

# LAWYERING THAT HAS NO NAME: TITLE VI AND THE MEANING OF PRIVATE ENFORCEMENT

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*On the occasion of the fiftieth anniversary of the Civil Rights Act of 1964, this Essay examines the problem of private enforcement of Title VI. The Essay reviews the unduly constrained approach to private enforcement taken by courts in prominent decisions such as Regents of the University of California v. Bakke and Alexander v. Sandoval. Yet the Essay argues that to focus primarily on private court enforcement of Title VI will continue to relegate the provision to the margins of civil rights discourse, to make the provision appear largely as the “sleeping giant” of civil rights law. The practice of Title VI lawyering entails not just efforts to seek compliance in courts, but oversight, implementation, expansion, and elaboration of the provision in agencies and policy contexts, through which Title VI gains meaning and helps transform institutional practices.*

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## INTRODUCTION

Title VI of the Civil Rights Act of 1964 might just be the most powerful civil rights statute. The provision prohibits discrimination in federal, state, local, and private programs that receive federal financial assistance.<sup>1</sup> It extends across various types of practices and domains, addressing discrimination in a range of areas including education, housing, employment, health care, transportation, agricultural programs, and the environment. Yet “sleeping giant” is the term often invoked to describe Title VI.<sup>2</sup> Each anniversary of Title VI provokes concern that the full power of the statute has gone untapped.<sup>3</sup> Federal agency officials charged with administrative enforcement of the Civil Rights Act of 1964 announce new efforts to unleash the power of Title VI.<sup>4</sup> Nongovernmental actors, litigants, and advocates plot strategies to enhance private enforcement and implementation of the provision.<sup>5</sup> Yet to the general public and even to most lawyers, Title VI is largely unknown. Title VI is not a prominent feature of academic commentary on civil rights law and is often absent from civil rights casebooks. When Title VI was already three decades old, a prominent civil rights lawyer urged more use of the statute, deeming Title VI “powerful, but largely unused.”<sup>6</sup>

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1. Civil Rights Act of 1964, tit. VI, § 601, 42 U.S.C. § 2000d (2012) (“No 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.”). As a result of 1988 amendments to the Act, “program or activity” is defined broadly to include “all of the operations” of state or local governments “any part of which is extended Federal financial assistance.” Civil Rights Restoration Act of 1987 § 6, 42 U.S.C. § 2000d-4a. Federal regulations make clear that “[f]ederal financial assistance” includes grants, loans of funds, donations or grants of federal property, and the detail of federal personnel. *See* 28 C.F.R. § 42.102(c) (2013).

2. *See, e.g.*, U.S. DEP’T OF JUSTICE, PROTECTING AGAINST RACE, COLOR, AND NATIONAL ORIGIN DISCRIMINATION BY RECIPIENTS OF FEDERAL FUNDS 2 (2013) (internal quotation marks omitted), *available at* [http://www.justice.gov/crt/about/cor/4yr\\_report.pdf](http://www.justice.gov/crt/about/cor/4yr_report.pdf) (quoting Assistant Attorney General for the Civil Rights Division, Thomas E. Perez).

3. *See, e.g.*, *The Civil Rights Act 40 Years Later*, CENTER FOR AM. PROGRESS (July 2, 2004), <http://www.americanprogress.org/issues/women/news/2004/07/02/891/the-civil-rights-act-40-years-later> (“Title VI is a potentially powerful tool, but regrettably remains the sleeping giant of civil rights laws.”).

4. *See* Memorandum from Thomas E. Perez, Assistant Att’y Gen. for the Civil Rights Div., U.S. Dep’t of Justice, to Fed. Funding Agency Civil Rights Dirs. (Aug. 19, 2010), *available at* [http://www.justice.gov/crt/about/cor/titlevi\\_memo\\_tp.pdf](http://www.justice.gov/crt/about/cor/titlevi_memo_tp.pdf) (offering resources on behalf of the Department of Justice, which is charged with coordinating compliance with the Civil Rights Act of 1964, to help agencies enhance enforcement efforts on the occasion of Title VI’s forty-fifth anniversary).

5. *See, e.g.*, *The Civil Rights Act 40 Years Later*, *supra* note 3.

6. Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in 10 NAT’L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 173, 193 (Steven Saltzman & Barbara M. Wolvovitz eds., 1995).

For those familiar with the provision, Title VI's potential has been easy to map. Because of the broad reach of federal financial assistance into state, local, and private institutions, Title VI provides a potentially powerful tool for addressing wide-ranging problems of racial and ethnic discrimination.<sup>7</sup> The statute not only prohibits intentional discrimination, but its regulations provide that funding recipients cannot "utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin."<sup>8</sup> During the time when these regulations were deemed privately enforceable, the statute provided an opportunity to address discriminatory practices that might evade remedy if required to satisfy the constitutional intent standard.<sup>9</sup> Because of Title VI's breadth of coverage, advocates urged its use beyond the traditional civil rights areas of education, employment, and housing to address the problems of environmental justice and racial disparities in health care that began to be identified in the 1980s and 1990s.<sup>10</sup>

Title VI's relative lack of prominence is nevertheless also easy to explain. Few people, if any, describe themselves as Title VI lawyers. Only a handful of Title VI cases have ever made it to the Supreme Court, and the number of Title VI cases litigated each year has always paled in comparison to most other civil rights statutes, particularly in comparison to the fair employment provisions of the Civil Rights Act of 1964. Indeed, the key problem with Title VI has been the question of private court enforcement. The statute contains no explicit private right of action, and until the court effectively implied one in its sister statute, Title IX,<sup>11</sup> would-be litigants were uncertain whether the statute was pri-

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7. *Id.* at 173.

8. *E.g.*, 28 C.F.R. § 42.104(b)(2) (2013) (emphasis added); 49 C.F.R. § 21.5(b)(2) (2013) (emphasis added).

9. *See* *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."). The Court's subsequent ruling in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* allows that circumstantial evidence, including impact, may be relevant to proof of intent. 429 U.S. 252, 265-66 (1977) ("The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point [for determining invidious discriminatory purpose]." (citation omitted) (internal quotation marks omitted)). Yet as a practical matter the "intent" standard is still often difficult for plaintiffs to meet.

10. *See* *Jenkins*, *supra* note 6, at 173 (contending that Title VI was "particularly well-suited to address emerging civil rights issues such as environmental racism and racially inequitable health care" (footnote omitted)); Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 *FORDHAM L. REV.* 939, 975-76 (1990) (proposing an evidentiary standard for using Title VI to address disparate impact discrimination in the provision of health care).

11. *See* *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (finding a private cause of action implicit in Title IX).

vately enforceable.<sup>12</sup> Outside of the school desegregation context, for much of its history, it has been unclear what exactly to do with Title VI's great substantive reach. And when private court enforcement activity began to pick up in the late 1990s, the Court's 2001 decision in *Alexander v. Sandoval* held that, in fact, no private right of action existed to enforce the statute's disparate impact regulations, shutting down much of the statute's litigation promise.<sup>13</sup> Title VI's struggles with private enforcement render it quite unlike any other major civil rights statute: its story, such as it is, cannot be told primarily through court enforcement.

This Essay examines the question of private enforcement of Title VI. My argument is that to focus primarily on private court enforcement of Title VI will continue to relegate the provision to the margins of civil rights discourse, to make the provision appear largely asleep. The practice of Title VI lawyering entails not just efforts to seek compliance through courts and administrative agencies, but a practice of implementation, expansion, and elaboration of the provision that is not easily described, but through which Title VI gains meaning. This Essay proceeds in three Parts. Part I shows how crucial decisions of the Supreme Court served to render precarious the court enforcement regime of Title VI. Part II argues that court enforcement has never told the full story of how Title VI's regulatory regime is implemented. This Part provides accounts of the role of private lawyers in shaping the rules and guidance under Title VI, overseeing agency implementation of the provision, and using Title VI as a starting point for more expansive forms of problem solving and advocacy. Part III considers the future of these forms of private implementation. This Part argues that enriching our account of private implementation of Title VI serves to reshape standard narratives of how civil rights norms are created and of what constitutes civil rights lawyering.

## I. POSSIBILITIES AND CONSTRAINTS OF PRIVATE COURT ENFORCEMENT

Private court enforcement of Title VI has always presented something of a puzzle. Contrast Title VI with its better-known sister provision, Title VII, which prohibits discrimination in employment.<sup>14</sup> Title VII contains a private

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12. See Jenkins, *supra* note 6, at 180 (“[T]here was uncertainty during the statute’s first 15 years of operation as to whether it would support an independent claim for relief.”).

13. 532 U.S. 275 (2001).

14. Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to 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.” Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a)(1) (2012). It also makes 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 oth-

right of action, allowing individuals to file a claim in court after first filing with the Equal Employment Opportunity Commission (EEOC).<sup>15</sup> We also know that drafters conceived of private enforcement as the central way of enforcing Title VII after Congress abandoned earlier plans of a strong federal enforcement agency.<sup>16</sup> The Civil Rights Act of 1991 further strengthened Title VII's private enforcement regime, providing compensatory and punitive damages to increase incentives for litigation.<sup>17</sup> Today, more litigation occurs under Title VII than under any other federal civil rights statute, and the Supreme Court frequently issues decisions on the scope of Title VII.<sup>18</sup> There can be no doubt that private enforcement is central to any understanding of Title VII.

The story of Title VI is different. The provision has no explicit language or regulations allowing plaintiffs to file claims in court; agency regulations explicitly allow plaintiffs to bring administrative complaints.<sup>19</sup> Damages to individuals are not the typical remedy for a violation of Title VI; rather the goal of Title VI's regime is securing compliance upon threat of termination of federal

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erwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(2).

15. *See id.* § 2000e-5(b), (e)-(f) (detailing the procedures for filing a Title VII charge with the EEOC and for bringing claims in court). Individuals must first file a charge of discrimination with the EEOC, and the EEOC then has 120 days to investigate the claim. *See id.* § 2000e-5(b), (f)(1) (detailing administrative exhaustion requirements). After 180 days, an individual may request that the EEOC issue a "notice of right to sue," which allows the claimant to proceed with a complaint in federal or state court. *See id.* § 2000e-5(f)(1) (describing procedures for bringing suit); 29 C.F.R. § 1601.28 (2013) (same).

16. *See* SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 117-19 (2010) (detailing legislative history behind Title VII's enforcement structure); *see also id.* at 106-09, 113-14 (describing the weakening of the EEOC's enforcement powers after key congressional players resisted an agency with strong adjudicative and enforcement powers). For an account of the legislative compromises that permitted court suits but weakened agency enforcement, see Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1205-06 (2011).

17. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified as amended at 42 U.S.C. § 1981a); *see also* FARHANG, *supra* note 16, at 190-92 (showing that Congress sought to enhance private enforcement of Title VII by creating a damages remedy).

18. For recent Title VII cases, see *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (requiring a showing of but-for causation to recover for claims of retaliation); *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013) (defining "'supervisor' for purposes of vicarious liability under Title VII" as one "empowered by the employer to take tangible employment actions against the victim"); *Lewis v. City of Chicago*, 560 U.S. 205, 211 (2010) (holding that a plaintiff who fails to file a timely charge when a disparate impact practice is adopted may challenge the later application of that practice in a disparate impact suit); and *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (holding that employers may take race-conscious steps to avoid disparate impact liability under Title VII only where there is a "a strong basis in evidence" of such liability).

19. *See, e.g.*, 34 C.F.R. § 100.7(b) (2013) (delineating the administrative complaint procedures for the Department of Education); 45 C.F.R. § 80.7(b) (2013) (delineating the administrative complaint procedures for the Department of Health and Human Services).

funds.<sup>20</sup> While the Supreme Court would come to imply a private right of action to enforce the provision in court,<sup>21</sup> litigation has always been less central under Title VI than under Title VII. Indeed proponents introduced Title VI as an alternative to litigation, a way of leveraging federal funds to promote school desegregation and removing the litigation from courts “where they had been bogged down for more than a decade” after the *Brown* decision.<sup>22</sup> As a leading school desegregation expert Gary Orfield once put it: Title VI aimed “to make litigation unnecessary.”<sup>23</sup> In this sense, Title VI grows out of a very different strand of civil rights law than Title VII: one that begins in the New Deal and uses executive and agency power to promote nondiscrimination.<sup>24</sup> And Title VI grants agencies meaningful power to enforce the statute. Section 601 of Title VI forbids discrimination in programs that receive federal funds, while section 602 gives agencies power to enforce this prohibition through binding regulations. Contrast this grant of regulatory power with its absence in Title VII: Congress granted the EEOC the power to issue only procedural—not binding substantive—regulations under Title VII.<sup>25</sup>

Yet Title VI has never been *only* about executive power; private actors have always been part of the implementation regime in agencies, to be sure, but also in courts. Private administrative enforcement is an explicit part of Title VI’s enforcement regime, and the regime has also come to encompass private court enforcement. Lower courts permitted litigation to directly enforce Title VI quickly after enactment of the statute despite the lack of an explicit private

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20. See 42 U.S.C. § 2000d-1 (directing agencies to secure compliance by terminating federal funds or “by any other means authorized by law”). Before terminating funds, an agency must meet a set of requirements including providing notice, a hearing, an attempt at voluntary compliance, and “an express finding on the record . . . of a failure to comply” with the statute. See *id.* Termination of funds is rare; agencies generally secure compliance through a compliance agreement or “Memorandum of Understanding.” See Jenkins, *supra* note 6, at 178-80 (internal quotation marks omitted) (describing the sanction and compliance process under Title VI).

