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## YALE LAW & POLICY REVIEW

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### Old Dog, New Tricks: Title VI and Teacher Equity

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*‘Racial discrimination’ is too limited and brittle a concept through which to understand why and how schools fail black children, and litigation is too clumsy and confining a process through which to understand and remedy that problem – Stephen C. Halpern<sup>1</sup>*

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1. STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 304 (1995).

## INTRODUCTION

What can the law do to improve teacher quality? In answering this question, one can be forgiven for thinking about regulation rather than litigation. At the federal level, most litigation-heavy education laws are antidiscrimination statutes, focused on protecting certain categories of students rather than on enforcing high teaching standards.<sup>2</sup> Meanwhile, teacher quality has become a central aspect of education “policy” statutes.<sup>3</sup> Lax teacher preparation standards and poor hiring policies, in particular, create challenges for the education system. Good teachers not only increase students’ scores on standardized tests; they also can lower students’ teen pregnancy rates, increase their likelihood of going to college, and raise their lifetime incomes.<sup>4</sup> Replacing poor teachers with average ones can have similar effects.<sup>5</sup> Yet white and wealthy students are far more likely to be taught by high-quality educators than are minority and economically disadvantaged students.<sup>6</sup> The teacher quality crisis in the United States is real, and it contributes greatly to the broader woes of the American education system.

Title VI of the Civil Rights Act of 1964—which is over half a century old, and which is primarily understood as an antidiscrimination provision—may offer a solution to this crisis. Title VI forbids racial discrimination in the provision of resources in federally funded programs.<sup>7</sup> The U.S. Department of Education has recently made clear that teacher quality is, in fact, a resource covered by Title VI.<sup>8</sup> This Note argues that Title VI complaints, investigations, and lawsuits can encourage (or force) districts to pursue policies that are designed to

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2. These statutes include Title IV and Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000c-6, 2000c-8, 2000d-1 (2012), which cover race, color, and national origin; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012), which covers sex; the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2012), which covers English language learner status; and the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2) (2012), Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12133, 12188 (2012), and Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1416 (2012), all of which cover disability status.
  3. See the discussion of No Child Left Behind and the Every Student Succeeds Act, *infra* Section I.C.
  4. Annie Lowrey, *Big Study Links Good Teachers to Lasting Gain*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/06/education/big-study-links-good-teachers-to-lasting-gain.html> [<http://perma.cc/2J3J-QEKA>].
  5. *Id.*
  6. See *infra* notes 33–43 and accompanying text.
  7. The antidiscrimination mandate states: “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.” 42 U.S.C. § 2000d (2012).
  8. See *infra* Part II.

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provide minority students with better teachers. While other scholars have discussed Title VI in relation to school discipline,<sup>9</sup> assignment of students to special education,<sup>10</sup> school finance,<sup>11</sup> school reconstitution,<sup>12</sup> and general educational discrimination,<sup>13</sup> this is the first piece of legal scholarship to discuss Title VI in any depth in relation to teacher quality and teacher assignment.

Part I of the Note provides background on the racial and socioeconomic gaps that plague American education generally and access to good teachers in particular. Teacher quality is one of the most important factors contributing to student academic growth, yet recent attempts to alleviate these disparities through legislation have failed. Part II charts out a different course: the U.S. Departments of Education and Justice should make more aggressive use of Title VI to end unequal access to quality teachers. Part II explains the mechanics of Title VI and illustrates how Title VI investigations might play out in the teaching context. Parts III and IV then discuss a number of concerns that this new use of Title VI could generate. Part III lays out and resolves two issues related to the Title VI doctrinal test: how to measure teacher quality and how to handle state and school district defenses to allegations of discrimination. Part IV then tackles two larger concerns: (1) how to ensure that private parties will submit complaints to the Department of Education, as Title VI requires, while also guaranteeing that the potential flood of new claims will be promptly resolved; and (2) how the agencies can protect their Title VI guidance, and their disparate impact regulations, from legal challenge.

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9. See, e.g., Zachary W. Best, Note, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671 (2011).
  10. See, e.g., Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237; Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407 (2001).
  11. See, e.g., Maurice R. Dyson, *Leave No Child Behind: Normative Proposals To Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 17–31 (2002); Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 549, 553–54 (2001).
  12. See, e.g., Andrew Spitzer, Comment, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339, 1360–61 (2007).
  13. See, e.g., Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More than Just a Tort*, 96 NW. U. L. REV. 99, 99–102 (2001); Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1016–17 (2001).

## I. TEACHER QUALITY AND INEQUALITY

For at least three decades, we have been told that the American education system is in crisis.<sup>14</sup> If anything, the reform drumbeat has intensified in recent years, becoming an important part of the national political dialogue.<sup>15</sup> This sense of crisis is often expressed in terms of America's falling standing in the world as demonstrated by the nation's rankings on international standardized tests. For instance, on the 2012 Programme for International Student Assessment (PISA), American students performed a dismal 17th in reading, 20th in science, and 27th in math out of thirty-five participating nations.<sup>16</sup> These problems are in large part due to yawning achievement gaps between white and wealthy students, on the one hand, and minority and disadvantaged students, on the other. Teacher effectiveness is distributed in much the same, unequal manner. Because the quality of a child's teacher is the largest in-school factor contributing to student achievement, these racial and socioeconomic gaps are of particular concern to policymakers.

 A. *The Achievement Gap and the Importance of Teacher Quality*

America's poor academic standing is due in substantial part to its racial and economic achievement gaps. Cognitive differences between white and black babies emerge as early as two years old, and by the time they enter kindergarten African-American children already lag behind whites by 0.64 standard deviations in math and 0.4 in reading scores.<sup>17</sup> By the end of first grade, the gap wid-

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14. See, e.g., David P. Gardner et al., *A Nation at Risk: The Imperative for Educational Reform*, NAT'L COMMISSION ON EXCELLENCE EDUC. 5 (1983), <http://teachertenure.procon.org/sourcefiles/a-nation-at-risk-tenure-april-1983.pdf> [<http://perma.cc/QA99-RSGC>].
  15. See, e.g., *NCLB Reauthorization: Examining Strategies for Attracting, Supporting, and Retaining High Quality Educators: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 110th Cong. 2 (2007) (statement of Sen. Edward Kennedy, Chairman, S. Comm. on Health, Educ., Labor, and Pensions); Ulrich Boser et al., *A Look at the Education Crisis: Tests, Standards, and the Future of American Education*, CTR. FOR AM. PROGRESS (Jan. 26, 2016, 10:59 AM), <http://www.americanprogress.org/issues/education/report/2016/01/26/129547/a-look-at-the-education-crisis> [<http://perma.cc/SM9X-Z42L>]; Chris Farrell & Bill Radke, *Solving the U.S. Education Crisis*, MARKETPLACE (July 1, 2010, 2:30 PM), <http://www.marketplace.org/2010/07/01/life/solving-us-education-crisis> [<http://perma.cc/VY5B-8X36>].
  16. *Country Note: Programme for International Student Assessment (PISA) Results, United States*, OECD 1 (2014), <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf> [<http://perma.cc/4AV3-RL5R>].
  17. Roland G. Fryer, Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 REV. ECON. & STAT. 447, 449 (2004).

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ens to anywhere from one half to a full standard deviation in reading, and nearly three-quarters of a standard deviation in math.<sup>18</sup>

This trend continues throughout schooling. An analysis done by the National Center for Education Statistics found that the United States' 2009 PISA reading scores varied widely by race: Asian-American and white students scored statistically significantly higher than both the United States and Organisation for Economic Co-operation and Development (OECD) averages, while Hispanic and African-American students performed significantly worse than those averages.<sup>19</sup> The results would land Asian-American students in first place within the OECD, just ahead of Korea, while American white students would be third in the OECD rankings, behind Finland and ahead of Canada. Hispanic students, meanwhile, would find themselves in thirty-second place, between Austria and Turkey, while African-American students would be in thirty-fourth, behind every OECD nation except Mexico.<sup>20</sup> On average, the American public school system is not failing white and Asian students—it is perpetuating the condition of those who are already disadvantaged.

Social scientists have conducted a great deal of research to determine what causes this achievement gap, and which methods are most effective at improving academic performance. They have identified several factors, and some are far more influential than others. Non-school factors, such as race, socioeconomic status, and parents' education, have the largest effect, usually explaining more than half the variation in student performance.<sup>21</sup> Children of parents with economic, educational, and social advantages begin school better prepared and better able to learn.<sup>22</sup> However, the quality of the school system is important in its own right. One study has found that white-black achievement gaps are only one-third as large *within* a given school as they are nationally—suggesting that much of the gap is caused by African-Americans attending worse schools than white students.<sup>23</sup> And, of all the school-based factors contributing to education-

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18. *Id.*

19. H.L. Fleischman et al., *Highlights from PISA 2009: Performance of U.S. 15-Year-Old Students in Reading, Mathematics, and Science Literacy in an International Context*, U.S. DEP'T EDUC. & INST. EDUC. SCI. 14 (Dec. 2010), <http://nces.ed.gov/pubs2011/2011004.pdf> [<http://perma.cc/BZ7P-QKHR>].

20. *Id.* at 8, 14.

21. See, e.g., RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 14 (2004); Gillian Hampden-Thompson & Jamie Johnston, *Variation in the Relationship Between Nonschool Factors and Student Achievement on International Assessments*, U.S. DEP'T EDUC. & INST. EDUC. SCI. 2 (Apr. 2006), <http://nces.ed.gov/pubs2006/2006014.pdf> [<http://perma.cc/XEJ8-GFR4>].

22. ROTHSTEIN, *supra* note 21, at 17.

23. Fryer & Levitt, *supra* note 17, at 448.

al inequality, the quality of a child's teacher appears to have the greatest effect on student achievement, dwarfing other components such as class size.<sup>24</sup>

The idea that teacher quality matters is not particularly surprising. While Finland and Norway, for instance, are quite similar in culture and socioeconomic structure, Finland's superior system of teacher education, among other education policy choices, has led to far better student achievement than seen in Norway.<sup>25</sup> Empirical data also affirm the importance of good teaching. One meta-analysis found that teacher effects accounted for seven to twenty-one percent of the variation in student performance.<sup>26</sup> These numbers might not sound like much, but the effects are more powerful than they first appear. In fact, there is some belief among education scholars that a succession of good teachers can narrow or even eliminate the achievement gap. A number of studies have found that moving from a below-average teacher to an above-average one, or from an average teacher to an excellent one, can increase achievement gains by one-third to one-half of a standard deviation in a single year.<sup>27</sup> The policy implications of these numbers are enormous. Using even a conservative estimate of teacher effects, moving from an average teacher to an excellent teacher for four to five years in a row would completely eliminate the achievement gap.<sup>28</sup> Better teachers can also increase their students' lifetime earnings,<sup>29</sup> and improving teacher quality nationwide can even strengthen the gross domestic product.<sup>30</sup>

There are, of course, caveats to this research. First, teachers affect the learning of all of their students; good teaching may not eliminate the achievement gap, but instead just increase all students' achievement equally. Still, a focus on guaranteeing high-quality teachers for minority-heavy schools would tend to increase minority students' achievement in particular. Second, because students are not randomly assigned to teachers—better-informed parents can steer their

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24. See, e.g., Spyros Konstantopoulos, *Trends of School Effects on Student Achievement: Evidence from NLS:72, HSB:82, and NELS:92*, 108 TCHRS. C. REC. 2550, 2577 (2006); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417, 419 (2005); S. Paul Wright et al., *Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 J. PERSONNEL EVALUATION EDUC. 11, 57, 61 (1997).
  25. Isak Ladegaard, *Big Differences in Finnish and Norwegian Teacher Education*, SCIENCE/NORDIC (Dec. 12, 2012, 6:53 AM), <http://sciencenordic.com/big-differences-finnish-and-norwegian-teacher-education> [<http://perma.cc/BP82-BEMK>].
  26. Barbara Nye et al., *How Large Are Teacher Effects?*, 26 EDUC. EVALUATION & POL'Y ANALYSIS 237, 240, 253 (2004).
  27. *Id.* at 253.
  28. Eric Hanushek, *Teacher Deselection*, in *CREATING A NEW TEACHING PROFESSION* 165, 172 (Daniel Goldhaber & Jane Hannaway eds., 2009).
  29. Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633, 2634 (2014).
  30. Hanushek, *supra* note 28, at 174, 176.

children toward higher-quality teachers, for instance—the findings of these studies may not be as robust as they appear on their face. Third, and most importantly, the research assumes that one could perfectly identify teacher quality and replace the worst teachers with better ones. Since, at least for the moment, there are no perfect predictors of teacher quality available, these effect estimates are likely to be overstated.<sup>31</sup> In other words, interventions to improve the teaching force will not have the full power that these analyses suggest, because administrators cannot tell with certainty which teachers are more or less effective. Limitations of geography and reputation will also prevent school districts from hiring exclusively excellent teachers. It is important, therefore, to temper expectations in regards to these data.

*B. The Reality of Teacher Inequality*

The research does make one thing quite plain, however: teacher quality is the largest in-school factor that determines student achievement. And, indeed, “[e]ffective teachers appear to be effective with students of all achievement levels, regardless of the level of heterogeneity in their classrooms.”<sup>32</sup> Assigning high-quality teachers to students who need them, therefore, is an important duty for school districts and an important equal protection issue. However, teacher assignment between high- and low-minority schools is anything but equitable. For example, research shows that majoring in the subject one teaches is an important factor in student achievement, particularly in middle school and high school.<sup>33</sup> But classes in high-minority schools are nearly 40% more likely to be taught by teachers who neither majored nor minored in their subject than are classes in low-minority schools.<sup>34</sup>

Additionally, teachers with at least three years of experience are significantly more effective on average than those with little teaching experience, and teachers may see quality gains for their first decade or more in the profession.<sup>35</sup> Yet “schools with the most low-income and minority students employ almost twice the proportion of teachers with fewer than three years of experience as

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31. Nye et al., *supra* note 26, at 253.

