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The Civil Rights Act of 1964: An Overview

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SUMMARY

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The Civil Rights Act of 1964: An Overview

The Civil Rights Act of 1964, comprised of eleven titles and numerous sections, has been called the "most comprehensive undertaking" to prevent and address discrimination in a wide range of contexts.

From discriminatory voter registration practices to racial segregation in business establishments and public schools, the Civil Rights Act of 1964 enacted new prohibitions and protections targeting discriminatory conduct in different forms and diverse contexts. The act not only created new statutory rights, but also designed distinct methods of enforcing these rights, and established federal entities responsible for the enforcement or facilitation of these protections as well. "In our time," the Supreme Court has stated, "few pieces of federal legislation rank in significance."

Although the titles address discrimination based on race, color, religion, national origin, or sex, the Civil Rights Act of 1964 was principally a legislative response to ongoing and pervasive conditions of racial segregation and discrimination in the United States. Such conditions included the enforced exclusion of black citizens from a host of services and establishments affecting much of daily life: public libraries, public parks and recreation systems, public schools and colleges, restaurants, hotels, businesses, performance halls, hospitals and medical facilities, and any other setting designated as "white-only." Legislative history reflects that Titles II, III, IV, and VI, for example, were enacted to address these forms of race-based segregation and discrimination.

Though its titles share a thematic focus on discrimination, the 1964 Act—from a legal perspective—is perhaps best understood as a series of unique and *distinct* statutes. The titles vary in terms of the actions and practices they prohibit, whether and how an individual may seek relief for the violation of a title's requirements, and available remedies for particular violations. Relatedly, where provisions of a title are enforced in federal courts, they have given rise to distinct lines of case law, questions of interpretation, and application. Federal courts have also interpreted the titles as having been enacted on different constitutional bases—the Commerce Clause, the Spending Clause, and the Fourteenth and Fifteenth Amendments.

The eleven titles differ in other respects as well. Some, such as Titles II and VI, enacted altogether *new* laws while others, such as Titles I and V, amended earlier federal civil rights laws. Among the titles which enacted new laws, one finds further differentiation: some, such as Titles II and VII, created new *statutory* rights and protections against *private* actors, while others, such as Titles III and IV, addressed the federal enforcement of *constitutional* rights and protections against *state actors*. These differences may have unique legal implications when amending one particular title or another.

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Introduction

The Civil Rights Act of 1964[1] addresses a range of subjects, including discriminatory voting tactics;[2] discrimination in service or access to commercial establishments;[3] the desegregation of public facilities[4] and schools;[5] discrimination in employment;[6] race discrimination in federally funded programs;[7] and federal enforcement in these areas.[8] The act also created two federal agencies (the Equal Employment Opportunity Commission[9] and the Community Relations Service[10]) to enforce or facilitate certain civil rights protections.

As originally enacted, every title that created or enforced protections addressed discriminatory actions on the basis of race, color, religion, or national origin,[11] with one title—Title VII—including a prohibition against sex discrimination.[12] Since then, Congress has enacted various amendments to the Civil Rights Act of 1964, including amendments to Titles IV and IX authorizing the Attorney General's enforcement against certain equal protection violations based on sex,[13] and numerous other amendments specific to Title VII, including the codification of disparate impact liability.[14]

This report is intended to provide a general legal understanding of the act's titles and requirements. Importantly, given the breadth of the act, and the significant and considerable range of legal issues that can arise under each title,[15] this overview is not exhaustive. Rather, this report

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[1] *See* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. The act became law on July 2, 1964. *See id*.

[2] *See* 52 U.S.C. § 10101(a)(2) (codified as amended). *See also id*. § 10101(a)(1) (providing that all citizens who are otherwise qualified voters "shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude").

[3] *See* 42 U.S.C. § 2000a (addressing "discrimination or segregation on the ground of race, color, religion, or national origin").

[4] *Id*. § 2000b *et seq*. (addressing the "right to the equal protection of the laws, on account of his race, color, religion, or national origin," in the context of "equal utilization of any public facility").

[5] *See* Pub. L. No. 88-352, 78 Stat. 246-248 (addressing federal enforcement and technical assistance concerning the desegregation of public schools based on race, color, religion, or national origin).

[6] 42 U.S.C. § 2000e *et seq*. (addressing discrimination in the workplace based on "race, color, religion, sex, or national origin").

[7] *Id*. § 2000d *et seq*. (addressing discrimination "on the ground of race, color, or national origin" in any program or activity receiving federal financial assistance).

[8] *See, e.g., id*. § 2000h-2.

[9] *See id*. § 2000e-4.

[10] *Id*. § 2000g *et seq*. *See also About CRS*, Community Relations Service, Dep't of Justice, https://www.justice.gov/crs/about/faq (stating that the Community Relations Service "is an agency within DOJ that is congressionally mandated by Title X of the Civil Rights Act of 1964 to assist communities in resolving conflicts based on race, color, and national origin.").

[11] *See supra* notes 2-7.

[12] *See* Pub. L. No. 88-352, § 703, 78 Stat. at 255 (reflecting Title VII provisions, as originally enacted, addressing discrimination in employment based on "race, color, religion, sex, or national origin").

[13] *See* Pub. L. No. 92-318, § 906(a), 86 Stat. 235, 375, ("Sections 401(b), 407(a) (2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000c(b), 2000c-6(a) (2), 2000c-9, and 2000h-2) are each amended by inserting the word 'sex' after the word 'religion.'").

[14] *See, e.g.*, The Civil Rights Act of 1991, P.L. 102-166, § 105, 105 Stat. 1071, 1074-75.

[15] Such issues might include, for example, the relationship between specific titles of the 1964 Act and other federal civil rights statutes; the methods of proving violations under each title, judicially-created defenses or theories of liability under a particular title; implications that might arise from certain amendments to a particular title or provision; the evidence that courts have found sufficient or insufficient to show violations of a statutory provision in a title;

offers discussion relating to the general background of each title, each title's principal statutory sections, the methods of enforcing their requirements, and the constitutional bases for their enactment (as reflected in legislative history or interpreted by federal courts). The report also includes some limited discussion of legal issues that have arisen under a given title's provisions.

This report addresses each title of the act in separate sections, which vary in length and depth of treatment. This variability largely corresponds to the unique operation of each title, and the questions of interpretation, application, and enforcement that may have arisen under each. A title comprised of more complex or frequently litigated provisions, for example, invites more discussion of resulting case law and agency interpretations than a title with less frequently litigated or debated provisions.

In discussing legislative history, this report relies primarily upon two sources: the House Judiciary Committee report (House Report No. 88-914) [16] which accompanied H.R. 7152, the bill that would become the 1964 Act;[17] and the Senate Commerce Committee report (Senate Report No. 88-872),[18] which addressed provisions that were incorporated into Title II of the act. The report does not discuss or draw upon other aspects of the voluminous congressional record relating to the passage of the 1964 Act, or other historical or contemporaneous developments. When federal courts have discussed legislative history relating to the 1964 Act, or the historical context and purposes of a specific title, this overview includes discussion from such decisions.

This report concludes with potential legislative considerations regarding amendments to the act.

Title I: Prohibiting discriminatory voter registration "tactics"

Title I[19] of the 1964 Act amended voting provisions of an earlier statute, the Civil Rights Act of 1957 (1957 Civil Rights Act),[20] to address "problems encountered in the operation and

differing views among federal courts on how to construe and apply various sections and exemptions under a title; interpretations by federal *agencies* of statutory provisions in the 1964 Act (including competing or apparently conflicting interpretations); and other complex questions that have arisen with respect to a particular title.

[16] H. REP. NO. 88-914 (1963) (report from the Committee on the Judiciary, to accompany H.R. 7152). H. REP. NO. 914 is divided into two parts. Part I, submitted on November 20, 1963, includes a general statement of the bill, and a general "sectional analysis," followed by the inclusion of individual views expressed by various Members, and additional majority and minority views. *See id*. at pt, 1, at 1-121. Citations in this overview to Part I are either to its opening general statement, or its sectional analysis. Part II of H. REP. NO. 914 was submitted on December 2, 1963, and reflects additional views on H.R. 7152 of William M. McCullough, John V. Lindsay, William T. Cahill, Garner E. Shriver, Clark MacGregor, Charles Mathias, and James E. Bromwell. Because Part II contains a more detailed discussion of the factual background and testimony presented before Congress, as discussed by proponents of H.R. 7152, than the general statement and sectional analysis in Part I, this overview often cites to Part II for such discussion.

[17] *See* Hayes v. United States, 464 F.2d 1252, 1261 (5th Cir. 1972) ("House Report Number 914, November 20, 1963, accompanied H.R. 7152, the version which eventually became the Civil Rights Act of 1964.").

[18] S. REP. NO. 88-872 (1964) (report from the Committee on Commerce, together with individual views, to accompany S. 1732). The Supreme Court, when addressing Title II of the 1964 Act, has repeatedly cited this report. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 299-300 (1964) (citing S. REP. NO. 872); Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 250, 252 (1964) (same).

[19] Title I was originally codified through various subsections in 42 U.S.C. § 1971. See Florida State Conf. of NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008) ("Section 1971(a)(2)(B) was originally enacted as part of Title I of the Civil Rights Act of 1964"). The provisions enacted through Title I are now codified at 52 U.S.C. § 10101, preceding the statutory provisions that comprise the Voting Rights Act of 1965, codified at 52 U.S.C. § 10301 *et seq*.

[20] The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 52 U.S.C. § 10101). The

enforcement" of these earlier provisions.[21] Title I was not the first time Congress amended the 1957 Civil Rights Act—it had previously done so through the Civil Rights Act of 1960.[22] These earlier legislative efforts, however, had failed to effectively "counteract state and local government tactics of using, among other things, burdensome registration requirements to disenfranchise African–Americans."[23] Title I thus amended the 1957 Act to "outlaw[] some of the tactics used to disqualify Negroes from voting."[24]

The voting provisions of Title I and the 1957 Civil Rights Act are distinct from the Voting Rights Act of 1965 (VRA),[25] and generally lesser known—a circumstance that some scholars have attributed to the effectiveness of the VRA, which was enacted just a year after Title I.[26] Provisions

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1957 Civil Rights Act, which amended provisions of an earlier civil rights statute (*see id*. at 637), provided, among other things, that "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 52 U.S.C. § 10101(a)(1). The 1957 Civil Rights Act also "authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *See* South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966) (describing voting provisions of the 1957 Act).

[21] *See* H. REP. NO. 914, Part I at 19 ("Title I is designed to meet problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960, by which the Congress took steps to guarantee to all citizens the right to vote without discrimination as to race or color."). *See also id.*, Part 2, at 3 (describing the "primary thrust of the 1957 and 1960 Civil Rights Acts" being "to guarantee and enforce voting rights"; stating that the "principal feature of the 1957 [A]ct" was to authorize the Attorney General to bring enforcement litigation "to end discrimination in voting practices" while the 1960 Act "permitted the appointing of Federal referees to speed up registration after a pattern or practice of discrimination had been found by a court").

[22] *See* Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86. The 1960 Act, among other things, amended the 1957 Civil Rights Act to permit States to be joined as defendants in voting rights litigation, to give "the Attorney General access to local voting records," and to "authorize[] courts to register voters in areas of systematic discrimination." *See South Carolina*, 383 U.S. at 313. *See generally Statutes Enforced by the Voting Section*, Civil Rights Div., U.S. Dep't of Justice, https://www.justice.gov/crt/statutes-enforced-voting-section, (last visited Sept. 1, 2020) ("The Civil Rights Acts provide some of the early federal statutory protections against discrimination in voting. Certain of these protections originated in the Civil Rights Act of 1870, and were later amended by the Civil Rights Acts of 1957, 1960, and 1964. The voting provisions of the Civil Rights Acts are codified at 52 U.S.C. 10101 & 52 U.S.C. 20701-20706 (formerly 42 U.S.C. 1971 & 1974).").

[23] *See* Florida State Conf. of NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008) (also stating that Title I "was at the time the latest entry in a spurt of federal enforcement of voting rights after a long slumber following syncopated efforts during Reconstruction").

[24] *See South Carolina*, 383 U.S. at 313 (stating that, among other features, Title I of the 1964 Act "outlawed some of the tactics used to disqualify Negroes from voting in federal elections"). Such tactics included, for example, denying voter registration to black voting applicants based on not listing "'the exact number of months and days in his age'" or requiring other such "trivial information" for the purpose of "inducing voter-generated errors that could be used to justify rejecting applicants." *See Florida State Conf. of NAACP*, 522 F.3d at 1173 (internal citation omitted). *See also* H. REP. NO. 914, pt. 2, at 5 (stating that voting "registrars [would] overlook minor misspelling errors or mistakes in age or length of residence of white applicants, while rejecting" an application from a black applicant "for the same or more trivial reasons.").

[25] *Cf.* 52 U.S.C. § 10101 (the voting provisions of the 1957 Civil Rights Act); 52 U.S.C. § 10301 *et seq*. (the statutory provisions that comprise the Voting Rights Act of 1965).

[26] *See generally*, Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 138-40 (2010) (suggesting that the "obscurity" of Title I and other voting provisions of the 1957 Civil Rights Act is "partly attributable to the courts' general refusal to imply a private right of action" to enforce those provisions; also observing that the 1964 amendments enacted through Title I "might well have assumed greater importance [] had Congress not enacted the V[oting] R[ights] A[ct of 1965] the next year," which had "effectively overwhelmed the system of disenfranchisement that had kept Southern blacks from voting since the end of Reconstruction"). Brian K. Landsberg, *Sumter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877, 881-82 (2003) (discussing the voting provisions of the 1964 Act and stating that "the combination of the

of Title I, however, continue to be litigated, including in recent years to challenge state voter registration practices.[27]

As discussed below, Title I added provisions[28] prohibiting (1) the use of different standards for qualifying voters;[29] (2) certain uses of literacy or "interpretation" tests;[30] and (3) the denial of the right to vote based on immaterial errors in a registration or other voting document.[31] In addition, to "help meet the problem of lengthy and often unwarranted delays,"[32] Title I of the 1964 Act further amended the 1957 Civil Rights Act to expedite judicial review of voting cases.[33]

Legislative history reflects two constitutional bases for enacting Title I: Congress's power to enforce the Equal Protection Clause of the Fourteenth Amendment and to enforce the Fifteenth Amendment of the Constitution.[34] Relatedly, the Supreme Court has construed the voting provisions of the 1957 Civil Rights Act as an exercise of Congress's authority under the Fifteenth Amendment.[35]

Mississippi summer of 1964 and the attack at the bridge in Selma" led to the Voting Rights Act of 1965 "before the effectiveness of the 1964 Act could be tested" with respect to its voting provisions). Given these rationales for the relative obscurity of Title I, and changes to the VRA's operation and enforcement resulting from the Supreme Court's 2013 decision *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated the VRA's coverage formula, it may be that Title I's provisions may see increased enforcement activity for challenging discrimination in the voting context. For more information on the VRA, including its operation and enforcement following *Shelby County*, see CRS Testimony TE10033, *History and Enforcement of the Voting Rights Act of 1965*, by L. Paige Whitaker (Mar. 12, 2019).

[27] *See, e.g.*, *Florida State Conf. of NAACP*, 522 F.3d at 1158 (reflecting that plaintiffs alleged that a state statute requiring "a new verification process as a precondition of voter registration," which involved a matching procedure that was resulting in errors regarding individuals' voting eligibility, "conflict[ed] with" Title I of the 1964 Act, among other statutory and constitutional claims). *See also id*. at 1172-75 (analyzing Title I challenge). *See also, e.g.*, Washington Ass'n of Churches v. Reed, 492 F.Supp.2d 1264, 1266, 1270 (W.D. Wa. 2006) (reflecting that plaintiffs challenged a state statute requiring a "match [of] a potential voter's name to either the Social Security Administration ("SSA") database or to the Department of Licensing ("DOL") database before allowing that person to register to vote," as a violation of Title I; concluding that the plaintiffs had "demonstrated a likelihood of success on the merits" of their claim that the state statute violated the "materiality" provision, "42 U.S.C. § 1971(a)(2)(B)"). As noted earlier, 42 U.S.C. § 1971(a)(2)(B) is now codified at 52 U.S.C. § 10101(a)(2)(B).

[28] This overview of Title I of the 1964 Act only discusses the statutory provisions that were amended by Title I, and does not address any other pre-existing provisions of the 1957 or 1960 Acts. Those provisions included, for example, a declaration that all U.S. citizens who are otherwise qualified by law to vote "shall be entitled and allowed to vote," "without distinction of race, color, or previous condition of servitude" (*see* 52 U.S.C. § 10101(a)(1)); a prohibition against intimidation, threats, or coercion for the purpose of interfering with an individual's right to vote (*see id*. § 10101(b)); the grant of jurisdiction to federal district courts over civil actions brought under the voting section (*see id*. § 10101(d)); actions that a federal court must take upon finding a "pattern or practice" of discrimination (*see id*. § 10101(e)); and the appointment of voting referees (*see id*.), among other topics.

[29] *See id*. § 10101 (a)(2)(A).

[30] *See id*. § 10101(a)(2)(C).

[31] *See id*. § 10101(a)(2)(B).

[32] *See* H. REP. NO. 914, pt. 1, at 19.

[33] *South Carolina*, 383 U.S. at 313.

[34] *See* H. REP. NO. 914, pt. 2, at 6 (citing the Equal Protection Clause of the 14th Amendment, Section 2 of the 15th Amendment, and Article I of Section 8 of the Constitution as bases for enacting Title I of the Civil Rights Act of 1964; stating that "through the use of the 15th amendment, Congress is vested with the authority in Section 2 to enact appropriate legislation to enforce the provisions of the amendment," and that "[u]nder the 'equal protection' clause of the 14th amendment, Congress also has the authority to enact the voting provision of title I").

[35] *See* United States v. Mississippi, 380 U.S. 128, 138-40 (1965) (addressing the voting provisions of the 1957 Civil Rights Act, and stating that they were "passed by Congress under the authority of the Fifteenth Amendment to enforce that Amendment's guarantee, which protects against any discrimination by a State, its laws, its customs, or its officials in any way").

General Background: Different Standards for Qualifying Black Voters

The main objective of Title I, as reflected in House Report No. 914, was to address the "[d]iscriminatory use of literacy tests and other devices by registration officials," and prohibit "disqualifying an applicant for immaterial errors or omissions in papers requisite to voting."[36]

Describing such discriminatory practices, the Supreme Court observed that numerous states had enacted literacy tests or other registration requirements "specifically designed to prevent Negroes from voting."[37] If white illiterate voters would be disqualified from voting based on such tests, states had developed "alternate tests" in the form of "grandfather clauses, property qualifications," or "'good character' tests" to "assure" that illiterate white voters would still be able to vote.[38] Later, as literacy rates increased among black citizens of voting age, the Court observed that states began administering "interpretation" or "understanding" tests,[39] which required that applicants give, for example, "'a reasonable interpretation' of any section of the State or Federal Constitution, 'when read to him by the registrar.'"[40] Besides being "given easy versions" of both literacy and interpretation tests, white applicants for registration were commonly "excused altogether" from taking or satisfying those tests, or "received extensive help from voting officials."[41] Black applicants were typically "required to pass difficult versions of all the tests, without any outside assistance and without the slightest error."[42]

Congress heard testimony regarding the unequal application of these tests[43] and sought through Title I to target methods "employed by some State or county voting officials to defeat Negro

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[36] *See* H. REP. NO. 914, p. 1, at 19.

[37] South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (identifying "Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia" as states that had "enacted tests still in use which were specifically designed to prevent Negroes from voting").

[38] *Id.* at 310-13.

[39] *See* United States v. Mississippi, 380 U.S. 128, 132-33 (1965) (stating that "[b]y the 1950's a much higher proportion of Negroes of voting age in Mississippi was literate"; also reflecting that by 1954, the state required that "an applicant for registration had to be able to read and copy in writing any section of the Mississippi Constitution, and give a reasonable interpretation of that section to the county registrar, and, in addition, demonstrate to the registrar 'a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government'"). *See also, e.g.*, Louisiana v. United States, 380 U.S. 145, 149 (1965) (stating that "[b]eginning in the middle 1950's registrars of at least 21 parishes began to apply the interpretation test. In 1960 the State Constitution was amended to require every applicant thereafter to 'be able to understand' as well as 'give a reasonable interpretation' of any section of the State or Federal Constitution 'when read to him by the registrar'").

[40] *See Louisiana*, 380 U.S. at 149-50 (stating that "the registrars, without any objective standard to guide them, determine the manner in which the interpretation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct").

[41] *South Carolina*, 383 U.S. at 312. As an illustration of how such tests were administered to disqualify black but not white applicants, the Court noted that a white applicant had satisfied the requirement of being able "to interpret the state constitution by writing, 'FRDUM FOOF SPETGH.'" *See id.*, n. 12. (citing United States v. Louisiana, 225 F. Supp. 353, 384 (E.D. La 1963), aff'd, 380 U.S. 145 (1965)).

[42] *South Carolina*, 383 U.S. at 312.

[43] *See* H. REP. NO. 914, pt. 2, at 5 ("Testimony shows that Negroes will be given long and difficult parts of the Constitution to read, transcribe, and analyze, while whites will be assigned easy sections. Registrars have been known to aid white registrants but ignore the Negro applicant. Similarly, registrars will overlook minor misspelling errors or mistakes in age or length of residence of white applicants, while rejecting a Negro application for the same or more trivial reasons.").

registration."[44] The legislative history of Title I also reflects concern that federal courts delayed the adjudication of cases brought under the 1957 and 1960 Civil Rights Acts' voting provisions to curb these practices.[45] Though the 1957 Civil Rights Act authorized the Attorney General to file civil actions to enforce the statute's voting rights provisions,[46] House Report No. 914 reflects that Congress was concerned that "certain district court judges ha[d] been less than enthusiastic in their enforcement" of these earlier provisions, taking two or more years to issue decisions, and in some cases, "refus[ing] to act in the face of convincing evidence."[47] The vehicles chosen for addressing these practices through Title I are detailed below.

Title I Substantive Provisions

Mandating Uniform Standards for Qualifying Individuals to Vote

In the context of disparately applied voting registration practices, Title I amended the 1957 Civil Rights Act to make it unlawful for any person acting under the color of law to "apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision" to determine "whether any individual is qualified" to vote.[48] Put another way, this provision requires states and localities to use the same standards, practices, or procedures for all individuals to determine their voting eligibility.[49]

Prohibition of Literacy or Interpretation Tests, with Exceptions

Title I also amended the 1957 Civil Rights Act to add a general prohibition against the use of "any literacy test as a qualification for voting in any election."[50] A literacy test, as defined by Title I, includes "any test of the ability to read, write, understand, or interpret any matter."[51] The statutory provision, however, allows the use of a literacy test if (1) it is administered to all individuals, (2) "is conducted wholly in writing," and (3) "a certified copy of the test and of the

[44] *See id.*, pt. 2, at 5.

[45] *See id.*, pt. 2, at 4-5.

[46] *See* 52 U.S.C. § 10101(c) (providing that "the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order"). *See also supra* notes 20-21.

[47] *See* H. REP. NO. 914. pt. 2, at 4.

[48] 52 U.S.C. § 10101(a)(2)(A).

[49] *See id.* § 10101(a)(2)(A).

[50] *See id.* § 10101(a)(2)(C) ("No person acting under color of law shall…employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 [52 U.S.C. § 20701 *et seq.*]: *Provided, however,* That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.").

[51] *Id* § 10101(a)(3)(B) ("the phrase 'literacy test' includes any test of the ability to read, write, understand, or interpret any matter").

answers given by the individual is furnished to him within twenty-five days of the submission of his request."[52]

In addition, Title I created a "rebuttable presumption" to apply in a legal proceeding brought by the Attorney General to challenge a discriminatory voting practice, where "literacy is a relevant fact."[53] In such cases, a person is presumed to "possess sufficient literacy, comprehension, and intelligence to vote in any election," if such individual "has not been adjudged an incompetent" and has completed the sixth grade in a public school or an accredited private school "where instruction is carried on predominantly in the English language."[54]

Immaterial Errors or Omissions on Voting Applications, Registrations, or Records

Title I also added a prohibition against denying a person's right to vote based on errors or omissions on "any record or paper relating to any application, registration, or other act requisite to voting," that "is not material" to determining whether the individual is qualified to vote.[55] The intent of this provision—sometimes referred to as the "materiality" provision[56]—was to prohibit the use of "unnecessary information for voter registration" as "an excuse" for disqualifying potential voters.[57] This "materiality" provision continues to be litigated, including in recent years[58] (though federal courts disagree about the availability of a private right of action under Title I, as discussed below).

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[52] *See id.* § 10101(a)(2)(C).

[53] *See id.* § 10101(c) (providing that the Attorney General may institute a civil action or other proceeding for preventive relief "[w]henever any person has engaged or ... is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b)," and establishing a rebuttal presumption "in any such proceeding literacy is a relevant fact").

[54] *See id.*

[55] 52 U.S.C. § 10101(a)(2)(B) ("No person acting under color of law shall…deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election"). *See also, e.g.*, Florida State Conf. of NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008) (describing this provision as prohibiting the denial of a person's "right to vote based on errors or omissions that are not material in determining voter eligibility").

[56] *See, e.g.*, Schwier v. Cox, 340 F.3d 1284, 1297 (11th Cir. 2003) (referring to 42 U.S.C. § 1971(a)(2)(B), now codified at 52 U.S.C. § 10101(a)(2)(B), as "the materiality provision").

[57] *Id.* at 1294. *See also id.* (citing, as an example, the disqualification of an applicant based on the failure to list the exact number of months and days in his age on an application). *See generally, Florida State Conf. of NAACP*, 522 F.3d at 1173 ("Such trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants."); H. REP. NO. 914, pt. 2, at 5 (stating that voting "registrars [would] overlook minor misspelling errors or mistakes in age or length of residence of white applicants, while rejecting" an application from a black applicant "for the same or more trivial reasons."). While the provision was intended to address registration practices that had been used to disenfranchise black voters, it does not expressly refer to race. *See* 52 U.S.C. § 10101(a)(2)(B).

[58] *See, e.g., Florida State Conf. of NAACP*, 522 F.3d at 1158 (reflecting that plaintiffs alleged that a state statute requiring "a new verification process as a precondition of voter registration," which involved a matching procedure that was resulting in errors regarding individuals' voting eligibility, "conflict[ed] with" Title I of the 1964 Act, among other statutory and constitutional claims). *See also id.* at 1172-75 (analyzing Title I challenge). *See also, e.g.*, Washington Ass'n of Churches v. Reed, 492 F.Supp.2d 1264, 1266, 1270 (W.D. Wa. 2006) (reflecting that plaintiffs challenged a state statute requiring a "match [of] a potential voter's name to either the Social Security Administration ("SSA") database or to the Department of Licensing ("DOL") database before allowing that person to register to vote," as a violation of Title I; concluding that the plaintiffs had "demonstrated a likelihood of success on the merits" of their claim that the state statute violated the "materiality" provision, "42 U.S.C. § 1971(a)(2)(B)"). As noted earlier, 42

The materiality provision does not define when an error is or is not "material" for determining voter qualifications.[59] Recent litigation under this provision has pressed federal courts to address, for example, whether an applicant's social security number is "material" or "not material," for registering to vote;[60] or whether an individual's unintentional failure to mark a check box on a registration form is "material" such that a state or locality may deny voter registration on that basis.[61] With no clear statutory definition, and given that the term "material" is subject to various meanings,[62] federal courts have interpreted this Title I provision in different—and sometimes conflicting—ways.[63]

Title I Enforcement

Expedited Judicial Review of Cases Brought by the Attorney General

As noted above, although the 1957 Civil Rights Act had expressly authorized the Attorney General to file enforcement actions in federal court,[64] there were reports of delays by federal courts in adjudicating these claims.[65] To expedite such adjudications, Congress amended the 1957 Civil Rights Act through Title I in two related respects.[66]

U.S.C. § 1971(a)(2)(B) is now codified at 52 U.S.C. § 10101(a)(2)(B).

[59] *See* 52 U.S.C. § 10101(a)(2)(B).

[60] *See, e.g.*, Schwier v. Cox, 439 F.3d 1285, 1286 (11th Cir. 2006) (affirming district court's conclusion that the state of Georgia could not mandate disclosure of social security numbers "because such information is not 'material' to a voter registration system" under Title I); Diaz v. Cobb, 435 F.Supp.2d 1206, 1213 (S.D. Fla. 2006) (stating, without citation, that a failure to provide a social security number is one type of error that is not material for Title I purposes). *Cf. Florida State Conference of NAACP*, 522 F.3d at 1155-57, 1174-75 (where Florida law required the inclusion of a drivers' license number or the last four digits of a social security number as "a precondition of registering to vote," holding that errors in transposing those numbers on a registration form were "material" under Title I; interpreting the Help America Vote Act of 2002 as indicating that "Congress deemed" identification numbers "material" for the purpose of Title I and adding that Title I does not expressly require "a least-restrictive-alternative test for voter registration applications").

[61] *See, e.g.*, *Diaz*, 435 F.Supp.2d at 1208, 1211-14 (where plaintiffs alleged that several voter applications had been improperly rejected for the inadvertent failure to check a box relating to mental incapacitation or a felony conviction, concluding that "the questions posed by the check boxes" were material "as a matter of law" for the purposes of Title I, and interpreting a provision in the Help America Vote Act of 2002 as "constitut[ing] a specific Congressional direction to reject an application as incomplete for failure to check one of the boxes"). *But see Washington Ass'n of Churches*, 492 F.Supp.2d at 1268-71 (W.D. Wa. 2006) (interpreting the Help America Vote Act of 2002 to require verification of a voter's identity before *casting* or *counting* that person's vote, "but not as a prerequisite to registering to vote," and concluding that the plaintiffs had demonstrated a likelihood of success on the merits of their claim that errors in information that prevented Washington state from matching an applicant to another government database were not material in determining whether that person was qualified to vote under Washington law.).

[62] *See, e.g.*, *Florida State Conference of NAACP*, 522 F.3d at 1173-74 (stating that the term "not surprisingly signifies different degrees of importance in different legal contexts" and discussing two possible ways of construing "materiality" in the context of Title I's provision and the substantially different legal outcomes, depending on which meaning of "materiality" is used).

[63] *See, e.g.*, *supra* notes 60 and 61.

[64] *See* 52 U.S.C. § 10101(c) ("Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order."); *id*. § 10101(d) (providing that "district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section").

[65] *See supra* "General Background: Different Standards for Qualifying Black Voters," p. 6.

[66] *See* Pub. L. No. 88-352, 78 Stat. 242 (adding subsection (h) addressing expedited judicial review). This subsection

First, in a case alleging "a pattern or practice of discrimination,"[67] Title I permits the Attorney General or a defendant to request that a three-judge panel "hear and determine the entire case."[68] At least one panelist must be an appellate court judge and at least one must be a district court judge.[69] The designated judges must assign the case for hearing "at the earliest practicable date," "participate in the hearing and determination" of the case, and "cause the case to be in every way expedited."[70] The final judgment of the panel is directly appealable to the Supreme Court.[71]

Second, in certain other cases,[72] Title I requires that the chief judge of the district where the case is pending "immediately" designate a judge to the case.[73] If no judge in the district is available, the case must be designated to appellate court judge of the circuit instead.[74] Title I makes it "the duty" of the designated federal judge to "assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."[75]

Injunctive Relief

When the Attorney General files a civil action under Title I or other voting provisions of the 1957 and 1960 Civil Rights Acts, the action is "for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order."[76] Thus, courts granting relief for violations of these voting provisions, for example, have issued orders enjoining the discriminatory practice at issue.[77]

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was later re-designated through the VRA. *See* Pub. L. No. 89-110, § 15, 79 Stat. 445.

[67] *See* 52 U.S.C. § 10101(g) (providing for the availability of a "three-judge court" in "any proceeding instituted by the United States" in which "the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section").

[68] *Id.* (requiring that the request for the three-judge court "be immediately furnished" to the chief judge of the circuit, or the presiding circuit judge of the circuit, in which the case is pending).

[69] *Id. See also* H. REP. NO. 914, pt. 2, at 4-5 (expressing the view that a three-judge court would bring a "balanced and broad range of views" to "bear upon a voting case," which "should assure fewer instances of delay and a greater willingness to safeguard the individual's right to vote").

[70] 52 U.S.C. § 10101(g).

[71] *Id. See also* H. REP. NO.914, pt. 2, at 5 (conveying the view that "[b]y cutting down a layer of appeal, it is our hope that the time will not be long distant when the issue of voter discrimination is behind us.").

[72] *See* 52 U.S.C. § 10101(g) (referring to "any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection").

[73] *Id.* (in the absence of the chief judge, making it the duty of the acting chief judge).

[74] *Id.* ("In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit ... who shall then designate a district or circuit judge of the circuit to hear and determine the case").

[75] *Id.*

[76] *See id.* § 10101(c).

[77] *See, e.g.*, United States v. Atkins, 323 F.2d 733, 734-35, 745 (5th Cir. 1963) (in case alleging that racially discriminatory voter registration practices violated the 1957 Civil Rights Act, directing the district court to enter an order "enjoining the members of the Board of Registrars of Dallas County, and their successors in office, from engaging in any act or practice intended to result or the probable effect of which would be to result in racial discrimination in the registration for voting in Dallas County," among other injunctive relief).

Whether Individuals May Bring a Private Action to Challenge Discriminatory Voting Practices

Though the 1957 Civil Rights Act, as amended, expressly authorizes the Attorney General to bring litigation to enforce its voting rights provisions, the statute is silent on whether an individual may bring a private right of action.[78] Thus, federal appellate courts have disagreed on whether an individual may bring a private right of action alleging a violation of Title I or other voting provision of the 1957 Civil Rights Act,[79] including through 42 U.S.C. § 1983, which permits individuals to bring a private action against persons acting under the color of state law for constitutional or statutory violations.[80] The U.S. Court of Appeals for the Eleventh Circuit, for example, has held that a claim alleging a violation of Title I's "materiality" provision may be enforced through a private action brought under 42 U.S.C. § 1983.[81] The U.S. Court of Appeals for the Sixth Circuit, however, has adopted the opposite view, dismissing Title I claims brought by private plaintiffs on the basis that the statute "is enforceable by the Attorney General, not by private citizens."[82]

As reflected above, Title I of the 1964 Act was motivated by concerns over voter registration practices intentionally designed to disqualify black applicants, and the pace with which federal courts were adjudicating voting cases. Though two other titles in the 1964 Act relate in some manner to voting (Title V with respect to the U.S. Commission on Civil Rights' investigations of equal protection violations in the voting context, for example, and Title VIII relating to voting statistics), Title I is the only title in the act containing substantive requirements directed at discrimination in the voting context.

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[78] *See* 52 U.S.C. § 10101.

[79] *See generally, e.g.*, Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 140-41 (2010) (discussing federal case law on the question of the private enforceability of the voting provisions of the 1957 Civil Rights Act and stating that "[t]here is a split of authority in the lower courts") (footnotes omitted).

[80] 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

[81] Schwier v. Cox, 340 F.3d 1284, 1296-97 (11th Cir. 2003) (addressing 42 U.S.C. § 1971(c), now codified at 52 U.S.C. § 10101(c), and concluding that the statute's voting rights provisions "may be enforced by a private right of action under § 1983").

[82] McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000) (dismissing claim alleging violation of the "materiality" provision of Title I of the 1964 Act, brought by a private plaintiff, on the basis that the provision "is enforceable by the Attorney General, not by private citizens"). *See also* Northeast Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 630 (6th Cir. 2016) (holding that plaintiff could not bring a private right of action alleging a violation of Title I's materiality provision, as "[w]e have held that the negative implication of Congress's provision for enforcement by the Attorney General is that the statute does not permit private rights of action" and that "*McKay v. Thompson* therefore binds this panel"; also observing that "[a]nother circuit later reached the opposite conclusion" (citing Schwier v. Cox, 340 F.3d 1284, 1294–96 (11th Cir. 2003)).

Title II: Addressing discrimination and segregation in business establishments

Title II of the 1964 Act, divided into seven sections,[83] addresses segregation and discrimination[84] against individuals based on race, color, religion, or national origin, in the context of access and service at various business establishments. Title II, as reflected in legislative history[85] and interpreted by the Supreme Court,[86] was enacted based on Congress's power to regulate interstate commerce.[87]

As discussed below, Title II's substantive protections are contained in its first three sections.[88] The first section generally provides that all persons "shall be entitled to the full and equal enjoyment" of goods and services of certain establishments that constitute places of "public accommodation," "without discrimination or segregation on the ground of race, color, religion, or national origin."[89] Title II also prohibits discrimination or segregation where mandated by state or local laws or rules, regardless of whether the establishment at issue constitutes a place of "public accommodation" under the first section.[90] A third section prohibits interference with those federal statutory rights.[91]

General Background: Racial Segregation in Business and Travel

Racial segregation in the commercial context, often mandated by local law,[92] commonly took form in the wholesale exclusion of black citizens from business establishments designated as "white only."[93] If black citizens sought service at these establishments or businesses, they were

[83] *See* 42 U.S.C. §§ 2000a - 2000a-6.

[84] *See, e.g.*, *id*. § 2000a(a); *id*. § 2000a(b); *id*. § 2000a(d); *id*. § 2000a-1.

[85] *See* S. REP. NO. 88-872, at 12-14 (discussing the Commerce Clause basis for the public accommodations provisions); H. REP. NO. 914, pt. 2, at 8, 13 (discussing the constitutional bases for enacting Title II as both the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause).

[86] *Heart of Atlanta Motel*, 379 U.S. at 261-62 (upholding Title II against a constitutional challenge asserting that Congress exceeded its authority under the Commerce Clause to enact it with respect to hotels and motels).

[87] *See* U.S. CONST. art. I, § 8, cl. 3.

[88] *See* 42 U.S.C. §§ 2000a(a), 2000a-1, 2000a-2.

[89] *Id*. § 2000a(a).

[90] *Id*. § 2000a-1.

[91] *Id*. § 2000a-2.

[92] *See, e.g.*, Peterson v. City of Greenville, S.C., 373 U.S. 244, 246-47 (1963) (discussing a local South Carolina ordinance that mandated racially segregated eating areas in "any hotel, restaurant, cafe, eating house, boarding-house or similar establishment"; reflecting that under the ordinance, meals ordered by black persons and white persons could be served in the same room only where white and black persons were seated at a "distance of at least thirty-five feet," with "separate eating utensils and separate dishes" used for white and black persons, which were required to be "distinctly marked" as such, and where a separate facility was used to clean dishes and utensils used by white persons and black persons). *See also generally* Regents of Univ. of California v. Bakke, 438 U.S. 265, 393-94 (1978) (Marshall, J., concurring in part and dissenting in part) (stating that following the Supreme Court's 1896 decision in *Plessy v. Ferguson*, state and local laws permitting or mandating racial segregation "expanded" to "residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms," including laws that "authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts ... Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was ... excluded from theaters, restaurants, hotels, and inns.").

[93] *See generally*, *e.g.*, Blow v. North Carolina, 379 U.S. 684, 684–85 (1965) (describing a roadside restaurant that

often subject to arrest and criminal prosecution, and convicted and sentenced to fines or imprisonment under state or local trespassing laws.[94] Against this backdrop and leading up to the 1964 Act,[95] Congress heard testimony regarding the daily forms of discrimination against black citizens in public transportation, eating establishments, hotels, retail stores, markets, and other places that catered to the general public but offered black individuals "either differentiated service or none at all."[96]

In addition, "voluminous testimony" before Congress provided "overwhelming evidence" of discrimination against black travelers, including the routine denial of food and lodging services.[97] In its 1964 decision *Heart of Atlanta Motel v. United States*,[98] the Supreme Court observed that this "uncertainty" of when and where one might find accommodations not only resulted in economic harm—by impeding and discouraging interstate travel for "a substantial portion" of the

"served whites only and carried a sign to that effect on its front door"); *Katzenbach*, 379 U.S. at 297 (stating that the defendant restaurant "has refused to serve Negroes in its dining accommodations since its original opening in 1927"); Bouie v. City of Columbia, 378 U.S. 347, 348-49 (1964) (describing a drug store with several departments, including a "restaurant department, which was reserved for whites").

[94] *See, e.g.*, Bell v. State of Md., 378 U.S. 226, 228-29 (1964) (reflecting that petitioners, black students, went to a Baltimore restaurant and were told they would not be served because of their race; that the restaurant owner went to the police station to get warrants for their arrest; and that the students were arrested and subsequently convicted under a state criminal trespass law); *Bouie*, 328 U.S. at 348-49 (reflecting that petitioners, black college students, were convicted for criminal trespass under South Carolina law, after taking seats at a restaurant booth where they "continued to sit quietly" waiting to be served, were refused service, and were then arrested after the owner called the police to remove them); Lombard v. State of La., 373 U.S. 267, 268-69 (1963) (reflecting that petitioners, three black college students and one white college student, were arrested and convicted under a state trespass law; stating that the petitioners had gone to a "refreshment counter" where they "sat quietly" to await service but were refused and told to leave, and that the petitioners were then arrested after the manager closed the counter believing the situation to constitute an emergency; also reflecting that the petitioners were sentenced to prison time and fines); *Peterson*, 373 U.S. at 245-46 (reflecting that black petitioners were arrested and convicted for violating a state trespass statute for sitting at a lunch counter reserved for white persons).

[95] *See* United States v. Baird, 85 F.3d 450, 454-55 (9th Cir. 1996) (explaining that prior to Title II, "many establishments generally open to the public" excluded groups based on race, color, religion, and national origin, and thereby "established public badges of inferiority for the excluded groups, marking them as of lower social status"; stating that "[i]n response to almost a decade of massive demonstrations, freedom rides, and sit-ins, which swayed public opinion throughout the nation, Congress used its power under the Commerce Clause to eliminate segregation of public accommodations.").

[96] *See, e.g.*, S. REP. NO. 88-872, at 15. *See also* Katzenbach v. McClung, 379 U.S. 294, 301 (stating that, in its 1964 companion decision *Heart of Atlanta Motel v. United States*, the Court had noted "that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope"). *See also, e.g.*, *id.* at 299-300 (pointing to testimony by the Under Secretary of Commerce, before the Senate Committee on Commerce, attributing the "condition" of race-based discrimination in various establishments, which caused lower per capita spending in those establishments by black patrons, to racial segregation).

