ALIGNING "EDUCATIONAL NECESSITY" WITH TITLE VI: AN ENHANCED REGULATORY ROLE FOR EXECUTIVE AGENCIES IN TITLE VI DISPARATE IMPACT ENFORCEMENT

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Title VI charges the federal government with removing discrimination in our public institutions. In light of disparate impact claims concerning a range of racially discriminatory education practices, this Note makes the case for the benefit of an official regulation from the U.S. Department of Education—as a federal arm—that more specifically informs the disparate impact framework's educational necessity standard. This regulation would not only aid plaintiffs seeking to challenge harmful educational practices, but also provide courts with more specific and authoritative guidance in adjudicating Title VI disparate impact claims. This Note argues that a beneficial starting point for such a regulation would make clear that a discriminatory school policy should be evaluated based on whether a school policy advances equal educational opportunities and whether the school is in the best position to remedy a policy that does not. A regulation guided by this standard comports with Title VI's original intention of rooting out discrimination against protected minority groups as well as helps to ensure minorities' full access to a high quality public education.

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INTRODUCTION

Every year, many thousands of New York City's eighth and ninth grade students vie for spots in one of the city's eight premier "Specialized High Schools."[1] These public schools include the renowned Bronx High School of Science[2] and Stuyvesant High School.[3] A high number of graduates from these schools go on to attend elite universi-

[1] *See* N.Y. EDUC. LAW § 2590-h(1)(b) (McKinney 2014) (naming those schools). Fiorello H. LaGuardia High School of Music & Art and Performing Arts is also considered a Specialized High School. *Id.* It is the only Specialized High School where admission is based on multiple measures, including music, dance, or drama arts auditions and an evaluation of academic records. *Admissions*, FIORELLO H. LAGUARDIA HIGH SCH. OF MUSIC & ART & PERFORMING ARTS, http://schools.nyc.gov/SchoolPortals/03/M485/AboutUs/Overview/Admissions+Overview.htm (last visited June 27, 2015).

[2] *See Notable Alumni*, THE BRONX HIGH SCH. OF SCI. ALUMNI ASSOC. & ENDOWMENT FUND, http://alumni.bxscience.edu/?page=notablealumni (highlighting the fact that the Bronx High School of Science boasts more Nobel Laureates than any other secondary school in the world (eight) and several Pulitzer Prize winners, among other prestigious national honors) (last visited June 1, 2015).

[3] *See* Rachel Monahan, *Stuyvesant High School No. 8 on U.S. News & World Report's List of Best Science and Math Schools in Country*, N.Y. DAILY NEWS (May 29, 2012, 11:52 PM), http://www.nydailynews.com/new-york/education/stuyvesant-high-school-no-8-u-s-news-world-report-list-best-science-math-schools-country-article-1.1086493 (noting that Stuyvesant High School is "often considered the most prestigious public high school in" New York City).

ties and assume political, economic, and social leadership positions across the country.[4]

New York state law creates just one criterion for admission to one of the Specialized High Schools: students' rank-order score on a 2.5-hour multiple-choice entrance exam.[5] In 2012, close to 11,585 black and Latino students took that exam.[6] Of this pool of thousands, *nine* black and *twenty-four* Latino students were determined to be qualified for entrance into Stuyvesant High School.[7] Overall, only about *six percent* of New York City students who gained a spot at any Specialized High School for the 2012–2013 school year were black, while just *seven percent* were Latino.[8] By comparison, the Specialized

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[4] *See* Heather Mac Donald, *How Gotham's Elite High Schools Escaped the Leveller's Ax*, CITY J. (Spring 1999), http://www.city-journal.org/html/9_2_how_gothams_elite.html ("The Bronx High School of Science, Stuyvesant High School, and Brooklyn Technical High School have nurtured nine Nobel laureates, hundreds of Westinghouse Science Talent Search winners, award-winning biologists and astrophysicists, astronauts, inventors, and captains of commerce. The Ivy Leagues clamor for their graduates, virtually all of whom attend college.").

[5] *See* N.Y. EDUC. LAW § 2590-h(1)(b) (McKinney 2014) (providing that admission to the specialized high schools must be "conducted in accordance with the law in effect on the date preceding [December 31, 1996]"). The law in effect to which N.Y. EDUC. LAW § 2590-h(1)(b) refers states that admission to special high schools "shall be solely and exclusively by taking a competitive, objective, and scholastic achievement examination." N.Y. EDUC. LAW § 2590-g(12)(b) (1996). N.Y. EDUC. LAW § 2590-g(12)(b) further provides that no student will be admitted to a special high school unless they achieve a score above the school's "cut-off" score, that which is determined by rank-ordering the test scores and "counting down to the score of the first candidate beyond the number of openings available"). *Id.*; *see also Specialized High School Admissions Test (SHSAT)*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/accountability/resources/testing/shsat.htm (last visited June 1, 2015) (summarizing the application requirements for admission to a Specialized High School and discussing the components of the SHSAT).

[6] CMTY. SERV. SOC'Y OF N.Y. & NAACP LEGAL DEF. & EDUC. FUND, THE MEANING OF MERIT: ALTERNATIVES FOR DETERMINING ADMISSION TO NEW YORK CITY'S SPECIALIZED HIGH SCHOOLS 1 (Oct. 7, 2013), http://www.naacpldf.org/files/case_issue/CSS_MeaningOfMerit_finalWeb.pdf.

[7] *Id.*

[8] *Id.* at 8. In 2012, the NAACP Legal Defense and Educational Fund (NAACP-LDF) and other civil rights organizations filed a complaint with the United States Department of Education's Office for Civil Rights alleging that the admissions process for New York City's Specialized High Schools violates Title VI of the Civil Rights Act of 1964. Letter from Damon T. Hewitt, NAACP Legal Def. & Educ. Fund, Inc., et al. to N.Y. Office, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 27, 2012), http://www.naacpldf.org/files/case_issue/Specialized%20High%20Schools%20Complaint.pdf. The plaintiffs not only challenged the validity of the tests, but also argued that the exclusive reliance on the test to determine admissions could not be defended by the New York City Department of Education as an "educational necessity." *Id.* at 16–22. As of this writing, it is unclear whether the civil rights advocacy groups' Title VI complaint will be successful or whether they will convince the New York City Department of Education to implement a new admissions strategy for the Specialized High Schools.

High Schools accepted a reported thirty-five percent of white students for the 2012–2013 school year.[9]

A black or Latino student in New York could demonstrate his or her ability to excel at a Specialized High School by consistently earning high academic marks, proving significant leadership potential, or displaying creative ability. Yet, because the only determinative factor for admission under this New York City law is a thirteen- or fourteen-year-old's score on a single test, many talented minority students are automatically denied admission. For years now, the policy has disproportionately impacted New York City's black middle school students attempting to equally take advantage of the city's best educational opportunities.[10]

This kind of racially discriminatory educational law typifies the public school practices that Title VI of the landmark Civil Rights Act of 1964 prohibits.[11] Under the current formulation of the law, however, discriminatory school policies can stand if a school shows that its practice or policy is, legally speaking, an "educational necessity."[12] What exactly qualifies as necessary has yet to be defined with any meaningful regulatory or statutory force.[13] Considering the work agencies have done to strengthen enforcement against racially discriminatory policies in contexts outside of public education,[14] this regulatory and statutory void is noteworthy.

The task of answering the question of which discriminatory school policies qualify as "necessary" effectively has been left to courts. Given the subjectivity regarding the merit of different education practices, judges have been, unsurprisingly, inconsistent in their

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[9] NAACP Legal Defense and Educational Fund, Inc., http://www.naacpldf.org/files/case_issue/All%20Appendices.pdf.

[10] *See, e.g.*, Elizabeth A. Harris, *Lack of Diversity Persists in Admissions to New York City's High Schools*, N.Y. TIMES, Mar. 5, 2015, at A27, http://www.nytimes.com/2015/03/06/nyregion/lack-of-diversity-persists-in-admissions-to-selective-new-york-city-high-schools.html?_r=0 ("Amid calls for new admission procedures to increase diversity in New York City's elite public high schools, the number of black and Hispanic students remained virtually unchanged this year."); CMTY. SERV. SOC'Y OF N.Y. & NAACP LEGAL DEF. & EDUC. FUND, *supra* note 6, at 8 (highlighting, for example, the quickly declining enrollment of black students at the three largest Specialized High Schools since 1994).

[11] *See infra* notes 42–47 and accompanying text (discussing how Title VI imagined the prohibition of "disparate impact," given the statute's loose statutory definition of discrimination).

[12] *See infra* Part II.A (discussing the "necessity" standard under the Title VI disparate impact framework).

[13] *See infra* Part I.B (explaining the standards for a disparate impact claim under federal law).

[14] *See infra* Part II.B (discussing the statutory codification of the business necessity standard in the employment discrimination context); *infra* Part III.B (discussing, as an example, disparate impact regulations in the housing discrimination context).

approaches to making these determinations.[15] The lack of clarity on the meaning of "educational necessity" has led some courts to uphold discriminatory school policies that racially discriminate against minority students that otherwise might not have been upheld if courts had a more concrete standard to apply.[16]

While touting the benefits of clarifying the educational necessity standard's scope in Title VI disparate impact claims to remedy this problem, much of the scholarship has focused on higher education admissions,[17] secondary school discipline programs,[18] and high-stakes testing in secondary schools.[19] Other scholarship has highlighted the special role of administrative agencies in bolstering the enforcement of Title VI disparate impact claims more generally.[20]

This Note builds on the existing scholarship by suggesting that there is much to gain from relying on the Department of Education's (DOE) presumed expertise[21] and authority[22] as a Title VI executive

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[15] *See infra* Part II.A (discussing the consequences of judicial rulings for civil rights plaintiffs).

[16] *Id.*

[17] *See* Michael G. Perez, Note, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467 (2004) (arguing that higher education admissions policies should be subject to disparate impact scrutiny and proposing a judicial standard specifically conceived for the higher education context).

[18] *See* 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 (2012) (suggesting a framework to approach Title VI disparate impact claims in the context of school discipline in which 1) adjudicators consider which party is in the best position to remedy the disproportionate harm to students of color (as opposed to which party is "culpable"; and 2) school districts are required to show that their legitimate purpose (as part of the educational necessity standard) includes equal educational opportunity).

[19] *See* Jay P. Heubert, *Nondiscriminatory Use of High-Stakes Tests: Combining Professional Test-Use Standards with Federal Civil-Rights Enforcement*, 133 EDUC. L. REP. 17, 18–19 (1999) (recommending the application of Title VI disparate impact standards to high-stakes standardized testing).

[20] *See, e.g.*, Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 127 (2014) [hereinafter Johnson, *The Agency Roots of Disparate Impact*] (noting that "agencies' implementation of disparate impact draws on their distinctive set of competencies relative to courts" and discussing, as an example, the Department of Housing and Urban Development's recent promulgation of disparate impact rules and their potential to "stabilize disparate impact law and to provide clarity to regulated entities subject to different judicial standards"); *see also* Olatunde C.A. Johnson, *Lawyering that Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1296 (2014) [hereinafter Johnson, *Lawyering that Has No Name*] ("The practice of Title VI lawyering entails not just efforts to seek compliance through courts and administrative agencies, but a practice of implementation, expansion, and elaboration of the provision that is not easily described, but through which Title VI gains meaning.").

[21] *See infra* Part I.A (discussing the idea of executive agencies as embodying a relatively high level of expertise).

[22] *See* 42 U.S.C. § 2000d-1 (2012) ("Each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 2000d of [Title VI] with

agency[23] to issue a regulation that would make clear the parameters of the educational necessity standard. It argues for a regulation that applies to a broader range of educational practices, honors the antidiscriminatory intent of Title VI as part of the Civil Rights Act, and rightly moves beyond courts' current reliance on "business necessity" from the employment discrimination context as a corollary for "educational necessity."[24]

This Note ultimately suggests an official DOE regulation requiring that any school policy or practice defended as an educational necessity adhere to an implicit default institutional goal of providing equal educational opportunities[25] for all racial minorities. Mandating this goal as a threshold requirement for the legitimate goals that a public educational institution proffers in defense of a school policy properly balances the important deference due to schools' decision making with full consideration of civil rights discrimination claims.

