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Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964

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SUMMARY

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Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits federally funded programs, activities, and institutions from discriminating based on race, color, or national origin. In its current form, largely unchanged since its adoption, Title VI incorporates a number of unique features. Besides barring federally funded programs from discriminating based on race, Title VI also authorizes and directs all federal funding agencies to promulgate rules effectuating that nondiscrimination mandate. Those rules were also made subject to presidential approval, an authority since delegated to the Attorney General by executive order. To enforce Title VI, agencies also have at their disposal a uniquely powerful tool: the termination or refusal to provide federal financial support to an institution or program seeking it. Although this power to withdraw federal funds was envisioned as the primary mechanism for enforcing Title VI, that authority was also hedged with a range of procedural requirements designed to spur agencies to resolve complaints against recipients through voluntary agreements.

In the 50 years since Title VI became law much of the debate over the statute has centered on how the courts have read its two central provisions—Sections 601 and 602—and how federal agencies have gone about enforcing them. In the courts those debates have especially focused on what counts as unlawful "discrimination" under Section 601. The courts have long agreed that Title VI bars federally funded programs from intentionally singling out individuals by race for adverse treatment. In its first case involving Title VI the Supreme Court suggested that Section 601 might also reach beyond intentional discrimination to bar the use of policies with a disparate impact—policies that, irrespective of the intent, impose a discriminatory effect on different racial groups. With its 2001 ruling in *Alexander v Sandoval*, the Court appeared to put that interpretive question to rest: Title VI directly prohibits only intentional discrimination.

For the agencies charged with enforcing Title VI, the primary concerns have tended to be more operational and programmatic—how to go about the business of reviewing and assessing particular practices under Section 602 of the statute. Section 602 authorizes and directs agencies to issue regulations "effectuat[ing]" Section 601. The breadth of that authority has produced a further point of uncertainty about the statute: what limits are there to funding agencies' rulemaking authority under Title VI? So far, two divergent views have emerged from the Court's decisions: (1) a largely deferential view that would give agencies leeway to issue prophylactic rules reaching conduct beyond intentional discrimination, and (2) a more exacting view under which agencies may redress only provable cases of intentional discrimination.

Although Title VI's nondiscrimination prohibition accompanies nearly all awards of federal financial support, much of the statute's doctrine has been shaped by its use in the public schools. That doctrinal history has centered on one agency in particular: the Office for Civil Rights (OCR) in the U.S. Department of Education (ED). Title VI continues to play a central part in OCR's mission of protecting civil rights on campuses at all educational levels, and in institutions both public and private. OCR handles a large volume and variety of claims alleging race and national origin discrimination, which it administratively resolves through a series of investigative procedures laid out in its Case Processing Manual. Although the types of allegations OCR investigates vary, three major categories of complaint occupy much of its docket: disparate treatment, retaliation, and racial harassment.

Congress has the ultimate say over how Title VI works—rooted not only in its legislative power but in its authority to oversee the statute's enforcement. In recent years two questions surrounding Title VI have drawn particular congressional interest: the viability of disparate impact regulations under Section 602 and the possible inclusion of new protected classes in Section 601. No matter how Congress may choose to address those subjects, however, they are likely only to raise further questions about the future of this landmark civil rights law.

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Introduction

With its adoption as part of the Civil Rights Act of 1964, Title VI invested the federal government with a uniquely powerful role in addressing race and national origin discrimination.[1] Like other statutory provisions in the Civil Rights Act,[2] Title VI seeks to end race discrimination among institutions and programs whose doors were otherwise open to the public—especially public schools.[3] But unlike the Civil Rights Act's better known and more heavily litigated provisions,[4] Title VI is concerned specifically with the use of "public funds," designed to ensure that federal dollars not be "spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[5] And to fulfill that broad mandate, Title VI takes a distinctive approach to policing discrimination by making the promise of nondiscrimination a condition of the federal government's financial support.

Title VI consequently prohibits all federally funded programs, activities, and institutions from discriminating based on race, color, or national origin.[6] Although that prohibition accompanies nearly all grants and contracts awarded by the federal government,[7] much of Title VI's doctrine has been shaped by its use in the public schools.[8] That doctrinal story has accordingly centered on one agency in particular: the Office for Civil Rights (OCR) in the U.S. Department of Education (ED). As this report explains, Title VI continues to play a central part in OCR's mission of protecting civil rights on campuses at all educational levels, and in institutions both public and private.[9]

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[1] 42 U.S.C. § 2000d et seq.; *see also* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1294 (2014) (noting that Title VI has long been regarded as the "sleeping giant" of federal civil rights law, a "powerful but largely unused" antidiscrimination statute). Title VI, by its terms, applies to discrimination based on three distinct categories: race, color, and national origin. To ease exposition, this report generally refers more simply to Title VI's prohibition on "race discrimination," which, unless otherwise indicated, is intended to mean discrimination outlawed by Title VI.

[2] *See, e.g.*, 42 U.S.C. § 2000c-6(a)(1) (empowering the Attorney General to receive and file suit over complaints that a "school board" has deprived students of the "equal protection of the laws").

[3] By the time the Civil Rights Act became law in 1964, fully a decade after the Supreme Court had declared an end to the *de jure* segregation of public schools in *Brown v. Board of Education*, 347 U.S. 483 (1954), "only 1.2 percent of black schoolchildren in the South attended school with whites." GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008). Discounting Tennessee and Texas, that "percentage drops to less than one-half of one percent (0.48 percent)." *Id.*

[4] *See id.* at 1294-95 (describing Title VI as "largely unknown" to "the general public and even to most lawyers," likely because "the number of Title VI cases litigated each year has always paled in comparison to most other civil rights statutes, particularly in comparison to the fair employment provisions of the Civil Rights Act of 1964").

[5] 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey quoting President Kennedy).

[6] 42 U.S.C. § 2000d.

[7] The only exceptions are funds disbursed pursuant to "a contract of insurance or guaranty." *See* 42 U.S.C. §§ 2000d-1, 2000d-4. Thus, for example, to the extent that a bank "receives federal financial assistance in the form of deposit insurance from the" Federal Deposit Insurance Corporation, it would likely not be bound by Title VI's nondiscrimination mandate. Marshall v. Webster Bank, N.A., 2011 U.S. Dist. LEXIS 5665, at *20-21 (D.Conn. Jan. 20, 2011) (dismissing a race discrimination complaint on this basis because the alleged "federal assistance [was] in the form of a guaranty or contract for insurance").

[8] *See generally* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995). *See also* 110 Cong. Rec. 7068 (1964) (statement of Sen. Ribicoff) (observing that "[u]nquestionably, more programs under HEW would be affected than all other programs put together" by Title VI).

[9] Given the breadth of institutions that receive federal education money, all public elementary and secondary schools are subject to Title VI, as well as nearly all colleges and universities, public and private. *See* U.S. Dep't of Educ., Office for Civil Rights, *Race and National Origin Discrimination: Frequently Asked Questions*,

This report begins by briefly tracing Title VI to its historical and conceptual roots in the federal spending power, and explains how the early understanding of that power shaped the various legislative proposals that ultimately became Title VI. The report then examines the central doctrinal question behind the statute: what exactly Title VI outlawed by prohibiting "discrimination" among federally funded programs, and what agencies are therefore allowed to do in order to enforce that prohibition. The report then turns to ED's OCR, briefly reviewing how that agency goes about the day-to-day work of enforcing Title VI in schools, and concludes by surveying two recent developments related to Title VI, along with some considerations should Congress wish to revisit this landmark civil rights law. Because this report focuses specifically on how OCR has come to understand and enforce Title VI, it does not directly discuss litigation under the statute, whether filed by a private party or by the U.S. Department of Justice following a referral from OCR,[10] though many of the substantive legal standards overlap.

Title VI of the 1964 Civil Rights Act: Origins and Overview

Leveraging the Spending Power: The Origins of Title VI

By the time Title VI was being seriously debated in 1964, its basic premise—that federal dollars should not go to support programs or institutions that discriminate based on race—was already familiar. In 1947, nearly a decade before the Supreme Court declared an end to the *de jure* segregation of the public schools in *Brown v. Board of Education*,[11] President Truman's Committee on Civil Rights had already sketched out the basic pattern for Title VI, calling for "establishment by act of Congress or executive order" of a federal office to review "the expenditures of all government funds," so that none would go to subsidize discrimination based on race, color, creed, or national origin.[12] Several years later, in 1953, President Eisenhower was also expressing dismay at the "discrimination in expenditure of [federal] funds as among our citizens."[13] And *Brown*, decided the next year, put even more pressure on the federal government to begin leveraging its funds to combat discrimination[14]—first in the public schools, but possibly also on a wider scale.

The early years of the Kennedy Administration saw some of the first steps in that direction. Early on in his tenure, for example, Abraham Ribicoff, then the Secretary of Health, Education, and

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https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html ("All public school districts are covered by Title VI because they receive some federal financial assistance. All public colleges and universities and virtually all private colleges and universities are covered because they receive such assistance by participating in federal student aid programs.").

[10] *See* Alexander v. Sandoval, 532 U.S. 275, 279-80 (explaining that private parties may sue to enforce Title VI); *see also infra* note 34 and accompanying text.

[11] 347 U.S. 483 (1954).

[12] PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 170 (1947); *see also* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 4-7 (1981) (recounting this history in greater detail).

[13] HALPERN, *supra* note 8, at 23.

[14] *Id.* (noting that "the *Brown* decision in 1954 focused even greater attention than ever on the use of federal funds," leading to several proposals for the government to begin doing so in "housing, education, and other matters"); *cf.* 110 Cong. Rec. 7068 (1964) (statement of Sen. Ribicoff) (explaining that, since *Brown*, "the executive branch ha[d] been moving, cautiously at first but with firmness in recent years, to carry out the mandate of the Constitution").