32. Wright et al., *supra* note 24, at 63.

33. See *Educational Resource Disparities for Minority & Low-Income Children: Quick Facts*, CHILD. DEF. FUND 1 (Jan. 2004), [http://www.childrensdefense.org/library/data/resource\\_disparities.pdf](http://www.childrensdefense.org/library/data/resource_disparities.pdf) [<http://perma.cc/UHA4-KQ4A>].

34. Heather G. Peske & Kati Haycock, *Teaching Inequality: How Poor and Minority Students Are Shortchanged on Teacher Quality*, EDUC. TR. 2 (June 2006), <http://files.eric.ed.gov/fulltext/ED494820.pdf> [<http://perma.cc/E9RS-XXW5>].

35. See Stephen Sawchuk, *New Studies Find that, for Teachers, Experience Really Does Matter*, EDUC. WEEK (Mar. 24, 2015), <http://www.edweek.org/ew/articles/2015/03/25/new-studies-find-that-for-teachers-experience.html> [<http://perma.cc/2UQP-XG5W>].

higher-income and lower-minority schools.”<sup>36</sup> And even those who *have* been on the job longer do not perform as well in disadvantaged areas. Inexperienced teachers have approximately the same effect in both high- and low-poverty schools, but experienced teachers tend to be more effective in low-poverty schools than in high-poverty schools.<sup>37</sup> This creates a double disadvantage for impoverished and minority students: they tend to have less experienced teachers, and even their experienced teachers are worse than those in wealthier, whiter schools.<sup>38</sup>

These inequities are due at least in part to differences in teacher turnover, a problem that takes a disproportionate toll on high-minority schools. Nationally, about thirty percent of teachers leave the profession within their first five years.<sup>39</sup> However, annual teacher turnover is nearly thirty percent higher in schools that have mainly free or reduced-price lunch students than in schools with few such students.<sup>40</sup> Even more disturbingly, teachers are more than twice as likely to transfer out of high-poverty schools than they do out of low-poverty schools.<sup>41</sup> While poverty and race are of course different measures, the two are correlated, and researchers have found that teachers also leave high-minority schools at higher rates than they do low-minority schools.<sup>42</sup> This is problematic because teacher turnover can have a negative effect on student achievement—and the effect is significantly worse in schools with sizeable minority populations than in white-heavy schools.<sup>43</sup> In short, minority students are receiving the short end of the teacher-quality stick.

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36. Lindsey Luebchow, *Equitable Resources in Low Income Schools: Teacher Equity and the Federal Title I Comparability Requirement*, NEW AM. FOUND. 6 (June 2009), [http://static.newamerica.org/attachments/2735-equitable-resources-in-low-income-schools/Equitable\\_Resources\\_in\\_Low\\_Income\\_Schools\\_47d037c9be4144caa2e487eb63fb611e.pdf](http://static.newamerica.org/attachments/2735-equitable-resources-in-low-income-schools/Equitable_Resources_in_Low_Income_Schools_47d037c9be4144caa2e487eb63fb611e.pdf) [<http://perma.cc/E9NS-AAZZ>].
37. Glenda L. Partee, *Attaining Equitable Distribution of Effective Teachers in Public Schools*, CTR. FOR AM. PROGRESS 8 (Apr. 2014), <http://cdn.americanprogress.org/wp-content/uploads/2014/04/TeacherDistro.pdf> [<http://perma.cc/MV67-4GT7>].
38. *Id.*
39. Matthew Ronfeldt et al., *How Teacher Turnover Harms Student Achievement*, 50 AM. EDUC. RES. J. 4, 5 (2013).
40. Rebecca Goldring et al., *Teacher Attrition and Mobility: Results from the 2012–13 Teacher Follow-Up Survey*, U.S. DEP’T EDUC. & INST. EDUC. SCI. 8 (Sept. 2014), <http://nces.ed.gov/pubs2014/2014077.pdf> [<http://perma.cc/D4ZK-DL75>].
41. *Id.*
42. Ronfeldt et al., *supra* note 39, at 22.
43. *Id.* at 23, 25.



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C. *Existing Legal Avenues for Pursuing Teacher Equity*

Until now, efforts to improve teacher equity have focused either on Title I of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act (NCLB),<sup>44</sup> or on state constitutional lawsuits.<sup>45</sup> Two provisions of NCLB were particularly relevant to teacher assignment and quality. First, it required that all school districts move toward a one hundred percent rate of “highly qualified” teachers by 2006.<sup>46</sup> However, the requirements for new teachers to be deemed “highly qualified” were far from rigorous. Teachers only needed to have a bachelor’s degree, become certified as a teacher, and prove that they actually knew the subjects they taught.<sup>47</sup> These looked more like the bare minimum requirements to become a teacher than anything deserving the label “highly qualified.” Because states could set the passing scores for teacher certification exams—and, indeed, many of them set the bar very low—they had a great deal of latitude in meeting NCLB’s mandate.<sup>48</sup> Moreover, for teachers already on the job, school districts could count everything from their years of experience to attendance at meetings to the giving of presentations as credit toward “highly qualified” status.<sup>49</sup> Thus, while new teachers had to prove that they had at least some content knowledge of their subjects, previously hired teachers did not even have to meet this most basic of standards.<sup>50</sup>

Even with such a low bar, states found it difficult to meet the law’s mandate when it came to disadvantaged schools. For instance, a study of the Ohio system found that one out of eight teachers in high-minority schools did not meet the “highly qualified” standard, as opposed to only one out of every sixty-seven in low-minority schools.<sup>51</sup> Nationally, high-minority and high-poverty schools maintained about three times as many unqualified teachers as did other

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- 44. See, e.g., Luebchow, *supra* note 36, at 3–4; Partee, *supra* note 37, at 40; Peske & Haycock, *supra* note 34, at 10.
  - 45. See, e.g., Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation To Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1621 (2013).
  - 46. No Child Left Behind Act of 2001, tit. II, § 1119(a)(2)–(3), 115 Stat. 1425, 1505–1506 (codified at 20 U.S.C. § 6319(a)(2)) (repealed 2015).
  - 47. *New No Child Left Behind Flexibility: Highly Qualified Teachers*, U.S. DEP’T EDUC., <http://www2.ed.gov/nclb/methods/teachers/hqtflexibility.html> [<http://perma.cc/CBB7-VS7N>].
  - 48. DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 152 (2009).
  - 49. *Id.*; JESSE H. RHODES, *AN EDUCATION IN POLITICS: THE ORIGINS AND EVOLUTION OF NO CHILD LEFT BEHIND* 156–57 (2012).
  - 50. RHODES, *supra* note 49, at 157.
  - 51. Luebchow, *supra* note 36, at 6.

schools.<sup>52</sup> And, in the end, the requirement seemed to have little effect on teacher quality. In one survey, thirty-eight percent of state respondents and seventy-four percent of district respondents reported that the mandate made little or no difference to the effectiveness of their workforces.<sup>53</sup> The much-maligned requirement was repealed in 2015 by the successor to NCLB, the Every Student Succeeds Act (ESSA).<sup>54</sup>

NCLB conditioned federal education funding on the requirement that each district provide services to federally funded, high-poverty schools that “are at least comparable to services in [low-poverty] schools that are not receiving funds.”<sup>55</sup> However, this has not proven to be an effective lever for regulating teacher quality across schools. “Under current law, two schools within the same school district may be deemed ‘comparably resourced’ even if the teachers in one school are far more experienced, and therefore receive higher salaries, than those in a neighboring school.”<sup>56</sup> Districts accomplish this feat by using “salary averaging,” in which they take the average salary of teachers in the district and write their budgets as though every teacher received that salary.<sup>57</sup> By doing this, the *number* of teachers in a school becomes the sole measure by which the federal government can determine whether high-poverty schools and low-poverty schools receive comparable teaching resources.<sup>58</sup> This loophole allows school districts to get away with placing less effective teachers in high-minority schools, as long as salary scales are similar for similar experience levels across the district. It also leads to even greater intra-district funding disparities, because districts hire inexperienced, inexpensive teachers for their high-poverty schools and thereby can divert some of their federal funding to pay for their more experienced teachers in low-poverty schools.<sup>59</sup>

The current form of the Elementary and Secondary Education Act is our most up-to-date federal education law, meant to deal with our current education policy needs. Yet it has failed to counter the teacher inequality crisis. If anything, the replacement of NCLB with ESSA makes the law even less relevant to teaching. Aside from eliminating the “highly qualified” standard, ESSA gives states near-complete control over how to assess student achievement and teach-

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52. COHEN & MOFFITT, *supra* note 48, at 153.

53. *Id.*

54. Kaylan Connally, *How Will ESSA Influence States' Teacher Quality Efforts?*, NEW AM. (Jan. 11, 2016), [http://www.newamerica.org/education-policy/edcentral/essa\\_teacherquality](http://www.newamerica.org/education-policy/edcentral/essa_teacherquality) [<http://perma.cc/9QSS-QMUT>].

55. 20 U.S.C. § 6321(c)(1) (2012); *see* Luebchow, *supra* note 36, at 3.

56. Luebchow, *supra* note 36, at 3.

57. *Id.* at 6.

58. *Id.*

59. Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools To Fail*, 2004 BROOKINGS PAPERS ON EDUC. POL'Y 201, 212.

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er performance.<sup>60</sup> It also prohibits the Department of Education from incentivizing states to adopt common academic standards.<sup>61</sup>

Meanwhile, the main avenue for education reform *litigation* has been at the state level. After the Supreme Court effectively cut off federal constitutional challenges to education systems in *San Antonio Independent School District v. Rodriguez*,<sup>62</sup> advocates began to bring cases in state courts under state constitutions.<sup>63</sup> At first, these cases took the form of state equal protection claims, challenging the inequitable resources provided to poor and minority-heavy school districts.<sup>64</sup> Equity cases were of limited effect: only about half were successful; those courts that did rule against the states required only equalization of funding, not of teacher quality or of student opportunities more generally; and political resistance to funding equity led states to reduce spending in wealthy districts rather than increase spending in poor districts.<sup>65</sup> Ultimately, each marginal dollar did more to improve quality in rich than in poor districts.<sup>66</sup>

The focus then shifted to adequacy-based claims, arguing that the education clauses in every state's constitution required that every student receive a certain minimum level of educational quality.<sup>67</sup> State courts were more willing to entertain these suits and eventually managed to develop standards to define adequacy.<sup>68</sup> However, even the adequacy cases have been disappointing to reform advocates. They have mitigated some of the inequality in funding between districts, but school finance has proven to be too blunt a mechanism to improve educational quality.<sup>69</sup>

One problem is that the decisions in state constitutional cases almost never tackle teaching as a discrete concern.<sup>70</sup> Of the twenty-six state high courts to order funding equality, only two—in Tennessee and Wyoming—engaged in any-

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60. Gregory Korte, *The Every Student Succeeds Act vs. No Child Left Behind: What's Changed?*, USA TODAY (Dec. 11, 2015), <http://www.usatoday.com/story/news/politics/2015/12/10/every-student-succeeds-act-vs-no-child-left-behind-whats-changed/77088780> [<http://perma.cc/XJ8E-9QH3>].

61. *Id.*

62. 411 U.S. 1, 58–59 (1973).

63. Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1360 (2010).

64. *Id.* at 1361.

65. *Id.* at 1362–63, 1365.

66. Winston, *supra* note 13, at 1013.

67. Black, *supra* note 63, at 1364–65.

68. *Id.* at 1365.

69. *Id.* at 1370.

70. Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1601 (2016).

thing close to a thorough and accurate analysis of teacher quality issues.<sup>71</sup> A recent trial court decision holding Connecticut's education system to be unconstitutional also analyzed the state's teacher compensation and evaluation methods in detail.<sup>72</sup> But state constitutional cases are inefficient, even when they succeed in affecting teaching. The Connecticut litigation lasted for eleven years before the trial court's judgment,<sup>73</sup> and since the state has appealed the trial court's ruling,<sup>74</sup> it is guaranteed an even longer life. The Tennessee and Wyoming cases took fourteen and nine years, respectively, to wind their way through the court system.<sup>75</sup>

A quicker method has arisen recently: a group of reform advocates has filed cases claiming that teacher tenure deprives students of their right to an adequate education.<sup>76</sup> A California trial court struck down a state tenure statute in 2014, only two years after the case was filed.<sup>77</sup> But the state appellate court reversed the ruling,<sup>78</sup> and the California Supreme Court declined to hear the case.<sup>79</sup> Beyond the doctrinal hurdles that such tenure challenges may face, however, they are simply misguided. There is no empirical evidence to support the idea that tenure is the cause of inadequate teaching.<sup>80</sup> Like other previous attempts to improve teacher quality through the law, tenure suits have failed to get the job done.

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71. *Id.* at 1635.

72. Conn. Coal. for Justice in Educ., Inc. v. Rell, No. X07HHDCV145037565S, 2016 Conn. Super. LEXIS 2183, at \*73–85 (Conn. Super. Ct. Sept. 7, 2016).

73. *Id.* at \*106.

74. Matthew Kauffman, *Supreme Court Will Consider Education Ruling*, HARTFORD COURANT (Sept. 20, 2016), <http://www.courant.com/news/connecticut/hc-ccjef-supreme-court-appeal-0920-20160920-story.html> [<http://perma.cc/269X-6SHY>].

