infractions and policies in every grade and school”; gathering the data demanded by OCR “was commonly described as unprecedented, intimidating and costly”; even in schools found to be in compliance with Title VI, “teachers and principals discussed feeling undermined and scared by the process. . . . There was a noticeable decline in staff morale after these investigations concluded that did not fade once the district was found to be legally compliant.” School officials interviewed by the

Association’s staff “described the scope of the investigatory process as overwhelming and intimidating for school personnel.”⁴⁵

The principal drawback of this enforcement strategy is that it is extremely resource intensive for the agency as well as for the targeted institution. During her tenure, Assistant Secretary Lhamon repeatedly told Congress that these investigations are so demanding that the agency needed a substantial increase in its budget and staffing. That increase was not forthcoming. For several decades now, the number of complaints received by OCR has risen, but the number of staff members has declined.

The Core Task: Resolving Complaints

None of the statutes under which OCR operates requires it to investigate and resolve complaints filed by students, parents, school employees, or advocacy organizations. Yet since the mid-1970s, this has been its predominant bureaucratic task. How many of these complaints it resolves within the year has become the chief measure of its effectiveness. In the late 1970s OCR devoted about 80% of its resources to processing complaints.⁴⁶ By 1993, the agency reported, “nearly 90 percent of OCR resources” were still being spend “in a complaint mode.”⁴⁷ In its FY 2018 budget request, it blandly stated “OCR’s performance measures are based on the percentage of complaints resolved within 180 days and the percentage of complaints pending after 180 days.”

This focus on prompt resolution of individual complaints originated in the appendix of a 1975 supplemental order issued by Judge John Pratt in *Adams v. Richardson*. At its inception *Adams* was an effort by civil rights groups to force the Nixon Administration to use Title VI to speed up school desegregation, especially in the South. Over the next two decades federal judges in the District of Columbia used the litigation to supervise and reshape the way OCR handled Title

IX and §504, and as well as Title VI. Judge Ginsburg complained that the *Adams* litigation had “grown ever larger in the two decades since its initiation,” turning the district court judge into an “overseer or pacer of procedures government agencies use to enforce civil rights prescriptions.” “Over the past two decades,” she wrote, “the once contained action expanded to colossal proportions.”⁴⁸

Several years into the case, Judge Pratt concluded that “HEW has often delayed too long in ascertaining whether a complaint or other information of racial discrimination constitutes a violation of Title VI.” He took the fateful step of requiring the agency to investigate all complaints submitted to it. Accordingly, Judge Pratt established a “90–90–30” rule: the agency had ninety days from the receipt of a complaint to determine whether a district had complied with Title VI; if it found a violation, it had an additional ninety days to seek compliance through negotiations; and if voluntary compliance was not forthcoming, it had thirty days to initiate formal enforcement proceedings.

Leaders of OCR—both Republican and Democratic—initially objected to this emphasis on resolving complaints. Soon after Judge Pratt established his Part F deadlines, HEW warned that “investigations, negotiations, and enforcement action concerning isolated incidents of discrimination by a grantee can consume as much staff time as monitoring the operation of, for example, some entire school systems.” Moreover, “complaints received by the Department” often are not “broadly representative of the spectrum of the Department’s civil rights enforcement program.” Rather than follow a “reactive” approach “geared toward securing individual relief for persons claiming discrimination,” HEW insisted that it should be allowed to develop “a methodical approach geared toward identifying and eliminating systemic discrimination.”⁴⁹

Democratic appointees repeated this argument. David Tatel, appointed head of OCR by President Carter, told Judge Pratt that OCR could not “plan systematically if we must respond to each group’s attempts to compel OCR to commit the bulk of its resources to enforcement of a particular law, or to enforcement in a particular set of institutions in a particular manner.” If the agency’s limited resources “continue to be allocated and consumed by the duty to comply with individual and uncoordinated court orders,” he warned, the new administration would be unable “to develop a balanced enforcement program.”⁵⁰ When the Clinton administration took power after twelve years of Republican rule, the newly installed leaders of OCR charged that they had “inherited a reactive approach to civil rights enforcement” that had failed “to protect students from egregious cases of discrimination.” “Because the vast majority of the agency’s resources were spent reacting to complaints that arrived in the morning mail,” the agency charged, “glaring instances of long-standing discrimination went unredressed.”⁵¹

During the Carter years, OCR managed to use the court order to increase substantially its staff and appropriations. That surge proved temporary. Although the Reagan administration sought to have the *Adams* case dismissed, it was quite happy with the resulting focus on complaints. Investigating complaints puts a premium on addressing individual cases rather than launching institution-wide compliance reviews, and on closing cases quickly. This approach encouraged the agency to focus on “disparate treatment” of individuals rather than “disparate impact” on racial groups. “Disparate impact” analysis requires examining a school district as a whole, rather than the treatment of particular individuals who file complaints. Moreover, the focus on prompt resolution of complaints created pressure for constricting the scope of OCR’s investigations and promoting quick settlements.