Welfare (HEW), refused to locate the department's summer teacher-training institutes at "any college or university that declined to operate such institutes without discrimination."[15] In a related decision, HEW later moved to withdraw support from segregated schooling on military bases as well.[16] Those steps led others in the Administration, like then-Attorney General Robert Kennedy, to publicly suggest that the federal funds might be used on a wider scale, "to persuade southern states to alter their racial practices" more generally.[17]

These early uses of the federal spending power to redress race discrimination had their limits, however. After leaving HEW for the U.S. Senate, Ribicoff explained during the floor debate over Title VI that, while at HEW, he had frequently "found [his] authority to act was questionable, and in some instances ... limited by the explicit wording of congressional enactments."[18] A number of Kennedy Administration officials evidently shared that view, with some publicly questioning whether the executive branch had authority to withhold money appropriated by Congress or condition disbursement on terms not found in underlying funding authorities.[19] This view "did not go unchallenged," as civil rights leaders made clear during the House hearings on the bill;[20] nor has it received a definitive judicial ruling since.[21] But with the risk of a bruising, possibly fatal, legal challenge looming over unilateral executive action,[22] it "became clear" to Administration officials "that administrative action alone could not solve the entire problem."[23]

Congressional action, by contrast, seemed to face far fewer legal constraints. In several earlier decisions the Supreme Court had established that Congress unambiguously had the right under the Spending Clause[24] to condition the receipt of appropriated funds on the terms of its choosing, even in areas traditionally left to the regulation of the states.[25] Congress was therefore free to do by legislation what the executive branch could only questionably have done on its own: make nondiscrimination a condition for receiving federal financial support.[26]

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[15] 110 Cong. Rec. 7065 (1964) (statement of Sen. Ribicoff).

[16] HALPERN, *supra* note 8, at 24.

[17] *Id.*; 110 Cong. Rec. 7068 (1964) (statement of Sen. Ribicoff) (explaining that, since *Brown*, "the executive branch ha[d] been moving, cautiously at first but with firmness in recent years, to carry out the mandate of the Constitution").

[18] *Id.* at 7065 (statement of Sen. Ribicoff).

[19] HALPERN, *supra* note 8, at 26-27.

[20] *Id.* at 27 (discussing the NAACP and ACLU's view that "the president did not need congressional authorization but had the unilateral authority via executive order to withhold funds from programs that discriminated").

[21] *Id.* The Supreme Court has yet to rule on the scope of the President's authority to "impose reasonable contractual requirements in the exercise of its procurement" or grant-making authority. Chrysler Corp. v. Brown, 441 U.S. 281, 305-06 (1979) (raising but declining to address that question). The question has been raised and analyzed, however, in some federal courts of appeals. *See* Contractors Ass'n of Eastern Pa. v. Sec'y of Labor, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971) (considering the President's authority to make certain nondiscrimination provisions a condition for federal contracts).

[22] *Cf. Contractors Ass'n of Eastern Pa.*, 442 F.2d 159 (discussing this issue in connection with Executive Order 11246, mandating nondiscrimination by federal contractors).

[23] 110 Cong. Rec. 7065 (1964) (statement of Sen. Ribicoff).

[24] *See* U.S. CONST., Art. 1, § 8, cl. 1.

[25] *See* Oklahoma v. U.S. Civil Service Comm'n, 330 U.S. 127, 143-44 (1947) (concluding that "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual"). The Supreme Court has since repeatedly reaffirmed Congress's power to condition the expenditure of federal funds, subject to certain limitations. *See* South Dakota v. Dole, 483 U.S. 203, 206-07 (1987) (affirming that under the Spending Clause, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives").

[26] HALPERN, *supra* note 8, at 27 (explaining that President Kennedy was "[u]nwilling to accept the political risk and

Title VI: An Overview

The final legislative resolution, reached after a period of protracted debate, was Title VI.[27] The legislation went through a number of significant alterations from the measure originally proposed by the Kennedy Administration, many of which sought to address fears of potential administrative abuse by layering agencies' enforcement power with procedural protections for funding recipients.[28] But the basic pattern suggested by the Committee on Civil Rights some 20 years earlier—making nondiscrimination a condition for federal financial support—remained the same. In its final form, largely unchanged since its adoption, Title VI incorporates five basic features relevant to this report:

1. **Nondiscrimination Mandate.** Title VI bars any federally funded "program or activity" from discriminating against a "person in the United States" based on his or her "race, color, or national origin."[29]
2. **Implementing Rules, Regulations, and Orders.** All federal funding agencies are "authorized and directed" to promulgate rules, regulations, or orders of general applicability "effectuat[ing]" that nondiscrimination mandate.[30]
3. **Approval of Implementing Rules, Regulations, and Orders.** Any rule, regulation, or order issued under Title VI was made subject to presidential approval,[31] an authority since delegated to the Attorney General by executive order.[32]
4. **Agency Enforcement.** To enforce Title VI an agency could resort to either of two measures:[33] (1) the termination or refusal to provide federal financial assistance to an institution or program seeking it; or (2) "any other means authorized by law," now understood to be a lawsuit brought by the Attorney General seeking a recipient's compliance with Title VI.[34]

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confront the controversy that would ensue if he issued an executive order" mandating nondiscrimination as a condition for receiving federal financial assistance).

[27] 42 U.S.C. § 2000d et seq. For a comprehensive account of the legislative debate over Title VI, see generally Abernathy, *supra* note 12.

[28] HALPERN, *supra* note 8, at 27-41 (concluding that "[i]t would be hard to overestimate the significance of the procedural protections Congress placed in the statute," which "encumbered those who would have to wield th[e] power" Title VI granted).

[29] 42 U.S.C. § 2000d.

[30] *Id.* § 2000d-1 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 [42 USCS § 2000d] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.").

[31] *Id.* ("No such rule, regulation, or order shall become effective unless and until approved by the President.").

[32] Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980) (delegating to the Attorney General the authority vested in the President under Section 602 of Title VI, "relating to the approval of rules, regulations, and orders of general applicability").

[33] 42 U.S.C. § 2000d-1 ("Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law.").

[34] *See, e.g.*, Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575 (D.C. Cir. 1983) (noting that "although fund termination was envisioned as the primary means of enforcement under Title VI,[] ... Title VI clearly tolerates other enforcement schemes," including the "referral of cases to the Attorney General, who may bring an action against the

5. **Procedural Requirements Related to Agency Enforcement.** Though an agency's withdrawal of federal funds was envisioned as the primary mechanism for enforcing Title VI, that authority was hedged with a range of procedural requirements designed to spur agencies into seeking consensual resolutions with recipients.[35]

Each of these statutory features is explained below, including how they have come to be understood since Title VI's passage and the role they play in addressing racial discrimination at school.[36]

Defining "Discrimination" Under Title VI

Title VI revolves around a single sentence-long prohibition, found in Section 601 of the law, providing that "[n]o person in the United States" may be "subjected to discrimination" by a "program or activity" that receives federal financial assistance based on his or her "race, color, or national origin."[37] Plainly that prohibition outlaws racial "discrimination" in all federally funded programs. It does not define, however, the sorts of practices Title VI thereby excludes.[38] And with the legislative history on this point inconclusive at best,[39] the task of providing a workable definition has been left to the agencies charged with enforcing Title VI and, ultimately, to the courts.[40] As explained below, however, with its 2001 decision in *Alexander v. Sandoval*,[41] the Supreme Court appears to have put the basic interpretive question to rest: Section 601 directly prohibits only *intentional discrimination*.

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recipient").

[35] Originally those requirements provided that (1) the agency could terminate funds only if it had advised the recipient of its noncompliance and attempted voluntary resolution; (2) the agency had to limit the effect of fund termination to the "program or activity" found to be out of compliance with Title VI; (3) before withdrawing funds the head of the agency had to file "written report of the circumstances and the grounds for such action" with the relevant congressional committees; and (4) the agency had to wait at least 30 days after filing that report before cutting off funds. *See* 42 U.S.C. § 2000d-1. Of those requirements only the first has been amended since Title VI became law. With the adoption of the Civil Rights Restoration Act of 1987 (CRRA), Pub. L. No. 100–259, 102 Stat. 31 (1988), Congress broadened the definition of "program or activity" to include, in the educational context, "all of the operations" of an elementary or secondary school or institution of higher education when "any part of" those institutions or entities receives federal funding. 42 U.S.C. § 2000d-4a(2). The CRRA thereby extended Title VI's coverage "so that it [now] encompasses programs or activities of a recipient of Federal financial assistance on an institution-wide" and system-wide basis. Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107, 115 (3d Cir. 1999).

[36] *See supra* note 9 (explaining the scope of public and private institutions of education that receive federal funding and are subject to Title VI).

[37] 42 U.S.C. § 2000d.

[38] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (White, J., announcing judgment of the Court) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so."); *see also* Charles F. Abernathy, *supra* note 12, at 25 (noting that while debating the provision of the House bill that eventually became Section 601 of Title VI, "two members . . . perceptively remarked that the word 'discrimination' had no fixed meaning, and was nowhere defined in title VI").

[39] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 286 (1978) (Powell, J., announcing the judgment of the Court) (noting the "repeated refusals of [Title VI's congressional] supporters precisely to define the term "discrimination"); *see also* Abernathy, *supra* note 12; HALPERN, *supra* note 8, at 295 (concluding that Title VI's "legislative history" did not "provide a workable definition" of "discrimination").

[40] *See* HALPERN, *supra* note 8, at 6 ("It was left to the federal courts and to executive branch officials enforcing Title VI to identify the parameters of the legal right blacks had to equal, nondiscriminatory treatment in public schools.")

[41] 532 U.S. 275 (2001).