21. The Court held in *Cannon* that Title IX, which is patterned on Title VI, was privately enforceable. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699-74 (1979).

22. COUNCIL OF THE WHITE HOUSE CONFERENCE “TO FULFILL THESE RIGHTS,” COUNCIL’S REPORT AND RECOMMENDATIONS TO THE CONFERENCE 41 (1966); see also 110 CONG. REC. 7054 (1964) (statement of Sen. John Pastore).

23. STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 44 (1995) (internal quotation mark omitted) (quoting Gary Orfield).

24. See, e.g., Exec. Order No. 8802, 3 C.F.R. 234 (1941) (establishing a “Committee on Fair Employment Practice” and forbidding discrimination by federal agencies); Exec. Order No. 10,479, 3 C.F.R. 961 (1953) (banning discrimination by contractors on federally financed construction sites).

25. See Civil Rights Act of 1964, tit. VII, § 713, 42 U.S.C. § 2000e-12 (granting the EEOC the power to issue “suitable procedural regulations to carry out the provisions of this subchapter”).

right of action.<sup>26</sup> Congress in 1976 permitted recovery of attorneys' fees by prevailing parties in Title VI cases,<sup>27</sup> thereby including the statute in a regime that incentivizes private court enforcement of civil rights laws. Then the Supreme Court's decision in *Cannon* confirmed that a private right of action existed to enforce Title IX, Title VI's sister statute.<sup>28</sup> *Cannon* addressed the question of private enforcement of Title IX, which prohibits discrimination on the basis of sex by educational institutions that receive federal funds.<sup>29</sup> Title IX is modeled on Title VI and similarly lacks express authorization of a private right of action in court.<sup>30</sup> The *Cannon* Court concluded that Title IX's language and legislative history permitted implication of a private right of action, relying heavily on the similarities between Title VI and Title IX.<sup>31</sup> After *Cannon*, Congress seemed to bring Title VI closer to the typical individual enforcement model of a civil rights statute when it abrogated states' Eleventh Amendment sovereign immunity in Title VI suits.<sup>32</sup>

At the same time, private court enforcement has proved precarious under Title VI, as seen in three cases considered in this Part. The first is *Regents of the University of California v. Bakke*,<sup>33</sup> which in finding that Title VI's antidiscrimination provisions were coextensive with the Equal Protection Clause effectively limited the substantive reach of the statute. The second is the *Adams*

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26. See, e.g., *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967) (holding that Title VI was privately enforceable in the context of a school desegregation case); see also *Blackshear Residents Org. v. Hous. Auth.*, 347 F. Supp. 1138, 1140, 1145 (W.D. Tex. 1972); *Hawthorne v. Kenbridge Recreation Ass'n*, 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972); *S. Christian Leadership Conference, Inc. v. Connolly*, 331 F. Supp. 940, 943 (E.D. Mich. 1971); *Gautreaux v. Chi. Hous. Auth.*, 265 F. Supp. 582, 583-84 (N.D. Ill. 1967).

27. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. § 1988) (providing that 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" (internal quotation mark omitted)).

28. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

29. Education Amendments of 1972, tit. IX, § 901, 20 U.S.C. § 1681 (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

30. See *Cannon*, 441 U.S. at 683 (noting that the statute does not expressly authorize a private right of action for injured parties).

31. See *id.* at 697-700 (finding that the language and legislative history of Title IX and Title VI presumed the availability of private court enforcement). Lower courts subsequently interpreted *Cannon* to apply to Title VI. See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 977 n.3 (9th Cir. 1984).

32. See Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified as amended at 42 U.S.C. § 2000d-7); see also *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (reading this amendment to Title VI as a "validation of *Cannon's* holding").

33. 438 U.S. 265, 287 (1978) (opinion of Powell, J.).

litigation, which in its final stages limited the ability of private actors to appeal to courts when agencies fail to effectively enforce Title VI.<sup>34</sup> And the last is *Alexander v. Sandoval*, which rejected private enforcement of the statute's disparate impact regulations.<sup>35</sup>

A. *Bakke and the Judicial Limits of Title VI "Itself"*

Decided in 1978, *Bakke* is not really a decision about private court enforcement of Title VI, but the Court's ruling would come to have significant implications for enforcement of Title VI. The *Bakke* case is known foremost for addressing the question of whether higher education institutions could consider race and ethnicity in their admissions. Less well known is that *Bakke* importantly limits the scope of private enforcement of Title VI by holding that the Title VI prohibition on discrimination must be read coextensively with the Equal Protection Clause.<sup>36</sup>

This aspect of *Bakke* may have come as a surprise to anyone who was paying attention to the Court's Title VI jurisprudence. Just four years before *Bakke*, the Court had faced the question of the scope of Title VI in *Lau v. Nichols*.<sup>37</sup> *Lau* involved a class action lawsuit on behalf of non-English-speaking Chinese students against the San Francisco Unified School District for its failure to provide the supplemental education and other interventions necessary to help them learn English.<sup>38</sup> The lower courts had rejected the plaintiffs' claim, ruling that the disadvantages faced by the students were due to their own socioeconomic background and were "created and continued completely apart from any contribution by the school system."<sup>39</sup> Justice Douglas's very brief opinion for the Court rejected that argument and reversed. Though Justice Douglas quoted the central antidiscrimination language of Title VI, the holding appears to depend on the regulations promulgated by the Department of Health, Education, and Welfare (HEW) to enforce Title VI.<sup>40</sup> These regulations forbade educational practices with a discriminatory effect,<sup>41</sup> required school districts to take steps to

34. 356 F. Supp. 92 (D.D.C.), *modified*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam). For a discussion of the *Adams* litigation, see text accompanying notes 79-92 below.

35. 532 U.S. 275 (2001) (declining to imply a private right of action to enforce Title VI's disparate impact regulations).

36. *See infra* notes 49-58 and accompanying text.

37. 414 U.S. 563 (1974).

38. *See id.* at 564.

39. *Id.* at 565 (quoting *Lau v. Nichols*, 483 F.2d 791, 797 (9th Cir. 1973)) (internal quotation mark omitted).

40. *Id.* at 566-69.

41. *See id.* at 568 ("[A] recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as re-



address the needs of students with language deficiencies,<sup>42</sup> and prohibited school districts from providing services to some students that were not provided to others (part of the factual context of the lawsuit was that 1000 non-English-speaking Chinese students were receiving supplemental English-language instruction, but another 1800 were not).<sup>43</sup>

Justice Douglas's opinion says so little that it is hard to discern the questions lurking in *Lau*—most fundamentally whether private individuals had the power to enforce Title VI and its regulations, as well as the substantive scope of “discrimination” prohibited by Title VI. For Justice Douglas, the questions were easily resolved. The relevant enforcement frame was one of contract. The school district had “contractually” agreed to be governed by Title VI and its regulations,<sup>44</sup> and the statute and regulations were within Congress's (and HEW's) power,<sup>45</sup> leaving only the question of whether the school district was properly complying with this contract.

One of the concurring opinions provides hints of the debates that would come in later cases regarding the enforceability and substantive scope of Title VI. In his concurrence, Justice Stewart seemed doubtful that the prohibitions of section 601, standing alone, provided a basis for the plaintiffs' claim. For Justice Stewart, the viability of the cause of action depended on the prohibitions of the regulation, making the key question the validity of the regulations. Applying a pre-*Chevron* analysis that the regulation need only be “reasonably related to the purposes of the enabling legislation” and that department regulations are entitled to “great weight,” Justice Stewart satisfied himself that the regulations

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spect individuals of a particular race, color, or national origin.” (alteration in original) (quoting 45 C.F.R. § 80.3(b)(2))).

42. *See id.* at 567 (“In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded ‘to rectify the language deficiency in order to open’ the instruction to students who had ‘language deficiencies.’” (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595, 11,595 (July 18, 1970))).

43. *See id.* (“HEW’s regulations specify that the recipients may not . . . ‘[p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program’ [or] . . . ‘[r]estrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.’” (citation omitted) (quoting 45 C.F.R. § 80.3(b)(1))); *id.* at 569 (Stewart, J., concurring) (“It is uncontested that more than 2,800 schoolchildren of Chinese ancestry attend school in the San Francisco Unified School District system even though they do not speak, understand, read, or write the English language, and that as to some 1,800 of these pupils the respondent school authorities have taken no significant steps to deal with this language deficiency.”).

44. *Id.* at 568 (majority opinion).

45. *See id.* at 569 (“The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here.” (citation omitted)); *see also id.* at 566 (“The Department of Health, Education, and Welfare (HEW) . . . has authority to promulgate regulations prohibiting discrimination in federally assisted school systems.”).

were a valid exercise of HEW's authority.<sup>46</sup> Justice Stewart's opinion also carefully noted that the school district had not contested the plaintiffs' standing to sue, which Stewart too seemed to frame as a question of contract law, casting the plaintiffs as third-party "beneficiaries of the federal funding contract between" HEW and the school district.<sup>47</sup> Despite this lack of clarity, both the statute and its regulations seemed to be privately enforceable after *Lau*. Four years later, however, *Bakke* held that the statutory prohibitions of Title VI extended no further than the Constitution.

The plaintiffs in *Bakke* had argued that the admissions program of the medical school of the University of California at Davis violated Title VI as well as the Constitution by assuring admission for a specified number of minority students.<sup>48</sup> Following the canon of constitutional avoidance, Justice Powell's opinion announcing the judgment of the Court addressed the statutory question prior to the constitutional question.<sup>49</sup> Justice Powell's first move was to assume, without deciding the "difficult" question, that the statute creates a private right of action.<sup>50</sup> Justice Powell next examined the meaning of "discrimination" in section 601 of Title VI.<sup>51</sup> Admitting that the term "discrimination" is amenable to different meanings, Justice Powell turned to Title VI's legislative history.<sup>52</sup> Looking through the House and Senate legislative history of Title VI, he found that Congress was concerned about the problems facing blacks, and that Congress did not consider the question of racial preferences.<sup>53</sup> For support, Justice Powell relied on the language of Senator Hubert Humphrey, a key sponsor of the Civil Rights Act of 1964, that "the purpose of Title VI was 'to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.'"<sup>54</sup> Justice Powell drew also on remarks by Senator Abraham Ribicoff, another proponent of the legislation, asserting that "there is a constitutional restriction against discrimination in the use of federal funds; and title VI

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46. *See id.* at 571 (Stewart, J., concurring) (internal quotation marks omitted); *see also id.* at 572 n.3 ("The United States as *amicus curiae* . . . and the [school district] appear to concede, that the guidelines were issued pursuant to § 602.").

47. *Id.* at 571 n.2.

48. *See* 438 U.S. 265, 269-70 (1978) (opinion of Powell, J.).

49. *Id.* at 281 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). The parties had initially not briefed the Title VI question, which was not addressed by the courts below, so the Court ordered supplementary briefing on this question. *See id.*

50. *Id.* at 283 (finding it unnecessary to "address this difficult issue" since the issue was not argued or decided by the courts below).

51. *Id.* at 284.

52. *Id.*

53. *Id.* at 284-85.

54. *Id.* at 286 (quoting 110 CONG. REC. 6544 (1964) (statement of Sen. Hubert Humphrey)).

simply spells out the procedure to be used in enforcing that restriction.”<sup>55</sup> Against the plaintiffs’ claim that Title VI forbade any consideration of race, Justice Powell used this evidence to reject the notion that the statute enacted a “purely color-blind scheme.”<sup>56</sup> Rather, Justice Powell found that Congress was concerned about ensuring equal treatment in the furtherance of “constitutional principles.”<sup>57</sup> Justice Powell concluded that “[i]n 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.”<sup>58</sup>

Justice Powell’s decision sought to protect Title VI against a reading that forbids all forms of racial distinction, a “purely color-blind scheme.” Instead, Justice Powell offered that Title VI is concerned with addressing caste, segregation, and equality just as is the Fourteenth Amendment.<sup>59</sup> But the decision also limits Title VI by tethering it to the Court’s view of the Equal Protection Clause.<sup>60</sup>

*Bakke*’s pronouncements on Title VI shaped its private enforcement in the years to come. As is well known, the central aspect of Justice Powell’s *Bakke* opinion—holding that the Equal Protection Clause allows institutions of higher education to consider race and ethnicity as factors in their admissions program in furtherance of “diversity”—was joined by no other Justice.<sup>61</sup> Yet Justice Powell’s argument that Title VI should be read as an implementation of the Fourteenth Amendment effectively became binding law when four Justices concurred in this aspect of the ruling. Justice Brennan (writing for himself and Justices White, Marshall, and Blackmun) agreed that Title VI “goes no further

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55. *Id.* (quoting 110 CONG. REC. 13,333 (1964) (statement of Sen. Abraham Ribicoff)) (internal quotation mark omitted).