Throughout the 1980s, OCR developed administrative practices that complied with the procedural mandates of *Adams*, facilitated the prompt resolution of complaints, sharply reduced the number of compliance reviews--and simultaneously infuriated civil rights groups and Democrats on oversight committees. The average time for processing a complaint plummeted from 1300 days in 1982 to 230 in 1984, the average age of pending compliance reviews dropped from a little over 1000 days to 270,⁵² and the number of complaints missing at least one *Adams* deadline fell from 500 in 1984 to only 100 in 1988.⁵³ Similarly, the agency bragged that in the first two years of the Trump administration,

OCR resolved almost double the number of complaints per year compared to the previous eight years. In fact, OCR resolved on average over 3,200 more complaints than it received during these two fiscal years. . . . More significantly, OCR has achieved a 60% increase in . . . complaint resolutions involving educational institutions agreeing to make changes to address a civil rights violation or concern.⁵⁴

Fewer resources devoted to lengthy, institution-wide investigations meant more resources for prompt resolution of individual complaints.

By the time Democrats won back the White House in 1992, the emphasis on prompt resolution of complaints had become deeply embedded in OCR's standard operating procedures and sense of mission. In his excellent book on Title VI, Stephen Halpern notes that an agency that in the 1960s had "led a social revolution" in the segregated South had become "preoccupied with management efficiency in the processing of complaints." This became "the primary organizational objective."⁵⁵ As Jeremy Rabkin put it, "The litigation forced OCR to become a complaint processing agency, a sort of small claims court for civil rights disputes."⁵⁶ "The great catch phrase in OCR operations in the late 1970s and into the 1980s," Rabkin writes, was "productivity," with

“an endless stream of memos harping on the need to improve the productivity of regional offices and individual agency investigators.” Unfortunately, this “did not refer to any measure of real-world benefits per man-hour of effort, but simply to the number of complaints that were processed—with whatever outcome—per investigator per month.” With good reason, he described this as a “classic example of bureaucratic goal displacement.”⁵⁷

Evaluating Complaint-Based Regulation

The focus on complaint resolution proved attractive to OCR’s leaders and rank-and-file for several reasons. Most obviously, it provides a tangible measure of the agency’s activities and accomplishments. OCR has always been attacked from the left for doing too little and from the right for doing too much. Here it could say, “Look at what we are doing to help real people deal with real problems.” OCR’s annual reports to Congress repeat this theme year after year. To put the matter in more bureaucratic terms, complaint resolution constitutes a routinizable task that justifies the agency’s existence.

Investigating and resolving complaints has distinctive advantages for Republican and Democratic administrations. For the former, as noted above, it provides an opportunity to focus on “disparate treatment” rather than “disparate impact.” For the latter, it offers the opportunity to build—slowly and away from media scrutiny—an ever-expanding common law of discrimination policy. Because resolution agreements are allegedly voluntary, few of OCR’s actions are subject to judicial review.⁵⁸ Despite the fact that in the aggregate these agreements constitute federal policy, the “letters of finding” issued by the agency at the conclusion of its investigations and negotiations always include this proviso: “This letter sets forth OCR’s determination in an individual case. This letter is not a formal statement of OCR policy and should not be relied upon,

cited, or construed as such.”⁵⁹ This absolves the agency of the need to weigh the policy’s aggregate costs and benefits or to justify its policy choices. For an agency subject to strenuous criticism for whatever position it takes, policymaking through below-the-radar negotiations is an attractive way to proceed.

Despite the disclaimer contained in its letters, OCR frequently relies on these agreements not just in subsequent negotiations, but also to justify the general policy statements it later announces. This strategy was apparent on the controversial issue of transgender students’ access to bathrooms. After negotiating a few agreements with school districts requiring them to grant access on the basis of the students’ gender identity, OCR informed judges that this was their long-standing policy. It then relied on the combination of those settlements and court rulings to support its 2016 DCL on the topic.⁶⁰ Resolution agreements are remarkably flexible tools. As the University of Montana example shows, they can be wielded or withdrawn at will.

