

Civil Rights and the Courts in Shaping Health Equity

Viewing Health Equity through a Legal Lens: Title VI of the 1964 Civil Rights Act

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Abstract Enacted as part of the watershed Civil Rights Act of 1964, Title VI prohibits discrimination by federally assisted entities on the basis of race, color, or national origin. Indeed, the law is as broad as federal funding across the full range of programs and services that affect health. Over the years, governmental enforcement efforts have waxed and waned, and private litigants have confronted barriers to directly invoking its protections. But Title VI endures as the formal mechanism by which the nation rejects discrimination within federally funded programs and services. Enforcement efforts confront problems of proof, remedies whose effectiveness may be blunted by underlying residential segregation patterns, and a judiciary closed to legal challenges focusing on discriminatory impact rather than intentional discrimination. But Title VI enforcement has experienced a resurgence, with strategies that seek to use the law as a basic compliance tool across the range of federally assisted programs. This resurgence reflects an enduring commitment to more equitable outcomes in federally funded programs that bear directly on community health, and it stands as a testament to the vital importance of a legal framework designed to move the nation toward greater health equity.

Keywords health equity, Civil Rights Act, Title VI

Introduction

Enacted as part of the watershed Civil Rights Act of 1964, Title VI prohibits discrimination on the basis of race, color, or national origin by both public and private entities that receive federal financial assistance. The aim of Title VI, a core part of a legal landmark in American history (Purdum 2014), is no less than to ensure that the vast machinery of federal social

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welfare funding is used to reduce segregation and discrimination in all its forms, not enable it. As such, Title VI functions as a major policy lever for achieving fundamental change in the nation's social fabric. This overarching goal is to be accomplished through the establishment of formal, regulatory expectations on the part of the federal government not only that certain types of practices will cease but also that recipients of federal financial assistance will take affirmative steps to ensure that they administer their programs and services in a manner that promotes equality. Implicit in Title VI at the time of enactment was a further expectation that government efforts to end discrimination in federally funded programs and activities would be supplemented through private enforcement efforts; but a generation of shifting sands in judicial philosophy has considerably narrowed government's ability to rely on private enforcement efforts, thereby magnifying its own role in shaping Title VI as a legal framework for health equity.

Title VI was enacted at a time when legal segregation was still the norm in major sections of the nation. As racial segregation laws disappeared, the government interest in enforcement waned, although recent governmental use of the law as an instrument of change has regained considerable momentum. How to adapt a law such as Title VI to modern circumstances, however, emerges as a major issue. Like other civil rights laws grounded in the goal of racial justice, Title VI today confronts what perhaps might be characterized as a more pernicious problem: the residential segregation that affects minority Americans and is so closely associated with health inequity (Williams and Braboy Jackson 2005). Under such circumstances, the crucial legal question is the disparate racial impact of seemingly neutral laws. As a tool for addressing this form of discrimination, Title VI faces two basic challenges: problems of proof and the challenge of fashioning legal remedies that themselves do not cross racially impermissible lines under current judicial doctrine (i.e., quotas), while still addressing the racial effects of policies that produce a discriminatory impact. Nonetheless, Title VI represents a seminal achievement in the effort to reset the social compact, one whose terms remain highly relevant to today's challenges. To dwell simply on challenges of implementation and enforcement would be to miss the forest among the trees.

The Origins and Evolution of Title VI

As a central element of the 1964 Civil Rights Act, Title VI was a crowning achievement of the civil rights era that spanned from World War II through

the 1960s, and health and health care figured prominently in its creation. Title VI was designed to serve a core purpose: to end discrimination based on race, color, or national origin within programs that receive “federal financial assistance.”¹ Unlike Title II of the Act, which reaches purely private conduct by enterprises engaged in commerce (such as hotels, restaurants, movie theaters, and other places of public accommodation), Title VI rests on Congress’s power—indeed, its constitutional duty as viewed by some legal observers and courts—to ensure that federal funding is not spent on private entities that discriminate (Abernathy 1981).