Banning Intentional Discrimination (Disparate Treatment)

Despite Title VI's basic ambiguity, the courts have long agreed that, at a minimum, Section 601 bars federally funded programs from *intentionally* singling out individuals for adverse treatment because of their race.[42] This sort of intentional discrimination is commonly known as *disparate* or *different treatment*. And it can be proved in either of two ways: (1) directly, by pointing to a policy or decision that expressly singles out individuals by race, or (2) indirectly, by providing circumstantial evidence that a discriminatory motive was likelier than not responsible for the alleged mistreatment.[43]

Disparate Treatment: Direct Evidence

Perhaps the clearest way a program may discriminate along racial lines is by *expressly* singling out individuals by race for adverse treatment. Thus, for example, a school that explicitly excludes students from an assembly by race will clearly have discriminated in this intentional sense.[44] And because the "discrimination" involved appears on the face of the policy or decision itself, proving a violation of Title VI becomes that much more straightforward: to prevail, the aggrieved party generally need only establish that the discriminatory policy existed and was used against him.[45]

Disparate Treatment: Circumstantial Evidence

Although still litigated, over the years such facially discriminatory policies and decisions have grown less common—a shift widely attributed to laws like the 1964 Civil Rights Act.[46] As a

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[42] *Cf.* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 589 (1983) (White, J., announcing judgment of the Court) ("The Court squarely held in *Lau v. Nichols* . . . that Title VI forbids the use of federal funds . . . in programs that intentionally discriminate on racial grounds."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (Powell, J.) (announcing the judgment of the Court) ("Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to the" intentional discrimination barred by the Constitution.); *id.* at 334 (Brennan, J.) (concurring in the judgment in part and dissenting in part) ("Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes.").

[43] *See, e.g.*, De La Cruz v. Tormey, 582 F.2d 45, 50 (9th Cir. 1978) (distinguishing "government action" which is "'facially' discriminatory," in violation of the Equal Protection Clause, from a "more subtle variety of discrimination focuse[d], not on the form of the governmental action, . . . but rather upon its effects").

[44] *See* U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Oak Park and River Forest High School District 200, at 3-4 (Sept. 29, 2015) (concluding that a "racially exclusive assembly" constituted intentional discrimination); *see also infra* notes 176-183 and accompanying text.

[45] *Cf.* Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n, 459 F.3d 676, 694 (6th Cir. 2006) (noting that a complainant need not prove discriminatory animus where the allegation involves a facially discriminatory policy); *accord* Parker v. Franklin County Cmty. Sch. Corp., 667 F.3d 910, 920 (7th Cir. 2012) (citing *Cmtys. for Equity* for the same). Because Title VI has been read to incorporate constitutional principles, as explained below, even where a recipient has been found to have intentionally discriminated based on race it may still not be liable under Title VI if its discriminatory conduct was narrowly tailored to serve a compelling interest. Generally, however, that is a difficult showing to make. See CRS Report R45481, *"Affirmative Action" and Equal Protection in Higher Education*, by Christine J. Back and JD S. Hsin, at 21-24 (Jan. 31, 2019).

[46] *See* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LABOR L. 395, 401, 418 (2011) (observing that "after the passage of Title VII of the Civil Rights Act in 1964, most formal, facially discriminatory employment policies ended, even as less formalized discrimination continued," and that "[o]ver time . . . individuals made fewer blatantly and overtly racist or sexist decisions" as well); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008) (documenting the "extraordinary" impact that the enforcement of Title VI had in unraveling the *de jure* segregation of schools in the South); HALPERN, *supra* note 8, at 80 ("The enforcement of title VI between 1965 and 1968 is widely and rightfully recognized as having produced historic breakthroughs in dismantling the system of [*de jure*] racial segregation in southern schools.").

result, the more usual case today instead involves allegations of racially motivated mistreatment under a policy or decision that, at least on its face, is race-neutral.[47]

Thus, for example, an African American student might still plausibly allege that a school official discriminated against him based on his race by disciplining him more severely than his white classmates for substantially the same misconduct, even though neither the discipline policy nor the disciplining official made any mention of his race.[48] In such cases, the "*form* of the governmental action"—the literal wording of the policy used or the decisionmaker's explanation—is not at issue.[49] What matters is *why* the individuals alleging mistreatment received the treatment they did; whether, that is, a discriminatory *intent* shaped the allegedly discriminatory decision. Where the surrounding circumstances suggest that some such racial animus was likelier than not what motivated the adverse treatment, that treatment will amount to intentional discrimination, presumptively violating Title VI.[50]

Banning Discriminatory Effects (Disparate Impact)

Title VI has long been understood to bar federally funded programs from intentionally discriminating based on race. At least for the first few decades following its adoption, however, there was considerably more debate about whether Section 601 might also forbid policies that, while not purposefully discriminatory, nonetheless had a disparate effect on persons of different races. And in its first case involving Title VI—*Lau v. Nichols*[51]—the Supreme Court seemed to say exactly that.[52] In its most recent encounter with disparate impact under Title VI, however, in *Alexander v Sandoval*,[53] the Court squarely rejected *Lau*'s ruling on that point.[54] Today, as a result, the *only* discrimination Title VI directly prohibits is *intentional*.[55]

The Origin of Disparate Impact Under Title VI: *Lau v. Nichols*

Lau was the Court's first encounter with Title VI, and it set the stage for much of the uncertainty about the statute that has followed. In *Lau,* non-English-speaking Chinese students had sued San Francisco's school system alleging that its policy of refusing bilingual or remedial English

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[47] *See* Rashdan v. Geissberger, 764 F. 3d 1179, 1182 (9th Cir. 2014) (analyzing circumstantial evidence of discrimination under Title VI according to the same standards as Title VII); *see also* Green, *supra* note 46, at 401 (noting that even as "most formal, facially discriminatory employment policies ended, . . . less formalized discrimination continued").

[48] *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Platteville Public Schools, at 11-12 (Nov. 20, 2013) (analyzing a similar claim under Title VI).

[49] *Tormey*, 582 F.2d at 50.

[50] As a formal matter, the federal courts of appeals have generally applied the same "basic allocation of burdens and order of presentation of proof"—widely known as the *McDonnell Douglas* burden-shifting framework—that the Supreme Court has used in reviewing claims of employment discrimination under Title VII of the 1964 Civil Rights Act. Rashdan, 764 F. 3d at 1182 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) and collecting cases). *See also supra* note 45 (noting the constitutional defense).

[51] 414 U.S. 563 (1974).

[52] *See, e.g.*, *Guardians*, 463 U.S. at 589 (White, J., announcing the judgment of the Court) ("The Court squarely held in *Lau v. Nichols* . . . that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities.").

[53] 532 U.S. 275 (2001).

[54] *Id.* at 285 ("[W]e have since rejected *Lau*'s interpretation of [Section] 601 as reaching beyond intentional discrimination.").

[55] *Id.* at 280.

instruction effectively denied them the educational opportunities provided non-Chinese students, in violation of Title VI as well as the Equal Protection Clause of the Fourteenth Amendment.[56] And in an unexpectedly unanimous ruling,[57] the Court agreed—albeit along two different lines of reasoning.

Relying "solely" on Section 601, five of the Justices, led by Justice Douglas, concluded that Section 601 barred discrimination "which has [a discriminatory] *effect* even though no purposeful design is present."[58] In that case the effect was clear: "the Chinese-speaking minority receive[d] fewer benefits than the English-speaking majority" from the city's schools.[59] As recipients of federal educational dollars subject to Title VI, the school system had "contractually" obligated itself to reform its instructional policies to ensure the Chinese-speaking minority the same educational benefits as the English-speaking majority.[60]

Lau therefore seemed to imply that Section 601 directly outlawed policies with discriminatory effects, irrespective of their motivating intent—a form of discrimination now commonly known as *disparate impact*. But the Court also mixed some uncertainty into that message. Immediately after saying that they were "rely[ing] solely on [Section] 601" in siding with the student plaintiffs, the majority in *Lau* turned to recite a regulation issued by HEW, specifically addressing what recipient school districts had to do under Title VI to ensure students with "linguistic deficiencies" had the same "opportunity to obtain the education generally obtained by other students in the system."[61] That discussion drew a contrasting concurrence from three other Justices, all of whom agreed that the student should prevail under a disparate impact theory, but believed that the proper basis for that theory—and the result in favor of the students—was HEW's regulation implementing Title VI, not Section 601 itself.[62] In all, though, eight Justices in *Lau* put down a marker in favor of disparate impact under Title VI, five seemingly under Section 601. And so, whatever the vagaries in its rationale, *Lau*'s basic message seemed clear: Title VI barred not just intentional discrimination, but policies with a disparate impact as well.

Limiting *Lau*

Only a few years after handing down *Lau*, in its landmark ruling in *Regents of the University of California v. Bakke*,[63] the Court appeared to reverse course. *Bakke* involved a white applicant's challenge to the affirmative action admissions policy then in use at the University of California at Davis's medical school.[64] And like the Chinese students in *Lau*, Bakke objected to that policy on

[56] *Lau*, 414 U.S. at 564-65. The case also involved a claim under the Equal Protection Clause of the Fourteenth Amendment, which the Court declined to address. *See id.*

[57] *See* Rachel F. Moran, *The Story of* Lau v. Nichols*: Breaking the Silence in Chinatown*, *in* EDUCATION LAW STORIES 111, 134 (Michael A. Olivas & Ronna Greff Schneider eds. 2008) (observing that, though "some attorneys and scholars had expected the decision in *Lau* to be a close and difficult one, the Court handed down a unanimous opinion in just six weeks after oral argument").

[58] *Lau*, 414 U.S. at 566.

[59] *Id.* at 568.

[60] *Id.* at 568-69.

[61] *Id.* at 566-67.

[62] *Id.* at 569-71 (Stewart, J., concurring in the result, and joined by Blackmun, J., and Burger, C.J.). Justice White concurred in the judgment but declined to write or join an opinion. *Id.* at 569.

[63] 438 U.S. 265 (1978).

[64] For a more detailed analysis of Bakke and affirmative action more generally in higher education, see CRS Report R45481, "Affirmative Action" and Equal Protection in Higher Education, by Christine J. Back and JD S. Hsin (Jan. 31, 2019).

both constitutional and statutory grounds.[65] To dispose of his challenge the Justices therefore had to confront the question they effectively avoided in *Lau*: how does Section 601's nondiscrimination mandate relate to the Fourteenth Amendment's Equal Protection Clause? None of the opinions in *Bakke* commanded a clear majority, but in separate opinions, five of the Justices, separately sifting through the legislative record, arrived at the same answer: Title VI's drafters intended Section 601 to "enact[] constitutional principles," and nothing more.[66] Title VI, in their view, therefore "proscribe[d] only those racial classifications that would violate the Equal Protection Clause"[67]—policies that the Court had already said must involve more than just a racially disparate impact, but a provable discriminatory intent as well.[68]

In the decades since *Bakke*, the Court continued to divide over the basic ambiguity in Title VI—over exactly what sort of "discrimination" Section 601 outlawed.[69] By the time Title VI returned to the Court in 2001, however, with *Alexander v. Sandoval*,[70] a unified five-Justice majority appeared to settle on a more definite view.