75. *See* Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 234 (Tenn. 2002); *State v. Campbell Cty. Sch. Dist.*, 19 P.3d 518, 528 (Wyo. 2001); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1243 (Wyo. 1995).

76. *See* Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 78–79 (2016).

77. *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*4 (Cal. Super. Ct. Aug. 27, 2014).

78. *Vergara v. State*, 202 Cal. Rptr. 3d 262, 268 (Cal. Ct. App. 2016).

79. John Fensterwald, *California High Court Lets Rulings Stand on Teacher Tenure, School Funding Lawsuits*, EDSOURCE (Aug. 22, 2016), <http://edsource.org/2016/state-supreme-court-declines-to-hear-vergara-inadequate-funding-cases/568350> [<http://perma.cc/2RBF-WWA4>].

80. Black, *supra* note 76, at 80–81.

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II. OLD LAW, NEW SOLUTION: TITLE VI AND TEACHERS

Neither the ESEA nor state constitutional litigation has ensured that teachers are equitably distributed. But another federal statute might be the answer. Title VI of the Civil Rights Act of 1964 offers another way to achieve teacher equality within and across schools in a district, using a method that can operate within existing law and that legal scholars and policymakers alike have mostly overlooked. It also comes with significant advantages over the methods discussed in the previous Part. Title VI cases would focus squarely on teacher quality, rather than on broader questions of education financing. Investigations and litigation would also benefit from the resources and expertise that the U.S. Departments of Education and Justice could bring to bear. The Department of Education is required by law to investigate any complaints that have evidentiary support, which ensures that private individuals can get some basic level of review from the federal government. And, because Title VI requires agencies to seek cooperation from those under investigation, it both allows for faster resolution of cases and provides a level of flexibility in designing remedies that other legal avenues lack.

As we will see later on, these advantages do come with drawbacks. Like with any new legal theory, applying Title VI to teacher quality cases will require agencies and the courts to iron out important doctrinal details. To determine when there is a Title VI violation, they will have to develop standards for measuring teacher quality. To decide whether to impose liability, they will have to consider and respond to states' and districts' defenses. The Department of Education will also have to consider how to adapt its investigative process to what could become a wave of new complaints from aggrieved individuals. Finally, using Title VI to get at an issue as politically charged as teacher quality could lead to resistance: intransigent states or districts could challenge the agencies' legal authority to pursue such cases in the first place. These concerns are serious, and should be borne in mind when considering this proposal. However, as Parts III and IV will explain, these difficulties are surmountable.

A. *Mechanics: The Structure of Title VI*

Title VI is the Civil Rights Act's resource equity provision. It states: "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."<sup>81</sup> This means that federal monies come with an important string attached. If federally funded programs discriminate by race in the provision of resources, the program has violated the Civil Rights Act—and, thereby, has impliedly violated the terms of the bargain by which they received the funds in the first place.

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81. 42 U.S.C. § 2000d (2012).

By all measures, this simple provision has had a major impact on America's school system. A year after the Civil Rights Act passed, Congress enacted the ESEA, whose main provision consisted of a "billion dollar aid program to local school districts."<sup>82</sup> The Act now grants an amount of money equal to forty percent of the per-pupil expenditure in a state for each student who falls below certain standards for socioeconomic status.<sup>83</sup> By providing a large carrot in the form of grant money for disadvantaged schools, the ESEA gave federal agencies and courts a big stick: the power to force districts to comply with Title VI. Indeed, within five years of passage, Title VI transformed southern schools from the most segregated to the most integrated in the country.<sup>84</sup> This success led advocates to push for similarly worded laws to ban discrimination based on other characteristics, including gender (Title IX of the Education Amendments of 1972), handicapped status (Section 504 of the Rehabilitation Act of 1973), and age (the Age Discrimination Act of 1975).<sup>85</sup>

What constitutes discrimination under the statute, though, is somewhat contested. The bill never defined the term "discrimination," leaving this task to the agencies and the courts. Indeed, during the debate over Title VI, Senator Richard Russell of Georgia called the provision "the realization of a bureaucrat's prayers."<sup>86</sup> The U.S. Supreme Court has determined that the language of the statute itself only applies to intentional discrimination.<sup>87</sup> However, the Department of Education (DOE) has also promulgated regulations that elaborate on and expand the reach of the statute. The relevant regulation states, in part:

A recipient [of federal funds] . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which *have the effect of subjecting individuals to discrimination* because of their race, color, or national origin, or *have the effect of defeating or substantially impairing* accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.<sup>88</sup>

The Department of Justice (DOJ) has promulgated an identical regulation.<sup>89</sup> The regulations thus prohibit not just intentional discrimination, but al-

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82. Hugh Davis Graham, *The Civil Rights Act and the American Regulatory State*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 42, 50 (Bernard Grofman ed., 2000).

83. 20 U.S.C. § 6333(a)(1), (c)(1)–(4) (2012).

84. Gary Orfield, *The 1964 Civil Rights Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 82, at 89–90.

85. Graham, *supra* note 82, at 50.

86. *Id.* at 48.

87. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

88. 34 C.F.R. § 100.3(b)(2) (2016) (emphases added).

89. 28 C.F.R. § 42.104(b)(2) (2016).

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so facially race-neutral policies that have the effect of discriminating against students on the basis of race without proper justification.<sup>90</sup> The Department of Education’s regulation, in particular, is generally considered to require equity of resources in federally funded school systems.<sup>91</sup> Through these administrative rules, Title VI has “provided the chief leverage for national enforcement [since] 1970 of a disparate impact standard in minority rights.”<sup>92</sup>

Title VI creates three avenues by which school districts can be held accountable for discrimination. First, if an individual believes that a state or district has *intentionally* discriminated against her in its provision of resources, that individual can file a lawsuit directly under Title VI or under Section 1983.<sup>93</sup> Second, the DOE or DOJ can, *sua sponte*, initiate an investigation of a state or school district based on the results of periodic compliance reviews.<sup>94</sup> Or, third, an individual “who believes himself or any specific class of individuals to be subjected to discrimination prohibited by” the regulations may file a written complaint with DOE or DOJ officials within 180 days of the alleged violation.<sup>95</sup> The Departments “will make a prompt investigation” if there is enough evidence to support the allegation.<sup>96</sup> In the latter two situations, the Departments have an obligation to work with the states or school districts to determine if they can remedy any violations voluntarily before initiating any sort of legal action.<sup>97</sup> If the state or district does not comply, however, or it is otherwise determined that voluntary action will not remedy the problem, the Departments can sue or cut off grant funding.<sup>98</sup>

Congressional sponsors put a great deal of weight on the idea that Title VI would operate primarily through voluntary means. Senator Abraham Ribicoff, who helped write the substitute amendment that became the final version of Title VI,<sup>99</sup> said that “[t]he withholding of funds would be the last step to be taken only after the administrator or the agency had used every other possible means to persuade or to influence the person or the agency offending to stop the discrimination.”<sup>100</sup> Otherwise, legislators worried, federal agencies could end up

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90. See Catherine E. Lhamon, *Dear Colleague Letter: Resource Comparability*, U.S. DEP’T EDUC. 6 (Oct. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> [<http://perma.cc/3WM7-DZ3A>].

91. *Id.* at 8–9.

92. Graham, *supra* note 82, at 48.

93. See *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001).

94. 28 C.F.R. § 42.107(a), (c) (2016); 34 C.F.R. § 100.7(a), (c) (2016).

95. 28 C.F.R. § 42.107(b); 34 C.F.R. § 100.7(b).

96. 28 C.F.R. § 42.107(c); 34 C.F.R. § 100.7(c).

97. 42 U.S.C. § 2000d-1 (2016); 28 C.F.R. § 42.107(d)(1); 34 C.F.R. § 100.7(d)(1).

98. 28 C.F.R. § 42.108(a) (2016); 34 C.F.R. § 100.8(a) (2016).

99. See 110 CONG. REC. 7,065 (1964) (statement of Sen. Abraham Ribicoff).

100. *Id.* at 7,066.

harming the very students they sought to help by cutting off the funding that paid for the students' education and welfare.<sup>101</sup> Yet, at the same time, Congress did little to specify what procedures the agencies would have to follow, or how long they might have to seek voluntary compliance from federally funded programs, before moving to more drastic measures.<sup>102</sup> The statute provides two limitations: funding may be cut off only for the specific program found to violate the non-discrimination provision, and programs must be given an opportunity for a "hearing" prior to any decision to cut off funding.<sup>103</sup> But, while the sponsors evidently believed these hearings would operate like formal agency adjudications—with written records and the ability to present and rebut evidence<sup>104</sup>—the statute does not incorporate any particular requirements.

Cutting off funding is not the only legal action an agency can take, however. In fact, other than a flurry of cutoffs in the statute's early years under the Johnson Administration, the cutoff provision has been used exceedingly rarely in the education context.<sup>105</sup> In addition to the termination of funding, Title VI authorizes agencies to enforce the antidiscrimination provision "by any other means authorized by law."<sup>106</sup> Among other things, this means that agencies can engage in civil litigation. Thus, DOJ can initiate—and DOE can refer cases to DOJ to initiate—lawsuits against non-complying districts, in order to enforce Title VI and the implementing regulations.<sup>107</sup> This has been seen as a less drastic way of ensuring compliance. Indeed, at least one of the Senate sponsors of Title VI expressed his belief that "lawsuits to end discrimination, would be . . . preferable [to] and more effective" than withholding funds.<sup>108</sup> Before any such suit can be filed, however, the appropriate official from the program in question must be notified of the failure to comply with Title VI, and the agency must then "determine[] that compliance cannot be secured by voluntary means."<sup>109</sup> Again, the statute leaves unsaid what steps an agency must take in order to determine that the program will not be voluntarily brought into compliance. According to one Senate sponsor, all that would be required is "an informal conference at which the noncomplying party [is] advised of the proposed referral, and given a further opportunity to avoid litigation by voluntary agreement to comply."<sup>110</sup> Litigation is thus a less procedurally onerous option than cutting off

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101. *Id.* at 7,060 (statement of Sen. John Pastore).

102. See HALPERN, *supra* note 1, at 37.

103. 42 U.S.C. § 2000d-1 (2012).

104. 110 CONG. REC. 7,060 (1964) (statement of Sen. John Pastore).

105. HALPERN, *supra* note 1, at 294.

106. § 2000d-1.

107. 28 C.F.R. § 42.108(a) (2016); 34 C.F.R. § 100.8(a) (2016).

108. 110 CONG. REC. 7,066 (1964) (statement of Sen. Abraham Ribicoff).

109. § 2000d-1.

110. 110 CONG. REC. 7,060 (1964) (statement of Sen. John Pastore).



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funding. And it is this tool that the Departments of Education and Justice could employ to tackle teacher inequality.

*B. How To Apply Title VI to Teacher Quality*

Title VI has long covered a wide variety of school-related resources. The first Supreme Court case brought under Title VI, *Lau v. Nichols*,<sup>111</sup> dealt with San Francisco's decision not to provide bilingual education services for around 1,800 Chinese students who did not speak English.<sup>112</sup> Courts have also applied Title VI to affirmative action policies,<sup>113</sup> segregated university systems,<sup>114</sup> and student assignment to schools,<sup>115</sup> among other issues. The DOE, for its part, applies Title VI to the distribution of everything from extracurricular activities, to advanced courses, to school facilities, to educational technology, to textbooks.<sup>116</sup> In fiscal year 2015 the Office of Civil Rights (OCR) at DOE received 2,157 complaints raising Title VI issues; the most common problems were differential treatment or denial of benefits (849 complaints), retaliation claims (561), and racial harassment (452).<sup>117</sup> Inequitable provision of any educational resource can be seen as discriminating against students or denying them participation in school programs based on race or national origin.

Despite the wide Title VI net that OCR historically cast, teacher quality has mostly slipped through uncaught. Teacher quality has been invoked indirectly, as an aspect of bilingual education cases,<sup>118</sup> but has received little direct attention until quite recently. One Dear Colleague Letter in 2001 briefly discussed the unequal provision of quality teachers between high-minority and low-minority schools; it also highlighted court findings that students must receive equal op-

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111. 414 U.S. 563 (1974), *abrogated by* Alexander v. Sandoval, 532 U.S. 275 (2001).

112. *Id.* at 564.

113. *E.g.*, Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

114. *E.g.*, United States v. Fordice, 505 U.S. 717, 722 (1992).

115. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1226 (W.D. Wash. 2001), *rev'd*, 285 F.3d 1236 (9th Cir. 2002), *and opinion withdrawn on grant of reh'g*, 294 F.3d 1084 (9th Cir. 2002), *and rev'd and remanded*, 377 F.3d 949 (9th Cir. 2004), *and aff'd*, 426 F.3d 1162 (9th Cir. 2005), *rev'd and remanded*, 551 U.S. 701 (2007).

116. Lhamon, *supra* note 90, at 11–12, 17–19.

117. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., DELIVERING JUSTICE: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 18 fig.12 (May 2016), <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf> [<http://perma.cc/X74Z-CLJG>].