Title VI became law at a time when the desegregation of schools and other public services was a major focus of civil rights concern. Its underlying rationale rested in significant part on a decision by the United States Court of Appeals for the Fourth Circuit in *Simkins v. Moses H. Cone Memorial Hospital* (323 F.2d 959 [4th Cir. 1963] [en banc], cert. den., 376 U.S. 938 [1964]). *Simkins*, which involved the denial of admitting privileges to black physicians and the admission of black patients by a hospital built with Hill-Burton funding, was an outgrowth of what David Barton Smith has termed ‘The North Carolina Campaign,’ a pivotal chapter in the history of the civil rights movement (Smith 1999). The *Simkins* decision emphasized the constitutional basis for barring the flow of federal funds to public or private entities that discriminated.

Indeed, revulsion over discriminatory practices in health care—what Martin Luther King Jr. termed one of the most “shocking and inhumane” aspects of racism—figured strongly in the Senate floor debate over passage (Smith 1999). At the time of enactment, the precise number of federally assisted health actors was not known with any degree of certainty (Abernathy 1981), although by 1963, when *Simkins* was decided, over 104 racially segregated hospitals had been built, the great majority of which were for whites only (Byrd and Clayton 2001). (As an aside, it is worth recalling that only one year later, the Johnson administration struck an agreement with the Senate—never codified in statute—to exempt physicians treating Medicare patients from Title VI [Smith 1999]. This agreement ostensibly rested on Medicare’s original structure as indemnity insurance whose funds did not directly flow to physicians but instead were transferred to beneficiaries in repayment for the services they purchased.

1. The regulations define “federal financial assistance” to include: “(1) grants and loans of federal funds, (2) the grant or donation of federal property and interests in property, (3) the detail of federal personnel, (4) the sale and lease of, and permission to use, federal property or interest in such property without consideration or at a nominal consideration, and (5) any federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.” 45 C.F.R. § 80.13(f).

Today, most private physicians directly participate in one or more federal health care programs, which under § 1557 of the Affordable Care Act are now defined to encompass both insured and administered products offered by insurers that participate in federal programs.)

By its express statutory terms, Title VI prohibits acts of intentional discrimination by “any program or activity receiving federal financial assistance” (42 U.S.C. § 2000d). But the earliest implementing regulations, which remain in force today, go further, extending the law’s prohibitions to conduct and practices that have the *effect* of discriminating. For example, regulations originally issued by the United States Department of Health, Education and Welfare following enactment—part of the government-wide rules that remain applicable today and touch virtually every form of federal financial assistance—outlaw “criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of their race, color, or national origin,” as well as practices that have “the effect of defeating or substantially impairing accomplishment of the objectives of the program [with] respect [to] individuals of a particular race, color, or national origin” (45 C.F.R. § 80.3[b][2]). Thus, Title VI rules, which endure today, establish two types of prohibited discrimination: (1) intentional discrimination, as measured by evidence pointing to a specific intent to exclude or segregate; and (2) policies or practices that may be facially neutral but discriminatory in impact (Perez 2002). Over the five decades of Title VI’s existence, Congress has not refuted this far-reaching interpretation.

Title VI’s prohibitions apply to any form of federal financial assistance, including grants, loans or contracts, other than “contracts of insurance or guarantee,” which as § 1557 of the Affordable Care Act makes clear, do not include private health insurance coverage sold by entities that receive federal funding. Title VI also sweeps broadly in terms of the activities subject to its provisions, covering public and private actors alike. The statute defines the term *program or activity* to encompass all of the operations of state and local agencies receiving federal funding, governmental entities that distribute federal funds, colleges and universities, and private corporations or organizations engaged in education, health care, housing, or social services, or parks and recreation (42 U.S.C. § 2000d-4a). In other words, the receipt of federal funding by a governmental or private entity, or any part thereof, triggers a duty not to discriminate.

Title VI is, of course, a law and, by their very nature, laws can cast what many might prefer to think of as broader social matters in an uncomfortable light, opening up policies and practices to legal scrutiny, sanctions, and

remedies for conduct and practices considered to come within their ambit. In no case is the desire to define a problem other than in legal terms more powerful than in the area of race discrimination: who possibly would want to equate regrettable social conditions with the legal concept of discrimination, particularly if no one is able to identify an overt legal practice (such as an ordinance that mandates segregation by race) that drives such results?