The alternative of relying on informal guidelines—if anything at all—to aid civil rights claimants is limited in a way that such a clarifying regulation would not be.[26] Worse, delegating the work of clarifying an antidiscrimination enforcement requirement like the educational necessity standard to courts—which have no particular expertise in public education practices—risks countering what otherwise might be consistently effective and robust civil rights enforcement. In contrast, a more comprehensive regulation would aid federal courts, which might be more likely to defer to a consistent standard to guide their disparate impact adjudications when federal agencies like the DOE or United States Department of Justice (DOJ) bring disparate impact claims.[27]

This Note proceeds in three Parts. Part I highlights Title VI's implicit embrace of the disparate impact analysis as a legal tool for minority groups facing discrimination in public institutions. It also discusses federal agencies' recent invocation of the disparate impact stan-

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respect to such program or activity by issuing rules, regulations, or orders . . . which shall be consistent with achievement of the objectives of the statute.").

[23] *See infra* notes 28–32 and accompanying text (explaining the Department of Education's (DOE) authority under Title VI).

[24] *See infra* notes 42–47 and accompanying text (discussing how Title VI likely envisioned the prohibition of "disparate impact" with a loose statutory definition of discrimination).

[25] *See infra* note 161 (discussing equal educational opportunity).

[26] *See infra* Part III.B.2 (discussing the benefits of an agency regulation as opposed to less legally authoritative agency measures).

[27] *See id*. (discussing the benefits of an agency regulation as opposed to less legally authoritative agency measures).

dard to strengthen antidiscrimination enforcement in public schools. Part II analyzes some of the ways courts have applied the educational necessity standard in the absence of a regulation to guide their analyses. It further discusses the negative consequences that have resulted for litigants bringing public education disparate impact claims. Part II specifically underscores the implications of the development of the "business necessity" standard in the Title VII employment discrimination context for a development of the educational necessity standard under Title VI disparate impact claims. Finally, Part III considers guidance the DOE and DOJ have already issued and proposes a preliminary standard that should guide the development of an agency-promulgated regulation that respects the Title VI-rooted right to equal educational opportunities.

I
TITLE VI, EXECUTIVE AGENCIES, AND DISPARATE IMPACT IN PUBLIC EDUCATION

Title VI of the 1964 Civil Rights Act prohibits racial discrimination in public schools[28] and other federally funded education programs and activities.[29] The statute specifically authorizes the DOE to enforce the statute's antidiscriminatory standards.[30] Under this authority, and in line with the original aim of Title VI, DOE regulations prohibit the use of practices and policies that have "the *effect* of subjecting individuals to discrimination because of their race" in federally funded schools and educational programs.[31] In other words, the regulations prohibit those practices and policies that have what has come to be termed a "disparate impact"[32] on minorities. Discriminatory practices can stand, however, if they are determined to be educa-

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[28] *See* 42 U.S.C. § 2000d-4a(1) (2012) (defining the terms "program or activity" and "program" that are covered by Title VI); *see also 10 Facts About K–12 Education Funding*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/overview/fed/10facts/index.html (last modified Sept. 19, 2014) ("The federal share of K–12 spending has risen very quickly, particularly in recent years.").

[29] Title VI specifically reads: "No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d.

[30] *See* § 2000d-1 (empowering the federal government to terminate federal funding or assistance to any program or activity that fails to comply with the mandates of Title VI).

[31] 34 C.F.R. § 100.3(b)(2) (2014) (emphasis added); *see also* 28 C.F.R. § 42.104(b)(2) (2014) (reiterating that a federal fund recipient cannot use "criteria or methods of administration" which "have the effect of subjecting individuals to discrimination because of their race, color, or national origin").

[32] *See infra* notes 73–78 and accompanying text (delineating the scope of the "disparate impact" legal standard under Title VI).

tionally necessary.[33] To aid this determination, a defendant bears the burden of demonstrating that their challenged practice is supported by a "substantial legitimate justification"[34] and furthermore "bear[s] a manifest demonstrable relationship to classroom education."[35]

Unlike "disparate treatment,"[36] which implies discriminatory intent, a practice or policy that has a disparate impact suggests unintentional or indirect discrimination.[37] Generally, a prohibition on disparate impact presumptively invalidates a policy that has a discriminatory effect on a protected racial group, regardless of the policy's intent.[38] The disparate impact framework[39] is therefore a useful tool for plaintiff minority groups to address harms suffered from less direct, but nonetheless insidious, forms of discrimination that can be more difficult to prove.[40]

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[33] *See infra* Part II.A (discussing the "necessity" standard under the Title VI disparate impact framework).

[34] Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); *see also infra* Part II.A (explaining the development of the educational necessity standard).

[35] *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1418; *see also* Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969, 982 & n.9 (9th Cir. 1984) (noting that the defendant must demonstrate that "the requirement which caused the disproportionate impact was required by educational necessity,"—that is, that "any given requirement has a manifest relationship to the education in question"); *infra* Part II.A (explaining the development of the educational necessity standard).

[36] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("[Disparate treatment occurs when the defendant] simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

[37] *See id.* (noting that the disparate impact model of discrimination prohibits the use of "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

[38] *See* 42 U.S.C. § 2000e-2(k) (2012) (establishing the burden of proof in disparate impact cases in the employment context); Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971) (analyzing a disparate impact claim in the employment context). An important premise of this Note is that the disparate impact legal framework is not a "gotcha test," but rather is a formal tool for holding powerful actors, like school systems, accountable for acts that discriminate against racial minorities—even those not taken with any apparent animus.

[39] *See infra* Part II (discussing the Title VI disparate impact framework).

[40] *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act); *Int'l Bhd. of Teamsters*, 431 U.S. at 335–36 n.15 (stating that in the law of disparate impact, "[p]roof of discriminatory motive . . . is not required"); *see also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06 (2006) (noting that "disparate impact theory allows proof of discrimination without the need to prove intent," but lamenting the fact that the "courts never fully accepted the disparate impact theory as a legitimate definition of discrimination, or as a legitimate means of proving discrimination").

This Part discusses the legal mandate of disparate impact, as borne from Title VI.[41] While the statute clearly prohibits federal fund grantees like public schools[42] from discriminating on the basis of race, color, or nationality, it conspicuously does not define discrimination. Therefore, Congress has to some extent charged courts and federal agencies like the DOE with demarcating the scope of Title VI's application to discriminatory practices.[43]

A. The Special Role of Agency Enforcement of Disparate Impact

Title VI grants federal agencies implicit statutory authority to determine what qualifies as discrimination.[44] Despite agencies' "joint march with the federal courts to end a century of mistreatment of

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Proving intentional discrimination can be particularly difficult in the face of the abstract ways that structural discrimination—that is, the "processes or environmental conditions that slot people into particular social positions, roles and networks"—operates, including in the context of education systems. DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 22–23 (2014). *But see* Selmi, *supra* (arguing that disparate impact has displaced a more robust theory of intentional discrimination that could have been more effective at achieving racial equality).

Regardless of the debated merits of a disparate impact antidiscrimination theory or an intent-based antidiscrimination theory, some form of antidiscrimination tool that considers the consequences, even if not the intent, of the legal context undoubtedly remains necessary. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2518 ("[A]ntidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."). This is especially because of the historic discrimination against racial minorities and the continued prevalence of unequal outcomes for racial minorities in the public education context. *See, e.g.*, JOHN H. FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 155, 445–47 (2006); Motoko Rich, *School Data Finds Pattern of Inequality Along Racial Lines*, N.Y. TIMES, Mar. 21, 2014, at A18 (summarizing data compiled by the DOE from every school district in the United States and noting that "[r]acial minorities are more likely than white students to be suspended from school, to have less access to rigorous math and science classes, and to be taught by lower-paid teachers with less experience").

41 Title VI specifically reads: "No person in the United States shall, on the ground of race . . . 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).

42 *See* U.S. DEP'T OF EDUC., *supra* note 28 ("The federal share of K–12 spending has risen very quickly, particularly in recent years.").

43 *See* Johnson, *The Agency Roots of Disparate Impact*, *supra* note 20, at 127 ("[D]isparate impact's fate is intimately connected with civil rights' hybrid enforcement regime—one that lodges implementation power not just in courts, but also in agencies.").

44 Title VI states: "Each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 2000d of [Title VI] with respect to such program or activity by issuing rules, regulations, or orders . . . which shall be consistent with achievement of the objectives of the statute." 42 U.S.C. § 2000d-1 (2012). In addition, each regulation must be approved by the President to become effective. *Id.*

black Americans,"[45] judges and scholars alike have noted that particular authority was reserved for agencies.[46] Title VI's legislative history suggests that disparate impact, specifically, would be embraced as a form of discrimination to be addressed.[47]

The development of the discrimination standards under Title VII informed how courts and agencies capitalized on their authority to develop discrimination standards under Title VI.[48] Litigants and courts vigorously employed the disparate impact theory to address a range of discriminatory employment practices in Title VII[49] and ultimately adopted it in the Title VI context.[50] Advocates have since encouraged the theory as a useful legal tool for achieving equality in a wide range of other social arenas.[51]

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[45] Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination*," 70 GEO. L.J. 1, 9 (1981) (arguing that Congress intended Title VI to be coterminous with neither the theoretically stricter Constitution nor its own rigid standard of discrimination).

[46] *See* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 623 (1983) (Marshall, J., dissenting) (concluding that Congress had "willingly conceded 'great powers'" to regulators with expertise in a given area under Title VI (quoting *Civil Rights: Hearing on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong. 1520 (statement of Emanuel Celler, Chairman of the House Judiciary Committee))). Furthermore, Congress must have anticipated that the determination of what qualifies as discrimination—including disparate impact, for example—would have "different parameters in different contexts, and that those parameters should be determined by agency employees with specialized knowledge in a given field." Best, *supra* note 18, at 1683.

[47] *See* Johnson, *The Agency Roots of Disparate Impact*, *supra* note 20, at 137 (noting that "the legislative record supports an expansive reading of those constitutional norms and of Title VI's goals"). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1977) (expressing in dicta that Title VI could extend no further than the Constitution, and thus, pursuant to the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 299 (1976), a Title VI violation required a showing of intent). Indeed, then President John F. Kennedy's rationale for Title VI was this: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which *encourages*, *entrenches*, *subsidizes* or *results* in racial discrimination." JOHN F. KENNEDY, JOHN F. KENNEDY: 1963: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT 248 (1963); *see also generally* U.S. COMM. ON CIVIL RIGHTS, 2 EDUCATION: 1961 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT 39–63, 111–15 (1961), http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk2.pdf (documenting, for example, the remaining problems of school segregation, school overcrowding, inadequate school teaching staffs in predominately black schools across the country, and the effects of ability grouping on black students in desegregated schools).

[48] *See* Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971) (rejecting Duke Power Company's policy of basing employment for managerial positions on the receipt of a high school diploma and successful completion of intelligence tests because of the disparate impact the policy had on the class of black employees).

[49] *See infra* note 121 (noting cases applying disparate impact under *Griggs*).

[50] See *infra* Part II.B for a general discussion of how Title VI adopted disparate impact tenets from Title VII.

[51] Specifically, a plethora of scholars have argued in recent years for an extension of disparate impact theory to address several different kinds of social equality issues. *See, e.g.*,

Unlike in the Title VII context, where courts invented disparate impact standards, agencies were the "first movers" in the development of disparate impact under Title VI.[52] Professor Olatunde Johnson maintains that this difference in large part reflects agencies' "specific competence" with regard to the forms of discrimination Title VI was meant to address.[53] Johnson further explains that the relevance of Congress's grant of power to agencies in this way underscores that "Title VI created an explicit regime that allowed the agency authority in shaping disparate impact—a regime in which Title VI 'itself' and its regulations are intimately connected."[54] At least one federal agency confirmed this explanation in regulations promulgated soon after Title VI's enactment by Congress.[55] The regulations prohibited not only intentional discrimination, but also practices with "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."[56]

The next Subpart describes how federal agencies currently enforce disparate impact for civil rights claimants as well as recent efforts to strengthen this enforcement.

Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002) (encouraging the application of disparate impact theory to voting literacy tests); Carl H. Coleman, *The "Disparate Impact" Argument Reconsidered: Making Room for Justice in the Assisted Suicide Debate*, 30 J.L. MED. & ETHICS 17 (2002) (urging application of disparate impact theory to assisted suicide); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861 (2004) (discussing the application of the disparate impact theory to a disabilities statute); Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259 (2002) (discussing disparate impact's applicability to prohibit discrimination against breastfeeding); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 895–98 (2004) (arguing for use of disparate impact analysis to address racial stigma).

52 Johnson, *The Agency Roots of Disparate Impact*, *supra* note 20, at 133.

53 *Id.* at 132.

54 *Id.* at 139.

55 *See* HEW Discrimination Prohibited, 45 C.F.R. § 80.3(b)(2) (1966) (establishing a definition of discrimination under Title VI that moved beyond intentional discrimination to encompass disparate impact).

56 *Id.* Beyond courts' recognition for the special role of agencies in carrying out Title VI enforcement, the Attorney General also has occasionally directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in [their] regulations are fully utilized so that all persons may enjoy *equally* the benefits of Federally financed programs." CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 54–55 (1998), http://www.justice.gov/crt/grants_statutes/legalman.pdf (last visited Oct. 14, 2014) (emphasis added). Such deference awarded to agencies is all the more reason for the DOE to take a more active role in clarifying disparate impact standards regulating public education.

B. Federal Standards for Title VI Disparate Impact

In keeping with their unique position as agencies in developing Title VI disparate impact standards, the DOE's Office for Civil Rights (OCR) and the DOJ have a legal obligation to enforce Title VI[57] and its implementing regulations.[58] The DOJ enforces Title VI with respect to all recipients of federal financial assistance, including schools.[59] The DOJ also enforces Title VI upon referral from another federal funding agency or through intervention in an existing lawsuit, and it coordinates the enforcement of Title VI government-wide.[60]

There is a straightforward regulatory enforcement scheme for pursuing disparate impact claims in the public education context. If a recipient of federal assistance is found to have discriminated and does not voluntarily comply with DOE standards for addressing the policy's discriminatory impact, the DOE can either initiate fund termination proceedings or refer the matter to the DOJ for appropriate legal action.[61] In the context of education, private parties may file disparate impact complaints with the DOE, which has the power to investigate, review, and revoke federal funds pursuant to Title VI.[62]

The DOE has recently made efforts to ramp up civil rights law enforcement in public schools, including a series of guidance letters addressing "issues of fairness and equity."[63] These letters specifically sought to examine cases in public schools for "evidence of discrimination through 'disparate impact.'"[64] Several civil rights organizations

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[57] *See* 42 U.S.C. § 2000d *et seq.* (2012) (defining the federal government's role in Title VI).

[58] *E.g.*, 34 C.F.R. § 100.3 (2012) (defining "discrimination" for the purposes of Title VI enforcement).

[59] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 56, at 21–32, 40–42 (defining the term "recipient" of federal financial assistance).

[60] The Department of Justice's (DOJ) Office for Civil Rights (OCR) at the Office of Justice Programs (OJP) "is the principal DOJ office that enforces Title VI through the administrative process." OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 1, http://www.ojp.usdoj.gov/about/ocr/pdfs/OCR_TitleVI.pdf (last visited Oct. 14, 2014).

[61] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 56, at 80–81 (explaining that the agency can refuse to grant or continue assistance, or refer "the violation to the Department of Justice for judicial action").

[62] *See supra* notes 28–31 and accompanying text (explaining the DOE's authority in this regard).

[63] Nick Anderson, *Duncan Will Pressure Schools to Enforce Civil Rights Laws*, WASH. POST (Mar. 8, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/07/AR2010030702285.html.

[64] *Id.* In September 2010, for example, Thomas Perez, Assistant Attorney for Civil Rights at the DOJ, commented on the increasing efforts of the federal government to address the disproportionate impact of school discipline policies on students of color. Thomas E. Perez, Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice, Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at

are actively filing complaints in response to the agency's commitment to enforcing disparate impact claims.[65]

Importantly, DOJ and DOE enforcement of disparate impact claims could still conceivably end up in federal court, as federal judges ultimately have review power over agency actions.[66] However, when courts have adjudicated these claims they have done so in confusing and inconsistent ways.[67] These inconsistencies risk negative consequences for litigants seeking to vindicate claims of discrimination under an incoherent disparate impact framework. Furthermore, if federal courts' treatment of disparate impact claims in other sectors is any indication,[68] then such claims are that much more likely to fail without clearer authorized guidelines appropriately considering equal education opportunities.[69]

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the Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunities Conference, (Sept. 27, 2010), http://www.justice.gov/crt/speeches/perez_eosconf_speech.php. Perez described "policy development and enforcement" that went towards "a mission to ensure that all students at every level can access a quality education on an equal basis." *Id.* Russlynn Ali, former Assistant Secretary of the Education Department's Civil Rights Office, unequivocally announced in the same year that "disparate impact is woven through all civil rights enforcement of this administration." Mary Ann Zehr, *Obama Administration Targets 'Disparate Impact' of Discipline*, EDUC. WEEK (Oct. 7, 2010) http://www.edweek.org/ew/articles/2010/10/07/07disparate_ep.h30.html. Ali explained that federal officials are obliged to look for evidence of unintentional disparate impact resulting from school practices and not just evidence of a particular group being intentionally discriminated against in public education institutions. *Id.*

[65] See *infra* note 71 for a discussion of these efforts. Additionally, in terms of how relevant agencies would regard disparate impact litigation under Title VI, the direction under President Barack Obama significantly contrasted with that of the prior Republican administration. *See* Anderson, *supra* note 63 (reporting that Secretary Duncan stated: "The truth is that, in the last decade, the Office for Civil Rights has not been as vigilant as it should have been in combating gender and racial discrimination and protecting the rights of individuals with disabilities. . . . "). Russlyn Ali also commented: "It's my understanding . . . that disparate impact was not a theory that was used during the last administration in education." Zehr, *supra* note 64. Finally, it was reported that the disparate impact cases approved under the George W. Bush Administration were highly scrutinized "because some officials felt that the Clinton Administration had abused the disparate-impact approach to bring 'frivolous or ideologically motivated cases.'" *Id.*

[66] *See* 42 U.S.C. § 2000d-2 (2012) ("Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to . . . judicial review . . . .").

[67] See *infra* Part II.A for a discussion of judicial treatment of the educational necessity standard.

[68] *See, e.g.*, Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, Note, 38 HARV. C.R.-C.L. L. REV. 479 (2003) (discussing the failures of disparate impact in the Title VII employment context); Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 248 (2005) (explaining the unsettled state of disparate impact law in the context of Title VII).

[69] *See supra* note 68 and accompanying text (discussing the decline of disparate impact in the Title VII context).

Yet, none of the DOE's or DOJ's efforts have included plans to use their authority to more robustly clarify what the standard is for proving disparate impact under Title VI in the context of public education.[70] This lack of clarity persists despite the efforts of civil rights groups across the nation to invoke the disparate impact standard as a legitimate tool for vindicating important Title VI civil rights claims stemming from a range of public school practices and policies.[71]

When these practices harm minorities, even if unintentionally, they ultimately must confront the educational necessity question under Title VI. This Note focuses on this crucial question: What should sufficiently qualify as an "educationally necessary" practice to withstand a disparate impact discrimination claim? The next Part considers how federal courts have grappled with this question.

II.
Judicial Formulations of Disparate Impact and the Educational Necessity Standard in Public Education

The Supreme Court first endorsed the availability of a Title VI disparate impact theory of discrimination in the context of public schools in *Lau v. Nichols*.[72] The decision relied on guidance issued by what was then the Department of Health, Education, and Welfare (HEW).[73] The Court concluded on the basis of the HEW guidelines that "[d]iscrimination is barred which has that *effect* [of discriminating

[70] See *infra* Part III.B.2 for a discussion of the nonbinding guidance DOE and DOJ have issued to clarify the disparate impact standard.

[71] See *infra* Part II.A for a discussion of recent civil rights groups' advocacy in this regard. Recent scholarship has praised the utility of using Title VI disparate impact regulations—as opposed to the more demanding task of proving unconstitutionality—to challenge state laws that discriminate against students of color. *See, e.g.*, Paul Easton, Note, *School Attrition Through Enforcement: Title VI Disparate Impact and Verification of Student Immigration Status*, 54 B.C. L. Rev. 313 (2014) (arguing that federal Title VI disparate impact regulations provide a more promising avenue for challenging state laws that tend to chill educational opportunity for Hispanic students by inquiring into immigration status).

[72] 414 U.S. 563 (1974).

[73] *Id.* at 566–67. There, a class of students of Chinese ancestry challenged a California school district's English-only instruction. The group of Chinese students, who spoke no English, argued that English-only instruction precluded them from receiving a proper education and resulted in unequal educational opportunities. *Id.* at 564. Despite no evidence of intentional discrimination against students of Chinese ancestry, the Court granted relief under Title VI. *Id.* at 563, 568–69. The relevant Department of Health, Education, and Welfare (HEW) guidelines stated that school districts were required to "'rectify the language deficiency in order to open' the instruction to students who had 'linguistic deficiencies.'" *Id.* at 567 (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595, 11,595 (July 10, 1970)).

in the availability of academic facilities] even though no purposeful design is present."[74] Though the Court first recognized a disparate impact claim under Title VI on the basis of the HEW guidelines, it did not address the issue of an educational necessity defense.

Currently, a prima facie claim of disparate impact under Title VI requires a showing that a "facially neutral" policy has resulted in a racial disparity.[75] While there is "no rigid mathematical threshold" for demonstrating a prima facie case of disparate impact for affected minorities,[76] federal courts use some form of statistical analysis to make "reliable inferences about racial disparities in a population based on the performance of a particular sample."[77] After a prima facie case of disparate impact is made, the burden of proof shifts to the defendant to justify the disparate impact as the result of a practice that is educationally necessary.[78] The next Subpart explains how early courts further developed this educational necessity standard.

A. Early Judicial Formulations of the Educational Necessity Standard

Justice Thurgood Marshall first embraced the concept of an educational necessity defense in a footnote appearing in his dissent in *Guardians Association v. Civil Service Commission of New York*.[79] In his opinion, Justice Marshall stated that "a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity."[80] In *Board of Education of City School District of New York v. Harris*, the Supreme Court first explicitly declared that this "burden" could be fulfilled by "proof of 'educational necessity,' analogous to the 'business necessity' justification applied under Title VII of the Civil Rights Act of 1964."[81]

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[74] *Id.* at 568.

[75] Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999) (citing Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999) (collecting cases that adopt the Title VII burden shifting framework in Title VI disparate impact cases)), *overruled on other grounds by* Alexander v. Sandoval, 532 U.S. 275 (2001).

[76] Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1526 (M.D. Ala. 1991) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988) (plurality opinion)).

[77] *Id.* at 1527.

[78] *See infra* Part II.A (discussing the educational necessity standard).

[79] 463 U.S. 582, 623 n.15 (1983) (Marshall, J., dissenting).

[80] *Id.*

[81] 444 U.S. 130, 151 (1979). Indeed, courts adjudicating disparate impact claims under Title VI have often looked to Title VII of the Civil Rights Act of 1964 and relevant case law for guidance on developing several requirements of the Title VI disparate impact proof model. *See, e.g.*, Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999) (collecting cases that adopt the Title VII burden shifting framework in Title VI disparate impact cases),

Even if the practice or policy in question was not intentional discrimination, a policy qualifies as having an unlawful "disparate

overruled on other grounds by Alexander v. Sandoval, 532 U.S. 275 (2001). These requirements have included, for example, tests for what counts as evidence of an adverse impact, with Title VI courts stating that the adverse impact must be "'significant.'" *See* GI Forum Image De Tejas v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 677–78 (W.D. Tex. 2000) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (plurality opinion)) (using the Equal Employment Opportunity Commission's (EEOC) four-fifths rule to determine whether the adverse impact is significant enough under Title VI). Title VI courts have concluded that "there is no rigid mathematical threshold of disproportionality that must be met to demonstrate a sufficiently adverse impact . . . ." Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999). Statistical disparities must only be substantial enough to raise an "inference of causation." *Id.* at 697–98 (quoting *Watson*, 487 U.S. at 994–95). Title VI adjudication also has been influenced by Title VII's considerations of whether or not a particular practice has to *cause* the particular impact. A prima facie disparate impact claim under Title VI, for example, has also been interpreted to require a showing that a particular practice *caused* the racial disparity—that is, a plaintiff must go beyond simply showing "at the bottom line" that a statistical disparity exists. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989) (stating that in the Title VII context, it is not enough to simply show a "racial *imbalance* in the work force"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2012)), *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003). Congress lessened this particularity requirement with the Civil Rights Act of 1991. *Id.* (indicating that a plaintiff is not required to identify a particular employment practice if "the elements of [an employer's] decisionmaking process are not capable of separation for analysis"). But Congress did not completely discard it and expressly included the causation requirement. *See* 42 U.S.C. 2000e-2(k)(1)(A) (2012) ("An unlawful employment practice based on disparate impact is established under this subchapter only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . .").