[97] *Heart of Atlanta Motel*, 379 U.S. at 253 (stating that conditions for black travelers were "so acute" that they necessitated a "special guidebook" identifying the accommodations that would serve black travelers in different parts of the country). *See also* S. REP. NO. 872, at 15-16 (quoting witness testimony describing the uncertainties during travel; "I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi ... How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive, until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or ice cream cone because they are not white?").

[98] 379 U.S. 241 (1964).

black community[99]—but also "qualitative" harm.[100] Black travelers were "subjected to or fear discrimination in railroad, bus, and airlines terminals—thereby reducing interstate travel."[101] Relatedly, Congress received testimony that black commercial truck drivers were "not sent on overnight trips in certain areas of the country because of a lack of rest accommodations."[102]

The "primary purpose" of Title II's public accommodations provisions was "to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[103]

Title II Provisions: "Full and Equal Enjoyment"

In a "Place of Public Accommodation"

Section 201 of Title II provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[104] As discussed below, the statute expressly identifies four types of establishments subject to this "public accommodations" provision.

[99] *Id*. at 253. *See also id*. at 257 (stating that the fact that Congress addressed what it considered a "moral problem" through Title II "does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse"); *Katzenbach*, 379 U.S. at 299-300 (stating that "[t]he record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants" and discussing examples of such effects; also stating that "there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes," including that "discriminatory practices prevent[ed] Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating.").

[100] *See Heart of Atlanta Motel*, 379 U.S. at 253 (in addition to the economic effects of racial discrimination on interstate travel, pointing to the "obvious impairment of the Negro traveler's pleasure and convenience"). *See generally*, *e.g*., S. REP. NO. 88-872, at 15 (1964) (Comm. Rep.) (quoting witness testimony) ("The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity").

[101] H. REP. NO. 914, pt. 2 at p. 10.

[102] *Id*.

[103] *See* S. REP. NO. 88-872, at 16. *See also*, *Heart of Atlanta Motel*, 379 U.S. at 250 ("The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"). *See also* H. REP. NO. 914, pt. 1, p. 18 (generally discussing the proposed Act and stating that it "would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.").

[104] 42 U.S.C. § 2000a(a).

Covered Establishments That "Affect Commerce"

Section 201(a)[105] identifies "four classes of business establishments"[106] subject to Title II's public accommodations provision, if their "operations affect commerce, or if discrimination or segregation by [them] is supported by State action."[107] Thus, an establishment must constitute a covered business *and* affect commerce,[108] to be subject to this provision's requirements.[109] Relatedly, Section 201(c) establishes the legal standard "for determining whether the operations" of an establishment affects commerce under Title II.[110] Section 201 also provides that an enumerated establishment will constitute a place of public accommodation under Title II if the "discrimination or segregation by it is supported by State action."[111]

The four categories of covered establishments under Section 201 are

- ***Lodging for transient guests***: "any inn, hotel, motel, or other establishment which provides lodging to transient guests."[112] Establishments in this category per se "affect commerce" under the statute, and do not require a separate showing to that end.[113]
- ***Eating establishments***: "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station."[114] An establishment in this category "affect[s] commerce" if it "serves or offers to serve interstate travelers of a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce."[115]

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[105] Section 201 is codified at 42 U.S.C. § 2000a(a).

[106] *Heart of Atlanta Motel*, 379 U.S. at 247 (describing Title II's list of "four classes of business establishments").

[107] 42 U.S.C. § 2000a(b).

[108] *See, e.g.*, United States v. Lansdowne Swim Club, 894 F.2d 83, 86 (3d Cir. 1990) ("Under the statute, a place of public accommodation has two elements: first, it must be one of the statutorily enumerated categories of establishments that serve the public, 42 U.S.C. § 2000a(b); second, its operations must affect commerce.").

[109] *See also* 42 U.S.C. § 2000a(c) (generally defining "commerce" as "travel, trade, traffic, commerce, transportation, or communication" among states, between the District of Columbia and any State, between any foreign country, territory, or possession and any State or the District of Columbia; or between points in the same State but through any other State or the District of Columbia or a foreign country).

[110] *See* 42 U.S.C. § 2000a(c) (for each category of covered establishments, identifying conduct that affects commerce). *See also* Daniel v. Paul, 395 U.S. 298, 303 (1969) ("Section 201(c) sets forth the standards for determining whether the operations of an establishment in any of these categories affect commerce within the meaning of Title II").

[111] *See* 42 U.S.C. § 2000a(b) (stating that the listed establishments constitute a place of public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action"). *See also id.* § 2000a(d) ("Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.").

[112] *Id.* § 2000a(b)(1). The statute does not apply, however, to "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." *See id.*

[113] *See id.* § 2000a(c) (stating that the "operations of an establishment affect commerce within the meaning of this subchapter" if it is one of the establishments described in paragraph (1) of subsection (b)). *Cf. id.* §2000a(b)(1).

[114] *Id.* § 2000a(b)(2).

[115] *See id.* §2000a(c). *See, e.g.*, *Daniel*, 395 U.S. at 304-05 (concluding that a snack bar moved in interstate commerce, as "three of the four food items sold at the snack bar contain[ed] ingredients originating outside of the State," and that it

- ***Entertainment establishments***: "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment."[116] Such an establishment "affect[s] commerce" if "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce."[117]
- ***Entities physically located within and serving patrons of another covered establishment***: Distinct from the other three categories, this part of the statute addresses entities that are either
    - located *within* another covered establishment under Title II (*e.g.*, a barbershop operating within a hotel[118]); or
    - have, on its premises, a covered establishment "physically located within" it.[119]

    Under either circumstance, if that entity "holds itself out as serving patrons" of the otherwise covered establishment, it too is a covered establishment.[120] Relatedly, an establishment in this category "affect[s] commerce" if "it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection."[121]

offered to serve and served out-of-state persons); Blow v. North Carolina, 379 U.S. 684, 685-86 (1965) (holding that facts concerning defendant restaurant–that it was located on an interstate highway next to a motel owned by the same person, that its menu and other advertising was posted in those motel rooms, and that it advertised on billboards along the interstate highway, radio and newspapers–"made it clear 'that the restaurant 'serves or offers to serve interstate travelers'" and thus constituted a place of public accommodation within the meaning of Title II). *See generally, e.g.*, *Katzenbach*, 379 U.S. at 304 (stating that by prohibiting discrimination "only in those establishments having a close tie to interstate commerce, i.e., those, like the [defendant restaurant], serving food that has come from out of the State," "Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.").

[116] *Id*. § 2000a(b)(3).

[117] *See id*. § 2000a(c).

[118] *See* Nesmith v. Young Men's Christian Ass'n of Raleigh, N.C., 397 F.2d 96, 100 (4th Cir. 1968) ("A typical example of the situation at which this section is aimed is a barbershop operated within a hotel but under separate management from the lodging establishment. In such a case, if the barbershop represented that it would service guests of the hotel, the barbershop would become a 'covered establishment.'").

[119] 42 U.S.C. § 2000a(b)(4). *See, e.g.*, *Daniel*, 395 U.S. at 305 (holding that a snack bar's status as a covered establishment affecting commerce rendered the 232-acre recreational area in which the snack bar was located a covered establishment under 42 U.S.C. §2000a(b)(4)).

[120] *See* 42 U.S.C. § 2000a(b)(4).

[121] *Id*. § 2000a(c).

Retail and Other Establishments or Services

As noted above, in setting forth the categories of establishments covered by Title II, Section 201 provides illustrative examples of the types of entities that fall under those categories. These examples, however, are not exhaustive. For establishments not expressly listed in the statute, courts engage in "a fact-intensive inquiry"[122] that looks at whether the particular establishment in question is similar enough in operation or nature to those expressly listed in the statute to fall within one of the four categories,[123] to constitute a business subject to Section 201. When analyzing such questions, federal courts have more readily concluded that places offering recreational activities (*e.g.*, swimming, scuba diving, basketball, ice skating, bowling, amusement parks) may be covered under the statute as a "place of exhibition or entertainment."[124] The absence of express identification in the statute, however, has led some courts to conclude that certain establishments are generally *not* subject to Title II's public accommodation provision,[125] such as retail stores[126] (ranging from sporting goods stores[127] to car dealerships[128]), transportation services (*e.g.*, commercial airlines),[129] banks,[130] and salons,[131] among others.[132]

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[122] *See* Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 431 (4th Cir. 2006).

[123] *See, e.g.*, *Daniel*, 395 U.S. at 301, 305-06 (holding that a 232-acre recreational lake facility that had amenities such as "swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar," constituted a place of entertainment under Title II; rejecting the defendant's argument that Title II's entertainment provision concerned only places "where patrons are entertained as spectators or listeners" rather than places in which patrons directly participated in a sport or activity). *Cf. Denny*, 456 F.3d at 432 (distinguishing a hair salon, which in the court's view "primarily offer[ed] body maintenance services with tangential entertainment value," from the recreational facility that the Supreme Court held constituted a place of entertainment in *Daniel v. Paul*, where the "raison d'etre [of that facility] was to sell entertainment to its customers") (citing *Daniel*, 395 U.S. at 301)).

[124] *See generally*, *e.g.*, *Denny*, 456 F.3d at 432-33 (citing and discussing other federal appellate decisions analyzing whether certain types of businesses constituted a place of entertainment under Title II). *See also*, *e.g.*, United States v. Allen, 341 F.3d 870, 877-88 (9th Cir. 2003) (holding that local park was a place of entertainment within the meaning of Title II, citing evidence including that the park was a place where local and national fundraising events were held, where the symphony orchestra would perform, and pointing to the presence of playground equipment, picnic tables, and barbeque grills on park grounds as other sources of entertainment); Smith v. Young Men's Christian Ass'n of Montgomery, Inc., 462 F.2d 634, 648 (5th Cir. 1972) (concluding that the "recreational activities presented by the Montgomery YMCA" rendered it a "place of entertainment" under Title II's public accommodation provision).

[125] As noted earlier, even if a particular establishment does not fall within one of the first three categories of lodging, eating, or entertainment, it may still be subject to Title II under the fourth category if it has, located on its premises, a covered establishment, and the entity "holds itself out as serving patrons of such covered establishment." *See* 42 U.S.C. § 2000a(b)(4). *See*, *e.g.*, Dombrowski v. Dowling, 459 F.2d 190, 197-98 (7th Cir. 1972) (where plaintiff brought Title II claim against a commercial office building for refusing to rent to him based on the race of his clientele, holding that the district court erred in granting summary to the defendant, as the presence of a restaurant in the office building could render the building a covered establishment under 42 U.S.C. § 2000a(b)(4), if the building held itself out as serving the restaurant's patrons).

[126] *See*, *e.g.*, Priddy v. Shopko Corp., 918 F.Supp. 358, 359 (D. Utah 1995) (concluding that Congress did not intend for retail stores to be covered; pointing to statutory language in 42 U.S.C. § 2000a(b)(2) indicating that restaurants, including those located within a retail store, constitute covered establishments and reasoning that if "retail establishments were also intended to be covered, there would be no need" for that additional statutory language concerning restaurants within retail stores). *Cf.* Armstrong v. Target Corporation, No. 10-1340, 2010 WL 4721062, at *3-4 (D. Minn. Nov. 15, 2010) (concluding that, though retail stores are not generally subject to Title II's public accommodations provision, "the fact that Target has a restaurant on its premises brings it within § 2000a(b)(4) and makes it a covered establishment"). *See generally* Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL'Y & L. 331, 338, 341 (2006) (discussing Title II and its absence of coverage for racial discrimination at retail stores).

[127] *See*, *e.g.*, Bishop v. Henry Modell & Co., 2009 WL 3762119, at *13 (S.D.N.Y. Nov. 10, 2009) ("The text of § 2000a does not explicitly include retail establishments, see 42 U.S.C. § 2000a(b), and case law confirms that retail stores are not places of public accommodation within the meaning of the provision.") (collecting district court cases).

Membership Organizations Closely Affiliated with a Physical Location

Apart from the question of whether Title II covers a particular type of business establishment, at least two federal appellate courts have addressed whether a membership organization may constitute a "place of public accommodation" under the statute, regardless of whether it operates a physical location open to the general public.[133] Emphasizing the plain language of the statute enumerating physical places, both the U.S. Court of Appeals for the Seventh and Ninth Circuits have held that—absent a close affiliation or connection to a physical place open to the public[134]—membership organizations standing alone do not constitute a "place" within the meaning of Title II's public accommodations provision.[135] Based on the same rationale, the few federal courts to

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[128] *See, e.g.*, Lewis v. Northland Chrysler Dodge Ram Jeep, 2014 WL 3054563, at *3 (E.D.Mich. July 7, 2014), aff'd (Aug. 7, 2015) (dismissing plaintiff's Title II claim and concluding that "[p]lainly, car dealerships, like retail stores and beauty salons, do not fall within" one of the four types of covered establishments "that count as places of public accommodation").

[129] *See, e.g.*, James v. Am. Airlines, Inc., 247 F.Supp.3d 297, 305-06 (E.D.N.Y. Mar. 31, 2017) (where plaintiff brought a Title II claim alleging racially discriminatory treatment on an American Airlines flight, dismissing her claim on the basis that "an aircraft is not a 'place of public accommodation'") (citing federal district court decisions addressing whether a commercial airline is an establishment covered by Title II); Kalantar v. Lufthansa German Airlines, 402 F.Supp.2d 130, 139 (D.D.C. 2005) ("Among the four categories of places of public accommodation provided by Title II—places of lodging, places of eating, places of entertainment, and establishments located within or surrounding these other three types of premises—none even remotely resembles an airline, or indeed any other vehicle or mode of transportation.").

[130] *See, e.g.*, Lowe v. ViewPoint Bank, 972 F.Supp.2d 947, 959 (N.D.Tex. 2013) (granting summary judgment on plaintiff's Title II claim against defendant bank on the basis that "a bank is not a place of public accommodation" under 42 U.S.C. § 2000a(b)).

[131] *See, e.g.*, *Denny*, 456 F.3d at 433-34 (concluding that a salon was not a "place of entertainment" within the meaning of Title II and observing that "[b]arber shops and beauty salons are sufficiently common and pervasive that we cannot casually attribute their omission [in the statute] to mere oversight"; by way of comparison, pointing to Congress's specific inclusion of beauty shops as a public accommodation covered by the Americans with Disabilities Act). Though beyond the scope of this report, even when relief is precluded under Title II's public accommodation provisions, plaintiffs can assert a claim under 42 U.S.C. § 1981, which generally prohibits race-based discrimination in private contracts. *See, e.g.*, *Denny*, 456 F.3d at 434-47 (analyzing § 1981 claim and concluding that plaintiffs' evidence created a triable issue that the salon had refused to perform on a contract because of race).

[132] *See, e.g.*, Cuevas v. Sdrales, 344 F.2d 1019, 1021, 1023 (10th Cir. 1965) (stating that "if the legislation were intended to cover such places as bars and taverns, where the sale of drinks is the principal business, Congress would have specifically included them"; also stating that "generally, beer is considered a drink, and although it may be served in eating places, a place serving only beer is not considered a restaurant, cafeteria, lunch room, lunch counter or soda fountain"). *Cf.* United States v. DeRosier, 473 F.2d 749, 751-52 (5th Cir. 1973) (concluding that a neighborhood bar was a place of entertainment subject to Title II's public accommodations section, based on the presence in the bar of a juke box, shuffle board, and pool table "for the use and enjoyment of the bar's patrons").

[133] *See* Clegg v. Cult Awareness Network, 18 F.3d 752, 755-56 (9th Cir. 1994); Welsh v. Boy Scouts of America, 993 F.2d 1267, 1269-75 (7th Cir. 1993).

[134] *See Welsh*, 993 F.2d at 1272 (distinguishing between Title II's applicability to membership organizations "that are closely connected to a facility or structure" such as the YMCA, and membership organizations "whose purpose is not closely connected to a particular facility").

[135] *See Clegg*, 18 F.3d at 756 ("[W]e hold that Title II covers only places, lodgings, facilities and establishments open to the public, and applies to organizations only when they are affiliated with a place open to the public and membership in the organization is a necessary predicate to use of the facility. When the organization is unconnected to entry into a public place or facility, the plain language of Title II makes the statute inapplicable."); *Welsh*, 993 F.2d at 1269 (pointing to statutory language identifying "fifteen specific examples of regulated facilities" and concluding that the list "reveals Congress' intent to regulate facilities as opposed to gatherings of people"). *See generally* Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d. Cir. 1998) (stating that Title II's prohibition against discrimination in places of public accommodation "has been limited to places rather than including membership in an organization" or an "organization's operations unconnected to any physical facility") (citing *Clegg*, 18 F.3d at 755–56 and *Welsh*, 993 F.2d

have addressed whether a web-based service could constitute a "place" covered by Title II have held that they are not.[136] Thus, for a membership organization to constitute a place of public accommodation under Title II, several federal courts have required a showing that the organization is closely affiliated with a physical location open to the public.[137]

Private Club Exemption

Title II's public accommodation section specifically identifies one category of place *not* subject to Section 201's requirements—"private club[s]" or "other establishment[s] not in fact open to the public."[138] The intent of this exception, as described by the U.S. Court of Appeals for the Seventh Circuit, "is to preserve the right of truly private organizations to maintain their unique existence."[139] An establishment seeking shelter under the exception has the burden of proving that it is not "open to the public."[140]

Title II does not otherwise address or define what constitutes a private club or other establishment "not in fact open to the public" that qualifies for this exemption.[141] Case law, however, reflects that federal courts have interpreted this exemption to require more than the mere assertion that an establishment is a private club[142] or evidence that certain membership criteria exist.[143] As the

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at 1269–75).

[136] *See* Noah v. AOL Time Warner, Inc., 261 F.Supp.2d 532, 541-45 (E.D. Va. 2003), aff'd, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (where plaintiff argued that AOL's chat rooms were places of entertainment within the meaning of Title II, concluding that "an examination the statute's exhaustive definition make clear, 'places of public accommodation' are limited to actual, physical places and structures, and thus cannot include chat rooms, which are not actual physical facilities"); Ebeid v. Facebook, Inc., No. 18-07030, 2019 WL 2059662, at *6 (N.D.Ca. May 9, 2019) (holding that Facebook is not a place of public accommodation within the meaning of Title II on the basis that the statute only covers physical establishments).

[137] *See supra* notes 135-36.

[138] *See* 42 U.S.C. § 2000a(e) ("The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).").

[139] *See Welsh*, 993 F.2d at 1277. *See also, generally*, Watson v. Fraternal Order of Eagles, 915 F.2d 235, 240 (6th Cir. 1990) (stating that "[t]he reason for this particular exclusion is that private clubs often resemble places of public accommodation by serving food and drink and providing entertainment for their guests"; adding that the exception does not "give the clubs *carte blanche* to violate all other antidiscrimination laws" but "only exempts them from the particular provisions of Title II" and observing that suits can proceed against such establishments under other statutes such as 42 U.S.C. § 1981 or state law).

[140] *See, e.g.*, *Lansdowne Swim Club*, 894 F.2d at 85 (stating that the establishment "has the burden of proving it is a private club"); United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968) (same).

[141] *See id*. *See also, e.g.*, United States v. Lansdowne Swim Club, 894 F.2d 83, 85 (3d Cir. 1990) (observing that "[a]lthough the statute does not define 'private club,' cases construing the provision do offer some guidance").

[142] *See, e.g.*, *Richberg*, 398 F.2d at 527-29 (discussing record evidence relating to the defendant's contention that it was a private club, and concluding that the diner "was a club in name only, and a facade to permit [it] to continue in its racially discriminatory ways of yesterday. A club must have substance"). *See also id*. at 528 (describing as instructive a district court's discussion of Title II's legislative history and quoting its conclusion that "it is clear that the only clubs which meet the 'factual' test of the statute are those whose 'membership is genuinely selective on some reasonable basis.' Specifically precluded from this exemption are 'sham establishments' which 'are in fact open to the white public and not to Negroes'") (quoting United States v. Clarksdale, King & Anderson Co., 288 F.Supp. 792, 795 (N.D. Miss.1965). *See also, e.g.*, People of State of N.Y. by Abrams v. Ocean Club, Inc., 602 F.Supp. 489, 490-91, 496 (E.D.N.Y. 1984) (in Title II case alleging that an establishment discriminated against Jewish guests and Jewish applicants for membership, rejecting the establishment's contention that it was a private club).

[143] *See, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 433, 438-440 (1973) (where membership was defined by geographic area, limited in maximum number, and required formal board or majority members' approval, holding that not-for-profit association which operated neighborhood pool facilities did *not* constitute a private

Supreme Court observed in *Daniel v. Paul*, an establishment might refer to itself as a private club, charge a nominal membership fee, and then routinely and openly grant membership cards to white patrons but not black patrons, all as a "subterfuge designed to avoid coverage of the 1964 Act."[144]

To determine, then, whether an establishment constitutes a bona fide "private club" under Title II, federal courts have engaged in fact-specific analyses that consider various aspects of a given establishment,[145] including but not limited to

- the establishment's selectivity,[146] such as evidence of its standards for admission,[147] the process required for membership,[148] or whether the establishment's ultimate approval of a membership application reflects genuine selectivity or is little more than a procedural formality;[149]
- whether the entity is publicly or privately financed, or is nonprofit or for profit;[150]

club within the meaning of Title II; ordering the lower court, on remand, to evaluate the plaintiffs' Title II claim "free from the misconception that Wheaton-Haven is exempt").

[144] *Daniel*, 395 U.S. at 301-02.

[145] *See generally* Nesmith v. Young Men's Christian Ass'n of Raleigh, N.C., 397 F.2d 96, 101-02 (4th Cir. 1968) ("In determining whether an establishment is in fact a private club, there is no single test. A number of variables must be examined in the light of the Act's clear purpose of protecting only 'the genuine privacy of private clubs ... whose membership is genuinely selective ... '") (quoting 110 Cong. Rec. 13697 (1964) (remarks of Senator Humphrey)).

[146] *See Welsh*, 993 F.2d at 1276-77 (stating that "[i]n construing the private club exception of Title II, courts have properly placed great weight on the first factor, that of selectivity" and that a "pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements").

[147] *See Nesmith*, 397 F.2d at 102 (observing that private clubs typically have clearly articulated admission standards, and contrasting that with the defendant YMCA, which had "no standards for admissibility" and as such, was "simply too obviously unselective in its membership policies to be adjudicated a private club"). *See also, e.g.*, Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1336 (2d Cir. 1974) (rejecting club's argument that it was not open to the general public because it was only open to 110 residents out of 2,300 homeowners in the community; stating that "if limitation on the number of users were the [dispositive] test, every restaurant or night club limited by law or fire regulations to a given number of occupants at a given time would be magically transformed into a 'private club.' Accordingly, we have no difficulty in ... finding that the Lake Hills Swim Club, Inc., is not a 'private club' within the meaning of § 2000a(e)").

[148] *See, e.g.*, *Lansdowne Swim Club*, 894 F.2d at 85-86 (concluding that the criteria for admission were "not genuinely selective," where membership process for pool club required completing an application, submitting two letters of recommendation, and paying fees). *Cf. Welsh*, 993 F.2d at 1276-77 (in the context of addressing Title II claim alleging exclusion based on religion—that is, the plaintiff's lack of a belief in a supreme being—analyzing whether the Boy Scouts was a private club exempt from Title II and concluding that the membership commitment required by its Constitution and Oath to "nurture belief in God, respect for one's country and his fellow man, and being of good moral character" sufficiently demonstrated the Boy Scouts' selectivity).

[149] *See, e.g.*, *Lansdowne Swim Club*, 894 F.2d at 86 (addressing the defendant's argument that membership approval was a fifth factor to consider, and concluding that, even if treated as a fifth factor, the evidence of the organization's formal procedure of voting in new members failed to show genuine selectivity; pointing to evidence that the only information given to members before voting on new member admission were applicants' names, addresses, their children's names and ages, and the identities of the recommenders); *Nesmith*, 397 F.2d at 101 (discussing evidence that though the YMCA has a membership committee, "there are no prescribed or regularly used qualifications for membership and no particular rules or regulations governing the committee's activities" and noting that the membership application "asks only for the name, address and church affiliation of the prospective member" with no interview apparently held or required).

[150] *See Welsh*, 993 F.2d at 1277 (stating that the fact that the entity was a nonprofit organization "favor[ed] the private club status" of the Boy Scouts); *Smith*, 462 F.2d at 648 (citing fact that the defendant receives "a substantial amount of revenue from the general public" and "operates as a quasi-public agency" as supporting the conclusion that it was not a private club within the meaning of Title II).

- the history or origin of the entity;[151] and
- members' activities,[152] and whether or how it is controlled by members,[153] among other factors.[154]

Depending on these factors, if a court determines that an entity qualifies as a "private club" within the meaning of Title II, the entity is not subject to the requirements of its public accommodation provision.[155]

Barring State or Local Segregation Mandates

As discussed above, the applicability of Section 201 of Title II turns significantly on an establishment's characteristics to determine whether it constitutes a place of public accommodation. By contrast, Section 202,[156] which prohibits state-sponsored segregation, does not turn on the *category* of establishment, but instead whether "discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State… or political subdivision thereof."[157] In other words, if a state or local law or rule can be said to require "discrimination or segregation" based on race, color, religion, or national origin, Section 202 provides that "all persons shall be entitled to be free, *at any* establishment or place, from discrimination or segregation of any kind" based on those protected traits.[158]

Among the few federal appellate decisions interpreting and applying Section 202 is a 1967 decision from the U.S. Court of Appeals for the Fifth Circuit, *Robertson v. Johnston*.[159] In *Robertson*, a white female plaintiff alleged that the New Orleans police arrested her at a local bar "to enforce a custom or usage of the City of New Orleans which forbids or discourages white women from frequenting places that are predominantly Negro."[160] Though no city ordinance or regulation was at issue, the court of appeals held that the text of Section 202 was "sufficiently

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[151] *See, e.g., Lansdowne Swim Club*, 894 F.2d at 86 (examining evidence relating to the origin of the pool club and concluding that there was "ample evidence" to support the district court's finding that it was not intended to be a private club; citing facts including testimony that it was created to be a community pool, that organizers had solicited area residents to join and had conducted public recruitment meetings, and that the club had accepted every family that applied before its opening). *See generally Welsh*, 993 F.2d at 1277 (stating that another factor in the private club analysis "considers the history" of the club.).

[152] *See, e.g., Richberg*, 398 F.2d at 527 (given club's asserted purposes, examining whether members' activities reflected any pursuit of those purposes and citing the absence of any meetings, committees, or planned member "enterprises," among other facts, as indicative that the club was not "private" within the meaning of Title II; adding "[a] cafe cannot, by drafting itself a set of by-laws, become an exempt club").

[153] *See Welsh*, 993 F.2d at 1276 (listing "the membership's control over the operations of the establishment" as one of seven factors it would consider to determine whether an entity is a private club under Title II)

[154] *See id.* (also listing factors such as "the use of facilities by nonmembers," "the club's purpose," and "whether the club advertises for members").

[155] *See* 42 U.S.C. § 2000a(e) ("The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public").

[156] 42 U.S.C. § 2000a-1.

[157] *Id.* § 2000a-1. *See, e.g*, Tyson v. Cazes, 363 F.2d 742, 742, 744 (1966) (where public bar and lounge refused to serve black patron and asked him to leave because of his race, and local ordinance had been in effect requiring separate services for black and white patrons at public bars, stating that "these two factors—the prohibitory ordinance and the refusal to serve appellant on account of his race—[had] made the defendants' conduct illegal under Section 203 of the Civil Rights Act of 1964").

[158] 42 U.S.C. § 2000a-1 (emphasis added).

[159] Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967).

[160] *Id.* at 44.

broad to cover" a local custom of segregation or discrimination having the "force of a law, ordinance, regulation, rule or order."[161] It was "readily apparent," in the court's view, that if the plaintiff could show a local custom of "discrimination or segregation" that was required (or purported to be required) by New Orleans officials, and that her arrest was to enforce that custom, "she may well be entitled to injunctive relief under" Section 202.[162]

A Prohibition Against Deprivation, Intimidation, or Punishment

Section 203 of Title II[163] prohibits any person from depriving, or attempting to deprive an individual of the rights secured by Sections 201 and 202, including through intimidation or punishment.[164] More specifically, Section 203 makes it unlawful for any person to

- "withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person" of a right or privilege secured by Sections 201 and 202;
- "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by" Sections 201 or 202; or
- "punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by" those sections.[165]

In general, Section 203 has served as the basis for court orders enjoining individuals from a range of violent acts against black citizens for seeking service at covered establishments.[166] In addition, the Supreme Court has held that Section 203 forbids state or local prosecutions against individuals for exercising their rights under Title II (*e.g.*, seeking service at a segregated establishment), based on trespassing or other local laws.[167] When interference with an

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[161] *Id*. at 45, n. 5 (noting a definition of custom as a "practice of the people, which, by common adoption and acquiescence, and by a long and unvarying habit, has become compulsory, and has acquired the force of law") (citing BLACK'S LAW DICTIONARY, 4th Ed. 1951, at 460 and 10 WORDS AND PHRASES 732 (Perm. Ed.); *Cf*. Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970) (discussing the statutory term "custom" in 42 U.S.C. §1983 and interpreting it to refer to practices of state officials, that either "by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior" that have the force of law; stating that "Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South").

[162] *Robertson*, 376 F.2d at 45. As the lower court had not analyzed the plaintiff's claim under Section 2000a-1, the court of appeals remanded the case to the district court for fact finding and analysis of a claim under that section. *See id*. at 44-45.

[163] 42 U.S.C. § 2000a-2.

[164] *See id*. ("No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person of any right or privilege secured by section 2000a or 2000a–1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a–1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a–1 of this title.").

[165] *See id*.

[166] *See, e.g.*, U.S. by Katzenbach v. Original Knights of Ku Klux Klan, 250 F.Supp. 330, 340-42 (1965) (addressing Title II claim seeking an injunction against members of the Ku Klux Klan for interfering with the exercise of others' rights under Title II; reflecting that the interference included making it a regular practice to go to "places where they anticipated that Negroes would attempt to exercise civil rights, in order to harass, threaten, and intimidate," gathering a group of about 30 white persons to attack black citizens and damage the car in which they were driving because they sought service at a local gas station, "brandishing clubs" while ordering black patrons to leave a local restaurant, and attacking black citizens "with clubs, belts, and other weapons" to interfere with their enjoyment of a local park, among other acts).

[167] *See* Hamm v. City of Rock Hill, 379 U.S. 306, 311-12, 317 (1964) (concluding that Section 2000a-2 "prohibits

individual's Title II rights takes the form of a conspiracy by two or more persons to commit a physical assault or attack, the perpetrators may face prosecution under 18 U.S.C. § 241, a federal civil rights conspiracy statute.[168]

Title II Enforcement

Litigation by Private Individuals for Injunctive Relief & Attorney's Fees Only

Section 204[169] of Title II expressly provides that an aggrieved person may file a private right of action to secure temporary or permanent injunctive relief halting the unlawful conduct.[170] A plaintiff who prevails on a Title II claim "cannot recover damages,"[171] but a court "may allow" reasonable attorney's fees for the prevailing party.[172] The Supreme Court has interpreted Title II's fee provision to mean that a prevailing plaintiff "should ordinarily recover an attorney's fees," with the exception being where "special circumstances would render such an award [to the plaintiff] unjust."[173]

Notably, Section 204 also provides that a federal court may appoint an attorney for the complainant "[u]pon application by the complainant and in such circumstances as the court may

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prosecution of any person for seeking service in a covered establishment, because of his race or color," thereby "immuniz[ing]" from prosecution "non-forcible attempts to gain admittance to or remain in establishments covered by the Act"; vacating state court judgments and dismissing charges against black patrons who had been prosecuted under South Carolina and Arkansas state trespassing statutes); Frinks v. North Carolina, 468 F.2d 639, 642 (4th Cir. 1972) ("As *Hamm* made clear, the Civil Rights Act of 1964 protects persons who refuse to obey an order to leave public accommodations, not only from conviction in state courts, but from *prosecution* in those courts.") (emphasis in original).

[168] *See, e.g.*, United States v. Allen, 341 F.3d 870, 873 (9th Cir. 2003) (reflecting facts of federal prosecution and indictment of nine white defendants for interfering with the federally protected rights of Hispanic and black patrons under Title II, where the assailants "surrounded them wielding weapons, berated them with racial epithets, and forced them out of the park for no reason other than their race"). 18 U.S.C. § 241 generally prohibits two or more individuals from conspiring to "injure, oppress, threaten, or intimidate any person ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same," and is punishable by fine or imprisonment.

[169] 42 U.S.C. § 2000a-3.

[170] *See id.* § 2000a-3(a) ("Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a–2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved").

[171] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

[172] 42 U.S.C. § 2000a-3(b) ("In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.").

[173] *Newman*, 390 U.S. at 402. In so holding, the Supreme Court observed that because the relief available under Title II is injunctive, and not monetary, "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id.* "Congress therefore enacted the provision for counsel fees," the Court explained, "to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* In reaching this conclusion, the Court also expressly rejected a lower court's interpretation that would have required additional evidence of bad faith on the part of the defendant for a plaintiff to recover a reasonable attorney's fee. *Id.* at 401 (where the court of appeals would have granted fees "only to the extent that the respondents' defenses had been advanced 'for purposes of delay and not in good faith,'" holding that this standard did not "properly effectuate[] the purposes" of Title II's fee provision).

deem just" and authorize the Title II action to proceed without the payment of fees, costs, or security.[174]

Procedural Prerequisites for Filing Suit

Before filing a civil action under Title II, a plaintiff must satisfy certain procedural prerequisites if the locality or state in which the conduct occurred also has public accommodation antidiscrimination laws.[175] Specifically, Section 204 provides that if the alleged unlawful conduct occurred in a state or locality that has such a law, and a state or local agency can grant or seek relief or file criminal proceedings based on that conduct, a person must first provide "written notice" of the alleged misconduct "in-person" or "by registered mail" to the state or local agency.[176] A person must then wait at least thirty days before filing a Title II lawsuit.[177]

Section 207[178] further provides that federal district courts "shall have jurisdiction" over Title II proceedings, and "shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law." Several federal appellate courts, however, have concluded that the procedural requirements of Section 204 (including written notification to a local agency) are jurisdictional in nature, meaning that a person's failure to adhere to those requirements renders the court without jurisdiction to hear the matter.[179]

Referral to the Community Relations Service

Upon the filing of a Title II action in federal court, the statute gives a court discretion to "refer the matter to the Community Relations Service" if the court "believes there is a reasonable possibility

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[174] 42 U.S.C. § 2000a-3(a) ("Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.").

[175] *See* 42 U.S.C. § 2000a-3(c). *See also* Bilello v. Kum & Go, LLC., 374 F.3d 656, 658 (2004) ("By its plain language, 42 U.S.C. § 2000a–3(c) requires notice to the state or local authority as a prerequisite to filing a civil action when a state or local law prohibits discrimination in public accommodations and provides a remedy for such practice").

[176] 42 U.S.C. § 2000a-3(c) ("In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.").

[177] *Id*. *Cf. id*. § 2000a-3(d) ("In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a)").

[178] *Id*. § 2000a-6.

[179] *See, e.g., Bilello,* 374 F.3d at 659 (holding that it "lack[ed] jurisdiction to review the district court's dismissal" of the plaintiff's Title II claim, because the plaintiff "failed to notify the [Nebraska Equal Opportunity] Commission of the alleged discriminatory public accommodation practice and policy"; further stating that "we join the Seventh and Tenth Circuits in holding these procedural prerequisites must be satisfied before we have jurisdiction over a section 2000a claim"); Stearnes v. Baur's Opera House, Inc., 3 F.3d 1142, 1145 (7th Cir. 1993) (holding that the procedural requirements of §2000a-3 are jurisdictional, and differentiating between § 2000a-3 and § 2000a-6 on the basis that the latter is meant to indicate that a person who has already given notice to a state agency need not thereafter exhaust the state-level remedy before a district court acquires jurisdiction over that person's Title II claim) (citing Harris v. Ericson, 457 F.2d 765, 767 (10th Cir.1972)).

of obtaining voluntary compliance."[180] The period for obtaining voluntary compliance cannot exceed a total of 120 days.[181] The Community Relations Service, a federal entity established by Title X of the 1964 Act, is discussed in further detail later in this report.[182]

Exclusivity of remedies and litigation under other civil rights statutes

Section 207(b) states that "[t]he remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter."[183] But immediately following that text, the provision states that "nothing in this subchapter shall preclude any individual… from asserting any right based on any other Federal or State law not inconsistent with this subchapter…or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."[184] Over the years, there have been questions about the import of Section 207's reference to the exclusivity of Title II remedies.

In its 1968 decision *United States v. Johnson*,[185] for example, the Supreme Court addressed whether conspirators who had attacked black patrons at a restaurant for exercising their rights under Title II could be criminally prosecuted under 18 U.S.C. § 241, or could only be sued under Title II for injunctive relief.[186] The Court rejected the argument that, given the "exclusive-remedy provision" of Title II, the assailants could only be subject to a civil suit for an injunction.[187] Rather, the Court concluded that the provision was only intended to limit to injunction the penalty against *proprietors or owners* for refusing to serve black patrons, and thus foreclosed criminal prosecution of them on the basis of such refusals alone.[188] The Court further reasoned that the provision thus permitted the criminal prosecution of *other* individuals.[189] As the assailants in *Johnson* were not associated or connected to the proprietor or owner of the establishment,[190] the Court held that they could be criminally prosecuted for their acts under 18 U.S.C. § 241.[191] The

[180] 42 U.S.C. § 2000a-3(d) (providing that "the court may refer the matter to the Community Relations Service ... for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance").

[181] *Id*. (providing that the period for obtaining voluntary compliance facilitated by the Community Relations Service shall not be "for not more than sixty days," and further providing that "upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance").

[182] *See infra* "Title X: The Community Relations Service."

[183] 42 U.S.C. § 2000a-6(b).

[184] *Id*.

[185] 390 U.S. 563 (1968).

[186] *See id*. at 563-64.

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

[188] *Id*. at 567 (stating that "the exclusive-remedy provision of s 207(b) was inserted only to make clear that the substantive rights to public accommodation defined in s 201 and s 202 are to be enforced exclusively by injunction. Proprietors and owners are not to be prosecuted criminally for mere refusal to serve Negroes.").

[189] *Id*. (stating that "the Act does not purport to deal with outsiders").

[190] *See id*. at 565 (stating that "no proprietor or owner is here involved. Outside hoodlums are charged with the conspiracy.").

[191] *See id*. at 566-67 (stating that "[w]e refuse to believe that hoodlums operating in the fashion of the Ku Klux Klan, were given protection by the 1964 Act for violating those 'rights' of the citizen that § 241 was designed to protect" and that it could not "imagine that Congress desired to give them a brand new immunity from prosecution under 18 U.S.C. s 241—a statute that encompasses 'all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States'") (internal quotation omitted).

remaining text of Section 207, in the Court's view, was also "evidence that it was not designed" to preempt "every other mode of protecting a federal 'right.'"[192]

Intervention or "Pattern or Practice" Enforcement Actions by the Attorney General

Apart from a private right of action, Title II also authorizes the Attorney General to enforce Title II in two ways: (1) intervening in a civil action filed by a private person alleging a violation of Title II under Section 204;[193] or (2) bringing a "pattern or practice" enforcement action under Section 206 when "the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" under Title II, and "the pattern or practice is of such a nature and is intended to deny the full exercise of the rights."[194] The statute does not define what constitutes a "pattern or practice" for the purposes of a Title II action.[195]

As with civil actions brought by private individuals under Title II, enforcement actions brought by the Attorney General are limited to seeking injunctive relief.[196]

Expedited Judicial Review of "Pattern or Practice" Claims

If the Attorney General has filed a "pattern or practice" complaint, the Attorney General may request that a three-judge district court panel be convened to hear the case.[197] Much like the procedures in Title I for the review of a voting rights claim, Section 206(b) of Title II provides that upon request by the Attorney General, a panel of three judges (at least one circuit judge and one district court judge) must be convened "at the earliest practicable date" to make a determination on the claim and "to cause the case to be in every way expedited."[198] An appeal from the final judgment of that three-judge panel goes directly to the Supreme Court.[199]

If the Attorney General has not requested a three-judge panel, a district court judge must "immediately" be designated to hear the case,[200] and if no district court judge is available, the

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[192] *Id*. at 566 (pointing to the remaining statutory text in Section] 207(b) providing that "nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title ... or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right" as "evidence that it was not designed as preempting every other mode of protecting a federal 'right' or as granting immunity to those who had long been subject to the regime of [Section] 241.").

[193] 42 U.S.C. § 2000a-3(a) (providing that "upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance").

[194] *Id*. § 2000a-5(a).

[195] *See id*. *See generally*, *e.g*., United States v. Jarrah, No. 16-02906, 2017 WL 1048123, at *2 (S.D. Tex. Mar. 20, 2017) (addressing Title II pattern or practice action brought by the Department of Justice, and discussing and citing cases reflecting that courts have "reached different conclusions" regarding the evidence required in a "pattern or practice" claim, including "the relevance of frequency, numerosity or recency of discriminatory conduct").

[196] *See* 42 U.S.C. § 2000a-5(a) (providing that the Attorney General may request "preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice").

[197] *Id*. § 2000a-5(b).

[198] *Id*.

[199] *Id*.

[200] *Id*. (providing that "[i]n the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending

chief judge of the circuit "shall then designate a district or circuit judge of the circuit to hear and determine the case."[201] Whether a district or appellate court judge, Title I makes it "the duty" of the designated federal judge to "assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."[202]

Title III: The Equal Protection Clause and *De Jure* Segregated Public Facilities

Similar to Title II, Title III also concerns discrimination and segregation based on race, color, religion, and national origin, but in "public facilities" rather than business establishments.[203] Public facilities under Title III not only include facilities "owned" by a state or local subdivision, but also those "operated" or "managed by or on behalf of" a state or local subdivision.[204] Examples of public facilities include "parks, libraries, auditoriums, and prisons."[205]

Despite their shared thematic focus on discrimination and segregation in certain public places, Title III differs substantially from Title II in its operation and enforcement. Unlike Title II, which created interrelated *statutory* protections in the context of *commercial businesses*, the principal thrust of Title III is the *enforcement of constitutional* protections against *state actors*.[206] Rather than create a new or complementary statutory right, all three sections of Title III[207] relate to the Attorney General's enforcement of the Equal Protection Clause in the context of desegregating public facilities.[208] In addition, whereas Title II's provisions addressing discrimination and

immediately to designate a judge in such district to hear and determine the case").