118. *See* Lau v. Nichols, 414 U.S. 563 (1974), *abrogated by* Alexander v. Sandoval, 532 U.S. 275 (2001); Memorandum from Michael L. Williams, Assistant Sec'y for Civil Rights, to OCR Senior Staff, U.S. Dep't of Educ. (Sept. 27, 1991), <http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html> [<http://perma.cc/W32L-TYJ3>].

portunities to learn the material featured in high-stakes testing.<sup>119</sup> However, the letter also described suits relating to the provision of educational resources as “an *emerging* area of the law.”<sup>120</sup>

In 2014, OCR finally remedied this oversight. As part of a larger Dear Colleague Letter, it officially included “effective and qualified teachers” within the set of resources required by Title VI to be equitably distributed.<sup>121</sup> OCR noted that courts have “repeatedly required equitable allocation” of teacher experience or training in Fourteenth Amendment cases,<sup>122</sup> and proceeded to extend this requirement to Title VI. For the first time, it laid out in detail how inequitable assignment of teachers can lead to OCR investigation, and what factors OCR will consider in determining whether a district’s actions violate Title VI.<sup>123</sup> This means that Title VI can be used as a means of ensuring equal access to high-quality teachers, particularly within districts but also potentially across districts within a state.<sup>124</sup>

The mechanics of Title VI specified in the statute itself, OCR’s general Title VI policies, and the procedures OCR laid out in its 2014 guidance provide a sense of how Title VI teacher quality claims might go forward. First, as mentioned above, individuals or civil rights organizations could bring private lawsuits against states or districts, claiming that they discriminated against racial or ethnic minority students in their assignment of teachers. However, this requires them to properly allege *intentional* discrimination.<sup>125</sup> Districts must (1) treat students differently in terms of resource provision on the basis of race, and must either (2) not be able to articulate a neutral, nondiscriminatory reason for the differential treatment or else (3) articulate a supposedly neutral reason that turns out to be a pretext for discrimination.<sup>126</sup> Plaintiffs could make out a claim by pointing to a particular policy and showing that it created statistical disparities amongst otherwise similar students; the district would then respond to the allegations of discrimination and the plaintiffs would come back with any evidence suggestive of pretext.<sup>127</sup> This procedure is extremely similar to the three-

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119. Richard W. Riley, *Guidance on Racial and Ethnic Disparities in Access to Educational Resources*, U.S. DEP’T EDUC. 2, 4 (Jan. 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-200101-title-vi.pdf> [<http://perma.cc/4FUF-K9XM>].

120. *Id.* at 4 (emphasis added).

121. Lhamon, *supra* note 90, at 5.

122. *Id.* at 33 n.44.

123. *Id.* at 12–16.

124. *Id.* at 1 n.†.

125. *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001).

126. Lhamon, *supra* note 90, at 6–7.

127. *Id.* at 7.

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step test used for intentional employment discrimination claims under Title VII.<sup>128</sup>

Today, however, intentional discrimination in teacher assignment likely does not occur that often. Additionally, it is not entirely clear that courts will be as lenient as would OCR in allowing plaintiffs to make a prima facie case. Courts tend to apply Title VII's standards to Title VI claims, and Title VII requires a plaintiff to provide enough information to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's" treatment and thereby "create[] a presumption" of discrimination.<sup>129</sup> This standard often requires more than mere statistics; generally, "impact alone is not determinative."<sup>130</sup> Courts must also consider the jurisdiction's history of racial discrimination, the events and procedures leading to the practice being challenged, and any contemporaneous statements made by those who imposed the policy.<sup>131</sup> If a plaintiff can produce enough evidence, the program receiving funding can make a relatively easy rebuttal to the prima facie case; the plaintiff then has "the ultimate burden of persuading the court that she has been the victim of intentional discrimination," shown "either directly by persuading the court that a discriminatory reason more likely motivated the [program] or indirectly by showing that the [program's] proffered explanation is unworthy of credence."<sup>132</sup> With these hurdles, intentional discrimination may be difficult to prove.

This leaves disparate impact claims, which involve facially neutral policies "that function unfairly to exclude minorities . . . without any sufficient justification."<sup>133</sup> And, because only the agency regulations cover disparate impact under current law, private suits would not be an option for most teacher quality claims. (This issue will be discussed in greater depth in Section IV.A.) This means that individuals will have to submit complaints about teacher inequality to OCR for it to investigate. OCR can also initiate its own investigations.

To make a prima facie disparate impact case, OCR would ask whether a specific, facially neutral teacher assignment policy has a negative effect on the quality of teachers that minority students receive as compared to white students.<sup>134</sup> OCR's guidance shows that it plans to take a number of factors into account when making this determination. First, it would consider whether a state or district had implemented high-quality teacher evaluation systems, as

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128. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

129. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

130. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

131. *Id.* at 267–68.

132. *Burdine*, 450 U.S. at 256; see also *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) (collecting cases holding that the Title VII burden-shifting framework applies to Title VI disparate treatment claims).

133. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

134. Lhamon, *supra* note 90, at 8.

these can help states ensure a more equitable distribution of teaching resources across schools and districts.<sup>135</sup> Second, it would determine whether minority students tend to attend schools with less stable teaching forces than white students attend, by examining teacher turnover and teacher absentee rates.<sup>136</sup> Third, it would measure the qualifications, licensure status, and experience of teachers in high-minority versus low-minority schools, as well as whether teachers are teaching in their areas of expertise and whether districts provide “equitable resources to improve teacher quality and retention.”<sup>137</sup> OCR would also consider whether students of different races have equal access to high-quality principals and support staff.<sup>138</sup>

If OCR finds a prima facie case of disparate impact, the school district or state would then have to show that its policy was “necessary to meet an important educational goal.” If the district or state could not make such a showing, OCR would make a finding of discrimination in violation of Title VI.<sup>139</sup> If the district did provide an adequate rationale for its policy, OCR would then ask whether there are similarly effective policies that would result in less of a disparate impact, or whether the proffered reason for the current policy is merely pretext for discrimination. A positive answer to either of these questions would likewise result in a finding that the district or state violated Title VI.<sup>140</sup> OCR would then work with the district or state to remedy the problem through cooperative effort.<sup>141</sup> If the offending entity does not change its policy, however, OCR could then refer the case to DOJ for litigation, or OCR could even cut off funding.

Whether done voluntarily through cooperation or against their will as a result of litigation, there are several ways in which violators could remedy teacher inequality. Districts could put in place better training, mentoring, and professional development programs in an effort to achieve better teacher retention in high-minority schools.<sup>142</sup> They could place better principals in high-minority schools in an effort to attract better teachers, or hire good teachers earlier in the year before other districts snap them up.<sup>143</sup> They could improve their own data

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135. *Id.* at 13.

136. *Id.* at 13–14.

137. *Id.* at 14–15.

138. *Id.* at 15–16.

139. *Id.* at 8.

140. *Id.*; see *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1412–13 (11th Cir. 1993). Again, these standards are borrowed from the case law on Title VII. See *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985), *abrogated on other grounds by Lee v. Etowah Cty. Bd. of Educ.*, 963 F.2d 1416, 1419 n.3 (11th Cir. 1992).

141. Lhamon, *supra* note 90, at 21.

142. *Id.* at 22.

143. *Id.* at 22–23.

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systems, so as to better determine which teachers and principals see greater success and why.<sup>144</sup> They could improve the physical conditions of high-minority schools to provide teachers a more attractive working environment.<sup>145</sup> They could also use financial or other incentives to encourage their best teachers to switch from low-minority to high-minority schools.<sup>146</sup>

The first and the last of these options are likely to be the most effective. Schools cannot simply fire their teachers and sweep in a new cohort of high-quality educators. And in the early years of teaching, experience has a greater effect on student achievement than “advanced degrees, teacher licensure tests scores, National Board certification at the elementary level, and class size.”<sup>147</sup> Greater professional development and mentorship opportunities—especially teacher residency programs and programs that use master teachers to train new teachers<sup>148</sup>—are vital to reducing turnover, and thereby improving the lot of students in high-minority schools.

Financial incentives to transfer between schools are similarly necessary. Empirical research shows that the key factor in predicting which schools teachers tend to gravitate toward is the character of the student body.<sup>149</sup> Teachers prefer to teach in schools with lower levels of impoverished and minority students, perhaps as a proxy for safety or students’ learning ability.<sup>150</sup> This may affect where teachers choose to work when they first start out in the profession—a decision that on its own accounts for sixty-five to ninety percent of later observed differences in teacher quality.<sup>151</sup> Moreover, most of the difference in teaching quality occurs between schools within a district, rather than between districts or regions.<sup>152</sup> And, when teachers transfer schools, it tends to be from high-poverty and high-minority schools to low-poverty and low-minority

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144. *Id.* at 23.

145. *Id.*

146. *Id.*

147. Jennifer King Rice, *The Impact of Teacher Experience: Examining the Evidence and Policy Implications*, URBAN INST. 1 (Aug. 2010), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/1001455-The-Impact-of-Teacher.Experience.pdf> [<http://perma.cc/RAS2-R4N8>].

148. *See, e.g.,* Partee, *supra* note 37, at 3.

149. Dan Goldhaber, *Addressing the Teacher Qualification Gap: Exploring the Use and Efficacy of Incentives To Reward Teachers for Tough Assignments*, CTR. FOR AM. PROGRESS 4 (Nov. 2008), [http://www.americanprogress.org/wp-content/uploads/issues/2008/11/pdf/teacher\\_qualification\\_gap.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2008/11/pdf/teacher_qualification_gap.pdf) [<http://perma.cc/D9WM-XL44>].

150. *Id.*

151. *Id.* at 13.

152. *Id.*

schools within their districts.<sup>153</sup> Incentives to move in the other direction—*toward* high-minority schools—are a crucial tool to counter this inertial pull.

Of course, both of these remedies would cost money. School districts could well argue that they lack the funds necessary to combat the systemic problems that create teacher inequality. Cost may be a practical obstacle to reform, but it is not a legal defense to Title VI violations.<sup>154</sup> Because districts cannot simply plead destitution, Title VI investigations could force them to rearrange their school budgets in a manner that local politics might otherwise prevent. It is true that many schools with high minority populations also have fewer financial resources,<sup>155</sup> suggesting that it will be difficult for them to implement the very solutions most likely to guarantee better teaching. However, this may be less of a concern than it appears at first glance. Only fifty-nine percent of the difference in per-pupil spending occurs across school districts; the other forty-one percent occurs between schools within a single district.<sup>156</sup> This within-district number is likely due to the same teacher salary differences created by discriminatory teacher assignment.<sup>157</sup> In other words, districts already have some of the money necessary to remedy teacher inequity. Moreover, because Title VI violations require heavily white schools against which to compare high-minority schools, the districts most ripe for Title VI investigations are those with a greater racial mix—and usually, therefore, a larger property-tax base.<sup>158</sup> High-minority districts, meanwhile, will benefit more from investigations against *states*, as any violation would require states to equalize teacher quality across, rather than within, districts. States will also be in a better position to afford the necessary remedies than will individual districts.

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153. Jennifer S. Cohen & Raegen T. Miller, *Evidence of the Effects of the Title I Comparability Loopholes: Shining a Light on Fiscal Inequity Within Florida's Public School Districts*, CTR. FOR AM. PROGRESS & AM. ENTERPRISE INST. 7 (May 2011), [http://blogs.edweek.org/edweek/teacherbeat/florida\\_paper.pdf](http://blogs.edweek.org/edweek/teacherbeat/florida_paper.pdf) [http://perma.cc/5LYW-RCGP].
154. See *infra* Section III.B.
155. Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), <http://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414> [http://perma.cc/JB2B-WDLS].
156. Ary Spatig-Amerikaner, *Unequal Education: Federal Loophole Enables Lower Spending on Students of Color*, CTR. FOR AM. PROGRESS 16 (Aug. 2012), <http://cdn.americanprogress.org/wp-content/uploads/2012/08/UnequalEducation-1.pdf> [http://perma.cc/YM]3-5K3T].
157. *Id.*
158. Amy Stuart Wells, *Diverse Housing, Diverse Schooling: How Policy Can Stabilize Racial Demographic Change in Cities and Suburbs*, NAT'L EDUC. POL'Y CTR. 10 (Dec. 2015), [http://www.greatlakescenter.org/docs/Policy\\_Briefs/Wells-Housing-School-Nexus.pdf](http://www.greatlakescenter.org/docs/Policy_Briefs/Wells-Housing-School-Nexus.pdf) [http://perma.cc/JAX8-L8PL].

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These remedies, especially teacher-training and school-switching incentives, are promising avenues for reducing teacher inequalities. But no district or state has been forced to adopt them yet, as OCR has only just begun to explore the relationship between Title VI and teacher quality. OCR has engaged in some related activity: for instance, it recently started using Title VI to enforce the race-specific remedies of NCLB that were discussed in Section I.B.<sup>159</sup> And DOJ has often initiated cases related to discrimination based on the race of the *teachers*—i.e., assigning black teachers to schools with mostly black students and white teachers to schools with mostly white students.<sup>160</sup> (It has, in fact, done this for the past fifty years.<sup>161</sup>) However, because OCR has only recently read Title VI to include teacher quality, DOJ has not initiated *any* discrimination cases in this area.<sup>162</sup> And OCR has done very little investigative work. OCR receives approximately 10,000 complaints annually and opens around twenty investigations per year on its own.<sup>163</sup> As of January 5, 2016, however, OCR had only received twenty-one complaints that dealt even in part with teacher equity issues under Title VI.<sup>164</sup> OCR had also initiated five inquiries on its own that addressed, at least in part, equitable access to effective teachers.<sup>165</sup> This makes for a total of twenty-six cases in OCR’s *entire records system*, out of over 10,000 investigations conducted *annually*—and only sixteen of them were still under investigation as of early 2016.<sup>166</sup> Title VI has great power to bring high-quality teachers to high-minority schools, but agencies have yet to fully harness it.