To be sure, OCR still conducts a few compliance reviews: 16-17 annually in the first two years of the Trump Administration and in the first year of the Biden administration.⁶¹ And, as noted above, OCR can readily turn individual complaints into systematic institution-wide investigations. But it remains the case that the bulk of agency resources are devoted to resolving individual complaints.

To which groups and to which issues are these resources devoted? The bulk of complaints received by OCR fall into one of four categories: disability, race and ethnicity, sex, and age. The distribution of complaints has been fairly stable over the years, as Table 2 indicates. Half the complaints involve disability, one-quarter to one-fifth involve race or national origin, almost one-fifth sex, and a much smaller fraction age discrimination. Sex discrimination complaints show the greatest variability, ranging to only 10% under Bush ’41 to over one-third under Obama.

Some of this variability is caused by multiple filings by a few individuals or organizations. For example, of the 1149 age discrimination complaints filed under President Biden, nearly one third (407) were filed by one person. Even more dramatically, one person filed 6,157 Title IX complains in 2016. In 2014 two people filed a total of 1,700 Title IX complaints. OCR received relatively few such multiple complaints before 2013. But in 2013, it received 2,535; in 2014, 2052; in 2015, 1682; in 2016, 6204; in 2017, 1768; and 2018, 1715.⁶² OCR has recently reported that in 2022 it received nearly 19,000 complaints.⁶³ Seldom before had that number ever exceeded 10,000. We do not yet know how many of these complaints were filed by a handful of people, or what factors contributed to the surge.

Table 2: Distribution of Complaints

| <u>Administration</u> | <u>% disability</u> | <u>% race/ethnicity</u> | <u>% sex</u> | <u>% age</u> |
|-----------------------|---------------------|-------------------------|--------------|--------------|
| Reagan | 46 | 26 | 21 | 6 |
| GHW Bush | 59 | 25 | 10 | 5 |
| Clinton | 58 | 26 | 12 | 4 |
| GW Bush | 54 | 19 | 19 | 6 |
| Obama | 42 | 19 | 34 | 5 |
| Trump | 50 | 19 | 21 | 6 |
| Biden | 48 | 24 | 17 | 11 |

Source: OCR’s annual reports to the president and Congress

Another way to look at the data on complaints is to ask what sorts of discrimination were most commonly alleged. OCR groups Title VI, Title IX, and disability complaints into several broad categories. The figures in Table 3 come from the first report issued by OCR during the

Biden administration. (Previous reports showed a similar distribution.) It indicates that the categories of “different treatment,” “harassment,” and “retaliation” along with “appropriate education” for students with disabilities constitute the bulk of OCR’s workload.

Table 3: Complaints by Type, FY 2021

Title VI

| | |
|------------------------|------|
| Different Treatment | 1112 |
| Harassment | 476 |
| Retaliation | 557 |
| Total for these 3 | 2145 |
| Total for all Title VI | 2944 |

Title IX

| | |
|------------------------|------|
| Different Treatment | 468 |
| Harassment | 502 |
| Retaliation | 305 |
| Total for these 3 | 1275 |
| Total for all Title IX | 2093 |

Disability

| | |
|--------------------------|------|
| Appropriate Education | 2064 |
| Different Treatment | 1249 |
| Retaliation | 973 |
| Total for these 3 | 4286 |
| Total for all disability | 6789 |

What characterizes the complaints in each of these major categories is that they must be addressed on an *individualized* basis. Did this particular student receive an “appropriate” education? Did person A receive different treatment than person B? Was this student harassed on the basis of race, sex, or disability? Did the institution retaliate against a person who had filed a previous complaint? On the one hand, investigating such complaints provides regulators with a

healthy concreteness: at times investigators can get a good sense of whether students, faculty, and other have been treated fairly. Here is the opportunity for government to respond to the concerns of particular people. On the other hand, we cannot know that similar cases are being handled in a similar fashion. Or that federal officials are following known rules. To make matters worse, those filing complaints frequently must wait a long time before their case is resolved.

Reconciling the demand for uniformity and rule-abidingness on the one hand and responsiveness to individual circumstances on the other is seldom easy. In fact, it is one of the central dilemmas of public bureaucracy.⁶⁴ One way to address this problem is slowly to build up a common law through adjudication of individual cases. That requires not just publicizing the results in each case, but providing the rationale for each decision. This OCR almost never does. Although the Obama administration released more letters of finding and resolution letters than previous administrations, even then only a fraction of the total were ever made public.

