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Title VI Challenges by Private Parties to the Location of Health Care Facilities: Toward a just and Effective Action

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TITLE VI CHALLENGES BY PRIVATE PARTIES TO THE LOCATION OF HEALTH CARE FACILITIES: TOWARD A JUST AND EFFECTIVE ACTION

INTRODUCTION

Health care services are vital to all members of society; people must be healthy to obtain other societal benefits.[1] Nevertheless, commentators continue to report racial discrimination in the provision of health care services.[2] The law forbids intentional discrimination on the basis of race in a variety of contexts.[3] Victims of discrimination, however, often cannot demonstrate that the discrimination they faced was intentional.[4] In addition, facially neutral policies that have a disproportionate effect in excluding minorities from care result in discrimination just as powerful as intentional discrimination.[5] Civil rights laws

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[1] *See* Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127, 131 (1993).

[2] *See, e.g.*, *id.* at 192; Raphael Metzger, *Hispanics, Health Care, and Title VI of the Civil Rights Act of 1964*, Winter 1993–94 KAN. J.L. & PUB. POL'Y 31, 31–32; Jane Perkins, *Race Discrimination in America's Health Care System*, 27 CLEARINGHOUSE REV. 371, 373 (Special Issue 1993); Sidney D. Watson, *Health Care in the Inner City: Asking the Right Question*, 71 N.C. L. REV. 1647, 1648 (1993) [hereinafter Watson, *Inner City*]; Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939, 941 (1990) [hereinafter Watson, *Reinvigorating Title VI*]. Perkins notes, however, that the extent of discrimination is hard to determine because of inadequate and inconsistent data collection. Perkins, *supra*, at 377.

This Note will generally employ the nonspecific term minority. When authorities cited refer to specific minority groups, the terminology of the cited source has been adopted.

[3] Watson, *Reinvigorating Title VI*, *supra* note 2, at 943 & n.21 (citing Title I, 42 U.S.C. § 1971 (1982) (voting rights); Title II, *id.* § 2000a (public accommodations); Title III, *id.* § 2000b (establishments affecting interstate commerce); Title IV, *id.* § 2000c to –9 (public education); Title V, *id.* § 1975a–d (U.S. Civil Rights Commission); Title VI, *id.* § 2000d to –4 (federally funded programs and activities); Title VII, *id.* § 2000e to –15 (employment); Title VIII, *id.* § 2000f (Secretary of Commerce to compile registration and voting statistics); Title IX, 28 U.S.C. § 1447 (1982) (procedure after removal of suits from state to federal court; authorization of Attorney General to intervene in civil rights suits); Title X, 42 U.S.C. § 2000g to –3 (community relations service); Title XI, *id.* § 2000h to –6 (miscellaneous provisions)). Watson notes that prior to the passage of the 1964 Civil Rights Act, health care facilities openly discriminated against African Americans. *Id.* at 940.

[4] *See* Mitchell A. Horwich, Note, *Title VI of the 1964 Civil Rights Act and the Closing of a Public Hospital*, 1981 DUKE L.J. 1033, 1034 (1981).

[5] *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 941–42. A variety of language is used to distinguish between intentional discrimination and unintentional discrimination that has a discriminatory effect. *See* Randall, *supra* note 1, at 190 (intentional discrimination referred to as

have contributed to the decline in overt discrimination.[6] Thus, challenging facially neutral policies that have a disparate impact on minority groups is an important means of closing the gap that still exists in this country between the health status of minority and nonminority groups.[7]

Locating health care facilities in areas inaccessible to minority populations discriminates against members of minority groups; few people, however, have challenged this subtle form of disparate impact discrimination.[8] The inequitable placement of health facilities discriminates against minorities more effectively than discriminatory policies that come into play once patients walk through the door because some individuals may not even attempt to use more distant facilities.[9] Nevertheless, commentators find that Title VI of the Civil Rights Act of 1964 ("Title VI") has provided little assistance in ending health care discrimination.[10] Although plaintiffs in one recent challenge to the location of a hospital succeeded in obtaining a preliminary injunction based on Title VI,[11] the court in another recent challenge to the relocation of health care services dismissed the case before reaching the merits.[12] Because hospitals currently can defend with ease facially

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"disparate treatment discrimination" and unintentional discrimination referred to as "disproportionate adverse impact discrimination"); Watson, *Reinvigorating Title VI*, *supra* note 2, at 942 (unintentional discrimination generally referred to as "disproportionate impact"). This Note will refer to unintentional discrimination caused by facially neutral policies as disparate impact discrimination.