As Justice Scalia explained for the *Sandoval* majority, despite the lingering "uncertainty regarding [Title VI's] commands," it seemed "beyond dispute" at that point that a policy with only a disparate impact did not violate Section 601.[71] Tallying the votes in *Bakke* seemed to make that clear enough: on that statutory point, five Justices in *Bakke* explicitly agreed that Title VI should be read coextensively with the Equal Protection Clause.[72] And as claims under that constitutional provision had already been limited to cases of provable discriminatory intent,[73] the *Sandoval* majority thought it stood to reason that claims under Title VI had to be so limited as well.[74]

The difficulty, however, was *Lau*. There, after all, the Court seemed to say that Section 601 *did* prohibit policies with a racially disparate impact, irrespective of whether those effects were intentional.[75] But as the *Sandoval* majority saw it, *Bakke* had effectively resolved that difficulty as

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[65] *Bakke*, 438 U.S. at 278 (Powell, J., announcing the judgment of the Court).

[66] *Id.* at 286; *id.* at 328 (Brennan, J., concurring in the judgment in part and dissenting in part) ("In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.").

[67] *Id.* at 287 (Powell, J., announcing the judgment of the Court).

[68] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.")

[69] The only other case to squarely present the question was Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). That case involved a claim brought by black and Hispanic police officers under Title VI, challenging the New York City police department's use of a written examination as a component of its entry-level hiring. *Id.* at 585 (White, J., announcing the judgment of the Court). The officers argued that the exams had an unjustifiably "discriminatory impact on the scores and pass-rates of blacks and Hispanics," violating Title VI—a claim which the Court rejected, albeit in a badly fractured judgment, splintered into six different opinions. *See id.* at 584; *see also* Alexander v. Choate, 469 U.S. 287, 293 (1985) (explaining that "[n]o opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI").

[70] 532 U.S. 275 (2001).

[71] *Id.* at 279.

[72] *Id.* at 280-81.

[73] *Arlington Heights*, 429 U.S. at 265 (discussing Washington v. Davis, 426 U.S. 229, 242 (1976), among other cases).

[74] *Sandoval*, 532 US. at 280-81.

[75] *Cf. Guardians*, 463 U.S. at 589 (White, J., announcing the judgment of the Court) ("The Court squarely held in *Lau v. Nichols* . . . that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities."); *cf. Lau*, 414 U.S. at 566

well: to the extent *Lau* rested on Section 601 directly—rather than HEW's regulations[76]—the majority in *Lau* had simply misread Title VI.[77] The only discrimination Title VI directly outlawed, according to the votes in *Bakke*, was intentional. As far as the *Sandoval* Court was concerned, to the extent *Lau* disagreed with *Bakke*, *Lau* had already been "rejected."[78]

Regulating "Discrimination" Under Title VI

In *Sandoval* the Court appeared to resolve the basic ambiguity in Title VI: the statute's central nondiscrimination mandate—Section 601—outlaws only intentional discrimination. But saying that much, the *Sandoval* majority also acknowledged, did not speak to whether policies with a disparate impact might still be barred by regulations issued under the rulemaking grant found in Section 602 of Title VI. Section 602, as noted, directs agencies to promulgate regulations "to effectuate" the antidiscrimination prohibition of Section 601 "consistent with achievement of the objectives of the statute."[79] And pursuant to that directive, all Cabinet-level federal funding agencies, along with many smaller agencies, have since issued rules and guidance under Title VI outlawing disparate impact discrimination.[80] As this section explains, however, *Sandoval* seems to have placed narrower limits on what funding agencies may redress through regulations under Section 602, arguably constraining them to redress in their rulemakings the same forms of intentional discrimination outlawed by Section 601.

Rulemaking Under Title VI: Section 602

In the courts, and especially the Supreme Court, much of the fight over Title VI has focused on definitions—what in general terms will count as unlawful "discrimination" under Section 601.[81]

(relying "solely" on Section 601 to rule for the plaintiffs).

[76] *See Lau*, 414 U.S. at 567-68 (discussing HEW's disparate impact regulation).

[77] *Sandoval*, 532 U.S. at 285 ("[W]e have since rejected *Lau*'s interpretation of [Section] 601 as reaching beyond intentional discrimination."); *cf. Lau*, 414 U.S. at 569-71 (Stewart, J., concurring in the result).

[78] *Sandoval*, 532 U.S. at 285.

[79] 42 U.S.C. § 2000d-1.

[80] 7 C.F.R. Part 15 (Agriculture); 15 C.F.R. Part 8 (Commerce); 32 C.F.R. Part 195 (Defense); 34 C.F.R. Part 100 (Education); 10 C.F.R. Part 1040 (Energy); 40 C.F.R. Part 7 (Environmental Protection Agency); 45 C.F.R. Part 80 (Health and Human Services); 6 C.F.R. Part 21 (Homeland Security); 24 C.F.R. Part 1 (Housing and Urban Development); 43 C.F.R. Part 17, Subpart A (Interior); 28 C.F.R. Part 42, Subpart C (Justice); 29 C.F.R. Part 31 (Labor); 22 C.F.R. Part 141 (1982) (State); 49 C.F.R. Part 21 (Transportation); 31 C.F.R. Part 22 (Treasury); 38 C.F.R. Part 18, Subpart A (Veterans Affairs). In addition to these Cabinet-level departments, a number of other agencies have also promulgated rules or, in some cases, guidance pursuant to Section 602 of Title VI. *See, e.g.*, 45 C.F.R. Part 1203 (Corporation for National and Community Service); 44 C.F.R. Part 7, Subpart A (FEMA); 41 C.F.R. Subpart 101-6.2 (General Services Administration); 14 C.F.R. Part 1250 (NASA); 13 C.F.R. Part 112 (Small Business Administration); 18 C.F.R. Part 1302 (Tennessee Valley Authority).

[81] Though definitional disputes have loomed large over the federal docket, questions about Title VI's enforcement have also figured prominently over the years, especially in the federal courts of appeals. Three issues have proved particularly salient: (1) whether private parties may sue to enforce Section 601, *see Sandoval*, 532 U.S. at 279-80 (concluding that they may, based on Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)); (2) whether and to what extent the federal courts may oversee funding agencies' enforcement of Title VI, *see* Women's Equity Action League v. Cavazos, 906 F.2d 742, 749 (D.C. Cir. 1990) (Ginsburg, J.) (holding that private parties may not "demand across-the-board judicial supervision of continuing federal agency enforcement" of Title VI and are instead limited to "situation-specific suits against [a] federal agency based on federal funding of a particular project or district"); and (3) whether private parties may sue to enforce regulations issued under Section 602, *see Sandoval*, 532 U.S. at 288-91 (finding "no evidence anywhere in the text [of Title VI] to suggest that Congress intended to create a private right to enforce regulations promulgated under [Section] 602").

But for the agencies charged with actually enforcing that mandate the primary concerns have tended to be more operational and programmatic: how to go about the business of reviewing and assessing particular practices under Title VI.[82] To address those concerns, funding agencies have therefore had to look beyond the bare substantive standard in Section 601 to their rulemaking authority under Section 602.

Section 602 is at once a source of authority and a command, "authoriz[ing] and direct[ing]" every federal funding agency to "effectuate" Section 601's nondiscrimination mandate "by issuing rules, regulations, or orders of general applicability consistent with" the "objectives" of its underlying funding authority.[83] Every Cabinet-level department, among many other smaller agencies, has since done so.[84] And given DOJ's unique coordinating authority over Title VI,[85] those funding agencies have generally followed the rules DOJ developed for HEW in 1964,[86] including its regulation outlawing disparate impact discrimination.[87]

Like the nondiscrimination provision in Section 601, the rulemaking authority provided by Section 602 was made deliberately broad.[88] That breadth has produced a further point of uncertainty about the statute: what limits are there to agencies' rulemaking authority under Section 602? The Supreme Court, for its part, has never squarely addressed that question, nor the validity of the disparate-impact regulations in particular.[89] And as explained below, the resulting ambiguity has yielded two contrasting views of what Section 602 will allow an agency to outlaw as unlawful "discrimination" under Title VI: (1) a largely deferential view that would give agencies broad leeway to issue "broad prophylactic rules"[90] reaching conduct beyond intentional

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[82] The first major steps taken under Title VI—perhaps unsurprisingly given its roots in *Brown v. Board of Education*—emerged with HEW's efforts to end the *de jure* segregation of public schools, especially in the South. Empowered by the infusion of new grant money appropriated by the Elementary and Secondary Education Act of 1965 (ESEA), HEW issued its first set of Title VI guidelines in April 1965, which made measurable progress toward desegregation a condition for receiving funds under ESEA. *See* Singleton v. Jackson Mun. Separate Sch. Dist., 348 F.2d 729, 730 (5th Cir. 1965) (describing the "close connection . . . between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy"); *see also* HALPERN, *supra* note 8, at 45-52 (discussing the background to HEW's 1965 Guidelines and their reception in the federal courts). Assistance provided under ESEA remains a major source of ED's enforcement authority today.

[83] 42 U.S.C. § 2000d-1.

[84] *See supra* note 80 (citing regulations of various agencies and departments).

[85] *See* Exec. Order No. 12250, *Leadership and Coordination of Nondiscrimination Laws*, reprinted at 45 Fed. Reg. 72, 995 (Nov. 4, 1980) (delegating presidential approval authority under Section 602 of Title VI to the Attorney General).