OCR has not made it easy for outsiders to examine this key part of its operation. When a reporter for the *Chronicle of Higher Education* filed a Freedom of Information Act request on OCR's handling of one investigation, the documents he received were "almost entirely redacted." The conduct of OCR's investigations, he noted, "are notoriously opaque."⁶⁵

In her extensive examination of OCR's use of rulemaking and enforcement discretion, law professor Catherine Kim found that the agency not only "implement[s] contentious policy initiatives through guidance documents to evade the more onerous constraints imposed on rulemaking," but, "more alarmingly," also "circumvent[s] even the modest checks on guidance documents by channeling policy initiatives through the strategic exercise of enforcement discretion." "OCR enforcement proceedings," she found, "do not *usually* result in settlement, but rather they *always* do." As a result, "There has not been a single instance over the past quarter

century in which enforcement decisions resulted in the final agency action necessary for judicial review.” In short, Kim writes, “The limited disclosure of OCR enforcement decisions has precluded the public’s ability to exercise meaningful checks on them.”⁶⁶

One additional feature of OCR’s emphasis on resolving individual complaints deserves attention: it favors those with the skill and confidence to speak up. Studies of the Individuals with Disabilities Education Act and section 504 suggest that well-educated professional parents are more likely to be vocal and effective advocates for their children than are those with less education and income.⁶⁷ That is part of the explanation for the large number of disability complaints. Similarly, many of the Title IX athletic complaints involve comparisons between the facilities for male and female varsity teams, not the resources schools with large numbers of disadvantaged children devote to recreational and fitness activities. As is so frequently the case, education, income, and organization matter. The complaint process amplifies the squeaky wheel, which is not always the wheel most in need of grease.

Conclusion

Thus far I have tried to provide a description of federal regulation of education that emphasizes its peculiar features. I will close with some generalizations about the regulatory process and its consequences.

First and most obviously, this is a remarkably opaque regulatory process. Policy is made on an ad hoc process, often in the disguise of “enforcement.” Guidelines are not legally binding, but schools can be subjected to legal sanctions if they do not follow them. Important policy directives are announced in letters to “colleagues” with little or no exploration of costs, unintended consequences, or alternatives. They are presented not as policy choices that must be justified, but as “interpretations” somehow implicit in the vague language of civil rights statutes. Since I have

complained about this repeatedly, both here and in other writings, I will not continue to beat that horse.

Second: the prevalence of institutional “leapfrogging,” mission creep, and occasional mission gallop. Although some federal education statutes have become longer and more detailed over time (a leading example here is IDEA), the three main civil rights laws affecting education, Title VI, Title IX, and §504, are very brief, and have changed little over the past half century. Meanwhile, administrative glosses on them have steadily expanded, extending to affirmative action in college admissions and public-school assignments, bilingual education, school discipline, school funding, sexual misconduct, lactation rooms for students with young children, the meaning of a “varsity sport,” what constitutes an “appropriate education” for students with disabilities (even if they are not covered by the IDEA), and pronouns, bathrooms, and sports teams for transgender students.

As I have explained in The Transformation of Title IX, the original goal of Title IX—removing institutional barriers to educational opportunity for women and girls—was achieved relatively quickly, with remarkable success. Regulators slowly switched to the broader objective of changing how all of us—students, teachers, administrators, and the public at large—think about all matters sexual. Sexual stereotypes became the problem, and reeducation of everyone the solution. This was apparent not just in the battles over sexual harassment and transgender rights, but in the emphasis Title IX regulation placed on high visibility college athletics.

This expansion has often the form of institutional “leapfrogging” by federal courts and federal agencies: one institution would take a small step, the other would build upon that, and the process would continue for several more cycles. Each institution would claim authority from the other, with little attention paid to the long-term consequences of these multiplying incremental

changes. The result was substantial innovation without anyone admitting they were doing anything new.

Such expansion has usually taken place during Democratic administrations. (The major exception here came during the Nixon and Ford administrations, when OCR launched a number of Title VI initiatives.) Examples include the expansion of Title IX regulation of college sports, efforts to desegregate higher education in the South, and an abortive effort to expand bilingual education during the Carter administration; another push for bilingual education, more aggressive (and successful) pressure on colleges to expand varsity athletics for women, and the first guidelines on sexual harassment in education settings during the Clinton administration; and an outpouring of new rules on affirmative action, school discipline, school resources, sexual harassment, athletics, bilingual education, and transgender issues under President Obama. Over the past two years the Biden administration has resuscitated some of those guidelines and has proposed sexual harassment rules that look much like those announced by the Obama administration.