56. *Id.* at 284.

57. *Id.* at 285.

58. *Id.* at 287.

59. *See id.* at 285 (“The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements [of members of Congress] . . . generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs.”).

60. Indeed, there is a dissonance between Justice Powell’s reading of Title VI in light of its anticaste legislative purpose and his acceptance of the argument that the Fourteenth Amendment requires the same scrutiny of racial remedies as it does of policies informed by a purpose to subjugate. *See id.* at 295 (“The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments.”).

61. In their partial concurrence, four Justices agreed with Justice Powell that “a plan like the ‘Harvard’ [diversity] plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.” *Id.* at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part) (citation omitted). While most lower courts (and institutions) followed the “diversity” rationale, its status as binding precedent was only assured after the Court revisited the question of race-conscious higher education admissions in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself.”<sup>62</sup>

The effect of *Bakke* was to tie Title VI to the implementation of the Court’s own conception of equal protection, and to limit private litigants in advancing a broader set of rights claims that might be furthered by statutory and regulatory, as opposed to constitutional, norms. As Justice Brennan concluded after touring its congressional history, Title VI “did not create any new standard of equal treatment beyond that contained in the Constitution.”<sup>63</sup> This conception of Title VI would immediately place the *Bakke* decision in tension with the Court’s ruling in *Lau*, a point recognized by Justice Brennan’s opinion. *Lau* could be read to hold that Title VI prohibits some actions based on their effect on certain groups.<sup>64</sup> But two years after *Lau*, the Court held in *Washington v. Davis* that the Equal Protection Clause does not forbid actions solely because they have a racially disproportionate impact.<sup>65</sup> After *Bakke*, the *Davis* holding would offer a similar limiting principle for Title VI. As Justice Brennan realized, holding that Title VI is no broader than the Constitution thus raised “serious doubts concerning the correctness of what appears to be the premise of [the *Lau*] decision.”<sup>66</sup>

This tethering of Title VI to judicially constructed meanings of equal protection is not an inevitable reading of the statute. Justice Brennan seemed to accept a more dynamic reading of the statute when he contended that judges, administrative agencies, the passage of time, and experience would inform the contours of Title VI’s prohibition on “discrimination.”<sup>67</sup> Further, Justice Brennan noted that the scope of the Equal Protection Clause was “in a state of flux and rapid evolution” at the time Congress was constructing the Civil Rights Act of 1964.<sup>68</sup> And in reality, close examination of the legislative history reveals little support for the notion that Congress would have limited Title VI to inten-

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62. *Bakke*, 438 U.S. at 324-25 (Brennan, J., concurring in the judgment in part and dissenting in part). Of course these Justices took a more expansive view of the constitutional mandate. *Id.* at 328 (“[Title VI] does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.”).

63. *Id.* at 331.

64. *See id.* at 352 (noting that *Lau* could be read to mean that “Title VI proscribes conduct which might not be prohibited by the Constitution”). In his opinion, Justice Powell rejected the argument that *Lau* provided support for an idea of colorblindness. In doing so, he distinguished *Lau* as resting “solely on the statute, which had been construed by the responsible administrative agency to reach educational practices” with a disparate impact. *Id.* at 304 (opinion of Powell, J.). Interestingly, Justice Powell’s opinion did not explore the potential conflict between this aspect of *Lau* and *Washington v. Davis*, 426 U.S. 229 (1976).

65. 426 U.S. 229.

66. *Bakke*, 438 U.S. at 352 (Brennan, J., concurring in the judgment in part and dissenting in part).

67. *Id.* at 337.

68. *Id.* at 339.

tional discrimination. Introducing the provision that would become Title VI, President Kennedy announced its broad goals, stating that “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”<sup>69</sup> Key sponsor Senator Humphrey indicated that Title VI prohibits practices of segregation and discrimination that result in racial discrimination even where they may not be unconstitutional (such as when funds go to support private, segregated institutions). Rather, he stated that the purpose of Title VI was to “insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.”<sup>70</sup> Several of Title VI’s proponents did align the statute with the Constitution, but at the time of the passage of the Civil Rights Act of 1964 there was no sharp distinction in constitutional law between intent and impact,<sup>71</sup> and members of Congress articulated constitutional norms that went beyond intent or invidiousness.<sup>72</sup> But while Justice Brennan acknowledged that the meaning of Title VI “could be shaped by experience, administrative necessity, and evolving judicial doctrine,”<sup>73</sup> the Court’s core holding seems to render Title VI a procedure for terminating funds or encouraging voluntary compliance with norms determined solely by reference to the Court’s constitutional rulings.

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69. CIVIL RIGHTS: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 88-124, at 12 (1963).

70. See *Bakke*, 438 U.S. at 332-33 (Brennan, J., concurring in the judgment in part and dissenting in part) (quoting 110 CONG. REC. 6544 (1964) (statement of Sen. Hubert Humphrey)) (“In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions . . . . In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.” (quoting 110 CONG. REC. at 6544 (statement of Sen. Hubert Humphrey)) (internal quotation mark omitted)).

71. See, e.g., *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1290 (5th Cir. 1971), *aff’d*, 461 F.2d 1171 (5th Cir. 1972) (per curiam); *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff’d sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

72. See, e.g., 110 CONG. REC. at 1528 (statement of Rep. Emanuel Celler) (“[T]he Constitution may impose on the United States an affirmative duty to preclude racial segregation or discrimination by the recipient of Federal aid.”). See generally Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 GEO. L.J. 1, 29-30 (1981) (providing evidence of the lack of agreement among members of the legislative and executive branches on the meaning of discrimination).

73. *Bakke*, 438 U.S. at 337 (Brennan, J., concurring in the judgment in part and dissenting in part); see also *id.* at 338 (“Specific definitions [of discrimination] were undesirable, in the views of the legislation’s principal backers, because Title VI’s standard was that of the Constitution and one that could and should be administratively and judicially applied.”); *id.* at 339 (noting that Attorney General Robert Kennedy testified that the “rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts”).

The limitations of hitching Title VI to court-determined equal protection are made plain by Justice Powell's opinion in *Bakke*. Justice Powell's analysis of the constitutional contours of affirmative action depends on the judiciary's institutional context: he noted that the judiciary lacks competence to determine which groups should benefit from affirmative action.<sup>74</sup> (The Court's solution was to review all equal protection claims under strict scrutiny.) These same considerations may be less compelling when administrative actors participate in defining the meaning of "discrimination." This hitching excises the broader set of inclusionary norms that Title VI seems to encompass or permit—that subsidization might perpetuate forms of inequality, and that government actors have an affirmative duty to promote inclusion.<sup>75</sup>

A final problem with *Bakke* is that it produced an uneasy peace between Title VI and its regulations—raising inevitable questions about how far beyond a prohibition on "intentional discrimination" agency regulations could extend. Relevant to the examination here of private enforcement, *Bakke* made the substantive scope and the private enforceability of Title VI less certain. Title VI would not necessarily be a location for staking new forms of rights claims not already recognized by the Constitution. And, five years later, a majority of Justices relied on *Bakke* to conclude that Title VI itself by its terms was limited to intentional discrimination.<sup>76</sup> *Bakke* would also make consequential the Court's holding—several decades later in *Sandoval*—that Title VI's regulations are not privately enforceable.<sup>77</sup>

#### B. Adams and the Limits of Judicial Oversight

Court decisions have also curtailed another potential avenue of private court enforcement of Title VI: judicial review of agency failure to enforce the

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74. *Id.* at 296-97 (opinion of Powell, J.) ("There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. . . . The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.").

75. Drafters and early shapers of Title VI often referenced it as a vehicle not just for cleansing federal funds of unconstitutional practices, but of advancing substantive inclusion. See, e.g., GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 94 (1969) (citing a 1965 memorandum in which the U.S. Commissioner of Education wrote that "Title VI can become . . . a condition necessary to progress in the future").

76. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting). The opinion was highly fractured, but the Court in a subsequent opinion addressing the Rehabilitation Act of 1973 (which was modeled on Title VI), interpreted *Guardians* as holding that "Title VI itself directly reached only instances of intentional discrimination." See *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

77. See discussion *infra* Part I.C.

statute. If Title VI's main regulatory approach is to require the executive branch to enforce rules, the question naturally becomes what happens when an agency fails to enforce? A court order to enforce does not appear to be part of the answer. In *Women's Equity Action League v. Cavazos*, the D.C. Circuit held that private parties could not bring court actions against federal officials for failing to enforce Title VI.<sup>78</sup>

The case reversed an earlier holding by the D.C. Circuit in the landmark *Adams* litigation. By several accounts, HEW's Office for Civil Rights did little to enforce the Civil Rights Act of 1964's prohibition of segregation in institutions of higher education.<sup>79</sup> By the time of the Nixon Administration, enforcement of Title VI was "lax" according to civil rights groups.<sup>80</sup> In response, the NAACP Legal Defense and Educational Fund (LDF) initiated litigation in the District Court for the District of Columbia alleging that HEW officials had failed to enforce Title VI.<sup>81</sup> The district court agreed, requiring the agency to start compliance procedures against ten state systems of higher education.<sup>82</sup> The D.C. Circuit sustained the action, holding that the terms of Title VI were not so broad as to preclude judicial review.<sup>83</sup>

Initially, *Adams* was a success. The plaintiffs achieved an order from the district court requiring that HEW comply with deadlines for processing administrative complaints.<sup>84</sup> The litigation continued through the 1980s with the court ordering HEW to refuse approval of state higher education plans that were insufficient in dismantling dual systems of higher education.<sup>85</sup> At one point in the litigation, the district court ordered HEW to hire additional civil rights workers to enforce the *Adams* decree with respect to higher education institutions.<sup>86</sup>

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78. 906 F.2d 742, 748 (D.C. Cir. 1990).

79. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 55 (1991) (explaining that until 1968 the Office for Civil Rights had no compliance review program for higher education institutions, and as late as January 1975 had only terminated funds to two small institutions).

80. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 395 (1994).

81. See *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam).

82. See *id.* at 94-95. The plaintiffs had also challenged the agency's failure to vigorously enforce Title VI with regard to certain primary and secondary institutions, and the district court ordered that the agency start enforcement proceedings against nearly 200 school districts that were out of compliance with Title VI or the Supreme Court's school desegregation rulings. See *id.* at 96-97.

83. See *Adams*, 480 F.2d at 1162 (rejecting applicability of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)).

84. See *Adams*, 356 F. Supp. at 95.

85. See *Adams v. Califano*, 430 F. Supp. 118, 120-21 (D.D.C. 1977).

86. See *Adams v. Bell*, 711 F.2d 161, 176 n.24 (D.C. Cir. 1983) (en banc) (Wright, J., dissenting); GREENBERG, *supra* note 80, at 397.

However, subsequent decisions limited the initial reach of *Adams*. In the 1970s, the *Adams* litigation expanded to include not just Title VI, but also Title IX and the Rehabilitation Act, encompassing allegations of noncompliance extending to programs in fifty states, not just by HEW and its successor the Department of Education, but also by the Department of Labor.<sup>87</sup> The expanded case came before the D.C. Circuit in *Cavazos*, and the court ruled that there would be limits to court oversight.<sup>88</sup> According to the D.C. Circuit, the action, which began as a school desegregation case, had expanded to “colossal proportions” and the claims had shifted from a deliberate agency policy of nonenforcement to arguments that agencies had failed to execute compliance as “promptly or expeditiously as plaintiffs would like.”<sup>89</sup> The court held that plaintiffs had no right to “across-the-board judicial supervision” of federal agency enforcement activities.<sup>90</sup> According to the court, this conclusion was the inevitable result of the Supreme Court’s ruling in *Cannon*, which, in implying a private right of action under Title IX to maintain claims against grant recipients, held that plaintiffs in Title IX and Title VI cases could not maintain suits directly against agencies for failure to enforce the law.<sup>91</sup> For similar reasons, the court also declined to find a right to pursue a remedy under the Administrative Procedure Act, reasoning that *Cannon*’s grant of a private court remedy took away judicial oversight of federal government enforcement.<sup>92</sup>

The bottom line of the D.C. Circuit’s decision is that private parties cannot bring suits to require agencies to more vigorously enforce Title VI, thus limiting the ability of private litigants to use courts as a means of agency oversight.

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87. See *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 745 (D.C. Cir. 1990) (describing expansion of the *Adams* litigation); see also *id.* at 746 (detailing “swell[ing]” of litigation to include other “statutory civil rights guarantees”).

88. See *id.* at 748-79; see also HALPERN, *supra* note 23, at 290 (“[Courts] made it evident . . . that it was the sprawling and unwieldy expansion of the *Adams* litigation that necessitated its dissolution.”).

89. *Women’s Equity Action League*, 906 F.2d at 744-45 (internal quotation mark omitted).

90. *Id.* at 749.

91. See *id.* at 747 (“The message of *Cannon* was that no private right of action should be inferred from federal legislation absent a showing of approbation from the lawmaking branch. Moreover, *Cannon*’s examination of the legislative history of Title VI suggested that Congress wished to ward off suits against the government of the very kind plaintiffs now press.” (citations omitted)).