[201] *Id*. (providing that "[i]n the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case"). *See also id*. (stating that "[i] t shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited").

[202] *Id*.

[203] *See id*. § 2000b(a).

[204] *Id*. § 2000b(a) (addressing the deprivation or threat of "the loss of [a person's] right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 2000c of this title").

[205] *See Justice Manual* (Title 8-2.234), U.S. Dep't of Justice, https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes#8-2.234, (describing the agency's enforcement of Title III of the 1964 Act and stating that the Title "prohibits discrimination on the basis of race, color, religion, or national origin in public facilities, such as parks, libraries, auditoriums, and prisons"). At present, the Housing and Civil Enforcement Section within the Civil Rights Division of the Department of Justice, enforces Title III. *See id*.

[206] *See* United States v. Guest, 383 U.S. 745, 781 (1966) (Brennan, J., concurring in part and dissenting in part) (contrasting Titles III and IV of the 1964 Act, with Title II, on the basis that Titles III and IV "reflect the view that the Fourteenth Amendment creates the right to equal utilization of state facilities. Congress did not preface those titles with a provision comparable to that in Title II explicitly creating the right to equal utilization of certain privately owned facilities. Congress rightly assumed that a specific legislative declaration of the right was unnecessary, that the right arose from the Fourteenth Amendment itself."). *See also, e.g.*, H. REP. NO. 914, pt. 1, at 18 (generally stating that various parts of the bill that would become the 1964 Act "would open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities").

[207] *See* 42 U.S.C. §§ 2000b, 2000b-1, 2000b-2.

[208] *See* H. REP. NO. 914, pt. 1, at 22 (generally describing Title III in the following terms: "This title would authorize the Attorney General under certain circumstances to bring suit to desegregate public facilities (other than schools) which are owned or operated by State or local governmental units" and "would also authorize the Attorney General to

segregation in business establishments are rooted in Congress's power to regulate interstate commerce,[209] legislative history reflects an understanding that Congress enacted Title III pursuant to Section 5 of the Fourteenth Amendment,[210] which grants Congress the "power to enforce, by appropriate legislation," the protections and guarantees of the Fourteenth Amendment.[211]

General Background: Racial Segregation in Public Park Systems, Libraries, and Other Public Facilities

The enforced exclusion of black citizens from public facilities such as libraries, parks, and museums was another common condition of racial segregation in the United States.[212] As with commercial establishments, when black citizens sought access or service at such public facilities, they were sometimes subject to arrest, conviction, and criminal penalties.[213]

By the time the 1964 Act was enacted, the Supreme Court and lower courts had already held that racial segregation in a state or local government-owned or operated facility—whether that be a segregated court room, public library, or public park—violated the Equal Protection Clause of the

intervene in pending actions in the Federal courts seeking relief from discriminatory practices by State and local governmental units or officers."). The Equal Protection Clause of the Fourteenth Amendment provides that "No state… shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[209] *See supra* notes 85-86.

[210] *See* H. REP. NO. 914, pt. 2, at 15 (stating that Title III is "a valid and necessary implementation of the 14th amendment").

[211] U.S. CONST. amend. XIV, § 5.

[212] *See, e.g.*, Anderson v. City of Albany, 321 F.2d 649, 650, 653-54 (5th Cir. 1963) (concluding that the evidence was "clear" that the facilities owned and operated by the city, including the city's library, auditorium, public parks, and recreational facilities were segregated by race such that certain facilities excluded black patrons altogether or required that patrons be seated or served based on their race); Cobb v. Montgomery Library Bd., 207 F.Supp. 880, 884 (M.D. Ala. 1962) (concluding that the city defendants "have in the past and are at the present time pursuing a policy, custom or usage which provides for the enforced exclusion of members of the Negro race in the use of the public library system and in the public museum"); Shuttlesworth v. Gaylord, 202 F. Supp. 59, 61, 64 (N.D. Ala. 1961), *aff'd sub nom.* Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962) (permanently enjoining city defendants from continuing its race-based exclusion of and discrimination against black citizens in the city's public park system, the Birmingham Museum of Art, the Municipal Auditorium of the City of Birmingham, city ball parks and golf courses, zoo grounds, tennis courts, swimming pools, and playgrounds; observing that the "separation of races in the use of parks, swimming pools, tennis courts, golf courses and all the attending facilities located on these parks and playgrounds was so apparent that each of the supervisors of the Park and Recreation Board could identify each park on the basis of race"). *See also* Regents of Univ. of California v. Bakke, 438 U.S. 265, 394 (1978) (Marshall, J., concurring in part in the judgment) (describing conditions of racial segregation in federal government buildings and stating that "even the galleries of the Congress were segregated.").

[213] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 135-39, 143 (1966) (where regional public library system did not allow black patrons to use branch locations, but instead issued "Negro" library cards to be used exclusively at a "bookmobile" designated for black patrons, reversing the convictions of black petitioners who went to a library branch location, "sat and stood in the room, quietly," and were subsequently arrested by the local sheriff for refusing to leave; noting "that petitioners' presence in the library was unquestionably lawful. It was a public facility, open to the public."); *Shuttlesworth*, 202 F. Supp. at 61 (discussing evidence of "city ordinances requiring the separation of races in play as well as in the use of public recreational facilities," and which "impose[d] criminal penalties upon both the participants and the owner or supervisor of the facilities involved").

Fourteenth Amendment.[214] In its 1963 decision *Watson v. City of Memphis*,[215] for example, the Supreme Court addressed the "unmistakable and pervasive" racial segregation of the city of Memphis' municipal public park and recreation system.[216] That such racial segregation was unconstitutional, the Court stated, was clear, pointing to its 1955 decision *Dawson v. Mayor and City Council of Baltimore* in which "the constitutional proscription of state enforced racial segregation was found to apply to public recreational facilities."[217]

Though individuals may sue for constitutional violations, as was the case in *Watson*,[218] legislative history relating to Title III reflects a concern that such recourse was "only available to private persons who are able through their own resources to obtain justice."[219] Under this view, "implementing legislation" such as Title III, which authorized the Attorney General to file such suits, was "required if the Federal Government is to have the power to protect their rights,"[220] particularly where an individual would be unable, or constrained, to bring litigation on his or her own.[221]

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[214] *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (addressing an Equal Protection Clause challenge by a black petitioner to his arrest and conviction for contempt, which was based solely on his refusal to sit in the section of a segregated traffic court room which had been designated for blacks; concluding that "[s]uch a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities"); New Orleans City Park Imp. Ass'n v. Detiege, 252 F.2d 122, 123 (5th Cir.), *aff'd sub nom*. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (holding that the race-based exclusion of black citizens from a public park violated the Equal Protection Clause and stating that "Courts have decided that the refusal of city and state officials to make publicly supported facilities available on a non-segregated basis to Negro citizens deprives them of equal protection under the laws in too many cases for us to take seriously a contention that such decisions are erroneous and should be reversed"); *Anderson*, 321 F.2d at 653-54 (where district court dismissed claims of black petitioners which challenged various forms of racial segregation in the city's public facilities, including the public library and auditorium, concluding that the record evidence "so clearly convinces us that, upon application of the proper legal principles," the trial court had no discretion to deny the injunction sought by the petitioners"; stating that "it has been 'obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State'") (quoting Dawson v. Mayor & City Council of Baltimore City, 220 F.2d 386, 387 (4th Cir.), aff'd, 350 U.S. 877 (1955)).

[215] 373 U.S. 526 (1963).

[216] *Id*. at 534-35 (reflecting that the city's racially segregated park and recreation system consisted of approximately 131 parks, 61 playgrounds, 12 municipal community centers, and other facilities including a museum, seven city golf courses, boating areas, and a zoo).

[217] *Id*. at 529 (citing Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386 (4th Cir.), aff'd, 350 U.S. 877 (1955), and Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954)).

[218] *See, e.g.*, *id*. at 528 (reflecting that the civil action was filed by black residents of Memphis for "declaratory and injunctive relief directing immediate desegregation of municipal parks and other city owned or operated recreational facilities from which Negroes were then still excluded").

[219] H. REP. NO. 914, pt. 2, at 15-16.

[220] *See id*. at 17 (adding that "No man should be forced to bear unwarranted discrimination and thus be denied the equal protection of the law because he cannot fully invoke in a court of law the constitutional protections that are his by right.").

[221] *See id*. at 15-16 ("[W]e have sought in Title III to authorize the Attorney General to uphold the rights of the individual where he is unable to protect himself"). Accordingly, and as discussed in further detail in this report, the Attorney General must certify, before filing a Title III action, that the individual(s) for which relief is being sought are either "unable ... to bear the expense of the litigation or to obtain effective legal representation" or that "the institution of such litigation [by such individuals] would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property." *See* 42 U.S.C. § 2000b(b).

Title III: Provisions

Enforcement Actions by the Attorney General

Section 301[222] of Title III authorizes the Attorney General to file a civil action "for or in the name of the United States" upon receiving a written and signed complaint alleging that an individual is "being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State" or local subdivision based on race, color, religion, or national origin and is thereby "being deprived of or threatened with the loss of his right to the equal protection of the laws."[223] Title III concerns the threat of loss or denial of the "right to the equal protection of the laws"[224] and thus enforces the Equal Protection Clause.[225]

Prerequisites to Suit

Section 301 also identifies certain conditions that must be met before the Attorney General may bring a Title III enforcement action. When these conditions are met, the Attorney General may file suit directly "in any appropriate district court of the United States."[226]

The first condition is the receipt of a written and signed complaint that alleges the denial of equal use of or access to a public facility based on race, color, religion, or national origin.[227] To file suit pursuant to the complaint, the Attorney General must

- "believe[] the complaint is meritorious"; and
- certify:
    - "that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief";[228] and
    - that filing a civil action "will materially further the orderly progress of desegregation in public facilities."[229]

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[222] 42 U.S.C. § 2000b(a).

[223] *See id*.

[224] *See id*. (excepting "a public school or public college as defined in section 2000c of this title" from the definition of public facilities under Title III).

[225] *See generally, e.g.*, H. REP. NO. 914, pt. 1, at 22 (describing the Attorney General's ability to file suit upon receiving a "signed complaint regarding a denial of equal protection of the laws"); United States v. Wyandotte County, Kan., 480 F.2d 969, 970 (10th Cir. 1973) (reflecting that the Attorney General challenged the race-based segregation of inmates in a county jail as violations of both Title III of the 1964 Act and the Equal Protection Clause of the Fourteenth Amendment).

[226] 42 U.S.C. § 2000b(a) (additionally stating that federal district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section").

[227] *Id*. *See also id*. § 2000b-3 (defining "complaint" as "a writing or document within the meaning of section 1001, title 18").

[228] *See id*. § 2000b(a). *See also id*. § 2000b(b) ("The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.").

[229] *See id*. § 2000b(a). *See also, e.g.*, H. REP. NO. 914, pt. 1, at 22 (describing this prong as certification by the Attorney General "that the initiation of a suit by the United States will further the national public policy favoring progress in

Though there appears to be little case law addressing these conditions to file suit under Title III, House Report No. 914 reflects the view that the determinations made by the Attorney General in deciding to go forward with a suit were not intended to be reviewable.[230]

Remedies, Costs, and Private Litigation

Section 301(a) generally provides that the Attorney General may seek "such relief as may be appropriate."[231] Because Title III concerns the Attorney General's enforcement of the Equal Protection Clause, it would appear that the remedies and relief for a Title III violation are the same as those that a federal court may order for an Equal Protection Clause violation.[232] That relief might include, for example, an injunction ordering the halt of unconstitutional conduct or mandating that specific actions be taken to effectuate or implement redress for the individuals harmed by the unconstitutional conduct, among other relief that a federal court generally has broad discretion to order.[233]

Should a defendant prevail in a Title III action, Section 302 provides that "[i]n any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person."[234]

More generally, while Title III is enforced by the Attorney General, this federal enforcement does not preclude or impede individuals from seeking relief for discrimination or segregation based on race, color, religion, or national origin in public facilities. Section 303 provides that nothing in the

desegregation of public facilities").

[230] *See* H. REP. NO. 914, pt. 1, at 22. *See also*, *e.g.*, *id.* at pt. 2, at 22. The report also expressed the view of several Members that these criteria were intended to "circumscribe" the litigation of the Attorney General to avoid federal enforcement in every case alleging an Equal Protection violation in the public facilities context. *See id.*, pt. 2, at 16 (stating that "in order to avoid the Attorney General from becoming a gratuitous public counsel for all who claim a denial of equal protection of the laws, this provision is worded to circumscribe the Attorney General's activities to only these most necessitous of circumstances. Not only must the complainant be unable to initiate and maintain legal proceedings for defined reasons, but the Attorney General must find that the institution of an action will materially further the public policy of the United States.").

[231] 42 U.S.C. § 2000b(a). *Cf. id.* § 2000a-3 (injunctive relief only) and § 2000a-6.

[232] *See*, *e.g.*, *Wyandotte Cnty.*, 480 F.2d at 970-72 (in a case brought by the Attorney General alleging that a county jail's race-based assignment of inmates violated Title III and Equal Protection Clause and seeking injunctive relief, analyzing the claims without differentiating between the two).

[233] *See*, *e.g.*, Gates v. Collier, 501 F.2d 1291, 1295-96 (5th Cir. 1974) (where racially discriminatory and segregated prison conditions, among other conditions, violated various constitutional rights including under the Eighth and Fourteenth Amendments, upholding the district court's order of injunctive relief, which included an order that the defendants "submit 'a comprehensive plan for the elimination of all unconstitutional conditions in inmate housing, inadequate inmate housing, inadequate water, sewer and utilities, inadequate firefighting equipment, inadequate hospital and other structures condemned by this court,'" among other ordered relief). *See generally*, Smith v. Young Men's Christian Ass'n of Montgomery, Inc., 462 F.2d 634, 636, 643 (5th Cir. 1972) (where plaintiffs brought an Equal Protection Clause challenge to various practices of race-based segregation and exclusion in branches of the YMCA, affirming most aspects of district court's order, including a prohibition of the construction of any new branches on a site that "may tend to perpetuate the past policies and practices of racial segregation," the requirement that the YMCA notify by letter "'each and every member'" that each YMCA branch, program, and activity "'is open to members of all races'"; the requirement that the YMCA include in "'every advertisement, and in every brochure, pamphlet or poster, publicizing the Montgomery YMCA or any of its activities a statement that such programs and activities are open to members of all races,'" and the requirement that the YMCA submit a detailed plan on how it would eliminate its segregated memberships and activities, including addressing representation of black citizens on YMCA's city-wide Board of Directors and other governing bodies).

[234] 42 U.S.C. § 2000b-1.

title "shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this subchapter."[235]

Title IV: The Equal Protection Clause and *De Jure* Segregated Public Schools and Colleges

Title IV of the 1964 Act, like Title III, addresses federal enforcement of the Equal Protection Clause. While Title III focuses on the desegregation of public facilities, Title IV addresses desegregation in the context of public education. The Supreme Court has read the "language and the history of Title IV" to show that Congress enacted it to define the federal government's role in implementing the mandate of the 1954 *Brown v. Board of Education* decision holding that racially segregated public schools violate the Equal Protection Clause.[236] Thus, Title IV concerns desegregation that dismantles state-imposed, or *de jure*, segregation, not "racial imbalance" disconnected from "discriminatory action of state authorities."[237]

More specifically, Title IV authorizes litigation by the Attorney General to address the deprivation of equal protection of the laws in public schools and colleges[238] so as to further "desegregation."[239] Title IV also provides for federal funding and technical assistance to facilitate such school desegregation.[240] "Desegregation," for Title IV purposes, refers to "the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin."[241] As originally enacted, Title IV defined desegregation based on "race, color, religion, or national origin," and was amended in 1972 to add "sex" to the definition of

[235] *Id*. § 2000b-2.

[236] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (stating that Title IV was enacted "to define the role of the Federal Government in the implementation of the *Brown I* decision"). *See also* Brown v. Bd. of Educ., 347 U.S. 483, 486-88, (1954) (addressing consolidated cases challenging the denial of "admission to schools attended by white children under laws requiring or permitting segregation according to race," and holding that race-based segregation in public education violates the Fourteenth Amendment's Equal Protection Clause). *See also* H. REP. NO. 914, pt. 2, at 17 (discussing Title VI as implementing the Supreme Court's 1954 *Brown v. Board of Education* decision).

[237] *See Swann*, 402 U.S. at 17-18 (citing Title IV provisions referring to racial balancing, and concluding that these references were included to foreclose a reading of Title IV "as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities."). *See also* 42 U.S.C. § 2000c(b) (for Title IV purposes, defining "desegregation" to *not* mean "the assignment of students to public schools in order to overcome racial imbalance").

[238] *See id*. § 2000c-6.

[239] *See id*. § 2000c-6(a) (including as a condition for filing suit that "the Attorney General believes ... that the institution of an action will materially further the orderly achievement of desegregation in public education").

[240] *See e.g.*, *id*. § 2000c-2 (addressing technical assistance for desegregating schools); *id*. § 2000c-3 (providing for training relating to desegregation); *id*. § 2000c-4 (authorizing grants for training relating to "problems incident to desegregation").

[241] *See id*. § 2000c(b). *See also id*. §2000c–9 (providing that "[n]othing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, sex or national origin").

desegregation.[242] Federal courts have construed Title IV as an exercise of Congress's authority under Section 5 of the Fourteenth Amendment.[243]

General Background: "Dual" Systems of Public Education Based on Race

As with other conditions of racial segregation, state or local laws often required or expressly permitted the race-based exclusion of black students from white-only public education institutions.[244] State-imposed segregation commonly took the form of fully bifurcated, or "dual,"[245] public school systems—that is, one set of K-12 schools, colleges, and universities

[242] Pub. L. No. 92-318, 86 Stat. 375, § 906(a) ("Sections 401(b), 407(a)(2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000c(b), 2000c-6(a) (2), 2000c-9, and 2000h-2) are each amended by inserting the word 'sex' after the word 'religion.'"). After the 1972 amendment adding "sex," it appears that the few cases that have reached federal courts alleging a Title IV violation on that basis have challenged admissions policies in the *higher education* context. *See* United States v. Virginia, 518 U.S. 515, 519-520 (1996) (in equal protection challenge to male-only admissions policy at Virginia Military Institute (VMI), holding that VMI's admission "reserved exclusively to men" violated "the Constitution's equal protection guarantee"). *See also id*. at 523 (noting that the VMI lawsuit was "prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI"). *See also* United States v. Mass. Maritime Academy, 762 F.2d 142, 145, 147, 157-58 (1st Cir. 1985) (reflecting that the Attorney General filed the Title IV suit challenging the male-only admissions of the Massachusetts Maritime Academy, which was followed by a bench trial resulting in a finding of intentional discrimination; and affirming the district court order permanently enjoining defendants from sex discrimination in admissions and recruiting).

[243] *See, e.g.*, Hayes v. United States, 464 F.2d 1252, 1261 (5th Cir. 1972) ("Enactment of Title IV was a legitimate exercise of Section 5 of the Fourteenth Amendment to the Constitution's grant of Congressional power."). *See also, e.g.*, United States v. Fruit, 507 F.2d 194, 195 (6th Cir. 1974) (referring to Title IV as a "statute Congress had the authority to enact under Section 5 of the Fourteenth Amendment").

[244] *See, e.g.*, Brown v. Board of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 486 n.1 (1954) (reflecting that the States of South Carolina, Delaware, and Virginia had state statutes or constitutional provisions that required the segregation of white and black children in public schools, and that the State of Kansas had a statute expressly permitting racially segregated public schools); Guey Heung Lee v. Johnson, 404 U.S. 1215 n.* (1971) (Douglas, Circuit Justice) (observing that until 1947, the State of California permitted separate schools "for children of Chinese, Japanese, or Mongolian parentage" and Native Americans; also reflecting that where public school districts chose to establish such racially segregated schools, state law prohibited the admission of Native American children and "children of Chinese, Japanese, or Mongolian parentage" into "any other school"); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 412 (8th Cir. 1985) (describing the "state's role in the segregation of the public schools of Arkansas," beginning with the passage of a state law in 1867 requiring separate schools for black children); United States v. DeSoto Parish Sch. Bd., 574 F.2d 804 (5th Cir. 1978) (reflecting that Louisiana state law "required that the Louisiana public schools be operated on a segregated basis" through 1957, at which time those provisions were repeated). In addition, the Supreme Court and federal courts of appeals have addressed state actions that deliberately created or operated segregated public school systems by race, based on evidence other than a state law or ordinance requiring or permitting racially segregated schools. *See, e.g.*, Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 198-201 (1973) (holding that state-imposed segregation may be established apart from legislative evidence of a statute or ordinance addressing racially segregated schools; stating that petitioners had proved that "for almost a decade after 1960 respondent School Board had engaged in an unconstitutional policy of deliberate racial segregation in the Park Hill schools"); Morgan v. Kerrigan, 509 F.2d 580, 585, 588-98 (1st Cir. 1974), cert denied, 421 U.S. 963 (1975) (where school board argued that the existing segregation in Boston public schools was not intentional or state-imposed, discussing evidence of the district court's findings regarding the intent to segregate black students from white students in various ways; concluding that the "actions of the Boston authorities are not distinguishable from what the Supreme Court has termed the 'classic pattern of building schools specifically intended for Negro or white students'").

[245] *Swann*, 402 U.S. at 5-6 (describing the practice of "maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race," and the constitutional mandate to "eliminate [such] dual systems and establish unitary systems at once"). *See also id*. at 22 ("The constant theme and thrust of every holding from Brown I to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle

created exclusively for white students, and another set of schools for black students, created to preserve the white-only admissions at those institutions.[246] Private schools that provided instruction to black and white students together were at times prosecuted and subjected to state-imposed penalties for doing so.[247]

Though the Supreme Court unanimously held, in 1954, that racially segregated public schools were unconstitutional,[248] states and local school districts continued to operate intentionally racially segregated public school and university systems well after that date.[249] According to

dual school systems.").

[246] *See, e.g.*, United States v. Fordice, 505 U.S. 717, 721-22 (1992) (describing the creation of Mississippi's public university system in 1848 with the establishment of "the University of Mississippi, an institution dedicated to the higher education exclusively of white persons" and the expansion of that system in subsequent decades during which the state continued to establish public colleges for attendance by white students and other public colleges for attendance by black students); United States v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225, 227 (1969) (stating that "many" states other than those at issue in the Court's 1954 decision *Brown v. Board of Education* had "for many years maintained a completely separate system of schools for whites and nonwhites, and the laws of these States, both civil and criminal, had been written to keep this segregated system of schools inviolate. The practices, habits, and customs had for generations made this segregated school system a fixed part of the daily life and expectations of the people."); *Brown I*, 347 U.S. at 486-88 (stating that black petitioners in the consolidated case, from school districts in South Carolina, Delaware, Virginia, and Kansas "ha[d] been denied admission to schools attended by white children under laws requiring or permitting segregation according to race"). *See also, generally*, Regents of Univ. of California v. Bakke, 438 U.S. 265, 394 (1978) (Marshall, J., concurring in part and dissenting in part) (stating that "the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established.").

[247] *See, e.g.*, Berea College v. Kentucky, 211 U.S. 45, 51-53 (1908) (reflecting that a privately-incorporated college was prosecuted, found guilty, and fined under a Kentucky state statute for admitting and providing instruction to black and white students together).

[248] *Brown I*, 347 U.S. at 494-95 (holding that state-imposed segregation of public schools based on race deprived black students of the equal protection of the laws guaranteed by the Fourteenth Amendment). Following *Brown I*, the Supreme Court repeatedly held that state or local entities have an "affirmative duty" under the Equal Protection Clause of the Fourteenth Amendment to eliminate "all vestiges" of state-imposed racial segregation. *See, e.g.* Freeman v. Pitts, 503 U.S. 467, 485 (1992) ("The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present. This was the rationale and the objective of *Brown I* and *Brown II*."); *Swann*, 402 U.S. at 15 (stating that the "objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution ... If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked."). "Each instance of a failure or refusal to fulfill this affirmative duty," the Court has explained, "continues the violation of the Fourteenth Amendment." Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979).

[249] *See, e.g.*, *Fordice*, 505 U.S. at 721-22 (describing the origin and development of Mississippi's intentionally segregated public university system from 1848 through 1950, and stating that "[d]espite this Court's decisions in *Brown I* and *Brown II*, Mississippi's policy of *de jure* segregation continued" thereafter; stating that the University of Mississippi admitted its first black student in 1962, "and then only by court order," and that "[f]or the next 12 years the segregated public university system in the State remained largely intact"); Lau v. Nichols, 414 U.S. 563, 564 (1974) (stating that the "San Francisco, California, school system was integrated in 1971 as a result of a federal court decree") (citing Lee v. Johnson, 404 U.S. 1215 (1971)); *Swann*, 402 U.S. at 13 (observing that by 1968, when it considered the case Green v. County Sch. Bd., 391 U.S. 430, "very little progress had been made" with respect to desegregation in "dual school systems [that] had historically been maintained by operation of state laws"); Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 778 F.2d 404, 412 (8th Cir. 1985) (reflecting that up until 1983, Arkansas state law continued to "require[] the board of school directors in each district of the state to 'establish separate schools for white and colored persons,'"; stating that the statute, ARK. STAT. ANN. § 80–509(c), was repealed on November 1, 1983); Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 835 (5th Cir. 1969) (in a Title IV case, discussing actions taken by the school board to circumvent its constitutional obligation to racially desegregate its schools by "deliberate[ly] attempt[ing] to subvert the public schools and to place in their stead a system of private schools

House Report No. 914, though there had been initial success in some districts to transition to a desegregated school system, "the crux of the matter is that…there are almost as many segregated school districts in late 1963 as there were at the end of 1959."[250] The report also identified methods that school districts were using to evade their constitutional obligation to dismantle racially segregated public schools.[251] Without federal intervention, or otherwise hastening the pace of desegregation, the report expressed the view that it would take another century—until the year 2063—for all school districts to reach compliance with the Supreme Court's *Brown* decisions.[252]

For Title IV purposes, a public school not only includes "any elementary or secondary educational institution" operated by a state, state subdivision, or agency, but also elementary or secondary schools "operated wholly or predominantly *from or through* the use of governmental funds or property, or funds or property derived from a governmental source."[253] Likewise, a public college means "any institution of higher education or any technical or vocational school above the secondary school level," operated by a state entity or operated wholly or mainly through government funds or property.[254]

Title IV Provisions: Federal Intervention by DOJ and ED

Under Title IV, federal intervention relating to the desegregation of public schools encompasses both litigation by the Attorney General and technical assistance provided by the Department of Education (ED),[255] as discussed in more detail below.

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supported by parish funds and property and attended solely by white students. Such a scheme is constitutionally intolerable").

[250] *See* H. REP. NO. 914, pt. 2, at 18-20.

[251] *See id*. at 20-21 (discussing four methods of avoiding desegregation, including 1) the assertion of legal arguments such as justifying segregation as an exercise of a state's police power; 2) attempts to disqualify plaintiffs from bringing court actions to end segregation; 3) the promulgation of "pupil placement and assignment laws which alter the theoretical basis of separation from a classification based on race" to separation based on other factors such as "free choice of pupil" and "home environment"; and 4) "various devices employed to separate the operation of the schools from the state," such as establishing "a 'private-public' school system as a means of circumventing desegregation and in some cases the closing of schools").

[252] *See id*. at 20 (stating that "at this pace, it will still take until the year 2063 before the compliance order of the 1955 Supreme Court decision which called for school desegregation in biracial school districts 'with all deliberate speed' will be carried out. This must be remedied by affirmative congressional action."). *See generally* Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954); Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).

[253] 42 U.S.C. § 2000c(c) (stating that a "'[p]ublic school' means any elementary or secondary educational institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.").

[254] *See id*.

[255] *See* H. REP. NO. 914, pt. 1, at 23 (describing the "two main purposes" of Title IV as authorizing the Secretary of the Department of Education to provide "technical assistance and financial aid to assist in dealing with problems incident to desegregation" and authorizing the "Attorney General to institute suits seeking desegregation of public schools where the students or parents involved are unable to bring suit and where he considers that a suit would materially further the public policy favoring the orderly achievement of desegregation in public education").

Enforcement Actions by the Attorney General

Section 407[256] of Title IV authorizes the Attorney General to file a civil action "for or in the name of the United States" upon receiving a written and signed complaint alleging one of two conditions: either that "minor children … are being deprived by a school board of the equal protection of the laws," or that an individual "has been denied admission" to or continued attendance at "a public college by reason of race, color, religion, sex or national origin."[257] Like Title III, Title IV concerns the deprivation of "the equal protection of the laws"[258] and has thus been construed to address violations of the Equal Protection Clause.[259]

Prerequisites to Suit

Section 407 also identifies certain conditions that must be met before the Attorney General may bring an enforcement action. When these conditions are met, the Attorney General may file suit directly[260] "in any appropriate district court of the United States."[261]

The first condition is the Attorney General's receipt of a written and signed complaint alleging that a school board is depriving minor children of equal protection of the laws, or that a public college has denied an individual admission based on "race, color, religion, sex or national origin."[262]

To file a civil action pursuant to the complaint, the Attorney General must also

- "believe[] the complaint is meritorious";[263]
- certify:
    - "that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief"[264]; and

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[256] 42 U.S.C. § 2000c-6.

[257] *See* 42 U.S.C. § 2000c-6. As noted earlier, Title IV was amended in 1972 to add "sex" to several statutory sections. *See supra* note 242.

[258] *See id*.

[259] *See, e.g*., United States v. CRUCIAL, 722 F.2d 1182, 1185 (5th Cir. 1983) (reflecting that the Attorney General brought suit against the county for its continued operation of an intentionally racially segregated public school system in violation of both Title IV of the 1964 Act and the Fourteenth Amendment). *See also id*. at 1186-91 (addressing legal issues on appeal without differentiating analytically between Title IV and the Fourteenth Amendment).

[260] 42 U.S.C. § 2000c-6(a) (authorizing the Attorney General "to institute for or in the name of the United States a civil action"). *Cf. id*. § 2000h-2 (authorizing the Attorney General to *intervene* in an action that has been commenced in any federal court "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, sex or national origin").

[261] 42 U.S.C. § 2000c-6(a) (additionally stating that federal district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to ... enlarge the existing power of the court to insure compliance with constitutional standards").

[262] *Id*. (stating that with respect to a complaint relating to minor children, the complaint must be "signed by a parent or group of parents" and with respect to an individual denied admission or continued attendance at a public college, the complaint must be "signed by an individual, or his parent"). *See also id*. § 2000c-6(c) (for Title IV purposes, defining "parent" as "any person standing in loco parentis" and "complaint" as "a writing or document within the meaning of section 1001, title 18").

[263] *Id*. § 2000c-6(a).

[264] *See id*. *See also id*. § 2000c-6(b) (stating that the inability to initiate and maintain proceedings is shown "when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation" or when "the institution of such litigation would jeopardize the

- that filing a civil action "will materially further the orderly achievement of desegregation in public education";[265]
- give notice "of such complaint to the appropriate school board or college authority";[266] and
- certify that the Attorney General is "satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint."[267]

House Report No. 914 reflects the view that, as with the preconditions for filing Title III actions, the determinations upon which the Attorney General makes the requisite certifications for filing Title IV actions were not intended to be "reviewable."[268] At least one federal court of appeals has expressly held that the information giving rise to the Attorney General's certifications under Title IV are subject to neither judicial review nor disclosure to the defendant.[269]

Remedies, Costs, and Private Litigation

As for relief for Title IV violations, Section 407 provides that the Attorney General may seek "such relief as may be appropriate."[270] Because Title IV concerns the Attorney General's enforcement of the Equal Protection Clause,[271] the remedies and relief available for Title IV violations appear to be the same as those that a federal court may order to address an Equal Protection Clause violation.[272] Though beyond the scope of this overview to comprehensively discuss court-ordered remedies responsive to *de jure* segregation, as a general matter, courts have broad discretion in fashioning relief to undo a state actor's intentional, race-based separation of students.[273] Over the years, such judicial remedies have included, among other things, race-based

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personal safety, employment, or economic standing of such person or persons, their families, or their property").

[265] *See id.* § 2000c-6(a). *See* United States v. Mass. Maritime Acad., 762 F.2d 142, 152 (1st Cir. 1985) (observing that "[a] required purpose in all such [Title IV] cases is to 'materially further the orderly achievement of desegregation in public education'") (quoting 42 U.S.C. § 2000c–6(a)).

[266] 42 U.S.C. § 2000c-6(a).

[267] *Id.*

[268] *See* H. REP. NO. 914, pt. 1, at 24 (discussing preconditions to suit and stating "[i]t is not intended that determinations on which the certification was based should be reviewable").

[269] United States v. Greenwood Mun. Separate Sch. Dist., 406 F.2d 1086, 1090-91 (5th Cir. 1969), *cert. denied*, 395 U.S. 907 (1969) ("[W]e hold that the [school] board has no right, nor have the courts any right, to examine the information which triggered the Attorney General's certificate"; also discussing the legislative history of Title IV and holding that defendants were not entitled to discovery of the identities of the individuals who submitted written complaints to the Attorney General, as "[s]eeing their names and the precise language of their complaints will not give the board any information it cannot get by looking at conditions in the schools, specifically at the extent of desegregation of students, teachers, and activities. The progress of desegregation is what school cases are all about"). *See also Massachusetts Maritime Academy*, 762 F.2d at 152 ("Courts have held that neither the defendant school board nor the courts have a right to examine the information which triggered the Attorney General's certificate.").

[270] *See* 42 U.S.C. § 2000c-6 (a).

[271] *See generally Swann*, 402 U.S. at 16 (stating that Title IV was enacted "to define the role of the Federal Government in the implementation of the *Brown I* decision").

[272] *See generally, e.g.*, *CRUCIAL*, 722 F.2d at 1191 (in suit filed by the Attorney General alleging violations of Title IV and the Fourteenth Amendment, ordering the district court on remand, without noting any distinction between requisite relief under Title IV or the Equal Protection Clause, to hold a hearing on proposed desegregation plans and promptly adopt a plan); Andrews v. Monroe City Sch. Bd., No. 65-11297, 2016 WL 1484506, at *1 (Apr. 14, 2016) (in a Title IV action, approving the terms of a consent decree setting out requirements to be met by the school board and concluding that the decree was "consistent with the Fourteenth Amendment to the United States Constitution and federal law, and that such entry will further the orderly desegregation of the District").

[273] *See generally Swann*, 402 U.S. at 15-16 (discussing the equitable powers of a court in the context of a school

student assignments, goals for balancing the racial composition of students,[274] and mandatory busing or transportation.[275]

Title IV, however, includes several references to racial balancing[276] that could be read as a restriction on dismantling segregation through such race-based measures.[277] Section 407, for example, provides that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another … in order to achieve such racial balance."[278] Addressing this potential ambiguity in its 1971 *Swann* decision, the Court interpreted this statutory text as reflecting Congress's intent that Title IV only address segregation caused by state action, not racial imbalance apart from discrimination by state authorities.[279] Thus, Section 407 does not "restrict… or withdraw from courts their historic equitable remedial powers" for redressing Equal Protection Clause violations.[280]

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desegregation case, and observing that "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution"). *See also id*. at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

[274] *See generally, e.g.*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems."); *Swann*, 402 U.S. at 19 (where the school board had operated an intentionally segregated public school system through 1969, rejecting the school board's contention that the district court's remedial order requiring a ratio of at least two black teachers out of every 12 teachers to desegregate school faculties was unconstitutional); *id*. at 24-25 (upholding aspect of district court's order setting a target racial balance of black and white students in each school and stating that the district court's "very limited use made of mathematical ratios was within [its] equitable remedial discretion"; stating that "the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement" and adding that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."). *See also, generally, Freeman*, 503 U.S. at 493 ("In *Swann* we undertook to discuss the objectives of a comprehensive desegregation plan and the powers and techniques available to a district court in designing it at the outset. We confirmed that racial balance in school assignments was a necessary part of the remedy in the circumstances there presented.")

[275] *See North Carolina State Bd. of Educ.*, 402 U.S. at 44-46 (addressing a state statute that prohibited assigning students to schools based on race, and "involuntary" busing for that purpose; holding that the statute's wholesale prohibition against such measures "contravene[d]" Supreme Court precedent that "all reasonable methods be available to formulate an effective remedy" to state-imposed segregation and adding that "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it").

[276] *See, e.g.*, 42 U.S.C. § 2000c(b)("'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome *racial imbalance*.") (emphasis added).

[277] *See Swann*, 402 U.S. at 16 (reflecting that the defendant school authorities had argued that Title IV limited "the equity powers of federal district courts").

[278] *Id*. § 2000c-6(a) (emphasis added).

[279] *Swann*, 402 U.S. at 17-18 (pointing to Title IV's references to racial balance in 42 U.S.C. §§ 2000c(b) and 2000c-6 and concluding that this language was intended to foreclose a reading Title IV "as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities.").

[280] *See Swann*, 402 U.S. at 17 (rejecting the argument raised by school authorities that Title IV constrained or limited "the equity powers of federal district courts" to mandate relief for state-imposed racial segregation in public schools; stating that Title IV's various provisions reflected "no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers"). The Supreme Court also rejected similar arguments in its 1971 decision *McDaniel v. Barresi*. *See McDaniel*, 402 U.S. 39, 40-42 (1971). *McDaniel* concerned a Title IV and Equal

Should a defendant prevail in a Title IV action, Section 408[281] provides that "[i]n any action or proceeding under this subchapter the United States shall be liable for costs the same as a private person."[282]

Though Title IV is enforced by the Attorney General, this federal enforcement does not interfere with an individual's right to seek relief against racial discrimination or segregation in the public education context. Section 409[283] provides that "[n]othing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education."[284]

Technical Assistance for Desegregating Public Schools

Besides authorizing enforcement litigation by the Attorney General, Title IV also authorizes the Secretary of the Department of Education (ED) to provide technical assistance, training, and grants to support public school desegregation.[285] Addressing the focus of this technical assistance, House Report No. 914 expressed the view that efforts should be directed at "overcom[ing] the past deprivation caused by inferior schools" for black students by providing special counseling, guidance, and instruction;[286] supporting local administrators, teachers, and students in the transition from one-race to integrated schools;[287] and "disseminat[ing] information concerning desegregation plans, problems, and possible solutions."[288] The statutory provisions setting out ED's responsibilities with respect to Title IV are discussed in more detail below.

Preparing, Adopting, and Implementing Desegregation Plans

Section 403[289] authorizes the Secretary "to render technical assistance ... in the preparation, adoption, and implementation of plans for the desegregation of public schools," to governmental

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Protection Clause challenge to a Georgia county's plan which considered students' race in school assignments for the purpose of desegregating the county's intentionally segregated public school system. *Id*. at 40-41. The Court held that the county had properly taken students' race into account because, having operated a racially segregated public school system, the county was "'clearly charged with the affirmative duty to take whatever steps might be necessary" to eliminate it "'root and branch.'" *Id*. at 41 (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 437 (1968)). As the Court explained, dismantling a public school system in which students had been intentionally separated by race "almost invariably require[s]" that a school board consider race when assigning students to new schools because "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." 402 U.S. at 41. In that context, Title IV, the Court concluded, "clearly does not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems." *Id*. at 42.

[281] 42 U.S.C. § 2000c-7.

[282] *Id*.

[283] *Id*. § 2000c-8.

[284] *Id*.

[285] *See id*. §§ 2000c-2–2000c-5.

[286] *See* H. REP. NO. 914, pt. 2, at 21 (stating that the "gap in scholastic achievement of students is often considerable" and that "[t]here is an obvious need to provide special counseling, guidance, and remedial instruction to overcome the past deprivation caused by inferior schools"; expressing the view that "public education may have been separate but it was seldom equal").

[287] *See id*. (stating that the "transition from all-Negro to integrated schools is at best a difficult problem of adjustment for teachers and students alike" and that the "hurdles that must be overcome in teaching biracial classes and in administering biracial school systems are similarly tremendous").

[288] *See id*. ("It is clear then that the Congress must enact legislation empowering the Federal Government to disseminate information concerning desegregation plans, problems, and possible solutions.").

[289] 42 U.S.C. § 2000c-2.

entities that are "legally responsible for operating a public school or schools."[290] Technical assistance may take the form of "information regarding effective methods of coping with special educational problems occasioned by desegregation," and assistance and advising by "personnel of the Department of Education or other persons specially equipped to advise and assist" in such matters,[291] among other support.

Grants for Training Relating to Problems "Occasioned by Desegregation"

Apart from technical assistance, Section 404[292] of Title IV also authorizes the Secretary to provide grants, or contract with, higher education institutions to operate "short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation."[293] Meanwhile, Section 405[294] authorizes the Secretary to issue grants to school boards, upon application, to pay for costs of training to teachers and school personnel in "dealing with problems incident to desegregation" and hiring specialists to advise on "problems incident to desegregation."[295] In issuing grants under Section 405, the statute requires that the Secretary consider the amount available for grants, other pending applications, the "financial condition" of the applicant school board, "the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant."[296] Payments for a grant or contract under Title IV may be made in advance or reimbursed, including in installments, as determined by the Secretary.[297]

As a general matter, it appears unclear from the agency's publicly available materials how it now assists entities with desegregation. When ED revised its Title IV regulations in 2016,[298] for example, the agency created Equity Assistance Centers (EAC),[299] formerly known as Desegregation Assistance Centers,[300] among other changes it made to its Title IV regulations.[301]

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[290] *Id*. (authorizing technical assistance upon application by "any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools").

[291] *See id*. *See also* 34 C.F.R. § 270.7 (defining "[s]pecial educational problems occasioned by desegregation" to mean "those issues that arise in classrooms, schools, and communities in the course of desegregation efforts based on race, national origin, sex, or religion. The phrase does not refer to the provision of special education and related services for students with disabilities as defined under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq*.)").

[292] 42 U.S.C. § 2000c-3.

[293] *Id*. (also permitting stipends for individuals who attend a training institute on a full-time basis, "in amounts specified by the Secretary in regulations, including allowances for travel to attend such institute").

[294] *Id*. § 2000c-4.

[295] *Id*. (authorizing the Secretary, "upon application of a school board, to make grants to such board").

[296] *Id*.

[297] *Id*. § 2000c-5.