Not surprisingly, therefore, despite the underlying intent of Title VI, as legal segregation laws disappeared, so too the appetite for framing issues as discrimination inevitably diminished. Policies and practices that might, in fact, be contributing to racially identifiable results have been viewed as a problem that lay outside the purview of civil rights law. The concept of “disparities,” used by minority health researchers to define the racially measurable impact of policies and practices, proved to be an easier way to maintain a discourse about race and society with those who would change the subject away from discrimination, conveniently overlooking the fact that Title VI was intended to reach both acts of deliberate segregation as well as practices that produced such effects. Indeed, the rise of disparities research, rather than propelling efforts to adapt Title VI to more modern conditions, may have provided a softer lens through which to view policies and practices that, in legal terms, would have been expressed as discriminatory in effect. For example, the failure of a hospital’s surgeons to participate in Medicaid—disproportionately relied on by racial and ethnic minority groups—might produce disparities in terms of who has access to advanced surgical treatment. At the same time, a policy that extends admitting privileges to surgeons that refuse to participate in Medicaid might also be thought of as one that is discriminatory in effect.

By the early 1980s, Title VI enforcement already had been severely reduced. As David Barton Smith explains, the creation of an Office for Civil Rights within the United States Department of Health, Education and Welfare (later renamed Health and Human Services, or HHS) by the Nixon administration was actually an effort to separate civil rights enforcement from any direct connection to program operations and isolate it into a small, underfunded entity with no real powers (Smith 1999). Rather than elevating the cause, the establishment of a civil rights office was understood as designed to achieve precisely the opposite result (Smith 1999). The impact of this decision reverberated over decades. Civil rights enforcement staff disappeared, as did the office’s budget, which lacked any separate funding for enforcement efforts (Rosenbaum and Teitelbaum 2003).

This governmental effort to move away from defining problems as ones covered by the broad reach of Title VI could be seen in the 1985 Report of

the Secretary's Task Force on Black and Minority Health. Commissioned by the Reagan administration, the Report produced an extensive statistical compilation focusing on the excess rates of death and disability among racial and ethnic minorities. But as important as it was in advancing public understanding of the elevated risk of poor health and death among minority populations, the 1985 report also diverted the discussion away from a civil rights lens, presumably in order to make its findings more politically palatable. The Secretary's Task Force was chaired not by the director of the HHS Office for Civil Rights (who served as a member), but instead by a distinguished government health researcher (Dr. Thomas E. Malone). The Report contained no chapter on the status or potential relevance of civil rights enforcement; indeed, the Report contained no real discussion of the possible link between disparities on the one hand and the reach of Title VI into problems of disparate impact on the other. Instead, the Report tended to focus on chronicling racial differences rather than finding root causes of inequality. The Report offered recommendations for training more minority health professionals and for better health education for minority communities. But it was fundamentally devoid of an agenda for addressing discriminatory effects associated with facially neutral policies and practices, such as provider participation in public insurance programs, language barriers to health and social services, the siting and location of care, and the segregation of patients by payer source, which may have lacked any underlying discriminatory intent but nonetheless produced effects that disproportionately advantaged racially identifiable groups.

It would take many years for civil rights advocates to connect the findings from disparities research to the question of Title VI civil rights enforcement. The seminal Institute of Medicine study, *Unequal Treatment*, did a great deal to reframe research into health disparities as a source of evidence regarding racial inequality rather than mere racial differences. From this study has flowed something of a resurgence of governmental efforts to devise remedies that are grounded in concepts of overcoming inequality, which lies at the heart of Title VI, in order to address institutional policies and practices that have a discriminatory effect as well as those with discriminatory purpose. Chief among this reestablished link have been landmark policies, first introduced in 2000 under the Clinton administration, modified somewhat by the George W. Bush administration, and expanded under the Obama administration, to use the results of health disparities research as a means for establishing language access as a basic compliance requirement for federally assisted entities, ranging

from health care programs to other programs receiving federal financial assistance and designed to address the broad range of social conditions that affect health.