A DOE investigator therefore is also likely to require a showing of causation for Title VI disparate impact, though exactly what causation means within the Title VI regime is not entirely clear. For example, some courts have held that the facially neutral practice must cause the disparate impact. *See, e.g.*, Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993) ("The plaintiff's duty to show that a practice has a disproportionate effect by definition requires the plaintiff to demonstrate a causal link between the defendant's challenged practice and the disparate impact identified."). *But see* Sandoval v. Hagan, 197 F.3d 484, 508 (11th Cir. 1999) (avoiding a hard causation requirement and holding that a plaintiff must demonstrate that a neutral policy "casts" an adverse and disproportionate effect on a protected class), *rev'd on other grounds sub nom.* Alexander v. Sandoval, 532 U.S. 275 (2001). Exactly how and the extent to which courts require a showing that a facially neutral practice caused an alleged disparate impact can vary, that which is not inconsequential for civil rights plaintiffs. *Compare* Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984) (ruling that the school violated Title VI and implicitly crediting the causal explanation that cultural bias inherent in the IQ tests—a bias that the school board never sought to eliminate—favored white students over black students and caused a disproportionate number of black students to be assigned to be in special education classes), *with* African Am. Legal Def. Fund, Inc. v. N.Y. State Dep't of Educ., 8 F. Supp. 2d 330, 338 (S.D.N.Y. 1998) (rejecting the plaintiffs' argument that the state's racially disparate allocation of funding between mostly white school districts and mostly black ones was caused by the attendance-based criteria used to distribute state funds—criteria that did not account for the fact that "single parenting, poor housing, and medical problems" disproportionately impact minority students).

impact" if it has adverse consequences for a particular minority group and is not justified by an educational necessity.[82] Lower courts took up this educational necessity standard to develop a framework for adjudicating Title VI disparate impact claims—one that would include a consideration of the defense's ambiguous contours.[83]

In *Georgia State Conference of Branches of NAACP v. Georgia*,[84] the Eleventh Circuit articulated what would come to be the foundational interpretation of the educational necessity standard. Relying on Title VII precedent developing the business necessity standard, the court explained that under the Title VI disparate impact scheme, once plaintiffs have demonstrated a disparate impact, defendants bear the burden of demonstrating that their challenged practice is supported by a "substantial legitimate justification."[85] The court in *Georgia State Conference of Branches of NAACP* was the first to equate educational necessity with the production of a "substantial legitimate justification" for a particular practice.[86] In cases since *Georgia State Conference of Branches of NAACP*, defendants attempting to meet the "substantial legitimate justification" burden consistently have been required to show that their challenged practices "bear a manifest demonstrable relationship to classroom education."[87]

But judges are not education policy experts. Without sufficiently specific regulatory guidelines to evaluate an educational necessity once disparate impact is shown, a court is essentially left to its own devices to balance the competing interests of the disparate impact

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[82] *See Harris*, 444 U.S. at 151 (comparing "educational necessity" to the "business necessity" justification applied under Title VII). Once a defendant proffers an educational necessity defense for its policy or practice, the burden then shifts to the plaintiff to demonstrate that "the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination." Powell v. Ridge, 189 F.3d 387, 394 (3d Cir. 1999) (citing Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)), *overruled on other grounds by* Alexander v. Sandoval, 532 U.S. 275 (2001). This Note does not address the disparate impact's burden shifting framework beyond the production of the educational necessity defense.

[83] *See, e.g.*, *Powell*, 189 F.3d at 393 (collecting cases that adopt the Title VII burden shifting framework in Title VI disparate impact cases and adopting consideration of an "educational necessity" defense).

[84] *Ga. State Conference of Branches of NAACP*, 775 F.2d 1403 (11th Cir. 1985).

[85] *Id.* at 1417.

[86] *Id.* ("The plaintiff first must show by a preponderance of the evidence that a facially neutral practice has a racially disproportionate effect, whereupon the burden shifts to the defendant to prove a substantial legitimate justification for its practice.").

[87] *Id.* at 1417–18; *see also* Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969, 982 & n.9 (9th Cir. 1984) (noting that the defendant must demonstrate that "the requirement which caused the disproportionate impact was required by educational necessity," i.e. that "any given requirement has a manifest relationship to the employment in question" (quoting Connecticut v. Teal, 457 U.S. 440, 446–47 (1982))).

claimants against the educational institutions' interests.[88] Problems arise for Title VI plaintiffs in this regulatory void because educational institutions can proffer a range of reasonably valid explanations or educational goals to justify particular school policies.

One of the earliest cases of disparate impact in the public education context demonstrates the effect this phenomenon can have on a court. *Georgia State Conference of Branches of NAACP*, for example, involved a civil rights class action to challenge an achievement grouping practice because it resulted in a disproportionate number of black children being assigned to special education programs.[89] Whether the plaintiffs had made a prima facie case of disparate impact was not in dispute on appeal.[90] The appellate court, however, assigned more weight to the school's claim that, in line with its educational goals, grouping allowed for more resources to be devoted to "lower achieving students," and that grouping "improved class manageability, student and teacher comfort, and student motivation."[91] The court therefore concluded that the school had proven the educational necessity of its practices.[92]

In effect, the court in *Georgia State Conference of Branches of NAACP*, with no serious DOE guidance, evaluated the school's goals and justification for its practices against contrary evidence provided by the plaintiffs.[93] And that court ultimately decided against the black student plaintiffs.[94] Civil rights plaintiffs—often minority students seeking to vindicate rights granted by Title VI—risk continuing to suffer from what are likely to be courts' inconsistent application of the

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[88] *See* Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267, 286 (2006) (describing plaintiffs' dissatisfaction with outcomes when judges balance a practice's disparate impact against its institutional importance without explicit guidelines on how to evaluate either issue).

[89] *See Ga. State Conference of Branches of NAACP*, 775 F.2d at 1417 (stating that the district court found that "the racial composition of many of the local defendants' regular classrooms differs from what would be expected from a random distribution").

[90] *See id.* ("We need not reach the issue whether the district court properly found that the plaintiffs made out an adequate *prima facie* showing of disparate impact . . . .").

[91] *Id.* at 1419.

[92] *See id.* at 1420 ("[T]he district court did not err in finding that the defendants had rebutted the plaintiffs' *prima facie* case of disparate impact by establishing the educational necessity of achievement grouping.").

[93] The plaintiffs had offered evidence indicating, among other things, that achievement grouping exacerbates, rather than relieves, the problem of the disproportionate lower achievement by black students. *Id.* at 1419.

[94] *Id.* The court went on to conclude that they could not overturn the district court's findings "simply because th[e] evidence was merely conflicting." *Id.* The plaintiffs had further criticized the district court's failure to find that the school district's methodology for assigning the students was valid, but the Eleventh Circuit essentially dismissed that challenge as well, claiming that the district court's finding of validity was "implicit." *Id.* at 1419–20.

educational necessity standard. Indeed, Professor Charles Abernathy has suggested that in addition to challenging causation, challenging the educational necessity proffered by a defendant is the most significant hurdle faced by a claimant when asserting racially disparate impact of school practices.[95] The relatively small body of case law interpreting the Title VI disparate impact regulations leaves courts with almost no guidance on how to evaluate a claim that a policy with a negative disparate impact on racial minorities is educationally necessary.[96]

Remedying the lack of clarity as to what constitutes an educational necessity is especially important because plaintiffs still rely on Title VI public education disparate impact claims to eradicate continuing discriminatory school policies.[97] In February 2013, for example, civil rights organizations filed a complaint with the OCR claiming that a Texas school district's practice of issuing criminal tickets as a disciplinary tool in its schools violates Title VI.[98] The

[95] *See* Abernathy, *supra* note 88, at 303, 313–17 (discussing the challenges judges face in deciding disparate impact cases).

[96] *See* Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993) (applying disparate impact educational necessity analysis to a public school districting scheme); *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1417–18 (applying disparate impact educational necessity analysis to public school tracking practices); Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1529–32 (M.D. Ala. 1991) (applying disparate impact analysis to the use of the ACT Assessment for admission to a teacher training program); Sharif *ex rel.* Salahuddin v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 362 (S.D.N.Y. 1989) (applying disparate impact educational necessity analysis to a scholarship program based entirely on SAT scores).

[97] Note that there is no longer a private right of action to bring a disparate impact claim under Title VI. Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (foreclosing the ability of private litigants to directly initiate Title VI disparate impact suits in federal court without filing with a federal agency). However, a claim could still easily end up in a federal court. *See* 42 U.S.C. § 2000d-2 (2012) (stating that actions are subject to judicial review). But after *Sandoval* removed the private right of action to a disparate impact claim, relatively few public education Title VI disparate impact cases have reached federal courts. Instead, the DOE actively accepts and investigates disparate impact complaints that parties file with it. *See OCR Complaint Processing Procedures*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/complaints-how.html (last updated Mar. 16, 2015) (outlining the complaint processing procedures). But courts can still adjudicate these disparate impact claims, and in light of the significantly increased DOE and DOJ focus on addressing disparate impacts in public schools, *see supra* Part I.B (discussing the DOE's recent guidance letters affirming the agency's commitment to enforcing disparate impact claims), there is perhaps a greater chance of such cases reaching courts. This Note presupposes the importance, efficiency, and practicability of not waiting for these cases to reach courts (and nonexpert judges) in increased numbers, and to instead clarify—via more authoritative regulation—the educational necessity standard for stronger enforcement of disparate impact.

[98] Letter from Damon T. Hewitt, NAACP Legal Def. & Educ. Fund, Inc., et al. to Dall. Office, Office for Civil Rights, U.S. Dep't of Educ. (Feb. 20, 2013), http://www.naacpldf.org/files/case_issue/Bryan%20ISD%20OCR%20Complaint. pdf.

plaintiffs pointed to the fact that School Resource Officers were four times more likely to issue tickets to black students for criminal offenses of "Disruption of Class" and "Disorderly Conduct—Language" occurring within schools.[99] The plaintiffs' argument was based on their contention that the ticketing practice was not educationally necessary.[100]

In 2014, other civil rights organizations filed Title VI disparate impact violation complaints with the OCR in Newark,[101] New Orleans,[102] and Chicago[103] alleging that black students were subjected to school closures at disproportionately higher rates than white students. In each of these cases, the plaintiffs argued that school closings are not necessary to meet an important educational goal.[104] In Chicago, the plaintiffs further argued that the school closings were both unnecessary and that students rarely end up in schools that provide better school environments or that facilitate improved academic performance.[105] In New Orleans, too, the plaintiffs showed that most of the minority students displaced by closed schools were at schools that were showing improvements, but ultimately were underperforming and failing.[106] The risk of unsuccessful challenges in federal courts to persisting discriminatory policies is disconcerting.

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[99] *Id.* at 14.

[100] *Id.* at 21–24. Since the filing of the complaint against Brazos County, the Bryan Independent School District apparently has revised its disciplinary system. *See* Steve Fullhart, *Disciplinary Program Changed at Local School District*, KBTX, Oct. 9, 2013, http://www.kbtx.com/home/headlines/Disciplinary-Program-Changed-at-Local-School-District-227130731.html (describing the new components of the school district's disciplinary program and noting that the change "came, in part, because of complaints of unequal treatment by schools in the district").

[101] *See* Letter from Judith Browne Dianis, Advancement Project, et al. to N.Y. Office, Office for Civil Rights, U.S. Dep't of Educ. (May 13, 2014), http://b.3cdn.net/advancement/dbb9368e46b3ffa960_8v1m6vqze.pdf (arguing that school closures disproportionately affected black students and therefore violated Title VI).