Until the Trump administrations, Republicans rarely attempted to rescind or modify these administrative guidelines directly. Rather, they would simply relax enforcement efforts, sometimes suggesting that their predecessors' rules lacked an adequate statutory basis. On occasion they received an assist from the courts: in the late 1970s and early 1980s federal judges clipped the wings of OCR on bilingual education; the Supreme Court's *Grove City* decision put a halt to Title IX rules on athletics for nearly a decade. Under George W. Bush both OCR and the White House tried to relax rules developed by OCR and the courts to evaluate colleges' athletic programs. (It failed, largely because the NCAA, previously the most vocal critic of such rules, joined with women's advocacy groups to oppose such retrenchment.) As many political scientists have pointed out, new policies develop constituencies that defend the status quo—which in the

American political system is much easier to defend than to change. Until 2017, the result was a regulatory ratchet, with alternating expansions and pauses.

The Trump administration was different, not primarily because the President was a black (or orange) swan, but because the Obama administration had been so aggressive in expanding regulation. The biggest change came with its new rules on sexual harassment—the first major Title IX regulation since 1975. To respond, the Biden administration has been forced to go through another long, difficult rulemaking process itself. Between 2017 and 2020 OCR also rescinded a number of Obama guidelines, and substantially changed the agency’s enforcement priorities. In the past civil rights regulation of education institutions had been relatively low-visibility, with civil rights and women’s groups the most active participants. Over the past decade it has shifted from such “client politics” to higher visibility “majoritarian politics,” to use James Q. Wilson’s helpful typology. Regulation of education has become more partisan and more ideological than ever before.

Third, the relationship between the OCR and the federal courts is changing, and this shift will likely have major consequences for the agency’s policymaking mode. OCR can no longer count on federal judges adopting an expansive interpretation of civil rights statutes. To the extent the courts and the agency fail to move along “parallel tracks,” OCR cannot rely on private rights of action to give its guidance documents enforcement teeth. It can double down on its “investigate and colonize” strategy. But this requires resources that are in short supply. It is possible that OCR could increase its use of APA rulemaking in an effort to gain judicial support for its policies. But this invites searching judicial review—which has rarely been applied to its “interpretations” and Dear Colleague Letters. The Supreme Court’s recent embrace of the “major questions doctrine” further increases the likelihood of the Court rejecting the Biden administration’s sexual harassment

and transgender regulations. The weakness of OCR's enforcement tools increases the leverage of the federal judiciary.

Fourth, what can we learn here about the "administrative state" or the "deep state"? Most obviously, it is not very administrative, and it does not run very deep. Judges have been at least as important as administrators in the expansion of regulation. It was this potent combination, not the inherent expansionary zeal of administrators that produced the civil rights state as we know it. The role of federal judges was particularly pronounced during the long *Adams v. Richardson* receivership. Federal courts were also crucial to the expansion of regulation of college sports and sexual harassment.

Just as importantly, all the major expansions were promoted by *political executives*, not careerists. Presidents Nixon and Ford didn't anticipate what the people they appointed to OCR would do, but their successors certainly did. And they largely got what they wanted. For example, President Clinton appointed a former MALDEF attorney as Assistant Secretary for Civil Rights, and she in turn appointed people who aggressively pushed bilingual education. President Biden reappointed Catherine Lhamon to reinstate her Obama-era policies. Although Donald Trump often appointed inexperienced outsiders to key administrative positions, at OCR he chose a skillful and experienced lawyer, Kenneth Marcus, who succeeded in revising several controversial policies. In short, presidents exercise substantial control through their administrative and judicial appointments.

Finally, we should always remember how little control the federal government has over what actually goes on in the classroom and how little we know about the long-term consequences of federal regulation. Without a doubt, federal rules on education of students with disabilities has required schools to spend much, much more on these students and has improved the quality of

education provided to them. But what have been the consequences for the majority of students, who are not guaranteed an “adequate education”? We no longer expect English learners to “sink or swim” without specialized language instruction, but it is far from clear that the federal prescriptions of the 1970s and 1990s or the elaborate procedures now in place have substantially improved the education we provide to our large number of English learners. In the abstract, it makes sense to keep troubled students in alternative school programs rather than suspend or expel them. But since the federal government has no authority to impose or supervise these alternatives, well-intentioned efforts to address the “school to prison pipeline” might well make school life worse for other (usually minority) children and for their often-frazzled teachers. For decades Title IX regulation of sports has focused on a tiny number of intercollegiate varsity athletes. Meanwhile the athletic opportunities for high school girls—especially those in predominantly minority schools—have shrunk. Similarly, OCR has focused on sexual misconduct in higher education, paying little attention to the more serious problem at the elementary and secondary level. Evaluating competing risks and the effectiveness of its programs has never been a high priority of OCR or federal judges.