Title VI: Covering the Breadth of Health Equity

Although health scholars often focus on the role of Title VI in the context of health care, Title VI has a panoramic scope, as broad as the range of federally assisted programs that bear on health equity. In both government enforcement and in efforts by private litigants to directly enforce its guarantees, the emphasis naturally has been on the regulations' effects test; that is, on policies and practices that appear to be associated with racially unequal results. This more modern use of Title VI offers insight into the comprehensive nature of the law's reach (Abernathy 2006).

Despite the context in which they arise, Title VI cases tend to focus on specific types of conduct: criteria or practices that make certain people less likely to qualify for assistance; practices that cause certain eligible persons to receive a lesser amount of assistance; practices that cause people to receive services of lower quality or in segregated settings; and practices that diminish or impair the value of the service. Furthermore, because Title VI applies government-wide, enforcement cases touch on virtually every federally assisted program or activity that bears on the health and well-being of the population, from education to mass transit, housing, child welfare, health care, and environmental health (Abernathy 2006; Edson 2004; Johnson 2014; Mank 2007; Yan 2013). As federal financial assistance has permeated the social fabric, so has the reach of Title VI.

As discussed at greater length below, in 2000 the United States Supreme Court ended the ability of private individuals to sue to enforce Title VI disparate impact standards. Prior to that point, private litigation strategies were frequently part of Title VI enforcement efforts. Some cases prevailed in court, others lost. More importantly, the filing of a case by private individuals served as a sort of strategic lever, encouraging plaintiff groups and public officials to negotiate solutions that could alleviate the discriminatory effects of policies and practices. Private litigation as an enforcement technique was used across many different social welfare spheres.

Beyond siting services, challenges have involved the use of eligibility or placement criteria that segregate racial minorities, or that deprive them of the value of the service or result in services of lower quality. In education, numerous claims have challenged the use of isolated IQ tests and other student placement tools that result in the concentration of minority children

in programs and classrooms designed for those with limited intellectual ability (Abernathy 2006). Title VI also has been used to challenge nursing facility admissions practices that group all Medicaid beneficiaries in one wing of an institution, thereby effectively segregating black patients who disproportionately rely on Medicaid (Rosenbaum and Frankford 2012).

Title VI cases also have tested the impact of seemingly neutral program decisions to take a more expedient or less costly approach to a problem, such as condemning the land on which community gardens are flourishing in order to build new community housing, as opposed to acquiring other land at a somewhat higher cost that would leave community gardens intact (Abernathy 2006). The effects test cases also have involved practices or policies that appear facially neutral but that work to disfavor minority program beneficiaries, such as a decision by a public housing authority to give priority to rehabilitation services for homeowners as opposed to renters (Abernathy 2006). Title VI challenges also have tested the discriminatory effects of disciplinary actions by recipients of federal funding, such as school discipline (Johnson 2014), and actions by health care providers operating programs to treat substance use disorders and that report one group of patients to law enforcement (black pregnant patients exposed to crack cocaine), while not reporting other patients (white pregnant patients exposed to alcohol) (*Ferguson v. City of Charleston, South Carolina*, 186 F.3d 469 [4th Cir. 1999]).

Transit planning has received particular Title VI attention because of unusually creative advocacy work in the face of the extraordinary impact on minority communities that flows from the absence of public transit (Johnson 2014). Title VI cases have focused on the decisions by local and state transit authorities to upgrade transit options (such as fast airport rail service) used predominantly by white riders while relegating minority communities to limited and unreliable forms of transportation (Yan 2013). Most recently, residents of Baltimore challenged the governor's decision to divert transportation funding away from urban mass transit improvements in favor of highway investment (Complaint, *Baltimore Regional Initiative Developing Genuine Equality, Inc. v. State of Maryland, et al.*, DOT No. 2016-0059).

Title VI challenges have ebbed and flowed in their success. Since its inception, courts have accorded the statute an “an ancillary, but not co-equal, role in enforcing national antidiscrimination policy,” waffling on whether Title VI should have a more or less stringent standard for discrimination than the Constitution (Abernathy 1981: 14). Challenges involving disparate treatment generally have more favorable outcomes for

the plaintiffs because, where it can be proven that the defendant has plainly discriminatory motives, the matter not only clearly violates Title VI, but also the Constitution. The early Title VI school segregation cases provide examples of such obvious discriminatory behavior. Conversely, challenges alleging discriminatory impact have fared less well with federal courts since the statutory language does not define “discrimination” and much deference is given to agency guidance and findings on the matter. Challenges alleging discriminatory effects on the environment or transitory impacts have tended to have less successful outcomes for plaintiffs, because of the unwillingness on the part of the courts to develop complex remedies other than those created by an enforcement agency itself.