[102] *See* Letter from Judith Browne Dianis, Advancement Project, et al. to Dall. Office, Office for Civil Rights, U.S. Dep't of Educ., (May 13, 2014), http://b.3cdn.net/advancement/24a04d1624216c28b1_4pm6y9lvo.pdf (arguing that school closures disproportionately affected black students and therefore violated Title VI).

[103] *See* Letter from Judith Browne Dianis, Advancement Project, et al. to Chi. Office, Office for Civil Rights, U.S. Dep't of Educ. (May 13, 2014), http://b.3cdn.net/advancement/05d51d8dad82f1f1cd_lh1m6sitf.pdf (arguing that school closures disproportionately affected black students and therefore violated Title VI).

[104] *See, e.g.*, *id.* at 20 (arguing that the disparate impact of school closures cannot be excused because the closures are not necessary to meet an important educational goal); Letter from Judith Browne Dianis et al. to Dall. Office, supra note 102, at 22 (arguing that school closures disproportionately affected black students and therefore violated Title VI); Letter from Judith Browne Dianis et al. to N.Y. Office, supra note 101, at 21 (arguing that school closures disproportionately affected black students and therefore violated Title VI).

[105] Letter from Judith Browne Dianis et al. to Chi. Office, *supra* note 103, at 20.

[106] Letter from Judith Browne Dianis et al. to Dall. Office, *supra* note 102, at 16–17.

Identifying the specific ways courts have inconsistently treated the disparate impact standard is important for determining how they can more effectively enforce it. For one, judicial confusion often arises when deciding whether a policy or practice is properly tailored to meet the educational objectives of a particular educational policy.[107]

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[107] *See* Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1192 (2002) (explaining that even when courts accept the "legitimacy" of the educational objectives for a particular educational policy, "there is no clear or obvious legal standard that courts can apply to decide whether the policy or practice is sufficiently tailored to meet these objectives"). Braceras notes that as a result of this lack of clarity, some courts have adopted a stringent standard. *See id.* ("Some courts require proof that the test (or other policy or practice) bears a 'manifest relationship' to the educational goal."). Other courts have been more permissive. *Id.* ("[A]t least one court has held that a defendant fails to meet its burden of proving educational necessity only if the evidence reflects that the test falls so far below acceptable . . . minimum standards that the test could not be reasonably understood to do what it purports to do." (internal quotation marks omitted)).

At least one court has noted that Title VI regulations do not explicitly explain what it means to show that a challenged practice has a "manifest relationship to classroom education." Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1412 (11th Cir. 1993). The *Elston* court, acknowledging this lack of clarity in the education regulations, relied on the way former Title VI cases had analyzed the educational necessity issue and determined that "what [those cases were] essentially requiring is that defendants show that the challenged course of action is demonstrably necessary to meeting an important educational goal." *Id.* They concluded, rather circularly, that such "necessity" is considered a substantial legitimate justification for the challenged practice. *Id.* (citing Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417–18 (11th Cir. 1985)).

Especially disconcerting for civil rights plaintiffs, some courts have seemingly set the standard of review for an educational practice *below* the requirement of a "necessity," which makes it easier for a defendant engaging in a discriminatory practice to justify its actions. In *GI Forum, Image De Tejas v. Texas Education Agency*, for example, the court considered whether the use of the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation unfairly discriminated against Texas minority students. 87 F. Supp. 2d 667, 668 (W.D. Tex. 2000). The plaintiffs challenged the use of the TAAS test under the Due Process Clause of the United States Constitution and 34 C.F.R. § 100.3, the implementing regulation to Title VI. *Id.* The Court determined that the use of the TAAS examination did not have an impermissible adverse impact on Texas's minority students. *Id.* In making this determination, the court viewed the word, "necessity," as part of the standard as "somewhat misleading," explaining that "the law does not place so stringent a burden on the defendant as that word's common usage might suggest." *Id.* at 679. The court concluded that, in fact, an educational necessity exists "where the challenged practice serves the *legitimate* educational goals of the institution." *Id.*; *see also* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999) ("The defendant bears *only* a burden of producing evidence to sustain its educational necessity." (emphasis added)). *But cf.* 42 U.S.C. §§ 2000e(m), 2000e-2k(1)(A) (2012) (requiring the defendant under Title VII to bear *both* a burden of production and persuasion on its business necessity justification). The court thus required only that the Texas Education Agency produce evidence that there is a "manifest relationship between the TAAS test and a legitimate educational goal." *GI Forum*, 87 F. Supp. 2d at 679 (citing Connecticut v. Teal, 457 U.S. 440, 446 (1982)).

This analysis blatantly contrasts with the conception of the standard developed by the Eastern District of Michigan in *Lucero v. Detroit Public Schools*. There, plaintiffs challenged the school defendants' decision to build a new school—whose students would

Secondly, courts have not evaluated what an "important goal"[108] of a school is in consistent ways when considering what qualifies as an educational necessity. The looser the definition of "important goal," the likelier a judge would be to allow a discriminatory, albeit well-intentioned, school policy to stand. This Note encourages strengthened enforcement of Title VI disparate impact for civil rights plaintiffs by proposing a regulation that specifically addresses the latter issue.

Scholars have posited similar reasons for courts' varying determinations as to what counts as an "important goal" sufficient to constitute an educational necessity. Jennifer Braceras, the former Commissioner of the United States Commission on Civil Rights, concludes that the different approaches to evaluating an educational goal arise because of the "absence of clear and objective criteria by which to judge the 'necessity' of a particular educational policy . . . ."[109] Professor Charles Abernathy cites a number of potential reasons judges' approaches to Title VI claims have historically resulted in difficulties when determining educational necessity.[110] One of Abernathy's conclusions is that a judge could easily find that a public educational institution's interest in an underlying goal was important.[111] Because of

be overwhelmingly minority—on a contaminated site. 160 F. Supp. 2d 767, 786 (E.D. Mich. 2001). The plaintiffs contended that they would be subjected to unreasonable risks of exposure to contaminants. *Id.* at 686–87. Though ultimately ruling against the plaintiffs, the court still unequivocally concluded that an educational necessity is what it textually indicates: "an action that is *necessary* to meet an important educational goal." *Id.* at 796 (emphasis added).

The *Lucero* conception of the standard was similarly applied in *Larry P. ex rel. Lucille P. v. Riles*, in which plaintiffs successfully challenged the use of nonvalidated IQ tests, which resulted in the disproportionate enrollment of black children in educable mentally retarded classes. 793 F.2d 969, 983 (9th Cir. 1984). The defendants responded with a range of defenses under the guise of educational necessity, defenses that included, among other things, that the tests actually benefit black children and that black children have a higher percentage of mental retardation than whites. *Id.*

108 *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 56, at 56 ("To prove a substantial legitimate justification, the recipient must show that the challenged policy was necessary to meeting a goal that was legitimate, important, and integral to the recipient's institutional mission. . . . The justification must bear a manifest demonstrable relationship to the challenged policy." (citations omitted) (internal quotation marks omitted)).

109 Braceras, *supra* note 106, at 1192 ("Some courts have required proof that the objective underlying the challenged policy is 'substantially legitimate,' while others require proof that the educational objective is 'legitimate, important, and integral' to the institution's mission." (citations omitted)).

110 Abernathy, *supra* note 88, at 313–17.

111 *Id.* at 313–14. More specifically, Abernathy explains that judges lack confidence in their own abilities to critically evaluate the course of action chosen by the schools and have been wary of the negative consequences of siding with the plaintiffs. *Id.* at 314–17. Consequently, courts have deferred to the educational institutions, which they presume to be better equipped to evaluate and make normative judgments on the issue. *Id.* at 316–17 & nn.342–43.

these traditionally proffered neutral educational goals and the subjectivity of determining importance, judges have a difficult time consistently determining when disparate impact outweighs them.[112] In short, judges simply have not had the capacity or sufficient guidance under regulations or statutes to compare "apples (the plaintiff's interests in being free of disparate impact) with oranges (the grantee's interests in pursuing the challenged course of action)."[113]

Professor Abernathy also has suggested that different courts' varying conceptions of the educational necessity standard do not amount to much in terms of case outcomes.[114] But such a suggestion conflicts with the reality that courts' inconsistent jurisprudence on the educational necessity standard has already had a negative impact on Title VI claimants.[115] This suggestion also conflicts with other scholars' conclusions of inconsistent judicial considerations of discrimination claims.[116] And as complaints are steadily filed with the DOE,

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[112] *Id.* at 314 ("[T]he good of educational upgrading or spreading of social subsidies benefits the entire community and is therefore more important than the good of eliminating disparate effects, which benefits only some parts of the minority community.").

[113] Best, *supra* note 18, at 1691. Similar observations have been made in the context of school finance adequacy litigation. *See, e.g.*, Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 118 (2010) ("A closer look at . . . recent dismissals [of school adequacy lawsuits] reveals judges deeply concerned about their institutional competence to deal with the questions presented . . . .").

[114] *See* Abernathy, *supra* note 88, at 303 ("Although some of the cases use the predominant Title VI formulation that shifts a substantial burden of explanation to the defendant, others use a less demanding formula, but neither prove important to the outcomes."). Another legitimate criticism is that, after the elimination of a private right of action for Title VI claims in *Alexander v. Sandoval*, 532 U.S. 275 (2001), these cases have not been before the federal courts with enough frequency to warrant any concerns about clarifying the disparate impact standard's educational necessity prong. *See* Johnson, *Lawyering that Has No Name*, *supra* note 20, at 1311 ("Title VI's less prominent status in the canon of civil rights laws is perhaps explained by the relatively low visibility of Title VI in courts, which emerges in part from the uncertain private court enforcement regime . . . ."). *But see infra* notes 114–15 and accompanying text (discussing the remaining benefits of these efforts).

[115] For examples of instances when courts applied a lower burden of explanation from schools and subsequently upheld school policies with a disparate impact on racial minorities, see *Cureton v. Nat'l Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687, 706 (E.D. Pa. 1999) (requiring that the educational institution's goal be "legitimate" to meet the educational necessity burden); *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 n.9 (9th Cir. 1984) (requiring a "manifest relationship" to an educational goal to meet the educational necessity burden). *Compare* Parents in Action on Special Educ. (PASE) v. Hannon, 506 F. Supp. 831, 883 (N.D. Ill. 1980) (finding the assignment of students to classes for students with educable mental retardation as a valid practice), *with Larry P.*, 793 F.2d at 983 (finding the assignment of students to classes for students with educable mental retardation to be a violation of Title VI).

[116] *See, e.g.*, Johnson, *The Agency Roots of Disparate Impact*, *supra* note 20, at 132 n.57 ("[I]n the context of Title VI . . . concerns about judicial competence and the broad reach of disparate impact rules have made some courts reluctant to adequately implement

there is an increased likelihood that a claim will arise before a federal court;[117] judicial discrepancies with such important implications for civil rights plaintiffs therefore should be resolved.[118]

A more forceful regulation, with sufficient authority from the DOE, that clearly sets forth the criterion courts should consider in determining which practices qualify as educational necessities could mitigate this problem. Because courts traditionally have relied on Title VII—and the business necessity standard specifically—for the Title VI judicial standards they have developed for disparate impact claims,[119] it is useful to analyze the evolution of the business necessity standard and the positive impact that its ultimate codification has had on courts' employment discrimination jurisprudence. The next Subpart takes up this discussion and suggests implications for a similar development of the educational necessity standard.

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disparate impact rules." (internal quotation marks omitted)); Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUMB. HUM. RTS. L. REV. 495, 518 (1999) (noting that courts have reached mixed results in disparate impact challenges to certain educational policies).

[117] *See supra* notes 98–105 and accompanying text (discussing recent civil rights complaints filed with the DOE).