[86] Section 602 directs every funding agency to issue its own rules "effectuat[ing]" Section 601's nondiscrimination mandate. *See* 42 U.S.C. U.S.C. § 2000d-1. Once President Lyndon Johnson delegated his approval authority under Title VI to the Attorney General, however, DOJ took the lead in "work[ing] out a consistent, enforceable policy" under the statute, beginning with the regulations it crafted for HEW shortly after the law's passage. *Comment: Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 844-45 (1968). Those regulations later served as the "standard" by which DOJ reviewed and approved other agencies' regulations, a fact which explains their general uniformity to this day. *Id.*

[87] *See Guardians*, 463 U.S. at 619 (Marshall, J., dissenting) ("Following the initial promulgation of regulations adopting an impact standard, every Cabinet Department and about 40 federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact.").

[88] *See* Abernathy, *supra* note 12, at 276 (observing that the congressional drafters of Title VI "consciously adopted a compromise that delegated to agency regulators, subject to extraordinary Presidential oversight, the decision" of how to enforce its bar on "discrimination" in federally funded programs).

[89] *Cf. Sandoval*, 532 U.S. at 308 (Stevens, J., dissenting) (noting that "the question whether [Section] 601 applies to disparate-impact claims has never been analyzed by this Court on the merits").

[90] *Sandoval*, 532 U.S. at 305 (Stevens, J., dissenting).

discrimination; and (2) a more exacting view under which agencies would be limited to redressing provable cases of intentional discrimination.

The Limits to Section 602: Two Views

1. The Reasonable-Relation View

The earliest view of Title VI's rulemaking authority was also the most expansive. In his concurring opinion in *Lau*, Justice Stewart set out the basic theory: because Section 602 allows agencies to promulgate rules "effectuat[ing]" Section 601, HEW had the authority to enact any rule that broadly furthered the purpose of deterring "discrimination" in federally funded programs.[91] All the courts would require, as a formal matter, is that any rules issued under Section 602 be "reasonably related" to the antidiscriminatory ambitions of the statute.[92] Only two other Justices signed on to Justice Stewart's view in *Lau*, and it has never been adopted by a majority of the Court.[93] But it also has never been squarely rejected by the Court either.[94]

This more expansive view of Section 602 appears nevertheless to rest on two arguable bases. The first comes down to basic principles of administrative law. As Justice Stewart noted in *Lau*, the Court has generally accorded considerable latitude to agencies authoring rules pursuant to generic rulemaking provisions, on the assumption that Congress intended to defer more particular legislative decisions to their expert judgment.[95] And thus, when presented with such broad delegations—permitting an agency, for example, to make "such rules and regulations as may be necessary to carry out" another statutory mandate[96]—the courts have traditionally been inclined to defer "to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."[97]

Given its similarly expansive wording, Section 602 could be seen to embody much the same sort of broad rulemaking authority.[98] In such cases, as Justice Stewart argued, and as some Justices later agreed,[99] the test should be correspondingly lenient, asking only whether the agency's rule

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[91] Lau v. Nichols, 414 U.S. 563, 571 (Stewart, J., concurring).

[92] *Id.*

[93] *Cf. Sandoval*, 532 U.S. at 280-81 (noting that "five Justices in *Guardians* voiced the view" that "regulations promulgated under [Section] 602 of Title VI may proscribe activities that have a disparate impact on racial groups"); *see also* Alexander v. Choate, 469 U.S. 287, 294 (1985) (noting that "the Court held [in *Lau*] that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI this case").

[94] As explained below, a majority in *Sandoval* seemed to question whether Section 602 could reach discrimination not outlawed by Section 601, but they expressly declined to decide that issue there. *Sandoval*, 532 U.S. at 286 n.6.

[95] *Lau* , 414 U.S. at 571 (Stewart, J., concurring) (citing Mourning v. Family Publ'ns Serv., 411 U.S. 356 (1973)).

[96] *Mourning*, 411 U.S. at 369.

[97] *Id.* at 371-72. As Justice Stevens later pointed out, this reasoning has some resonance with the rule later developed under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), generally calling for the courts' to defer to agencies' rules when confronted with an ambiguity in their organic statutes. *See Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting) ("[W]hen the agencies charged with administering a broadly-worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling unless it presents an unreasonable construction of the statutory text"). For an overview of *Chevron* deference, *see* CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole (Sept. 19, 2017).

[98] 42 U.S.C. § 2000d-1.

[99] *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 643 (1983) (Stevens, J., dissenting) ("It is well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal

bears some reasonable relationship "to the purposes of the enabling legislation."[100] That leniency would arguably authorize an agency to issue "broad prophylactic rules" so long as they "realiz[e] the vision laid out in" Section 601—as arguably would a rule outlawing policies with racially disparate impacts.[101]

Apart from principles of administrative law, this more expansive view of Section 602 might also find support in a constitutional analogy, based on two of the Reconstruction Amendments. As Justice Stevens pointed out in his dissent in *Guardians Association v. Civil Service Commission*, the Court had at one time indicated—in a decision dating to "the dawn of [the last] century"—that "an administrative regulation's conformity to statutory authority was to be measured by the same standard as a statute's conformity to constitutional authority."[102] And as it happened, only a few years before *Guardians*, the Court had read the Fifteenth Amendment, despite "only prohibit[ing] purposeful racial discrimination in voting," to allow "Congress [to] implement that prohibition by banning voting practices that are discriminatory in effect."[103] Congress could do that, according to Justice Stevens, because the Fifteenth Amendment—much like Title VI—supplements its prohibition against racially discriminatory voting policies[104] with a provision empowering Congress "to enforce" that prohibition "by appropriate legislation."[105] Given the structural similarity between the amendment and Title VI, Justice Stevens saw no reason why Section 602 should give federal agencies any less authority than the Fifteenth Amendment offers Congress—including authority to outlaw policies with discriminatory effects.[106]

Justice Steven's view in *Guardians*, like Justice Stewart's in *Lau*, has never commanded a majority from the Court. That analogy may also have lost some force more recently, following the Court's arguably more restrictive decisions under the Fifteenth Amendment.[107] But the Court has also never expressly ruled out the analogy, and it appears to be at least consistent with the way the federal courts have read another of the Reconstruction Amendments—the Thirteenth, outlawing

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statute that governs completely private conduct, those regulations have the force of law so long as they are 'reasonably related to the purposes of the enabling legislation.'"); *id.* at 592-93 (White, J., announcing judgment of the Court) (apparently agreeing with Justice Stewart in *Lau*).

[100] *Lau*, 414 U.S. at 571 (Stewart, J., concurring) (quoting Thorpe v. Hous. Auth. of the City of Durham, 393 U.S. 268, 280-281 (1969)).

[101] *Sandoval*, 532 U.S. at 305 (Stevens, J., dissenting).

[102] *Guardians*, 463 U.S. at 644 (Stevens, J., dissenting) (discussing Boske v. Comingore, 177 U.S. 459, 470 (1900)).

[103] *Id.*

[104] U.S. CONST. amend. XV, § 1.

[105] *Id.* at § 2.

[106] *Cf. Sandoval*, 532 U.S. at 309-10 (Stevens, J., dissenting) (suggesting that under the "well-established principle of administrative law" in *Chevron* that the Court should "read [Section] 602 as granting the federal agencies responsible for distributing federal funds the authority to issue regulations interpreting [Section] 601 on the assumption that their construction will—if reasonable—be incorporated into our understanding of [Section] 601's meaning"). This analogy presumes, moreover, that the standard under the Thirteenth Amendment will remain what the Court said it was in *Jones v. Alfred H. Mayer Co*. In recent years, however, a number of parties have contested the vitality of *Jones* on that point, arguing that the deferential standard in that case has been eroded by the Court's more recent decisions under the Fourteenth and Fifteenth Amendments. *See, e.g.*, United States v. Metcalf, 881 F.3d 641 (8th Cir. 2018) (rejecting a challenge to the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 on this basis); United States v. Cannon, 750 F.3d 492 (5th Cir. 2014) (same); United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), *cert. denied*, 134 S.Ct. 1538 (2014) (same).

[107] *See* United States v. Cannon, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., specially concurring) (noting that in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court appears to have restricted Congress's power to enact remedial legislation under the Fifteenth Amendment, by requiring it to justify any such legislation with evidence of "current needs" "in our current society").

slavery and involuntary servitude.[108] Whether that analogy would find favor among the Justices today seems at best uncertain, however, partly for the reasons discussed below.

2. The View from *Sandoval*

In opposition to the early expansive reading of Section 602, a number of other Justices—and arguably a majority in *Sandoval*—have suggested that regulations under Section 602 must instead fit more closely with the particular purpose of Section 601: ridding federally funded programs of intentional discrimination. *Sandoval*, given its posture, did not squarely address disparate impact rules under Title VI; that case concerned the right of private parties to sue under a Title VI disparate impact regulation, not the validity of the underlying regulation itself.[109] But in a suggestive footnote in his opinion for the majority, Justice Scalia expressed some doubt that those regulations could be squared with the majority's view that Section 601 bars only intentional discrimination.[110]

The majority's concern fastened less on the breadth of Section 602 than on the narrowness of Section 601. It seemed "strange," Justice Scalia explained, that a rule prohibiting disparate impact could "effectuate" the purpose of Section 601 when that provision "permits the very behavior that the regulations forbid."[111] Or as Justice O'Connor had put the same point in her concurrence in *Guardians*, also involving a disparate impact claim under Title VI, it was "difficult to fathom how the Court could uphold" regulations outlawing discriminatory *effects* when, to do so, they would have to "go well *beyond*" Title VI's purpose of proscribing *intentional* discrimination.[112]

The majority in *Sandoval*, like Justice O'Connor in *Guardians*, seemed to signal their dissatisfaction with the "reasonably related" test endorsed by Justice Stewart's concurrence in *Lau*. Neither, however, proposed a test to replace it. To do so, however, they may well have turned to a constitutional analogy of their own—based not on the Fifteenth Amendment but the Fourteenth.