92. A prior decision by the D.C. Circuit ruled that review under section 704 of the Administrative Procedure Act was inappropriate for plaintiffs who had other remedies. See *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (en banc). In *Women’s Equity Action League*, the D.C. Circuit relied on *Council of & for the Blind* in ruling that *Cannon* precluded Administrative Procedure Act review. See 906 F.2d at 751 (“So far as we can tell, the suit targeting specific discriminatory acts of fund recipients is the only court remedy Congress has authorized for private parties . . .”). The D.C. Circuit also relied on *Council of & for the Blind* to reject plaintiffs’ argument that they had a right of action under either the Mandamus Act or the Constitution. *Id.* at 752.



### C. Sandoval and the Limits of Private Enforcement

The D.C. Circuit relied on the availability of private court enforcement to limit oversight suits against agencies, but the Supreme Court subsequently placed important limits on the scope of private court enforcement. As even casual observers of Title VI know, the Court held in *Alexander v. Sandoval* that Title VI's disparate impact regulations were not privately enforceable.<sup>93</sup> The case presented a devastating blow to the efforts of civil rights groups to expand disparate impact litigation under Title VI.<sup>94</sup> Disparate impact counters the difficulties often associated with proving intentional discrimination, and allows redress of contemporary forms of exclusion not traceable to judicial understandings of intentional discrimination.

The great potential of private enforcement of Title VI's disparate impact regulations can be seen in important cases brought in the 1980s and 1990s that challenged practices that led to the overrepresentation of minority children in special education classes<sup>95</sup> and disproportionate siting of heavily polluting facilities in minority communities.<sup>96</sup> One of the most groundbreaking uses of Title VI was the litigation concerning public transportation inequities in Los Angeles. Minority bus riders challenged the Los Angeles County Metropolitan Transportation Authority (MTA) for funding and expanding rail services utilized largely by suburban, white commuters, while reducing funding for buses primarily ridden by minorities.<sup>97</sup> These practices, the plaintiffs asserted, constituted both intentional discrimination in violation of the Equal Protection Clause and disparate impact discrimination in violation of Title VI and its regulations.<sup>98</sup> After the district court found that the MTA's actions violated Title VI's disparate impact regulations, the MTA and the plaintiffs negotiated a consent decree that increased funding and services for the bus system.<sup>99</sup>

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93. 532 U.S. 275 (2001).

94. See Philip Tegeler, *Title VI Enforcement in the Post-Sandoval Era*, POVERTY & RACE (Poverty & Race Research Action Council, Wash., D.C.), Sept.-Oct. 2010, at 5, 5 (discussing the devastating effect of *Sandoval* on civil rights advocacy).

95. See *Larry P. v. Riles*, 793 F.2d 969, 981-83 (9th Cir. 1984) (holding that the educational practices that disproportionately placed black students in special education classes lacked adequate justification and violated Title VI).

96. See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927-28, 937 (3d Cir. 1997) (allowing the plaintiffs to go forward with their claim that a state's issuance of permits to operate waste processing facilities in a predominantly black community violated Title VI), *vacated*, 524 U.S. 974 (1998).

97. See *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 263 F.3d 1041, 1043-44 (9th Cir. 2001) (summarizing the plaintiffs' claims).

98. See *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1117 & n.1 (9th Cir. 2009).

99. *Labor/Cnty. Strategy Ctr.*, 263 F.3d at 1043-44 (holding that the district court and the special master properly interpreted the consent decree the parties had reached). As a student intern at LDF, I assisted in the initial stages of this litigation.

The *Sandoval* case put a practical end to this strategy of private court enforcement of disparate impact rules. A key element of the Court's ruling depended on the *Bakke* holding that Title VI itself reached no further than the Constitution.<sup>100</sup> A majority of Justices in *Guardians*, which held that there was a private right of action to enforce Title VI, had relied on *Bakke* to construe the Title VI statute as limited to intentional discrimination.<sup>101</sup> Five Justices, however, had also held that the disparate impact regulations issued pursuant to Title VI were a valid exercise of agencies' authority to effectuate its provisions.<sup>102</sup> The holding in *Guardians* about the scope of the substantive prohibitions of Title VI did not necessarily answer whether these presumably valid disparate impact regulations could be privately enforceable. This question was answered in *Sandoval* when five Justices agreed with the state defendant that the private right of action did not extend to Title VI's regulations.<sup>103</sup>

Much has been written about the doctrinal implications of the case.<sup>104</sup> The practical implications for Title VI enforcement in court are clear: an end to the private court enforcement of disparate impact regulations. Most advocates characterize Title VI as substantially weakened as a result of the decision, and prominent groups have subsequently sought legislation allowing private enforcement claims.<sup>105</sup>

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In different ways *Sandoval*, *Bakke*, and *Adams* limit the ways in which private actors can utilize courts to implement Title VI. In the next Part, I show that court implementation interacts with a richer regulatory regime of which courts are only part. Part III then looks at how private actors have deployed regulatory and other nonlitigation strategies to implement and shape the meaning of Title VI.

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100. See *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).

101. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 641 (Stevens, J., dissenting); see also *supra* note 76 (noting highly fractured nature of the *Guardians* decision).

102. See *id.* at 591-92 (opinion of White, J.); *id.* at 623-24 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, J., dissenting).

103. See *Sandoval*, 532 U.S. at 293.

104. See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 197-98 (situating the *Sandoval* decision within the Court's jurisprudence on implied rights of action).

105. See Tegeler, *supra* note 94, at 5 (describing the impact of *Sandoval* on advocacy efforts and initial efforts to pursue a legislative "fix" for the decision (internal quotation marks omitted)).

## II. SHAPING REGULATION

Title VI's less prominent status in the canon of civil rights laws is perhaps explained by the relatively low visibility of Title VI in courts, which emerges in part from the uncertain private court enforcement regime described in Part I. Yet to focus on Title VI's enforcement in courts likely understates the role of private lawyers in the enforcement and implementation of Title VI. Behind examples of strong executive enforcement of Title VI stand private lawyers. For instance, commentators have long credited Title VI with an important role in helping advance school desegregation after *Brown v. Board of Education*.<sup>106</sup> After passage of Title VI, the threat of the loss of federal funds alone led a significant number of school districts to desegregate.<sup>107</sup> Other school districts, however, required more aggressive use of Title VI by executive branch authorities, including federal investigations and the commencement of proceedings to terminate federal funds.<sup>108</sup> Yet this type of executive enforcement itself depended on private enforcement activity. Administrative complaints and litigation were the most visible part of this enforcement scheme<sup>109</sup>—a strategy that leverages the explicit role the statute gives to individuals to bring complaints before agencies.<sup>110</sup> But implementation of Title VI to advance school desegregation also entailed lawyering advocacy to create expansive rules and prod agency enforcement to move school systems toward meaningful integration. This work outside of courts should also be understood as lawyering to implement and enforce Title VI. Such advocacy creates locations for elaborating the meaning of Title VI that extend beyond the strictures imposed by court decisions like *Sandoval* and *Bakke* to encompass some of the norms underlying Title VI, including dismantling patterns of exclusion, preventing subsidization of inequality, and using government funds and programs to affirmatively further inclusion.

In this Part, I show how Title VI lawyering is manifest in advocacy to shape the rules and guidance that govern regulated actors (rules that sometimes emerge after private administrative and judicial enforcement actions), oversight of agencies' implementation and enforcement, and leveraging of Title VI com-

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106. 347 U.S. 483 (1954).

107. See, e.g., ORFIELD, *supra* note 74, at 228, 262-63 (noting that Virginia's enforcement of Title VI school desegregation guidelines and the "lure" of federal funds contributed to desegregation gains, that early Title VI enforcement efforts by HEW were successful, and that "[t]he Civil Rights Act forced Virginia to choose between segregation and progress" and the state "chose progress"); ROSENBERG, *supra* note 79, at 97-100 (collecting data and reports showing that financial inducements prompted important increases in desegregation and specifically noting that "along with the lure of federal dollars was the threat of having them taken away" through federal enforcement proceedings).

108. See ROSENBERG, *supra* note 79, at 50-54, 97-100.

109. See *infra* notes 116-19 and accompanying text (describing the work of private civil rights lawyers in enforcing Title VI).

110. See *supra* note 19.

plaints outside the strictures of the regulatory regime to prompt remedies and gain broader public visibility for particular problems. This type of lawyering itself takes many forms, with lawyers not only bringing lawsuits and drafting administrative complaints, but proposing and drafting regulations, and working with policy experts and community-based organizations to advocate for best practices and policy solutions.

### A. *Expanding Rules*

#### 1. *School desegregation*

The role of lawyers in shaping Title VI's regulatory regime is most prominent in the context of efforts to achieve school desegregation in the 1960s through the 1970s. By many accounts, enforcement of Title VI by HEW was a significant contributing factor in the desegregation of Southern school districts.<sup>111</sup> After enactment of Title VI in 1964, HEW issued guidelines that provided federal funds only to school districts that submitted plans showing that they had either desegregated their school systems, had submitted to court-ordered plans, or would pursue voluntary desegregation plans.<sup>112</sup> HEW strengthened the rules on what constituted acceptable voluntary desegregation plans in 1965 and further tightened these rules in March 1966.<sup>113</sup> In March 1968, HEW issued more specific regulations requiring "complete desegregation by the fall of 1968, or, in some cases, fall of 1969."<sup>114</sup>

When academic commentators recognize the power of executive enforcement of Title VI, particularly in comparison to the prior slow decade of school desegregation litigation in courts, they credit HEW enforcement of these guidelines.<sup>115</sup> Yet even this story of agency power depended in part on the role of private lawyers, whose judicial and political advocacy crucially helped shaped the rules that guided HEW enforcement. Rulings achieved in private constitutional litigation interacted with agency rules. The school desegregation litigation brought by civil rights lawyers became a key location for affirming and enforcing HEW's guidelines.<sup>116</sup> Commentators have noted that many Southern

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111. See ROSENBERG, *supra* note 79, at 48-54 (reporting a range of data and results showing the impact of HEW's Title VI enforcement efforts on school desegregation in the South); *id.* at 53 (reporting findings that "districts desegregating under HEW pressure were less segregated in 1972 than were districts desegregating under court orders" although the districts that desegregated under court order "were more segregated to start with").

112. *See id.* at 48.

113. *See id.*

114. *Id.*

115. *See, e.g.,* ORFIELD, *supra* note 75, at 262-63; ROSENBERG, *supra* note 79, at 48.

116. *See, e.g.,* Singleton v. Jackson Mun. Separate Sch. Dist., 348 F.2d 729, 730-31 (5th Cir. 1965) (giving "great weight" to guidelines set by HEW's Office of Education in requiring a school district to desegregate four grades); Price v. Denison Indep. Sch. Dist. Bd. of

school districts preferred desegregation administered by courts rather than by administrators,<sup>117</sup> and that Title VI became more effective when courts (in particular the Fifth Circuit) embraced the HEW guidelines.<sup>118</sup> HEW's enforcement activities would not have been possible without willing administrators, and the guidelines no doubt provoked strong opposition from many school districts and congressional opponents of school desegregation.<sup>119</sup> Yet the example of school desegregation shows how private litigation interacted with executive power to amplify the power of Title VI.

## 2. *Transportation equality directives*

More recently, the role of private lawyers has been evident in the shaping of Title VI's regulations in the area of transportation equity. Over the past decade, the Department of Transportation (DOT) has promulgated a remarkable set of rules and guidance implementing Title VI. The DOT's Federal Transit Administration (FTA), which provides funding for mass transit both via formula and on a discretionary basis, requires that certain grant recipients conduct impact assessments of their programs and activities on minority communities and take steps to remedy and avoid practices that have a disparate impact.<sup>120</sup> In particular, large mass transit programs are required to gather and analyze data to ensure that minority communities are benefiting fairly from mass transit pro-

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Educ., 348 F.2d 1010, 1012-13, app. (5th Cir. 1965) (requiring adherence to HEW's 1965 guidelines, and appending the HEW guidelines to the decision). Litigation brought directly by HEW against school districts also played a pivotal role in the enforcement of the guidelines. *See, e.g.,* United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 845, 847-48, 856-57 (5th Cir. 1966) (upholding HEW's 1966 guidelines), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (en banc) (per curiam).

117. *See* HALPERN, *supra* note 23, at 48 (quoting a HEW official as noting that school boards often found it "politically more comfortable" to be forced to desegregate by court order").

118. *See id.* at 42 (discussing the "synergistic" relationship between HEW and the federal courts that would produce between 1964 and 1968 the "first major successes" in addressing school segregation in the South); ROSENBERG, *supra* note 79, at 100 (describing how HEW guidelines empowered courts to enforce school desegregation norms).

119. *See* HALPERN, *supra* note 23, at 47-48 (detailing Southern opposition to the 1965 guidelines); *id.* at 54-57 (detailing congressional and Southern opposition to the 1966 guidelines).