Watson provides the following example of disparate impact: hospitals that require patients to have a treating physician before they can be admitted effectively discriminate against minority populations, even though there may be a valid medical reason for the requirement. Watson, *Reinvigorating Title VI*, *supra* note 2, at 941–42. The requirement of a primary physician ensures that admitted patients have someone to provide care; it has the effect of disproportionately excluding from hospital care minorities, who more frequently lack a primary physician. *See id.* at 941–42 & n.15.

[6] Watson, *Reinvigorating Title VI*, *supra* note 2, at 941; Horwich, *supra* note 4, at 1059.

[7] *See* Perkins, *supra* note 2, at 379. It is important to note, however, that discrimination on the basis of race is not the only reason that health outcomes are different for majority and minority group members. *Id.* at 373. Economic disparities form significant barriers to health care access as well. *Id.* This Note will focus only on disparate impact discrimination in health care as it relates to race; other contributing factors are beyond the scope of this Note.

[8] Latimore v. County of Contra Costa, No. C 94–1257, slip op. at 25–26 (N.D. Cal. Aug. 1, 1994); Perkins, *supra* note 2, at 380; Watson, *Reinvigorating Title VI*, *supra* note 2, at 966–67; Horwich, *supra* note 4, at 1058.

[9] *See* Richard J. Zall, Note, *Maintaining Health Care in the Inner City: Title VI and Hospital Relocations*, 55 N.Y.U. L. REV. 271, 276 (1980).

[10] Watson, *Reinvigorating Title VI*, *supra* note 2, at 942; Horwich, *supra* note 4, at 1059–60.

[11] *Latimore*, No. C 94–1257, slip op. at 32–33.

[12] *See* Mussington v. St. Luke's-Roosevelt Hosp. Ctr., 824 F. Supp. 427, 434 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994).

neutral policies with a discriminatory impact, significant questions still remain about the viability of this cause of action.[13]

Health care reform is a major initiative in this country today.[14] Efforts to reform the health care system received national attention in 1994, but so far have failed.[15] Discussion of reform plans, however, continues.[16] Given the potential for future change in the health care industry, Title VI challenges to the location of health care facilities may assume increased importance.[17]

For many, achieving racial equality in health care through the enforcement of civil rights is an important national policy.[18] Given the slow progress in reducing and eliminating discrimination, activists also seek to prevent systemwide reform efforts from inadvertently widening the current gap between health care services offered to minority and nonminority individuals.[19] Strengthening Title VI will help accomplish these objectives.[20]

This Note explores the legal issues surrounding judicial enforcement of civil rights challenges by private parties to the location of health care facilities. Part I discusses Title VI in general, focusing on its implementing regulations and on judicial interpretation of the statute.[21] Part II details the history and current state of the law in Title VI actions as it relates to the location of health care facilities.[22] Part III argues that the burden on plaintiffs in Title VI cases should be decreased and provides three specific proposals for doing so: allowing plaintiffs to benefit from the "continuing violation" doctrine, removing the burden currently placed on plaintiffs to provide a less discriminatory alternative to a challenged plan, and eliminating the distinction currently made between the Title VI regulations and the Title VI statute itself.[23]

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[13] *See* Randall, *supra* note 1, at 190; Watson, *Reinvigorating Title VI*, *supra* note 2, at 942.

[14] Randall, *supra* note 1, at 130; *see* Louise G. Trubek & Elizabeth A. Hoffmann, *Searching for a Balance in Universal Health Care Reform: Protection for the Disenfranchised Consumer*, 43 DEPAUL L. REV. 1081, 1081 (1994).

[15] Adam Clymer, *Hillary Clinton Says Administration Was Misunderstood on Health Care*, N.Y. TIMES, Oct. 3, 1994, at A12.

[16] *Id.*

[17] *See* Randall, *supra* note 1, at 193; *see also* David F. Chavkin, *Health Access and the Civil Rights Laws: The Smoking Gun and Other Sorrows*, 15 CLEARINGHOUSE REV. 561, 566 (1981).