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[108] Like Title VI, the Thirteenth Amendment also consists of two basic provisions: a general prohibition—found in Section 1 of the amendment—outlawing "slavery" and "involuntary servitude" "within the United States," and a separate provision—Section 2—granting Congress "power to enforce" Section 1 "by appropriate legislation." U.S. CONST. amend. XIII. As the Court has read those provisions, they not only "clothe[] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States," but also with the power to "rationally determine" what those forbidden "badges" or "incidents" of slavery are. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)). It is worth noting, however, that a number of parties have contested the vitality of *Jones* on this point, and pressed for a more constrained view of Congress's remedial power under the Thirteenth Amendment, arguably in line with the Court's more recent decisions under the Fourteenth and Fifteenth Amendments. *See, e.g.*, United States v. Metcalf, 881 F.3d 641 (8th Cir. 2018) (rejecting a challenge to the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 on this basis); United States v. Cannon, 750 F.3d 492 (5th Cir. 2014) (same); United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), *cert. denied*, 134 S.Ct. 1538 (2014) (same).

[109] *See Sandoval*, 532 U.S. at 278, 281 ("We must assume for purposes of deciding this case that regulations promulgated under [Section] 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [Section] 601.").

[110] *Id*. at 280-81.

[111] *Id.* at 286 n.6.

[112] *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring in the judgment) (emphasis in original). Nor did Justice O'Connor think those regulations could be sustained even under the more lenient "reasonably related" test. As she explained, "'Reasonably related to' simply cannot mean inconsistent with." *Id.* at 614. And yet that, she believed, "would be the effect of upholding the administrative regulations" outlawing disparate impact, when "the expressed will of Congress is that federal funds recipients are prohibited only from purposefully discriminating on the grounds of" race and national origin. *Id.*

Under the Fourteenth Amendment, the Court has held that Congress may legislatively *enforce* that amendment's guarantees of equal protection and due process of law but in doing so may not *redefine* what would count as violating either.[113] By that analogy, an agency could then clearly seek to enforce Section 601's bar against intentional discrimination by enacting prophylactic regulation "congruent and proportional" to redressing instances of *different treatment*.[114] But the agency could not substantively *amplify* that prohibition by adding to the types of discrimination outlawed by Section 601—as a disparate impact rule arguably would, given the Court's view in *Sandoval* that Section 601 does not bar a policy simply for having discriminatory effects.[115]

Unresolved Questions About Disparate Impact Under Section 602

The Court has yet to squarely resolve which of these views of agencies' rulemaking authority under Section 602 is the right one. Regardless of which they choose, however, an agency arguably may still be able to defend its Title VI disparate impact regulations, depending on how it styles its enforcement under that regulation.

Even if Section 602 is construed narrowly to permit only regulations that address intentional discrimination, it might still be argued that Title VI allows agencies to promulgate regulations addressing disparate impact in at least some circumstances. As Justice Stevens pointed out dissenting in *Sandoval*, one way of looking at Title VI's disparate impact regulations is as an *indirect* rule against intentional discrimination—only intentional discrimination in a "more subtle form[]," masked by an "ostensibly race-neutral" policy but with "the predictable and perhaps intended consequence of materially benefitting some races at the expense of others."[116] Styled that way, an agency might be able to defend its disparate impact rules as a means of "counteract[ing] unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[117] In that sense, those rules would still be *directed* at "uncovering discriminatory intent," even if only in subtler forms, such as "covert and illicit stereotyping."[118] And, for that reason, those rules would arguably also comply with *Sandoval*'s more exacting standard for Section 602 regulations, despite their formal focus on racial disparities.

Even if styled in this way, however, a disparate impact rule under Title VI would likely face further constraints. As the Court recently explained in the context of the Fair Housing Act, an agency relying on a disparate impact theory will still need to "point to a defendant's policy or policies causing" the "statistical disparity" at issue—that the policy actually had racially discriminatory *effects*.[119] And to make that showing, the agency may also need to satisfy a "robust causality requirement," to "ensure[] that [r]acial imbalance [] does not, without more, establish a prima facie case of disparate impact," protecting "defendants from being held liable for racial disparities they did not create."[120] What such a causality requirement might entail as a practical

[113] City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997); *cf.* Gail Heriot and Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL. 472, 533-44 (2018) (sketching an argument along these lines).

[114] *Cf. id.* at 520 (noting that, under the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

[115] *See supra* note 78 and accompanying text.

[116] *Sandoval*, 532 U.S. at 306 (Stevens, J., dissenting).

[117] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

[118] *Id.*

[119] *Id.* at 2523. (explaining this requirement for disparate impact liability under the Fair Housing Act).

[120] *Id.* (internal quotation marks omitted).

matter seems unclear at this point.[121] Nevertheless, recasting the argument over Section 602 in these terms might help sharpen some of the debate around Title VI, by redirecting the discussion away from the abstract concerns about rulemaking authority to the more basic and concrete issue of what disparate impact liability may—or may not—involve.

Enforcing Title VI at School: The U.S. Department of Education's Office for Civil Rights

Although Title VI applies to funds distributed by every federal agency,[122] much of the doctrine under the statute has been shaped by its use in the public schools.[123] That doctrinal story has accordingly centered on one agency in particular: the Office for Civil Rights (OCR), originally housed in HEW but today located in the U.S. Department of Education (ED).[124] As the agency primarily responsible for enforcing Title VI in the public schools, as well as nearly all colleges and universities,[125] OCR handles every year a large volume and variety of claims alleging race and national origin discrimination.[126] Some of the most common types of those claims are

[121] The U.S. Department of Housing and Urban Development has issued an advance notice of proposed rulemaking to address this very question under the Fair Housing Act. *See* U.S. Dep't of Hous. and Urban Dev., *Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 83 Fed. Reg. 28560, 28561 (June 20, 2018) (seeking public comment as to whether "the Disparate Impact Rule [should] be amended to clarify the causality standard for stating a prima facie case under *Inclusive Communities* and other Supreme Court rulings").

[122] The only exceptions are funds disbursed pursuant to "a contract of insurance or guaranty." *See* 42 U.S.C. §§ 2000d-1, 2000d-4. Thus, for example, to the extent that a bank "receives federal financial assistance in the form of deposit insurance from the" Federal Deposit Insurance Corporation, it would likely not be bound by Title VI's nondiscrimination mandate. Marshall v. Webster Bank, N.A., 2011 U.S. Dist. LEXIS 5665, at *20-21 (D.Conn. Jan. 20, 2011) (dismissing a race discrimination complaint on this basis because the alleged "federal assistance [was] in the form of a guaranty or contract for insurance").

[123] *See generally* HALPERN, *supra* note 8; *see also* 110 Cong. Rec. 7068 (1964) (statement of Sen. Ribicoff) (observing that "[u]nquestionably, more programs under HEW would be affected than all other programs put together" by Title VI).

[124] *See* HALPERN, *supra* note 8, at 106, 186-87 (describing the organization of OCR under HEW and its later relocation as a part of the newly created Department of Education). ED has played such a pivotal role in Title VI's history that at least one federal court of appeals has suggested that the department's interpretation of the statute merits *Chevron* deference. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998) ("The Department of Education is the agency charged by Congress with enforcing Title VI. As such, its interpretation is entitled to a high degree of deference by the courts so long as it does not conflict with a clearly expressed congressional intent and it is reasonable.") Whether *Chevron* deference really applies to Title VI, however, is less clear. *Cf.* Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (explaining that for "statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency's particular interpretation'); *see also* FLRA v. Dep't of the Treasury, Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989) (declining to defer to an agency's reading of the Privacy Act and the Freedom of Information Act, because it was "not charged with a special duty to interpret" them).

[125] *See* U.S. Dep't of Educ., Office for Civil Rights, *Race and National Origin Discrimination: Frequently Asked Questions*, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html ("All public school districts are covered by Title VI because they receive some federal financial assistance. All public colleges and universities and virtually all private colleges and universities are covered because they receive such assistance by participating in federal student aid programs.").

[126] As of March 1, 2019, OCR listed more than 1,500 pending Title VI cases currently under investigation, some dating as far back as 2005. *See* U.S. Dep't of Educ., Office for Civil Rights, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tvi.html.

discussed below, beginning first with a brief overview of how ED, as a matter of policy, processes the complaints it receives under Title VI.[127]

OCR's Enforcement of Title VI

OCR primarily enforces Title VI through its investigation and resolution of complaints.[128] To guide its review of those complaints, OCR has published a detailed manual of procedures—known as the Case Processing Manual (CPM)—by which it receives, analyzes, and disposes of allegations under Title VI, among other statutes within its jurisdiction.[129] That guidance document, described below, divides OCR's enforcement into five distinct phases:

Jurisdictional Evaluation. At the first phase of its review, OCR evaluates an allegation for its basic sufficiency—conducting an essentially jurisdictional analysis. As a part of that evaluation, OCR first examines whether an allegation has enough information in it, of the right kind.[130] If so, OCR has to establish jurisdiction over both the subject matter of the complaint as well as the entity complained of. Thus, the allegation must state enough facts from which to infer race or national origin discrimination (subject matter jurisdiction),[131] and the complainant must allege discrimination by a program or activity that receives ED's financial assistance (personal jurisdiction).[132] And the allegation must also be timely: a complaint under Title VI generally must be filed with OCR within 180 calendar days of the date when the discrimination allegedly occurred.[133] Insufficiency on any of these points may result in an allegation's dismissal without OCR's further investigation or review.[134]

After determining that it has jurisdiction over an allegation and finds it otherwise suitable for review, OCR will formally open its investigation, beginning with the issuance of informational

[127] As noted earlier, this report does not discuss the two other mechanisms available for enforcing Title VI in the schools: (1) a lawsuit filed by a private party under Title VI's implied right of action or (2) a suit brought in federal court by DOJ, following a referral from OCR. For OCR's referral procedures, *see* U.S. Dep't of Educ., Office for Civil Rights, *Case Processing Manual* [hereafter CPM], at 23-24 (Nov. 19, 2018).