120. *See* 49 C.F.R. §§ 21.1, 21.3, 21.5 (2013) (imposing requirements of nondiscrimination and inclusion on federal grantees); FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., CIRCULAR FTA C 4702.1A, TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS II-1 to -3 (2007), *available at* [http://www.fta.dot.gov/documents/Title\\_VI\\_Circular\\_4702.1A.pdf](http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf) (listing guidelines intended to increase access to mass transit, promote participation in planning by underrepresented groups, and prevent racial and ethnic disparities in the environmental effects of transportation).

grams,<sup>121</sup> to determine whether significant system-wide changes in services and fares have a discriminatory impact on minority groups,<sup>122</sup> to conduct ongoing monitoring to ensure that prior decisions are not having a disparate impact,<sup>123</sup> and to take corrective action to remedy found disparities.<sup>124</sup> Funding recipients must also integrate into their programs environmental justice concerns—determining whether their programs and activities have adverse health and environmental impacts on minority communities and taking efforts to mitigate or avoid these impacts.<sup>125</sup> These rules require grantees to include underrepresented groups in transportation planning by, among other efforts, conducting outreach to minorities and persons with limited English proficiency and furthering participation by these groups.<sup>126</sup> The Federal Highway Administration, the office of the DOT that administers surface transit programs, similarly requires that grant recipients evaluate the environmental justice impact of their programs and assess the impact of their transportation projects on communities before taking action.<sup>127</sup>

In prior writing, I have called these rules implementing Title VI “equality directives,” because they place affirmative requirements of equity and inclusion on state and local grantees and use *ex ante* regulatory power rather than relying primarily on *ex post* court enforcement.<sup>128</sup> In this sense, the rules might be cast as a manifestation of regulatory rather than private power. Transportation is a particularly fitting place for such affirmative government intervention. Federal, state, and local decisions concerning the funding and construction of transit and highway development powerfully shape patterns of race, class, and ethnic inclusion. Past federal funding for highway development has helped construct

121. See FED. TRANSIT ADMIN., *supra* note 120, at V-1 (“Requirement to Collect Demographic Data”).

122. See *id.* at V-5 (“Requirement to Evaluate Service and Fare Changes”).

123. See *id.* at V-7 (“Requirement to Monitor Transit Service”).

124. See *id.* (“If a recipient’s monitoring determines that prior decisions have resulted in disparate impacts, agencies shall take corrective action to remedy the disparities.”).

125. See *id.* at IV-4 (“Guidance on Conducting an Analysis of Construction Projects”).

126. See *id.* (“[Grantees] should seek out and consider the viewpoints of minority, low-income, and [limited English proficient] populations in the course of conducting public outreach and involvement activities.”).

127. See FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., COMMUNITY IMPACT ASSESSMENT: A QUICK REFERENCE FOR TRANSPORTATION (1996), available at [http://www.ciatrans.net/CIA\\_Quick\\_Reference/Purpose.html](http://www.ciatrans.net/CIA_Quick_Reference/Purpose.html); FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., FHWA ORDER 6640.23A, FHWA ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (2012), available at <http://www.fhwa.dot.gov/legregs/directives/orders/664023a.htm> (establishing policies and procedures for the Federal Highway Administration’s compliance with a 1994 executive order on environmental justice).

128. See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1362-63 (2012) (describing “equality directives” emerging from civil rights statutes which place proactive and affirmative duties on actors within the administrative state).

patterns of urban-suburban settlement, contributing to concentrated poverty and spatial segregation that persists today.<sup>129</sup> Decisions on how to construct and subsidize mass transit influence poor, minority communities' access to resources such as jobs, schools, green space, and effective social networks.<sup>130</sup> Regulatory and programmatic decisions have constructed contemporary transit patterns; these Title VI rules harness this same power to reshape a segregated and unequal transit landscape.

Further, the story of the development of these rules is instructive as to how one might unleash Title VI's administrative power. A 1994 executive order commanded federal agencies to implement Title VI, requiring them to incorporate environmental justice concerns in their planning and regulations.<sup>131</sup> A subsequent 2000 executive order required agencies to take affirmative steps to develop rules providing "meaningful access" and increased participation in federal programs for persons with limited English proficiency.<sup>132</sup> With these

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129. See DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820-2000*, at 166 (2003) (describing how the construction of highways "destroyed many older neighborhoods, especially those inhabited by people of color"); JOHN R. LOGAN & BRIAN J. STULTS, *THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 1, 4 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf> (documenting high black-white segregation levels); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 26-33 (2013) (introducing data showing a much higher likelihood that black children will be raised in neighborhoods of concentrated poverty than white children and arguing that this is a key contributor to contemporary patterns of racial inequality).

130. See, e.g., THOMAS W. SANCHEZ ET AL., *THE RIGHT TO TRANSPORTATION: MOVING TO EQUITY* 1-2, 53-57 (2007) (discussing the "spatial mismatch" between where low-income, urban, and often predominantly minority households live and where their jobs are located); James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality*, in *SEGREGATION: THE RISING COSTS FOR AMERICA* 1, 17-20 (James H. Carr & Nandinee K. Kutty eds., 2008) (detailing segregated, poor communities' lack of access to high-quality schools); Thomas W. Sanchez, *The Impact of Public Transport on US Metropolitan Wage Inequality*, 39 *URB. STUD.* 423, 434 (2002) (finding links between the availability of public transportation and wage inequality in large metropolitan areas).

131. See Exec. Order No. 12,898, 3 C.F.R. 859 (1994), reprinted as amended in 5 U.S.C. § 4321 app. (2012) (directing all federal agencies to integrate environmental justice concerns into their programs and planning by evaluating the environmental and human health effects of their programs and policies on minority and low-income communities); *id.* at 860 (requiring each agency to develop an environmental justice strategy that identifies the programs, policies, public participation process, and rulemakings related to human health or the environment, and that promotes public participation in decisionmaking and research); *id.* at 861 (requiring federal agencies "whenever practical and appropriate" to collect and analyze information to determine whether their programs, policies, or activities have a disproportionate effect on minority and low-income populations); *id.* at 862 (requiring federal agencies to promote public participation in decisionmaking related to the environment through public hearings and a notice provision, and to translate documents for limited English proficient populations).

132. Exec. Order No. 13,166, 3 C.F.R. 289 (2000), reprinted as amended in 42 U.S.C. § 2000d-1 app. (2012).

presidential directives, the DOT promulgated the more specific guidance to grantees, which now requires impact assessments of major programmatic changes, outreach to minority and traditionally underserved communities, and mitigation of harmful disparities.<sup>133</sup> The DOT promotes compliance with these regulatory objectives by providing grantees information on how to effectively conduct impact assessments, provide outreach, and ensure public participation,<sup>134</sup> and by withholding federal funds from jurisdictions that fail to effectively comply with Title VI's directives.<sup>135</sup>

Yet this is not simply a story about agency power. The advocacy of non-governmental organizations and lawyers has proved crucial in the unleashing of Title VI's regulatory force in the area of transportation. One must recall that *Sandoval*—the decision that eliminated a private right of action for Title VI's regulations—was a transportation case. The case arose from an effort to provide access to driver's licenses in Alabama for individuals not proficient in English.<sup>136</sup> In strengthening its affirmative Title VI guidance after the *Sandoval* decision, the DOT emphasized that the elimination of a private right of action would likely lead to an increase in administrative complaints by private parties.<sup>137</sup> In this instrumental way, the threat of private enforcement through the administrative complaint structure has likely played a role in the adoption of front-end rules. Grantees can more effectively shield themselves from after-the-fact complaints from advocates and community groups by including those groups in planning decisions, and by assessing the potential impact of programming and evaluating alternatives.

Beyond the practical concerns, private enforcement has played a role by framing the issue of transportation equity. Litigation, administrative com-

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133. See, e.g., Letter from Peter Rogoff, Adm'r of Fed. Transit Admin., U.S. Dep't of Transp., to Colleague (Mar. 8, 2011), available at [http://www.fta.dot.gov/documents/Dear\\_Colleague\\_Letter\\_-\\_Civil\\_Rights\\_-\\_March\\_2011.pdf](http://www.fta.dot.gov/documents/Dear_Colleague_Letter_-_Civil_Rights_-_March_2011.pdf) (reminding grantees of Title VI requirements and the FTA's implementing guidance).

134. See, e.g., FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., REGION 10 BULLETIN NO. 2010-62, TRANSIT SERVICE AND FARE EQUITY ANALYSIS WEBINAR (2010), available at <http://www.fta.dot.gov/documents/ScanBull10-62TransitServiceFareEquityAnalysisWebinar08-12-10.pdf> (inviting grantees to a webinar about how to perform impact assessments on fare changes); NAT'L COOP. HIGHWAY RESEARCH PROGRAM, RESEARCH RESULTS DIGEST 340, STATE DOT BEST PRACTICES FOR TITLE VI COMPLIANCE 10-11 (2009), available at [http://onlinepubx.trb.org/onlinepubs/nchrp/nchrp\\_rrd\\_340.pdf](http://onlinepubx.trb.org/onlinepubs/nchrp/nchrp_rrd_340.pdf) (providing examples of effective public outreach and participation efforts).

135. See Johnson, *supra* note 128, at 1384 & n.209 (providing examples of instances in which the FTA conditioned funding on the grantees changing their programs or analyses).

136. See *Alexander v. Sandoval*, 532 U.S. 275, 278-79 (2001) (describing initial claims brought by plaintiffs).

137. See Notice of Proposed Title VI Circular, 71 Fed. Reg. 40,178, 40,179 (July 14, 2006) (predicting that *Sandoval* would likely increase the number of administrative complaints, and that grant recipients would thus benefit from guidance specifying how they could best avoid practices that have a disparate impact on minority communities).



plaints, and advocacy helped make environmental justice and transportation access salient civil rights issues. The executive order on environmental justice emerged from litigation, administrative complaints, and other advocacy efforts beginning in the 1980s to address claims of disparate environmental burdens facing minority communities.<sup>138</sup> Litigation and complaints pursued in the mid-1990s, including cases like the MTA litigation,<sup>139</sup> harnessed Title VI to address disparities in access to mass transit, elevating the question of transit access and making plain the potential benefits of front-end planning and inclusion of minority groups. In strengthening its Title VI directives in transportation, the DOT presented these directives as a response to complaints filed against transit systems.<sup>140</sup>

Additionally, in the late 1990s and 2000s community groups began to organize around the question of transportation equity, making Title VI a key piece of their advocacy. The most prominent example is the Transportation Equity Network (TEN), a national coalition of more than 350 state and local faith-based and community groups.<sup>141</sup> TEN's advocacy centers on improving funding and other resources for public transit, encouraging greater participation of traditionally underserved community groups in transportation planning, and creating environmentally sustainable and socially inclusionary transportation policy.<sup>142</sup> Legal organizations like Public Advocates, a San Francisco Bay Area nonprofit law firm, work with transportation-equity groups to file Title VI

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138. See LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 54-55, app. (2001) (highlighting studies showing that race is a stronger predictor of the siting of environmental hazards than income); U.S. COMM'N ON CIVIL RIGHTS, *NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE* 1-3, 13-16 (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf> (discussing the origins of the environmental justice movement, delineating problems regarding environmental justice, and providing an overview of the goals of Executive Order 12,898); Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENVTL. L.J. 9, 36-40 (2007) (detailing the development of the modern environmental justice movement).

139. See *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001).

140. See Notice of Proposed Title VI Circular, 71 Fed. Reg. at 40,180 (providing examples of Title VI litigation and administrative complaints seeking increased transportation equity).

141. See *Who We Are*, TRANSP. EQUITY NETWORK, <http://www.transportationequity.org/what-we-do/who-we-are.html> (last visited June 8, 2014).

142. See *About Ten*, TRANSP. EQUITY NETWORK, <http://www.transportationequity.org/what-we-do.html> (last visited June 8, 2014); *Platform: What We Want: The TEN Platform*, TRANSP. EQUITY NETWORK, <http://www.transportationequity.org/what-we-do/background.html> (last visited June 8, 2014).

complaints and to leverage those Title VI complaints to strengthen the regulatory regime.<sup>143</sup>

In recent years, Public Advocates has filed a series of Title VI complaints with the DOT seeking to promote access of minority communities to mass transit services in California. Public Advocates assisted the Bus Riders Union (the same group that was involved in the 1994 case against the MTA) in preparing a Title VI complaint in 2010 challenging the MTA's decision to substantially reduce bus service.<sup>144</sup> In response to the complaint, the FTA found that the MTA was in violation of certain federal requirements obliging it to evaluate the impact of transit expansion projects and ordered the agency to address disparities in the adoption of particular transportation policies.<sup>145</sup> In 2009, Public Advocates filed a Title VI complaint on behalf of several groups against the Bay Area Rapid Transit District (BART), which operates rail service in the Bay Area.<sup>146</sup> BART sought to extend its rail system, deriving support in part from federal stimulus funds, and Public Advocates claimed that the proposed extension failed to adequately service minority, transit-dependent populations in the East Bay.<sup>147</sup> Public Advocates successfully argued to the FTA that the system extension violated Title VI because BART had failed to do the required impact assessments or consider alternatives.<sup>148</sup> In the end, the DOT reallocated stimulus funds away from this project.<sup>149</sup>

The BART and Bus Riders Union complaints make use of the expanded DOT Title VI guidance, and other advocates have built on the BART complaint to strengthen the Title VI regime. In particular, after the success of the BART

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143. See *Staff: Guillermo Mayer*, PUB. ADVOCES., <http://www.publicadvocates.org/guillermo-mayer-0> (last visited June 8, 2014) (describing affiliations with grassroots transportation groups and TEN Network); *USDOT Title VI Reform*, PUB. ADVOCES., <http://www.publicadvocates.org/usdot-title-vi-reform> (last visited June 8, 2014) (describing Title VI advocacy efforts).