[18] *See* Kenneth Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 HASTINGS L.J. 137, 138 (1978); *see also* Perkins, *supra* note 2, at 381; Randall, *supra* note 1, at 193.

[19] *See* Perkins, *supra* note 2, at 381, 383; *see also* Randall, *supra* note 1 at 193.

[20] Randall, *supra* note 1, at 193; *see* Watson, *Reinvigorating Title VI*, *supra* note 2, at 943.

[21] *See infra* notes 24–122 and accompanying text.

[22] *See infra* notes 123–277 and accompanying text.

[23] *See infra* notes 278–311 and accompanying text.

I. General Background of Title VI

Congress intended the Civil Rights Act of 1964 ("the Act") to eliminate discrimination in the United States in a variety of areas.[24] Title VI of the Act prohibits discrimination in the use of federal funds.[25] The statute is ambiguous, however, with respect to what constitutes discrimination.[26] It provides, in pertinent part: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[27] The grant of authority in Title VI is based on Congress's spending power, through which Congress may not only prohibit certain conduct, but also may place conditions on receipt of funds.[28] Title VI explicitly authorizes various departments to promulgate and enforce regulations.[29] The scope of Title VI is substantively laid out in these regulations.[30]

A. *Agency Regulations Implementing Title VI*

Agency regulations implement the broad antidiscrimination mandate of Title VI.[31] The Department of Health, Education, and Welfare ("HEW"), which is now the Department of Health and Human Services ("HHS"), promulgated the first set of administrative regulations implementing Title VI.[32] Because the language of Title VI lacks specificity,

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[24] *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 941, 943 n.21; *see also* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 Geo. L.J. 1, 4–10 (1981) (detailing the legislative history of Title VI); Wing, *supra* note 18, at 147–54 (discussing the legislative history of both the Civil Rights Act of 1964 and Title VI).

[25] Abernathy, *supra* note 24, at 1; Wing, *supra* note 18, at 137.

[26] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (White, J., plurality opinion).

[27] 42 U.S.C. § 2000d (1988).

[28] *Guardians*, 463 U.S. at 598–99 (White, J., plurality opinion); Watson, *Reinvigorating Title VI*, *supra* note 2, at 943–44. In contrast, Title VII, which seeks to regulate private employer-employee relationships, is based on the Commerce Clause, and thus takes the form of a prohibition against discrimination, not conditions on the receipt of funds. Watson, *Reinvigorating Title VI*, *supra* note 2, at 943–44.

[29] 42 U.S.C. § 2000d-1 (1988). The Office of Civil Rights ("OCR") is charged with investigating complaints under Title VI. Wing, *supra* note 18, at 161–62.

[30] *See* 45 C.F.R. § 80 (1994).

[31] *See id.*; *Guardians*, 463 U.S. at 592 (White, J., plurality opinion); Watson, *Reinvigorating Title VI*, *supra* note 2, at 945.

[32] *See* Bryan v. Koch, 627 F.2d 612, 614 (2d Cir. 1980); Wing, *supra* note 18, at 154. Other agencies patterned their regulations after those of HEW. Wing, *supra* note 18, at 154 n.60.

the Supreme Court has looked to the agency regulations to interpret and enforce the statute.[33]

The HHS regulations seek to enforce the mandate of Title VI, namely preventing racial discrimination.[34] They apply to all programs for which the federal government provides financial aid.[35] In addition to a general prohibition against discrimination, the regulations prohibit a specific list of discriminatory practices.[36] Prohibited practices

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[33] *See Guardians*, 463 U.S. at 592 (White, J., plurality opinion).

[34] 45 C.F.R. § 80.1. Section 80.1 indicates that:

> The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the 'Act') to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health and Human Services.

Id.

[35] *Id.* § 80.2. Section 80.2 provides that: "This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in appendix A to this part." *Id.* Among the programs and activities listed in Appendix A are the following: grants for construction or modernization of emergency rooms of general hospitals; supplementary medical insurance benefits for the aged; and grants, loans and loan guarantees with interest subsidies for hospital and medical facilities. *Id.* at Appendix A Part 1 ¶¶ 63, 121, Part 2 ¶ 22.