The Complexity of Title VI as a Tool to Achieve Health Equity

All legal actions are difficult; for several reasons, using Title VI may be especially complicated. The first reason might be thought of as one of framing. For perfectly understandable reasons, there is a resistance to labeling a particular policy or practice as one that may place it within the legal lexicon of a statute whose purpose is to address discrimination on the basis of race or national origin, especially practices and conduct that are seemingly neutral but that produce discriminatory effects. Policies that hurt the poor may be repugnant on many grounds, but should they be considered discriminatory because the poor are more likely to be members of racial or ethnic minority groups? Resistance to such characterization is inevitable, particularly in a nation whose very existence rests on the original sin of racism and classification and segregation based on race. If investing transit funds in commuter trains from the suburbs rather than subways in the inner city is viewed simply as government choice regarding resource allocation with adverse fallout on the poor, this essentially sidesteps the question of whether federally assisted entities should be viewed as having a duty to avoid such fallout when the poor are, in fact, racially identifiable. Many might prefer to address the solution as one of fairer economic investment rather than as one grounded in racial justice owing to generations of practices that have produced racially identifiable outcomes where income and wealth are concerned.

A second problem relates to the challenges of proving a claim and answering defenses. To show disparate impact, a challenger must demonstrate a nexus between a particular policy and racially identifiable

effects. For example, requiring all nursing home residents covered by Medicaid to be housed in a separate wing may be repugnant social policy, but it becomes a Title VI matter only if it can be shown that Medicaid patients are disproportionately African American. But what happens when no data on the race of Medicaid patients are available? Federal programs require recipients of assistance to maintain substantial racial data on those who receive benefits, but certain situations may be more subtle, such as particular settings in which patients are seen (a private physician's office rather than a specialty residency rotation clinic), or a first-come-first-serve policy for obtaining certain benefits in communities in which it is harder for certain racially distinct groups of residents to either understand the policy or arrive early.

Furthermore, it may be necessary to show that the observed racial results rest on other, equally plausible explanations. For example, in health care, simply showing that minority cancer patients receive less advanced cancer treatments is not sufficient. The challenger also would have to demonstrate that minority patients are not offered certain choices and that, when given equal choice, minority patients are equally as likely to prefer more advanced care. While simulation studies conducted by researchers have, in fact, shown racial bias in diagnosing and treating patients (Schulman et al. 1999), this is not the same as proving in a judicial or administrative setting that a particular policy maintained by a particular health care institution resulted in less equitable treatment. In other words, law is quite specific, and a finding of discriminatory practices cannot rest on simulations (although simulation experiments certainly may be relevant in helping explain institutional behavior). That is to say, the presence of statistical disparities alone do not show that a policy or practice had a discriminatory effect. This does not mean that intentional discrimination must be proved, but it does mean that a challenger would need to draw a link between the statistical evidence and an actual policy or practice. Proof of this nature is time consuming and costly.

Additionally, a showing of discrimination may not be sufficient. There are defenses such as the necessity of certain policies even if they do have a discriminatory impact. Steps to mitigate the impact of such policies might be ordered, but the policies may survive essentially intact. For example, stopping a hospital from leaving a poor, heavily minority community and relocating to a more affluent service area is virtually impossible, even though federal regulations governing the application of Title VI to health care explicitly offer the example of hospital siting practices as one that may fall within the purview of the law. A court might order the hospital to open a

satellite clinic in a poor neighborhood as well as free shuttle services to its main campus, but the hospital relocation itself moves forward (Rosenbaum and Frankford 2012).

A third problem relates to remedies: How far should the courts go in second-guessing the decisions of program administrators regarding resource allocation in the case of programs that are often seriously underfinanced and on a daily basis demand difficult decisions about priorities; and if imbalances are found, how far can the courts or agencies go in imposing affirmative balancing remedies?