144. See *Bus Riders Union Administrative Complaint*, PUB. ADVOCES., <http://www.publicadvocates.org/bus-riders-union-administrative-complaint> (last visited June 8, 2014).

145. *Id.*; see also THE DMP GRP., TITLE VI COMPLIANCE REVIEW OF THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (2011), available at [http://www.fta.dot.gov/documents/Final\\_LAMetroTitleVI\\_Report\\_12\\_12\\_11.docx](http://www.fta.dot.gov/documents/Final_LAMetroTitleVI_Report_12_12_11.docx) (presenting the findings of the final report prepared for the FTA).

146. See *BART/Oakland Airport Connector (OAC)*, PUB. ADVOCES., <http://www.publicadvocates.org/bartoakland-airport-connector-oac#updates> (last visited June 8, 2014).

147. See Johnson, *supra* note 128, at 1405 & nn.301-02, 1406 & n.303-06 (describing Public Advocates' claim as well as BART's extension project, which it intended to fund with \$70 million in stimulus funds, DOT loans, and regional revenue).

148. See *id.* at 1406 (detailing the DOT's reallocation of stimulus funds in response to the complaint).

149. See Letter from Peter Rogoff, Adm'r of Fed. Transit Admin., U.S. Dept. of Transp., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Feb. 12, 2010), available at [http://www.urbanhabitat.org/files/Feb%2012%20BART%20MTC%20Letter\\_0.pdf](http://www.urbanhabitat.org/files/Feb%2012%20BART%20MTC%20Letter_0.pdf).

complaint, Public Advocates and other community groups formally urged the FTA to strengthen its guidance for grantees' impact assessments, namely by standardizing and tightening the metrics for assessing discriminatory impacts.<sup>150</sup> In response, the FTA issued a letter to all funding recipients emphasizing that grantees should heed the FTA's Title VI guidance to assess the impact of service and fare changes.<sup>151</sup> Then, in 2012—after allowing for public comment by transit agencies and various groups—the FTA revised its Title VI guidance circular.<sup>152</sup> In key respects, the 2012 guidance strengthened the Title VI requirements.

Advocates here played a role reminiscent of the one played by those in the 1960s who pressed for stronger rules in the area of school desegregation. Private enforcers have used the administrative process to press for compliance with agency rules, but also to expand the contours and meaning of these rules. The claim here is not that these advocacy efforts are always successful—the FTA did not adopt all the changes urged by Public Advocates and other transportation-equity groups. Rather, the point is to understand that administrative complaints to secure compliance and advocacy to expand the rules constitute private enforcement of Title VI. This private enforcement is incident to meaningful agency enforcement.

### 3. *School discipline reform*

Efforts to reform primary and secondary school discipline policies provide another recent example of leveraging the advantages of the administrative complaint process, in particular agency expertise and flexibility in crafting remedies and publicizing solutions. In recent years, plaintiffs have filed administrative complaints against school districts claiming that certain school discipline policies have an unjustified disparate impact on minority school children

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150. See PUB. ADVOCATES, CIVIL RIGHTS AND ENVIRONMENTAL JUSTICE IN PUBLIC TRANSPORTATION: PROPOSED FTA ACTIONS TO BUILD ON ITS STRONG RECORD OF ENFORCEMENT (2010), available at [http://www.publicadvocates.org/sites/default/files/library/white\\_paper\\_on\\_fta\\_title\\_vi\\_circular\\_with\\_cover\\_letter\\_12-20-10.pdf](http://www.publicadvocates.org/sites/default/files/library/white_paper_on_fta_title_vi_circular_with_cover_letter_12-20-10.pdf) (providing recommendations for strengthening the FTA's Title VI guidance). For more information about the efforts of Public Advocates in the BART case, see generally GUILLERMO MAYER, PUBLIC ADVOCATES, THE OAKLAND AIRPORT CONNECTOR: A CASE STUDY ON TITLE VI ADMINISTRATIVE ENFORCEMENT (2010), available at [http://www.transportationequity.org/images/downloads/TEN\\_Title\\_VI\\_Webinar\\_20100708\\_G.Mayer.pdf](http://www.transportationequity.org/images/downloads/TEN_Title_VI_Webinar_20100708_G.Mayer.pdf) (detailing the advocacy strategy of Public Advocates in the BART case).

151. See Letter from Peter Rogoff to Colleague, *supra* note 133.

152. See FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP, CIRCULAR FTA C 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012), available at [http://www.fta.dot.gov/documents/FTA\\_Title\\_VI\\_FINAL.pdf](http://www.fta.dot.gov/documents/FTA_Title_VI_FINAL.pdf).

with the Department of Education's Office for Civil Rights (OCR).<sup>153</sup> While racial and ethnic disparities in the administration of school discipline have long been a concern of civil rights groups, advocacy intensified in response to the adoption by school districts in the 1990s of "zero tolerance" and other policies that increased suspension and expulsion of minority youth and that made punishments for school rule infractions more severe.<sup>154</sup> Advocates have framed the question as one of the "school-to-prison" pipeline, emphasizing the increasing links between violations of school discipline policies and the criminalization of minority youth.<sup>155</sup>

Private enforcement through the administrative process can promote examination of the potentially exclusionary impacts of these practices, and the possibilities of alternatives that further safety and the rights of disciplined children. Where it has found violations, OCR has worked with school districts to develop remedies such as training for teachers in effective discipline methods, school climate surveys, and the implementation of discipline review coordinator positions and systems for collecting and evaluating data on the effect of school discipline policies on particular groups.<sup>156</sup> These are not classic forms of court-ordered remedies such as damages or injunctive relief. These are remedies developed often in collaboration with school districts and other stakeholders, which stem from a problem-solving approach—an attempt to develop remedies that reflect the varied and often conflicting goals of participants.

Further, on January 8, 2014, the Department of Education took major action in the area of school discipline when it issued guidance and a "Dear Colleague Letter" to schools and administrators on federal standards and best prac-

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153. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE VI ENFORCEMENT HIGHLIGHTS 8 (2012), available at <http://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf> (stating that from fiscal year 2009 to fiscal year 2011, the OCR received almost 900 complaints about possible civil rights violations involving school discipline and began 15 investigations); see also Jason Langberg, *Title VI Complaints as a Tool in Dismantling the School-to-Prison Pipeline*, JUV. JUST. & CHILD. RTS. (Juvenile Justice & Civil Rights Section, N.C. Bar Ass'n, Cary, N.C.), June 2013, <http://juvenilejusticeandchildrensrights.ncbar.org/newsletters/jjcrjune13/pipeline>; *Durham Public Schools Punish Black Students and Students with Disabilities at Higher Rates than Peers*, LEGAL AID N.C. (Apr. 16, 2013), [http://www.legalaidnc.org/public/learn/media\\_releases/2013/durham-public-schools-punish-black-students-disabled-students-at-higher-rates-than-peers.aspx](http://www.legalaidnc.org/public/learn/media_releases/2013/durham-public-schools-punish-black-students-disabled-students-at-higher-rates-than-peers.aspx) (announcing the filing of a complaint filed with the OCR).

154. See, e.g., ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>; CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 79-80 (2010).

155. See KIM ET AL., *supra* note 154.

156. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *supra* note 153, at 9-10 (detailing remedies that have been developed in conjunction with school districts).

tices in school discipline.<sup>157</sup> The guidance letter provides information on the type of discipline that violates Title VI, and on effective programs for remedying and avoiding discriminatory discipline policies.<sup>158</sup>

Similar stories can be found in other substantive areas. For instance, the Department of Agriculture has promulgated rules requiring that federal agencies and grantees administering programs related to food, nutrition, forestry, and agriculture conduct a “civil rights impact analysis” to ensure that minorities and people with disabilities fairly benefit from federally funded programs.<sup>159</sup> This regime of affirmative impact assessments is less vigorous and extensive than the ones that exist in the context of transportation and education. These agriculture rules are notable here, however, because their emergence can also be explained by private enforcement activity that brought attention to inequities and discrimination in the administration of agriculture programs. In particular, civil rights groups pursued litigation and administrative complaints in the 1980s challenging longstanding Department of Agriculture funding practices that excluded black farmers, and that led to the destruction of many black farms in the South.<sup>160</sup> Affirmative impact assessments have emerged as a regulatory response to prevent similar forms of discrimination going forward.

### B. Oversight

Leveraging the administrative complaint process and advocating for broader rules and guidance have been crucial dimensions of Title VI enforcement. Private actors also implement Title VI when they oversee how agencies enforce and fail to enforce Title VI. The ultimate resolution of the *Adams* litigation limits how private groups can turn to courts for oversight of agencies, but other routes remain open for private groups to engage in agency oversight. As in any administrative enforcement regime, the political process functions as a form of oversight. Congress conducts hearings on Title VI—both to enhance enforcement and to reign in enforcement.<sup>161</sup> Private groups are participants in this process.

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157. See Letter from Catherine E. Lhamon, Assistant Sec’y for Office of Civil Rights, U.S. Dep’t of Educ. & Jocelyn Samuels, Acting Assistant Att’y Gen., Office of Civil Rights, U.S. Dep’t of Educ., to Colleague (Jan. 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

158. *Id.*

159. See OASCR Directive 4300-4, Civil Rights Impact Analysis 1 (U.S.D.A. 2003) (summarizing the purpose of a civil rights impact analysis).

160. See TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2-9 (2013), available at <http://new.nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf> (providing a summary of the litigation and judicial relief).

161. See, e.g., *Oversight Hearing: Office for Civil Rights, Department of Education: Hearing Before the S. Comm. on Labor & Human Res.*, 102d Cong. (1991).

Beyond congressional oversight, the United States Commission on Civil Rights has also played a central oversight role with regard to Title VI. Created prior to the passage of the Civil Rights Act of 1964, the bipartisan Commission is composed of six members appointed by the President and is charged with overseeing the laws and policies of the United States with respect to civil rights.<sup>162</sup> The Commission has been plagued by political and ideological struggles over its membership and role in more recent years.<sup>163</sup> Yet at the inception of the Civil Rights Act of 1964, the Commission crucially helped train federal, state, and local agencies on Title VI compliance,<sup>164</sup> and over the past several decades it has issued reports and data on the efficacy of the federal government's Title VI enforcement activities.<sup>165</sup> At important junctures, the Commission has highlighted federal agencies' laggard enforcement of Title VI, for instance faulting HEW in the mid-1960s for dispensing federal funds to school districts that had failed to make meaningful progress towards desegregation.<sup>166</sup> The Commission often consists of members of the civil rights community and is staffed by lawyers and advocates with expertise in civil rights law and enforcement.<sup>167</sup> The Commission's capacity to hold hearings and conduct factfinding investigations has made it a central conduit for nongovernmental actors to participate in the process of evaluating the efficacy of Title VI en-

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162. See Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101, 104, 71 Stat. 634, 634-35 (codified as amended at 42 U.S.C. §§ 1975-1975a).

163. See, e.g., Katherine Q. Seelye, *Dispute Erupts over Seat on Civil Rights Panel*, N.Y. TIMES (Dec. 5, 2001), <http://www.nytimes.com/2001/12/06/us/dispute-erupts-over-seat-on-civil-rights-panel.html> (discussing the controversy over whether President Bush was entitled to appoint a candidate to the Commission); Katherine Q. Seelye, *Divided Civil Rights Panel Approves Election Report*, N.Y. TIMES (June 9, 2001), <http://www.nytimes.com/2001/06/09/us/divided-civil-rights-panel-approves-election-report.html> (reporting disagreement within the Commission regarding whether to release a report on voting irregularities in Florida during the 2000 presidential election).

164. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, COMPLIANCE OFFICER'S MANUAL: A HANDBOOK OF COMPLIANCE PROCEDURES UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (1966).

165. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, TITLE VI . . . ONE YEAR AFTER: A SURVEY OF DESEGREGATION OF HEALTH AND WELFARE SERVICES IN THE SOUTH (1966); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS UNDER FEDERAL PROGRAMS: AN ANALYSIS OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (1968); U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1970); 1 U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? (2002) [hereinafter U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP], available at <http://www.usccr.gov/pubs/10yr02/vol1/vol1.pdf>.

166. See U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66, at 52 (1966) (finding that HEW's Office of Education had accepted as proof of compliance mandatory court orders with standards "far below [those] required by that Office for school districts desegregating under voluntary plans").