[36] *Id.* § 80.3. Section 80.3(b) provides, in pertinent part:

> (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:
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> (i) Deny an individual any service, financial aid, or other benefit provided under the program;
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> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
>
> (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;
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> . . . .
>
> (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which *have the effect of* subjecting individuals to discrimination because

include both providing an individual a lesser opportunity to participate in the program than that offered to others[37] and locating facilities with the effect of excluding individuals from the programs provided.[38]

The regulations apply to any program receiving federal funds and to each agency and institution running those programs in their entirety.[39] In addition, each institution receiving funds must provide assurances that it complies with the nondiscrimination requirement.[40] One commentator notes that health care facilities were not emphasized during the debate around Title VI.[41] The regulations provide

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> of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

Id. (emphasis added).

[37] *Id.* § 80.3(b)(1)(vi). The restriction provides: "[A recipient may not] [d]eny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program . . . ." *Id.*

[38] *Id.* § 80.3(b)(3). The specific restriction provides:

> *In determining the site or location* of a facilities [sic], an applicant or recipient may not make selections with the *effect* of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

Id. (emphasis added).

[39] 45 C.F.R. § 80.2; *see* 42 U.S.C. § 2000d-4a (1988) (defining "program or activity" and "program"); Watson, *Reinvigorating Title VI*, *supra* note 2, at 945. Congress passed the Civil Rights Restoration Act in response to the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984). *See* Metzger, *supra* note 2, at 34. *Grove City* held that the antidiscrimination coverage of Title IX was limited only to the program or activity receiving federal funds, not the institution as a whole. 465 U.S. at 573–74. The Court also noted that Title IX was analogous to Title VI. *Id.* at 566. The Civil Rights Restoration Act of 1987 extended Title VI nondiscrimination provisions "throughout an entire agency or institution if any part receives federal financial assistance." Watson, *Reinvigorating Title VI*, *supra* note 2, at 945 & n.39 (citing the Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988)).

[40] 45 C.F.R. § 80.4 (1994). Section 80.4(d) provides the following:

> (2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. *If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.*

Id. § 80.4(2) (emphasis added).

[41] Wing, *supra* note 18, at 152.

illustrative examples, however, which include references to health care facilities.[42] The illustrations also provide an example of how placement of a project in a location with a discriminatory effect might be impermissible.[43] Thus, even though health care facilities may not have been the primary focus of Title VI, they are nonetheless covered by Title VI's broad scope.[44]

Although the regulations prohibit both discrimination in general and certain discriminatory activities, they do not provide a general definition of discrimination.[45] Commentators and the courts recognize that Title VI prohibits intentional discrimination, but disagree about whether the statute itself or the regulations implementing the statute prohibit disparate impact discrimination.[46] The regulations, commentators note, indicate agency intent to prohibit acts that have a discriminatory impact despite their lack of discriminatory intent.[47] The United

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[42] 45 C.F.R. § 80.5. The regulations state:

> (e) In grants to assist in the construction of *facilities for the provision of health*, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. . . . In [the] case of *hospital construction grants* the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith.

Id. (emphasis added).

[43] *Id.* (illustrative examples section).

> (h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, *in selecting or approving projects or sites* for the construction of public libraries which will receive Federal financial assistance, *may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing* accomplishments [sic] of the objectives of the Federal assistance as respects individuals of a particular race, color, or national origin.

Id. § 80.5(h) (emphasis added).

[44] Wing, *supra* note 18, at 152.

[45] *See* 45 C.F.R. §§ 80.3 (discrimination prohibited), 80.13 (definitions section); Watson, *Inner City*, *supra* note 2, at 1670; Watson, *Reinvigorating Title VI*, *supra* note 2, at 948.

[46] *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring); Watson, *Reinvigorating Title VI*, *supra* note 2, at 951–54; Abernathy, *supra* note 24, at 17.

[47] Perkins, *supra* note 2, at 379; Watson, *Reinvigorating Title VI*, *supra* note 2, at 948. The regulations provide, in part, the following:

> [a] recipient . . . may not . . . utilize criteria or methods of administration *which have the effect of* subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect of* defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

45 C.F.R. § 80.3(b)(2) (emphasis added). Other parts of the regulations, however, permit some

States Supreme Court has agreed that the Title VI regulations do, in fact, incorporate the disparate impact definition of discrimination.[48]