The history of the Title VI effects test, not found in the statute but established by regulation, has been fraught with challenges. In *Lau v. Nichols* (414 U.S. 563 [1974]), a unanimous Supreme Court held that a recipient of federal financial assistance could be liable under the terms of Title VI (if not the Constitution itself) for practices that discriminated within the meaning of Act, in this case, the lack of language-accessible programs for San Francisco public school children of Asian descent. The lower court had rejected the children's claims, finding that their poverty, not actions on the part of the school system, was at fault. Reversing, the Court based its rulings on federal Title VI rules applicable to schools, which utilized an effects test and required educational programs to take affirmative steps to help students overcome language barriers. In this case, the San Francisco school system's failure to affirmatively help children overcome their language barriers violated the rules and "effectively foreclosed" such students from "any meaningful education" (*Lau*, 414 U.S., p. 566.). *Lau* represented the "high-water mark" in terms of the willingness of the judiciary to halt practices that, even if not intentional and thereby a direct violation of the Constitution, could be shown to have a discriminatory impact (Abernathy 1981: 17).

But the limits of Title VI from the Court's perspective became evident in *Regents of the University of California v. Bakke* (438 U.S. 265 [1978]), which involved the use of affirmative action tools by the University of California (specifically, racial quotas) to weigh medical school admission decisions. While *Bakke* did not overturn *Lau*, it signaled the Court's willingness to impose significant limits on the reach of Title VI's remedial powers beyond its basic constitutional underpinning of outlawing intentional segregation and discrimination by race. In so doing, the Court signaled a sharp constraint on the ability of federally assisted entities to devise remedies, in this case, quantifiable, to address race-specific measures of inclusiveness that exceeded constitutional constraints under the Fourteenth Amendment (Abernathy 1981; Johnson 2014). This question

of how far government can go to remedy the past effects of discrimination in federally assisted programs, or to avert the possibility of racially unequal results, continues to dominate civil rights law to the present.

Beyond the constitutional constraints on remedies that turn on affirmative efforts to achieve equity through the use of quantifiable targets, the question of remedies under the Title VI effects test raises other issues. One review of Title VI cases concludes that, in the main, agencies and judges appreciate the difficult balancing decisions that go into the operation of federally assisted programs (Abernathy 2006). As a result, business necessity constitutes a recognized defense under Title VI (Watson 1990), and in reviewing the legality of agency practices, courts will look to their reasonableness, a standard of review substantially lower than the compelling interest standard needed to justify practices found to amount to intentional discrimination (Abernathy 2006). It is hard, in other words, to convince a court or an agency that a particular decision affecting programs and services operated for a large and diverse population must be reversed or modified based on evidence of impact on a subset, although it is by no means impossible, as is illustrated by numerous cases involving negotiated settlements softening or modifying policies and practices shown to have a disparate impact on minority populations (Johnson 2014; Rubin-Wills 2012; Yan 2013). For example, in hospital siting cases, settlements have involved the establishment of satellite services in communities losing access to the main hospital facility (Rosenbaum and Frankford 2012). Similarly, in transit cases, advocates have achieved significant modifications in regional transportation plans to ensure a more reasonable level of investment in minority communities (Johnson 2014; Yan 2013).

Finally is the question of who has the right to enforce Title VI's disparate impact prohibitions. Unlike Title VII of the 1964 Civil Rights Act, which bars discrimination on prohibited grounds in the case of employment, Title VI contains no express right to relief in the courts, a crucial issue in modern jurisprudence (Rosenbaum and Frankford 2012). In *Bakke*, which arose under Title VI and dates back to a time when the courts were less strict about clear evidence regarding the right of private individuals to seek judicial intervention under "implied right of action" theory, the United States Supreme Court essentially assumed such a right. But in *Alexander v. Sandoval* (532 U.S. 275 [2001]), a case in which private litigants challenged Alabama's policy of English-only drivers' license tests, the Court foreclosed private judicial actions to enforce the federal effects test rule, limiting access to the courts to claims of intentional discrimination brought directly under the statute (Abernathy 2006;

Harvard 2001; Johnson 2014; Perez 2002; Rosenbaum and Teitelbaum 2003). At least one scholar has argued that, in a health care context, the ACA's extension of Title VI protections to new insurance markets may restore a private right of action for violations of the Title VI disparate impact rules (Steege 2011). But this theory has not yet been tested. As one might imagine, the *Sandoval* decision was an enormous blow to private enforcement efforts under Title VI, made all the more necessary by under-resourced federal enforcement agencies hobbled in their work by the politics of discrimination oversight. Since the major thrust of efforts to use Title VI to secure more equitable treatment entailed reliance on disparate impact theory, the loss of access to the courts has posed significant problems.