[298] *See generally* Notice of Final Title IV Regulations, 81 Fed. Reg. 46808 (July 18, 2016) (codified at 34 C.F.R. pt. 270).

[299] 34 C.F.R. § 270.1 (defining the "Equity Assistance Center Program as a "program [that] provides financial assistance to operate regional Equity Assistance Centers (EACs), to enable them to provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools, and in the development of effective methods of coping with special educational problems occasioned by desegregation."). *See also* 34 C.F.R. § 270.7 (defining Equity Assistance Center as "a regional desegregation technical assistance and training center funded" by ED).

[300] *See generally* Notice of Final Title IV Regulations, 81 Fed. Reg. 46808 (July 18, 2016) (codified at 34 C.F.R. pt. 270) (describing change from Desegregation Assistance Centers to Equity Assistance Centers).

[301] Among changes to its Title IV regulations, ED removed a previously-existing section, 34 C.F.R. § 271 *et seq*.,

Through its Office of Elementary and Secondary Education, ED currently funds four such EACs[302] and describes their activities largely in terms of educational support services relating to "nondiscrimination."[303] In its overview of the centers, ED does not specify what types of technical assistance the centers provide to school districts relating directly to desegregation plans or desegregation orders.[304]

Title V: Amendments concerning the U.S. Commission for Civil Rights (USCCR)

Title V of the 1964 Act amended provisions of the 1957 Civil Rights Act which created the U.S. Commission for Civil Rights (USCCR).[305] The USCCR[306] is a "purely investigative and fact-finding body,"[307] and under the 1957 Act, was responsible for: investigating allegations relating to

which addressed technical assistance for state educational agencies (SEA) regarding desegregation. *See* Notice of Final Title IV Regulations, 81 Fed. Reg. at 46809 (stating that ED chose to eliminate regulations addressing technical assistance for SEAs, because "Congress has not funded the SEA Desegregation program in more than 20 years, and as a result, the Department no longer administers this program. Given these circumstances, the Department believes that retaining the SEA Desegregation program regulations under part 271 is not in the public interest, and could only result in public confusion. Thus, the Department will move forward in removing 34 CFR part 271, and consolidating current part 272 into part 270").

[302] *See Contacts for Equity Assistance Centers*, U.S. Dep't of Educ., Office of Elementary and Secondary Educ., https://www2.ed.gov/programs/equitycenters/contacts.html, (last visited Sept. 1, 2020) (identifying four Equity Assistance Centers presently "funded by the U.S. Department of Education under Title IV of the 1964 Civil Rights Act" and stating that the "Equity Assistance Center (EAC) Program is administered by the Office of Program and Grantee Support Services (PGSS) in the Office of Elementary and Secondary Education").

[303] *See Training and Advisory Services–Equity Assistance Centers*, U.S. Dep't of Educ., Office of Elementary and Secondary Education, https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/, (last visited Sept. 1, 2020) (stating that "typical activities include: (1) technical assistance in the identification and selection of appropriate education programs to meet the needs of English Learners (ELs); and (2) training designed to develop educators' skills in specific areas, such as the dissemination of information on successful education practices and the legal requirements related to nondiscrimination on the basis of race, sex, national origin, and religion in education programs. Projects include technical assistance and training for education issues occasioned by school desegregation. The centers work with schools in the areas of harassment, bullying, and prejudice reduction. Centers also develop materials, strategies, and professional development activities to assist schools and communities in preventing and countering harassment based on ethnicity, gender, or religious background.").

[304] *See id.* (not discussing or referring to public schools or school districts regarding desegregation plans or court-ordered desegregation). A number of schools or school districts in the United States, however, remain subject to court desegregation orders. *See generally* U.S. Gov't Accountability Off., GAO-16-345, Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination (2016), at 40 (stating that "as of November 2015 there were 178" open school desegregation cases). *See also id.* at n. 65 (stating that the Department of "Justice is not a party in all of the cases in which a court has ordered a district to desegregate. As a consequence, the 178 cases cited above do not include all of the open desegregation orders—only those to which Justice is a party to the case."). *See, e.g.*, Stout by Stout v. Jefferson Cnty. Bd. of Educ., 882 F.3d 988, 1009-10 (11th Cir. 2018) (rejecting school board's contention that it had been deemed "unitary" and holding that precedent addressing the Jefferson County school district "makes clear that Jefferson County has not fully fulfilled its desegregation obligations and remains subject to judicial oversight").

[305] *See* Pub. L. No. 88-352, 78 Stat. 241, 249-52 (1964) (amending the 1957 Civil Rights Act with respect to the USCCR).

[306] The USCCR is currently defined in statute as an eight-member body, with no more than four members of any political party at a given time. 42 U.S.C. § 1975(b) ("The Commission shall be composed of 8 members. Not more than 4 of the members shall at any one time be of the same political party").

[307] Hannah v. Larche, 363 U.S. 420, 441 (1960) (describing the USCCR and stating that "its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal

the deprivation of the right to vote; studying and collecting information of legal developments relating to Equal Protection Clause violations; and submitting findings and recommendations to the President of the United States and Congress.[308] Through Title V of the 1964 Act, Congress further defined the USCCR's responsibilities and procedures.[309] The Supreme Court has understood the 1957 Act, which created the USCCR, as a valid exercise of Congress's authority to enforce the Fifteenth Amendment.[310]

Through Title V, Congress reauthorized the Commission through 1968,[311] and thereafter reauthorized or extended authorization for the Commission several times.[312] Although its most recent reauthorization expired in 1996,[313] Congress has continued to fund the Commission through the annual appropriations process,[314] and the USSCR maintains a number of the major functions set out in Title V.[315]

General Background

Leading up to the 1964 Act, the USCCR was a temporary body[316] subject to uncertainty over its continued operation.[317] From 1959 through 1963, the Commission was twice funded through "11th hour" appropriation riders that posed logistical and staffing challenges for the USCCR.[318] The

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liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.").

[308] *See* Pub. L. No. 85-315, 71 Stat. 634, 635 (1957) (describing duties of the USCCR). *See generally*, Jocelyn C. Frye, Robert S. Gerber, Robert H. Pees, & Arthur W. Richardson, Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 454-62 (1987) [hereinafter Frye et al., *Rise and Fall*] (stating that the USCCR was created under Part I of the 1957 Civil Rights Act and discussing the early years of the USCCR and its work leading up to the 1964 Act).

[309] *See* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, 536 (2014) [hereinafter Brown, *The Civil Rights Act of 1964*] (stating that "under the Title V of the Civil Rights Act of 1964, procedures of the Commission were more clearly laid out or established and the duties of the Commission were expanded").

[310] *Hannah*, 363 U.S. at 452 (addressing various legal arguments relating to the operation and procedures of the USCCR and stating that "[t]he respondents have also contended that the Civil Rights Act of 1957 is inappropriate legislation under the Fifteenth Amendment. We have considered this argument, and we find it to be without merit").

[311] Pub. L. No. 88-352, 78 Stat. 241, 251 (1964) *See id*. *See also* Brown, *The Civil Rights Act of 1964*, *supra* note 309, at 536 ("The Act authorized the Commission through January 1968.").

[312] Congress has since "reauthorized or extended the legislation creating the Commission several times; the last reauthorization was in 1994 by the Civil Rights Commission Amendments Act of 1994." *About USCCR*, USCCR, Mission, https://www.usccr.gov/about/. *See also* Civil Rights Commission Amendments Act of 1994, P.L. 103-419; 108 Stat. 4338; United States Commission on Civil Rights Act of 1983, P.L. 98-183, 97 Stat. 1301.

[313] The 1994 legislation provided that the USCCR "terminate on September 30, 1996," but the agency has continued operations thereafter "pursuant to annual appropriations." *See* United States v. Wilson, 290 F.3d 347, 351 (D.C. Cir. 2002) (citing 42 U.S.C. § 1975d).42 U.S.C. § 1975d.

[314] *See id*.

[315] *See, e.g.*, *About USCCR*, USCCR, *Powers*, https://www.usccr.gov/about/powers.php (stating that, among other functions, the USCCR "conduct[s] hearings on critically important civil rights issues, including issuing subpoenas for the production of documents and the attendance of witnesses").

[316] Frye et al., *Rise and Fall*, *supra* note 308, at 454 (stating that the USCCR was created under Part I of the 1957 Civil Rights Act as "a temporary, bipartisan" body "within the executive branch of the federal government").

[317] *See* H. REP. NO. 914, pt. 2, at 22 (stating that the USCCR "has labored constantly in a climate of uncertainty over its future").

[318] *See id*. (describing "11th hour reprieve[s]" to the USCCR's continued operation through "riders to appropriations bills in 1959 and 1961," which granted "2-year extensions of the Commission's life. This year through an amendment

USCCR's activities during that time included regional fact-finding hearings[319] that addressed "voting rights, denials of equal opportunity and protection in housing, education, employment, and the administration of justice."[320] In those years, the USCCR's investigative efforts, including through written requests for information or interrogatories to state or local officials, were often met with refusals to cooperate.[321] In the context of such refusals to cooperate, the USCCR's hearings, and subpoenas for witness testimony and evidence, were investigative tools that enabled the entity to gather information relevant to its statutory mandate.[322]

Title V Provisions

Title V changed the USCCR in several ways,[323] including further defining and expanding its responsibilities.[324] With respect to the USCCR's investigations regarding voting, for example, Title V added a mandate that USCCR investigate "any patterns or practice of fraud or

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to a private bill Congress gave the Commission an additional year of life."). *See also id*. (expressing the view that until the USCCR is made permanent, it would continue to have "serious difficulties in recruiting and retaining the services of top caliber personnel," and describing low morale evidenced by "a rash of resignations" each time "the Commission draws nearer to its demise").

[319] *See, e.g.*, Frye et al., *Rise and Fall*, *supra* note 308, at 463-64 (discussing hearings that the USCCR held in 1962, including in Los Angeles, San Francisco, and Memphis; at the Los Angeles and San Francisco hearings, the USCCR "received testimony on education, housing and police misconduct" and in Memphis, "the Commission investigated discrimination in public health facilities and discovered that many hospital facilities in Memphis were not admitting blacks.").

[320] *See* H. REP. NO. 914, pt. 2, at 22 (describing the activities of the USCCR as having "engaged in intensive research and investigations in the areas of voting rights, denials of equal opportunity and protection in housing, education, employment, and the administration of justice").

[321] *See, e.g.*, *Hannah*, 363 U.S. at 423-27 (discussing responses to the Commission's fact-finding efforts relating to allegations of voting rights violations in Louisiana; describing the agency's interviews of several local voting registrars, which yielded "little relevant information" and prompted one of the registrars to seek perjury charges against the individuals who had reported voting rights violations, and the Commission's 315 interrogatories directed at the voting registrars of 19 Louisiana parishes, which—through letters prepared by the Attorney General of Louisiana—the registrars refused to answer).

[322] *See generally*, *e.g.*, Frye et al., *Rise and Fall*, *supra* note 308, at 456-57 (recounting the Commission's first public hearing in Montgomery, Alabama in 1958 and stating that through its hearing, the USCCR "began to uncover serious voting rights violations"; also describing how "state officials directly flouted [the Commission's] subpoena power" by refusing to provide voting records, that "their defiance was officially supported by state authorities in several counties," and that the U.S. Attorney General had to file a lawsuit to enforce the Commission's subpoena, which resulted in a district court order "requiring state officials in three counties to make their voting records available to the Commission.").

[323] *See generally*, *e.g.*, Frye et al., *Rise and Fall*, *supra* note 308, at 465 (describing provisions in the 1964 Act that concerned the USCCR and stating that the act "established a number of new procedural requirements designed to strengthen protections for witnesses appearing at Commission hearings"; "introduced a requirement that the Commission 'serve as a national clearinghouse for information in respect to denial of equal protection of the laws because of race, color, religion or national origin'"; "barred any investigation of the membership of fraternal organizations, college fraternities or sororities, private clubs or religious organizations"; and "extended the life of the Commission for another four years, requiring the submission of a final report before its expiration"). It should be noted that this overview only addresses the changes made to the USCCR through Title V, and does not address subsequent changes to the USCCR.

[324] *See* Pub. L. No. 88-352, § 504, 78 Stat. 241, 251 (1964) (amending provisions defining the duties of the USCCR, codified at 42 U.S.C. § 1975(a)). *See also* H. REP. NO. 914, pt. 1, at 24 ("Title V, in addition to effecting minor procedural and technical changes, would ... give the Commission new authority (1) to serve as a national clearinghouse for information concerning denials of the equal protection of the laws, and (2) to investigate allegations as to patterns or practices of fraud or discrimination in Federal elections").

discrimination" in the conduct of an election.[325] Title V also provided that the USCCR is to "serve as a national clearinghouse for information" for Equal Protection Clause violations "because of race, color, religion or national origin, including but not limited to the fields of voting, education, housing, employment, the use of public facilities, and transportation, or in the administration of justice."[326] Furthermore, though the USCCR was already charged with studying legal developments relating to certain Equal Protection Clause violations, and "apprais[ing] the laws and policies of the Federal Government with respect to" such violations, Title V additionally mandated that the USCCR study legal developments, and appraise federal laws and policies, with respect to "the administration of justice."[327]

Title V also addressed procedures for Commission hearings,[328] the subpoena of witnesses,[329] and provisions relating to compensation for the commissioners,[330] among other operational matters. It conferred upon the USCCR the authority to "make such rules and regulations as are necessary to carry out the purposes of this Act."[331] As noted above, through Title V, Congress reauthorized the Commission through 1968,[332] and more recently, continues to appropriate funds to support the USSCR's operations.[333]

Title VI: Race Discrimination in Federally Funded Programs

Title VI addresses discrimination based on race, color, or national origin in the context of federally funded programs.[334] Though Title VI might appear "deceptively simple," as discussed in more detail in this section, the case law "giving content" to and interpreting the statute's broadly

[325] *See* Pub. L. No. 88-352, § 504, 78 Stat. 241, 251 (1964).

[326] *Id*. *See also* 42 U.S.C. § 1975a(a) (describing the USCCR's current duties).

[327] *See supra* note 326.

[328] *See* Pub. L. No. 88-352, § 501, 78 Stat. 241, 249-50 (1964) (reflecting, among other amendments, provisions requiring the public announcement of Commission hearings in the Federal Register 30 days before they occur, addressing the right of a witness compelled to testify to "be accompanied and advised by counsel," and mandating that the USCCR receive evidence or testimony in "executive session," if it "determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person"). *See also* 45 C.F.R. §§ 702.3, 702.6 (current USCCR regulations relating to notices for hearings and executive session, respectively).

[329] *See* Pub. L. No. 88-352, § 501, 78 Stat. 241, 249-50 (1964). *See generally*, H. REP. NO. 914, pt. 1, at 24 (stating that Title V "would effect minor amendments" to the USCCR's procedural rules for hearings, such as increasing witness fees and allowance to amounts "generally allowed to witnesses in other proceedings," and with respect to subpoenaing witnesses, allowing the USCCR to "to subpoena a witness to testify within the State in which he has appointed an agent for service of process and to testify outside the State if the hearing is to be held within 50 miles of the place in which he is found, resides or is domiciled, does business, or has appointed an agent for service of process"). *See also* 42 U.S.C. § 1975a(e)(2) (current statutory provision addressing USCCR's subpoena power).

[330] Pub. L. No. 88-352, §§ 502, 503, 78 Stat. 241, 250-51 (1964).

[331] *Id*. at 252. For federal regulations concerning the USCCR, including its organizational structure and staff, see 45 C.F.R. pt. 701.

[332] *See* Brown, *The Civil Rights Act of 1964*, *supra* note 309, at 536 ("The Act authorized the Commission through January 1968.").

[333] *See Wilson*, 290 F.3d at 351 (citing 42 U.S.C. § 1975d).

[334] *See* 42 U.S.C. § 2000d *et seq*.

worded prohibition[335] reflects continuing disagreement over the prohibition's scope and application.[336]

In addition to the judicial debate over its requirements, Title VI is also unique among the titles in the 1964 Act in at least several other respects: the breadth of its applicability, the administrative methods of enforcing the statute, and the constitutional basis for its enactment. Indeed, because the federal government, through its full array of departments and agencies, disburses considerable amounts of funding to an exceedingly broad range of recipients,[337] Title VI—which applies to all such recipients—has an accordingly far reach.[338] Moreover, every department and agency that distributes federal financial assistance is responsible for ensuring that recipients comply with Title VI's requirements.[339] Though House Report No. 914 does not refer to the constitutional authority that Congress relied on to enact Title VI, the Supreme Court has repeatedly interpreted Title VI as having been enacted pursuant to Congress's power under the Spending Clause.[340]

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[335] *See* Alexander v. Sandoval, 532 U.S. 275, 303 (2001) (Stevens, J., dissenting) (describing Title VI as "a deceptively simple statute," but stating that "[]in the context of federal civil rights law, however, nothing is ever so simple. As actions to enforce § 601's antidiscrimination principle have worked their way through the courts, we have developed a body of law giving content to § 601's broadly worded commitment.").

[336] *See* "A Backdrop of "Fractured" Title VI Decisions."

[337] *See, e.g.*, *The Department of Transportation Title VI Program*, Dep't of Transp. (DOT), https://www.transportation.gov/mission/department-transportation-title-vi-program (stating that DOT gives federal financial assistance "each year for thousands of programs and activities (programs) conducted by diverse entities, including but not limited to State and local governments"); *Education and Title VI*, U.S. Dep't of Educ., Office for Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html, (last visited Sept. 1, 2020) (identifying as DOE funding recipients: "50 state education agencies, their subrecipients, and vocational rehabilitation agencies; the education and vocational rehabilitation agencies of the District of Columbia and of the territories and possessions of the United States; 17,000 local education systems; 4,700 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries and museums"); *Non-Discrimination in Housing and Community Development Programs*, U.S. Dep't of Housing and Urban Development (HUD), https://www.hud.gov/program_offices/fair_housing_equal_opp/non_discrimination_housing_and_community_development_0#_Filing_a_Complaint, (last visited Sept. 1, 2020) (listing examples of common HUD funding recipients, including Community Development Block Grants, Public Housing, and Housing Choice Vouchers (Section 8), among others); Press Release, Dep't of Def., Fiscal Year 2020 University Research Funding Awards, (Feb. 25, 2020) (on file with author) ("The Department of Defense (DoD) announced $185 million in multidisciplinary university research initiative (MURI) awards to 26 research teams pursuing basic research spanning multiple scientific disciplines. These five-year grants will be provided to teams located across 52 U.S. academic institutions, subject to satisfactory research progress and the availability of funds.").

[338] *See supra* note 337. *See also, e.g.*, *HHS Grants*, U.S. Dep't of Health and Human Servs., https://www.hhs.gov/grants/grants/index.html, (last visited Sept. 1, 2020) (stating that "HHS is the largest grant-making agency in the US. Most HHS grants are provided directly to states, territories, tribes, and educational and community organizations, then given to people and organizations who are eligible to receive funding"); Press Release, HUD Public Affairs, *Pandemic Underscores Need for HUD's Foster Youth Housing Program, Department Allocates New Funding to Six States* (May 4, 2020) (on file with author) (announcing "$100,000 in the latest installation of grants for HUD's new *Foster Youth to Independence (FYI) Initiative*"), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_059, (last visited Sept. 1, 2020).

[339] *See* 42 U.S.C. § 2000d-1. *See also* "Federal Agencies: Administrative Enforcement and Title VI Regulations."

[340] *See* Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 287 (1998) (observing that "Congress attache[d] conditions to the award of federal funds under its spending power, U.S. CONST., art. I, § 8, cl. 1" in Title VI of the 1964 Act, as well as Title IX of the Education Amendments of 1972); Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582, 599 (1983) (White, J.) (citing examples from the 1964 Congressional Record and stating that "legislative history clearly shows that Congress intended Title VI to be a typical 'contractual' spending power provision" and that "Title VI is Spending Clause legislation"). Notably, under that reading, Title VI and any later amendments to it would require considerations not applicable to other titles of the 1964 Act, as legislation enacted on that basis must meet certain requirements to be a valid exercise of Congress's spending power. *See, e.g.*, Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17-18 (1981) (describing "legislation enacted pursuant to the spending power" as "much in the nature of a contract" and stating that "[t]he legitimacy of Congress' power to legislate under

General Background: Race-Based Segregation and Discrimination in Hospitals, Schools, and Other Federally Funded Programs

Legislative history reflects at least two related motivations for enacting Title VI. One aim was to address the denial of equal access to and discrimination in the full range of federally-funded programs or activities based on citizens' race[341]—from discrimination and exclusion in school lunch programs to vocational rehabilitation programs to the receipt of surplus agricultural commodities by the U.S. Department of Agriculture.[342] Title VI was also responsive to the federal government's distribution of billions of dollars to institutions such as hospitals and medical care centers,[343] as well as private universities and other research centers,[344] which continued to racially segregate their facilities, staff, patients, or students, or otherwise excluded black citizens altogether.[345]

Racial segregation and discrimination in hospitals drew particular legislative attention in the lead-up to the 1964 Act,[346] in light of a 1963 Fourth Circuit en banc decision, *Simkins v. Moses H.*

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the spending power thus rests on whether the State voluntarily and knowingly accepts the terms"; "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.") *See also, e.g.*, Arlington Central School Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 300-03 (2006) (applying *Pennhurst* to evaluate a fee-shifting provision in the Individuals with Disabilities Education Act (IDEA); *Guardians*, 463 U.S. at 596-603 (White, J.) (applying *Pennhurst* to analysis of whether and to what extent Title VI permits relief for disparate impact discrimination in a private right of action).

[341] *See* H. REP. NO. 914, pt. 2, at 24 ("Testimony before the House Judiciary Subcommittee and data gathered by the Civil Rights Commission is available which demonstrates that in many regions of the country, citizens are denied the equal benefits from Federal financial assistance programs because of their color.").

[342] *Id*. at 25 (stating that "testimony presented before our committee reveals that Negro children have been denied free lunches on the unfounded claim that their parents could afford to buy their noontime meals. Similarly, Negro families have been denied access to or eliminated from receiving surplus agricultural commodities which are distributed by the U.S. Department of Agriculture ... Many additional examples can be cited where Negroes are continuing to be denied equal protection and equal benefits under Federal assistance programs. Vocational and technical assistance, public employment services, manpower development and training, vocational rehabilitation are only a few of the examples which can be cited.").

[343] *See id*. at 24 (stating that as of May 1963, $2 billion in federal funding had been dedicated to hospital construction, equipment, and the establishment of "other forms of medical care facilities such as nursing phones and public health centers" under the Hill-Burton Act; discussing "example after example" of how, "[d]espite the extent of this Federal contribution," "Negroes are denied equal treatment under the act. Negro patients are denied access to hospitals or are segregated within such facilities. Negro doctors are denied staff privileges—thereby precluding them from properly caring for their patients. Qualified Negro nurses, medical technicians, and other health personnel are discriminated against in employment opportunities. The result is that the health standards of Negroes and, thereby, the Nation are impaired ... In a related fashion, racial discrimination has been found to exist in vendor payment programs for medical care of public assistance recipients. Hospitals, nursing homes, and clinics in all parts of the country participate in these programs, and, in some, Negro recipients have received less than equal advantage.").

[344] *See id*. at 25 ("Billions of dollars of Federal money is expended annually on research. This money which primarily goes to universities and research centers for scientific and educational investigation is granted regularly by such agencies as NASA, AEC, the Department of Defense, NIH, Office of Education, and National Science Foundation. Regrettable as it may seem, a number of universities and other recipients of these grants continue to segregate their facilities to the detriment of Negro education and the Nation's welfare.").

[345] *See supra* notes 343-44. *See generally* Regents of Univ. of California v. Bakke, 438 U.S. 265, 413, n. 11 (1978) (Stevens, concurring in the judgment in part and dissenting in part, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist) ("It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities.") (citing 110 CONG. REC. 1521 (1964) (remarks of Rep. Celler); *id.*, at 6544 (remarks of Sen. Humphrey)).

[346] *See supra* note 345. *See also* H. REP. NO. 914, pt. 2, at 24 (stating that "[t]estimony before the House Judiciary Subcommittee ... demonstrates that in many regions of the country, citizens are denied the equal benefits from Federal financial assistance programs because of their color," and pointing to the Hill-Burton Act, and racial segregation and

Cone Memorial Hospital.[347] *Simkins* involved two private hospitals that received extensive federal funding under the Hill-Burton Act,[348] and which operated on a racially-segregated basis such that both hospitals refused to admit black physicians and patients.[349] In their applications for federal funding, which were approved, the hospitals had "openly stated" that "certain persons in the area will be denied admission to the proposed facilities as patients because of race, creed or color."[350] With evidence of discrimination "'clearly established,'"[351] the court of appeals held that there was sufficient evidence of state action to conclude that the hospitals were subject to the Fifth and Fourteenth Amendments.[352] The court also held that sections of the Hill-Burton Act[353]—and its implementing regulations permitting separate facilities for white and black patients[354]—

discrimination committed by hospitals that received federal funding under that statute, as "a relevant case in point").

[347] *See generally* Regents of Univ. of California v. Bakke, 438 U.S. 265, 384 (1978) (White, J.) (discussing Title VI and stating that "there was frequent reference to Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A.4 1963), *cert. denied*, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964), throughout the congressional deliberations"). *See also* Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203, 213-14 (2001) (describing the Fourth Circuit's decision in *Simkins* as "health care's *Brown v. Board of Education*" and asserting that it "played a significant role in shaping the 1964 Civil Rights Act," in part because the *Simkins* decision "deflated the opposition's criticism [to Title VI] and helped assure passage of Title VI").

[348] *See* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 963 (4th Cir. 1963) (stating that "[a]s a result of their involvement in the Hill-Burton hospital construction program, both hospitals have received large amounts of public funds, paid by the United States" and reflecting that the "United States had appropriated $1,269,950.00 to the Cone Hospital and $1,948,800.00 to the Long Hospital").

[349] *See id*. at 961-62 (describing the hospitals' practices and stating that one hospital "completely excludes Negro patients and professionals" while the other "excludes all but a select few Negro patients, who are admitted on special conditions not applied to whites" and which "did not admit Negro doctors and dentists to staff privilege" at the time the complaint was filed).

[350] *Id*. at 962 (also stating that "[t]hese applications were approved by the North Carolina Medical Care Commission, a state agency, and the Surgeon General of the United States under his statutory authorization.").

[351] *Id*. ("The claims of racial discrimination were, as the District Court found, 'clearly established.'").

[352] *Id*. at 960-61, 967-68 (on the issue of whether the hospitals' activities were "sufficiently imbued with 'state action' to bring them within the Fifth and Fourteenth Amendment prohibitions against racial discrimination," stating that though "[n]ot every subvention by the federal or state government automatically involves the beneficiary in 'state action,'" "the Hill-Burton program, and examination of its functioning leads to the conclusion that we have state action here"; finding it "significant here that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health."). *See also id*. at 963-65 (describing the operation of the Hill-Burton program at the federal and state levels).

[353] *Id*. at 961, n.1 (reflecting that the Hill Burton Act contained an antidiscrimination provision that prohibited race discrimination, but expressly excepted and allowed "cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group") (citing 42 U.S.C. § 291e(f)).

[354] *Id*. at 961, n.2 (quoting the implementing regulation 42 C.F.R. § 53.112, which permitted recipients to operate "separate hospital, diagnostic or treatment center, rehabilitation or nursing home facilities" for "separate population groups" if the recipients' plan "otherwise makes equitable provision on the basis of need for facilities and services of like quality for each such population group in the area").

were unconstitutional.[355] The Supreme Court's denial of a petition for certiorari in *Simkins*[356] closely preceded Senate debate on Title VI.[357]

In that context, Title VI declared that it is "the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance."[358] The Supreme Court has described the two objectives of Title VI as (1) to "avoid the use of federal resources to support discriminatory practices;" (2) "to provide individual citizens effective protection against those practices."[359] More colloquially, the operation of Title VI has been described in the following way: "Stop the discrimination, get the money; continue the discrimination, do not get the money."[360]

"Discrimination" Prohibited by Title VI Under Sections 601 and 602

Section 601 of Title VI: Addressing Intentional Discrimination

Section 601 of Title VI requires that, as a condition for receiving federal dollars, recipients comply with the mandate that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[361]

As reflected above, the text of Section 601 is notably phrased in general terms—a prohibition against "discrimination," without specifying what kinds of actions constitute unlawful discrimination under Title VI.[362] This ambiguity[363] has led to intense judicial debate regarding

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[355] *Id*. at 969-70 ("These federal provisions undertaking to authorize segregation by state-connected institutions are unconstitutional"; also holding that "[u]nconstitutional as well under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth are the relevant regulations implementing this passage in the statute").

[356] *See* Moses H Cone Mem'l Hosp. v. Simkins, 376 U.S. 938 (1964) (denying petition for writ of certiorari on March 2, 1964).

[357] *See* David Barton Smith, *Health Care's Hidden Civil Rights Legacy*, 48 ST. LOUIS U. L.J. 37, 49 (2003) (stating that the bill proposing the 1964 Act "worked its way through Congress shadowing the *Simkins* case in the courts" and that the Supreme Court's denial of certiorari "came just days before the debate regarding the civil rights bill was to begin in the Senate"; expressing the view that the *Simkins* case, and the Supreme Court's denial of certiorari, "transformed a vague and controversial section of the bill into something that now seemed like almost a redundant detail" and stating that President Johnson signed the Civil Rights Act into law on July 2, 1964, with Title VI essentially unaltered.").

[358] *See* H. REP. NO. 914, pt. 1, at. 25.

[359] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) (adding that "[b]oth of these purposes were repeatedly identified in the debates" on both Title VI of the 1964 Act, and Title IX of the Education Amendments of 1972). *See also id*. n. 36 (quoting excerpts from the Congressional Record discussing Title VI and Title IX).

[360] *See Guardians*, 463 U.S. at 599 (White, J.) (statement of Rep. Lindsay on Title VI) (citing 110 CONG. REC. 1542 (1964)).

[361] 42 U.S.C. § 2000d. *But see id*. § 2000d-3 ("Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.").

[362] *Compare id*. (prohibiting, "on the ground of race, color, or national origin," "discrimination under any program or activity receiving Federal financial assistance") *with id*. § 2000e-2(a) (identifying various practices that constitute unlawful discrimination under Title VII of the 1964 Act, including failing or refusing to hire an individual because of a protected trait, firing an individual, and discriminating against an individual in compensation, terms, conditions or privileges of employment, among other enumerated actions).

[363] *See generally Guardians*, 463 U.S. at 592 (White, J., announcing the judgment of the Court) (in a Title VI analysis, observing that "the word 'discrimination' is inherently" ambiguous); Regents of Univ. of California v. Bakke, 438 U.S.

exactly what Congress intended to outlaw. More specifically, the Justices of the Supreme Court have debated whether, as a matter of statutory interpretation, Section 601 prohibits only intentional discrimination, or whether it also prohibits policies or practices that, though facially neutral, disproportionately and negatively impact a protected group without sufficient justification.[364] This latter form of discrimination is often referred to as "disparate impact" discrimination,[365] and does not require evidence of discriminatory motive.[366]

Though the debate among the Justices is discussed in further detail below, the Supreme Court has settled for now on reading Section 601 to bar discriminatory conduct that violates the Equal Protection Clause, with respect to race, color, or national origin.[367] Under that reading, Section 601 prohibits *intentional* discrimination only,[368] while permitting the use of racial classifications only when they are narrowly tailored to further a compelling government interest.[369] Thus, individuals suing to enforce Section 601 may challenge only intentional, and not disparate impact, discrimination.[370]

265, 284 (1978) (opinion of Powell, J.) (quoting Section 601 and observing that "the concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations").

[364] *See generally* Alexander v. Choate, 469 U.S. 287, 292-93 (1985) (explaining that in the Court's 1983 *Guardians* decision, "Members of the Court offered widely varying interpretations of Title VI" on the issue of whether it reached both intentional and disparate impact discrimination).

[365] *See generally* Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., et al., 135 S.Ct. 2507, 2513 (2015) ("In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale.") (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

[366] *See generally* Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact'… Proof of discriminatory motive, we have held, is not required under a disparate-impact theory") (internal citation omitted). As a general matter, and though beyond the scope of this overview, it should be noted that a distinction between disparate impact discrimination and evidence of discriminatory intent may not be entirely clear. *See generally Inclusive Communities*, 135 S.Ct. at 2522 (observing, in the context of the Fair Housing Act, that disparate impact liability "plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."); Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) (suggesting "that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume"; though agreeing "that a constitutional issue does not arise every time some disproportionate impact is shown," stating that when the "disproportion is as dramatic" as demonstrated in some of the Court's earlier decisions, "it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.").

[367] *See infra* note 411. *See also Guardians*, 463 U.S. at 641-42 (Stevens, J., dissenting, joined by Justices Brennan and Blackmun) (reading the Court's precedent interpreting Title VI as confirming that "[t]oday, proof of invidious purpose is a necessary component of a valid Title VI claim" and stating that "[i]f a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress").

[368] *See Sandoval*, 532 U.S. at 280-81 (citing *Bakke* and *Guardians* as precedent that "made clear" that Title VI prohibits "only intentional discrimination").

[369] *See, e.g.*, Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 310 (2013) (stating that "*Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests'") (citing 539 U.S., at 326).

[370] *See Sandoval*, 532 U.S. at 279-80 (explaining that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages," and that "§ 601 prohibits only intentional discrimination"). *See also id.* at 293 (holding that no private right of action exists to enforce Title VI regulations prohibiting disparate impact discrimination).

Section 602: Addressing Discrimination including Disparate Impact Discrimination

Though the Supreme Court interprets Section 601 as coextensive with the Equal Protection Clause, disparate impact discrimination remains within the purview of Title VI through Section 602, the statute's administrative enforcement provision.[371] Section 602 directs each federal department or agency that extends federal financial assistance to "effectuate" Section 601, including by issuing regulations "consistent with achievement of the objectives of the statute,"[372] To that end, federal agencies have long interpreted and enforced Title VI to prohibit disparate impact discrimination[373]—that is, actions that disproportionately harm members of a protected group without justification.[374]

Addressing Section 602 in its 1983 decision *Guardians Association v. Civil Service Commission of the City of New York,*[375] five Justices adopted the view that federal regulations implementing Title VI may validly prohibit disparate impact discrimination.[376] Several Justices reasoned that, while Section 601 reached only intentional discrimination,[377] federal agencies had "acted in a reasonable manner to further the purposes of Title VI" by issuing regulations under Section 602 that prohibited practices with a racially disparate impact.[378] Thus, a regulatory prohibition against

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[371] 42 U.S.C. § 2000d-1.

[372] *See id*.

[373] *See generally Guardians*, 463 U.S. at 619 (Marshall, J., dissenting) ("Following the initial promulgation of regulations adopting an impact standard, every Cabinet department and about forty federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact."). *See id*., n. 7 (citing and listing agencies' Title VI disparate impact regulations). *See also Sandoval*, 532 U.S. at 294 (Stevens, J., dissenting) (stating that pursuant to "powers expressly delegated by [the 1964] Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the 'effect' of discriminating on those bases."). *See generally*, *Title VI Overview*, Civil Rights Division, Federal Coordination and Compliance Section, Dep't of Justice, https://www.justice.gov/crt/fcs/TitleVI-Overview, (last visited Sept. 1, 2020) ("Title VI itself prohibits intentional discrimination. However, most funding agencies have regulations implementing Title VI that prohibit recipient practices that have the effect of discrimination on the basis of race, color, or national origin."). Though beyond the scope of this overview to address developments relating to Title VI, last year the Departments of Justice and Education appeared to depart from this view by rescinding guidance relating to disparate impact discrimination under Title VI. For more information, see CRS Legal Sidebar LSB10254, *Is the Trump Administration Rethinking Title VI?*, by JD S. Hsin.

[374] *See generally supra* note 365.

[375] 463 U.S. 582 (1983).

[376] *See Guardians*, 463 U.S. at 584, n. 2 (White, J., announcing the judgment of the Court) (describing the Justices' separate opinions and stating that "Justice Stevens, joined by Justice Brennan and Justice Blackmun, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate impact standard are valid. *Post,* at 3249. Justice Marshall would hold that, under Title VI itself, proof of disparate impact discrimination is all that is necessary. *Post,* at 3239. I agree with Justice Marshall that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming *arguendo* that Title VI, in and of itself, does not proscribe disparate impact discrimination."). *See Guardians,* 463 U.S at 623, n. 15 (opinion of Marshall, J.) ("I also agree with Justice White ... that the administrative regulations are valid even assuming *arguendo* that Title VI itself does not proscribe disparate impact discrimination."). *See also Choate*, 469 U.S. at 293-94 (summarizing the holdings in the Court's *Guardians* decision); *Sandoval*, 532 U.S. at 282-83 (stating that in *Guardians*, "[f]ive Justices in addition voted to uphold the disparate-impact regulations").

[377] *See Guardians*, 463 U.S. at 641-42 (Stevens, J., dissenting, joined by Justices Brennan and Blackmun) (discussing the Court's precedent interpreting section 601 and concluding that "regardless of what some of us may have thought it meant before this Court spoke," "[t]oday, proof of invidious purpose is a necessary component of a valid Title VI claim").

[378] *See id*. at 642-45 (Stevens, J., dissenting, joined by Justices Brennan and Blackmun) (explaining that the Court has "repeatedly upheld the validity" of regulations that "require recipients to administer the grants in a manner that has no

disparate impact discrimination in federally-funded programs and activities remains, at least for now,[379] legally valid.

Notably as well, the Court has held that individuals cannot bring a private right of action alleging disparate impact discrimination in violation of Title VI *regulations*.[380] Thus, the enforcement of Title VI disparate impact regulations lies exclusively with and at the discretion of federal agencies.[381]

The Supreme Court and "Discrimination" Prohibited by Title VI

As mentioned above, the Supreme Court has questioned how to interpret Section 601. Did Congress intend for Section 601 to address racial discrimination that is unlawful under the Equal Protection Clause of the Fourteenth Amendment?[382] Or did Congress intend to reach beyond the requirements of the Equal Protection Clause to address other forms of racial discrimination?[383]

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racially discriminatory *effects*" because "Title VI explicitly authorizes" federal agencies to effectuate § 601 and "[n]othing in the regulations is inconsistent with any of the statutes authorizing the disbursement of the grants that the respondent received"; also explaining that it is "well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal 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'; further stating that [t]he presumption of validity must be at least as strong when a regulation ... merely defines the terms on which someone may seek federal money. By prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative agencies have acted in a reasonable manner to further the purposes of Title VI") (internal citations omitted) (emphasis in original). *See also Choate*, 469 U.S. at 293-94 (stating that the Court held in *Guardians* "that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI" and that "[i]n essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts").

[379] The Court has not, since *Guardians*, addressed the legal validity of Title VI disparate impact regulations. See *Sandoval*, 532 U.S. at 282 (stating that because the petitioners challenged the private of right action based on Title VI disparate impact regulations, but not the regulations themselves, "[w]e therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid."). The Court, however, has later noted in dicta some skepticism with regulations promulgated under Section 602 addressing conduct that Section 601 does not expressly prohibit, see *Sandoval*, 532 U.S. at 279, 286, n. 6 (though the only question presented before the Court was "whether there is a private cause of action to enforce" a Title VI disparate impact regulation, and the Court was "not inquir[ing]" as to whether the regulation was "authorized by § 602," nonetheless noting in dicta that "[w]e cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601, when § 601 permits the very behavior that the regulations forbid.") (internal citation omitted).

[380] *Sandoval*, 532 U.S. at 278, 293 (addressing "the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964" and holding "that no such right of action exists").

[381] *See supra* notes 373, 376 and 380. *See, e.g.*, South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774-76 (3d Cir. 2001) (where plaintiffs originally brought suit alleging that a state agency violated the Environmental Protection Agency's Title VI disparate impact regulations by granting a permit for a cement facility in a predominantly minority neighborhood that already contained contaminated industrial sites, discussing the Supreme Court's 2001 *Sandoval* decision, which came down as the litigation was ongoing, and stating that "[o]bviously, *Sandoval* eliminated the basis for the court's injunction" granting relief on that Title VI claim.).

[382] *See, e.g.*, *Bakke*, 438 U.S. at 284 (Powell, J., announcing judgment of the Court) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

[383] *See id.* at 416-17 (Stevens, J., concurring in part and dissenting in part) (expressing the view that "[t]he statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require" and that "§ 601 has independent force, with language and emphasis in addition to that found in the Constitution"; explaining that "[a]s with other provisions of the Civil Rights

The following discussion provides an overview of the Court's decisions reflecting the debate over Section 601's prohibition. While the Court now applies Section 601 coextensively with the Equal Protection Clause, it has taken this approach only after a series of fractured opinions concerning the scope of Section 601.

A Backdrop of "Fractured" Title VI Decisions

Harmonizing the Supreme Court's decisions interpreting the reach of Title VI, in the words of Justice John Paul Stevens, "is not an easy task."[384] The Court has observed that "[a]lthough Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands."[385]

When addressing Title VI in its 1974 decision *Lau v. Nichols*,[386] for example, a unanimous Court[387] recognized disparate impact liability under the statute.[388] In *Lau*, non-English speaking Chinese students alleged that the San Francisco public school system's refusal to provide English language or bilingual instruction denied them equal educational opportunities in violation of Title VI and the Equal Protection Clause.[389] Relying "solely on § 601" in its analysis, the majority opinion emphasized the school district's receipt of federal funding, and Title VI regulations requiring recipients to address the English language needs of national origin-minority students.[390] Stating that "[d]iscrimination is barred which has that *effect* even though no purposeful design is present,"[391] the Court concluded that the school district had violated Title VI's requirements[392]

Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not"). Justice Stevens, with Chief Justice Burger, Justice Stewart, and Justice Rehnquist would have read Title VI, however, to prohibit *any* consideration of race in any circumstance, including in the context of an admissions program designed to diversify a student body). *See id.* at 414 (rejecting the contention "that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma").

[384] Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582, 635 (1983) (Stevens, J., dissenting). *See also Grutter*, 539 U.S. at 325 (describing the Court's *Bakke* decision, which addressed Title VI and the Equal Protection Clause, as "fractured"); Alexander v. Sandoval, 532 U.S. 275, 298 (2001) (Stevens, J.) (dissenting) (describing the Court's Title VI *Guardians* decision as "fractured").

[385] *Sandoval*, 532 U.S. at 279.