### III. MAKING TITLE VI OPERATIONAL: DOCTRINAL CONCERNS

As demonstrated here, the Departments of Education and Justice have a potentially immense power: the authority to ensure equal access to quality teachers. Title VI, that dinosaur from the age of *de jure* school segregation, could do more to improve academic achievement among America’s poor and minority students than the Every Student Succeeds Act or other forward-looking statutes. OCR and DOJ have just barely begun to explore this avenue, however. Ramping up enforcement of Title VI’s prohibition on teacher quality

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- 159. Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation*, 9 STAN. J. C.R. & C.L. 247, 270–71 (2013).
  - 160. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).
  - 161. Orfield, *supra* note 84, at 102.
  - 162. E-mail from Joseph Wardenski, Att’y, Civil Rights Div., U.S. Dep’t of Justice, to author (Feb. 6, 2015, 2:03 PM) (on file with author).
  - 163. E-mail from Program Legal Group, Office for Civil Rights, U.S. Dep’t of Educ., to author (Jan. 5, 2016, 1:15 PM) (on file with author).
  - 164. *Id.*
  - 165. *Id.*
  - 166. *Id.*

discrimination could affect hundreds of districts directly and could affect thousands more by convincing them to change their policies voluntarily for fear of investigation.

But, like any new legal tool, there are a number of kinks to work out. As discussed in the previous Part, Title VI disparate impact claims are subject to a three-part test. First, a court or agency must determine that minority students have lesser access to high-quality teachers than do white students. Second, the state or school district being confronted must show the challenged policy is necessary to meet an important educational goal. And third, the court or agency must decide whether the state or district could pursue an equally effective policy that creates less of a disparate impact. There are concerns that must be addressed across all three of these steps. The first step requires that OCR and the courts develop a working measure for teacher quality, while the second and third require those bodies to overcome districts' legitimate arguments that their teacher assignment systems will be difficult to change. This Part lays out these doctrinal pitfalls and illuminates pathways by which OCR and the courts can avoid them.

#### A. *Step One: How To Measure Teacher Quality*

Title VI's power to equalize teacher quality depends on finding an answer to a deceptively simple question: what makes one teacher better than another? Researchers have spent decades trying to tease out whether teachers who seem to be of higher quality than others are truly better at their jobs, or whether they simply have better students.<sup>167</sup> Recent work confirms that it really is the teachers themselves making the difference,<sup>168</sup> but scholars are still trying to pinpoint which measurable characteristics best correlate with the ineffable idea of good teaching.<sup>169</sup> OCR must develop, and must convince courts to adopt, standards for determining teacher quality in order to meet the test for a prima facie case of disparate impact.

It is particularly important for OCR to take the lead on this issue because judges may be loath to design clear standards on their own. Sticking their necks out before the Department of Education develops focused standards could lead to criticism that would jeopardize the courts' legitimacy in this area. "Policies

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167. See COHEN & MOFFITT, *supra* note 48, at 202; Raj Chetty et al., *Measuring the Impacts of Teachers I: Evaluating Bias in Teacher Value-Added Estimates*, 104 AM. ECON. REV. 2593, 2593–94 (2014); MET Project, *Ensuring Fair and Reliable Measures of Effective Teaching: Culminating Findings from the MET Project's Three-Year Study*, BILL & MELINDA GATES FOUND. 4 (Jan. 2013), <http://www.edweek.org/media/17teach-met1.pdf> [<http://perma.cc/A92Y-3B5V>].

168. See, e.g., MET Project, *supra* note 167, at 4–5.

169. See Linda Darling-Hammond & Gary Sykes, *A Teacher Supply Policy for Education: How To Meet the "Highly Qualified Teacher" Challenge*, in WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 164, 172 (Noel Epstein ed., 2004).



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that offer equivocation, delay, ambiguity, and even obscurity,” on the other hand, “offer political advantages.”<sup>170</sup> As shown in Section II.B, OCR’s guidance lays out five factors to which it will look when deciding whether there is a disparate impact. Some of these factors, however, are considered more reliable indicators of teacher quality than others. OCR may also have to quantify some of their standards in order to reduce courts’ discretion, which judges might otherwise use to dismiss these politically charged cases.<sup>171</sup>

OCR’s first factor—teacher effectiveness data—is both the most promising and the most problematic. As OCR’s guidance points out, states are “developing evaluation systems that use multiple measures, *including student growth*,” to determine teacher quality.<sup>172</sup> Some of these measures, such as a combination of student and administrator evaluations, have good empirical backing.<sup>173</sup> However, the idea of using students’ standardized test results to evaluate teachers has generated a great deal of controversy.

There are a number of reasons why districts must exercise caution before relying on high-stakes testing. First, even the best tests are only able to measure a small portion of the skills and knowledge that students are supposed to have learned.<sup>174</sup> Results can also fluctuate based on test design and somewhat arbitrary decisions about what score constitutes adequacy or excellence.<sup>175</sup> And, because minority students are more likely to be in schools with worse conditions and to come from worse socioeconomic backgrounds, they are also more likely to perform poorly on standardized tests. This hurts the effectiveness ratings of their teachers, even if the teachers are good at their jobs.<sup>176</sup>

Second, there are certain types of teachers and certain student skills that standardized tests cannot measure. The visual and performing arts, physical education, civics, and experimental science are extremely difficult to test in a standardized manner. Standardized tests would either miss the purpose of these subjects—by testing factual knowledge instead of skill development—or would have trouble deciphering the impact of the teacher. Nor can current American standardized tests adequately measure skills that are important for future success, including socio-emotional skills, leadership, or love of learning.<sup>177</sup> Addi-

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170. HALPERN, *supra* note 1, at 296.

171. *Id.* at 299.

172. Lhamon, *supra* note 90, at 13 (emphasis added).

173. See MET Project, *supra* note 167, at 6.

174. DANIEL KORETZ, MEASURING UP: WHAT EDUCATIONAL TESTING REALLY TELLS US 9 (2008).

175. *Id.* at 184, 316.

176. COHEN & MOFFITT, *supra* note 48, at 203.

177. KORETZ, *supra* note 174, at 37; TONY WAGNER, THE GLOBAL ACHIEVEMENT GAP: WHY EVEN OUR BEST SCHOOLS DON’T TEACH THE NEW SURVIVAL SKILLS OUR CHILDREN NEED—AND WHAT WE CAN DO ABOUT IT 119–20 (2008).

tionally, it would be of little empirical help to give standardized tests to students before the third grade; the children are too young to fully comprehend the test instructions, and the conditions on test day have an even greater impact on young children than on older ones.<sup>178</sup> Together, these facts make it difficult to use student growth as a measure of effectiveness for many teachers.

Third, even when looking at those classes for which standardized tests are a valid measure of achievement, year-to-year test results are a poor measure of teacher quality. Just as polls have margins of error because they only contact a few hundred people, teacher effectiveness measures also have margins of error because educators teach relatively few students each year. This can cause large but substantively meaningless fluctuations in test results for teachers from year to year, making it seem as though a teacher educated her students better one year but worse the next, even though there was likely very little difference in the teacher's performance.<sup>179</sup> Unless student test scores are averaged over many years, they are of limited value in measuring teacher quality. And in exchange for these questionable benefits, high-stakes testing leads teachers to focus only on the subset of topics being tested ("teaching to the test"),<sup>180</sup> and to concentrate their efforts on "bubble kids" who are close to the proficiency mark.<sup>181</sup> OCR therefore must carefully consider how to use student growth measures as part of its Title VI disparate impact analysis.

Luckily, OCR appears to understand these limitations and has advocated for the use of evaluation systems with multiple measures.<sup>182</sup> There is some evidence to suggest that value-added models (VAMs) of student growth, which estimate students' future performance based on past results and attribute the difference in their actual performance to their teachers, can properly measure teacher quality if used in combination with student and administrator evaluations.<sup>183</sup> In particular, evidence suggests that weighting student growth measures

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178. David Berliner, *Why Giving Standardized Tests to Young Children Is "Really Dumb,"* WASH. POST (July 19, 2011), [http://www.washingtonpost.com/blogs/answer-sheet/post/why-giving-standardized-tests-to-young-children-is-really-dumb/2011/07/18/gIQAB7OnMI\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/why-giving-standardized-tests-to-young-children-is-really-dumb/2011/07/18/gIQAB7OnMI_blog.html) [<http://perma.cc/4XJW-9GNT>]. Some evidence has also shown that, even though the results of these tests are unreliable when looking at young children, the scores can lead teachers to form inappropriate negative perceptions of students, which causes harm to the children themselves. See Anna Weinstein, *Kindergarten Testing: The Realities and the Dangers*, EDUCATION.COM (Jan. 5, 2011), <http://www.education.com/magazine/article/testing-kindergarten-realities-dangers> [<http://perma.cc/Z98G-AV7B>].

179. COHEN & MOFFITT, *supra* note 48, at 204; KORETZ, *supra* note 174, at 168.

180. COHEN & MOFFITT, *supra* note 48, at 203; KORETZ, *supra* note 174, at 244-45; WAGNER, *supra* note 177, at 70-71.

181. KORETZ, *supra* note 174, at 195; WAGNER, *supra* note 177, at 71.

182. Lhamon, *supra* note 90, at 13.

183. MET Project, *Feedback for Better Teaching: Nine Principles for Using Measures of Effective Teaching*, BILL & MELINDA GATES FOUND. 3, 6 (Jan. 2013), <http://>

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at one-third to one-half of the total evaluation score, with administrative observations and student surveys each making up one-quarter to one-third of the total, can avoid the volatility of using only year-to-year student test scores while still predicting future student achievement.<sup>184</sup> If OCR trusts this data, it might seek to use it as a baseline by which to measure teacher effectiveness and to judge districts' own evaluation systems. While student achievement data may not always accurately predict a single teacher's effectiveness, it *can* predict whether a district is, on average, providing better instruction to its white students than to its minority students.

The other factors that OCR discusses in its guidance letter—the stability of the teacher workforce and teacher qualifications and experience—have better empirical bases. However, there is still some disagreement over the specifics, and over exactly how well these factors correlate with quality. For instance, most studies have found that having a teaching license or a master's degree alone has little effect on student achievement.<sup>185</sup> But having higher test scores, a major in their subject matter, at least three years of experience, or greater levels of content knowledge *do* tend to make teachers more effective.<sup>186</sup> Indeed, one study found that “combined measures of teacher expertise—scores on a licensing examination, master's degrees, and experience—accounted for more of the inter-district difference in” student achievement “than any other factor, including students' family income.”<sup>187</sup> On the other hand, a different study found that equally weighting student growth, student surveys, and evaluations by school administrators predicted teacher success better than having experience or a master's degree.<sup>188</sup>

The world of teacher evaluation is a messy one, but OCR can still create a practical framework for Title VI disparate impact claims. As we have already seen, Title VI law often borrows from Title VII employment discrimination doctrine; this is another place in which a transfer of principles would be valuable. In *International Brotherhood of Teamsters v. United States*,<sup>189</sup> for example, the Court examined a claim that T.I.M.E.-D.C. and its union, the Teamsters, were discriminating against African-Americans and Hispanics in their hiring of line drivers for T.I.M.E.-D.C.'s motor freight business.<sup>190</sup> In doing so, it exam-

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k12education.gatesfoundation.org/wp-content/uploads/2015/05/MET\_Feedback-for-Better-Teaching\_Principles-Paper.pdf [http://perma.cc/4T6G-RB7E].

184. MET Project, *supra* note 167, at 6–7, 14.
185. See Sean P. Corcoran, *Human Capital Policy and the Quality of the Teacher Workforce*, in *CREATING A NEW TEACHING PROFESSION*, *supra* note 28, at 29, 31.
186. See *id.*; Darling-Hammond & Sykes, *supra* note 169, at 170, 172.
187. Darling-Hammond & Sykes, *supra* note 169, at 170.
188. MET Project, *supra* note 167, at 10.
189. 431 U.S. 324 (1977).
190. *Id.* at 328. Note that this case involved a systemic disparate treatment claim (i.e., a pattern or practice of intentional discrimination), rather than a disparate impact

ined the company's employment statistics from a variety of angles: it compared (1) the percentage of minorities among the company's entire workforce to the percentage among the company's line drivers; (2) the percentage of minorities in particular cities where T.I.M.E.-D.C. had hubs to the percentage of minorities among the company's workforce in those cities; and (3) the percentages of the company's minority and white employees who were in the company's low-paying serviceman and local driver positions.<sup>191</sup> As *Teamsters* demonstrates, litigants and OCR would benefit from providing as many relevant statistical comparisons between teachers of white students and teachers of black students as possible. If OCR could show that a district allocated its teachers within or between schools such that minority students had teachers with worse evaluations, less experience, worse credentials, less background in their subject areas, worse principals, and less support staff than white students, that would provide a strong prima facie case of disparate impact.

OCR would also have to be careful with how it parses the statistics, as courts have been rather picky about which groups plaintiffs use as comparators and how they conduct their analyses.<sup>192</sup> In particular, OCR would do well to determine a ratio of teacher quality for minority versus white students that would act as a cutoff for disparate impact claims. The Equal Employment Opportunity Commission and DOJ, among others, have jointly adopted a four-fifths (eighty percent) rule for employment discrimination cases: if a minority group is selected for a position at less than four-fifths the rate of the most favored group, the agencies will assume a disparate impact; a rate above that ratio will not trigger this assumption.<sup>193</sup> Courts have often adopted this rule in Title VII cases.<sup>194</sup> Generating a similar rule of thumb for teacher inequity, along with setting numerical standards for the many measures of teacher effectiveness, would help tame the otherwise unruly process of establishing disparate impact.

### B. Steps Two and Three: State and District Defenses

Though not as thorny as figuring out how to measure teacher quality, OCR and private litigants will also have to confront and defeat states' and districts' defenses. In order to prove a prima facie case, OCR or the private plaintiffs would have to point to a specific policy that causes the disparity in teacher qual-

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claim. But the discussion in the text is just as relevant to disparate impact cases, which involve similar uses of statistics.

191. *Id.* at 337–38 & n.17.