The regulations also provide an enforcement procedure for violations.[49] One author notes that, in contrast to other titles of the Civil Rights Act, Congress intended Title VI to be enforced primarily through administrative rather than judicial channels.[50] The Office of Civil Rights ("OCR") handles Title VI enforcement, including that for health care facilities.[51] The regulations permit OCR to attempt to obtain compliance among fund recipients through voluntary or informal means.[52] If an applicant still fails to comply with the requirements, the governing agency may then terminate the federal funding, but only after giving the recipient an opportunity for a hearing.[53] Recipients who have their funding terminated may seek judicial review of agency action.[54] Programs that receive federal funds but are found to discriminate are thus given a choice: stop the discriminatory practice or lose federal funds.[55]

OCR also receives and reviews individual complaints of Title VI violations.[56] Some commentators, however, question the efficiency of the administrative complaint process.[57] Others criticize OCR more broadly, claiming that since Title VI's enactment, health care enforcement efforts have been inadequate.[58] One commentator notes that under the Reagan and Bush administrations, OCR almost completely

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difference in impact on varying groups where the impact serves the goal of eliminating past discrimination. *Id.* §§ 80.3(b)(6), 80.5(j). A discussion of this "affirmative action" is beyond the scope of this Note. *See id.* § 80.3(b)(6).

[48] *See, e.g., Guardians*, 463 U.S. at 607 n.27 (White, J., plurality opinion).

[49] 45 C.F.R. § 80.8.

[50] Watson, *Reinvigorating Title VI*, *supra* note 2, at 945–46.

[51] Wing, *supra* note 18, at 161–62. Wing states:

> OCR fulfills its Title VI responsibilities to health facilities primarily through four activities: (1) requiring Title VI assurances from health facilities certified for participation in the Medicare program; (2) requiring state agencies to submit Title VI compliance plans describing state enforcement activities; (3) investigating complaints and noncomplying recipients identified by assurance documentation; (4) conducting occasional special studies.

Id. at 163.

[52] 45 C.F.R. § 80.8(a), (c).

[53] *Id.* § 80.8(b), (c); Watson, *Reinvigorating Title VI*, *supra* note 2, at 946.

[54] 42 U.S.C. § 2000d(2); 45 C.F.R. § 80.11.

[55] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983) (quoting 110 CONG. REC. 1542 (1964) (statement of Rep. Lindsay)).

[56] Randall, *supra* note 1, at 189; Wing, *supra* note 18, at 163.

[57] *See* Perkins, *supra* note 2, at 380; Randall, *supra* note 1, at 189. The administrative complaint process is described at 42 C.F.R. § 80.7.

[58] *See* Watson, *Inner City*, *supra* note 2, at 1669; Wing, *supra* note 18, at 138.

abdicated its Title VI health care monitoring and enforcement responsibilities.[59] OCR's failure to produce data with which to evaluate Title VI compliance is also a source of criticism from scholars.[60] OCR, however, has not been the only body to enforce and interpret Title VI; the courts also have done so.[61]

B. *Judicial Elaboration of the Title VI Regulations*

The Title VI regulations leave some issues unresolved.[62] Courts have considered several of these issues: whether the plaintiff must show actual intentional discrimination or merely disparate impact in order to support a finding of discrimination;[63] whether a private cause of action exists aside from the administrative enforcement scheme;[64] and the available remedies under Title VI.[65] In a series of cases, the United States Supreme Court has addressed the initial question of whether discriminatory impact or disparate treatment is required for a plaintiff to prevail under Title VI and analogous statutes.[66]

For example, in 1974, in *Lau v. Nichols*, the United States Supreme Court held that a public school program that provided unequal benefits to English and non-English speaking children violated Title VI.[67] In *Lau*, a group of non-English speaking Chinese students brought suit against their school on the grounds that the school's failure to provide supplemental courses in the English language had a discriminatory impact on them.[68] The Court decided the case on Title VI grounds; after examining the regulations it concluded that disparate impact discrimination is prohibited.[69] The Court reasoned that the federal

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[59] Watson, *Inner City*, *supra* note 2, at 1669.

[60] Perkins, *supra* note 2, at 377; Watson, *Inner City*, *supra* note 2, at 1669. There are only two studies analyzing Title VI compliance by health facilities: one conducted by the General Accounting Office in 1971–72 and a limited survey of hospital compliance by OCR in 1981. Watson, *Inner City*, *supra* note 2, at 1669–70 & n.114.

[61] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978); Lau v. Nichols, 414 U.S. 563 (1974).