These complaints will sound all-too-familiar to students of regulation. Goal displacement, the distortions produced by standard operating procedures, the power of organized interests, fragmented institutional authority, limited resources and competing priorities, the difficulty of predicting the consequences of agency action—all these are constant themes in the extensive literature on economic regulation and the “social regulation” that took shape in the 1970s. They are equally important—but less frequently acknowledged—when it comes to education and civil rights.⁶⁸ Those who study regulation should acknowledge this, and seek to remedy it.

ENDNOTES

¹ Regulation and the Courts: The Case of the Clean Air Act (Brookings, 1983); “Administrative Law and Bureaucratic Reality,” Administrative Law Review (Summer, 1992)

² Between the Lines: Interpreting Welfare Rights (Brookings, 1994)

³ The Transformation of Title IX: Regulating Gender Equality in Education (Brookings, 2018); The Crucible of Desegregation: The Uncertain Search of Educational Equality (University of Chicago Press, 2023); and “Building the Civil Rights State,” press and date TBD.

⁴ Regulation and Its Reform (Harvard University Press, 1982).

⁵ For a succinct statement of the problem, see Frederick Hess, Letters to a Young Education Reformer (Harvard Education Press, 2017), 49-55

⁶ I have applied Wilson’s understanding of “coping organizations” to judicial efforts to reform schools in “Taking Remedies Seriously: Can Courts Control Public Schools?” in Joshua Dunn and Martin West, eds. From Schoolhouse to Courthouse: The Judiciary’s Role in American Education (Brookings, 2009)

⁷ Frederick M. Hess, Spinning Wheels: The Politics of Urban School Reform (Brookings, 1999).

⁸ Gregory v. Ashcroft, 501 U.S. 452, 461 and 464 (1991) (internal punctuation and citations omitted)

⁹ Gebser v. Lago Vista Independent School District 524 U.S. 274 (1998) and Davis v. Monroe County Board of Education 526 U.S. 629 (1999)

¹⁰ 104 California Law Review 881 (2016). I have described OCR’s strategy in this regard in The Transformation of Title IX, 214-18.

¹¹ “Strife in the Schools: Education Department Logs Record Number of Discrimination Complaints,” New York Times, Jan. 1, 2023.

¹² 351 F. Supp. 630 (D.D.C., 1972), Adams v. Richardson, 480 F.2d 1159 (D.C. Cir, 1973), Adams v. Weinburger, 391 F. Supp. 269 (D.D.C., 1975), Adams v. Bennett 675 F. Supp 668 (D.D.C., 1987), WEAL v. Cavazos, 906 F. 2d 742 (D.C. Cir., 1990)

¹³ 88 Harvard Law Review 1667 at 1712 (1975)

¹⁴ For a review of the proliferation of “guidance documents,” their uses and abuses, and the limited opportunities for judicial review, see Hale H. Melnick, “Guidance documents and Rules: Increasing Executive Accountability in the Regulatory World,” 44 Boston College Environmental Affairs Law Review 357 (2017)

¹⁵ Letter from Comptroller General Elmer Staats to Senator Birch Bayh, March 30, 1977 (www.gao.gov/assets/120/117641.pdf), 7–8.

¹⁶ Jeremy Rabkin, “Office for Civil Rights,” in James Q. Wilson, ed., The Politics of Regulation (Basic Books, 1980), 347.

¹⁷ Majority Staff of the Committee on Education and Labor, Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, House of Representatives, 100th Cong., 2 sess. (Washington, DC: Government Printing Office, 1988), pp. 33–35.