192. *See, e.g., Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 751–52 (S.D. Fla. 1989).

193. 29 C.F.R. § 1607.4(D) (2016).

194. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Black v. City of Akron*, 831 F.2d 131, 133–34 (6th Cir. 1987). *But see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (plurality opinion) (stating that the four-fifths rule “has not provided more than a rule of thumb for the courts”).

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ity—a seniority-based preference system for transferring between schools, for instance, or late hiring at hard-to-staff schools.<sup>195</sup> The state or district defending against the action could then try to show that the policy was “necessary to serve an important educational goal,” at which point OCR or the plaintiffs would have to prove that there are “comparably effective alternative policies or practices that would meet the school district’s stated educational goal with less of a discriminatory effect.”<sup>196</sup> A state or school district might have several legitimate defenses against a teacher quality disparate impact suit, which OCR or the courts would have to take into account. None, however, would prevent OCR from acting.

First, districts may be limited in whom they can hire. Most hiring is resolutely local, since many teachers look for positions near where they grew up or where they went to college.<sup>197</sup> A policy of hiring locally could lead districts to pick inexperienced teachers who have just been certified at local colleges, and the higher turnover at minority-heavy schools could funnel inexperienced teachers into those schools. Similarly, urban districts tend to have more trouble than do suburban districts in attracting teachers;<sup>198</sup> this could create disparities in quality across districts, for which Title VI might hold states liable. Yet a district or state could claim that local hiring is necessary to fill teaching slots—which is certainly an important educational goal. There is a major pitfall to this argument, however: the hiring process itself may end up contributing to the racial disparities, discouraging more effective non-local teachers from applying for vacancies. Some states, for instance, deny pension portability to teachers transferring from out-of-state; some districts, meanwhile, deny salary credit for previous positions, or cap salaries such that experienced teachers would have to take a pay cut to transfer into the district.<sup>199</sup> Teacher transfer provisions can also lead districts to hold off on new hiring until August or September, when many good teachers will already have taken other offers.<sup>200</sup> And, of course, the practice of local hiring alone can eliminate a number of more qualified candidates from consideration. Courts consider hiring factors like these in Title VII cases,<sup>201</sup> and would likely do so in Title VI cases, as well.

Second, districts may claim that their collective bargaining agreements provide a nondiscriminatory justification for many of their policies. Two of the policies most likely to create disparities in teacher quality—seniority-based

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195. See Lhamon, *supra* note 90, at 8; see also 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (laying out the same rule for Title VII cases); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (same).

196. Lhamon, *supra* note 90, at 8.

197. *Darling-Hammond & Sykes*, *supra* note 169, at 185.

198. *Id.*

199. *Id.* at 193.

200. *Id.*

201. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329–31 (1977).

transfer systems and salary schedules—are often features of collective bargaining agreements with teachers’ unions.<sup>202</sup> Because more experienced teachers tend to be of higher quality, and because high-minority schools have greater turnover, high-quality teachers are more likely to be found at schools with low minority populations. Seniority-based transfer provisions compound the problem because experienced teachers tend to transfer out of high-poverty schools (which tend to overlap with high-minority schools).<sup>203</sup> Fixed salary schedules, meanwhile, prevent districts from offering financial incentives for quality teachers to stay in or transfer to high-minority schools.<sup>204</sup> Certainly, paying teachers more as they gain more experience is a legitimate policy for school districts to enforce. Indeed, it is arguably “necessary” to meet the “important educational goal” of retaining veteran teachers.<sup>205</sup> Similarly, without a seniority-based transfer system, school districts could find themselves in danger of losing experienced teachers to neighboring districts.

If OCR or a court agreed that these policies were necessary to meet an important educational goal, the districts could point to the collective bargaining agreements as a reason why they could not enact policies with less of a disparate impact. The agreements, as valid contracts, are subject to the federal Constitution’s Contracts Clause.<sup>206</sup> State constitutions also prohibit the impairment of contracts.<sup>207</sup> But the federal Contracts Clause allows school districts or states to adjust contractual relationships, as long as the changes are made “upon reasonable conditions and . . . [are] appropriate to the public purpose justifying its adoption.”<sup>208</sup> State courts follow this same test for state contract clauses.<sup>209</sup> It is possible, therefore, for districts to change their collective bargaining agreements if needed. Moreover, as OCR has noted, “Federal civil rights obligations may require a school district to renegotiate agreements, revise its personnel policies, or take other steps to remedy the discrimination.”<sup>210</sup> If OCR or private plaintiffs could show that districts would be able to end seniority-based transfer policies, or provide incentives to teach in high-minority schools, without harming their ability to maintain veteran teachers, collective bargaining agreements would not stand in the way.

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202. See Darling-Hammond & Sykes, *supra* note 169, at 194.

203. Cohen & Miller, *supra* note 153, at 6–7.

204. Cf. Goldhaber, *supra* note 149, at 5 (“[I]n the absence of compensating differentials, the two-way job matching process should therefore favor schools with more-advantaged students, who will be better able to attract more-qualified teachers.”).

205. Lhamon, *supra* note 90, at 8.

206. U.S. CONST. art. I, § 10, cl. 1.

207. See, e.g., MICH. CONST. art. I, § 10; N.J. CONST. art. IV, § 7, para. 3.

208. U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 22 (1977).

209. See, e.g., Romein v. Gen. Motors Corp., 462 N.W.2d 555, 565 (Mich. 1990), *aff’d*, 503 U.S. 181 (1992).

210. Lhamon, *supra* note 90, at 23; see also 34 C.F.R. § 100.3(b) (2016).

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Finally, states or districts could attempt to use cost as a defense. Several of the most promising remedies for teacher inequity—more widespread hiring efforts, improved teacher training and mentoring programs, and financial incentive systems—could be quite expensive. Yet this is not sufficient to mitigate the duty to act under Title VI.<sup>211</sup> OCR or the courts may consider how a state or district distributes its funds, and whether they can provide more funds, when judging a disparate impact claim.<sup>212</sup> Cost, then, looks much like the other defenses we have surveyed. Districts and states may have valid, race-neutral reasons for adopting policies that result in teacher inequities across race. But, in many cases, they will still fail the Title VI disparate impact test: they may not protect a sufficiently important educational interest, they may not be necessary to meet that interest, or they may not be the most race-neutral way of achieving that interest. Title VI, then, has great potential to change the way school districts hire, train, and retain teachers.

IV. META-CONCERNS: THE COMPLAINT SYSTEM AND THE DISPARATE IMPACT REGULATIONS

The previous Part discussed the doctrinal concerns surrounding Title VI teacher equity cases. However, deeper policy issues lie beyond the three-step doctrinal test itself. Teacher inequity is a pervasive problem in America's schools. Agencies would be using Title VI to get at the prevailing political and policy issue confronting education today, in a way that they have not done since the days of school desegregation. Students, parents, and civil rights organizations will have to be made aware that they can complain to OCR about teacher inequity. Moreover, with such a pervasive issue—one that cuts to the core of education policy—the understaffed agencies might not be able to handle the problem on their own. Litigants thus may also need to reverse the jurisprudence prohibiting private rights of action for disparate impact claims under Title VI.

Taking on such an important issue through disparate impact litigation could also put into question whether the regulations allowing for disparate impact liability under Title VI extend impermissibly beyond the statute itself. Like OCR's recent reading of Title VII to require equal facility provision to transgender individuals, a robust expansion of Title VI to cover teacher quality could generate political and legal resistance.<sup>213</sup> States or districts might claim that OCR's guidance is an illegitimate reading of its own Title VI regulations.

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211. See Lhamon, *supra* note 90, at 11.

212. *Id.*

213. See Alan Blinder et al., *Countersuits over North Carolina's Bias Law*, N.Y. TIMES (May 9, 2016), <http://www.nytimes.com/2016/05/10/us/north-carolina-governor-sues-justice-department-over-bias-law.html> [<http://perma.cc/2KJ9-N3TV>] (reporting on North Carolina's decision to sue the DOJ over its determination that a North Carolina law banning transgender individuals from using the bathroom of their preferred gender violates Title VII).

Or they could take a more expansive route, arguing that the disparate impact regulations themselves are invalid. The Supreme Court's prior questioning of the regulations could encourage such a challenge.<sup>214</sup> While this concern applies to Title VI generally, rather than just to teacher quality suits, the greater and the lesser are interdependent. The same capacity for widespread change that makes Title VI teacher quality actions so attractive will also tempt regulated entities to oppose those actions, and to put pressure on the regulations. At the same time, the success of the entire Title VI teacher equity strategy depends upon the Supreme Court's willingness to uphold these regulations. As we will see, however, there is a strong case to be made that the disparate impact provisions are valid.

A. *Complaints, Cooperation, and Litigation*

As discussed in Part II, most Title VI actions arise through complaints to OCR or DOJ. Applying Title VI to teacher equity raises two issues related to the complaint process. While a large number of states and districts may experience inequalities in teacher effectiveness, private parties may not be aware of the option to complain to the agencies. And the more people who *do* become aware of the complaint process, the less likely it is to provide speedy and just results for the complainants. A private right of action would solve this problem by allowing individuals to sue directly—but this would require changing either the text of or the jurisprudence on Title VI.

Under the Supreme Court's 2001 decision in *Alexander v. Sandoval*,<sup>215</sup> private litigants do not have a right to sue for violations of the Title VI disparate impact regulations.<sup>216</sup> This means that all disparate impact claims must be funneled through the Department of Education and the Department of Justice. Anyone "who believes himself or any specific class of individuals to be subjected to discrimination" must file a complaint within 180 days of the alleged discrimination.<sup>217</sup> This may create a hurdle for private parties who are disadvantaged by a state or district's allocation of effective teachers. The time limit itself is unlikely to pose problems; the Court has ruled in the Title VII context that "[e]ach discrete discriminatory act"—such as the annual hiring or reassignment of teachers—"starts a new clock for filing charges alleging that act."<sup>218</sup> Moreover, a teacher equity claim under Title VI is analogous to a hostile work environment claim under Title VII: each "is composed of a series of separate acts that collectively constitute one" discriminatory activity.<sup>219</sup> Following this reasoning, the Court has ruled that if "an act contributing to the claim occurs within the filing

214. See *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001).

215. 532 U.S. 275.

216. *Id.* at 293.

217. 34 C.F.R. § 100.7(b) (2016).

218. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

219. *Id.* at 117.



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period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”<sup>220</sup> So too would it likely hold with Title VI teacher equity complaints.

A bigger problem will be encouraging complaints in the first place. The complaint system relies on two layers of knowledge: private individuals must be aware (1) that a given action may violate civil rights law, and (2) that disparate impact cases must flow through OCR and DOJ. But, currently, there is little to suggest that either of these presumptions is true with respect to teacher equity issues. OCR released its 2014 guidance document in the form of a Dear Colleague Letter to district and state education officials.<sup>221</sup> This was the first detailed message from OCR that teacher effectiveness is a resource covered by Title VI.<sup>222</sup> While it was published on the Department of Education’s website,<sup>223</sup> there is no indication that this information has filtered out to parents and students or to the general public. That OCR has only received twenty-one complaints related to teacher equity under Title VI supports the intuition that the public remains unaware of this legal option.<sup>224</sup> OCR could help mitigate this problem by working with civil rights organizations, which could in turn alert local communities about the new guidance. OCR could also focus on opening one or two high-profile investigations against large school districts or states with real teacher inequities, such as New York City or New York State.<sup>225</sup> The publicity from these efforts could help inform the public that Title VI covers teacher effectiveness.

If the measure of success is a higher level of complaints, however, then with success will come a second, even more profound problem with the current system. Under DOE regulations, OCR staffers must make “prompt” investigations whenever a complaint raises a potential Title VI violation.<sup>226</sup> But OCR has been struggling to keep up with the existing level of complaints. Since 1980, when DOE first became an independent agency, OCR’s staff levels have continuously dropped, down from 1,148 in 1980 to 540 in 2015<sup>227</sup>—a 53% decrease. The number of complaints it has received in the same period has steadily climbed, from

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220. *Id.*

221. Lhamon, *supra* note 90, at 1.

222. See Lhamon, *supra* note 90 and accompanying text.

223. See *Race and National Origin Discrimination: Policy Guidance*, U.S. DEP’T EDUC., <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/race-origin.html> [<http://perma.cc/4BQ5-QAGJ>].

224. E-mail from Program Legal Group to author, *supra* note 163.

225. *New York State’s Plan To Ensure Equitable Access to the Most Effective Educators 2014–2015*, N.Y. STATE EDUC. DEP’T 6–7, 34, 213, <http://www.p12.nysed.gov/accountability/T2/pdfs/FINALNYSEquityPlan.pdf> [<http://perma.cc/QH4Y-JQJM>].

226. 34 C.F.R. § 100.7(c) (2016).

227. OFFICE OF CIVIL RIGHTS, *supra* note 117, at 8 & fig.3.

3,497 in 1980 to 10,392 in 2015<sup>228</sup>—a 297% jump. In fiscal year 2015, OCR was only able to resolve 9,250 complaints, or over one thousand less than it received; and even this number includes complaints that were received in previous years.<sup>229</sup> Activists have also begun to shine a spotlight on the issue of sexual assault on college campuses, which has placed even greater pressure on OCR's skeletal staff: OCR had to handle more Title IX complaints from October 2012 to March 2014 than it had in the previous four years combined.<sup>230</sup> The more successful OCR is at informing the public about the teacher equity guidance, the less successful it will be at handling teacher equity cases promptly.