[128] In addition to its investigations of complaints, OCR is also required by regulation to conduct "compliance reviews" "from time to time" to assess whether "the practices of recipients . . . are complying" with Title VI. 34 CFR § 100.7(a). OCR may also conduct so-called "directed investigations" whenever "information indicates a possible failure to comply with the laws and regulations enforced by OCR, the matter warrants attention and the compliance concern is not otherwise being addressed through OCR's complaint, compliance review or technical assistance activities." CPM, *supra* note 127, at 22 (citing 34 CFR § 100.7(c)). Information about how frequently these types of review have resulted in investigations, resolutions, and enforcement actions does not appear to be publicly available.

[129] OCR relies on the CPM when handling complaints raised under all of the statutes it enforces, including Title IX of the Education Amendments of 1972, dealing with sex discrimination, and Section 504 of the Rehabilitation Act, addressing disability discrimination.

[130] Thus, for example, an allegation communicated only orally, or provided anonymously in correspondence, may be dismissed without further processing. CPM, *supra* note 127, at 4.

[131] *Id.* at 5.

[132] *Id.* at 6. Under several delegations arrangements ED also has some authority to investigate complaints involving programs or institutions that receive federal funds awarded by other federal agencies. *Id.* OCR has acknowledged, moreover, that statistical evidence will not make a complaint actionable on its own, but that evidence may support an investigation when presented with other facts suggesting disparate treatment. CPM at 6; *accord* Everett v. Pitt Cty. Bd. of Educ., 788 F.3d 132, 149 n.11 (4th Cir. 2015) (finding no abuse of discretion where a district court "refused to consider disparity in student discipline," "because there was not sufficient evidence in the record demonstrating that the school district target[ed] black students for discipline or otherwise treat[ed] them differently in disciplinary matters").

[133] CPM, *supra* note 127, at 8.

[134] OCR does, however, allow appeals from some dismissals. *See id.* at 21.

letters to both the complainant and recipient.[135] Those letters primarily serve to notify the parties of the allegations OCR intends to investigate and the basis for its jurisdiction, including appropriate statutory and regulatory authority.[136] The letters also apprise the parties of OCR's role in the investigation—as a "neutral fact-finder"—as well as the complainant's right to bring suit in federal court regardless of how OCR administratively resolves the complaint.[137]

Facilitated Resolution. As a part of its opening letter, OCR will also inform the parties of its voluntary resolution process, called a "Facilitated Resolution Between the Parties."[138] Under that process, OCR may offer to serve as "an impartial, confidential facilitator between the parties," to assist them in informally resolving the allegations before OCR formally makes any findings of its own.[139] During those discussions OCR may accordingly suspend its investigation for up to 30 calendar days to allow negotiations to proceed in good faith; it will reinstate its investigation, however, should the parties fail to reach an agreement within that time.[140] In no case, though, will OCR approve or otherwise endorse an agreement reached under this process, nor monitor a recipient's compliance with it.[141]

Investigation. If the parties cannot voluntarily resolve the complaint through facilitated negotiation, OCR will proceed to investigate.[142] At any time during that investigation—which may involve OCR's review of school data, interviews with students and staff, or other measures—the recipient may still choose to negotiate a voluntary resolution with OCR, and recent resolutions suggest that this is relatively common.[143] In such cases, OCR will issue a resolution letter memorializing the allegations and its investigation, along with the agreement resolving them.[144] In these cases, however, OCR will generally not make any findings on the underlying allegations.

In the event the recipient declines to negotiate a voluntary resolution, at the completion of its investigation OCR will issue findings on each allegation, resolving them by a preponderance of the evidence. In each case OCR will therefore explain why the evidence likelier than not supports the finding of a violation ("non-compliance determination") or else explain why it does not ("insufficient evidence").[145] In cases of non-compliance OCR will also propose a resolution agreement, outlining the steps for the recipient to take to resolve the allegations in question and ensure its future compliance with Title VI.[146] A recipient generally has 90 days in which to consider and negotiate the terms of a final agreement with OCR.[147] If the recipient and OCR fail to reach an agreement within that period, OCR will advise the recipient, by "Letter of Impending

[135] *Id.* at 12.

[136] *Id.* at 13.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 15.

[143] *Id.* at 15-16.

[144] *Id.* at 19-20.

[145] *Id.* at 17-18, 19-20. OCR also allows for appeals based on a finding of insufficient evidence. *See id.* at 21.

[146] *Id.* at 19-20.

[147] *Id.* at 18.

Enforcement Action," that it intends to proceed to enforcement should the parties fail to reach an agreement in short order.[148]

Monitoring. Once the sides have reached an acceptable resolution agreement, OCR will monitor, on an ongoing basis, the recipient's compliance with its terms. To do so, recipients generally must agree to certain reporting requirements, ensuring OCR access to "data and other information in a timely manner" by which it can assure the recipient's compliance.[149] OCR also reserves the right to "visit the recipient, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the recipient has fulfilled the terms and obligations of the resolution agreement."[150] In some instances OCR may also choose to amend or altogether end a resolution agreement "when it learns that circumstances have arisen that substantially change, fully resolve, or render moot, some or all of the compliance concerns that were addressed by the resolution agreement."[151]

Enforcement Action. Where OCR cannot negotiate or secure compliance with an acceptable resolution agreement, it may resort to either of the two enforcement mechanisms allowed by Title VI: (1) an administrative proceeding resulting in the termination or refusal of federal funds; or (2) the referral of a complaint to DOJ for litigation.[152] Fund termination, as noted, was envisioned as the primary mechanism for enforcing Title VI, and was once aggressively used by OCR to enforce the desegregation of southern schools.[153] Over the past several Administrations its use appears to have waned significantly,[154] perhaps owing to an increased reliance on resolution agreements, voluntary or otherwise, to achieve compliance.

Major Areas of Administrative Enforcement

OCR's administrative docket for Title VI is considerable, covering a wide variety of allegations involving race and national origin discrimination. Among the issues raised in those complaints, three appear especially common: different treatment, retaliation, and racial harassment. In 2016, for instance, OCR reported receiving some 2,400 total complaints raising issues under 17 general categories of Title VI violations.[155] Of those, 976 alleged some form of different treatment,[156]

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[148] Depending on the state of their negotiations the window for reaching an agreement may be as short as 10 calendar days, or as long as 30. *Id.* at 20.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 23.

[152] *Id.* at 23-24; *see also* 42 U.S.C. § 2000d-1.

[153] *See* HALPERN, *supra* note 8, at 294 (noting that "during the Johnson era . . . fund termination [was] used with regularity to combat racial discrimination in schools").

[154] OCR does not appear to publish any data on its use of fund termination proceedings. A CRS search of Westlaw and Lexis databases of OCR administrative proceedings failed to uncover any termination orders issued under Title VI in the last 25 years. *Cf.* HALPERN, *supra* note 8, at 294 (noting that "[t]he termination of federal funds is a most difficult and awkward sanction to invoke," and that, as of 1995, that sanction had "been used in no more than a handful of cases in the [preceding] two decades").

[155] U.S. Dep't of Educ., Office for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education* [2016 Report], at 17 (2016). As of this writing the 2016 Report remains the most recent that OCR has made publicly available on its website.

[156] As OCR styles this category, it includes allegations that a recipient has excluded individuals, or denied them some benefit, based on their race. *See* 2016 Report at 17; *see also* 34 C.F.R. § 100.3(a) (ED's regulation under Title VI disallowing any person to be "excluded from participation in, or denied the benefits of ... any program" "on the ground of race, color, or national origin").

while another 569 complaints alleged race-based retaliation[157] and a further 548 made claims of racial harassment.[158] In 2015, OCR reported largely similar figures as well.[159] The next section examines two recent examples of how OCR reviews complaints under Title VI, one involving a more typical allegation of indirect "disparate treatment," and another posing a less typical allegation of direct discrimination.

Different Treatment: Two Illustrations

The single largest category of complaints OCR receives involves allegations of "disparate treatment."[160] That category covers a wide variety of conduct, covering any complaint that a recipient has singled out an individual or individuals by race for adverse treatment. Of those complaints two types are especially common: "intentionally disciplining students differently based on race"[161] or else excluding them in some way.[162] As noted, OCR will seek to confirm those allegations in either of two ways: either directly, by looking to evidence of overt discriminatory intent, or else indirectly, by establishing that any "apparent differences in the treatment of similarly-situated students of different races" have no legitimate, nondiscriminatory basis.[163] And because Title VI has been read to overlap with the Equal Protection Clause,[164] even where OCR believes a recipient has treated individuals differently by race, it still has to assess whether that treatment was a "narrowly tailored" means of "meet[ing] a compelling governmental interest."[165]

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[157] According to OCR, retaliation occurs wherever a recipient "intimidate[s], threaten[s], coerce[s], or discriminate[s] against any individual for the purpose of interfering with any right or privilege secured by [S]ection 601" or ED's implementing regulations, or because an individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under" the same regulations. 34 C.F.R. 100.7(e).

[158] 2016 Report, *supra* note 155, at 17. Racial harassment involves allegations of "intimidation or abusive behavior toward a student based on race," whether by a peer or teacher, "that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program." *See* U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Platteville Public Schools, at 2 (Nov. 20, 2013). Under that theory, OCR holds recipient schools "responsible for taking prompt and effective action to stop racial harassment and prevent its recurrence." *Id.* at 3. In so doing OCR appears not to follow the prevailing rule in private actions under Title VI, holding a school liable only for teacher- or peer-on-student racial harassment only where the school has acted with "deliberate indifference" to it. *See* Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 273 (3d Cir. 2014) (collecting cases to this effect under Title VI). Meanwhile, though the same "deliberate indifference" standard applies to private suits under Title IX for sexual harassment, ED has signaled that it intends to enforce the "deliberate indifference" standard for sexual harassment claims as a part of its new package of regulations under Title IX.

[159] *See* U.S. Dep't of Educ., Office for Civil Rights, *Delivering Justice: Report to the President and Secretary of Education*, at 18 (2015) (reporting 849 complaints of different treatment, 561 of retaliation, and 452 of racial harassment).

[160] *See supra* note 154 and accompanying text.

[161] U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Minneapolis Public Schools, at 2 (Nov. 20, 2014).