[118] Compounding the problem of these discrepancies is the fact that courts vary when assigning weight to the standards developed by education experts in assessing the validity of different education practices. In the context of high-stakes testing, for example, some courts rely more frequently on test developers' user's manuals in evaluating the justification for education practice as a "necessity." *See, e.g.*, United States v. Fordice, 505 U.S. 717, 736–37 (1992) (rejecting Mississippi's exclusive reliance on ACT composite scores in making college admissions decisions, because the ACT User's Manual called instead for admissions standards based on ACT subtest scores, self-reported high school grades, and other factors); Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1519 (M.D. Ala. 1991) (relying on the ACT User's Manual to find that the ACT was not valid for use in admission to an undergraduate teacher training program); Sharif *ex rel.* Salahuddin v. N.Y. State Educ. Dep't, 709 F. Supp. 345 (S.D.N.Y. 1989) (relying on the SAT User's Manual in concluding that the SAT was not designed to measure student achievement in high school). Other courts, in evaluating the justifications for certain education practices like testing, pay little attention to research on how the use of certain education practices can affect students' educational opportunities or life chances. *See, e.g.*, People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997) (disregarding extensive evidence on the harmful educational effects of low-track placements on the ground that such educational questions are beyond the competence of judges). Naturally, this variation in courts' deference to education experts has the potential to affect whether a court determines a particular education practice to be an educational necessity or to have a substantial legitimate justification.

[119] *See supra* note 81 and accompanying text (describing the relationship between the Title VII "business necessity" standard and the Title VI "educational necessity" standard).

B. The Development of the Business Necessity Standard and Implications for the Analogous Educational Necessity Standard

Courts traditionally have relied on Title VII and its business necessity standard to develop standards for the Title VI disparate impact analysis.[120] In contrast with the lack of clarity regarding educational necessity, the codification of the business necessity standard has aided courts' employment discrimination jurisprudence. An analysis of how the business necessity standard has evolved and functioned in the Title VII context therefore is useful for evaluating the potential support an official educational necessity regulation might provide for valid Title VI claims. The business necessity defense's evolution from a vague judicial formulation to a statutorily codified standard helped courts enforce disparate impact in the context of employment discrimination. An analogous evolution for the educational necessity defense would benefit courts and plaintiffs litigating Title VI disparate impact claims.

The business necessity defense, which requires employers to justify employment practices upon a prima facie showing of discrimination under Title VII, first originated in *Griggs v. Duke Power Co*.[121] Initially, the Supreme Court developed the business necessity doctrine into a powerful tool for plaintiffs challenging exclusionary employment practices.[122] But the Court, through a series of subsequent decisions, eroded the standard's power for discrimination plaintiffs by weakening its requirements for employers.[123] Congress, however,

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[120] *Id.*

[121] 401 U.S. 424, 431 (1971) ("The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). The *Griggs* Court further clarified that the particular employment practice must be related to "measuring job capability," *id.* at 432, must be "demonstrably a reasonable measure of job performance," *id.* at 436, and must have a "manifest relationship to the employment in question," *id.* at 432.

[122] *See e.g.*, Connecticut v. Teal, 457 U.S. 440, 451–52, 456 (1982) (noting that an employment testing practice was justified under business necessity only if the test "measures skills related to effective performance [of the job]" and holding that an employer's acts of racial discrimination in promotions, effected by an examination having disparate impact, rendered the employer liable under Title VII for racial discrimination); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (explaining that *Griggs* instructed the Court to hold that business necessity required a "manifest relationship to the employment in question"); Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977) (concluding that a practice that was justified under the business necessity standard was "necessary to safe and efficient job performance"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (explaining that *Griggs* instructed the Court to hold that business necessity required a "manifest relationship to the employment in question").

[123] The first of these decisions was *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). The *Watson* plurality sought to limit disparate impact analysis by 1) increasing the

quickly responded to this erosion. In 1990, United States Senator Edward Kennedy introduced a statutory amendment to Title VII "to restore and strengthen civil rights laws that ban discrimination in employment . . . ."[124] What ultimately emerged was the Civil Rights Act of 1991, which, among other things, redefined the business necessity framework such that the burden "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" would be shifted to the employer.[125] In essence, the Civil Rights Act of 1991 aimed to provide courts with Congressional guidance on the business necessity standard.[126]

A useful lesson is gained from the historical development of the business necessity standard in contemplating a framework for a more authoritative and useful regulation regarding the educational necessity standard in the Title VI context: When courts distort an antidiscrimination legal standard under the Civil Rights Act of 1964 such that civil rights claimants suffer, an official statute or regulation realigning the standard to the commitment of the law can be appropriate. This is particularly so for Title VI's disparate impact standard, given that it borrows so heavily from Title VII. The foundational considerations that should guide a regulatory framework for the educational necessity standard, addressed in the next Part, are consistent

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plaintiff's burden in the *prima facie* case by adding an identification and causation showing (i.e., requiring the plaintiff to identify a specific employment practice and prove that it caused the disparate impact); and 2) reducing the defendant's procedural burden in the business necessity standard from one of persuasion to one of production. *Id.* at 994, 997. Among other things the Court did to constrain the disparate impact theory's reach, the *Watson* plurality reduced the defendant's burden in the business necessity standard to a less stringent showing that the challenged employment practices are based on legitimate business reasons. *Id.* at 998–99.

The erosion of the disparate impact theory then reached its pinnacle with the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 320, 325 (1998). In *Wards Cove*, the Court appeared to altogether replace the business necessity standard with a "business justification" standard. 490 U.S. at 658. The Court stated in *Wards Cove* that in analyzing the proffered justifications, a court should engage only in "a reasoned review of the employer's justification for his use of the challenged practice. . . . [T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* at 659.

The judicial erosion of the business necessity defense parallels what arguably is the current erosion of the educational necessity standard, as evidenced by lower courts' inconsistent treatment of educational necessity. *See supra* Part II.A (discussing the necessity standard under the Title VI disparate impact framework).

[124] S. 2104, 101st Cong. (1990).

[125] The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *codified as amended at* 42 U.S.C. § 2000e-2(k) (2012).

[126] *See id.* (clarifying that the burden of proving business necessity is on the employer).

with Congress's willingness to step in on behalf of civil rights plaintiffs when the judiciary provides insufficient protections.

III
Developing a Framework for an Educational Necessity Standard

This Part discusses the important considerations that should guide an educational necessity regulatory framework as well as the more straightforward and substantive provision that should be the framework's threshold requirement. Essentially, the framework should include a provision mandating a presumption that any public education institution will have as its goal equal education opportunity in any defense offered that an education practice is a "necessity."

A. Efforts by the Department of Education and the Department of Justice to Clarify the Educational Necessity Standard

Any discussion of educational necessity is conspicuously absent from promulgated DOE regulations.[127] But both the DOE and the DOJ have given some direction to potential Title VI litigants with regards to educational necessity and the disparate impact standard as a whole in public education institutions. In addition to issuing this type of informal guidance, the DOE itself regularly evaluates and investigates discrimination complaints.[128]

In its *Title VI Legal Manual*, the DOJ sets out general Title VI legal principles and standards.[129] Citing *New York Urban League, Inc. v. New York*,[130] the manual states that "[t]he elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law."[131] In describing the educational necessity standard, it recites courts' developed standards—that a practice has a disparate impact on individuals without a "substantial legitimate justification."[132]

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[127] *See* 34 C.F.R. § 100 (failing to address the business necessity defense).

[128] *See* U.S. Dep't of Educ., *supra* note 97 (outlining the complaint processing procedures). This fact underscores the DOE's expertise and competency for further developing more effective and authoritative education regulations.

[129] *See* Civil Rights Div., U.S. Dep't of Justice, *supra* note 56, at 3–6 (describing the legislative history and purpose of Title VI).

[130] 71 F.3d 1031, 1036 (2d Cir. 1995).

[131] Civil Rights Div., U.S. Dep't of Justice, *supra* note 56, at 55.

[132] *Id.* at 56 ("To prove a substantial legitimate justification, the recipient must show that the challenged policy was necessary to meeting a goal that was legitimate, important, and integral to the recipient's institutional mission. . . . The justification must bear a manifest demonstrable relationship to the challenged policy." (citations omitted) (internal quotation marks omitted)).

The DOJ, in conjunction with the DOE, also has given some indication of considerations for the educational necessity standard in the Title VI context, as it pertains to school discipline. In determining whether or not a disciplinary policy is "necessary to meet an important educational goal," the manual states that it considers "both the importance of the goal that the school articulates and the tightness of the fit between the stated goal and the means employed to achieve it."[133]

With regard to high-stakes testing specifically, the DOE has explained that the educational necessity should be assessed by examining test validity, reliability, and fairness, as well as the institutional goals and objectives of the school, the educational consequences to students, and the relationship of the educational institution to the student.[134] The DOE has issued similar informal guidance on disparate impact considerations for resource comparability[135] and student enrollment procedures[136] in public schools.

Such informal guidance undoubtedly is useful for addressing discrimination complaints related to these issues.[137] But these guidance standards nonetheless afford wide latitude to a school to define an educational "goal" broadly enough such that the school can retroactively justify a particular discriminatory practice were the school's policy to be challenged. Furthermore, the guidance merely rehashes courts' inconsistent interpretation of the educational necessity standard. The DOE has yet to utilize its authority and expertise to regulate how and under what circumstances education practices in the public sphere will be legally justified. With no specific definition, many educational institutions can define educational goals broadly

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133 Letter from Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Colleague 11 (Jan. 8, 2014), http://www.justice.gov/crt/about/edu/documents/dcl.pdf. The manual further concludes: If the policy is "not necessary to meet an important educational goal, then the Departments would find that the school had engaged in discrimination." *Id.*

134 OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICY-MAKERS 22–33 (2000).

135 *See* Letter from Catherine E. Lhamon, Assistant Sec'y, Office of Civil Rights, U.S. Dep't of Educ., et al. to Colleague 8–9 (Oct. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf (noting that in disparate impact considerations, the expectation is that resources be "equitably provided without regard to students' race, color, or national origin").

136 *See* Letter from Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., et al. to Colleague 1–2 (May 8, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf (providing updated guidance on the application of Title VI to student enrollment procedures).

137 *See, e.g.*, Letter from Damon T. Hewitt to N.Y. Office, *supra* note 8, (citing standards issued by the OCR throughout).

enough to justify a practice tangentially related to its educational mission as "necessary."[138]

B. The Benefits of a Regulation Promulgated by the Department of Education

A more forceful regulation from the DOE clearly defining educational necessity in a way that aligns with Title VI's antidiscrimination goals, regardless of a school's other tangential goals, would aid litigants filing disparate impact claims. It also would aid courts that are ill-equipped to determine not only what the educational necessity defense is, but also how it should be applied when determining what educational practices in federally funded schools are justified. But why should the DOE be responsible for issuing such a regulation? Beyond the special role of agencies in developing Title VI disparate impact,[139] the next Subsections highlight the DOE's agency expertise and the inadequacies of the guidelines it has developed so far.

1. Agency Expertise

Agencies generally are seen as possessing institutional expertise for solving complex social problems.[140] Specifically, they are expected to have access to a broad array of information, specialized knowledge, and a staff trained to be well versed in the issues they oversee.[141] Furthermore, agencies act through processes like notice-and-comment rulemaking that are open and accessible to a wide range of interests, providing a form of interest representation that enhances legitimacy.[142] Consequently, agency expertise lends significant credibility to a promulgated rule or regulation. Professor Johnson argues that agency expertise and competence are especially important in the context of Title VI disparate impact claims. Johnson notes that "agencies

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[138] As an example of the problems that potentially ensue, consider the stated mission of the Bryan Independent School District to provide "positive educational experiences that ensure high school graduation and post-secondary success." *About Us*, BRYAN INDEP. SCH. DIST., http://www.bryanisd.org/apps/pages/index.jsp?uREC_ID=180519&type=d&pREC_ID=375550 (last visited May 18, 2015). Because there are many factors that inform academic success, the ticketing practice that removes disciplinarily challenged students arguably goes towards the important goal of creating "positive educational experiences" for the student body as a whole. *Id.* Indeed, one could even argue that it is educationally "necessary."

[139] *See supra* notes 52–56 (discussing the seminal role of executive agencies in developing disparate impact under Title VI).

[140] LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 9 (2010).

[141] *Id.* Moreover, "[t]he legitimacy of agencies may depend in part on their expertise, thought superior to Congress's, for making generally applicable, forward-looking rules." *Id.*

[142] *Id.* at 8–9 (citing the Administrative Procedure Act as a source of agency legitimacy).

develop disparate impact within a particular regulatory and programmatic context in response to their knowledge of problems in a particular area."[143]

Regulations recently promulgated by the United States Department of Housing and Urban Development (HUD), for example, evince the power of relevant agencies under Title VI to act on their expertise. In 2013, HUD issued rules to implement Title VI and codify the disparate impact standard.[144] Professor Johnson notes that HUD's rule has the "virtue of establishing clarity and uniformity [regarding disparate impact enforcement], goals salient to HUD's particular role in the FHA housing regime."[145] The regulation proposed in this Note similarly establishes "clarity and uniformity"[146] in line with the DOE's role under the Civil Rights Act.