167. See *Commissioners*, U.S. COMMISSION ON CIV. RTS., <http://www.usccr.gov/about/commissioners.php> (last visited June 8, 2014) (providing biographical information of current commissioners).

forcement by federal agencies.<sup>168</sup> More recently, the Commission has conducted hearings and issued reports on how federal agencies can use Title VI to advance inclusion in the context of environmental justice<sup>169</sup> and reviewed the work of each federal agency charged with civil rights enforcement.<sup>170</sup>

The role of private lawyers in agency oversight and implementation is now understood as the classic work of Washington lawyers. But this work rarely produces cases that feature in legal casebooks, nor does it lend itself to stirring enforcement narratives. The late civil rights advocate William Taylor described the emergence of this type of work after passage of the Civil Rights Act of 1964 and other civil rights statutes in the mid-1960s.<sup>171</sup> As it became clear to Taylor that civil rights statutes engendered civil rights responsibilities for all agencies, he perceived the need for a private group that would “ride herd on federal agencies to see that they did their jobs.”<sup>172</sup> Taylor’s experience with the Commission had persuaded him that agencies would not enforce these laws in the absence of outside monitoring and pressure from civil rights groups.<sup>173</sup> This administrative advocacy was pursued by groups in other areas such as consumer protection, but according to Taylor no civil rights group consistently performed that role.<sup>174</sup> Accordingly, Taylor set up the Center for National Policy Review in 1970 (which operated until 1986), which was charged with assisting

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168. As an example, the former Staff Director of the Commission has described the work of the Commission in the 1960s to press HEW to reject “freedom-of-choice” plans offered by Southern school districts. See WILLIAM L. TAYLOR, *THE PASSION OF MY TIMES: AN ADVOCATE’S FIFTY-YEAR JOURNEY IN THE CIVIL RIGHTS MOVEMENT 85-86* (2004). William Taylor also detailed the Commission’s investigation into the federal government’s farm program, which was operated by private parties at the state and local level in a discriminatory fashion. See *id.* at 87. The Commission urged the President and the Department of Agriculture to address the discrimination. *Id.* Though Taylor admitted the problem was not fully resolved by this action, this investigation served as a predecessor to the 1990s lawsuit on discrimination within the Department of Agriculture’s farm program. *Id.*

169. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 138 (examining the implementation of Executive Order 12,898 by four federal agencies).

170. 3 U.S. COMM’N ON CIVIL RIGHTS, *TEN-YEAR CHECK-UP*, *supra* note 165 (2003) (analyzing the extent to which the civil rights programs in the Department of Agriculture, the Department of the Interior, the Environmental Protection Agency, and the Small Business Administration have implemented the Commission’s recommendations on the enforcement of civil rights statutes offered in previous reports), available at <http://www.usccr.gov/pubs/10yr03/10yr03.pdf>; 4 *id.* (2004) (providing a similar analysis of the efforts of the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, and the EEOC), available at <http://www.usccr.gov/pubs/10yr04/10yr04.pdf>.

171. See TAYLOR, *supra* note 168, at 102-04 (describing the creation of the Center for National Policy Review).

172. *Id.* at 102.

173. See *id.*

174. See *id.* at 102-03 (stating that “five years after enactment of the laws, no one had yet grasped this mantle,” and that this type of administrative advocacy was similar to the work of Ralph Nader in the auto safety and consumer protection fields).

other groups in petitioning for rulemaking, commenting on regulations, and filing administrative complaints.<sup>175</sup>

Political scientist Stephen Halpern has described LDF's increased engagement in administrative oversight beginning in the 1970s as the result of the group's initial success in the *Adams* litigation.<sup>176</sup> That litigation required OCR to interact with LDF and other civil rights groups, leading LDF to play a key role in the development and enforcement of Title VI in the area of higher education during the 1970s. As detailed by Halpern, this work gave civil rights groups access to information about how OCR worked, insights into the enforcement process, and rendered them "well-informed critics who could use the information they received to enhance their bargaining power."<sup>177</sup>

This type of administrative oversight is now a standard part of the arsenal of civil rights groups in Washington, D.C. Most major civil rights organizations have an advocacy presence in Washington,<sup>178</sup> much of it geared toward administrative enforcement and implementation. The Leadership Conference on Civil Rights and Human Rights, a coalition of more than 175 civil rights groups,<sup>179</sup> actively monitors and reports on administrative enforcement of civil rights including with regard to Title VI.<sup>180</sup>

This is not a claim about the sufficiency of the current work; as I suggest in Part III, this work might be expanded in critical ways to focus on proactive front-end enforcement and implementation of Title VI at the state and local

175. See *id.* at 103 (stating that the group "would also seek publicity for continuing problems of discrimination and perhaps file lawsuits to get federal agencies to do their jobs").

176. See HALPERN, *supra* note 23, at 293 ("[B]ecause of *Adams*, OCR had to deal with civil rights groups in a much different way than in the 1960s.").

177. *Id.*

178. See, e.g., *National Public Policy Office (Washington, D.C.)*, MALDEF, [http://www.maldef.org/about/offices/washington\\_dc/index.html](http://www.maldef.org/about/offices/washington_dc/index.html) (last visited June 8, 2014); *Washington, D.C. Advocacy*, NAACP LDF, <http://www.naacpldf.org/category/washington-dc-advocacy> (last visited June 8, 2014).

179. See *About The Leadership Conference on Civil and Human Rights & The Leadership Conference Education Fund*, LEADERSHIP CONF., <http://www.civilrights.org/about> (last visited June 8, 2014). The Leadership Conference on Civil and Human Rights was established in 1950 (originally known as the Leadership Conference on Civil Rights). *History of The Leadership Conference on Civil and Human Rights & The Leadership Conference Education Fund*, LEADERSHIP CONF., <http://www.civilrights.org/about/history.html> (last visited June 8, 2014). Taylor notes that by 1986, the groups that comprised the Leadership Conference had begun to take up much of the administrative advocacy work previously done by the Center for National Policy Review. See TAYLOR, *supra* note 168, at 130.

180. See, e.g., THE LEADERSHIP CONFERENCE EDUC. FUND, THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS, STILL SEGREGATED: HOW RACE AND POVERTY STYMIE THE RIGHT TO EDUCATION 13 (2013), available at [http://civilrightsdocs.info/pdf/reports/Still\\_Segregated-Shadow\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/Still_Segregated-Shadow_Report.pdf); *Department of Education Fails to Enforce Desegregation of Higher Education*, 2 CIV. RTS. MONITOR, June-July 1987, <http://www.civilrights.org/monitor/junejuly1987/art3p1.html>.



levels. The point is to include administrative advocacy and oversight in the meaning of Title VI enforcement.

### C. Mobilization

Beyond shaping rules and guidance and overseeing compliance and agency enforcement activities, private advocates leverage Title VI's regulatory regime as part of a broader set of problem-solving strategies. Recent examples of Title VI as a leverage point for mobilization can be found in the context of education.

As introduced above, civil rights advocates have sought to mobilize public policy attention on the question of harsh and discriminatory discipline policies. Title VI is only one piece of a larger advocacy strategy aimed at documenting the effect of school discipline policies on educational achievement and the criminalization of youth, highlighting racial disparities, developing legal and policy remedies, and encouraging alternatives.<sup>181</sup> The consistent attention that advocates have brought to the question of zero tolerance has helped define the policy issue; outside groups have functioned as policy entrepreneurs helping to map the problem and direct attention to the issue.<sup>182</sup> In 2010, the Department of Education pledged to reinvigorate its civil rights enforcement, including strengthening its focus on racial disparities stemming from school discipline policies.<sup>183</sup> In 2012, the agency significantly expanded its data collection ef-

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181. See ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *supra* note 154, at 31-39 (highlighting school systems with discipline policies that “reach out” instead of “push out”); KIM ET AL., *supra* note 154, at 23, 27-28, 56-64, 83-84, 91-95, 114-22 (outlining a range of legal strategies based on the Equal Protection Clause, First Amendment, Fourth Amendment, Due Process Clause, and federal and state disability laws); DANIEL J. LOSEN & TIA ELENA MARTINEZ, CTR. FOR CIVIL RIGHTS REMEDIES, CIVIL RIGHTS PROJECT AT UCLA, *OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS* (2013), available at [http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack\\_UCLA\\_4-8.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf); Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, POVERTY & RACE (Poverty & Race Research Action Council, Wash., D.C.), Jan.-Feb. 2011, at 5, 6-7 (documenting reform efforts that resulted from community mobilization by parents and students); ENDING THE SCHOOLHOUSE TO JAILHOUSE TRACK, <http://safequalityschools.org> (last visited June 8, 2014) (providing resources for parents, educators, students, law enforcement, and activists); *Nationwide Survey of State Education Agencies' Online School Discipline Data*, CIV. RTS. PROJECT AT UCLA (Sept. 12, 2013), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/online-data-resources/nation-wide-survey-of-state-education-agencies2019-online-school-disciplinary-data>.

182. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 45-70 (2d ed. 2003) (examining the importance of participants outside government in shaping policy).

183. See Arne Duncan, Sec'y of Educ., *Crossing the Next Bridge: Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama* (Mar. 8,

forts on school discipline (and other areas),<sup>184</sup> which has since provided a basis for broader advocacy strategies by groups—such as publicizing data on disparities, highlighting the variation among schools districts’ discipline policies, and suggesting effective alternatives.<sup>185</sup> As a result of investigations, complaints, and policy advocacy, major school districts have begun to revise their disciplinary policies.<sup>186</sup>

The use of high-stakes educational tests in determining access to elite high schools in New York City provides another example. In 2012, LDF, the Puerto Rican Legal Defense Fund, and several other New York City-based groups filed a Title VI complaint challenging the admissions process for New York City’s eight “Specialized High Schools,” the most competitive and elite high schools in the city.<sup>187</sup> The New York City Department of Education determines admission to these high schools through a student’s “rank-order score” on a single admissions test, without reference to grades, teacher recommendations, or other factors.<sup>188</sup> The groups provided evidence that this admissions practice has a statistically significant disparate impact on black and Latino applicants.<sup>189</sup> Further, they claimed that the use of a test as the sole criterion for admissions is not justified by educational necessity because testing experts discourage the use of tests as the single criterion for making high-stakes decisions,

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2010) (transcript available at <http://www2.ed.gov/news/speeches/2010/03/03082010.html>) (pledging renewed commitment to civil rights enforcement).

184. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (CRDC) (2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>; Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html> (reporting on the CRDC discipline data).

185. See, e.g., *Nationwide Survey of State Education Agencies’ Online School Discipline Data*, *supra* note 181.

186. See Lizette Alvarez, *Seeing the Toll, Schools Revise Zero Tolerance*, N.Y. TIMES (Dec. 2, 2013), <http://www.nytimes.com/2013/12/03/education/seeing-the-toll-schools-revisit-zero-tolerance.html>; *School Discipline in Broward County*, ADVANCEMENT PROJECT (Oct. 8, 2013), <http://www.advancementproject.org/blog/entry/school-discipline-in-broward-county> (describing the efforts of stakeholders from the school system, civil rights groups, law enforcement, and juvenile justice judges to revise school discipline policies in Broward County, Florida).

187. See Letter from Damon T. Hewitt, NAACP Legal Def. & Educ. Fund, Inc., et al., to N.Y. Office, Office for Civil Rights, U.S. Dep’t of Educ. (Sept. 27, 2012), available at [http://www.naacpldf.org/files/case\\_issue/Specialized%20High%20Schools%20Complaint.pdf](http://www.naacpldf.org/files/case_issue/Specialized%20High%20Schools%20Complaint.pdf).

188. *Id.* at 1.

189. See *id.* at 2 (showing that the impact is “particularly severe” at two of the most elite Specialized High Schools—Stuyvesant and Bronx Science).

and the admissions test has not been shown to be predictive of educational success at the schools.<sup>190</sup>

Significantly, however, the groups' strategy has extended beyond the filing of the administrative complaint. At base, the case presents a challenge to ingrained ideas about the meaning of merit, and how to determine access to a seemingly scarce resource—an elite education. These questions are contested as a matter of educational policy as well as normatively. Accordingly, the groups' complaint was accompanied by public policy advocacy to publicize the effect of the admissions practice, highlight racial and ethnic disparities, and show possible alternatives that would promote access for underserved groups while maintaining educational quality at the schools.<sup>191</sup> In October 2013, LDF and a New York community group released a “policy blueprint” for the incoming New York City mayor to advance effective alternatives for determining admission to the specialized high schools.<sup>192</sup>

As of this writing it is unclear whether the groups' Title VI complaint will be successful or whether the New York City Department of Education will adopt a different admissions strategy. Still, the case provides an example of using Title VI as a component of a larger policy advocacy strategy to marshal public attention on an issue and pursue policy as well as legal advocacy.

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190. *See id.* at 1 (“[The New York City Department of Education] has never shown that this practice (or the test itself) validly and reliably predicts successful participation in the programs offered by the Specialized High Schools.”).