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- ¹⁸ It added, “OCR has not defined the phrase equal educational opportunity in any of its policies or guidance memoranda.” U. S. Commission on Civil Rights, Equal Educational Opportunity Project Series, volume 1 (December, 1996), 196. <https://www.law.umaryland.edu/marshall/usccr/documents/cr12ed8az.pdf>
- ¹⁹ Report of the Commission on Civil Rights, Equal Employment Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices (September 1999), 121.
- ²⁰ U.S. Commission on Civil Rights, Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? (September, 2004). www.usccr.gov/pubs/10yr04/10yr04.pdf, 20.
- ²¹ The Transformation of Title IX, 120-123
- ²² See The Transformation of Title IX, 197 and 301n.3.
- ²³ See the 2022 resolution letter and agreement between OCR and the Victor Valley (CA) Union High School District on racial disparities in discipline:
https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09145003-b.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=;
- ²⁴ Blake Emerson and Ronald Levin, “Agency Guidance Through Interpretive Rules: Research and Analysis,” Final report submitted to the Administrative Conference of the U.S., 2019
<https://www.acus.gov/sites/default/files/documents/ACUS%20IR%20final%20report.5.28.2019.pdf>
- ²⁵ *Brown v. Califano*, 455 F. Supp. 837 (1978) at 842
- ²⁶ U.S. Commission on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs: A Report of the U.S. Commission on Civil Rights (June 1996), 40.
- ²⁷ Beryl Radin provides a good summary of the deficiencies of the funding cutoff in Implementation, Change, and the Federal Bureaucracy (Teachers College Press, 1977), 125–26.
- ²⁸ Joseph A. Califano Jr., Governing America: An Insider’s Report from the White House and the Cabinet (Simon and Schuster, 1981), 252–53.
- ²⁹ Martha Derthick provides a thorough explanation for the lack of litigation under NCLB in “Litigation under No Child Left Behind,” in Dunn and West, eds., From Schoolhouse to Courthouse.
- ³⁰ Democracy by Decree: What Happens When Courts Run Government (Yale, 2003)
- ³¹ *WEAL v. Cavazos*, 906 F.2d 742, 747 and 751 (D.C. Cir., 1990).
- ³² *Alexander v. Sandoval*, 532 U.S. 275, 306 (2001) (emphasis added).
- ³³ Gary Orfield, The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act (Wiley-Interscience, 1969), and Stephen Halpern, On the Limits of the Law: The ironic Legacy of Title VI of the 1964 Civil Rights Act (Johns Hopkins University Press, 1995), 51-52.
- ³⁴ See Melnick, “The Odd Evolution of the Civil Rights State,” 37 Harvard Journal of Law and Public Policy 113, 123-27 (2014).
- ³⁵ The Transformation of Title IX, ch. 7
- ³⁶ Quoted in Allan Wolk, The Presidency and Black Civil Rights: Eisenhower to Nixon (Farleigh Dickinson University Press, 1971), 116.

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- ³⁷ I describe this conflict in The Transformation of Title IX, 183-222
- ³⁸ See Melnick, The Crucible of Desegregation, 228-45
- ³⁹ *Ibid*, 226-27
- ⁴⁰ The Transformation of Title IX, 211-22
- ⁴¹ Quoted in Robin Wilson, “Colleges under Investigation for Sexual Assault Wonder What Getting It Right Looks Like,” Chronicle of Higher Education, August 11, 2015.
- ⁴² Robin Wilson, “As Federal Investigations of Sex Assault Get Tougher, Some Ask if That’s Progress,” Chronicle of Higher Education, October 8, 2015
- ⁴³ “OCR’s Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints,” February 12, 2014,” available at <https://media4.manhattan-institute.org/sites/default/files/OCR-disciplineguide-2014.pdf>.
- ⁴⁴ <https://www.federalregister.gov/documents/2021/06/08/2021-11990/request-for-information-regarding-the-nondiscriminatory-administration-of-school-discipline>
- ⁴⁵ AASA, The School Superintendents Association, “The 2018 AASA Discipline Survey,” available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Faasa.org%2FuploadedFiles%2FAASA_Blog\(1\)%2FAASASurveyDisciplineGuidance2014.pdf&clen=263697](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Faasa.org%2FuploadedFiles%2FAASA_Blog(1)%2FAASASurveyDisciplineGuidance2014.pdf&clen=263697)
- ⁴⁶ Jeremy Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy (Basic Books, 1989), 168.
- ⁴⁷ OCR, Annual Report to Congress: Fiscal Year 1993, 10, (<https://files.eric.ed.gov/fulltext/ED422667.pdf>)
- ⁴⁸ *WEAL v. Cavazos*, 906 F.2d 741, 744-45 (D.C. Cir. 1990)
- ⁴⁹ 40 Federal Register 24149. (June 4, 1975)
- ⁵⁰ These statements come from Tatel’s affidavit in the Adams litigation, as quoted in Halpern, On the Limits of the Law, 140
- ⁵¹ Office for Civil Rights, *1995 Annual Report to Congress*, 1 (www2.ed.gov/about/offices/list/ocr/AnnRpt95/edlite-ocr95rp1.html).
- ⁵² Testimony of Assistant Secretary for Civil Rights, Harry M. Singleton, “Investigation of Civil Rights Enforcement by the Department of Education,” Hearings before the subcommittee on Intergovernmental Relations and Human Resources, House Committee on Government Operations, 99th Cong. 1 sess., July 18 and September 11, 1985, 93-95
- ⁵³ Report by the Majority Staff of the Committee on Education and Labor, “Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, U.S. Department of Education,” House of Representatives, 100th Cong., 2 sess. (December, 1988), 103-114
- ⁵⁴ OCR, Annual Report to the Secretary, the President, and the Congress, FY 2017-18 (March, 2020), 4.
- ⁵⁵ Stephen Halpern, On the Limits of the Law, 151
- ⁵⁶ Rabkin, Judicial Compulsions, 168.
- ⁵⁷ *Ibid.*, p. 170