[386] 414 U.S. 563 (1974).

[387] Though the Justices in *Lau* were unanimous in granting relief to the plaintiffs on their Title VI disparate impact claim, they did so on different grounds. *Cf. Lau*, 414 U.S. at 566-69 (majority opinion holding that Section 601 prohibited disparate impact discrimination); *id.* at 569-71 (Stewart, J., concurring) (expressing the view that while it was "not entirely clear" that Section 601 "standing alone" rendered the school district's conduct unlawful, concluding that the school district had violated Title VI regulations prohibiting disparate impact discrimination). *See also Guardians*, 463 U.S. at 591 (opinion of White, J.) (discussing the Court's unanimous holding in *Lau* that the school district was prohibited "by Title VI from practicing unintentional as well as intentional discrimination against racial minorities"; explaining that "[f]ive Justices were of the view that Title VI itself forbade impact discrimination," while three Justices concurred in the result, but on the basis that the conduct violated "Title VI implementing regulations, which explicitly forbade impact discrimination," and which were valid because they were "not inconsistent with the purposes of Title VI").

[388] *Lau*, 414 U.S. at 566-69 (addressing Title VI claim challenging discriminatory effects of a public school system's failure to provide English language instruction to students who did not speak English, and reversing the court of appeals' dismissal of that claim).

[389] *Lau*, 414 U.S. at 564-65.

[390] *Id.* at 566-59.

[391] *Id.* at 568 (emphasis added).

[392] *See id.* (concluding that "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program").

and ordered the "fashioning of appropriate relief" on remand.[393] As the petitioners' Title VI claim did not rely on evidence of discriminatory intent, but challenged the effects of the school district's practices, the Court appeared to endorse a reading of Section 601 as prohibiting *disparate impact* discrimination.[394]

A few years later, however, the Court took a markedly different approach when addressing Title VI in its 1978 decision *Regents of Univ. of California v. Bakke,*[395] a case that challenged the admissions process at the University of California's medical school.[396] Producing no majority opinion,[397] the *Bakke* decision nonetheless introduced an interpretation of Title VI, adopted by five Justices, reading Section 601 to prohibit conduct that is unlawful under the Equal Protection Clause.[398] Importantly, under that view, and the Court's Equal Protection Clause precedent,[399] Title VI claims would require at least some evidence of a racially discriminatory motive.[400]

Following its "splintered" decision in *Bakke,*[401] the Justices debated, in the 1983 decision *Guardians Association v. Civil Service Commission of the City of New York*, how to square *Lau*—which recognized disparate impact liability under Section 601[402]—with *Bakke*, which read Section 601 to require evidence of discriminatory intent.[403] *Guardians*, however, resulted in

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[393] *Id*. at 569.

[394] *See id*. at 568-69. *See also* Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (stating that "the Court in *Lau* interpreted § 601 itself to proscribe disparate-impact discrimination") (citing *Lau*, 414 U.S. at 568); *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."); *id*. at 615 (O'Connor, J., concurring in judgment) ("I acknowledge that in *Lau v. Nichols,* the Court approved liability under Title VI for conduct having only a discriminatory impact.").

[395] 438 U.S. 265 (1978).

[396] *Id*. at 272-73.

[397] *See* Grutter v. Bollinger, 539 U.S. 306, 322 (2003) ("The [*Bakke*] decision produced six separate opinions, none of which commanded a majority of the Court.")

[398] *See Bakke*, 438 U.S. at 287 (expressing the view that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"). *See also id*. at 325 (Brennan, J., concurring in part and dissenting in part) (expressing the dissenters' "agree[ment] with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."). Justices White, Marshall, and Blackmun joined Justice Brennan's dissenting opinion. *See id*. at 324.

[399] *See generally* Village of Arlington Heights v. Metro Housing Devel. Corp., 429 U.S. 252, 265 (1977) (stating that under its 1976 decision Washington v. Davis, 426 U.S. 229, an Equal Protection Clause violation requires evidence of "racially discriminatory intent or purpose," but "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes"; also reading *Davis* as "mak[ing] it clear that official action will not be held unconstitutional *solely* because it results in a racially disproportionate impact") (emphases added). *Cf. id*. at 266 (identifying types of evidence that may support an inference of discriminatory intent, including "a clear pattern, unexplainable on grounds other than race, [that] emerges from the effect of the state action even when the governing legislation appears neutral on its face").

[400] *See supra* note 399.

[401] *See Grutter,* 539 U.S. at 322-23 (discussing the Court's 1978 *Bakke* decision, the six separate opinions produced in that case, and describing that decision as "splintered").

[402] *See supra* note 394.

[403] *Cf. Guardians*, 463 U.S. at 589-90 (White, J., announcing the judgment of the Court) (stating that because *Bakke* concerned whether "Title VI forbids intentional discrimination in the form of affirmative action intended to remedy past discrimination," a holding in *Bakke* that Title VI permits such intentional discrimination to the extent permitted by the Constitution "is plainly not determinative of whether" Title VI also prohibits disparate impact discrimination; expressing the view that the "holdings in *Bakke* and *Lau* are entirely consistent"); *id*. at 610-11 (Powell, J., concurring in the judgment) (expressing the view that as five Justices in *Bakke* adopted a "construction" of Title VI as coextensive

another "fractured" decision,[404] producing "widely varying interpretations" on the scope of Title VI.[405] Though no opinion commanded a majority, the Court read *Guardians* to produce two holdings: that (1) "Title VI itself directly reached only instances of intentional discrimination"[406] and (2) "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations" promulgated under Section 602.[407]

A question of disparate impact liability next reached the Court in 2001, on whether a private plaintiff could *sue* to enforce Title VI disparate impact regulations. In *Alexander v. Sandoval*,[408] the Court held that, absent congressional intent to create a private right to enforce Title VI regulations promulgated under Section 602, individuals could only sue to enforce Section 601.[409] In the context of discussing Section 601, a majority of the Court construed its precedent as "ma[king] clear" and "beyond dispute" that it reached "only intentional discrimination" that violates the Equal Protection Clause.[410]

After *Sandoval*, the Court has since applied Section 601 to bar intentional discrimination that violates the Equal Protection Clause.[411] Thus, the Court's Title VI decisions, taken and read

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with equal protection, that reading "necessarily requires rejection of the prior decision in Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), that discriminatory impact suffices to establish liability under Title VI.").

[404] *See Sandoval*, 532 U.S. at 298 (Stevens, J.) (dissenting) (describing the Court's Title VI *Guardians* decision as "fractured").

[405] *See* Alexander v. Choate, 469 U.S. 287, 292-93 (1985).

[406] *Id*. at 293 and n. 8 (noting the adoption of that view by seven Justices in three separate opinions in *Guardians*).

[407] *Id*. at 293 and n. 9 (noting the adoption of that view by five Justices in three separate opinions in *Guardians*).

[408] 532 U.S. 275 (2001).

[409] *Id*. at 293 ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.").

[410] *See Sandoval*, 532 U.S. at 280-81 (citing *Bakke* and *Guardians* as precedent that "made clear" that Title VI prohibits "only intentional discrimination," and stating that it was "beyond dispute" that "§ 601 prohibits only intentional discrimination"; also stating that essential to the Court's reversal of the state court decision in *Bakke* "was the determination that § 601" prohibits discrimination that would violate the Equal Protection Clause or the Fifth Amendment). The majority opinion also stated that "we have since rejected *Lau's* interpretation of § 601 as reaching beyond intentional discrimination." *Id*. at 285 (citing its own discussion, *id*. at 280-81, of *Bakke* and *Guardians*). The majority opinion elicited a dissent by Justice Stevens, in which Justices Souter, Ginsburg, and Breyer joined, expressing disagreement with the majority's characterization of the Court's Title VI precedent. *See Sandoval*, 532 U.S. at 294-302 (Stevens, J., dissenting) (asserting that the majority opinion provided a "muddled account" of the Court's decisions addressing a private right of action under Title VI; discussing the Court's precedent, including its *Guardians* decision, in which "a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices" that disparately impact "racial and ethnic minorities" and stating that "[t]hough the holding in *Guardians* does not compel the conclusion that a private right of action exists to enforce the Title VI regulations against private parties, the rationales of the relevant opinions strongly imply that result."). *See also id*. at 308 (Stevens, J., dissenting) (discussing the Court's Title VI precedent and stating that "the question whether § 601 applies to disparate-impact claims has never been analyzed by this Court on the merits").

[411] *See Grutter*, 539 U.S. at 343 (holding that the petitioner failed to prove an Equal Protection Clause violation; concluding that "[c]onsequently," the petitioner's Title VI claim failed, in reliance on Justice Powell's opinion in *Bakke* reading Title VI to "proscribe only those racial classifications that would violate the Equal Protection Clause") (citing *Bakke*, 438 U.S. at 287); Gratz v. Bollinger, 539 U.S. 244, 275-76 n.23 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.") (citing *Sandoval*, 532 U.S. 275, 281 (2001); United States v. Fordice, 505 U.S. 717, 732, n. 7 (1992); Alexander v. Choate, 469 U.S. 287, 293 (1985)). *See also Sandoval*, 532 U.S. at 280-81 (stating that "essential" to the Court's holding in its 1978 Bakke decision "was the determination that § 601 'proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment'") (citing *Bakke*, 438 U.S. at 287 (opinion of Powell, J.); *id*. at 325, 328, 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

together, now foreclose private suits alleging disparate impact discrimination and permit only private suits challenging intentional discrimination under Section 601.[412] Meanwhile, with respect to Section 602, federal agencies may continue to enforce, at least for now,[413] a prohibition of disparate impact discrimination through Title VI regulations.[414]

Federal Agencies: Administrative Enforcement and Title VI Regulations

In contrast to other titles of the 1964 Act, which are typically enforced by one or several federal entities,[415] Title VI's antidiscrimination mandate is enforced by every "Federal department and agency" that "is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract."[416] Accordingly, numerous federal agencies—from the Departments of Transportation[417] to the Treasury,[418] the Environmental Protection Agency[419] to the Federal Emergency Management Agency (FEMA)[420]—enforce Title VI with regard to their

[412] *See supra* notes 380 and 410.

[413] As noted earlier, the Court, in dicta, has expressed some skepticism that regulations promulgated under Section 602 can address conduct that Section 601 does not expressly prohibit. *See supra* note 379.

[414] *See "Section 602: Addressing Discrimination including Disparate Impact Discrimination."*

[415] For example, Titles III and IV grant the Attorney General authority to initiate enforcement actions in court. See "Enforcement Actions by the Attorney General" under Title III, and "Enforcement Actions by the Attorney General" under Title IV.

[416] *See* 42 U.S.C. § 2000d-1. A "contract of insurance or guaranty," however, does not constitute federal financial assistance for Title VI purposes. *See id.* (referring to "Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty"). *See, e.g.*, *Title VI of the Civil Rights Act*, Program Description, Dep't of Housing and Urban Development (HUD), https://www.hud.gov/programdescription/title6, (last visited Sept. 1, 2020) ("Title VI covers all HUD housing programs except for its mortgage insurance and loan guarantee programs.").

[417] *See generally The Department of Transportation Title VI Program*, U.S. Dep't of Transp. (DOT), https://www.transportation.gov/mission/department-transportation-title-vi-program, (last visited Sept. 1, 2020) (stating that DOT "distributes substantial Federal financial assistance each year for thousands of programs and activities (programs) conducted by diverse entities, including but not limited to State and local governments").

[418] *See generally Federally Assisted Programs and Federally Conducted Programs*, U.S. Dep't of Treasury (Treasury), https://home.treasury.gov/about/offices/management/civil-rights-and-diversity/federally-assisted-programs-and-federally-conducted-programs, (last visited Sept. 1, 2020) ("Any person eligible to receive benefits or services from the Department of the Treasury or its recipients is entitled to those benefits or services without being subject to prohibited discrimination. The Office of Civil Rights and Diversity enforces various federal statutes and regulations that prohibit discrimination in Treasury financially assisted and conducted programs or activities. If a person believes s/he has been subjected to discrimination and/or reprisal because of membership in a protected group then that person may file a complaint with the Office of Civil Rights and Diversity.").

[419] *See generally*, *Title VI and Environmental Justice at EPA*, Programs and Projects of the Office of General Counsel (OGC), Environmental Protection Agency (EPA), https://www.epa.gov/ogc/title-vi-and-environmental-justice-epa, (last visited Sept. 1, 2020) ("Under Title VI, EPA has a responsibility to ensure that its funds are not being used to subsidize discrimination based on race, color, or national origin. This prohibition against discrimination under Title VI has been a statutory mandate since 1964 and EPA has had Title VI regulations since 1973."). *See also generally EPA's Title VI - Policies, Guidance, Settlements, Laws and Regulations*, Programs and Projects of the OGC, EPA, https://www.epa.gov/ogc/epas-title-vi-policies-guidance-settlements-laws-and-regulations, (last visited Sept. 1, 2020).

[420] *See generally Civil Rights Title VI in Federally Assisted Programs*, Federal Emergency Management Agency (FEMA), https://www.fema.gov/media-library/assets/documents/26070, (last visited Sept. 1, 2020) ("The Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA) is committed to ensuring that the Civil Rights of all persons receiving services or benefits from the Agency's programs and activities are protected. This directive describes the policies, procedures, requirements and responsibilities of an Agency-wide program that adheres to such protection.").

respective funding recipients.[421] When a program or activity receiving federal financial assistance commits race discrimination in violation of Title VI's requirements, the federal agency that disbursed the funds may terminate or withhold funding to that recipient, among other agency actions discussed in further detail below.[422]

Methods of "Effectuating" Title VI's Antidiscrimination Mandate

Federal Regulations Interpreting and Implementing Title VI

Section 602 directs funding departments and agencies to issue "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."[423] Though Section 602 states that no regulation "shall become effective unless and until approved by the President,"[424] that authority has, since 1980, been delegated to the Attorney General by executive order.[425] The DOJ is also responsible for coordinating other federal agencies with respect to interpreting and implementing Title VI.[426]

Numerous departments and agencies have issued Title VI regulations,[427] as well as guidance documents to provide technical assistance to funding recipients on Title VI compliance.[428] As discussed earlier, in addition to forms of intentional discrimination,[429] Title VI regulations issued

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[421] *See, e.g.*, *supra* notes 417-20. Given the range of funding agencies and recipients, as well as the forms in which race, color, or national origin discrimination may take shape in these varied contexts, it is beyond the scope of this overview to examine each agency's specific operations with respect to enforcing Title VI. For more information on Title VI procedures and enforcement by the Department of Education, for example, see CRS Report R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, coordinated by Jared P. Cole (Apr. 4, 2019).

See also, e.g., U.S. Commission on Civil Rights, Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898 (Sept. 2016).

[422] 42 U.S.C. § 2000d-1.

[423] *Id*.

[424] *See id*.

[425] *See* Exec. Order No. 12250, *Leadership and Coordination of Nondiscrimination Laws* (Nov. 2, 1980), https://www.justice.gov/crt/executive-order-12250 ("The function vested in the President by Section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), relating to the approval of rules, regulations, and orders of general applicability, is hereby delegated to the Attorney General.").

[426] *See id*. at 1-201(a) ("The Attorney General shall coordinate the implementation and enforcement by Executive agencies of ... Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)").

[427] *See, e.g.*, *infra* notes 429-30.

[428] *See, e.g.*, Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (published Jan. 22, 2007), https://www.federalregister.gov/documents/2007/01/22/07-217/final-guidance-to-federal-financial-assistance-recipients-regarding-title-vi-prohibition-against, (last visited Sept. 1, 2020); Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, https://www.justice.gov/crt/fcs/EmergenciesGuidance, (last visited Sept. 1, 2020) (reflecting that the Title VI guidance was issued by the Departments of Justice, Homeland Security, Housing and Urban Development, Health and Human Services, and Transportation).

[429] *See, e.g.*, 28 C.F.R. § 42.104(b) (DOJ regulation identifying unlawful actions under Title VI, such as providing a service or benefit "to an individual which is different, or is provided in a different manner, from that provided to others under the program" on the ground of race, color, or national origin); 24 C.F.R. § 1.4(b) (Dep't of Housing and Urban Development Title VI regulation enumerating forms of discrimination prohibited by Title VI, including "[d]eny[ing] a person any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity" on the ground of race, color, or national origin).

by the DOJ and other entities prohibit funding recipients from actions that have a disparate impact or "effect" based on race, color, or national origin.[430]

Title VI Investigations, Voluntary Resolutions, and Fund Terminations

To ensure that funding recipients are complying with Title VI and regulations, Section 602 sets out a framework by which funding departments and agencies are to enforce those requirements.[431]

The "primary"[432] method for administratively enforcing the requirements of Title VI is through a funding department or agency's termination, suspension, or refusal to grant funding to a recipient when it finds that a recipient has violated Title VI or its implementing regulations.[433] Before terminating, suspending, or refusing to grant funds, however, the statute requires that the funding department or agency undertake certain steps, including providing an "opportunity for a hearing," "advis[ing] the appropriate person or persons of the failure to comply with the requirement" at issue, and determining that "compliance cannot be secured by voluntary means."[434] Such

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[430] *See, e.g.*, 28 C.F.R. § 42.104(b)(2) (DOJ regulation stating that a funding recipient "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin") (emphases added). *See also* CRS Report R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, coordinated by Jared P. Cole, at 10, n. 80 (Apr. 4, 2019) (providing a non-exhaustive list of federal regulations prohibiting disparate impact discrimination) (citing 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)).

[431] *See* 42 U.S.C. § 2000d-1. *See generally* Schlafly v. Volpe, 495 F.2d 273, 282 (7th Cir. 1974) ("42 U.S.C. § 2000d-1 provides both the authority for and the conditions precedent to the suspension of federal assistance."). 42 U.S.C. § 2000d-3, however, identifies an exception to federal department or agency action implementing Title VI: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." *Id.*

[432] *See* Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575 (D.C. Cir. 1983) (explaining that "fund termination was envisioned as the primary means of enforcement under Title VI," but that "Title VI clearly tolerates other enforcement schemes" including the "referral of cases to the Attorney General, who may bring an action against the recipient"). *See also Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964*, 28 C.F.R. § 50.3 at I(A) (stating that "[t]he ultimate sanctions under title VI are the refusal to grant an application for assistance and the termination of assistance being rendered").

[433] *See* 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").

[434] *See id.* § 2000d-1 (providing that "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"). *See also Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964*, 28 C.F.R. § 50.3 at I(A) (stating that "[b]efore these sanctions may be invoked, the Act requires completion of the procedures called for by section 602. That section require the department or agency concerned (1) to determine that compliance cannot be secured by voluntary means, (2) to consider alternative courses of action consistent with achievement of the objectives of the statutes authorizing the particular financial assistance, (3) to afford the applicant an opportunity for a hearing, and (4) to complete the other procedural steps outlined in section 602, including notification to the appropriate committees of the Congress"). *See generally, e.g.*, *Education and Title VI*, Office for Civ. Rights, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html ("Terminations are made only after the recipient has had an opportunity for a hearing before an administrative law

procedural steps often include an investigation conducted by the department or agency to determine whether a Title VI violation has occurred.[435]

As a matter of practice, academics and practitioners have observed that though some departments and agencies have used fund terminations, or the threat of terminating funds, as an effective enforcement tool in the past,[436] other agencies have never or rarely ordered the withdrawal or termination of a recipient's funding.[437] Agencies far more commonly resolve a Title VI violation through "voluntary means"[438]—that is, a settlement or resolution agreement in which the recipient agrees to take certain actions to address the Title VI violation(s), including changes or reforms to its practices.[439]

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judge, and after all other appeals have been exhausted.").

[435] *See, e.g.*, 28 C.F.R. § 42.107 (DOJ regulation implementing Title VI and discussing investigations and compliance reviews).

[436] *See generally, e.g.*, *Nat'l Black Police Ass'n*, 712 F.2d at 575, n. 32 (discussing the "[e]arly use of the sanction" of fund termination by the Department of Health, Education, and Welfare (HEW) and stating that "[b]etween July, 1964 and March, 1970, HEW initiated approximately 600 administrative proceedings against school districts found not to be in compliance with section 601 standards. In 400 of these cases, HEW found that the districts came into compliance following threat of termination, with no need for actual termination. Among the 200 cases in which funds were actually cut off, HEW subsequently determined that compliance had been achieved, and federal assistance was resumed in all but 4 districts."). *See also, generally*, Marianne Engelman Lado, *Towards Civil Rights Enforcement in the Environmental Justice Context: Step One: Acknowledging the Problem*, 29 FORDHAM ENVTL. L. REV. 1, 22-23 (2017) (stating that "[h]istorically, the threat of withholding federal funds created significant leverage in the struggle to address discriminatory policies and practices"; as an illustration, discussing the desegregation of racially segregated hospitals following the creation of Medicare in 1966, and stating that "[m]ore than one thousand hospitals integrated their medical staffs, patient floors and waiting rooms in a matter of months, and, faced with the loss of a significant portion of promised funding, additional facilities subsequently also changed policies and practices.") (footnotes omitted).

[437] *See, e.g.*, Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CALIF. L. REV. 1131, 1170 (2013) ("In the nearly sixty-year history of Title VI, neither the Department of Housing and Urban Development nor the Environmental Protection Agency ("EPA") has ever withheld or revoked funding for a Title VI violation.") (footnote omitted); Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights*, 85 YALE L. J. 721, 725 (1976) ("Although fund termination was envisioned as the primary means of enforcement under Title VI, and although it has proven the surest deterrent to discrimination, it has been given a low priority in the Justice Department guidelines for enforcing Title VI and is now hardly ever used.") (footnotes omitted).

[438] *See* 42 U.S.C. § 2000d-1 (providing that a funding agency or department must determine "that compliance cannot be secured by voluntary means" before it initiates fund termination or suspension proceedings).

[439] *See generally, e.g.*, *Education and Title VI*, Office for Civ. Rights, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html ("The principal enforcement activity is the investigation and resolution of complaints filed by people alleging discrimination on the basis of race, color or national origin."); *Informal Resolution and Voluntary Compliance*, Fair Housing and Equal Opportunity (FHEO), U.S. Dep't of Housing and Urban Dev., https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Informal_Resolution_and, (last visited Sept. 1, 2020) ("A Voluntary Compliance Agreement will obtain assurances from the Program to remedy any violations and ensure that the Program will not violate the rights of other persons under fair housing or civil rights authorities."). *See, e.g.*, *Agency Title VI Investigations and Resolutions*, Title VI Civil Rights News, Civil Rights Division, Dep't of Justice, https://www.justice.gov/crt/fcs/newsletters/Winter2017/Investigationsandresolutions, (last visited Sept. 1, 2020) (summarizing several Title VI investigations and resolutions, with copies of resolution letters and settlement agreements for each case); *Case Resolutions Regarding Race and National Origin Discrimination*, Office of Civ. Rights, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/frontpage/caseresolutions/race-origin-cr.html, (last visited Sept. 1, 2020) (providing "partial, illustrative list" of Title VI resolutions, with text of resolution letters and agreements); *Recent Civil Rights Resolution Agreements & Compliance Reviews*, Dep't of Health and Human Servs., https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/index.html, (last visited Sept. 1, 2020) (listing examples of voluntary resolutions, including of Title VI violations, with copies of the agreements reached in these cases).

When an agency does terminate, suspend, or refuse to grant funding, Title VI requires notice from the "head of the Federal department or agency" to "the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action."[440] Section 602 further provides that no termination, suspension, or refusal to grant funding "shall become effective until thirty days have elapsed after the filing of such report."[441] Title VI also permits a funding recipient to seek judicial review of such agency action in federal court.[442]

Meanwhile, the DOJ, as part of its coordinating role relating to federal agencies' Title VI implementation,[443] has issued regulations setting out the minimum components of an agency's Title VI enforcement apparatus.[444] Under these DOJ regulations, "any federal department or agency which extends federal financial assistance of the type subject to title VI"[445] must, for example, establish "procedures for the prompt processing and disposition of complaints,[446] maintain "a log of title VI complaints filed with it" and report such information to the DOJ,[447] collect certain data and information from its funding recipients,[448] and issue Title VI guidelines,[449]

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[440] 42 U.S.C. § 2000d-1.

[441] *Id*.

[442] *Id*. § 2000d-2 ("Any department or agency action taken pursuant to section 2000d–1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d–1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter."). *See generally* Schlafly v. Volpe, 495 F.2d 273, 282 (7th Cir. 1974) (describing 42 U.S.C. § 2000d-2 as providing that "'any person aggrieved ... may obtain judicial review' of agency action which results in the suspension of federal financial assistance, in accordance with the provisions of the [Administrative Procedure Act]") (quoting 42 U.S.C. § 2000d-2). *See also, e.g.*, Bd. of Public Instruction of Taylor Cnty., Fla. v. Finch, 414 F.2d 1068, 1070-71 (5th Cir. 1969) (reflecting that federal funding recipient, a county school district, sought judicial review of a Department of Education Title VI fund termination order based on the department's findings that the school district's desegregation efforts were deficient).

[443] *See* 28 C.F.R. § 42.401 ("Responsibility for enforcing title VI rests with the federal agencies which extend financial assistance. In accord with the authority granted the Attorney General under Executive Order 12250, this subpart shall govern the respective obligations of federal agencies regarding enforcement of title VI.").

[444] *See generally* 28 C.F.R. § 42.401 *et seq*. *See, e.g.*, *id*. § 42.415 ("Each federal agency subject to title VI shall develop a written plan for enforcement which sets out its priorities and procedures. This plan shall be available to the public and shall address matters such as the method for selecting recipients for compliance reviews, the establishment of timetables and controls for such reviews, the procedure for handling complaints, the allocation of its staff to different compliance functions, the development of guidelines, the determination as to when guidelines are not appropriate, and the provision of civil rights training for its staff.").

[445] *See* 28 C.F.R. § 42.402(b) (defining agency or federal agency within the meaning of DOJ Title VI coordinating regulations).

[446] *See id*. § 42.408(a) ("Federal agencies shall establish and publish in their guidelines procedures for the prompt processing and disposition of complaints").

[447] *See id*. § 42.408(d) ("Each federal agency shall maintain a log of title VI complaints filed with it, and with its recipients, identifying each complainant by race, color, or national origin; the recipient; the nature of the complaint; the dates the complaint was filed and the investigation completed; the disposition; the date of disposition; and other pertinent information. Each recipient processing title VI complaints shall be required to maintain a similar log. Federal agencies shall report to the Assistant Attorney General on January 1, 1977, and each six months thereafter, the receipt, nature and disposition of all such title VI complaints.").

[448] *See id*. § 42.406.

[449] *Id*. § 42.404(a) ("Federal agencies shall publish title VI guidelines for each type of program to which they extend financial assistance, where such guidelines would be appropriate to provide detailed information on the requirements of title VI ... The guidelines shall describe the nature of title VI coverage, methods of enforcement, examples of prohibited

among other requirements. Accordingly, agencies generally have their own processes for receiving discrimination complaints relating to a federally-funded program,[450] and investigating them to determine whether the recipient has failed to comply with Title VI's requirements.[451] The DOJ has also issued guidance for federal agencies with respect to "exercising their statutory discretion and in selecting, for each noncompliance situation, a course of action that fully conforms to the letter and spirit of Section 602 of the act and to the implementing regulations promulgated thereunder."[452]

"By Any Other Means Authorized by Law"

As discussed above, the primary method of Title VI enforcement is through an agency's investigation of complaints, which can resolve in a recipient's voluntary agreement to comply with Title VI, or—in the case of continued noncompliance—in proceedings to terminate, suspend, or refuse to grant federal funding to the recipient. Title VI, however, also provides that agencies may enforce compliance with Title VI requirements "by any other means authorized by law."[453] This "other means," as interpreted by federal agencies[454] and courts,[455] is now commonly understood to refer to an agency's referral of Title VI noncompliance to the DOJ for litigation in federal court.[456] DOJ's Title VI Guidance also identifies other possible means for enforcing

practices in the context of the particular type of program, required or suggested remedial action, and the nature of requirements relating to covered employment, data collection, complaints and public information.").

[450] *See generally, e.g., How to Submit a Report,* Civil Rights Division, Dep't of Justice, https://www.justice.gov/crt/how-submit-report, (last visited Sept, 1, 2020) (setting out various methods for reporting discrimination, including to its Federal Coordination and Compliance Section, which addresses discrimination in federally-funded programs or activities); *How to File a Civil Rights Complaint*, U.S. Dep't of Health and Human Services, https://www.hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html, (last visited Sept. 1, 2020); *Education and Title VI,* U.S. Dep't of Educ., Office for Civ. Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (describing the complaint process for reporting discrimination based on "race, color or national origin, against any person or group, in a program or activity that receives ED financial assistance"); *Filing a Discrimination Complaint Against a Recipient of EPA Funds,* External Civil Rights Compliance Office, Environmental Protection Agency, https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi#complaint, (last visited Sept. 1, 2020).

[451] *See generally, e.g., What to Expect: How OCR Investigates a Civil Rights Complaint*, U.S. Dep't of Health and Human Services, https://www.hhs.gov/civil-rights/filing-a-complaint/what-to-expect/index.html, (last visited Sept. 1, 2020).; *Case Resolution Manual,* External Civil Rights Compliance Office, Office of General Counsel, Environmental Protection Agency, https://www.epa.gov/ogc/case-resolution-manual.

[452] *See Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964,* 28 C.F.R. § 50.3.

[453] 42 U.S.C. § 2000d-1.

[454] *See, e.g., Title VI Overview,* Federal Coordination and Compliance Section, Civil Rights Division, U.S. Dep't of Justice, https://www.justice.gov/crt/fcs/TitleVI-Overview (stating that "[i]f a recipient of federal assistance is found to have discriminated and voluntary compliance cannot be achieved, the federal agency providing the assistance should either initiate fund termination proceedings or refer the matter to the Department of Justice for appropriate legal action.").

[455] *See Nat'l Black Police Ass'n,* 712 F.2d at 575 (stating that "Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient. The choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination.").

[456] *See Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964,* 28 C.F.R. § 50.3 at I(B)(1) (identifying several "[p]ossibilities of judicial enforcement," including "a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations" and "initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.").

compliance, including seeking assistance from and working with other federal, state or local agencies.[457]

Judicially-Implied Private Right of Action

Title VI does not contain a provision that expressly permits an individual to bring a private right of action in federal court against a funding recipient to seek relief for unlawful race, color, or national origin discrimination.[458] Rather, the Supreme Court has implied that right under Section 601, based on its reading of congressional intent,[459] and permits private individuals to "sue to enforce § 601 of Title VI and obtain both injunctive relief and damages."[460] Thus, individuals may sue a federal funding recipient directly in an action alleging unlawful discrimination under Title VI.[461] As discussed earlier, however, the Supreme Court has held that individuals may not bring suit alleging a violation of Title VI disparate impact *regulations*.[462] Instead, those regulations are enforced by federal agencies.[463]

Title VII: Discrimination in Employment

Title VII of the 1964 Civil Rights Act, as amended, is comprised of seventeen separate sections,[464] and is perhaps the most well-known of the titles in the act.[465] Described as "central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor,"[466] Title VII established new and specific prohibitions of

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[457] *See id.* § 50.3 (I)(B)(2) (listing several "effective alternative courses not involving litigation" that agencies could possibly use for addressing noncompliance by a recipient, including "consulting with or seeking assistance from other Federal agencies;" "consulting with or seeking assistance from State or local agencies"; and "bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries. The possibility of utilizing such administrative alternatives should be considered at all stages of enforcement and used as appropriate or feasible.").

[458] *See Guardians*, 463 U.S. at 600 (White, J., announcing the judgment of the Court) ("Title VI does not explicitly allow for *any* form of a private right of action.") (emphasis in original).

[459] *See id.* at 597; *Sandoval*, 532 U.S. at 279-80 (discussing the Court's 1979 decision Cannon v. University of Chicago, 441 U.S. 677, and explaining that "[t]he reasoning of that decision embraced the existence of a private right to enforce Title VI")..

[460] *Sandoval*, 532 U.S. at 279.

[461] *See, e.g.*, *Grutter*, 539 U.S. at 316-17 (reflecting that a white law school applicant filed a lawsuit against the University of Michigan law school, alleging, *inter alia*, that the school had violated Title VI by discriminating against her on the basis of race when it rejected her application for admission); Erie CPR v. Pa. Dep't of Transp., 343 F.Supp.3d 531, 537-543 (W.D.Pa. 2018) (reflecting that plaintiffs filed a Title VI suit alleging intentional discrimination relating to the city's decision-making process and plans for demolishing a bridge in an area comprised of "ethnically mixed" neighborhoods).

[462] *See* "Section 602: Addressing Discrimination including Disparate Impact Discrimination."

[463] *Id.*

[464] *See* 42 U.S.C. §§ 2000e -2000e-17.

[465] *See generally, e.g.*, Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993) ("Of the various titles in the 1964 Act, Title VII has been called one of the most significant pieces of civil rights legislation ever enacted by Congress") (footnotes omitted); Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV. 339, 343 (1986) ("The Civil Rights Act of 1964 is considered the most important civil rights legislation of the century, and title VII, the antidiscrimination in employment section, its most important section.") (footnotes omitted).

[466] *See* Univ. of Texas Southwestern Med. Center v. Nassar, 570 U.S. 338, 342 (2013).

discrimination in the workplace based on "race, color, religion, sex, or national origin";[467] created a detailed federal enforcement apparatus for receiving, investigating, and addressing discrimination complaints;[468] and established a federal commission, the Equal Employment Opportunity Commission (EEOC), to enforce Title VII's requirements.[469] Title VII is frequently looked to as a model, both by Congress,[470] and by federal courts,[471] when considering discrimination in other contexts. Finally, Title VII is unique among the titles of the 1964 Act in that Congress has substantively amended it over the decades, including in 1972, 1978, 1991, and 2009,[472] at times in direct response to Supreme Court interpretations of Title VII.[473] Federal courts commonly recognize Title VII as an exercise of Congress's Commerce Clause power.[474]

The legal issues that arise under Title VII are considerable and wide-ranging. As a result, this overview addresses certain aspects of Title VII in general terms. Following a brief discussion of the context of Title VII's enactment, this overview then discusses the private and federal employers subject to its requirements, intentional and disparate impact discrimination prohibited under Title VII, the title's enforcement in the private and federal sector, and available remedies.

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[467] *See, e.g.*, 42 U.S.C. § 2000e-2(a)-(d).

[468] *See id*. § 2000e-5.

[469] *See id*. § 2000e-4.

[470] *See generally* George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 159, 166-67 (2014) (stating that "[s]tatutes patterned on Title VII were enacted as early as the Age Discrimination in Employment Act of 1967, which was based on a report commissioned by Congress in the 1964 Act, and as late as the Americans with Disabilities Act of 1990") (footnote omitted).

[471] For example, the Supreme Court has sometimes analyzed questions arising under the Age Discrimination in Employment Act (ADEA) in reference to or against the backdrop of its Title VII precedent. *See generally, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173-75 (2009) (addressing the question of requisite causation for an ADEA claim and differentiating its analysis from its Title VII precedent); *id*. at 180-85 (Stevens, J., dissenting) (expressing the view that its Title VII precedent was applicable to resolving the legal question presented under the ADEA; discussing earlier decisions and stating that they "underscore[] that ADEA standards are generally understood to conform to Title VII standards"); Smith v. City of Jackson, Miss., 544 U.S. 228, 233-40 (2005) (analyzing the question of disparate impact liability under the ADEA in light of its Title VII disparate impact precedent).

[472] *See generally, e.g.*, George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 159, 169, 171-74 (2014) (discussing amendments to Title VII enacted through the Equal Employment Opportunity Act of 1972, the Pregnancy Discrimination Act of 1978, the Civil Rights Act of 1991, "which superseded or modified a long list of the Supreme Court decisions," and the Lilly Ledbetter Fair Pay Act of 2009). *See also, e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 411-12 (1985) (comparing a statutory exception in the ADEA with a statutory exception in Title VII, and observing that Congress "borrow[ed] a concept and statutory language from Title VII" when creating that exception).

[473] *See, e.g.*, Newport News Shipbuilding and Dry Dock Co. v. EEOC., 462 U.S. 669, 670 (1983) ("In 1978 Congress decided to overrule our decision in General Electric Co. v. Gilbert, 429 U.S. 125, (1976), by amending Title VII of the Civil Rights Act of 1964 'to prohibit sex discrimination on the basis of pregnancy.'") (citing P.L. 95-555, 92 Stat. 2076).

[474] *See generally, e.g.*, United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 206 n.6 (1979) (contrasting Title VI of the 1964 Act with Title VII of the act, on the basis that Title VII "was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments."); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311 (6th Cir. 1991) ("Title VII and the ADEA were both enacted under Congress' power to regulate commerce under the commerce clause of the United States Constitution."); Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 81 (3d Cir. 2003) ("Because Congress enacted Title VII under its Commerce Clause power, EEOC v. Ratliff, 906 F.2d 1314, 1315–16 (9th Cir.1990), the requirement that an employer be 'in an industry affecting commerce' is the statute's constitutional basis.").

General Background: Underemployment, Income Disparities, and the Removal of Discriminatory Practices that Favor White Employees

"The objective of Congress in the enactment of Title VII," the Supreme Court stated in its 1971 decision *Griggs v. Duke Power Company*, "is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[475]

Discussing the evidence presented before Congress in the lead-up to the 1964 Act, including data[476] prepared by the Department of Labor,[477] House Report No. 914 stated that "[t]estimony supporting the fact of discrimination in employment is overwhelming."[478] This data reflected, among other things, that the unemployment rate of "nonwhites" was more than twice the rate of white workers in 1962,[479] and showed "even more striking" disparities when examining data on occupation types reflecting that black employees were "largely concentrated among the semiskilled and unskilled occupations."[480] With respect to disparities in median annual income, the data reflected that in 1960, "nonwhite" male workers earned 59% less than white male workers.[481] Discussing the "effects of this severe inequality," the report stated that "an entire segment of our society is forced into a condition of marginal existence," and referred to "a higher infant mortality rate, a higher incidence of tuberculosis, and a lower life expectancy" experienced by black citizens.[482]

Though Title VII also prohibits discrimination based on sex, religion, and national origin, the discussion of evidence relating to discrimination in employment in House Report No. 914 focuses on racial disparities.[483] As a general matter, there is little legislative history relating to the prohibition of discrimination based on "sex," which, unlike the other protected traits under Title

[475] Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971). For a detailed discussion of the legislative history of Title VII specifically, including proposed amendments, excerpts from the congressional record, and House and Senate hearings and debates, *see* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431 (1966), http://lawdigitalcommons.bc.edu/bclr/vol7/iss3/3, (last visited Sept. 2, 2020).

[476] *See* H. REP. NO.914, pt.2, at 27-30 (reflecting and discussing several data tables).

[477] *See, e.g.*, *id*. at 26-27 (with respect to the first data table reflecting unemployment rates, stating that it was "contained in the Manpower Report of the President, 1963, prepared by the Department of Labor").

[478] *See id*. at 26.

[479] *See id*. at 27.

[480] *See id*. at 28 and table 3 (also stating that the concentration of black employees in semiskilled or unskilled occupations "heightens the chance of early and long duration layoffs").

[481] *See id*. (stating that the data on income levels "reveals the economic straitjacket in which the Negro has been confined"). The data compared median annual incomes from 1939 to 1960, which showed an increasing percentage gap over that time between the earnings of white and "nonwhite" male workers. *See id*. The data also compared "nonwhite" and white female workers, and reflected that in 1960, "nonwhite" female employees earned 50.3% less than white female employees. *See id*.

[482] *See id*. Part II of the House Report also expressed the view that "[t]he effect of this is to deny to the Nation the full benefit of the skills, intelligence, cultural endeavor, and general excellence which the Negro will contribute if afforded the rights of first-class citizenship." *See id*. (adding that increased "[n]ational prosperity" will result "through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment. Through toleration of discriminatory practices, American industry is not obtaining the quantity of skilled workers it needs.").

[483] *See generally* H. REP. NO. 914, pt. 1, at 26-32 (generally discussing proposed Title VII provisions without specific discussion of evidence or hearings relating to discrimination); pt. 2, at 26-30 (discussing evidence relating to race discrimination in employment).

VII, was added as a "last-minute" amendment to H.R. 7152.[484] In the years following Title VII's enactment, however, claims alleging discrimination on grounds other than race, including based on sex, have been widely litigated.

Title VII: General Coverage and Scope

The following section offers a general discussion of Title VII's provisions defining the employers subject to Title VII's requirements, and the traits or categories protected under Title VII from discriminatory employment actions.

Private and Federal Employers Subject to Title VII's Requirements

Title VII has separate sections prohibiting discrimination by private sector and federal employers, and correspondingly, separately identifies which private and federal employers are subject to its requirements.

With respect to private industry, Title VII applies to "a person engaged in an industry affecting commerce," with at least fifteen or more employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[485] Notably, a private sector employer for Title VII purposes also includes "any agent of such a person."[486] Accordingly, for Title VII liability purposes, an employer may generally be held legally responsible for the discriminatory acts of its employees.[487]

With respect to federal employers, Congress amended Title VII in 1972 to add provisions prohibiting discrimination against federal employees.[488] Title VII applies to federal executive

[484] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986) (stating that because "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," and "the bill quickly passed as amended," "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'") (citing 110 CONG. REC. 2577–2584 (1964)). *See also* 422 U.S. at 63-64 (stating that "[t] he principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment") (citing 110 CONG. REC. 2577 and 2584). *See also, generally*, Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431, 439-42 and n. 48 (1966) (discussing the proposed amendment to add "sex" and stating that "[i]t was proposed and quickly adopted after hasty debate in the House under the 'five-minute' rule which had been approved for House consideration of possible amendments to H.R. 7152. The House debate thereon covers no more than nine pages of the Congressional Record.") (citing 110 CONG. REC. 2577-84 (1964)).

[485] *See* 42 U.S.C. § 2000e(b).

[486] *See id*.

[487] See id.