[162] *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Oak Park and River Forest High School District 200 (Sept. 29, 2015) (addressing complaint of racially exclusive assembly).

[163] U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Platteville Public Schools [Platteville Letter], at 2 (Nov. 20, 2013).

[164] Alexander v. Sandoval, 532 U.S. 280-81 (2001).

[165] U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Oak Park and River Forest High School District 200, at 2 (Sept. 29, 2015).

Disparate Treatment: Circumstantial Evidence

In one recent example, OCR received a complaint from an African American student, identified only as "Student A," alleging that he had been disciplined more severely than his white classmates, in violation of Title VI.[166] As in many disciplinary cases, the student did not produce direct evidence of discrimination. And so OCR instead looked to whether there were any "apparent differences" in the way the school treated Student A from the way it handled "similarly-situated students of different races," and if so, whether those differences had a legitimate, nondiscriminatory basis.[167]

In the course of its investigation, OCR uncovered what it believed were four apparent differences in the way the school treated Student A. First, the school had repeatedly recorded disciplinary warnings it gave Student A, but "did not consistently record warnings given to similarly situated white students."[168] Second, even though "the Principal employed an informal progressive discipline policy" that was applied to Student A, "increasing the severity of the disciplinary consequence after each incident," a "similarly situated white student who had a more extensive disciplinary history, did not face increasingly severe disciplinary consequences."[169] Third, the evidence suggested that the school's principal "responded more favorably" to allegations made by a white student's mother than Student A's mother "that other students were teasing him to entice him to engage in misconduct."[170] And, finally, Student A had pointed to a specific case where a white male student had been treated more leniently for assaulting another student.[171]

The school, for its part, sought to defend some of those decisions by pointing to differences in the students' misconduct.[172] OCR, however, disagreed: according to its investigators, the students' files bore out no meaningful differences besides the students' race.[173] Nor did OCR accept the school's admission that in the other cases it had simply made a mistake: the quantity, frequency, and variety of those mistakes, OCR found, "established a pattern of unjustified, discriminatory treatment on the basis of race in the discipline administered to Student A."[174] That was enough, OCR concluded, to violate Title VI and its implementing regulations.[175]

Disparate Treatment: Direct Evidence

Another recent case, also involving an allegation of disparate treatment, illustrates how OCR reads Title VI against the backdrop of the Equal Protection Clause. That case arose in the wake of events in Ferguson, MO, in 2014, following the fatal police shooting of an 18-year-old African American that provoked widespread protests in Ferguson and elsewhere.[176] In response to the events there, an Illinois public school had decided to convene a special "Black Lives Matter"

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[166] Platteville Letter, *supra* note 163, at 11.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.* at 12.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* (citing 34 C.F.R. § 100.3(a) and 34 C.F.R. §100.3(b)(1)(i)–(iv)).

[176] U.S. Dep't of Educ., Office for Civil Rights to Superintendent, Oak Park and River Forest High School District 200 [Oak Park Letter], at 3 (Sept. 29, 2015).

assembly, so that "black students [could] express their frustrations" in "a comfortable forum."[177] To do that, however, the school chose to "limit the assembly to participation by students who self-identified as black."[178] That decision, as the school district later admitted, clearly amounted to different treatment—excluding some students while admitting others solely based on whether they identified as African American.[179] That finding alone, though, did not decide the school's liability under Title VI. Instead, OCR had to go on to examine whether the school's decision would satisfy *constitutional* requirements—whether the school had an "interest in holding a racially exclusive assembly [that] was compelling and that the means [it] used [would] survive strict scrutiny."[180] Looking to relevant constitutional precedent,[181] OCR ultimately sided with the complainant: even though the school did have a compelling interest in holding a racially exclusive assembly, it had nevertheless failed "to assess fully whether there were workable race-neutral alternatives" or to "conduct a flexible and individualized review of potential participants."[182] The school had therefore violated Title VI, according to OCR. And to resume compliance, the school district agreed not to allow similarly exclusive assemblies again.[183]

Considerations for Congress

Title VI has gone largely unchanged in the 50 years since it became law. As this report has explained, the debates over the statute have therefore centered on how the courts have read its two central provisions—Sections 601 and 602—and how federal agencies have gone about enforcing them. But Congress has the ultimate say over how Title VI works—rooted not only in its legislative power but in its authority to oversee the statute's use by federal agencies. As this section explains, recently two issues over the statute have drawn particular congressional interest: the viability of disparate impact regulations under Section 602, and the inclusion of new protected classes in Section 601.

As explained earlier, with its 2001 decision in *Alexander v. Sandoval*, the Court seemed to cast doubt on the future of *all* disparate impact liability under Title VI as currently written, even when liability was premised on regulations issued under Section 602. In the last several months, following the release of a widely remarked report on school safety, the Trump Administration signaled that it may be rethinking altogether Title VI regulations that reach beyond intentional discrimination to address policies with a racially disparate impact.[184] Given the continuing debate about the relation of Title VI's central provisions, Congress could opt to put down its own marker, by definitively clarifying Title VI's scope in either of two ways. On the one hand, Congress could make clear that Section 601 indeed prohibits only intentional discrimination, and that any rules under Section 602 may not find a recipient liable for discrimination absent proof of

[177] *Id.*

[178] *Id.*

[179] *Id.* ("[T]he District acknowledged holding a racially exclusive program—an assembly entitled "*Black Lives Matter*"—at which District officials turned away students of other races.").

[180] *Id.* at 3-4.

[181] *Id.* (applying Grutter v. Bollinger, 539 U.S. 306 (2003)). For a more extensive discussion of the Court's precedent under the Equal Protection Clause in this area, see CRS Report R45481, *"Affirmative Action" and Equal Protection in Higher Education*, by Christine J. Back and JD S. Hsin, at 21-38 (Jan. 31, 2019).

[182] Oak Park Letter, *supra* note 176, at 3.

[183] *Id.* at 4.

[184] For a more extensive discussion of that report and its implications for Title VI, *see* CRS Legal Sidebar LSB10254, *Is the Trump Administration Rethinking Title VI?*, by JD S. Hsin (Feb. 4, 2019).

discriminatory intent. Congress, on the other hand, could expressly endorse disparate impact under Title VI by, for example, grafting that standard onto Section 601, as it has done in Title VII of the 1964 Civil Rights Act.[185] That addition would unambiguously allow funding agencies to investigate policies and practices under Title VI based on their discriminatory effects, regardless of the underlying intent.

In addition to clarifying the types of discrimination Title VI outlaws, Congress could also choose to revise the classes of individuals who come within its protection. One recent proposal, for example, would amend Section 601 to include "sex (including sexual orientation and gender identity)" along with race, color, and national origin among its protected classes.[186] Although that or a similar amendment would clearly expand Title VI's coverage, its effects will likely hinge on how the courts choose to interpret Section 601 in light of such additions. Though a complete analysis lies beyond the scope of this report, at least two readings seem arguable.

On the one hand, the courts could continue to read Section 601 to "enact[] constitutional principles,"[187] in which case they would presumably review claims based on sex discrimination under a heightened standard of review,[188] while in the case of gender identity, possibly only for basic rationality.[189] On the other hand, to the extent that an amendment introduces a statutory protection for a class of individuals not currently recognized by the Court as a constitutionally "suspect classification," that addition, especially if buttressed by supporting legislative history, could suggest that Congress had decided to amend the reach of Title VI altogether, to "independently proscribe conduct that the Constitution does not."[190]

Conclusion

In the 50 years since becoming law Title VI has played a central role in addressing racial discrimination in the nation's schools. Title VI provides that protection in a unique way: by making the promise of nondiscrimination a condition for any program or institution that receives federal financial support. For much of its history, the debates over Title VI have fastened on two basic ambiguities in the statute: the kind of "discrimination" Title VI was meant to outlaw and the types of rules a funding agency could issue to effectuate that prohibition. The Supreme Court

[185] 42 U.S.C. § 2000e-2(k)(1)(A).

[186] Equality Act, H.R. 5, 116th Congress, § 6.

[187] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 285 (1978) (Powell, J., announcing judgment of the Court).

[188] Arguably, as a sex-based classification, a court would apply an intermediate level of review. *See* United States v. Virginia, 518 U.S. 515, 524 (1996) ("[A] party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification," by showing "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives"). At least one federal court of appeals, however, has suggested that where two nondiscrimination provisions "use the same language, they should, as a matter of statutory interpretation, be read to require the same levels of protection and equality." Jeldness v. Pearce, 30 F.3d 1220, 1227-28 (9th Cir. 1994). There the court consequently reviewed a gender discrimination claim under Title IX of the Education Amendments of 1972 just as it would have analyzed a claim of race discrimination under Title VI—that is, under strict scrutiny. *See id.*

[189] *See* Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (concluding that "neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause" and accordingly reviewing a claim of discrimination based on gender identity under rational basis); *but see* Carcano v. Cooper, 350 F. Supp. 3d 388, 421 (M.D.N.C. 2018) ("There has been considerable debate at the district and circuit court levels about the applicable standard of scrutiny for classifications based on transgender status, with the majority of courts to have considered the question in recent years finding that 'heightened' or 'intermediate' scrutiny applies.").

[190] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 417 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

appears to have definitively resolved the first of those ambiguities: because Title VI simply "enacts constitutional principles," as currently written, it prohibits *only* intentional discrimination. And on that basis the Court has suggested, but not definitively ruled on, how it might resolve the second ambiguity as well: to effectuate Title VI's purpose, an agency may outlaw only policies resulting from a provable discriminatory intent, not simply having a racially discriminatory effect.

Whether the Court will turn that suggestion into a holding remains to be seen. Until then, however, federal agencies like OCR will likely continue to enforce Title VI consistent with constitutional standards that the Court has since read into the statute. In OCR's case, that enforcement work is already considerable, involving thousands of complaints every year culminating in significant resolutions across a wide range of schools and institutions of higher education. And in the background remains ED's ultimate authority under Title VI—to withdraw its financial support from any program or institution that refuses to comply with the statute's command that all individuals be treated equally, regardless of their race.

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