191. Key groups including teachers' unions came out in favor of the complaint. *See Resolution on Specialized High School Admission Policies*, UNITED FED'N TCHRS. (Dec. 12, 2012), <http://www.uft.org/union-resolutions/resolution-specialized-high-school-admission-policies>. The issue has been extensively covered in the local press, though not all accounts are favorable of course. *See, e.g.*, Al Baker, *Charges of Bias in Admission Test Policy at Eight Elite Public High Schools*, N.Y. TIMES (Sept. 27, 2012), <http://www.nytimes.com/2012/09/28/nyregion/specialized-high-school-admissions-test-is-racially-discriminatory-complaint-says.html>; Juan Gonzalez, *New York City Specialized High Schools Admission Test a Tool for Affluent Residents to Buy Their Children's Way into Elite Public Schools*, N.Y. DAILY NEWS (Sept. 27, 2012, 11:39 PM), <http://www.nydailynews.com/new-york/education/new-york-city-specialized-high-schools-admission-test-tool-affluent-residents-buy-children-elite-public-schools-article-1.1170080>; Stephon Johnson, *New Report Challenges Merit of Single-Test Admission for Specialized High Schools*, N.Y. AMSTERDAM NEWS (Oct. 31, 2013, 1:15 PM), <http://amsterdamnews.com/news/2013/oct/31/new-report-challenges-merit-single-test-admission->; *see also* Philissa Cramer, *Complaint Targets Elite HS Admissions Process, Not Just Outcome*, CHALKBEAT (Sept. 27, 2012), <http://gothamschools.org/2012/09/27/complaint-targets-elite-hs-admissions-process-not-just-outcome>.

192. *See* CMTY. SERV. SOC'Y OF N.Y. & NAACP LEGAL DEF. & EDUC. FUND, INC., *THE MEANING OF MERIT: ALTERNATIVES FOR DETERMINING ADMISSION TO NEW YORK CITY'S SPECIALIZED HIGH SCHOOLS* (2013), available at [http://b3cdn.net/nycss/b72f6ba9554188f841\\_d3m6bzka.pdf](http://b3cdn.net/nycss/b72f6ba9554188f841_d3m6bzka.pdf).

#### D. Possibilities

It is tempting to understand this type of administrative advocacy only as a second-best option to court enforcement, a sad necessity given that *Sandoval* makes private court action impossible. The disadvantages of the administrative process are well understood, including potential problems of bureaucratic torpor, politics, and even capture. Yet administrative action has virtues of its own, and even potential advantages over court enforcement. In the context of civil rights enforcement generally, administrative actions can be cheaper than private litigation, particularly when one seeks to reform institutional structures. In an administrative complaint, the resources, costs, and expertise necessary to investigate and analyze complex questions of discrimination and disparate impact might be shared with the agency. An agency also might have institutional advantages over courts in the finding of a violation and the construction of the remedy. Agencies may be able to bring their underlying expertise about a particular substantive area to bear in determining what types of actions violate Title VI and its guidelines and regulations and in determining whether less discriminatory alternatives are available that further program goals. While courts may be less willing to order remedies that require supervision or intrusion into state and local practices,<sup>193</sup> a federal agency's funding and regulatory relationship with the relevant state or transit agency provides a potential opening for enforcement of remedies.

This dynamic may have played a role in the BART complaint before the FTA. While Title VI litigation has influenced the development of Title VI rules, the MTA mass transit litigation was one of the few cases actually won by plaintiffs in court. Courts might be less willing to find violations or order remedies that require altering the funding structure or design of a large transit institution. Yet the FTA's ongoing funding relationship with mass transit grantees and its ability to negotiate remedies with grantees that do not require individual damages or funding termination provide a structure for shaping remedies and pressing grantees to develop alternatives.<sup>194</sup> For this reason, private enforce-

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193. Judicial reluctance to second-guess the practices of state and local governments is apparent in key lower court decisions rejecting Title VI disparate impact claims. *See, e.g.,* *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 668 (W.D. Tex. 2000) ("It is clear that the law requires courts to give deference to state legislative policy; in the educational context, such deference is even more warranted. Education is the particular responsibility of state governments." (citations omitted)).

194. Termination of funds is rare in Title VI's enforcement regime. The statute emphasizes that suspension or termination is a last resort when voluntary compliance efforts are unsuccessful. *See* 42 U.S.C. § 2000d-1 (2012) (requiring that the termination of or refusal to grant assistance be undertaken only where "compliance cannot be secured by voluntary means"). This may seem a limitation in some respects if recipients do not view termination of funds as a credible remedy, but Title VI's conditions on spending rely on a range of funding compliance methods, including negotiations to secure compliance, voluntary compliance through agreements in the pre-award stage, and deferral of funding decisions pending com-

ment through the administrative process may yield benefits unavailable in court litigation.

Moreover, as shown by the examples above, the complaint process can force attention on civil rights problems like harmful disciplinary policies, produce knowledge about potential remedies and alternatives, and provide civil rights groups access and credibility with regulators. Crucially, this process enlarges the rules that govern grantees, allowing enforcement of statutory goals without depending simply on filing administrative complaints. What can emerge from this process is a set of rules that govern grantees at the time they receive federal funds, before a complaint is filed. Through this process, the very rules that constitute Title VI are shaped—the meaning of “discrimination” is elaborated. In this way, the work presents a marked contrast to the constrained model of rights elaboration in *Bakke*.

To be sure, attempts by civil rights groups to strengthen Title VI’s regulatory regime do not always produce the desired results. My suggestion is not that the strength of group advocacy efforts explains variations in lack of agency enforcement. Despite heavy investments in Title VI advocacy, environmental justice advocates have struggled to get the EPA to strengthen its enforcement. The agency has been plagued by backlogs in processing complaints,<sup>195</sup> and according to a recent account, the EPA’s Office of Civil Rights has failed to make a single final finding of noncompliance among the 247 complaints advocates have filed since 1993.<sup>196</sup> The case of environmental justice reminds us that the success and failure of Title VI advocacy depends on a range of factors which attend the agency context including conflicting regulatory goals, competing interest groups, the political and public salience of the issue, and the expertise, vigor, and inclinations of the agency and its administrators to advance particular regulatory goals.<sup>197</sup>

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pliance negotiation. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL 85-90 (2011), available at <http://www.justice.gov/crt/about/cor/coord/vimannual.pdf> (detailing the methods available to agencies to secure compliance).

195. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 138, at 55-62 (describing the EPA’s severe problems in investigating and resolving complaints).

196. See Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 760-61 (2013).

197. For instance, the EPA’s enforcement struggles can be explained by competing regulatory goals and the often-conflicting interests asserted by industry, state and local governments, environmental groups, and community groups. See, e.g., DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 25-28 (2011), available at [http://www.epa.gov/epahome/pdf/epa-ocr\\_20110321\\_finalreport.pdf](http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf) (finding in a report commissioned by the EPA that Office of Civil Rights staff lacked expertise to undertake Title VI investigations and that the Office of Civil Rights was not made a priority within the agency); LoPresti, *supra* note 196, at 776-79 (detailing opposition by state and local government officials and industry groups when the EPA sought to investigate Title VI environmental justice claims in Louisiana and Michigan).

Yet to acknowledge these real challenges of Title VI's regulatory regime should not lead one to ignore those important instances where legal advocates' implementation efforts have yielded more fruit.

### III. NAMING TITLE VI'S FUTURE

These accounts reveal that Title VI must be understood within a lawyering and advocacy framework broader than court enforcement. Delineating Title VI's force, that is, determining whether it is a "giant" that is sleeping or one that is awake, must be considered with reference to the full range of strategies employed by private actors in elaborating the statute's scope. This regulatory dimension of private implementation is of course present in every civil rights statute. It is the dimension that moves beyond not only litigation but beyond the filing of administrative complaints to help shape rulemaking, guidance, and other determinants of agency implementation. In the context of Title VII for instance, the EEOC, though lacking substantive rulemaking power, has the power to issue key guidance<sup>198</sup> and collect data.<sup>199</sup> Private actors have played a key part in shaping the EEOC's implementation efforts in this domain. But Title VI's enforcement by agencies with substantive rulemaking power, its reach across many federal agencies, and its substantive scope and coverage as well as the limited domain of courts in elaborating its norms, make understanding these more expansive forms of Title VI implementation crucial.

In highlighting this work, I want to acknowledge that the forms of statutory implementation and elaboration by private actors described in Part II are in many senses still in need of a name. Little has been written by scholars or advocates about this type of lawyering practice. It is not entirely clear that civil rights lawyers reflect on or name the advocacy performed at the federal, state, and local levels to implement Title VI as a distinct form of advocacy. The administrative lawyering described in Part II might thus simply be an ad hoc response by lawyers, determining what works to solve a particular problem and exploiting openings where they might be found. The efficacy of this type of lawyering cannot easily be measured.

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198. For an early example of influential EEOC guidelines, see Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (Aug. 1, 1970) (codified as amended at 29 C.F.R. §§ 1607.1-.14 (2013)) (providing rules for avoiding racially disparate impacts in selection practices). For a more recent example, see EEOC, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (providing guidance on how employers might avoid disparate impact discrimination in the consideration of arrest and conviction records in employment decisions).

199. See 42 U.S.C. § 2000e-8(c); 29 C.F.R. §§ 1602.7-.14. The EEOC has developed what is now known as the "Employer Information Report EEO-1," or just the EEO-1 Report, which requires certain employers to collect and report data on their employees' race, ethnicity, and sex. See *id.* § 1602.7 (internal quotation marks omitted).

At the same time, commentators have recognized in other contexts the role of private nongovernmental attorneys in agency implementation. Sophia Lee has detailed the role of civil rights groups in pressing the FCC to require broadcasters and common carriers to implement equal employment policies.<sup>200</sup> William Eskridge and John Ferejohn have highlighted the role of civil rights lawyers in shaping the administrative rules that govern Title VII in the area of pregnancy discrimination.<sup>201</sup> Robert Lieberman has recognized in the context of Title VII that private lawyers engaged their “private power” to press agencies outside the context of private court enforcement in the 1970s.<sup>202</sup> As in the account of Title VI that I offered in Part II, Lieberman shows how civil rights lawyers harnessed data provided by the EEOC, publicized agency investigations, and worked with administrators to target discriminatory employers and industries.<sup>203</sup> The work of lawyers to implement Title VI, like the above accounts of administrative lawyering, shows how agencies’ administrative enforcement depends on private advocacy. This account also has important implications for lawyering practice, showing that “enforcement” of Title VI means not just promoting compliance by grantees with preset rules, but engaging in an iterative process with agencies to expand and shape the very meaning of these rules.

Highlighting this lawyering has significance not just for describing the current and past work of nongovernmental lawyers and advocates, but also for reflecting on the gaps in this process of private implementation and on the strategies needed to advance this work. The administrative lawyering described by Lee and Eskridge and Ferejohn in other regulatory contexts tends to be undertaken by groups centered in Washington, D.C., which emphasize the implementation of statutes at the federal level. A Washington focus is evident too in administrative lawyering under Title VI as exemplified by early organizations like the Center for National Policy Review, which launched administrative lawyering under Title VI with the goal of overseeing federal agency implementation of Title VI.<sup>204</sup>

Title VI’s future depends on devolving this type of advocacy. Title VI’s rules extend to grantees at the state and local levels,<sup>205</sup> and advocates should

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200. See Sophia Z. Lee, *Race, Sex and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 821-23 (2010).

201. See WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 31 (2010).

202. Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement* 2-3 (Mar. 18, 2005) (unpublished manuscript), available at [http://web1.millercenter.org/apd/colloquia/pdf/col\\_2005\\_0318\\_lieberman.pdf](http://web1.millercenter.org/apd/colloquia/pdf/col_2005_0318_lieberman.pdf); see also JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 125-27 (1996).

203. See Lieberman, *supra* note 202, at 22-23.

204. See *supra* notes 171-75 and accompanying text.

205. See 42 U.S.C. § 2000d-4a (2012).

also engage in activity to monitor, shape, and guide implementation beyond the federal level. Now that the Department of Education requires state and local education departments and districts to develop new discipline practices and collect data, and the Department of Transportation requires grantees to conduct impact assessments and adopt alternatives, effective implementation means advocates and lawyers should be poised to participate in planning, evaluating data, comparing practices of state and local grantees, highlighting effective reforms, and decrying shortcomings. Indeed, devolving advocacy and oversight is particularly crucial given the success that advocates have had in expanding Title VI's domain.

#### CONCLUSION

To understand all the ways lawyers implement Title VI, one must resort to sometimes-vague phrases: multipronged lawyering, problem-solving advocacy, and administrative lawyering. This is the lawyering through which groups privately implement Title VI's antidiscrimination norm and at the same time shape the reach and meaning of that norm. In this Essay, I have suggested that this type of lawyering is a crucial way in which private groups implement Title VI's expansive goals of affirmative inclusion beyond the constrained interpretation of *Bakke*. It is how Title VI is monitored and implemented beyond the formal strictures of the *Adams* litigation and *Sandoval*.

Full realization of Title VI's regime depends on lawyers and other groups filing lawsuits and complaints, engaging in rulemaking and lobbying, conducting policy reviews, analyzing data, and participating in planning and design. Much of this work is not conventionally recognized as lawyering. In fact, there may be no such thing as a Title VI lawyer. Rather there are lawyers and advocates using Title VI as one tool among many to gain traction and find legal and policy solutions to particular problems. Given constraints on court enforcement and the complexity of civil rights problems today, finding a way to name and understand this work, and to highlight this advocacy in casebooks, might be critical not only for Title VI's future, but for the future of civil rights lawyering.