[488] *See generally* Chandler v. Roudebush, 425 U.S. 840, 841 (1976) (discussing Congress's 1972 amendments, which "extended the protection of Title VII of the Civil Rights Act of 1964 ... to employees of the Federal Government"; stating that a "principal goal" of those amendments "was to eradicate 'entrenched discrimination in the Federal service'") (internal citations omitted). *See* 42 U.S.C. § 2000e-16(a).

branch agencies,[489] military departments,[490] the U.S. Postal Service and Postal Regulatory Commission, and "units of the Government of the District of Columbia having positions in the competitive service," among others entities.[491] Concerning military departments, a number of federal courts have read Title VII's federal sector provision to apply only to the military's *civilian* workforce, not uniformed members.[492]

Though Title VII itself does not address Congress or various other legislative branch offices, the Congressional Accountability Act of 1995 (CAA)[493] makes certain federal antidiscrimination laws applicable to the legislative branch, including Title VII.[494] Under the CAA, "employing offices" subject to Title VII through the CAA include personal offices of a Member of the House of Representatives or of a Senator, and House and Senate Committees, among other legislative branch employers.[495]

As for individuals covered by Title VII's protections, Title VII's private sector provision defines a covered "employee" as "an individual employed by an employer," with certain specific exceptions (such as elected state officials, among others),[496] while also protecting applicants for

[489] 42 U.S.C. § 2000e-16(a) (listing covered employers to include "executive agencies as defined in section 105 of title 5"). Section 105 of Title 5, in turn, defines executive agencies as an "Executive department, a Government corporation, and an independent establishment."). Those terms are then further defined in 5 U.S.C §§ 101, 103, and 104. Executive departments include the Departments of State, Treasury, Defense, Justice, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security. See 5 U.S.C. § 101. A government corporation "means a corporation owned or controlled by the Government of the United States." *Id.* § 103(a). An independent establishment includes the Government Accountability Office and "an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." *Id.* § 105.

[490] 42 U.S.C. § 2000e-16(a) (identifying covered employers to include "military departments as defined in section 102 of title 5"). Section 102 of Title 5, in turn, defines military departments as: the Departments of the Army, the Navy, and the Air Force. 5 U.S.C. § 102.

[491] *See* 42 U.S.C. § 2000e-16(a) (also listing "units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress"). It should be noted that though this text refers to "units of the judicial branch ... having positions in the competitive service," it is unclear whether any such "competitive service" positions remain in the judicial branch today. *See generally, e.g.*, The Administrative Office of the United States Courts Personnel Act of 1990, P.L. 101-474, 104 Stat. 1097, § 3(a) (authorizing the Director of the Administrative Office of the U.S. Courts to establish a personnel management system concerning compensation, assignments, and other personnel actions of employees "without regard to the provisions of title 5, United States Code, governing appointments and other personnel actions in the *competitive service*.") (emphasis added). Thus, it appears that the present organization of positions within the judicial branch may no longer correspond with the statutory language in Title VII setting out its applicability to units of the judicial branch having "positions in the competitive service." *Cf.* 42 U.S.C. § 2000e-16(a).

[492] *See generally* Jackson v. Modly, 949 F.3d 763, 767-68 (D.C. Cir. 2020) (addressing the issue of whether Title VII's federal sector provision "applies to uniformed members of the armed forces of the United States military" and noting that "every one of our sister circuits to address this question has concluded—albeit based on varying rationales and depths of analysis—that the answer is no") (citing cases). *See also id.* at 765 (stating that "we join the unanimous rulings of our sister circuits, concluding that Title VII does not apply to uniformed members of the armed forces").

[493] 2 U.S.C. § 1301 *et seq*. For more information on the Congressional Accountability Act, including recent amendments to that act, *see* CRS Legal Sidebar LSB10384, *The Congressional Accountability Act of 1995 Reform Act: An Overview*, by Christine J. Back (Dec. 11, 2019).

[494] *See id.* § 1302(a)(2).

[495] *Id.* § 1301(a)(9).

[496] 42 U.S.C. § 2000e(f) (stating that "that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the

employment from discriminatory hiring and certain other practices.[497] Title VII's federal sector provision also protects "employees or applicants for employment"[498] of covered employers, as does the CAA.[499]

Protected Categories Under Title VII

The text of Title VII's antidiscrimination provisions prohibit discrimination based on an "individual's race, color, religion, sex, or national origin."[500] While Title VII did not, when enacted in 1964, contain definitions of any protected trait,[501] it now contains two—of religion and sex—which came by way of subsequent amendments in 1972 and 1978, respectively. When amending Title VII in 1972, Congress defined "religion" to include "all aspects of religious observance and practice, as well as belief."[502] Several years later, in 1978, Congress amended Title VII[503] to define "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."[504]

More recently, the Supreme Court resolved a significant and debated question of coverage among federal courts of appeals with respect to Title VII's application to discrimination based on sexual

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exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.").

[497] *See, e.g., id.* § 2000e-2(a)(1) (prohibiting an employer from refusing to hire any individual based on a protected trait); *id.* § 2000e-2(a)(2) (prohibiting an employer from limiting, segregating, or classifying employees or "applicants for employment").

[498] *See id.* § 2000e-16(a) ("All personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.").

[499] More specifically, the CAA defines a "covered employee" as "any employee" of a specifically enumerated legislative branch entity. *See* 2 U.S.C. § 1301(a)(3) (defining a "covered employee," for example, as "any employee" of "the House of Representatives," "the Senate," among other legislative branch entities). The CAA also provides that an "employee" includes "an applicant for employment and a former employee." *Id.* § 1301(a)(4).

[500] *See, e.g.*, 42 U.S.C. §§ 2000e-2(a)(1) and (a)(2). *See also id.* § 2000e-16(a) (mandating that "[a]ll personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.").

[501] *See* Pub. L. No. 88-352, 78 Stat. 241, 253-55 (enacting Section 701, the definitions section of Title VII).

[502] 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."). *See generally* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 72-75 (1977) (discussing the context for amending Title VII in 1972 to define religion, and stating that the "intent and effect of this definition was to make it an unlawful employment practice under s 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees").

[503] *See generally* Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 670 and n.1 (1983) ("In 1978 Congress decided to overrule our decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), by amending Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy"; further noting that Congress amended Title VII through the Pregnancy Discrimination Act, which added a new subsection to the definitions section of Title VII, 42 U.S.C. 2000e, addressing Title VII's applicability to pregnancy).

[504] 42 U.S.C. § 2000e(k) (also providing that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise.").

orientation or gender identity.[505] The Court interpreted Title VII's prohibition of discrimination "because of … sex"[506] to prohibit discrimination based on sexual orientation or gender identity.[507]

Prohibitions Against Intentional and Disparate Impact Discrimination

Title VII expressly prohibits both intentional and disparate impact discrimination.[508] As a general matter, an intentional discrimination claim requires some evidence of a discriminatory intent or motive.[509] A claim alleging "disparate impact" does not require evidence of such "intent"[510] and generally involves a legal challenge to a policy or practice that has a disproportionate and negative effect on a particular group without sufficient justification.[511] Title VII sets out in specific detail the actions that constitute unlawful forms of intentional and disparate impact discrimination under the statute, as discussed in further detail below.

[505] *See* Bostock v. Clayton Cnty., Georgia, 140 S.Ct. 1731, 1738 (2020) (stating that "we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons").

[506] *See* 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice for an employer to discriminate against an individual "because of such individual's … sex").

[507] *See Bostock*, 140 S.Ct. at 1737, 1754 (reasoning that because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids"; interpreting Title VII's prohibition of discrimination because of sex to thus prohibit discriminatory employment actions taken because an individual's sexual orientation or gender identity). For more information on the Supreme Court's *Bostock* decision, *see* CRS Legal Sidebar LSB10496, *Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications*, by Jared P. Cole (June 17, 2020).

[508] *See generally* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2031-32 (2015) (discussing Title VII's provisions prohibiting "'disparate treatment' (or 'intentional discrimination')," and its "'disparate impact' provision," and stating that they "are the only causes of action under Title VII").

[509] *See generally* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (stating that for intentional discrimination claims under Title VII, also referred to as "disparate treatment" claims, "[a] disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action.") (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).

[510] As noted earlier, however, the distinction between disparate impact discrimination and evidence of discriminatory intent may not be "nearly as bright, and perhaps not quite as critical" as one might assume. *See supra* note 366.

[511] *See generally* Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.") (internal citation omitted).

Intentional Discrimination Under Title VII

With respect to prohibited conduct by private sector employers, Title VII enumerates specific acts[512] that constitute "unlawful employment practices" when taken against an individual "because of such individual's race, color, religion, sex, or national origin."[513] These include

- the failure or refusal to hire an individual;[514]
- firing an individual;[515]
- "otherwise" discriminating with respect to an individual's "compensation, terms, conditions, or privileges of employment";[516]
- denying a reasonable workplace accommodation for an individual's religious observance or practice in the absence of "undue hardship";[517]
- the segregation of employees or applicants for employment; the limiting of employees or applicants for employment; or the classifying of "employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin";[518]
- discrimination relating to the "admission to, or employment in, any program established to provide apprenticeship or other training";[519]
- the discriminatory alteration or manipulation of scores or results of employment-related tests;[520] and

[512] *See generally Nassar*, 570 U.S. at 376 (stating that "Title VII is a detailed statutory scheme" that "enumerates specific unlawful employment practices"; pointing to Title VII provisions addressing "status-based discrimination by employers, employment agencies, labor organizations, and training programs, respectively"; "status-based discrimination in employment-related testing"; "retaliation for opposing, or making or supporting a complaint about, unlawful employment actions"; and "advertising a preference for applicants of a particular race, color, religion, sex, or national origin") (citing 42 U.S.C. § 2000e–2(a)(1), (b), (c)(1), (d), (l); *id*. at § 2000e–3(a); *id*. at § 2000e–3(b)).

[513] *See* 42 U.S.C. § 2000e-2(a)(1).

[514] *Id*.

[515] *Id*.

[516] *Id*.

[517] *See id*. § 2000e(j) (making it unlawful for an employer to refuse to accommodate an individual's religious observance or practice "unless an employer demonstrates that he is unable to reasonably accommodate [] an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."). *See generally, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2031 (2015) ("Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship.").

[518] *See* 42 U.S.C. § 2000e-2(a)(2).

[519] *Id*. § 2000e-2(d) ("It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.").

[520] *Id*. § 2000e-2l ("It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.").

- notices or advertising for employment that "indicat[e] any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin."[521]

Though some generally applicable Title VII requirements apply to labor organizations and staffing agencies,[522] Title VII also contains certain prohibitions which exclusively apply to those entities.[523]

Meanwhile, Title VII's prohibition applicable to federal employers is phrased differently and in more general terms: "All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States)… shall be made free from any discrimination based on race, color, religion, sex, or national origin."[524]

Other Prohibited Forms of Discrimination including Harassment

As discussed above, Title VII's private sector provisions expressly identify certain acts that are unlawful under the statute. Those enumerated acts, however, are not exhaustive of the conduct that may violate Title VII. The statute also prohibit acts that "otherwise [] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[525] In interpreting and applying this more broadly-phrased text to other circumstances, the Supreme Court and federal appellate courts have held, for example, that harassment can constitute unlawful discrimination under Title VII. [526] Federal courts have also addressed other discriminatory acts, including

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[521] *Id*. § 2000e-3(b). *See also id*. (allowing a notice or advertisement to "indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment").

[522] *See, e.g.*, *id*. § 2000e-3(a) (reflecting that employment agencies and labor organizations are subject to Title VII's antiretaliation provision); *id*. § 2000e-3(b) (prohibiting, among other actions, discriminatory advertising by "an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining").

[523] *Id*. § 2000e-2(c) (making it "an unlawful employment practice for a labor organization" to: "(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section"); *id*. § 2000e-2(b) ("It shall be an unlawful employment practice for an *employment agency* to fail or refuse to *refer for employment*, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to *classify or refer* for employment any individual on the basis of his race, color, religion, sex, or national origin.") (emphasis added). *See generally id*. § 2000e(d) (defining "labor organization" for Title VII purposes); *id*. § 2000e(c) (defining employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.").

[524] *See id*. § 2000e-16(a).

[525] *See id*. § 2000e-2(a)(1).

[526] *See generally, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67, 73 (1986) (recognizing sexual harassment as a violation of Title VII and expressly holding that such claims are actionable under Title VII); *See, e.g.*, Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 759-60 (8th Cir. 2004) (evaluating plaintiff's Title VII claim alleging race-based harassment and holding that the evidence was insufficient to show "that the harassment at [the his workplace] was so severe or pervasive that it altered the terms or conditions of his employment"). For more information on the Title VII harassment claims, and legal standards that currently apply for analyzing such claims, *see* CRS Report R45155, *Sexual Harassment and Title VII: Selected Legal Issues*, by Christine J. Back (Apr. 9, 2018).

allegations of diminished job responsibilities,[527] discriminatory working conditions,[528] and involuntary reassignments.[529] As a general matter, in cases such as these, federal courts often analyze whether the challenged conduct is "materially adverse"[530] so as to constitute an "adverse employment action"[531] that violates Title VII. In addressing such questions, federal courts have sometimes differed in their conclusions as to which discriminatory acts are sufficiently "adverse" to be unlawful under Title VII.[532]

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[527] *See, e.g.*, Thompson v. City of Waco, Texas, 764 F.3d 500, 502-06 (5th Cir. 2014) (analyzing Title VII claim brought by police detective alleging that the police department discriminated against him on the basis of race by restricting his work duties such that he was prohibited from searching for evidence without supervision, working in an undercover capacity, being the evidence officer at a crime scene, or being a lead investigator on an investigation, among other restrictions).

[528] *See, e.g.*, Peterson v. Linear Controls, Inc., 757 F. App'x. 370, 373 (5th Cir. 2019) (where black offshore electrician alleged that black team members were assigned to work outside without access to water while white team members worked inside with air conditioning, affirming the lower court's holding that "these working conditions are not adverse employment actions because they do not concern ultimate employment decisions"). A petition for certiorari was filed in this case, No. 18-1401 (filed May 7, 2019), but the parties settled in late June 2020, before the Supreme Court acted on the petition. See Erin Mulvaney, *Race Bias Case Over Outdoor Work Settles, Bypassing High Court*, BLOOMBERG LAW NEWS (June 22, 2020), https://news.bloomberglaw.com/daily-labor-report/race-bias-case-over-outdoor-work-settles-bypassing-high-court?context=search&index=2, (last visited Sept. 1, 2020). Relatedly, another petition for certiorari is currently pending before the Court on the issue of whether a denial of a lateral transfer may constitute an adverse action under Title VII in under certain circumstances. See Forgus v. Mattis, 753 F. App'x. 150 (4th Cir. 2018), *petition for cert. pending*, No. 18-942 (filed Jan. 15, 2019).

[529] *See, e.g.*, Daniels v. United Parcel Service, Inc., 701 F.3d 620, 635-36 (10th Cir. 2012) (where plaintiff alleged that her employer permanently reassigned her from the day shift to the night shift because of her sex, holding that the reassignment was not "sufficiently material to constitute a *significant* change in employment status or responsibilities" and thus not an "adverse employment action" for Title VII purposes) (emphasis in original); Collins v. Meike, 52 F. App'x 835, 837 (7th Cir. 2002) (where plaintiff alleged that her employer involuntary reassigned her from teaching to substitute teaching, and then later, reassigned her from sixth grade to fourth grade, a position for which she had no experience, holding that she had failed to establish her Title VII race discrimination claim on the basis that neither reassignment constituted an "adverse employment action"). *Cf.* Alvarado v. Texas Rangers, 492 F.3d 605, 612-14 (5th Cir. 2007) (discussing several decisions in which the court of appeals had previously held that "a transfer was the equivalent of a demotion and, hence, qualified as an adverse employment action"; stating that a transfer need not result "'in a decrease in pay, title, or grade'" where the new position "'proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement'") (citations omitted).

[530] *See generally* Laster v. City of Kalamazoo, 746 F.3d 714 (6th Cir. 2014) (stating that "[i]n the context of a Title VII discrimination claim, an adverse employment action is defined as a 'materially adverse change in the terms or conditions' of employment" and discussing some common indicia of adverse employment actions) (internal citation omitted); Brown v. City of Syracuse, 673 F.3d 141, 150 (2d Cir. 2012) ("'A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment.'") (quoting Joseph v. Leavitt, 465 F.3d 87, 90 (2d Cir. 2006)).

[531] *See generally Thompson*, 764 F.3d at 503 (stating that to establish a Title VII violation, "a plaintiff must prove that he or she was subject to an 'adverse employment action'—a judicially-coined term referring to an employment decision that affects the terms and conditions of employment"); Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000) (explaining that though Title VII makes no reference to an "adverse employment action," the phrase is "judicial shorthand" for federal courts' interpretation as to which employment actions Title VII prohibits). *See also, e.g.*, Lewis v. City of Chicago, 496 F.3d 645, 653 (7th Cir. 2007) (stating that "'[f]or an employment action to be actionable, it must be a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibility, or a decision causing a significant change in benefits'"; discussing three categories of employment actions that the Seventh Circuit has held to constitute "adverse employment actions") (internal citations omitted).

[532] *See, e.g.*, *supra* note 529.

Causation Standards for Proving Intentional Discrimination

To prevail on a Title VII intentional discrimination claim, a plaintiff must show that the challenged employment action was taken on account of his or her "race, color, religion, sex, or national origin"[533] (rather than for a legitimate, nondiscriminatory reason). To that end, Title VII generally provides at least two methods of showing causation sufficient to establish a violation of the statute.[534]

The first causation standard is rooted in the statutory text "because of" in Sections 703(a)(1) and (a)(2), Title VII's antidiscrimination provisions applicable to private sector employers.[535] While federal courts have construed this Title VII text differently over the years,[536] the Supreme Court has recently applied "because of" in Title VII's antidiscrimination provision to incorporate a "but for" causation standard.[537] Under that standard, a plaintiff is generally required to show that the harm being alleged "'would not have occurred' in the absence of—that is, but for—the defendant's" discriminatory motive.[538] Put another way, the evidence must show that the defendant's adverse or negative treatment of a person would not have occurred but for the person's protected trait.[539] Importantly, the "but for" standard as applied to Title VII's antidiscrimination provision does not require a showing that a person's protected trait was the *sole* reason for the challenged employment action.[540]

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[533] *Cf., e.g.*, 42 U.S.C. § 2000e-2(a)(1) and (a)(2); *id.* § 2000e-2(m).

[534] *See generally* Ponce v. Billington, 679 F.3d 840, 844-45 (D.C. Cir. 2012) (stating that "Title VII provides two separate ways for plaintiffs to establish liability"; describing the first as addressing discrimination "because of" a protected trait, and the second as addressing when a protected trait is "a motivating factor").

[535] *See* 42 U.S.C. § 2000e-2(a)(1) (making it an "unlawful employment practice" for an employer to take certain employment-related actions against an individual "*because of* such individual's race, color, religion, sex, or national origin") (emphasis added); *id.* § 2000e-2(a)(2) (making it an "unlawful employment practice" for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin") (emphasis added). *See generally* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2031-32 (2015) (quoting 42 U.S.C. § 2000e-2(a)(1) and (a)(2) and stating that these "two proscriptions [are] often referred to as the 'disparate treatment' (or 'intentional discrimination') provision").

[536] *See generally* McQuillen v. Wisconsin Educ. Ass'n Council, 485 U.S. 914, 914-15 (1988) (White, J., dissenting from a denial of a petition for a writ of certiorari on the question of whether a Title VII intentional discrimination claim requires a showing of "but for" causation). *See id.* at 915 (discussing the "the divergent positions taken by the Federal Courts of Appeals with regard to the standard of causation"; stating that "[t]wo Circuits have indicated that the discriminatory motive must be a 'significant' or 'substantial' factor, but not necessarily the determinative factor, before liability may be imposed on an employer under Title VII" while four circuits had adopted the view that "Title VII liability is established only when an unlawful motive was the 'but for' cause of the challenged employment action"). *See also, e.g.*, Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (describing the causation standard as requiring that a plaintiff show that her protected trait "was a *determinative* factor in the adverse employment decision, that is, that but for the protected characteristic, the plaintiff would have been hired (or promoted)") (emphasis in original).

[537] *See Bostock*, 140 S.Ct. at 1739 (pointing to "because of" in Title VII's antidiscrimination provision, 42 U.S.C. § 2000e-2(a)(1), and stating that its "'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation").

[538] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346-47 (2013) (describing "but for" causation and stating that "[i]n the usual course, this standard requires the plaintiff to show "that the harm would not have occurred" in the absence of—that is, but for—the defendant's conduct") (citations omitted).

[539] *See id. See also, generally, Bostock*, 140 S.Ct. at 1739 (stating that "causation is established whenever a particular outcome would not have happened 'but for' the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

[540] *See Bostock*, 140 S.Ct. at 1739 (stating that "[o]ften, events have multiple but-for causes" and "[s]o long as the plaintiff's [protected trait] was one but-for cause of that decision, that is enough to trigger the law"); Price Waterhouse v. Hopkins, 490 U.S. 228, 241, n.7 (1989) (noting that "Congress specifically rejected an amendment that would have

Liability for intentional discrimination may also be established under Title VII's "motivating factor" provision, Section 703(m),[541] which Congress added to Title VII in 1991.[542] A claim brought under this provision, sometimes referred to as a "mixed motive" claim,[543] requires evidence that a protected trait was "a motivating factor" for an employer's action against an individual, "even though other factors also motivated the practice."[544] Notably, if a plaintiff proves that an employer violated Title VII's "motivating factor" provision, but the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor,"[545] the plaintiff's remedies are limited to "only declaratory relief, certain types of injunctive relief, and attorney's fees and costs."[546]

Title VII's federal sector provision, Section 717,[547] offers yet another formulation using the phrase "based on."[548] Specifically, Section 717(a) mandates that "[a]ll personnel actions affecting employees or applicants for employment … shall be made free from any discrimination *based on* race, color, religion, sex, or national origin."[549] The Supreme Court has not addressed the causation standard relating to Title VII's federal sector provision.[550]

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placed the word 'solely' in front of the words 'because of') (citing 110 CONG. REC. 2728, 13837 (1964)); *Ponce*, 679 F.3d at 846 (stating that "nothing in Title VII requires a plaintiff to show that illegal discrimination was the sole cause of an adverse employment action"); *Fuentes*, 32 F.3d at 764 (stating that the plaintiff need not prove "that the illegitimate factor was the *sole* reason for the decision," but rather that "but for the protected characteristic, the plaintiff would have been hired (or promoted)").

[541] 42 U.S.C. § 2000e-2(m).

[542] *See generally* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93-95 (2003) (discussing the Court's analysis in its 1989 *Price Waterhouse* decision which, among other things, would have permitted a defendant who satisfied the requisite showing to avoid liability for a Title VII "mixed motive" claim; stating that Congress "'respond[ed]' to *Price Waterhouse* by 'setting forth standards applicable in 'mixed motive' cases' in two new statutory provisions" in Title VII, which it added through the 1991 Civil Rights Act). *See also, e.g.*, Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S.Ct. 1009, 1017 (2020) (discussing Congress's response to the Court's *Price Waterhouse* decision by amending Title VII through the Civil Rights Act of 1991).

[543] *See supra* note 542. *See also, e.g.*, Connelly v. Lane Const. Corp., 809 F.3d 780, 788 (3d Cir. 2016) (stating that "in a 'mixed-motive' case, the plaintiff must ultimately prove that her protected status was a 'motivating' factor").

[544] 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[545] *Id.* § 2000e–5(g)(2)(B)).

[546] *Desert Palace*, 539 U.S. at 94 (citing 42 U.S.C. § 2000e–5(g)(2)(B)).

[547] 42 U.S.C. § 2000e-16.

[548] *Id.* § 2000e-16(a).

[549] *See id.*

[550] Though beyond the scope of this overview to discuss other federal antidiscrimination statutes, the Court has recently addressed the question of causation with respect to a similarly-phrased federal sector provision in the Age Discrimination in Employment Act (ADEA). See Babb v. Wilkie, 140 S.Ct. 1168, 1171 (2020). That ADEA provision states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). In *Babb*, the Court addressed whether the ADEA's federal sector provision, 29 U.S.C. § 633a(a), "imposes liability only when age is a 'but-for cause' of the personnel action in question." See *Babb*, 140 S.Ct. at 1171. The Court construed what it viewed as the "critical statutory language"—"made free from any discrimination based on age"—to require that "personnel actions be untainted by any consideration of age." *Id.* The Court then interpreted the ADEA's federal sector provision to implicate two causation standards with different remedies. *Id.* If a plaintiff shows that a personnel action was tainted by consideration of age, but fails to show "that age was a but-for cause of the challenged employment decision," the Court held that the plaintiff is foreclosed from relief "generally available for a violation of § 633a(a), including hiring, reinstatement, backpay, and compensatory damages." *Id.* Instead, such a plaintiff is limited to "injunctive or other forward-looking relief." *Id.* at 1178. Meanwhile, reading the provision's text to also incorporate a but-for standard, the

Disparate Impact Discrimination Under Title VII

As discussed above, while an intentional discrimination claim requires evidence of discriminatory intent,[551] the focus of a Title VII disparate impact claim is "an observed disparity caused by a particular employment practice [that] cannot be justified as necessary to the employer's business."[552] As the U.S. Court of Appeals for the D.C. Circuit recently observed, "[t]he purpose of disparate impact analysis under Title VII is to permit plaintiffs to challenge 'practices, procedures, or tests' that may be 'neutral on their face, and even neutral in terms of intent,' but that disproportionately harm members of a protected class."[553]

Claims brought under Title VII's disparate impact provision have tended to challenge facially neutral hiring, transfer, or promotion criteria that lack job-relatedness yet disproportionately exclude or adversely affect candidates within a protected group.[554] By way of illustration, courts have addressed disparate impact challenges to height or weight requirements,[555] recruiting practices,[556] physical tests,[557] written exams,[558] minimum test score thresholds,[559] and residency

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Court held that a plaintiff who establishes but-for causation may obtain any relief available under the ADEA. *Id.* at 1171.

[551] *See* "Prohibitions Against Intentional and Disparate Impact Discrimination."

[552] *See* Davis v. District of Columbia, 925 F.3d 1240, 1248 (D.C. Cir. 2019).

[553] *Id.* (quoting Griggs v. Duke Power Company, 401 U.S. 424, 430 (1971).

[554] *See, e.g.*, Ernst v. City of Chicago, 837 F.3d 788, 804 (7th Cir. 2016) (in a Title VII claim alleging that a physical entrance exam for paramedics had a disparate impact on women, explaining that " in itself, there is nothing unfair about women characteristically obtaining lower physical-skills scores than men. But the law clearly requires that this difference in score must correlate with a difference in job performance. To guard against this unfairness, the law requires that the physical exam must validly test job-related skills.").

[555] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 323-332 (1977) (where female plaintiff applied for but was denied a position as a prison guard based on her failure to meet the state's minimum weight requirement, analyzing her claim that the state's minimum height (5 feet 2 inches) and weight (120-pound minimum) requirements had a disproportionate impact on female applicants in violation of Title VII); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 941-43 (10th Cir. 1979) (addressing Title VII disparate impact claim alleging that a company's 5'7 minimum height requirement for truckers had a disparate impact on "Spanish surnamed Americans"; reflecting that the plaintiffs had presented evidence that the company had hired "at least 16 white men who were less than 5'7 tall," one of whom was 5 feet 4 ½ inches, who stated "that his height had never been a handicap in operating the equipment" and "had years of accident-free driving and had received safe driving awards").

[556] *See, e.g.*, United States v. City of Warren, Mich., 138 F.3d 1083, 1092-94 (6th Cir. 1998) (addressing Title VII claim alleging that city's recruiting practices for certain municipal positions had disparate impact on black applicants).

[557] *See, e.g.*, Lanning v. Southeastern Pennsylvania Transp. Authority, 181 F.3d 478, 482-84 (3d Cir. 1999) (reflecting that plaintiffs brought a Title VII disparate impact claim alleging that the transit police department's physical fitness screening requirement had a disparate impact on female applicants).

[558] *See, e.g.*, Lopez v. City of Lawrence, Mass., 823 F.3d 102, 107-111 (1st Cir. 2016) (reflecting that plaintiffs, black and Hispanic police officers seeking promotion to Sergeant in municipal or state police departments, brought a Title VII claim alleging that the competitive written exam required by the state for promotion had an unjustified disparate impact on black and Hispanic officers).

[559] *See, e.g.*, Lewis v. City of Chicago, Ill., 560 U.S. 205, 208-09 (2010) (reflecting that plaintiffs, who had passed the written entrance exam required for eligibility to become firefighters, alleged that the city's practice of advancing only those applicants who scored an 89 out of 100 had a disparate impact on black applicants; also reflecting that the district court certified a class of more than 6,000 black applicants who had scored in the city's "qualified" test score range but had not been hired). In *Lewis*, the Court considered the question of whether "a plaintiff who does not file a timely [EEOC] charge challenging the *adoption* of a practice—here, an employer's decision to exclude employment applicants who did not achieve a certain score on an examination—may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice." *Id.* at 208. The Court held that the plaintiffs presented a cognizable disparate impact claim. *Id.* at 211-12 (stating "no one disputes that the conduct petitioners challenge occurred within the charging period. The real question, then, is not whether a claim predicated on that conduct is *timely*, but whether the practice thus defined can be the basis for a disparate-impact claim *at all*. We

requirements,[560] among other practices alleged to have disproportionately rendered applicants in protected groups ineligible for getting hired or promoted without adequate business justification. Other Title VII claims have alleged a disproportionate impact on a protected group in relation to terminations or reductions-in-force.[561]

General Background on Disparate Impact under Title VII

Though Title VII as originally enacted did not expressly refer to "disparate impact," Title VII has long been understood to prohibit this type of discrimination—since 1971, when the Supreme Court interpreted Title VII to prohibit disparate impact discrimination in its decision *Griggs v. Duke Power Company*.[562]

In *Griggs*, the Supreme Court addressed a claim brought by a group of black employees who alleged that the company had violated the Title VII provision[563] which prohibits employers from limiting, classifying, or segregating employees based on race, "in any way which would … adversely affect his status as an employee."[564] The evidence in *Griggs* reflected that before the 1964 Act became effective, the employer had "openly discriminated on the basis of race" by limiting all and only black employees to one department in the company (the labor department), which also received the lowest pay of all the other departments comprised exclusively of white employees.[565] After the 1964 Act became effective, the employer conditioned transfers *out* of the labor or coal handling departments on a high school education, or by passing two tests.[566] It is

conclude that it can.").

[560] *See, e.g.*, N.A.A.C.P. v. North Hudson Regional Fire & Rescue, 665 F.3d 464, 485 (3d Cir. 2011) (affirming grant of summary judgment to the plaintiffs on their Title VII claim alleging that the fire department's "residency requirement cause[d] a disparate impact by excluding well-qualified African–Americans who would otherwise be eligible for available firefighter positions" and stating that "North Hudson failed to present evidence to create any genuine dispute regarding this disparate impact or adduce a valid business necessity for the residency requirement."); United States v. City of Warren, Mich., 138 F.3d 1083, 1088-89 (6th Cir. 1998) (discussing Department of Justice's Title VII action alleging that the city's requirement that applicants for city municipal jobs be city residents at the time of their application had a disparate impact on black applicants).

[561] *See, e.g.*, *Davis*, 925 F.3d at 1249-1254 (analyzing Title VII claim challenging two criteria that the city agency used to identify positions for elimination in a large-scale reduction-in-force, which plaintiffs alleged had a disparate impact on black employees; discussing record evidence, including that "the termination rate was 444% higher for the African American employees than Caucasians"). *See also id.* at 1250 (discussing and citing decisions from other federal appellate courts analyzing Title VII disparate impact claims challenging a specific practice or criteria that an employer used in a reduction-in-force).

[562] 401 U.S. 424 (1971).

[563] *See id.* at 426, n. 1 (reflecting that petitioners sought relief under 42 U.S.C. § 2000e-2(a)(2)).

[564] *See* 42 U.S.C. § 2000e-2(a)(2) (making it an unlawful employment practice "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

[565] *See id.* at 426-27 (describing the district court's findings that "prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant"; also stating that "[n]egroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four 'operating' departments in which only whites were employed").

[566] *Id.* at 427-28 (reflecting that for incumbent employees, a transfer out of the labor department was contingent on a high school education, and then later in 1965, a transfer out of the labor or coal handling departments was permitted upon the passage of two tests, in the absence of a high school education). *See also id.* (reflecting that from "July 2, 1965, the date on which Title VII became effective," the company began requiring any new employee "to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education" to be eligible for a position in any of the four departments but labor).

these requirements which the plaintiffs challenged as unlawful under Title VII because they "operated to render ineligible a markedly disproportionate number of Negroes," without relating to the job.[567] The evidence in *Griggs* showed that neither the tests nor high school education requirement were related to performing the job functions in the other departments.[568]

The courts of appeals had held there was no Title VII violation based on the absence of evidence that the employer had acted with discriminatory intent when instituting the transfer criteria,[569] and thus rejected the plaintiff's disparate impact argument.[570] Reversing,[571] the Supreme Court held that a showing of intent was not required for the plaintiffs to prevail,[572] thereby interpreting the statute to provide for disparate impact liability subject to certain requirements.[573]

Two decades after the *Griggs* decision, in 1991, Congress codified the availability of disparate impact liability[574] in response to the 1989 Supreme Court decision in *Wards Cove Packing Co., Inc. v. Atonio*,[575] which had altered the legal framework first introduced in *Griggs* for disparate

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[567] *Id*. at 429 (reflecting that the plaintiffs had argued that "because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.").

[568] *Id*. (discussing, with respect to the high school education requirement, the district court's uncontested findings that "white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions" in the other departments; with respect to the tests for incumbent employees, stating that "[n]either was directed or intended to measure the ability to learn to perform a particular job or category of jobs"). *See also id*. at 431-32 (concluding that the evidence "shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used").

[569] *Id*. at 428 (discussing the lower court's conclusion that "there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements," and that "[o]n this basis, the Court of Appeals concluded there was no violation of the Act").

[570] *Id*. at 429 (explaining that the court of appeals "held that, in the absence of a discriminatory purpose," the challenged requirements were permitted under Title VII and in so holding, had necessarily rejected the plaintiff's disparate impact argument).

[571] *Id*. at 436.

[572] *Id*. at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). *See also id*. at 432 (stating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"). *See also* Smith v. City of Jackson, Miss., 544 U.S. 228, 235 (2005) (discussing the Court's analysis in *Griggs* and stating that "[w]e thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent").

[573] *See supra* note 572. *See also Griggs*, 401 U.S. at 432 ("Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."). *See generally, e.g.*, Texas Dep't of Housing and Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2516-18 (2015) (discussing the Court's analysis in *Griggs* and describing the "business necessity defense" derived from *Griggs*, which provides that "in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a 'manifest relationship' to job performance").

[574] *See generally Ricci*, 557 U.S. at 578 ("Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The act included a provision codifying the prohibition on disparate-impact discrimination.").

[575] *See* The Civil Rights Act of 1991, P.L. 102-166, § 3(2-3), 105 Stat. 1071 (stating that the purposes of the act included "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)"; and "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)"). *See generally Ricci*, 557 U.S. at 623-24 (Ginsburg, J., dissenting) (discussing *Wards Cove*, 490 U.S. 642 (1989), and legislative history relating to the Civil Rights Act of 1991; stating that Congress enacted the 1991 Act "[i]n response to *Wards Cove* and 'a number of [other] recent decisions by the United States Supreme Court that sharply cut back on the scope

impact claims.[576] Title VII has thus, since 1991, expressly provided that a Title VII violation may be established based on "disparate impact," and set out the burden of proof required in such cases.[577]

Burden of Proof in Disparate Impact Cases, and Business Necessity Defense

There are a broad range of interpretive[578] and evidentiary[579] legal issues that arise relating to disparate impact liability under Title VII. As a general matter, however, Title VII sets out a three-step framework for the analysis of such claims.[580]

First, a plaintiff must demonstrate that an employment practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin."[581] If a plaintiff demonstrates that an employment practice causes a disparate impact on a protected group, Title VII makes an employer liable for such a practice unless it can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[582] In other words, at

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and effectiveness of [civil rights] laws'") (quoting H.R. REP. NO. 102–40, pt. 2, p. 2 (1991)); Allen v. Entergy Corp., Inc., 193 F.3d 1010, 1015 (1999) ("The 1991 Civil Rights Act expressly amended Title VII to overrule the *Wards Cove* analysis."); *id*. at 1019-20 (Judge Heaney, dissenting) (stating that "[d]iscontent with the Court's narrow construction of Title VII led Congress to pass the 1991 Civil Rights Act to overrule *Wards Cove*," and discussing excerpts from the congressional record reflecting this intent).

[576] *See Ricci*, 557 U.S. at 623-24 (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (describing the *Wards Cove* decision as having "significantly modified the *Griggs–Albemarle* delineation of Title VII's disparate-impact proscription" by holding that "the employer bears only the burden of production, not the burden of persuasion" and replacing *Griggs*' instruction "that the challenged practice 'must have a manifest relationship to the employment in question'" with the rule that a challenged practice is permissible "as long as it 'serve[d], in a significant way, the legitimate employment goals of the employer'") (quoting *Wards Cove*, 490 U.S., at 659) (internal citations omitted).

[577] The Civil Rights Act of 1991, P.L. 102-166, § 105, 105 STAT. 1071 (providing for liability under Title VII for "[a]n unlawful employment practice based on disparate impact" and specifying requisite burdens of proof). *See* 42 U.S.C. § 2000e-2(k) (Title VII's disparate impact provision).

[578] *See, e.g.*, *Ricci*, 557 U.S. at 579-80, 582-85 (splitting 5-4 on the issue of whether the city had violated Title VII's ban against *intentional* race-based discrimination when it abandoned a test used for the fire department's captain and lieutenant selection and did not certify the test results because it had a disparate impact on black firefighters; as a matter of statutory construction, adopting a "strong basis in evidence" standard requiring that an employer who rescinds a test on disparate impact grounds must, to avoid liability for intentional discrimination, show it had "a strong basis in evidence to believe it w[ould] be subject to disparate-impact liability if it fail[ed] to take the race-conscious, discriminatory action").

[579] *See, e.g.*, Ernst v. City of Chicago, 837 F.3d 788, 796-805 (7th Cir. 2016) (discussing "validity studies" that examine whether a test or other selection procedure is job related in the context of Title VII disparate impact claims, and examining validity studies presented in Title VII case in light of federal regulation 29 C.F.R. § 1607.5(B)); Howe v. City of Akron, 801 F.3d 718, 743 (6th Cir. 2015) (referring to the "four-fifths rule" in 29 C.F.R. § 1607.4(D) and stating that "we have used the four-fifths rule as the starting point to determine whether plaintiffs alleging disparate impact have met their prima facie burden, although we have used other statistical tests as well"). *See also* 29 C.F.R. § 1607 *et seq*. (EEOC guidelines addressing tests or other employment selection tools with respect to disparate impact on a protected group).

[580] *See, e.g.*, N.A.A.C.P. v. North Hudson Regional Fire & Rescue, 665 F.3d 464, 476 (3d Cir. 2011) ("Disparate-impact litigation proceeds in three steps.").

[581] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (providing that to establish disparate impact liability under Title VII, "a complaining party [must] demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin"). *See also id*. § 2000e-2(k)(1)(B)(i) ("With respect to demonstrating that a particular employment practice causes a disparate impact," providing that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.").

[582] *Id*. § 2000e-2(k)(1)(A)(i) (providing that upon a showing of disparate impact, an unlawful employment practice

this second stage, an employer has the burden of showing that the challenged practice is justified on business necessity grounds.[583] If the employer fails to make that showing, then it is liable under Title VII for the discriminatory practice.[584] If it satisfies that showing, however, the burden then shifts back to the plaintiff[585] to show, at this third stage, that there is a less discriminatory, "alternative employment practice"[586] that "serves the employer's legitimate needs."[587]

If an employer shows that the challenged practice does not cause disparate impact,[588] however, the employer need not justify the practice as being required by business necessity.[589]

More generally, while Title VII prohibits practices that have an unjustified disparate impact, the statute does not mandate that employers "grant preferential treatment to any individual or to any group… on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer … in comparison with the total number or percentage of [such] persons … in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."[590] In other words, Title VII does not require that employers maintain a

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under Title VII is established if the "respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity").

[583] *See id*. *See generally Ricci,* 557 U.S. at 578 ("An employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'").

[584] *See generally Ernst,* 837 F.3d at 805 (concluding that the "lack of connection between real job skills and tested job skills is, in the end, fatal to [the employer]'s case. Thus, the plaintiffs should have prevailed on their Title VII disparate-impact claims").

[585] *See, e.g.,* M.O.C.H.A. Society, Inc. v. City of Buffalo, 689 F.3d 263, 274 (2d Cir. 2012) (in Title VII claim alleging that test required for fire lieutenant promotions disparately impacted black firefighters, stating that once the city had showed that the test was job related and consistent with business necessity, "[t]his returned the burden to [the plaintiff] to show that a different test or selection mechanism would have served the employer's legitimate interests 'without a similarly undesirable racial effect'") (citing Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 998 (1988)); *N.A.A.C.P. v. North Hudson*, 665 F.3d at 477 (stating that "a plaintiff can overcome an employer's business-necessity defense by showing that alternative practices would have less discriminatory effects while ensuring that candidates are duly qualified" and that "[p]roving a less discriminatory, viable alternative requires supporting evidence").

[586] Title VII's disparate impact provisions governing this third stage, 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii) and (C), provide that the complaining party must demonstrate "an alternative employment practice," and "the respondent refuses to adopt such alternative employment practice." *Id*. § 2000e–2(k)(1)(A)(ii). The statute further provides that this showing "with respect to the concept of 'alternative employment practice'" "shall be in accordance with the law as it existed on June 4, 1989." *See id*. § 2000e–2(k)(1)(C). This reference to "the law as it existed on June 4, 1989" appears to refer to case law preceding the Supreme Court's *Wards Cove* decision, which was decided on June 5, 1989. See Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989).

[587] *See Ricci*, 557 U.S. at 578 (citing 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii) and (C)). *See also* Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 998 (1988) (with respect to an alternative employment practice, stating that "the plaintiff must 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship'") (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). *See also Watson*, 487 U.S. at 998 (adding that "[f]actors such as the cost or other burdens of proposed alternative selection devices" would be relevant for "determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals").

[588] *See, e.g., Watson*, 487 U.S. at 996-97 (discussing a defendant's ability to challenge a plaintiff's statistical evidence of disparate impact, and the various possible bases to rebut the data; stating that "[w]ithout attempting to catalog all the weaknesses that may be found in such evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques").

[589] *Id*. § 2000e-2(k)(1)(B)(ii) ("If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.").