2. Inadequacy of Weak Guidelines

It is difficult to gauge how willing courts might be to defer to mere guidelines[147] that have been issued by government departments if the DOE were to litigate a disparate impact claim.[148] As already noted, there is skepticism about the capacity of courts to agree on an "important educational goal" such that the educational necessity standard proves effective and consistently enforceable.[149] And while standards like the ones that have been issued[150] may aid courts, such

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143 Johnson, *supra* note 20, at 140 (noting the important role of agencies in light of judicial resistance to disparate impact that partly stems "from concerns about court capacity to determine what impacts should be actionable and to develop appropriate remedies"). Professor Johnson notes, for example, that because agencies conduct investigations, process administrative complaints, and do other administrative activity, they are more privy to different kinds of exclusionary practices in different contexts. *Id.* at 142–43; *see also supra* notes 52–56 and accompanying text (discussing the seminal role of executive agencies in developing disparate impact under Title VI).

144 *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. § 100) ("Liability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if that practice was not motivated by a discriminatory intent.").

145 Johnson, *The Agency Roots of Disparate Impact*, *supra* note 20, at 151.

146 *Id.*

147 *See supra* notes 128–35 and accompanying text (discussing DOE and DOJ guidance).

148 *See* Johnson, *supra* note 20, at 143 (noting that the power of agencies "to shape disparate impact standards is even more robust in the context of Title VI" because Title VI grants federal agencies the power to "adopt rules and regulations . . . that are binding on federal agencies and grantees").

149 *See supra* Part II.A (discussing courts' attempts to adjudicate such disparate impact claims).

150 *See supra* notes 128–35 and accompanying text (discussing these standards).

standards issued via informal adjudication rarely receive deference in the way that an official disparate impact regulation would.[151]

Contrastingly, regulations that link federal civil-rights enforcement with explicit standards of appropriate education practices by ensuring equal educational opportunities would theoretically alter the relationship between the courts and the agency in a significant way.[152] HUD, for example, initially issued informal guidance, like the DOE, but decided to "take[ ] these informal actions one step further" by using its regulatory power to "formalize" the guidance and to make clear that disparate impact is an explicit part of the fair housing regime.[153]

In sum, agencies' unique expertise and the inadequacy of their current guidelines undeniably make them "key players" with courts in the development of the Title VI disparate impact standards.[154] With these justifications for the DOE's agency role in developing a regulation established, the next Subpart discusses what a proposed educational necessity regulation actually should consider.

C. The Foundational Principle of a Department of Education "Educational Necessity" Regulation: Equal Educational Opportunity

The core of disparate impact analysis is the necessity standard. When a plaintiff challenges a particular educational practice for its

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[151] *See* Heubert, *supra* note 19, at 30 n.33 ("The Office for Civil Rights has promulgated investigative guidelines for its own staff's use . . . . [T]hese may prove quite valuable . . . as expressions of OCR's opinions on how Title VI should apply. But none of these is a source of legally enforceable standards . . . upon which litigants and judges can rely.").

[152] Of course, this assumes that full *Chevron* deference might be awarded to such a DOE regulation. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (setting forth the legal test for determining whether courts should defer to a government agency's interpretation of a statute which it administers).

Since *Griggs*, in which the Court noted that "administrative interpretations of the [Civil Rights] Act [of 1964] by the enforcing agency is entitled to great deference," Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971), courts have been less likely to grant agencies, like the EEOC—and presumably like the DOE—*Chevron* deference. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) (applying *Skidmore* deference to the EEOC's interpretation of what constitutes a continuing violation under Title VII); *see also* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1944–45 (2006) (noting that though the EEOC has formal rulemaking power, the Court has not consistently afforded the agency *Chevron* deference).

However, courts are still encouraged to grant significant deference to administrative agencies. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (describing deference in administrative law as potentially warranted—even in the case of nonbinding interpretations that lack formal "power to control"—because agencies' interpretations "constitute a body of experience and informed judgment").

[153] Johnson, *supra* note 20, at 15.

[154] *Id.* at 142.

discriminatory effect, an educational institution will usually respond by saying that the practice is necessary to achieve some purpose related to the school's larger mission.[155] If the standards for what qualifies as an important educational goal are too nebulous, schools can escape any meaningful change by excusing practices that have an unnecessary disparate impact. Conversely, a standard too narrow might prevent schools from achieving their educational purposes and operational needs.[156] To this end, the "needs" or goals of a particular school cannot—and arguably should not—be completely regulated.[157] This is particularly true given the important differences between the public school context and the business context[158]—where the disparate impact "necessity" standard first originated.[159]

This Note argues for a regulation that informs what such a "need" or goal for all federal fund school recipients should be, *regard-*

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[155] *See supra* Part II.A (discussing courts' adjudication of disparate impact claims for public education institutions under Title VI).

[156] This concern might be especially important since the hallmark characteristic of the American public education system is local autonomy over school decisionmaking. *See* MARK. G. YUDOF ET AL., EDUCATIONAL POLICY & THE LAW 1 (2011) ("Today, the vast majority of children attend publicly run schools whose policies are determined by state and local officials.").

[157] *See* Perez, *supra* note 17, at 482 ("[T]he educational necessity standard . . . should be informed by the nature of the educational institution . . . [and] the procedural strictures . . . must be designed to effectively eliminate unnecessary disparate impact. [A] school should be given latitude to define its own needs, but [its] criteria . . . must be the best available means of serving those needs.").

[158] In the context of Title VII, for example, in order for an employment's practice to be considered "consistent with business necessity," they must be "job-related" by law. 42 U.S.C. § 2000e-2(k) (2012); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431–36 (1971) ("The touchstone is business necessity. If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."). Job-relatedness requires that a policy or practice bear "a significant relationship to successful performance of the job." H.R. REP. NO. 102-40, at 10 (1991).

Unlike the presumable goals of public educational institutions, businesses are primarily enterprises for profit. Policies with job-related criteria more easily align with a business's general goals of ensuring profit maximization. Schools, however, can have different missions—some level of deference will therefore need to be afforded. *See, e.g.*, Perez, *supra* note 17, at 483 (highlighting the specific context of admissions criteria for different universities, which might need to invoke a particular way of evaluating applicants for its ability to predict a students' successful completion of her duties, or "studies-relatedness"). Furthermore, "[t]he various 'mission-related' purposes of education will be manifested differently depending on the educational program . . . ." *Id.* at 485. The "mission necessities" of the institutions consequently vary, and will influence the policies or practices a school chooses to help carry out its mission. *Id.* The law ought to value this to the extent that it provides a social good. *But see* James S. Coleman, *What Is Meant by 'An Equal Educational Opportunity'?*, 1 OXFORD REV. EDUC. 27, 28 (1975) (arguing that equal educational opportunity is unachievable and that the term is "mistaken" and "misleading").

[159] *See supra* notes 79–81 and accompanying text (explaining how the educational necessity standard evolved from the original business necessity standard).

less of their mission.[160] Defining a goal applicable to *all* educational institutions for which particular criteria would be appropriate is admittedly more difficult than perhaps it is to develop a goal for employment or businesses, which primarily are profit driven.[161] Nevertheless, at a minimum, the DOE should tie educational necessity to a "default" standard for all federally funded schools to provide equal access to educational opportunities for racial minorities.[162] This

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[160] Jennifer Braceras levies a severe critique of the educational necessity standard, essentially challenging it as impractical. Braceras, *supra* note 106, at 1191–93; *see also* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 54–57 (1995) (describing criticism of the Department of Health, Education, and Welfare's 1966 Guidelines promoting school integration, including critiques that the Guidelines were somewhat arbitrary). For one, she cites the difficulty of making connections between a particular educational practice, like testing, and an educational institution's purported goal, such as "student motivation." Braceras, *supra* note 106, at 1191. Furthermore, according to Braceras, it is "nearly impossible to identify accurately the connection between a particular educational goal" and "productive citizenship." *Id.* Notably, Braceras cites no authority for either of these propositions; she essentially assumes that amorphous, fluid goals like "student motivation" and "productive citizenship" are what are always, or even regularly, the goals of schools or public education more generally.

Because factors like a student's motivation and ability to learn are difficult to ascertain for Braceras, she further concludes that the educational necessity standard in any form lacks feasibility. *Id.* at 1193. She points out that in contrast, the business necessity standard, as embodied by productivity and profit margins, is justiciable because those factors are quantifiable. *Id.* at 1191. Braceras, herself, raises important concerns, asking: "By what objective standard are courts supposed to evaluate [education practices]? We are told by proponents of the disparate impact model that courts should apply the standard of 'educational necessity,' although this standard is ambiguous, if not opaque." *Id.*

But these are precisely the concerns that this Note attempts to address. Sufficient guidance, promulgated under sufficient agency authority, would help obviate unnecessary "ambiguity" and "opaqueness."

[161] *See supra* note 157 (explaining the presumably different goals between businesses and public educational institutions).

[162] "Equal educational opportunity" is an oft-used term—a Google search for the phrase conducted on February 15, 2015 yielded 216,000 results—that can be ambiguous. To operationalize the concept of equal educational opportunity for this Note, I borrow the "resource equality ideal" from Professor Anne Alstott. Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 485 (2007). She writes: "Equality of opportunity contrasts with 'equality of result,' but beyond that, the sound bite does not specify . . . how to measure equality in distribution. . . . Resource equality . . . represent[s] one accepted view of 'equal opportunity' in political theory circles . . . that has been explored in a thoughtful literature over several decades." *Id.* at 485–86. Alstott concludes that under the "resource equality" approach, individuals must begin with an "equal share of society's resources and with the capacities [needed] to choose a way of life." *Id.* at 486. As it directly relates to public education, Alstott further concludes that "the equality of resources ideal suggests that every child should receive an equal investment." *Id.* Finally, Alstott rightly notes that the notion of equal opportunity is "more demanding of legal institutions" than is a merit-based framework, wherein opportunities are extended to those who are qualified. *Id.* While the "merit principle" is important for fairness, that principle alone "would leave uncorrected the brute luck that affects early development and the resources to which one has success." *Id.*

baseline necessity standard not only comports with the purpose of Title VI, but also allows for sufficient deference to educational institutions with varying missions.

Title VI already attaches antidiscrimination conditions to federal funds.[163] In failing to specify what counts as "discrimination," Congress essentially punted the issue to each federal agency tasked with distributing federal money.[164] Tasked with the responsibility of filling the concept of discrimination with meaning, the DOE has expressly prohibited not only intentional discrimination, but also use of federal money in a way that has the effect of discriminating on the basis of race, color, or national origin.[165] The next Subpart discusses why, at minimum, federally funded primary and secondary school entities specifically should be required to show that their respective "educational necessities" include equal opportunity goals.

1. The Legislative and Judicial Roots of the Equal Educational Opportunity Ideal

In light of the DOE's goal of prohibiting policies with discriminatory effects, federally funded primary and secondary school entities[166] should be required to show that their respective "educational necessities" include equal opportunity goals. A regulation to this effect would require that a grantee's "important goal" under the substantial legitimate justification standard includes ensuring equal educational opportunity. Such a regulation is a natural extension from Title VI's legislative intent to prevent public entities from easily disregarding disparate impacts and, by extension, discrimination against protected minority groups.[167]

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[163] Best, *supra* note 18, at 1673.

[164] *Id.* The House never settled the issue of whether Title VI banned only intentional discrimination or whether it also prohibited discriminatory effects, and instead chose to delegate the authority to define the contours of "discrimination" to the federal agencies. *See* 42 U.S.C. § 2000d-1 (2012) ("Each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders . . . which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."); *supra* note 41–44 and accompanying text (discussing the role of federal agencies in defining the scope of Title VI's proscription against discriminatory practices).

[165] *See supra* note 31 and accompanying text (discussing relevant DOE regulations).

[166] This Note does not address how the standard might be applied to other educational entities beyond primary and secondary public schools. However, see Perez, *supra* note 17, for a discussion of how an educational necessity framework might be applied to higher education admissions practices.