One way to mitigate this problem would be to restore the disparate impact private right of action that the Court took away in *Alexander v. Sandoval*.<sup>231</sup> There are three ways to do this. First, the Court could reverse the “unorthodox and somewhat haphazard” set of cases that ruled that Title VI itself is limited to intentional discrimination.<sup>232</sup> Alternatively, Congress could pass legislation that expands Title VI to include disparate impact. Second, Congress could pass a law creating a private right of action to enforce the Title VI regulations, overriding the Court's *Sandoval* decision. Or third, the Court could reconsider and overrule *Sandoval*, determining that a private right of action does exist to enforce the disparate impact regulations.

None of these options, though, stands a good chance of becoming reality. The Court exercises a “superpowered form of stare decisis” in the field of statutory interpretation.<sup>233</sup> “Absent special justification, [statutory interpretation opinions] are balls tossed into Congress's court, for acceptance or not as that branch elects.”<sup>234</sup> The Court is therefore unlikely to overrule its decisions on the scope of Title VI or on the existence of a disparate impact private right of action.

Instead, Congress may well have to override these decisions itself. This is also unlikely. As scholars have recently demonstrated, Congress has been far stingier about overriding judicial statutory interpretations since the late 1990s.<sup>235</sup> Perhaps because the disparate impact regulations remain intact, or perhaps be-

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228. *Id.*

229. *Id.* at 5, 43 n.2.

230. See Tyler Kingkade, *Senators Push for More Staff at Agency To Investigate Sexual Abuse at Colleges*, HUFFINGTON POST (Apr. 4, 2014, 3:54 PM), [http://www.huffingtonpost.com/2014/04/04/agency-sexual-assault-investigations-mccaskill-gillibrand\\_n\\_5092748.html](http://www.huffingtonpost.com/2014/04/04/agency-sexual-assault-investigations-mccaskill-gillibrand_n_5092748.html) [<http://perma.cc/RVD9-TMCC>].

231. 532 U.S. 275, 293 (2001).

232. *Id.* at 307 (Stevens, J., dissenting).

233. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015).

234. *Id.* at 2409.

235. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014).

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cause Congress has become more polarized, Congress has not overridden *Sandoval*. Scholars<sup>236</sup> and activists<sup>237</sup> alike have called for a congressional override, and members of Congress have introduced at least four bills that seek to overturn *Sandoval* by both adding disparate impact liability to Title VI and providing an explicit cause of action to enforce the federal regulations.<sup>238</sup> But none of these bills made it out of committee.<sup>239</sup> The fact that Congress has not passed one of these laws could provide the Court with yet another reason to uphold *Sandoval*.<sup>240</sup>

Even if Congress or the Court were willing to overturn *Sandoval* and sanction private disparate impact suits, allowing private suits could also generate greater animosity on the part of states and school districts, and eliminate the buy-in that comes with cooperative action. The authors of Title VI designed it to “put[] a premium on voluntary action.”<sup>241</sup> Accordingly, OCR encourages cooperation with those entities it investigates, and likewise encourages those entities to work with their own stakeholders to resolve Title VI issues.<sup>242</sup> Litigation rarely leaves room for such cooperative efforts. This could limit Title VI’s oth-

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236. See, e.g., Tanya L. Miller, Note, *Alexander v. Sandoval and the Incredible Disappearing Cause of Action*, 51 CATH. U. L. REV. 1393, 1425–26 (2002).
237. See, e.g., Leon Friedman, *Overruling the Court*, AM. PROSPECT (Dec. 19, 2001), <http://prospect.org/article/overruling-court> [<http://perma.cc/8DYH-Y8QD>].
238. Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong., §§ 3–4 (introduced in the House as H.R. 5896, 110th Cong., §§ 3–4); Civil Rights Act of 2008, S. 2554, 110th Cong., tit. I, §§ 102(a), 103 (introduced in the House as H.R. 5129, 110th Cong., tit. I, § 102(a), 103); Environmental Justice Enforcement Act of 2006, S. 4009, 109th Cong., §§ 3–4; Fairness and Individual Rights Necessary To Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, tit. I, §§ 102(a), 103 (introduced in the House as H.R. 3809, tit. I, §§ 102(a), 103). One other bill sought to override *Sandoval* solely by providing a private right of action to sue for violations of the Department of Transportation’s disparate impact regulations. See Transportation Opportunity and Accountability Act of 2011, H.R. 2019, 112th Cong., § 3(b).
239. See *Actions Overview H.R.5129 — 110th Congress (2007–2008)*, CONGRESS.GOV, <http://tinyurl.com/glyustx> [<http://perma.cc/FF5H-K2ND>]; *Actions Overview: H.R.5896 — 110th Congress (2007–2008)*, CONGRESS.GOV, <http://tinyurl.com/hv4ak65> [<http://perma.cc/F7GP-HF57>]; *Actions Overview: S.2554 — 110th Congress (2007–2008)*, CONGRESS.GOV, <http://tinyurl.com/j7r5cl2> [<http://perma.cc/TJP9-3YAE>]; *Actions Overview: S.2918 — 110th Congress (2007–2008)*, CONGRESS.GOV, <http://tinyurl.com/hutsdtb> [<http://perma.cc/Y877-22GD>]; *Actions Overview: S.4009 — 109th Congress (2005–2006)*, CONGRESS.GOV, <http://tinyurl.com/z9j8f2m> [<http://perma.cc/7HGX-4QTH>]; *Actions Overview H.R.3809 — 108th Congress (2003–2004)*, CONGRESS.GOV, <http://tinyurl.com/hun9dfz> [<http://perma.cc/N6B7-SN8X>]; *Actions Overview: S.2088 — 108th Congress (2003–2004)*, CONGRESS.GOV, <http://tinyurl.com/gmdy4gl> [<http://perma.cc/6UUK-62DJ>].
240. See, e.g., *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409–10 (2015).
241. 110 CONG. REC. 7061 (1964) (statement of Sen. John Pastore).
242. Lhamon, *supra* note 90, at 21.

erwise great potential to help districts voluntarily implement needed programs. If a district wanted to, or could be persuaded to, adopt financial incentives for teaching in hard-to-staff schools or eliminate seniority-based transfer rules, OCR could work with the district through the investigation process. OCR's determination that it violated Title VI could even provide a district with a legal shield against political fallout, or a legal sword to help it seek money from the state or the voters. The toxic atmosphere of the courtroom could cause districts to resist such remedies instead.

In all, then, OCR must clear several hurdles if it hopes to effectively subject teacher quality discrimination to the complaint process. More complaints will put strain on the understaffed office, and could lead to lengthy delays in conducting investigations and negotiating remedies. Allowing private rights of action would alleviate this strain, but the Court's decision in *Sandoval* makes this a difficult lift. And, as we have seen, litigation may not always be the best route to take when attempting to change states' and school districts' policies. Given the informational difficulties related to the complaint process, and the difficulty OCR and DOJ would have in handling a significant number of Title VI teacher equity cases alone, private suits would likely be of value. But OCR investigations will remain the primary means of enforcement.

### B. *Survival of the Disparate Impact Regulations*

Finally, tackling the pervasive problem of teacher inequities would launch Title VI into waters not explored since the desegregation debate of the 1960s. This could provoke great opposition and would likely end in a legal challenge to OCR's authority to conduct teacher quality investigations. States or districts could challenge OCR's guidance letter, claiming that it is not a valid interpretation of the Department of Education's Title VI regulations. Or, more seriously, it could challenge the disparate impact regulations themselves. In *Sandoval*, the Court left these regulations hanging by a thread: it assumed that they were valid because neither party challenged them, but it could not resist questioning their legality.<sup>243</sup> Since teacher quality suits could well involve challenges to the regulations, and since OCR and DOJ cannot conduct disparate impact investigations without them, it is essential that courts uphold the regulations.

Any challenge to OCR's Dear Colleague Letter must be taken seriously, but would be unlikely to succeed. The Dear Colleague letter is an interpretation of the Department of Education's Title VI regulations. Courts generally defer to agencies' interpretations of their own regulations.<sup>244</sup> But the regulations must be ambiguous, the interpretations must be consistent with the regulations, and the interpretations must be sufficiently authoritative.<sup>245</sup> Opponents of OCR's and DOJ's recent reading of Title VII and Title IX sex-discrimination regula-

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243. *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001).

244. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

245. *Id.* at 461–63.

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tions to include gender identity have claimed that this reading was improper.<sup>246</sup> This suggests that opponents of Title VI teacher quality suits might mount a similar challenge to the Dear Colleague Letter. However, the letter is an official document, signed by a relatively high-level officer, and was designed as a general policy statement rather than as a response to a particular lawsuit.<sup>247</sup> Moreover, the language being interpreted—“subjecting individuals to discrimination” and “defeating or substantially impairing accomplishment of the objectives of [a] program”—is certainly ambiguous.<sup>248</sup> It is more than reasonable to argue that being provided a low-quality teacher would “substantially impair[] accomplishment of the objectives of” a school district.<sup>249</sup>

More troublesome would be a direct challenge to the agencies’ disparate impact regulations themselves. There are two main methods by which Congress or the Court could uphold the regulations. First, Congress could pass a statute that extends Title VI to disparate impact discrimination or otherwise blesses the regulations. This option was discussed in the previous Section.<sup>250</sup> Or second, the Court could reverse its decisions holding that Title VI does not encompass disparate impact claims. As discussed here, there is good reason for the Court to do this, both as a matter of statutory interpretation and as a question of administrative deference.<sup>251</sup>

The relationship between Title VI and disparate impact liability has a tortured history. The Supreme Court encountered Title VI for the first time in *Lau v. Nichols*,<sup>252</sup> where it approved a private disparate impact suit over San Francisco’s refusal to provide bilingual education to Chinese students.<sup>253</sup> The Court’s decision was somewhat confusing: it explicitly noted that agency *regulations* prohibited policies that did not have a discriminatory intent and seemed to consider San Francisco’s actions as violating those regulations;<sup>254</sup> yet it said that it “rel[ie]d solely on § 601,” the antidiscrimination ban in the statute itself, to

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246. See, e.g., Petition for Writ of Certiorari at 25–37, Gloucester Cnty. Sch. Bd. v. G.G., No. 16-273 (Aug. 29, 2016), *cert. granted*, 2016 WL 4565643 (Oct. 28, 2016); Blinder et al., *supra* note 213.

247. See Lhamon, *supra* note 90, at 1, 25.

248. 34 C.F.R. § 100.3(b)(2) (2016).

249. *Id.*

250. See *supra* notes 233–40.

251. See *infra* notes 252–97. For an alternative analysis that reaches a similar conclusion, see David J. Galalis, Note, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 86–100 (2004).

252. 414 U.S. 563 (1974), *abrogated by* Alexander v. Sandoval, 532 U.S. 275 (2001).

253. *Id.* at 564–65.

254. *Id.* at 568–69.

decide the case.<sup>255</sup> Five years later, in *Cannon v. University of Chicago*,<sup>256</sup> the Court implied a private right of action for a disparate impact suit under Title IX of the Educational Amendments of 1972,<sup>257</sup> a provision that the Court stressed was directly “patterned after Title VI.”<sup>258</sup> These early cases, along with authoritative decisions by courts of appeals,<sup>259</sup> strongly suggested that Title VI banned disparate impact discrimination.

Yet, in *Regents of the University of California v. Bakke*,<sup>260</sup> decided a year before *Cannon*, five Justices determined that Title VI’s scope was coextensive with that of the Fourteenth Amendment.<sup>261</sup> Since the Court had determined in *Washington v. Davis* that the Fourteenth Amendment only applied to intentional discrimination,<sup>262</sup> *Bakke* seems to have eliminated disparate impact from the statute’s ambit. However, *Bakke* asked only whether Title VI prohibited voluntary affirmative action programs, and the five-Justice majority differed in how the Fourteenth Amendment (and therefore Title VI) would apply to such programs.<sup>263</sup> In fact, two of the Justices who were in the *Bakke* majority on Title VI—and Justice Stevens, who dissented in *Bakke*<sup>264</sup>—later insisted that *Bakke* only applied to affirmative action, and that Title VI in fact prohibits some forms of disparate impact.<sup>265</sup> This morass of conflicting opinions left Title VI’s scope less than clear for decades. Other than a series of confused and fractured opinions in *Guardians Association v. Civil Service Commission*,<sup>266</sup> and some dicta in a 1985 decision,<sup>267</sup> no Supreme Court decision conclusively determined that Title VI was limited to intentional discrimination until *Sandoval*.<sup>268</sup>

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255. *Id.* at 566.

256. 441 U.S. 677 (1979).

257. *Id.* at 680 n.2, 717.

258. *Id.* at 694.

259. *E.g.*, *Bossier Par. Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967).

260. 438 U.S. 265 (1978).

261. *Id.* at 287 (principal opinion of Powell, J.); *id.* at 325, 328 (Brennan, J., concurring in part and dissenting in part).

262. 426 U.S. 229, 239 (1976).

263. *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting).

264. *Bakke*, 438 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

265. *Sandoval*, 532 U.S. at 308–10; *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 589–90 (1983) (principal opinion of White, J.); *id.* at 623–24 (Marshall, J., dissenting).

266. 463 U.S. at 607–08 (Powell, J., concurring); *id.* at 612 (O’Connor, J., concurring); *id.* at 634 (Stevens, J., dissenting).

267. *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

268. 532 U.S. at 280–81.

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As an original matter, however, there is overwhelming evidence that Title VI *should* cover disparate impact claims under the Court’s statutory interpretation jurisprudence. Recently, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>269</sup> the Court held that disparate impact claims are cognizable under the Fair Housing Act.<sup>270</sup> In its opinion, the Court held that statutes “must be construed to encompass disparate-impact claims” when: (1) “their text refers to the consequences of actions and not just to the mindset of actors,” and (2) “that interpretation is consistent with statutory purpose.”<sup>271</sup> Title VI passes both of these tests.