In fact, however, *Sandoval* also helped trigger a flowering of other strategies, including an increase in the use of federal administrative complaints by private individuals, and more importantly perhaps, efforts by government itself to build tests of equity into federal financial assistance through the use of clear, measurable, and prospective compliance standards embedded directly into regulatory standards. Indeed, one could argue that *Sandoval* effectively caused the federal agencies to do what they were supposed to do in the beginning, namely, make equitable conduct an explicit part of the operation of federally assisted programs. The HHS language access standards offer a crucial illustration of clear and measurable standards that are designed to act as a standard of Title VI compliance for federally assisted entities. Other examples are efforts by federal agencies to effectively make equity planning and civil rights impact analyses core elements of the operation of federally assisted entities (Edson 2004; Johnson 2014; Yan 2013).

Concluding Thoughts

It is possible to think of Title VI as a holdover from a bygone era, when the pressing focus was on ending intentional discrimination by race. But that would be wrong. Title VI is far broader in its scope, the result of an early decision to interpret its reach liberally, followed by decades of private enforcement and, increasingly, more meaningful efforts on the part of the federal government itself, pressed into action by the end of private enforcement rights and the unceasing efforts of advocates and civil rights scholars. Today, it is expected that with participation in federal programs will come principles of non-discrimination in practice, embedded as a condition of program participation. In this regard, over its life, Title VI has

emerged as an essential policy lever in the quest to bring fairness and equity to federally assisted programs. To be sure, much work remains, whether in mass transit, public housing, health care, education, parks and recreation, or other life endeavors that touch on the health and well-being of society. Although specific racial quotas are not possible, standards of fair treatment and equity-conscious planning are.

Two questions emerge from this analysis. The first is whether Title VI should be strengthened in the area of disparate impact enforcement. The second is what that strengthening might look like.

To answer the first question, one must ask whether it is still worthwhile to define certain problems in terms of race or national origin. Would we be better off focusing on economic inequality as the root cause of health inequity and moving away from a race discrimination framework instead, given the emotional fallout that can arise when one defines problems in terms of race? Put in the vernacular, with legal segregation behind us, is the juice not worth the squeeze in the case of Title VI?

The answer to the question of whether it is still important to use federal funding as a lever for achieving greater equity on racial grounds must be yes. To be sure, intentional, legal segregation has disappeared from the scene of publicly funded programs and services. But as long as policies produce racially identifiable results, it is vital to a nation with a racial history such as ours that the racial questions get asked even when income inequality plays a powerful role. This can most clearly be seen in the national dialogue that ensued in the wake of studies showing racially distinct outcomes in health care even when controlling for income and health status.

The power of knowing that race matters when formulating and enforcing policy in federally assisted programs is vividly evident in the tragedy of police-involved shootings in minority communities. It is Title VI that, in great part, has provided the legal leverage for the oversight of community policing policies and for altering the practices of police departments. Indeed, what made the Dallas 2016 police shooting especially painful was the fact that Dallas was recognized for the degree to which, over two generations, policing practices had been transformed. Title VI offers a policy lever over the vast array of policies that affect community health, because it travels wherever federal funding flows. The fact that police departments are subject to ongoing oversight may help the nation weather such terrible crises. In the current climate, we need a law that focuses on racial justice, because the nation still focuses on race, because people who are members of historically disadvantaged racial and ethnic minority groups continue to disproportionately feel the adverse effects of social and

economic policy choices, and because what was true over fifty years ago is true today: public and private entities that accept public funding should be expected not merely to not discriminate on the basis of race but also to be actively involved in adapting programs and services in ways that achieve greater equity.