[167] *See supra* notes 44–48 and accompanying text (discussing how Title VI likely envisioned the prohibition of "disparate impact" with a loose statutory definition of discrimination).

This form of regulation also would reflect the Supreme Court's concerns in *Brown v. Board of Education*,[168] the seminal case of the twentieth century with regard to racial equality in the United States. In *Brown*, the Court famously surmised that segregation induced a "feeling of inferiority" for minority students,[169] feelings grounded in the racist symbolism that segregation created.[170] Based on the harm of the "separate but equal" doctrine and the importance of education as a socializing institution within a democracy,[171] *Brown* uprooted segregation as a clear symbol of racist ideology.[172]

The Department of Education's regulations, in prohibiting disparate adverse effects, also aim to eradicate such symbols of racist ideology.[173] Every time a public school accepts federal money, the school should actively work to eliminate such symbols and as a result, commit to creating equal education opportunity as one of its important goals.[174] Tying the federal funds of schools to policymaking[175] brings the effects of racially symbolic policies that result in unequal educational opportunities within the purview of federal control.

The DOE can feasibly go beyond hoping for a particular "interpretation" of the incomplete regulations and weak guidelines it has promulgated to accomplish its goal of eliminating symbols of racial discrimination. Specifically, the DOE can do more and actually advance a regulation that more clearly and forcefully requires this educational opportunities standard. Moreover, the standard should equally apply to *all* educational practices or policies—including

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168 347 U.S. 483 (1954).

169 *Id.* at 494.

170 Charles Lawrence, *"One More River to Cross"—Recognizing the Real Injury in* Brown*: A Prerequisite to Shaping New Remedies*, *in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 51–52 (Derrick Bell ed., 1980). In essence, segregation defined black individuals as inferior and legitimized their lower social position. *Id.*

171 In *Brown*, the Court stated that public education is "perhaps the most important function of state and local governments," noting that education "is required in the performance of our most basic public responsibilities" and "is the very foundation of good citizenship." 347 U.S. at 493. The Court went on to explain that education "awaken[s] the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* The *Brown* Court concluded: "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.*

172 *See id.* at 493–95 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

173 Best, *supra* note 18, at 1708.

174 *Id.*

175 *See* 34 C.F.R. § 100.3(b)(2) (2010) (prohibiting federal fund recipients' use of practices that have the effect of discrimination against a particular race, color, or national origin).

admissions criteria[176] and any other school practice that potentially disallows certain minority groups access to an equal opportunity at a high quality public education. The final subpart briefly considers how such a standard might be enforced.

2. *Enforcing the Equal Educational Opportunity Standard*

Only a discriminatory policy that also demonstrates a sufficient effort to ensure equal opportunity for students of color should legally withstand the "substantial and legitimate justification standard" scrutiny. But what efforts qualify as sufficient? Considered another way, how would such a standard be enforced without altogether reading out the "educational necessity" standard?

Importantly, the defendant's educational necessity burden is a conventional means-ends formulation; the defendant's ends must be important—that is, supported by a substantial legitimate justification—and the means used must strongly relate to those ends.[177] Any promulgated regulation should make it clear that an "important" end must include equal educational opportunities. But the additional consideration should *not* be whether a school's means is to blame for the school's failure to provide equal educational opportunities. Instead, the inquiry should be reframed in a way that focuses on whether schools are the most well-suited to remedy the disparate impact by changing its practices or policies.[178] If a claimant can show that a school, and not its students, should bear the responsibility of remedying the disparate impact, then a court should be significantly less likely to defer to a school's "educational necessity" defense.

Imposing this duty on a school district, a system of institutional power, to remedy a racially disparate impact to the highest degree that it can honors Title VI's antidiscrimination foundation.[179] Further-

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[176] *See* Perez, *supra* note 17, at 471–82 (developing this argument in the context of higher education admissions).

[177] *See* Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 701 (E.D. Pa. 1999) (requiring defendants to present evidence that "the 'challenged' practice serves, in a significant way, the legitimate [educational] goals of the [institution]" (alterations in original) (quoting Newark Branch, NAACP v. Town of Harrison, N.J., 940 F.2d 792, 804 (3d Cir. 1991))).

[178] I borrow this idea of refocusing the analysis from "causation" to "capability" from Zachary Best. Best, *supra* note 18, at 1701–06. In Best's words, "the fact that the grantee is in the position to remedy suggests that it is at least part of the cause." *Id.* at 1705.

[179] *See supra* notes 44–48 and accompanying text (discussing how Title VI likely envisioned the prohibition of "disparate impact" with a loose statutory definition of discrimination). Moreover, as Best argues, focusing on causation distracts from the ultimate goal of equal educational opportunity. Best, *supra* note 18, at 1701–02. For example, whether a claimant could prove causation in the first place by a preponderance of the evidence is questionable. Commentators have concluded that because there is often

more, this standard at least begins to address the problem of judges lacking guidance, or even worse, formulating their own standards when presiding over Title VI disparate impact claims.[180]

Under this framework, a court evaluating the New York City school district's Specialized High School admissions policy,[181] for example, would have to assume—along with the district's presumable "important" goal of guaranteeing an academically rigorous high school program—a default commitment to ensuring that black students will have an equal opportunity to benefit from such a program. An admissions policy relying on a single test score for admissions runs against such an assumption if black students are being denied access to Specialized High Schools at such disproportionately high rates.

In balancing the interest of a black New York City student to be free from disparate impact against the goals of the school system, an adjudicator would know the standard: A baseline expectation to ensure equal opportunities for all students. When a school practice clashes with that commitment in terms of disparate outcomes for a school's minority students, that practice should be found unlawful under Title VI. To help make this determination, a court primarily should be focused *not* on whether the New York City Department of Education caused the disparate impact, but instead how it can remedy the disparate impact.

The U.S. Department of Education's expertise is critical in this regard. As a federal executive agency, it could develop multiple explanations of disparate outcomes for different school policies in evaluating disparate impact claims to present to a court. If the DOE ultimately determines that New York City's educational policies driving the disparate impact result also demonstrate a significant commitment to equal opportunity in light of the DOE's varying explanations and alternative practices for achieving its educational goals, then

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"no social science consensus" on specific social phenomena, it is impossible for social scientists to draw the necessary inferences for legal proof in many cases. Kevin G. Welner & Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 451, 459 (1996) (citing Henry M. Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS. 217 (1975)).

In the context of school desegregation, for example, Henry Levin asserts that social science arguments ignore "the prima facie inequities" and, subsequently, whether educational policies align with a commitment to equal educational opportunity is not considered. Levin, *supra*, at 236–39. The same problem arguably would arise in other school policy contexts.

[180] *See supra* Part II.A (discussing the consequences of judicial rulings for civil rights plaintiffs).

[181] *See supra* notes 1–10 and accompanying text (discussing the admissions policies of New York City's Specialized High Schools).

the NYC Department of Education would satisfy its burden of proving educational necessity. In other words, if the DOE determined that New York City is not capable of doing more, according to the DOE's expertise, to remedy a finding of unequal educational opportunities for its students,[182] then a court would be correct to ultimately find that the school district's justification for the policy outweighs any unmet interests of the disparate impact claimants.

Importantly, this proposed framework would likely make it difficult—and intentionally so—for an institution committed to equal educational opportunities to rationalize how a practice that disproportionately affects protected minority groups in negative ways also serves the concomitant goal of ensuring equal educational opportunities. Just as important, the relative success of such a standard is contingent on it being grounded in the full force and authority of an executive agency regulation.

This proposal for a stronger regulatory role in enforcing Title VI's educational necessity standard is by no means a panacea for federal courts' problematic enforcement of the educational necessity standard.[183] In the employment discrimination context, for example, Congress went so far as to codify the business necessity standard in the Civil Rights Act of 1991 to emphasize the defendant's responsibility in defending its discriminatory employment practices as necessary.[184] Yet courts still found a way to erode that heightened standard when adjudicating employment discrimination claims,[185] which has

[182] For example, the admissions test for the Specialized High School has apparently never been validated. Letter from Damon T. Hewitt et al. to N.Y. Office, *supra* note 8, at 16–18. Neither have alternative pathways for disadvantaged students to be admitted to the Specialized High Schools been successful. *Id.* at 26–27. Furthermore, the policy goes against research demonstrating that "no single test score can be considered a definitive measure of a student's knowledge." NATIONAL RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 3 (Jay P. Heubert & Robert M. Hauser eds., 1999); *see also* Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 102–03 (1998) ("Although a test can be a very valuable tool in making decisions about a student's education . . . [m]any factors—some relating to the constructs measured by the test and some not—may affect a student's performance on a particular test.").

[183] *See supra* notes 88–96 (discussing the consequences of inconsistent judicial application of the educational necessity standard for civil rights plaintiffs).

[184] *See* 42 U.S.C. § 2000-e2(k) (2012) (reinstating the stricter standard for defendants' burden in proving business necessity).

[185] *See, e.g.*, Selmi, *supra* note 40, 769 (explaining that regarding employment testing practices, judicial determinations are "almost entirely subjective in nature, leaving courts to make normative judgments regarding the merits of the challenged practice"); Lye, *supra* note 122, at 327 (discussing efforts to erode the vitality of Title VII before the Civil Rights of 1991). Selmi further explains that courts often defer to employer practices in making those judgments because courts are generally hesitant to categorize "ambiguous behavior" as discriminatory. Selmi, *supra* note 40, at 796.

prompted some scholars to argue for a stronger statutory authorization of the business necessity standard under Title VII's disparate impact framework.[186]

The current state of affairs for Title VI disparate impact claims arguably is more troublesome. Courts adjudicating such claims are left to rely on even weaker guidelines[187] to decide whether discriminatory educational practices qualify as educational necessities. As in the employment discrimination context,[188] few courts are likely to be willing to challenge educational institutions' educational decisions and practices without stronger authority[189]—namely a stronger and more specific agency regulation—to rely on when doing so.

Conclusion

President Barack Obama has expressed that the right to receive a high quality public education is the "civil rights issue of our time."[190] And Title VI charges the federal government with removing discrimination in our public schools that potentially prevent access to such an education. A judicial analysis of discrimination in public education therefore should be undertaken with more exactitude to reflect our nation's commitment to this antidiscrimination principle. This effort must include addressing public school practices and policies that discriminate against protected minority groups, even if such discrimination is unintentional. Minorities' full access to a high quality public education experience is too high a price to pay for allowing these discriminatory harms to go uncorrected.

In light of disparate impact claims concerning a range of education practices that produce such harms, this Note makes the case for an official regulation from the DOE—as a federal arm—that more

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186 *See, e.g.*, *id.* at 751 (concluding that courts are generally unwilling to challenge "standard business practices" without a significantly stronger "statutory mandate"). Courts' apprehension to undo standard business practices echoes the sentiments of *Washington v. Davis*, 426 U.S. 229 (1976), where the Court expressed a concern about the possibility of the disparate impact theory undoing too much of the status quo. Selmi concludes, however, that if the disparate impact theory were applied more rigorously, "many central, and common, employment policies" would conceivably be invalidated. Selmi, *supra* note 40, at 751.

187 *See supra* Part III.A (discussing the guidance on Title VI enforcement published by the DOE and DOJ).

188 *See, e.g.*, Selmi, *supra* note 40, at 751 (concluding that courts are generally unwilling to challenge "standard business practices" without a significantly stronger "statutory mandate").

189 *See supra* notes 108–12 (discussing the hesitancy of judges to rule against school policies).

190 Helene Cooper, *Obama Takes Aim at Inequity in Education*, N.Y. Times, Apr. 6, 2011, at A16.

specifically informs the educational necessity standard. This regulation would not only aid plaintiffs seeking to challenge harmful educational practices, but also provide courts with more specific and authoritative guidance in adjudicating Title VI disparate impact claims. This Note argues that a beneficial starting point for such a regulation would make clear that a discriminatory school policy should be evaluated based on whether a school policy advances equal educational opportunities and whether the school is in the best position to remedy a policy that does not. A regulation guided by this standard comports with Title VI's original intention of rooting out discrimination against protected minority groups as well as helps to ensure minorities' full access to a high quality public education. To that end, what agencies can make clear is this: Under Title VI, no educational policies that limit opportunities for minority students can or should appropriately be upheld as necessary.