First, the statute clearly refers to consequences rather than motive. The language of Section 601 of the Civil Rights Act states: “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.”<sup>272</sup> In *Inclusive Communities*, the Court found that the Fair Housing Act included “results-oriented language” because it used the passive phrase “otherwise make unavailable.”<sup>273</sup> Likewise, Section 601 focuses on the person being discriminated against. Unlike the Fair Housing Act, Section 601 uses *exclusively* passive phrases, such as “be excluded from participation in,” “be denied the benefits of,” and “be subjected to discrimination.”<sup>274</sup> Like the Fair Housing Act, Title VI’s text “refers to the consequences of an action rather than the actor’s intent.”<sup>275</sup>

Second, disparate impact liability is consistent with Title VI’s purpose. Like the Fair Housing Act, Title VI “was enacted to eradicate discriminatory practices within a sector of our Nation’s economy”<sup>276</sup>—in this case, federally funded programs.<sup>277</sup> Moreover, the Court has determined that several statutes with similar wordings and purposes as Title VI allow for disparate impact, including Title VII of the Civil Rights Act, Section Five of the Voting Rights Act, and per-

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269. 135 S. Ct. 2507 (2015).

270. *Id.* at 2525.

271. *Id.* at 2518.

272. 42 U.S.C. § 2000d (2012).

273. 135 S. Ct. at 2518.

274. § 2000d.

275. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015). Just as the Fair Housing Act uses the phrase “because of race,” Title VI uses the phrase “on the ground of race.” However, while Texas argued that this language foreclosed disparate impact liability, the Court rejected this argument. *Id.* at 2519.

276. *Id.* at 2521.

277. See 110 CONG. REC. 7055 (1964) (statement of Sen. John Pastore) (“The title [Title VI] has a simple purpose—to eliminate discrimination in federally financed programs.”).

haps the Rehabilitation Act of 1973,<sup>278</sup> as well as the Fair Housing Act.<sup>279</sup> It would be more out of step with the Court's jurisprudence to find that Title VI does *not* include disparate impact than to conclude that it does.

Finally, OCR's regulations were passed soon after Title VI was enacted, as part of an effort coordinated by the DOJ; the Act also required the regulations to receive presidential approval.<sup>280</sup> According to traditional statutory interpretation principles, "[a]s a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of Title VI."<sup>281</sup> And the regulations include disparate impact as a prohibited form of discrimination.<sup>282</sup> A real reexamination of the law, then, would likely conclude that Title VI covers disparate impact.

This point about deference bleeds over into the final method of sustaining the regulations. Regardless of whether the statute itself clearly covers disparate impact, the Court could determine that the regulations validly interpret or enforce the statute. One path is through *Chevron* deference, the doctrine that courts must defer to reasonable agency interpretations of ambiguous statutory language.<sup>283</sup> It is true that the Court has held that Title VI is coterminous with the Constitution.<sup>284</sup> Other than *Sandoval*, however, these opinions were released prior to *Chevron*,<sup>285</sup> and, as discussed above, they did not conclusively close the door to disparate impact liability.

More importantly for *Chevron* purposes, however, even the cases that suggested that Title VI only proscribes intentional discrimination did not say that the statute was unambiguous. To the contrary, Justice Powell's controlling opinion in *Bakke* found that Title VI's prohibition on "discrimination" was "susceptible of varying interpretations."<sup>286</sup> Justice Brennan's partial concurrence, joined by three other Justices, said that "Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doc-

278. See *Alexander v. Sandoval*, 532 U.S. 275, 308 n.17 (2001) (Stevens, J., dissenting) (collecting cases).

279. *Inclusive Cmty. Project*, 135 S. Ct. at 2525.

280. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 341 (1978) (Brennan, J., concurring in part and dissenting in part).

281. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting).

282. See 34 C.F.R. § 100.3(b)(2) (2016).

283. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

284. See *supra* notes 260–68.

285. Compare *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Guardians*, 463 U.S. 582 (1983); and *Bakke*, 438 U.S. 265 (1978), with *Chevron*, 467 U.S. 837 (1984).

286. *Bakke*, 438 U.S. at 284 (principal opinion of Powell, J.).



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trine.”<sup>287</sup> These are clear statements that the Court considered the language to be ambiguous.<sup>288</sup> And, as Justice Stevens’ *Sandoval* dissent rightly pointed out, the majority in *Guardians* that read Title VI as applying only to intentional discrimination did so as a matter of stare decisis, because that is how they read *Bakke*.<sup>289</sup> Six Justices in *Guardians* either explicitly or implicitly acknowledged that Title VI’s language is ambiguous.<sup>290</sup> Normally, reasonable agency constructions of ambiguous language prevail.

*Chevron*’s command to defer to agency interpretations is even stronger because Congress clearly *intended* to defer to the Executive. “Indeed,” as Justice Brennan’s *Bakke* opinion stated, “there was a strong emphasis throughout Congress’ consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination.”<sup>291</sup> This, along with the statute’s breadth, provides strong evidence that courts should defer to the agencies’ interpretations.<sup>292</sup> The fact that the Court has previously held, haphazardly, that Title VI does not include disparate impact should not change this calculus. The Court’s opinion in *National Cable & Telecommunications Ass’n v. Brand X Internet Services* makes clear that “[o]nly a judicial precedent holding that the statute *unambiguously* forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”<sup>293</sup>

Despite the Court’s attempts in *Sandoval* to sweep the issue under the rug,<sup>294</sup> the Court has never definitively labeled Title VI unambiguous. *Sandoval* was also decided before *Brand X* clarified that agency regulations could trump court interpretations of ambiguous statutes.<sup>295</sup> *Brand X* did not cover situations in which the regulation in question existed prior to a court’s interpretation, as

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287. *Id.* at 337 (Brennan, J., concurring in part and dissenting in part).

288. *Bakke* also explicitly rejected a “color-blind” vision of Title VI, in favor of an evolving one, which supports an executive prohibition on disparate impact. *Id.* at 284–85 (principal opinion of Powell, J.); *id.* at 336 (Brennan, J., concurring in part and dissenting in part).

289. *Sandoval*, 532 U.S. at 308 (Stevens, J., dissenting).

290. 463 U.S. at 592 (principal opinion of White, J.); *id.* at 612 (O’Connor, J., concurring); *id.* at 621–24 (Marshall, J., dissenting); *id.* at 641, 643–44 (Stevens, J., dissenting).

291. *Bakke*, 438 U.S. at 338–39.

292. *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting).

293. 545 U.S. 967, 982–83 (2005) (emphasis added). *But see* Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps To Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 376 n.294 (2015) (arguing that Title VI regulations may not receive *Chevron* deference).

294. *Sandoval*, 532 U.S. at 280–81 (majority opinion).

295. *Compare id.*, with *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

the Title VI disparate impact regulations did prior to *Bakke*. Nor did it decide whether the *Brand X* rule would apply when the Supreme Court, as opposed to a lower court, had interpreted a statute.<sup>296</sup> (The few circuit courts to reach the issue have held that it does,<sup>297</sup> but this does not settle the question.) However, there is a strong argument to make that, under *Brand X*, DOE and DOJ should receive deference for their disparate impact regulations.<sup>298</sup>

With the untimely death of Justice Scalia, the identity of his replacement—and Justice Kennedy’s views as the potential swing vote—could determine whether or not the Court will take this path. If the Court does decide that the

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296. Compare *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring) (stating that *Brand X*’s reasoning “would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity”), with *id.* at 1017 (Scalia, J., dissenting) (“According to today’s opinion, the agency is thereupon free to take the action that the Supreme Court found unlawful.”). At least four Justices would hold that *Brand X* does allow agencies to displace prior Supreme Court opinions. See *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 548–49 (2009) (Thomas, J., dissenting). However, this issue has not been definitively settled. See *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1851–52 (2012) (Kennedy, J., dissenting) (“There has been no opportunity to decide whether the analysis would be any different if an agency sought to interpret an ambiguous statute in a way that was inconsistent with this Court’s own, earlier reading of the law.”). One student Comment read the plurality opinion in *Home Concrete* as “allowing an inference of *Brand X* applicability to Supreme Court decisions but not making it clear.” W. Matthew Pierce, Comment, *United States v. Home Concrete & Supply, LLC: Making “Ambiguous” Ambiguous*, 90 DENV. U. L. REV. 295, 315 (2012).
297. See *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1379 (Fed. Cir. 2011), cert. granted, judgment vacated on other grounds, 132 S. Ct. 2099 (2012); *Bakersfield Energy Partners, LP v. Comm’r*, 568 F.3d 767, 778 (9th Cir. 2009); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008).
298. Alternatively, the Court could follow Justice Stevens’ view, expressed in his *Sandoval* dissent, that the regulations are proper prophylactic measures to implement Title VI’s ban on discrimination. *Sandoval*, 532 U.S. at 307 (Stevens, J., dissenting). One could view Section 601’s discrimination ban and Section 602’s authorization of rulemaking as “an integrated remedial scheme,” in which “Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601.” *Id.* at 304. The sheer breadth of the delegation that Title VI gives to agencies allows them to enact “prophylactic rules necessary to actualize the goals enunciated in § 601,” even if those rules go beyond the more restricted reading one might otherwise give the statutory text. *Id.* at 305, 310. In *Guardians*, five Justices said that agencies may prohibit disparate impact through regulations as a way to “effectuate” Title VI. *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584 n.2 (1983) (principal opinion of White, J.); *id.* at 617–19 (Marshall, J., dissenting). Given the Court’s affirmation in *Inclusive Communities* that disparate impact liability can help uncover discriminatory intent, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015), the disparate impact regulations could be seen as necessary to enforcing Title VI even if the statute itself only prohibits intentional discrimination.

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disparate impact regulations are proper agency interpretations of an ambiguous statute, or that the statute itself encompasses disparate impact, then OCR's efforts to ensure teacher equity can proceed apace.

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The concerns laid out in this Part and in Part III should not in any way prevent OCR and DOJ from tackling teacher inequality. They do, however, suggest some strategic choices that the agencies could make to ensure that their Title VI efforts bear fruit. OCR could begin by using its spontaneous investigation powers to analyze major, politically liberal states or school districts. Such an investigation could provide the interest necessary to publicize the new standards. It would also provide OCR with an opportunity to test its teacher equity guidelines in a jurisdiction that has a greater political willingness to cooperate. OCR and the district or state could then work together to design innovative remedies to alleviate the inequality at a price the jurisdiction can afford. OCR could then move on to investigating jurisdictions that are governed by federal circuit courts with histories of affording deference to agencies. This way, if they are challenged, OCR and DOJ would have a better chance of developing precedent favorable to them—both on the substance of the remedies and on the validity of the disparate impact regulations.

CONCLUSION

Title VI is a traditional antidiscrimination statute and has generally been treated as such. It may have sufficed to deal with racial segregation; this was a purely “legal” problem. But racial discrimination, one might think, is only a small aspect of today's broader education policy debate. Under this theory, more policy work, rather than litigation, will solve the problem.

Yet this prevailing wisdom may not be so wise. Congress has tried to improve our education system through the No Child Left Behind Act, and forty-two states—many encouraged by the prospect of receiving waivers from the increasingly unrealistic mandates of NCLB<sup>299</sup>—have also adopted the Common Core curriculum.<sup>300</sup> But these more discretionary policy innovations have met with limited success. NCLB's unrealistic timeline for making all students proficient in math and reading, along with its heavy-handed state testing requirements, led Congress to replace it in 2015 with the Every Student Succeeds Act.<sup>301</sup>

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299. See Caitlin Emma, *The Price of Common Core Repeal*, POLITICO (Aug. 29, 2014, 9:16 AM), <http://www.politico.com/story/2014/08/oklahoma-common-core-no-child-left-behind-waiver-110421> [<http://perma.cc/4MQA-8KBT>].

300. See *Standards in Your State*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/standards-in-your-state> [<http://perma.cc/W4DE-6NQB>].

301. See Julie Hirschfeld Davis, *President Obama Signs into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/11/us/politics/president-obama-signs-into-law-a-rewrite-of-no-child-left-behind.html> [<http://perma.cc/P2VA-T4QH>].

Meanwhile, the Common Core standards and accompanying tests have generated a great deal of political backlash,<sup>302</sup> becoming a popular target for ridicule in the 2016 Republican presidential primary race.<sup>303</sup>

Employing Title VI to combat teacher inequality can add another valuable string to the educational improvement bow, while bringing Title VI into the twenty-first century. It can encourage, or force, states and school districts to implement remedies that have a real chance of alleviating teacher inequity. These include teacher training and mentoring, incentives designed to get effective teachers to transfer to needy schools, and many others. And precisely because it is legalistic, rather than prototypically policy-driven, Title VI is more insulated from the vicissitudes of politics than are these more modern policy initiatives. A more aggressive use of Title VI certainly will not solve all of America's education woes—but it would be a big step in the right direction.

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302. See Tim Murphy, *Inside the Mammoth Backlash to Common Core*, MOTHER JONES (Sept./Oct. 2014), <http://www.motherjones.com/politics/2014/09/common-core-education-reform-backlash-obamacare> [<http://perma.cc/9CMM-BSRY>].

303. Andy Sullivan, *2016 Candidates Slam Common Core, but Education Standards Take Root*, HUFFINGTON POST (Sept. 10, 2015, 8:45 AM), [http://www.huffingtonpost.com/entry/republicans-common-core\\_us\\_55f179e1e4b093be51bdb38e](http://www.huffingtonpost.com/entry/republicans-common-core_us_55f179e1e4b093be51bdb38e) [<http://perma.cc/RRP8-3594>].