[590] *See* 42 U.S.C. § 2000e-2(j)). *See generally* Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C., 478 U.S. 421, 452-62 (1986) (discussing the legislative history of § 2000e-2(j) and stating that the provision was added to

particular racial balance in their workforce[591] nor that they grant preferential treatment toward a racial group to achieve a particular racial balance.[592]

Unlawful Retaliation

In addition to prohibiting discrimination based on a particular trait, Title VII also prohibits retaliation against an individual for *reporting* such acts of discrimination.[593] Describing the relationship between Title VII's antidiscrimination and antiretaliation provisions, the Supreme Court has explained that "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective" by protecting "an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[594] The Court has explained, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."[595]

Comprised of two clauses, Section 704(a), Title VII's antiretaliation provision, more specifically prohibits an employer from "discriminat[ing]" against an employee or applicant for employment "because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an

respond to employer and labor union concerns that Title VII would be interpreted to require them to achieve racial balance in their workforces by granting preferential treatment to a member or members of a protected group). *See id*. at 461 (quoting Senator Humphrey's statements explaining that § 2000e-2(j) was "'added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.'") (citing 110 CONG. REC., at 12723). *See also id*. at 462 (stating that "Section 703(j) apparently calmed the fears of most opponents, for complaints of 'racial balance' and 'quotas' died down considerably after its adoption.").

[591] *See supra* note 590. *See* Ricci v. DeStefano, 557 U.S. 557, 582 (2009) (stating that "Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing") (citing 42 U.S.C. § 2000e–2(j)); Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 339 n. 20 (1977) (noting that "703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population").

[592] *See generally* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) (stating that Title VII "does not demand that an employer give preferential treatment to minorities or women") (citing 42 U.S. C. § 2000e-2(j)); United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 205-08 (1979) (discussing the legislative history of § 2000e-2(j) and stating that while Title VII does not require that employers grant preferential treatment to members of a protected group to address "a *de facto* racial imbalance in the employer's work force," Title VII nonetheless *permits* employers to take "voluntary race-conscious" actions in certain circumstances). *See also supra* note 591.

[593] *See* 42 U.S.C. § 2000e-3(a). *See generally, e.g.*, Metro. Gov't of Nashville and Davidson Cty., Tenn., 555 U.S. 271, 273 (2009) ("Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq*. (2000 Educ. and Supp. V), forbids retaliation by employers against employees who report workplace race or gender discrimination.").

[594] Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006) (stating that "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses").

[595] *Id*. at 67. *See also, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (in the context of interpreting Title VII's antiretaliation provision, describing the purpose of antiretaliation provisions generally as "[m]aintaining unfettered access to statutory remedial mechanisms").

investigation, proceeding, or hearing under this subchapter."[596] The first clause is commonly referred to as "the opposition clause" and the second clause as "the participation clause."[597]

As a general matter, federal courts have interpreted Title VII's opposition clause to protect conduct such as an employee's report of alleged discrimination to supervisors or managers.[598] With respect to the participation clause, federal courts have interpreted and applied it to protect conduct such as an employee's participation in a Title VII legal proceeding as a witness.[599] Meanwhile, the Supreme Court has interpreted Section 704(a) to not only prohibit employers from taking actions such as firing an employee for protected opposition or participation, but also other actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[600]

Title VII Exemptions and Permitted Practices

In addition to identifying practices that are unlawful, Title VII also specifies certain practices that it permits.[601] Among such practices are employment actions that consider the religion, sex, or

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[596] 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter") (emphasis added).

[597] *See Crawford*, 555 U.S. at 274 (explaining that Title VII's anti-retaliation provision has two clauses known as the opposition clause and participation clause) (citing 42 U.S.C. § 2000e-3(a)).

[598] *See, e.g.*, Laster v. City of Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014) ("The opposition clause protects not only the filing of formal discrimination charges with the EEOC, but also complaints to management and less formal protests of discriminatory employment practices."); Hertz v. Luzenac Am., Inc., 370 F.3d 1014, 1015-16 (10th Cir. 2004) ("Protected opposition can range from filing formal charges to voicing informal complaints to superiors."). *See also, e.g.*, Greengrass v. Int'l Monetary Sys. Ltd., 776 F.3d 481, 485 (7th Cir. 2015) (describing filing an EEOC charge as "'the most obvious form of statutorily protected activity.'") (quoting Silverman v. Bd. of Educ. of City of Chicago, 637 F.3d 729, 740 (7th Cir.2011)).

[599] *See, e.g.*, Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (holding that plaintiff, by giving deposition testimony in a Title VII proceeding, engaged in protected participation under Title VII). *Cf.* Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 49 (2d Cir. 2012) ("Every Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause.").

[600] Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (concluding that "the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," but employer actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination"). *See, e.g.*, *Greengrass*, 776 F.3d at 485 (analyzing a Title VII case in which the plaintiff alleged that her employer, a publicly-traded company, retaliated against her for filing an EEOC charge by identifying her in a filing with the Securities and Exchange Commission; concluding that "naming EEOC claimants in publicly available SEC filings could 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination' "); EEOC v. Go Daddy Software, Inc., 581 F.3d 951, 954-59 (2009) (reflecting jury verdict in favor of plaintiff in Title VII retaliation claim alleging that an employee was fired in retaliation for reporting comments made by supervisors relating to his Moroccan national origin and Muslim religion; affirming the district court's denial of the defendant's motions seeking judgment as a matter of law and a new trial). For a more detailed discussion of the Supreme Court's analysis in *Burlington Northern and Santa Fe Ry. Co. v. White*, *see* CRS Report R45155, *Sexual Harassment and Title VII: Selected Legal Issues*, by Christine J. Back (Apr. 9, 2018).

[601] *See, e.g.*, 42 U.S.C. § 2000e-1(b) (providing that "[i]t shall *not* be unlawful under section 2000e–2 or 2000e–3 of this title for an employer ... to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer ... to violate the law of the foreign country in which such workplace is located."); *id.* § 2000e-2(f) (discussing inapplicability of Title VII to

national origin of an individual in narrow circumstances.[602] The following Title VII provisions, for example, set forth exemptions or permit practices that would otherwise give rise to a discrimination claim.

Bona Fide Occupational Qualification (BFOQ): Sex, Religion, National Origin

In narrow circumstances, Section 703(e)(1) permits employers to make hiring decisions based on an individual's religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[603] Put another way, if the requirements or essential nature of a particular job reasonably necessitate an individual of a particular sex, for example, a sex-based hiring decision may be permitted under Title VII.[604] In interpreting this statutory provision, the Supreme Court has highlighted the term "occupational" to indicate that "objective, verifiable requirements must concern job-related skills and aptitudes," so as to prevent employers from relying on general, subjective standards.[605] With respect to sex-based job requirements, the Court has stated that the BFOQ provision is "meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex" under Title VII.[606]

Religious Employers and Educational Institutions

In addition to the BFOQ provision briefly discussed above, which applies to religion,[607] Title VII contains two other provisions that permit religious-based employment decisions by a religious

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actions taken "with respect to an individual who is a member of the Communist Party of the United States"); *id*. § 2000e-2(g) (addressing Title VII with respect to positions "subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President"); *id*. § 2000e-2(h) (addressing Title VII with respect to seniority or merit systems, "professionally developed ability test[s]," and wage differentiation in certain circumstances); *id*. § 2000e-2(i) (permitting "preferential treatment" "to any individual because he is an Indian living on or near a reservation" in certain circumstances). *See also id*. § 2000e-11 ("Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.").

[602] *See generally* Int'l Union, United Auto., Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) ("Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of 'religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise'") (quoting 42 U.S.C. § 2000e–2(e)(1)). *See also id*. at 201 ("The BFOQ defense is written narrowly, and this Court has read it narrowly.").

[603] 42 U.S.C. § 2000e-2(e)(1). *See also supra* note 602.

[604] *See generally, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 333-37 (1977) (analyzing Title VII's BFOQ provision in the context of a Title VII claim raised by a female applicant for a prison guard position at a maximum-security male prison; concluding that "in the particular factual circumstances of this case," the state's regulation limiting such positions to male prison guards "falls within the narrow ambit of the bfoq exception"); Teamsters Local Union No. 117 v. Wash. Dep't of Corr., 789 F.3d 979, 982 (9th Cir. 2015) (addressing Title VII claim brought by male correctional officers challenging the defendant's designation of certain positions at female prisons as female-only; holding that the policy was a justified use of sex under Title VII's bona fide occupational requirement provision, in light of documented sexual abuse by male prison guards of female inmates and other evidence).

[605] *See Johnson Controls,* 499 U.S. at 201 (also stating that the statutory terms "certain, normal, [and] particular" in Title VII's BFOQ provision "prevent the use of general subjective standards").

[606] *See Dothard*, 433 U.S. at 334 ("We are persuaded by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.").

[607] *See, e.g.,* Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 351-54 (7th Cir. 1986) (addressing a BFOQ defense raised

educational institution[608] or a "religious corporation, association, educational institution, or society,"[609] under certain circumstances. Though federal courts have questioned how to apply these provisions,[610] as a general matter, Title VII permits employers who fall within one of Title VII's religious exemptions to consider an individual's religious beliefs or practices in certain circumstances.[611]

Concerning religious employers generally, Section 702(a) permits a "religious corporation, association, educational institution, or society" to hire and employ individuals of a particular religion "to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[612] For religious educational institutions more specifically, Section 703(e)(2) provides that "a school, college, university, or other educational institution or institution of learning" may hire and employ individuals of a particular religion only if such institution "is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society," or if the institution's "curriculum … is directed toward the propagation of a particular religion."[613]

In short, while Title VII generally prohibits employers from discrimination on the basis of an individual's religion,[614] and requires employers to reasonably accommodate an individual's religious beliefs,[615] the statute also contains several exemptions specifically addressing employment decisions by religious entities.[616] By enacting general prohibitions against religious

by a university with a Jesuit tradition with respect to its denial of a faculty position to a non-Jesuit applicant on the basis of religion).

[608] 42 U.S.C. § 2000e-2(e)(2) (providing that "it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.").

[609] *Id*. § 2000e-1(a) ("This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

[610] *See, e.g.*, LeBoon v. Lancaster Jewish Community Center Ass'n, 503 F.3d 217, 226-27 (3d Cir. 2007) (discussing decisions from other circuits and factors that federal courts have considered to evaluate whether an employer is sufficiently "religious" so as to fall under Title VII's exemption in 42 U.S.C. § 2000e-1(a)). It is beyond the scope of this general overview to address the various legal questions that have arisen with respect to the operation of Title VII's religious exceptions.

[611] *See, e.g.*, Spencer v. World Vision, Inc., 633 F.3d 723, 725 (9th Cir. 2011) ("Religious discrimination is, of course, barred by Title VII of the Civil Rights Act. That bar, however, does not apply to 'a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities.'") (citing 42 U.S.C. §§ 2000e–1(a) and 2000e–2(a)). *See also, e.g.*, Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.")

[612] 42 U.S.C. § 2000e-1(a). *See, e.g.*, LeBoon v. Lancaster Jewish Community Center Ass'n, 503 F.3d 217, 221, 226 (3d. 2007) (where plaintiff alleged that she fired from her employer based on religion, holding that the employer, a nonprofit Jewish Community Center constituted a religious organization falling under Title VII's exemption in 42 U.S.C. § 2000e–1(a)).

[613] 42 U.S.C. § 2000e-2(e)(2). *See, e.g.*, Hall, 215 F.3d at 624-25 (discussing evidence relating to religious character of college and holding that the institution qualified for the Title VII exemption in § 2000e–2(e)(2)).

[614] *See* 42 U.S.C. §§ 2000e-2(a) and (b).

[615] *See id*. § 2000e(j).

[616] *Id*. §§ 2000e-1(a), 2000e-2(e)(1) and (e)(2).

discrimination, and these exemptions, the U.S. Court of Appeals for the Third Circuit observed that Congress both "intended Title VII to free individual workers from religious prejudice" while "enabl[ing] religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices."[617]

Title VII Enforcement: Private Sector, Federal, and State Employers

To enforce Title VII's requirements, Title VII of the 1964 Act established the Equal Employment Opportunity Commission (EEOC).[618] The EEOC is led by a 5-member commission,[619] and is also comprised of an Office of General Counsel[620] and 53 field offices[621] (as part of its Title VII enforcement with respect to private employers); and an Office of Federal Operations[622] (relating to its Title VII enforcement with respect to federal employers), among other units within the agency.

The EEOC's enforcement role as it exists today is different from when it was created in 1964. As originally enacted in 1964, Title VII had limited the agency's enforcement methods to seeking "cooperation and voluntary compliance"[623] with employers to address Title VII violations. In other words, if "the EEOC could not convince employers to voluntarily comply with Title VII," the agency had no additional methods for enforcing the statute's requirements.[624] Rather, the 1964 Act had authorized the DOJ to bring civil actions alleging a "pattern or practice" of discrimination under Title VII,[625] and provided for a private right of action for individuals to bring

[617] Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991). *See also id*. at 949 ("In enacting Title VII, Congress clearly asserted a strong government interest in eliminating religious discrimination in employment ... But Congress also recognized that religious groups have a constitutionally protected interest in applying religious criteria to at least some of their employees").

[618] *See* 42 U.S.C. § 2000e-4(a) ("There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years.").

[619] *See id*. *See generally*, *The Commission and the General Counsel*, EEOC, https://www.eeoc.gov/commission, (last visited Sept. 2, 2020).

[620] *See id*. § 2000e-4(b) ("There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e–5 and 2000e–6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys").

[621] *See Overview*, EEOC, https://www.eeoc.gov/overview, (last visited Sept. 2, 2020) (stating that the EEOC has "53 field offices serving every part of the nation"). *See generally* 42 U.S.C. § 2000e-4(f) ("The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.").

[622] *See generally* 29 C.F.R. §§ 1614.403-405.

[623] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (stating that when Congress enacted Title VII, "[c]ooperation and voluntary compliance were selected as the preferred means" to secure compliance with Title VII's requirements). *See also* Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 358-59 (1977) ("As enacted in 1964, Title VII limited the EEOC's function to investigation of employment discrimination charges and informal methods of conciliation and persuasion. The failure of conciliation efforts terminated the involvement of the EEOC.").

[624] *See* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 457 (6th Cir. 1999) (stating that this enforcement schema "left the task of eradicating unlawful employment practices largely to the private initiative of the victims").

[625] *See* Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 327 (1980) ("Prior to 1972, the only civil actions authorized other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect 'a pattern or practice' of discrimination.").

a Title VII suit in federal court.[626] Congress, however, substantially changed the enforcement schema through its 1972 amendments to Title VII, upon concluding that the methods of seeking cooperation and voluntary compliance had proven ineffective in addressing workplace discrimination.[627] Thus, Congress authorized the EEOC to bring civil actions against private sector employers for Title VII violations,[628] and transferred the authority to bring Title VII "pattern or practice" cases to the EEOC.[629] In addition, as the 1972 amendments made Title VII's requirements applicable to federal employers,[630] the amendments also vested the EEOC with certain responsibilities relating to federal agencies' Title VII compliance.[631]

As a general matter, the agency's Title VII enforcement encompasses two broad areas: (1) the investigation, conciliation, and litigation of discrimination claims against *private sector* employers[632] and (2) Title VII coordination and enforcement with respect to *federal agencies* in their capacity as employers.[633] The EEOC's enforcement[634] in these two contexts differ

[626] *See* 42 U.S.C. § 2000e-5(f)(1).

[627] *See Gen. Tel. Co.*, 446 U.S. at 325 (stating that "Congress became convinced, however, that the 'failure to grant the EEOC meaningful enforcement powers ha[d] proven to be a major flaw in the operation of Title VII'; explaining that the 1972 amendments "accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII"); *Frank's Nursery*, 177 F.3d at 457 (stating that "Congress resolved to remedy the failure of the Civil Rights Act of 1964 to include effective enforcement powers by amending Title VII" through its 1972 amendments, and that "[s]ignificantly, members of Congress debating the amendments agreed that the EEOC needed additional enforcement powers" and rather "differed on 'what procedures [would] insure the most effective enforcement of the substantive provisions of Title VII'") (citations omitted). *See also id*. ("Indeed, Congress expressed its concern that 'in the most profound cases,' employers had 'more often than not shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them'").

[628] *See supra* note 627. *See also Gen. Tel. Co.*, 446 U.S. at 326 ("In so doing, Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights.").

[629] *Id*. at 328 ("The 1972 amendments, in addition to providing for a § 706 suit by the EEOC pursuant to a charge filed by a private party, transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion."). *See also* 42 U.S.C. § 2000e-6(a)–(e). The Attorney General, however, has authority to bring "pattern-or-practice" suits against state or local government employers. *See generally Overview of Employment Litigation Section*, Civil Rights Division, Dep't of Justice, https://www.justice.gov/crt/overview-employment-litigation, (last visited Sept. 2, 2020) (stating that the Dep't of Justice initiates Title VII litigation in one of two ways, by either bringing "suit against a state or local government employer where there is reason to believe that a 'pattern or practice' of discrimination exists" pursuant to its authority under Section 707 of Title VII, or filing suit "pursuant to Section 706 of Title VII, against a state or local government employer based upon an individual charge of discrimination referred to the Section by the Equal Employment Opportunity Commission").

[630] *See* Chandler v. Roudebush, 425 U.S. 840, 841 (1976) ("In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (1970 Educ. and Supp. IV), to employees of the Federal Government."). *See generally* "Private and Federal Employers Subject to Title VII's Requirements."

[631] *See* 42 U.S.C. § 2000e-16(b).

[632] *See generally id*. §§ 2000e-2–2000e-6.

[633] *See generally id*. § 2000e-16.

[634] It is beyond the scope of this overview to discuss all of the EEOC's Title VII and other statutory enforcement activities. *See, e.g., id*. § 2000e-12(a) (authorizing the EEOC to "issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter," "in conformity with the standards and limitations of subchapter II of chapter 5 of title 5"); *id*. § 2000e-4(h) (directing the EEOC to carry out educational and outreach activities); *id*. § 2000e-4(j) (directing the EEOC to provide "technical assistance and training regarding the laws and regulations enforced by the Commission"); *id*. § 2000e-8(c) (addressing data collection by the EEOC).

substantially and is discussed briefly below. Meanwhile, the DOJ enforces Title VII's requirements with respect to state and local government employers.[635]

EEOC Title VII Enforcement: Private Sector Employers

Investigations, Conciliation Efforts, and Litigation

Title VII establishes "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court."[636] In general terms,[637] this multistep process begins with the EEOC's receipt and investigation of allegations or "charges" of discrimination (EEOC charge) filed by individuals against private sector employers.[638] Following an investigation,[639] the EEOC makes a determination as to "whether there is reasonable cause to believe" that discrimination occurred.[640] If there is reasonable cause, EEOC must first "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion"[641] before it can bring a civil action against an employer for an alleged Title VII violation.[642] The EEOC's civil actions, the Supreme Court has stated, are intended to "implement the public interest as well as to bring about more effective enforcement of private rights."[643] In addition to filing suit pursuant to an EEOC charge, the EEOC may also file suit on the basis of an EEOC Commissioner's charge.[644]

Private Right of Action and Intervention

Title VII also expressly provides for a private right of action and allows an individual to file suit after exhausting various administrative requirements, including filing a timely EEOC charge.[645]

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[635] *See id*. §§ 2000e-5(f), 2000e-6. *See also supra* note 629.

[636] Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355, 359 (1977).

[637] It is beyond the scope of this overview to discuss the various legal issues or questions that have arisen in relation to this administrative process, such as with regard to the timeliness and content of EEOC charges, the agency's efforts to conciliate before filing suit, and coordination with state agencies which enforce state antidiscrimination laws.

[638] *See Occidental Life*, 432 U.S. at 359 ("That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing"). *See also Frank's Nursery,* 177 F.3d at 455-56 (discussing the EEOC's private sector administrative process).

[639] *See* 42 U.S.C. § 2000e-5(b).

[640] *See id*.

[641] *See id*. ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

[642] *See id*. § 2000e-5(f) ("If ... the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.").

[643] *See Gen. Tel. Co*., 446 U.S. at 326 (also observing that "[t]he EEOC's civil suit was intended to supplement, not replace, the private action," but that "[t]he EEOC was to bear the primary burden of litigation").

[644] *See* 42 U.S.C. § 2000e-5(b) (reflecting that a charge may be "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer ... has engaged in an unlawful employment practice"); 29 C.F.R. §§ 1601.27-28 (discussing civil actions brought by the EEOC and related procedures). *See generally Commissioner Charges and Directed Investigations*, EEOC, https://www.eeoc.gov/commissioner-charges-and-directed-investigations, (last visited Sept. 2, 2020) (discussing Commissioner charges and related processes).

[645] *See generally* 42 U.S.C. § 2000e-5(e), (f).

When individuals file a civil action in federal court seeking relief under Title VII, the EEOC may intervene in such actions at the court's discretion.[646] Relatedly, Title VII provides that an aggrieved individual may intervene in a Title VII action initiated by the Commission.[647]

EEOC Coordination of Title VII Compliance by Federal Employers

Distinct from its private sector enforcement, the EEOC also coordinates and directs federal agencies' with respect to their Title VII obligations.[648] For example, Title VII directs the EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities" with respect to federal sector employers.[649] Title also makes the EEOC, among other things, "responsible for the review and evaluation of the operation of all [federal] agency equal employment opportunity programs."[650] The heads of departments or agencies must "comply with such rules, regulations, orders, and instructions," and submit plans to the EEOC describing the personnel and resources allocated for carrying out an agency's antidiscrimination obligations with respect to employment.[651] Meanwhile, Executive Order 12067 directs the EEOC to "provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap."[652] To that end, EEOC regulations,[653] as well as EEOC guidance documents and directives,[654] direct federal agencies on Title VII compliance and enforcement matters.

Meanwhile, the administrative process[655] for federal employees seeking relief under Title VII, and the EEOC's methods of enforcement in the federal employment context differ substantially from the private sector process. For example, federal employees do not file EEOC charges, nor does the EEOC investigate Title VII claims filed by federal employees.[656] Rather, under EEOC

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[646] *Id*. § 2000e-5(f)(1) ("Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance.").

[647] *Id*. ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.").

[648] *See generally, EEOC Coordination of Federal Government Equal Employment Opportunity*, Federal Sector, EEOC, https://www.eeoc.gov/federal-sector/eeoc-coordination-federal-government-equal-employment-opportunity, (last visited Sept. 2, 2020) ("Federal laws concerning workplace discrimination are enforced by different Federal agencies . . . The EEOC is responsible for coordinating the Federal government's employment non-discrimination effort.").

[649] *See* 42 U.S.C. § 2000e-16(b).

[650] *See id*.

[651] *See id*.

[652] *See* Exec. Order No. 12067, *Providing for Coordination of Federal Equal Employment Opportunity Programs* (June 30, 1978), at 1-201, https://www.eeoc.gov/federal-sector/executive-order-12067. *See also id*. at 1-301 (stating that the EEOC shall, "where feasible," "develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity" and "develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity").

[653] *See* 29 C.F.R. Part 1614 (regulations addressing *Federal Sector Equal Employment Opportunity*).

[654] *See generally, e.g.*, U.S. Equal Emp. Opportunity Comm'n, Management Directive 110 (as revised, Aug. 15, 2015), https://www.eeoc.gov/federal-sector/management-directive/management-directive-110, (last visited Sept. 2, 2020).

[655] *See generally Overview of Federal Sector EEO Complaint Process*, Federal Sector, EEOC, https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process, (last visited Sept. 2, 2020).

[656] *See id*.

regulations, federal employees report discrimination to their respective agencies,[657] and their federal employers in turn receive, investigate, and may make findings on such claims.[658] Relatedly, EEOC regulations set out the requirements for federal agency investigations and resolutions of discrimination claims brought by an agency's employees.[659] In addition, and in contrast to the EEOC's private sector Title VII enforcement, the EEOC's involvement in a Title VII claim brought by federal employees arises later in the process and at the request of the employee, through a hearing by an EEOC administrative law judge,[660] or an appeal to the EEOC's Office of Federal Operations.[661] Subject to certain requirements and time frames unique to federal sector discrimination claims, federal employees may file a civil action seeking relief under Title VII in federal court.[662]

Remedies for Title VII Violations

As a general matter, the relief available for Title VII violations is addressed in two statutory provisions: Section 706(g), which provides for the availability of back pay and various forms of equitable relief,[663] and 42 U.S.C. §1981a, which provides for compensatory and punitive damages.[664] Congress made compensatory and punitive damages available for Title VII violations through the Civil Rights Act of 1991.[665]

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[657] *See id*. § 1614.105-106 (setting forth time frames and procedures for individuals to report alleged discrimination to their employing agency).

[658] 29 C.F.R. § 1614.106(a) ("A complaint must be filed with the agency that allegedly discriminated against the complainant."); *id*. § 1614.108(a) ("The investigation of complaints shall be conducted by the agency against which the complaint has been filed."); *id*. § 1614.110(b) (stating that a final decision by an agency "shall consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part").

[659] *See id*. § 1614.101-110 (setting forth requirements regarding federal agencies' receipt and resolution of discrimination claims brought by federal employees).

[660] *See id*. § 1614.109 (discussing a hearing at the request of the complainant, and conducted by EEOC administrative law judges). *See id*. §1614.108(f)-(h) (reflecting that "the complainant may request a hearing by submitting a written request for a hearing directly to the EEOC," after receiving specific notification from the employing agency of the right to request a hearing or a final agency decision under section (f), "or at any time after 180 days have elapsed from the filing of the complaint").

[661] *See id*. § 1614.401-405 (addressing the availability of an appeal to the EEOC's Office of Federal Operations by a complainant, of final agency actions or dismissals, or the decision of an administrative law judge). *See also id*. § 1614.402 (discussing time frames by which an individual may appeal such actions or decisions).

[662] 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407 (among other things, providing that a federal employee may file a civil action in federal court: "(a) [w]ithin 90 days of receipt of the agency final action on an individual or class complaint; (b) [a]fter 180 days from the date of filing an individual or class complaint if agency final action has not been taken; (c) [w]ithin 90 days of receipt of the Commission's final decision on an appeal; or (d) [a]fter 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission."). *See also id*. § 1614.105-106 (discussing time frames and procedures for reporting alleged discrimination to their employing agency).

[663] *See* 42 U.S.C. § 2000e-5(g) (authorizing courts to issue injunctions and order various other forms of relief).

[664] *See id*. §1981a(a)(1) (providing for compensatory and punitive damages).

[665] *See generally* West v. Gibson, 527 U.S. 212, 215 (1999) ("In 1991 Congress again amended Title VII. The amendment relevant here permits victims of intentional employment discrimination (whether within the private sector or the Federal Government) to recover compensatory damages.") (citing Civil Rights Act of 1991, 105 Stat. 1072, 42 U.S.C. § 1981a(a)(1)); Landgraf v. USI Film Products, 511 U.S. 244, 247 (1994) ("The Civil Rights Act of 1991 ... creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964").

In cases of intentional discrimination, Section 706(g) provides that a court may order injunctive relief,[666] and "such affirmative action as may be appropriate," including but not limited to ordering back pay,[667] the reinstatement or hiring of employees, or "any other equitable relief as the court deems appropriate."[668] The general purpose of equitable relief under Title VII, the Supreme Court has stated, is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[669]

Apart from and in addition to the relief available under Section 706(g),[670] individuals who prevail on Title VII intentional discrimination claims[671] may also recover compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses";[672] and punitive damages, where "the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[673] The statute explicitly limits the total combined amount of compensatory and punitive damages according to

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[666] *See* 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice"). *See, e.g.*, EEOC v. Gurnee Inn Corp., 914 F.2d 815, 816-17 (7th Cir. 1990) (in a Title VII sexual harassment case, affirming the district court's order of injunctive relief prohibiting the employer "from engaging in future discrimination and order[ing] [it] to adopt both a policy banning sexual harassment and a procedure to enforce that policy"; stating that "courts are given wide discretion in Title VII cases to fashion a complete remedy, which may include injunctive relief, in order to make whole victims of employment discrimination").

[667] *See* 42 U.S.C. § 2000e-5(g)(1). *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (holding that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination") (quoting 118 Cong. Rec. 7168 (1972)). As a general matter, back pay is a form of monetary relief that compensates an individual for lost wages resulting from a discriminatory termination or denial of promotion.

[668] *See* 42 U.S.C. § 2000e-5(g)(1). *See also id*. § 2000e-5(g)(2)(A) (providing that "[n]o order of the court shall require ... the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual ... was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title").

[669] *See Albemarle*, 422 U.S. at 418. *See also id*. at 421 (stating that "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to ... invite inconsistency and caprice, but rather to make possible the 'fashion(ing) (of) the most complete relief possible'").

[670] *See Landgraf*, 511 U.S. at 253 (stating that the "compensatory damages provision of the 1991 Act is 'in addition to,' and does not replace or duplicate, the backpay remedy allowed under prior law"). *See also* 42 U.S.C. § 1981a(a)(1) (stating that "the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent").

[671] *See* 42 U.S.C. §1981a(a)(1) (making compensatory and punitive damages available in a Title VII action "against a respondent who engaged in unlawful *intentional* discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16]") (emphasis added).

[672] *See* 42 U.S.C. § 1981a(b)(3) (referring to compensatory damages as the sum of the amount for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses").

[673] *See id*. §1981a(b)(1) (making recovery of punitive damage available "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual"). *See generally* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 530, 546 (1999) (addressing the "circumstances under which punitive damages may be awarded in an action under Title VII" and concluding that "an employer's conduct need not be independently 'egregious' to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof").

employer size, with a maximum cap of $300,000.[674] In the case of an employer with over 500 employees, for example, the statute provides that a plaintiff's combined compensatory and punitive damages cannot exceed $300,000.[675]

While these remedies are generally available to Title VII plaintiffs who prevail on intentional discrimination claims, this relief is subject to specific limitations in a "mixed motive" claim brought under Section 703(m).[676] In a "mixed motive" case, if the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor,"[677] the statute limits the plaintiff's remedies to "declaratory relief, certain types of injunctive relief, and attorney's fees and costs."[678] Meanwhile, though beyond the scope of this overview to address legal issues relating to relief for disparate impact discrimination under Title VII, as a general matter, "[e]quitable remedies are available for disparate impact violations,[679] as well as injunctive relief.[680]

More generally, the prevailing party to a Title VII claim, plaintiff or defendant, may also recover "a reasonable attorney's fee (including expert fees) as part of the costs."[681]

Title VIII: Voting and Voter Registration Statistics

Title VIII of the 1964 Act, codified at 42 U.S.C. § 2000f, is a standalone statutory provision that directs the Secretary of Commerce to conduct a survey of registration and voting statistics capturing data relating to race, color, and national origin, to be "collected and compiled in

[674] *See id*. § 1981a(b)(3) (providing that the "sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages awarded under this section, shall not exceed" various amounts set out in the statute according to employer size, and capped at its maximum at $300,000).

[675] *See id*. § 1981a(b)(3)(D). *See id*. at (b)(3)(C) (in a case against an employer with 201 to 500 employees, providing that a plaintiff's combined compensatory and punitive damages cannot exceed $200,000); *id*. at (b)(3)(B) (in a case against an employer with 101 to 200 employees, limiting such total damages to no more than $100,000); *id*. at (b)(3)(A) (in a case against an employer with 15 to 100 employees, limiting such total damages to no more than $50,000).

[676] *See id*. § 2000e–5(g)(2)(B)) (providing that on a claim in which "a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court" may "grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title" but "shall *not* award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment") (emphasis added). *See, e.g.*, Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1351 (7th Cir. 1995) (rejecting defendant's argument that the plaintiff was required to prove "but for" causation to obtain back pay available under 42 U.S. § 2000e–5(g)(2)(A), and stating that Title VII, as amended by the 1991 Civil Rights Act, limits a plaintiff's remedies in a mixed motive case only "[i]f an employer proves that the same employment decision would have been made absent an illegal motivation, a plaintiff's remedies are limited") (citing 42 U.S.C. § 2000e–5(g)(2)(B)).

[677] *Id*.

[678] Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (citing 42 U.S.C. § 2000e–5(g)(2)(B)).

[679] *See Kolstad*, 527 U.S. at 547-48 ("Equitable remedies are available for disparate impact violations; compensatory damages for intentional disparate treatment; and punitive damages for intentional discrimination 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'").

[680] *See, e.g.*, NAACP v. North Hudson Regional Fire & Rescue, 665 F.3d 464, 485-86 (3d Cir. 2011) (in a Title VII disparate impact case challenging the employer's use of a residency requirement, affirming the district court's "permanent injunction against use of the Residents–Only List," as the injunction was "properly circumscribed to eliminate the employment practice that the expert reports establish is causing the disparate impact"; also observing that "district courts are afforded substantial discretion in fashioning injunctive relief").

[681] 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.").

connection with the Nineteenth Decennial Census," or the 1970 census.[682] This provision also directs the Secretary to conduct such a survey at "other times as the Congress may prescribe."[683] House Report No. 914 does not specify the constitutional basis for enacting Title VIII, but expressed that "[t]here is no question as to the constitutionality, necessity, and potential value of this census."[684] As a general matter, the U.S. Census Bureau continues to collect data on voting and registration,[685] and has done so since 1964.[686]

General Background: "Fragmentary" Voting and Registration Data

Legislative history reflects that at the time leading up to the 1964 Act, there was a concern over the "urgent need" for state-by-state, county-by-county voter registration data.[687] The data available at the time, according to House Report No. 914, was derived from "[f]ragmentary material" and did not sufficiently capture "voting turnout by race, color, or national origin particularly on a comparative basis for States, counties, or congressional districts."[688] Though "it was not possible to gather such information in conjunction with the 1960 census," the USCCR had urged Congress to authorize the collection of these statistics and consider "the feasibility of having a supplementary census."[689]

It was believed that such "complete and accurate" voting registration statistics could facilitate the registration of eligible voters who had not yet registered,[690] and remove a "severe handicap" to the federal enforcement of voting protections through litigation by the DOJ and fact-finding by the USCCR.[691]

Title VIII Provision

Title VIII directed the Secretary of Commerce to "conduct a survey to compile registration and voting statistics in such geographic areas as may be recommended by the Commission on Civil Rights," to determine "a count of persons of voting age by race, color, and national origin,"[692] and whether "such persons are registered to vote, and have voted in any statewide primary or general election in which the Members of the United States House of Representatives are nominated or

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[682] *See id.* § 2000f. *See also* Presidential Proclamation No. 3973, 35 Fed. Reg. 5079 (March 26, 1970) (reflecting that the Nineteenth Decennial Census was to be taken beginning April 1, 1970), https://www.presidency.ucsb.edu/documents/proclamation-3973-nineteenth-decennial-census-the-united-states.

[683] *See* 42 U.S.C. § 2000f.

[684] *See* H. REP. NO. 914, pt. 2, at 31.

[685] *See Voting and Registration*, U.S. Census Bureau, https://www.census.gov/topics/public-sector/voting.html, (last visited Sept. 2, 2020) ("[T]he Current Population Survey collects data on reported voting and registration").

[686] *See FAQs*, U.S. Census Bureau, https://www.census.gov/topics/public-sector/voting/about/faqs.html, (last visited Sept. 2, 2020) (stating that the Census Bureau "has collected voting and registration data since 1964" and has data "available for every national election since 1964").

[687] *See* H. REP. NO. 914, pt. 2, at 31.

[688] *Id.* at 30 (also describing the methods of measuring nonvoting used at the time as "highly unreliable").

[689] *Id.* at 31.

[690] *Id.* ("With this information, more complete and accurate statistics can be made available to the general public to help eligible citizens register who have neglected to do so.").

[691] *Id.* ("Lacking this information, the Commission on Civil Rights has labored under a severe handicap in its fact finding functions. The Department of Justice has also been hindered in its litigation efforts by not having complete and reliable registration and voting statistics.").

[692] 42 U.S.C. § 2000f.

elected, since January 1, 1960."[693] With respect to frequency of such data, Title VIII directed that the information "be collected and compiled in connection with the Nineteenth Decennial Census, and at such other times as the Congress may prescribe."[694]

Title VIII also provides that individual participation in the survey(s) is voluntary, stating that "no person shall be compelled to disclose his race, color, national origin, or questioned about his political party affiliation, how he voted, or the reasons therefore, nor shall any penalty be imposed for his failure or refusal to make such disclosure."[695] Relatedly, the statute requires that "[e]very person," questioned "orally, by written survey or questionnaire or by any other means," "shall be fully advised with respect to his right to fail or refuse to furnish such information."[696]

Title IX: Appeals and Attorney General Intervention

Title IX of the 1964 Civil Rights Act concerns the adjudication of certain civil rights cases in federal court, and litigation by the Attorney General.[697] Despite addressing altogether different matters, Title IX of the 1964 Act is sometimes confused[698] with Title IX of the Education Amendments of 1972, the federal statute which prohibits discrimination based on sex in federally funded education programs or activities.[699]

Title IX of the 1964 Act, however, enacted two distinct provisions unrelated to that later statute. Its first provision, Section 901, amended 28 U.S.C. § 1447(d) to permit individuals to appeal district court orders denying a petition requesting the removal of a civil rights case from state to federal court.[700] The second provision, Section 902, authorizes the Attorney General to intervene in any civil action alleging an Equal Protection Clause violation based on race, color, religion, or national origin.[701] In 1972, Congress amended this latter intervention provision to also authorize the Attorney General to intervene as a party in cases alleging a denial of equal protection based on sex.[702] Both of these provisions are discussed in further detail below.

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[693] *Id*.

[694] *Id*. (also stating that the "provisions of section 9 and chapter 7 of title 13 shall apply to any survey, collection, or compilation of registration and voting statistics carried out under this subchapter").

[695] *Id*.

[696] *Id*.

[697] *See* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 266 (reflecting that Title IX enacted Sections 901 and 902, which amended 28 U.S.C. § 1447(d), and created a new provision addressing intervention in certain cases by the Attorney General, respectively).

[698] *See, e.g.*, *The 14th Amendment and the Evolution of Title IX*, UNITED STATES COURTS, https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix (last visited Aug. 25, 2020) (quoting the statutory text of Title IX of the Education Amendments of 1972, and then stating that "Title IX *of the Civil Rights Act* was signed into law on June 23, 1972 by President Richard M. Nixon.") (emphasis added).

[699] *See* 20 U.S.C. § 1681 *et seq*.

[700] *See generally* Georgia. v. Rachel, 384 U.S. 780, 787, n.7 (1966) ("Section 901 of the Civil Rights Act of 1964 established an exception to the nonreviewability rule of 28 U.S.C. s 1447(d) for cases removed pursuant to 28 U.S.C. s 1443"). 28 U.S.C. § 1443, in turn, concerns certain types of civil rights cases. *See* 28 U.S.C. § 1443.

[701] *See* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 266 (reflecting that as originally enacted, Section 902 authorized intervention by the Attorney General in civil actions seeking relief for the denial of equal protection of the laws on account of race, color, religion, or national origin).

[702] *See generally* Fitzgerald v. Barnstable Sch. Cmty., 555 U.S. 246, 258 (2009) (stating that when enacting Title IX of the Education Amendments of 1972, Congress at that time also amended Section 902 of the 1964 Act " to authorize the Attorney General to intervene in private suits alleging discrimination on the basis of sex in violation of the Equal Protection Clause"; citing 86 Stat. 375 and describing the amendment as "adding the term 'sex' to the listed grounds,

General Background: State Prosecutions for Exercising Civil Rights

While Title IX's first provision permitting the appeal of a district court's remand order might appear technical or unrelated to civil rights protections, legislative history reflects that its enactment was responsive to state criminal prosecutions brought against black citizens and others in connection with exercising constitutional or statutorily-protected rights.[703]

As noted earlier, black citizens were at times prosecuted under state trespassing or other laws for conduct such as sitting in a white-only section of a racially segregated court room[704] or seeking service at a similarly designated establishment.[705] Individuals registering to vote,[706] or who peaceably gathered to protest conditions of racial segregation,[707] were also at times prosecuted under state laws for doing so. When such state prosecutions were initiated, the individuals charged under those laws would sometimes seek removal of the cases to federal court[708] under 28 U.S.C. § 1443.[709] Explaining the need for the removal of certain civil rights cases, Senator

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which already included race, color, religion, or national origin"). *See also* 42 U.S.C. § 2000h-2 ("Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, sex or national origin, the Attorney General for or in the name of the United States may intervene in such action"). *See also supra* note 242.

[703] *See* H. REP. NO. 914, pt. 2, at 31-32.

[704] *See, e.g.*, Johnson v. Virginia., 373 U.S. 61, 62 (1963) (addressing an Equal Protection Clause challenge by a black petitioner to his arrest and conviction for contempt, which "rested entirely on [his] refusal to comply with the segregated seating requirements imposed in this particular courtroom" and reversing the conviction; concluding that "[s]tate-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws").

[705] *See, e.g.*, *supra* notes 94 and 213.

[706] *See, e.g.*, Cooper v. Alabama, 353 F.2d 729, 730 (5th Cir. 1965) (reflecting that while appellant and others with him were waiting in a voter registration line at the Dallas County Courthouse, the local sheriff arrested and charged them with "remaining present at the place of an unlawful assembly after having been warned to disperse by a public officer").

[707] *See, e.g.*, Cox v. Louisiana, , 379 U.S. 536, 537-38, 545-50 (1965) (reflecting that the appellant was arrested, charged, and convicted under Louisiana laws for disturbing the peace, obstructing public passages and picketing before a courthouse, sentenced to jail time and fined over $5,000, for leading "a group of young college students who wished 'to protest segregation' and discrimination against Negroes and the arrest of 23 fellow students"; and concluding that the record evidence did not support the state's assertions that the gathering was disruptive or disorderly and stating that "[o]ur conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit. We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout."); Edwards v. South Carolina, 372 U.S. 229, 230-34, 236-38 (1963) (reflecting that 187 individuals, black high school and college students, were convicted under a South Carolina breach of the peace law, for gathering on two city blocks open to the public to protest racial discrimination, with "no violence or threat of violence on their part, or on the part of any member of the crowd watching them"; concluding that the evidence did not support the convictions and reversing).

[708] *See, e.g.*, Georgia v. Rachel, 384 U.S. 780, 782-84 (1966) (addressing a case in which 20 defendants were "arrested on various dates in the spring of 1963" for seeking service at restaurants in Atlanta, Georgia and were indicted under a state statute "making it a misdemeanor to refuse to leave the premises of another when requested to do so by the owner or the person in charge"; reflecting that petitioners alleged that their arrests were made to enforce the race-based exclusion of black patrons from places of public accommodation and that they sought removal of their prosecutions from state court to federal district court under 28 U.S.C. § 1443).