The second question is how, if Title VI remains powerful and relevant, its implementation might change to enable the law to better achieve its goals. One step would be to restore the private right of action to challenge practices and policies that are facially neutral but appear to have a racially measurable disproportionate impact. In the wake of the election of Donald Trump as president and the capture of both houses of Congress by Republicans, such a solution to the *Sandoval* problem is probably unlikely in the extreme. Of course, it is possible that judicial doctrine will evolve on its own, and that the United States Supreme Court will do an about-face on the question of whether private enforcement rights must be explicitly stated in law. This shift in jurisprudence is undoubtedly equally unlikely, particularly if a Republican president and Congress shift the Court further to the right. Thus, the use of Title VI by private parties in a judicial enforcement context is now precluded, at least where the problem of *de facto* discrimination is concerned; all eyes, instead, turn to government enforcement.

Here, even in a Trump administration, one might expect civil rights advocates to remain vigilant, placing administrative complaints before the federal agencies and the United States Justice Department on a range of issues. How rapidly and thoroughly these complaints will be acted on cannot be known, but the process of administrative advocacy remains very much alive. What probably will suffer in the coming years is the existence of a strong, government-initiated civil rights enforcement effort within the administration itself. As this article makes clear, even in times more conducive to framing issues as a civil rights matter, the executive branch has been relatively lethargic in its response to problems, with limited system monitoring and limited individual enforcement actions. Congress has been a significant part of this problem, refusing to fund civil rights enforcement in reasonable amounts.

Title VI enforcement agencies need budgets to collect data and commission research and analysis. They need staff. And they need to be an integral part of policy and programmatic development, not a mere commenter on regulations that already have been drafted. Title VI enforcement is not an add-on to federal program rules; it is part of the DNA of federal social programs. Just as a state housing agency does not qualify for federal

funding if it fails to follow proper accounting practices, the agency loses its eligibility for federal assistance if its policies and practices violate the terms of Title VI and other fair housing laws.

In recent years the Obama administration, as noted, has made civil rights-related planning and resource allocation decisions a core element of its program oversight efforts. Expanding on these efforts means increasing the resources available for civil rights enforcement so that agencies can commission the empirical research studies needed to develop policies of general applicability that regulate grantee conduct, funding to collect the data needed to ensure compliance and test the effectiveness of policies in reducing disparate outcomes, and, of course, funding to properly investigate and enforce such policies when potential violations are reported. It is not enough for an agency to ask that a recipient sign a general Title VI compliance agreement and then simply reflect on what types of conduct and practices merit further investigation. As with the language access policies, recipients of federal funding need general directives and operating rules and the certainty of knowing that, if they comply with such rules, they will not be subject to further investigation. To function properly, civil rights compliance needs to be simply part of the process of policy development and program oversight. The Obama administration has taken steps in this direction, but it seems unlikely that the Trump administration will continue these practices. Indeed, early signals—from calls for retrenchment in public insurance financing under the Affordable Care Act to proposals that seek to dismantle public education rather than invest in it—are not promising, to put it mildly.

For this reason, research remains crucial. The research enterprise, if anything, grows more critical when government investment in civil rights enforcement wanes. Of particular importance is research that does not simply document racial and ethnic differences in access, quality, and outcomes, but that attempts to shed light on factors that may underlie problems, even when those factors involve asking uncomfortable questions. When researching disparities, it is valuable to examine patient preference, community culture, and individual value and belief systems. But it is equally important—and undoubtedly harder—to ask institutions questions about their own preferences, their own culture, and their own value and belief systems, as embodied in their policies and practices.

But there is a paradox here. Research designed to get at the policy underpinnings of disparities patterns is closely associated with enforcement. This means that not only is such work costly, complex, and time consuming, but it is also the result of direct funding by government

agencies that seek answers in a civil rights context in order to better understand the potential for discriminatory effects that may result from the implementation of federal programs and policies. This type of deeper research can be expected to wither in an era of government disfavor of civil rights enforcement. In this case, the role of private funders—and of agencies and institutions that themselves that seek to more clearly understand the impact of their own policies and practices on the people and communities they serve—becomes paramount.

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