⁵⁸ One major exception was the massive settlement between OCR and the New York City school system announced in the waning days of the Carter administration. Liberal icon Judge Jack Weinstein temporarily halted enforcement of the agreement on the grounds that such “drastic governmental action” that “affects the lives of hundreds of thousands of citizens” should not “result solely from secret, informal negotiations conducted exclusively by a handful of government officials. . . . No matter how benign and well intentioned, those government officials who can, in practical effect, turn on or off the source of hundreds of millions of dollars, must conduct themselves with scrupulous regard for procedural protections. Not only must the result be just, but, if the people are to retain their faith in their government, the means used to achieve the result must be fair.” *Caulfield v. Board of Education*, 449 F. Supp. 1203, 1206-07 (E.D. N.Y. 1978). Judge Weinstein was later overruled by the Second Circuit.

⁵⁹ For example, letter to George Washington University, August 3, 2011, www2.ed.gov/about/offices/list/ocr/docs/investigations/11112079-a.pdf; and letter to Harvard Law School, December 30, 2014, <https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf>

⁶⁰ The Transformation of Title IX, pp. 227-35; also see Leor Sapir’s recent articles in City Journal.

⁶¹ OCR, Annual Report to the Secretary, the President, and the Congress, FY 2017-18, 5; and OCR, Safeguarding Students’ Civil Rights, Promoting Educational Excellence: Report to the President and Secretary of Education, FY 2021, 4

⁶² FY 2017-18 Report, 9.

⁶³ “Strife in the Schools: Education Department Logs Record Number of Discrimination Complaints,” New York Times, Jan. 1, 2023.

⁶⁴ James Q. Wilson, “The Bureaucracy Problem,” The Public Interest, Winter, 1967.

⁶⁵ Andy Thomason, “Why Isn’t Baylor Under Title IX Investigation? A Records Request Yields Laughably Little,” Chronicle of Higher Education, August 3, 2016.

⁶⁶ Catherine Y. Kim, “Presidential Control across Policymaking Forms,” UNC Legal Studies Research Paper no. 2571068, December 9, 2015 (<https://ssrn.com/abstract=2571068>), 31–33.

⁶⁷ Extensive evidence on IDEA collected by Eloise Pasachoff “suggests that children from wealthier families enforce their rights under the statute at higher rates than do children in poverty and that this disparity has a negative effect on the amount and quality of services children in poverty actually receive.” “Special Education, Poverty, and the Limits of Private Enforcement,” 86 Notre Dame Law Review 1413 (2011) at 1417. According to a federally funded study of special education students in the 1999-2000 school year, only 4% of the lowest income group requested a due process hearing, and only 10% of the middle income group. But 52% of high income parents initiated the hearing process. Much the same was true of requests for mediation: 9% for the lowest income group; 5% for middle income; 43% for highest income. Pasachoff, at 1426-27. Claire Raj and Emily Suski have found that low-income parents “often lack the ability to leverage litigation or the threat of litigation as a way to incentivize more or better services from their school districts.” “*Andrew F.’s* Unintended Consequences,” 46 Journal of Law and Education 499 (2017) at 509. The more individualized the decision-making, the more important such leverage becomes. Also see Daniela Caruso, “Bargaining and Distribution in Special Education,” 14 Cornell Journal of Law and Public Policy 171 (2005) at 178-9.

⁶⁸ Early and important exceptions are Rabkin, Judicial Compulsions and “Office for Civil Rights.”