[709] 28 U.S.C. § 1443 generally provides that "the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." *See id*.

Thomas Dodd, the floor manager for Title's IX remand provision, pointed to examples of "'cases to be tried in State courts in communities where there is a pervasive hostility to civil rights, and cases involving efforts to use the court process as a means of intimidation.'"[710]

Although removal was already permitted under 28 U.S.C. § 1443, Section 901 was adopted to address the ability of an individual to *appeal* a federal court order denying a removal petition and remanding a case to state court.[711] Legislative history of the 1964 Act reflects the concern that some federal judges were denying removal petitions without just cause and summarily remanding the cases to state court.[712] Such remand orders, however, were not appealable under 28 U.S.C. § 1447(d).[713] According to House Report No. 914, this led to a circumstance in which "many southern Federal judges" used § 1447(d) "with extraordinary effectiveness" to "deny judicial relief for citizens who have been prosecuted in the State courts for exercising their rights guaranteed by the Constitution."[714] In that context, Section 901 amended 28 U.S.C. § 1447(d) to allow individuals to appeal a district court's remand order in certain civil rights cases.[715]

Title IX's other provision addressing intervention by the Attorney General in equal protection cases is not discussed in either the sectional analysis in Part I of House Report No. 914, or Part II.[716] As discussed earlier, however, other titles of the 1964 Civil Rights Act authorize the Attorney General to file a civil action directly in certain cases alleging violations of Titles I, II, III, IV, VI, and VII of the act.[717]

Title IX Provisions

Section 901: Allowing Appeal of Remand Orders in § 1443 Civil Rights Cases

Section 901 of the 1964 Act amended an existing statutory provision that had generally barred any appellate review of a district court order remanding a case to state court, and created a limited exception for the review of such orders in certain civil rights cases.

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[710] *See* City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 842 and n.7 (1966) (quoting 110 CONG. REC. 6955 (1964)).

[711] *See* H. REP. NO. 914, pt. 2, at 32 ("The committee, therefore, adopted a provision (title IX) which makes the remand of a civil rights case to a State court by a Federal court after the case had been removed to the Federal court reviewable by appeal.").

[712] *See* H. REP. NO. 914, pt. 2, at 31-32 (discussing the use of 28 U.S.C. § 1447(d) and describing federal courts' denials of removal petitions and the related inability to appeal such orders as "a severe and unjustified encumbrance on citizens engaged in the struggle for equal rights").

[713] *See id*.

[714] *Id*. at 32.

[715] *See* H. REP. NO. 914, pt. 2, at 32 ("The committee, therefore, adopted a provision (title IX) which makes the remand of a civil rights case to a State court by a Federal court after the case had been removed to the Federal court reviewable by appeal."). *See generally* Kircher v. Putnam Funds Trust, 547 U.S. 633, 640 and n.7 (2006) (explaining that various federal statutes over the years have "limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court" and identifying 28 U.S.C. § 1447(d) as "[t] he current incarnation"; stating that 1447(d) provides "that an 'order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise'" but noting that the provision "specifically excepts certain civil rights actions from its bar").

[716] *See* H. REP. NO. 914, pt. 1, at 32 (with respect to Title IX of the 1964 Act, discussing only its provision concerning remand orders); *id*. at pt. 2, at 31-32 (same).

[717] *See, e.g*., "Expedited Judicial Review of Cases Brought by the Attorney General," "Intervention or "Pattern or Practice" Enforcement Actions by the Attorney General," "Enforcement Actions by the Attorney General," and "By Any Other Means Authorized by Law"

More specifically, Section 901 amended 28 U.S.C. § 1447(d) to add the italicized text: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, *except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise*."[718] As the Supreme Court stated in its 1966 decision *Georgia v. Rachel*,[719] "Congress specifically provided for appeals from remand orders in § 1443 cases" through § 901 of the Civil Rights Act of 1964.[720] "We have no doubt," the Court added, "that Congress thereby intended to open the way for immediate appeal."[721]

Section 901 thus created an exception permitting review specifically of remand orders where removal petitions had been sought under 28 U.S.C. § 1443.[722] That section, in turn, provides for the availability of removal by a defendant to federal district court in two types of civil or criminal actions originally brought in state court: those

> (1) [a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."[723]

Following the enactment of Section 901, federal courts of appeals had occasion to evaluate, and at times reverse, district court orders that had denied such removal petitions and had remanded civil rights cases to state court.[724]

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[718] *See* The Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 266 (stating that "Title 28 of the United States Code, section 1447(d), is amended to read as follows: 'An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.'").

[719] Georgia. v. Rachel, 384 U.S. 780 (1966).

[720] *Id*. at 786-87. *See generally id*. at 787, n.7 (discussing an earlier proposal to amend § 1443 directly, and two views of the final bill making remand orders appealable under Title IX; reflecting that some lawmakers would have preferred amending § 1443 and § 1447 directly over amending only § 1447(d) with respect to appellate review, and discussing the rationales offered to support those views) (quoting remarks by Rep. Kastenmeier, 109 CONG. REC. 13126, 13128 and 110 CONG. REC. 2773; and Sen. Dodd, 110 CONG. REC. 6956).

[721] *Rachel*, 384 U.S. at 787, n.7 (citing the remarks of: Rep. Kastenmeier, 110 CONG. REC. 2770; Sen. Humphrey, 110 CONG.REC. 6551; Sen. Kuchel, 110 CONG. REC. 6564; Sen. Dodd, 110 CONG. REC. 6955-6956).

[722] *See* 28 U.S.C. § 1447(d).

[723] *See id*. § 1443.

[724] *See, e.g.*, City of Baton Rouge v. Douglas, 446 F.2d 874, 875 (5th Cir. 1971) (where appellant alleged that his arrest and criminal prosecution for disturbing the peace under local law was a pretext and based solely "because he attempted to exercise his civil rights by seeking service in a public restaurant," reversing the district court's remand of the prosecution to state court); Whatley v. City of Vidalia, 399 F.2d 521, 522, 526 (5th Cir. 1968) (addressing the appeal of a district court's remand order on a removal petition concerning seventeen individuals alleging that they were arrested by the police "while peacefully engaged in activity that was designed to encourage voter registration," and concluding that the "order of remand was in error" and reversing the judgment and remanding the case to district court); *Cooper*, 353 F.2d at 729-31 (addressing appeal of a district court's remand of criminal prosecutions to state court, in a case involving the arrest of appellants while they waited in line to register to vote; concluding that the allegations in the removal petition stated "a good claim for removal under section 1443(1)" and reversing the district court order). *See also Whatley*, 399 F.2d at 522, n.1 (noting that "although the Supreme Court commented in the *Rachel* case on the great load of removal cases that would flow from an interpretation of the removal statute in the manner in which this court had construed it," stating that "[m]ost of the removal cases appealed to this court" concern numerous individuals, but are generally resolved in a single opinion or judgment and accordingly, that "[t]he total docket numbers in this court representing" such appeals, "instead of amounting to 1079 in the Fifth Circuit, constituted a much smaller load," in the "tens rather than the hundreds"); *Cf. Rachel*, 384 U.S. at 788, n. 8 (describing statistics on the number of criminal cases removed from state to federal courts as "revealing" and stating that "[f]or the fiscal years 1962, 1963, 1964, and 1965,

Section 902: Intervention by the Attorney General in Equal Protection Clause Cases

Section 902[725] authorizes the Attorney General to intervene "for or in the name of the United States" in a civil action "commenced in any court of the United States," which alleges the denial of equal protection of the laws under the Fourteenth Amendment based on race, color, religion, sex, or national origin.[726] Section 902 further provides that intervention in such action may be granted "upon timely application" by the Attorney General, and requires that the Attorney General certify "that the case is of general public importance."[727] With respect to remedies, the provision states that "the United States shall be entitled to the same relief as if it had instituted the action." Following the enactment of Section 902, the Attorney General has intervened in equal protection cases in a range of contexts, including, for example, cases involving racial segregation in public university[728] and K-12 school systems,[729] racial segregation and discrimination in state prison,[730] and race-based exclusion on county jury rolls,[731] among other areas.[732]

Title X: The Community Relations Service

Title X of the 1964 Act established the Community Relations Service (CRS), a federal entity created to assist communities with "resolving disputes, disagreements, or difficulties" relating to discrimination based on race, color, or national origin.[733] CRS is led by a Director appointed by

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there were 18, 14, 43, and 1,192 such cases, respectively. Of the total removed criminal cases for 1965, 1,079 were in the Fifth Circuit.").

[725] 42 U.S.C. § 2000h-2.

[726] *See* 42 U.S.C. § 2000h-2. As noted earlier, Section 902, as originally enacted, authorized intervention by the Attorney General in civil actions seeking relief for the denial of equal protection of the laws on account of race, color, religion, or national origin. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 902, 78 Stat. 241, 266-67 (1964). Congress amended Section 902 in 1972 to also authorize the Attorney General's intervention in civil actions addressing denials of equal protection based on sex. *See supra* note 702.

[727] 42 U.S.C. § 2000h-2 (stating that "the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance").

[728] *See, e.g.*, Geier v. Alexander, 801 F.2d 799, 800 (6th Cir. 1986) (in a civil action concerning the desegregation of Tennessee's formerly-segregated public university system, reflecting that the Attorney General intervened as a plaintiff under 42 U.S.C. § 2000h-2).

[729] *See, e.g.*, Fisher v. Tucson Unified Sch. Dist., 652 F.3d 1131, 1134, 1137 (9th Cir. 2011) (in a civil action brought by black and Mexican-American students alleging intentional and unconstitutional segregation and discrimination in the Tucson, Arizona, school system based on race and national origin, reflecting that the Attorney General intervened after the action was filed).

[730] *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1295-96 (5th Cir. 1974) (in a case brought by two classes of inmates at Mississippi state penitentiary, including one class comprised of black inmates alleging unconstitutional racial discrimination and segregation, reflecting that "[a] motion by the United States to intervene in this suit pursuant to 42 U.S.C.A. § 2000h-2" had been granted).

[731] *See, e.g.*, Black v. Curb, 422 F.2d 656, 657 (5th Cir. 1970) (in civil action brought by black residents of two counties in Alabama alleging "systematic exclusion" of black citizens from county juror rolls in violation of the Equal Protection and Due Process Clauses, reflecting that the Attorney General intervened as a plaintiff under "§ 902 of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2").

[732] In addition, and relatedly to the Attorney General's authority to intervene, Section 1103 of *Title XI* of the 1964 Act, provides that "[n]othing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding." 42 U.S.C. § 2000h-3.

[733] *Id*. § 2000g-1.

the President, with the advice and consent of the Senate, for a four-year term,[734] and is currently headquartered in Washington, D.C., with regional and field offices in different parts of the country.[735] CRS was originally a unit within the Department of Commerce,[736] with the expectation that one of its primary activities would be resolving disputes "arising out of the public accommodations title."[737] It was transferred to the DOJ in 1966,[738] including for the purpose of more closely coordinating mediation and conciliation activities with other DOJ entities, including its Civil Rights Division.[739]

General Background

House Report No. 914 generally refers to the Community Relations Service, without specific mention of the concerns or context that prompted Congress to establish it. Legislative history reflects, however, that an earlier iteration of the Community Relations Service was proposed in 1959 by then-Senator Lyndon B. Johnson.[740] That bill, S. 499, referred to "disagreements in communities in the various States disruptive to peaceful relations among the citizens of such communities"[741] and proposed establishing a federal service called the Community Relations Service, "to provide assistance in conciliating these disagreements and in eliminating the

[734] *Id*. § 2000g ("There is hereby established in and as a part of the Department of Commerce a Community Relations Service (hereinafter referred to as the 'Service'), which shall be headed by a Director who shall be appointed by the President with the advice and consent of the Senate for a term of four years.").

[735] *See Our Reach*, Community Relations Service, https://www.justice.gov/crs/crs-our-reach, (last visited Sept. 2, 2020) (stating that its "regional and field offices are strategically located throughout the country to maximize the availability of CRS's services, meet the unique needs of the communities they serve, and enable staff to deploy to communities quickly in times of crisis").

[736] *See* 42 U.S.C. § 2000g ("There is hereby established in and as a part of the Department of Commerce a Community Relations Service").

[737] *See Message of President Lyndon B. Johnson to Congress* to accompany Reorganization Plan No. 1 of 1966 (Feb. 10, 1966) [hereinafter *Message of the President*] (stating that "[t]he Community Relations Service was located in the Department of Commerce by the Congress on the assumption that a primary need would be the conciliation of disputes arising out of the public accommodations title of the act. That decision was appropriate on the basis of information available at that time. The need for conciliation in this area has not been as great as anticipated because of the voluntary progress that has been made by businessmen and business organizations.").

[738] Reorganization Plan No. 1 of 1966, Eff. Apr. 22, 1966, 31 F.R. 6187, 80 Stat. 1607, § 1 ("Subject to the provisions of this reorganization plan, the Community Relations Service now existing in the Department of Commerce under the Civil Rights Act of 1964 ... is hereby transferred to the Department of Justice.").

[739] *See Message of the President*, *supra* note 737 (stating that "assistance to communities in the identification and conciliation of disputes should be closely and tightly coordinated. Thus, in any particular situation that arises within a community, representatives of Federal agencies whose programs are involved should coordinate their efforts through a single agency. In recent years, the Civil Rights Division of the Justice Department has played such a coordinating role in many situations, and has done so with great effectiveness. Placing the Community Relations Service within the Justice Department will enhance the ability of the Justice Department to mediate and conciliate and will insure that the Federal Government speaks with a unified voice in those tense situations where the good offices of the Federal Government are called upon to assist.").

[740] S. 499, 86th Cong. (1959).

[741] *Id*. § 101 (also stating that "[t]he use of force in any manner as a means of trying to solve these disagreements not only fails to produce satisfactory solutions but also tends to aggravate the disagreements and to create new problems. Frequently the citizens who are involved in or affected by any such disagreement lack a satisfactory means of communicating with one another and of expressing their views directly to citizens of opposing views. As a result, a mutually satisfactory solution to the problems caused by the disagreement is made difficult, and sometimes impossible, of attainment").

problems ensuing therefrom."[742] Title X of the 1964 Act enacted various features like those in the 1959 bill.[743]

Title X Provisions: Functions and Role of Community Relations Service

CRS is required to provide "assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce."[744] Put another way, CRS's mandate involves assisting communities with resolving conflict relating to discrimination based on race, color, or national origin, which impairs constitutional or federal statutory rights, or affects or could affect interstate commerce.[745]

Title X also grants CRS discretion regarding which cases, among those meeting the statutory criteria described above, it chooses to conciliate. It may act "whenever, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby."[746] CRS "may offer its services either upon its own motion or upon the request of an appropriate State or local official or other interested person."[747]

Though CRS's original mandate focused on discrimination based on race, color, or national origin, its activities expanded in 2009, through a funding provision enacted as part of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act.[748] As a result, CRS's activities now also include "working with communities to prevent and respond to alleged hate crimes based on actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability."[749]

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[742] *Id*. § 102(a) (proposing the establishment of "an independent agency of the Government a Community Relations Service").

[743] *Compare, e.g.*, 42 U.S.C. § 2000g-1 (establishing the Service to "provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce"), *with* S. 499 § 102(a) (proposing that the Service provide conciliation assistance in communities with respect to "disagreements or difficulties regarding the laws or Constitution of the United States" or "disagreements or difficulties which affect or may affect interstate commerce").

[744] 42 U.S.C. § 2000g-1.

[745] *See id*.

[746] *Id*.

[747] *Id*.

[748] *See About CRS, Our History*, Community Relations Service, https://www.justice.gov/crs/about, (last visited Sept, 2, 2020) ("CRS's mandate expanded in 2009 under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act to include working with communities to prevent and respond to alleged hate crimes based on actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability."). More specifically, a provision enacted as part of the Hate Crimes Prevention Act authorized funding, including to CRS, for increased personnel "to prevent and respond to alleged violations" of the act. *See* P.L. 111-84, § 4706, 123 Stat. 2190 (2009) ("There are authorized to be appropriated to the Department of Justice, including the Community Relations Service, for fiscal years 2010, 2011, and 2012 such sums as are necessary to increase the number of personnel to prevent and respond to alleged violations of section 249 of title 18"). With respect to protected bases, the Hate Crimes Prevention Act addresses certain conduct committed "because of the actual or perceived race, color, religion, or national origin of any person," *see* 18 U.S.C. § 249(a)(1), as well as certain conduct committed "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." *See id*. at (a)(2)(A).

[749] *See About CRS, Our History*, Community Relations Service, https://www.justice.gov/crs/about, (last visited Sept, 2,

Unique Functions Relating to Title II of the 1964 Act

Title X generally excludes litigation-related activities from CRS's functions, such as certain "investigative or prosecuting functions."[750] However, CRS has unique responsibilities, including the authority to conduct investigations and hearings, when resolving public accommodation claims arising under Title II of the 1964 Act.[751]

More specifically, Title II of the 1964 Act provides that a federal district court may, after any Title II claim has been filed, refer the matter to CRS for the purpose of obtaining "voluntary compliance."[752] Upon such referral of a Title II claim under Section 204(d),[753] CRS may "make a full investigation" of such a complaint and "hold such hearings with respect thereto as may be necessary," "in executive session" and in confidence, unless all parties involved in the complaint agree to the release of any testimony, with the permission of the court.[754] With respect to these Title II claims, CRS "shall endeavor to bring about a voluntary settlement between the parties."[755]

CRS Activities: Conciliation and Cooperation

Apart from its functions unique to Title II, CRS describes its work as "provid[ing] facilitation, mediation, training, and consultation services that improve communities' abilities to problem solve and build capacity to prevent and respond to conflict, tension, and hate crimes."[756] To that end, CRS's work has included responding to incidents with the potential for prompting strife or unrest, through engagement with local communities including local leaders and law

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[750] 42 U.S.C. § 2000g-2(b) (providing that "[n]o officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service").

[751] *See id*. §2000a-4 ("The Service is authorized to make a full investigation of any complaint referred to it by the court under section 2000a–3(d) of this title and may hold such hearings with respect thereto as may be necessary").

[752] *See id*. § 2000a-3(d) (providing that a "court may refer the matter to the Community Relations Service ... for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.").

[753] *Id*.

[754] *Id*. § 2000a–4 (authorizing CRS to "make a full investigation of any complaint referred to it by the court under section 2000a–3(d) of this title and [to] hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties").

[755] *Id*.

[756] *See Our Work*, Community Relation Service, https://www.justice.gov/crs/our-work, (last visited Sept. 2, 2020) (also providing links to examples and further discussion of its activities).

enforcement.[757] CRS also conducts specific programming,[758] including to facilitate dialogue on "police-community partnerships."[759] In addition, case law reflects that CRS has been called upon to assist in settlements or consent decrees in civil rights litigation.[760]

Title X requires that CRS collaborate with "appropriate State or local, public, or private agencies," "whenever possible."[761] In addition, CRS is required to provide its assistance "in confidence and without publicity," and must "hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held."[762] Disclosure of such information by an officer or employee of CRS constitutes a "misdemeanor and, upon conviction thereof," results in a fine "not more than $1,000 or imprisoned not more than one year."[763]

More detailed discussion of CRS's activities may be found in its annual reports to Congress, which it is required to submit on or before January 31 of each year.[764]

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[757] The Community Relations Service's publicly available materials reflect that its work in recent years has involved responding to high-profile, race-related incidents, including the shooting deaths of Michael Brown in Ferguson, Missouri and Trayvon Martin in Sanford, Florida; the death of Eric Garner in Staten Island, New York; violence against Arab, Muslim, and Sikh communities following the September 11, 2001, attacks on the World Trade Center; the murder of Vincent Chin in Detroit, Michigan in 1982; and earlier on in the agency's history, the assassination of Reverend Dr. Martin Luther King, Jr. in 1968. *See Shooting Death of Michael Brown*, Community Relations Service, https://www.justice.gov/crs/timeline-event/shooting-death-michael-brown-ferguson-mo, (last visited Sept. 2, 2020) (describing CRS's various activities, including "establish[ing] a coalition of local elected and government agency officials, community leaders, law enforcement, school administrators, and faith leaders from the greater St. Louis area to discuss the underlying issues of the conflict and begin the process of developing long-term solutions to the community tension"); *Shooting of Trayvon Martin by George Zimmerman*, CRS Highlights Timeline, Community Relations Service, https://www.justice.gov/crs/about-crs/historical-timeline#event-646431, (last visited Sept. 2, 2020); *Death of Eric Garner – Staten Island, NY*, CRS Highlights Timeline, Community Relations Service, https://www.justice.gov/crs/about-crs/historical-timeline#event-646446, (last visited Sept. 2, 2020); *Post September 11th Terrorist Attacks Backlash Against Arab, Muslim, and Sikh Communities*, CRS Highlights Timeline, Community Relations Service, https://www.justice.gov/crs/about-crs/historical-timeline#event-646396, (last visited Sept. 2, 2020) (describing CRS's activities following the attacks); *Murder of Vincent Chin – Detroit, MI*, CRS Highlights Timeline, Community Relations Service, https://www.justice.gov/crs/about-crs/historical-timeline#event-646381, (last visited Sept. 2, 2020); *Assassination of the Reverend Dr. Martin Luther King, Jr.*, CRS Highlights Timeline, Community Relations Service, https://www.justice.gov/crs/about-crs/historical-timeline#event-645831, (last visited Sept. 2, 2020) (describing CRS's efforts, including to minimize a violent response in Memphis, Tennessee, where Rev. Dr. King was assassinated).

[758] *See generally, e.g.*, *Facilitation*, Community Relations Service, https://www.justice.gov/crs/our-work/facilitation, (last visited Sept. 2, 2020) ("CRS facilitation services include both structured programs and customized facilitated dialogues that are led by a CRS Conciliation Specialist or co-facilitated by a local, CRS-trained volunteer.").

[759] *See, e.g.*, *Strengthening Police and Community Partnerships (SPCP)*, Community Relations Service, https://www.justice.gov/crs/our-work/facilitation/strengthening-police-community-partnerships, (last visited Sept. 2, 2020).

[760] *See, e.g.*, Smith v. Bd. of Educ. of Palestine-Wheatley Sch. Dist., 769 F.3d 566, 568-69 (8th Cir. 2014) (in a case alleging racial discrimination and continued segregation of faculty and student activities in violation of the Fourteenth Amendment, and dilution of the votes of black plaintiffs in violation of the Voting Rights Act, reflecting that "the court ordered the parties to mediate the dispute with assistance from the United States Department of Justice Community Relations Service," which resulted in "a settlement that the court approved as a consent decree").

[761] 42 U.S.C. §2000g-2(a) ("The Service shall, whenever possible, in performing its functions, seek and utilize the cooperation of appropriate State or local, public, or private agencies.").

[762] *Id.* § 2000g-2(b).

[763] *Id.* ("Any officer or other employee of the Service, who shall make public in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or imprisoned not more than one year").

[764] *Id.* § 2000g-3. *See also Resource Center*, Community Relations Service, https://www.justice.gov/crs/crs-resource-

Title XI: Miscellaneous Provisions

Title XI of the 1964 Act contains various miscellaneous provisions,[765] including two relating to criminal contempt in connection to cases arising under Titles II through VII of the 1964 Act, and a provision addressing preemption. House Report No. 914 does not address these provisions, and there is limited federal case law addressing them.

Criminal Contempt Arising Under the Act

As a general matter, criminal and civil contempt[766] arise from a party's refusal to comply with a court order or directive.[767] Of these two forms of contempt, Section 1101 specifically addresses "any proceeding for *criminal* contempt arising under title II, III, IV, V, VI, or VII of this Act."[768] In such criminal contempt proceedings, Section 1101 entitles the accused to a jury trial, "upon demand therefor," "which shall conform as near as may be to the practice in criminal cases,"[769] and sets penalties for a contempt conviction to a fine not exceeding $1,000, or imprisonment not exceeding six months.[770]

This provision does not apply to "contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to writs, orders, or process of the court."[771] Section 1101 further provides that nothing in the provision shall "be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ,

center, (last visited Sept. 2, 2020) (providing links to CRS's annual reports from 2010 to 2018, among other publications).

[765] *See* 42 U.S.C. §§ 2000h-2, 2000h-3 (addressing intervention by the Attorney General in certain equal protection clause cases); *id*. § 2000h-4 (discussing the act's interaction with state law); *id*. § 2000h-5 (an appropriations provision); *id*. § 2000h-6 (severability clause).

[766] *See generally* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-29 (1994) (discussing its precedent addressing contempt, and the various substantive and procedural distinctions the Court has recognized between criminal and civil contempt; observing that "[a]lthough the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempts are somewhat less clear").

[767] *See* 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority," as to the "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice"; the "[m]isbehavior of any of its officers in their official transactions"; or "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command"). *See generally Int'l Union*, 512 U.S. at 831 (stating that "[t]he traditional justification for the relative breadth of the contempt power" has focused on the necessity of a court to impose compliance with its mandates and maintain orderly proceedings) (internal citation omitted).

[768] 42 U.S.C. § 2000h. In what appears to be one of the few federal appellate decisions interpreting this provision, the U.S. Court of Appeals for the D.C. Circuit held that a criminal contempt proceeding was one "arising under" Title VII of the 1964 Act, where a district court had issued an order to protect participants from retaliation in litigation alleging unlawful sexual harassment under Title VII, and the defendant was accused of violating that court order. *See Rapone*, 131 F.3d at 195.

[769] 42 U.S.C. § 2000h.

[770] *Id*. ("Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months."). Section 1101 also provides that "[n]o person shall be convicted of criminal contempt hereunder unless the act or omission constituting such contempt shall have been intentional, as required in other cases of criminal contempt." *Id*.

[771] *Id*.

process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention."[772]

Double Jeopardy Relating to Criminal Contempt

Title XI of the 1964 Act also includes a double jeopardy[773] provision relating to criminal contempt convictions arising under the act. Section 1102[774] generally provides that "[n]o person should be put twice in jeopardy under the laws of the United States for the same act or omission,"[775] and then specifically prohibits duplicative criminal prosecutions or criminal contempt proceedings for the same "act or omission" which arises under the 1964 Act.[776]

Section 1102 for example, provides that "an acquittal or conviction in a prosecution for a specific crime under the laws of the United States shall bar a proceeding for criminal contempt, which is based upon the same act or omission and which arises under the provisions of this Act."[777] Likewise, this Title XI provision states that "an acquittal or conviction in a proceeding for criminal contempt, which arises under the provisions of this Act, shall bar a prosecution for a specific crime under the laws of the United States based upon the same act or omission."[778]

Preemption of Conflicting State Laws

Various provisions of the 1964 Act, including in Titles II[779] and VII,[780] expressly contemplate the existence of state or local antidiscrimination laws that provide parallel or overlapping protections.[781] Addressing the interaction between such laws and the requirements of the 1964

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[772] *Id*.

[773] This overview does not address the legal principles relating to double jeopardy, or Supreme Court jurisprudence relating to the Double Jeopardy Clause of the Fifth Amendment of the Constitution, which provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[774] 42 U.S.C. § 2000h-1.

[775] *Id*. ("No person should be put twice in jeopardy under the laws of the United States for the same act or omission. For this reason, an acquittal or conviction in a prosecution for a specific crime under the laws of the United States shall bar a proceeding for criminal contempt, which is based upon the same act or omission and which arises under the provisions of this Act; and an acquittal or conviction in a proceeding for criminal contempt, which arises under the provisions of this Act, shall bar a prosecution for a specific crime under the laws of the United States based upon the same act or omission.").

[776] *See id*.

[777] *Id*.

[778] *Id*.

[779] *See id*. § 2000a-3(c) (requiring that an individual seeking relief for a Title II violation, before filing a civil action, must, among other things, provide "written notice of such alleged act or practice" "to the appropriate State or local authority," in cases where the "alleged act or practice prohibited ... occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof").

[780] *See id*. § 2000e-5(c)-(e) (discussing several procedural or other requirements relating to circumstances where the practice alleged to be unlawful under Title VII occurred "in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof").

[781] *See supra* notes 779-80. *See also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 101 (1983) ("State laws obviously play a significant role in the enforcement of Title VII."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) (interpreting the legislative history of Title VII as "manifest[ing] a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes"; also stating that "[t]he

Act, two provisions in the 1964 Act—one in Title VII,[782] the other in Title XI[783]—expressly permit state and local antidiscrimination laws[784] so long as their provisions are not "inconsistent with any of the purposes of this Act, or any provision thereof."[785] Put another way, state laws may address "the same subject matter" as any title of the 1964 Act,[786] and will be preempted or invalidated only when "inconsistent" with the purposes or provisions of the act.[787]

The broader of the two provisions, Section 1104[788] of Title XI, states that "[n]othing contained in any title … shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter."[789] Meanwhile, Section 708 of Title VII specifically refers to Title VII's protections and provides that nothing in that title "shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."[790]

In light of the above provisions, when addressing claims alleging that the 1964 Act has preempted a state or local antidiscrimination provision, federal courts have analyzed whether the challenged state provision conflicts with the requirements of a title of the act.[791] In its 1987 decision

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clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination").

[782] 42 U.S.C. § 2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.").

[783] *Id*. § 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.").

[784] *See* United States v. City of Philadelphia, 798 F.2d 81, 86 n. 5 (3d Cir. 1986) (noting that with respect to employment discrimination, it is "readily apparent that Congress has not 'occupied the field,' leaving no room for state or local regulation of employment discrimination. Quite to the contrary, Congress expressly contemplated that the states would exercise their traditional regulatory powers to prohibit employment discrimination") (citing 42 U.S.C. §§ 2000e–7 and 2000h-4; New York Gas Light Club v. Carey, 447 U.S. 54, 67(1980)).

[785] *See* 42 U.S.C. § 2000h-4 (stating that no "provision of this Act [shall] be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof").

[786] *Id*. (stating that "[n]othing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter"). *See also* Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 15 (1st Cir. 1973) (describing the "congressional policy" expressed in Title VII as one that clearly "encourag[es] state cooperation and initiative in remedying racial discrimination" and reading 42 U.S.C. § 2000h-4 to "expressly disclaim[] any intent to preempt state action").

[787] *Id*. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (plurality opinion) ("In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law."). *See also id*. at 282-83 (citing excerpts from the congressional record and stating that "§ 1104 was intended primarily to 'assert the intention of Congress to preserve existing civil rights laws'" and referring to the "scope of pre-emption available under §§ 708 and 1104" as "narrow").

[788] 42 U.S.C. § 2000h-4.

[789] *Id*.

[790] *Id*. § 2000e-7. *See also Shaw*, 463 U.S. at 101 ("Title VII expressly preserves nonconflicting state laws in its § 708") (citing and quoting 42 U.S.C. § 2000e–7).

[791] *See* Coal. to Def. Affirmative Action v. Granholm, 473 F.3d 237, 239, 251-52 (6th Cir. 2006) (addressing plaintiffs' argument that a state constitutional amendment, enacted by a statewide ballot initiative, was preempted by Title VI of the 1964 Act, and stating that to prevail on their claim, the "plaintiffs must establish a form of 'conflict preemption,'

California Federal Savings and Loan Association v. Guerra,[792] for example, the Supreme Court addressed a challenge to a state law requiring employers to grant up to four months of unpaid pregnancy disability leave and reinstate those employees to the positions they had held, unless the positions were no longer available due to business necessity.[793] Characterizing the state provision as mandating preferential treatment to pregnant employees, the petitioners argued that providing such "special treatment" conflicted with, and was thus preempted by, Title VII's provisions addressing pregnancy discrimination.[794] In analyzing the challenge, the Court first compared the purpose of Title VII with that of the state provision,[795] and then considered whether an employer's compliance with the state provision would require it to violate a requirement in Title VII.[796] Concluding that the purposes of the state provision aligned with that of Title VII,[797] and that the

which is to say they must show either that 'compliance with both federal and state regulations is a physical impossibility' or that 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (citing *Guerra*, 479 U.S. at 281 and quoting from its internal citations); Coalition for Economic Equity v. Wilson, 122 F.3d 692, 709-10 (9th Cir. 1997) (where plaintiffs argued that a state law enacted by proposition was preempted by Title VII, explaining that § 1104 of Title XI "would operate to pre-empt Proposition 209 only if Proposition 209 were inconsistent with any purpose or provision of the 1964 Civil Rights Act" and concluding that because the proposition did not conflict with the act, the district court had erred in concluding that the plaintiffs were likely to succeed on the merits of their preemption claims); Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1082 (8th Cir. 1972) ("We agree with the District Court that Congress expressly disclaimed any general preemptive intent in enacting Title VII, and that the Arkansas statute can be held invalid only if it is in conflict with the Civil Rights Act") (citing 42 U.S.C. §§ 2000e-7 and 2000h-4).

[792] 479 U.S. 272 (1987).

[793] *Id*. at 276 (describing the provision's text, and application and interpretation of that provision by the relevant state authority, as requiring employers to "provide female employees an unpaid pregnancy disability leave of up to four months," and "reinstate an employee returning from such pregnancy leave to the job she previously held, unless it is no longer available due to business necessity"; also stating that in "the latter case," the state provision required an employer to "make a reasonable, good-faith effort to place the employee in a substantially similar job").

[794] *Id*. at 284 (reflecting that the petitioners argued that the second clause of Title VII's provision addressing pregnancy discrimination, 42 U.S.C. § 2000e(k), "unambiguously rejects California's 'special treatment' approach to pregnancy discrimination" because the second clause, in the petitioners' view, "forbids an employer to treat pregnant employees any differently than other disabled employees"). The second clause of Title VII's pregnancy discrimination provision states: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k).

[795] *Guerra*, 479 U.S at 284-88 (discussing the context and legislative history relating to Congress's amendment of Title VII to add protections against pregnancy discrimination, noting excerpts of the congressional record "repeatedly acknowledg[ing] the existence of state antidiscrimination laws that prohibit sex discrimination on the basis of pregnancy" and expressing its general agreement with the court of appeals' "conclusion that Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise'") (internal citations omitted).

[796] *Id*. at 290-92 (addressing the petitioner's argument that the California provision would require employers to violate Title VII).

[797] *Id*. at 288 (concluding that "Title VII, as amended by the [Pregnancy Discrimination Act], and California's pregnancy disability leave statute share a common goal" relating to equal opportunities for women in the workplace).

petitioner's compliance would not require it to discriminate against non-pregnant employees,[798] the Court held that the provision was "not pre-empted by Title VII."[799]

Conclusion and Considerations for Congress

The Civil Rights Act of 1964, comprised of eleven distinct titles, addresses various forms of discrimination in a broad range of contexts. The act enacted new prohibitions and protections—from the voting to employment contexts—and established distinct methods for enforcing them. The act, among other things, also authorized the federal enforcement of guarantees under the Equal Protection Clause in certain circumstances. While all the titles in some way relate thematically to preventing or deterring discrimination, as discussed in this report, each title's provisions substantially differ in scope and application, and have given rise to unique considerations, debates, and questions.[800]

Over the years, Congress has amended provisions of certain titles of the 1964 Civil Rights Act, often to respond to or address specific questions of scope, application, interpretation, or enforcement.[801] Thus far, amendments to the act have mostly concerned one title in particular—Title VII.[802] As a matter of legislative precedent, these amendments generally reflect a context-specific approach that has focused on discrete issues particular to that title.

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[798] *Id*. at 290-91 (explaining that rather than "compel[ling] California employers to treat pregnant workers *better* than other disabled employees," the state provision "merely establishes benefits that employers must, at a minimum, provide to pregnant workers"; concluding that complying with the state provision did not conflict with Title VII's requirements, as "[e]mployers are free to give comparable benefits to other disabled employees, thereby treating 'women affected by pregnancy' no better than 'other persons not so affected but similar in their ability or inability to work'") (internal citations omitted).

[799] *Id*. at 292 ("The statute is not pre-empted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of the federal statute, nor does it require the doing of an act which is unlawful under Title VII.").

[800] *Compare "Immaterial Errors or Omissions on Voting Applications, Registrations, or Records"* (discussing questions of interpretation and application with respect to Title I's materiality provision); "Retail and Other Establishments or Services" (discussing how federal courts have applied Title II to conclude that certain establishments are, or are not, subject to its requirements); "The Supreme Court and "Discrimination" Prohibited by Title VI" (discussing Supreme Court precedent reflecting contrasting approaches to interpreting the statutory text of Section 601); "Protected Categories Under Title VII" (discussing the Supreme Court's interpretation of Title VII's prohibition of sex discrimination to prohibit discrimination based on sexual orientation and gender identity).

[801] *See* Pub. L. No. 92-318, 86 Stat. 375, § 906(a) (1972) (enacting amendments to provisions in Titles IV and IX of the 1964 Act to insert the word "sex" after the word "religion," in 42 U.S.C. §§ 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2). These provisions generally relate to the Attorney General's enforcement of Equal Protection Clause violations, and the amendments expanded the Attorney General's authority to enforce constitutional protections in the context of public education based on sex, and intervene in other cases alleging equal protection violations based on sex. *See* 42 U.S.C. § 2000c(b) (defining desegregation to include "the assignment of students to public schools and within such schools without regard to … sex"); *id*. § 2000c-6(a)(2) (authorizing the Attorney General to act upon a written complaint "signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of … sex"); *id*. § 2000h-2 ("Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of … sex," stating that "the Attorney General … may intervene in such action"). Meanwhile, 42 U.S.C. § 2000c-9 was amended to provide that "[n]othing in [Title IV] shall prohibit classification and assignment for reasons other than … sex").

[802] As discussed in this report, Congress has amended Title VII over the years to respond to a range of specific matters, including to grant the EEOC independent litigating authority and change aspects of enforcement with respect to private sector employers; to clarify definitions (as they relate to religious accommodation and pregnancy discrimination); to codify disparate impact liability and the legal standard to be applied; and to make compensatory and punitive damages available for intentional discrimination. Most recently, Congress amended Title VII to respond to the Supreme Court's decision Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007), and address the timeliness of

As legal debates and issues continue to arise under the various titles of the Civil Rights Act of 1964,[803] Congress may choose to amend aspects of the act to resolve such uncertainties or address new or changed circumstances. To the extent there is legislative interest in amending the act, potential considerations may include the substantive differences among the titles' prohibitions and their enforcement. Amendments to one title, for example, may have unique implications or effects, depending on its operation, context, prohibition(s), or the method of enforcement at issue. Amendments to the 1964 Act may also have implications for other statutes, including those which involve similar protections or protected characteristics, address related or overlapping contexts, or which federal courts have interpreted in relation to a title of the 1964 Act.[804]

Meanwhile, and particularly where proposed legislation seeks to amend multiple titles at once, another consideration may include the different constitutional authorities Congress relied upon when enacting the titles of the Civil Rights Act of 1964. As discussed in this report, Titles II and VII are commonly understood as exercises of Congress's power to regulate interstate commerce,[805] while other titles were enacted to enforce provisions of the Fourteenth and Fifteenth Amendments,[806] or may be supported by multiple constitutional bases. The constitutional basis for a title's enactment, however, may have implications for the requirements that certain amendments may have to conform to. The Supreme Court, for example, has interpreted Title VI as enacted pursuant to Congress's power under the Spending Clause.[807] Under that reading, amendments to Title VI would have to satisfy certain criteria unique to legislation enacted on that

compensation discrimination claims. *See "Title VII: Discrimination in Employment"*; The Lilly Ledbetter Fair Pay Act of 2009, P.L. 111-2, 123 Stat. 5, 6) (amending 42 U.S.C. § 2000e–5(e) to provide that discrimination in compensation occurs "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice"; and adding a provision addressing available relief for such claims). *See also id*. § 2, 5 (reflecting that the amendments were enacted in response to the Supreme Court's *Ledbetter* decision). The Ledbetter Act also amended or addressed provisions in other statutes with respect to discrimination in compensation, including the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act. *See* 123 Stat. 6-7.

[803] The Department of Justice, for example, has recently taken the view that the undergraduate admissions policy at Yale University violates Title VI of the Civil Rights Act. *See Justice Department Finds Yale Illegally Discriminates Against Asians and Whites in Undergraduate Admissions in Violation of Federal Civil-Rights Laws,* Office of Public Affairs, Dep't of Justice, https://www.justice.gov/opa/pr/justice-department-finds-yale-illegally-discriminates-against-asians-and-whites-undergraduate.

[804] Federal courts, for example, have analyzed Title IX of the Education Amendments of 1972 in relation to both Title VI and Title VII of the 1964 Civil Rights Act. The Supreme Court has repeatedly interpreted Title IX in relation to Title VI of the 1964 Act. *See, e.g.*, Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 286 (1998) (referring to Title VI as Congress's model for enacting Title IX of the Education Amendments of 1972 and observing various similarities between the two statutes, including that they "operate in the same manner"). In addition, federal courts have looked to their Title VII precedent interpreting and applying that statute's prohibition against discrimination "because of … sex" to analyze claims arising under Title IX of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex" in federally funded education programs or activities. *See* 20 U.S.C. § 1681(a). For additional discussion of how courts have interpreted Title IX in light of its Title VII precedent, *see* CRS Legal Sidebar LSB10531, *Title IX's Application to Transgender Athletes: Recent Developments,* by Jared P. Cole (Aug. 12, 2020).

[805] *See* "Title II: Addressing discrimination and segregation in business establishments" and "Title VII: Discrimination in Employment."

[806] *See* "Title III: The Equal Protection Clause and De Jure Segregated Public Facilities," "Title IV: The Equal Protection Clause and De Jure Segregated Public Schools and Colleges," and "Title V: Amendments concerning the U.S. Commission for Civil Rights (USCCR)."

[807] *See* "General Background: Race-Based Segregation and Discrimination in Hospitals, Schools, and Other Federally Funded Programs."

basis.[808] A title's constitutional basis may also shape or limit the content or parameters of subsequent legislative amendments, and how courts or agencies interpret them. Thus, Congress may wish to consider a title's distinct constitutional basis when evaluating proposed amendments, including in light of any potentially applicable legal standards, and for other purposes.

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[808] *See generally, e.g.,* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (discussing limitations on Congress's spending power); Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17-18 (1981). For more discussion on constitutional authorities, see CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview,* coordinated by Andrew Nolan and Kevin M. Lewis (Sept. 27, 2018).