[62] *Guardians*, 463 U.S. at 589–97, 607; *see also* Watson, *Reinvigorating Title VI*, *supra* note 2, at 946.

[63] *Guardians*, 463 U.S. at 589–93 (White, J., plurality opinion); *Bakke*, 438 U.S. at 287; *Lau*, 414 U.S. at 568.

[64] *Guardians*, 463 U.S. at 593–95, 597; Watson, *Reinvigorating Title VI*, *supra* note 2, at 946.

[65] *Guardians*, 463 U.S. at 607 & n.27.

[66] Alexander v. Choate, 469 U.S. 287, 293 n.7, 294 (1985) (interpreting § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulations); *Guardians*, 463 U.S. at 607 & n.27; *Lau*, 414 U.S. at 568.

[67] 414 U.S. at 564–66, 569.

[68] *See id.* at 564.

[69] *Id.* at 566–68.

government has the power to fix the terms on which federal funds are distributed and that, in this case, it had not exceeded that power.[70] Thus, the Supreme Court, in *Lau*, held that Title VI prohibits discriminatory effects in federally funded programs.[71]

In 1983, in *Guardians Ass'n v. Civil Service Commission*, a majority of the United States Supreme Court held that proof of discriminatory intent was not necessary to establish a violation of the Title VI regulations;[72] the Court, however, did require a showing of discriminatory intent to establish a violation of the Title VI statute itself.[73] In *Guardians*, the plaintiffs were minority police officers who contended that a qualifying examination with a non-job-related discriminatory impact resulted in disproportionate layoffs in violation of Title VI.[74] Respondents argued that the Court, in 1978, had confined the reach of Title VI to programs operated in an intentionally discriminatory manner, thereby overruling *Lau*.[75] The *Guardians* Court, however, chose to leave intact the holding of *Lau* as it related to the Title VI regulations.[76]

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[70] *Id.* at 569.

[71] *See id.* at 568–69.

[72] 463 U.S. 582, 584 & n.2 (1983) (White, J., plurality opinion).

[73] *Id.* at 608 n.1 (Powell, J., concurring). As to the issue of remedies, the Court upheld the court of appeals, which had reversed the district court's grant of compensatory damages. *Id.* at 584, 587–88 (White, J., plurality opinion). In addition, the Supreme Court implied a private right of action under Title VI in this case. *Id.* at 597 (White, J., plurality opinion); *see also* Perkins, *supra* note 2, at 379–80.

The *Guardians* opinion is complex; Justice Powell expressed his reservation about the Court's opinion as follows: "[o]ur opinions today will confuse rather than guide." 463 U.S. at 608 (Powell, J., concurring). Seven members of the Court shared the opinion that violation of the Title VI statute itself requires proof of discriminatory intent: Justices Powell, Rehnquist, O'Connor, Stevens, Brennan, Blackmun and Chief Justice Burger. *See id.* at 608 n.1 (Powell, J., concurring). The members of the Court holding that the Title VI regulations, which incorporate a disparate impact standard, are valid were the following: Justices White, Brennan, Marshall, Blackmun and Stevens. *Id.* at 607 n.27 (White, J., plurality opinion). A specific analysis of the validity of the Title VI regulations, as opposed to the scope of the statute itself, is first raised in a concurring opinion in *Lau*. 414 U.S. at 571 (Stewart, J., concurring). The Court has allowed the regulations to stand because they are consistent with the purposes of Title VI. *Guardians*, 463 U.S. at 591–92 (White, J., concurring). The Court found that "those charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination." *Id.*

[74] *See Lau*, 414 U.S. at 585–86.

[75] *See id.* at 589–90. Respondents argued that University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), had limited *Lau*. *Id.* at 589. *Bakke* concerned a challenge to the admissions policy of a school in which 16 of 100 positions were reserved for disadvantaged minority students. *See* 438 U.S. at 279. The *Bakke* Court held that the program was unlawful and the student challenging the policy must be admitted. *See id.* at 271. The Court also held, however, that the school was allowed to consider race as a factor in the admissions process. *See id.* at 272 (Powell, J., plurality opinion). The *Guardians* Court reasoned that because *Bakke* dealt with affirmative action, its holding was consistent with *Lau*, which dealt with nonbenign discriminations. 463 U.S. at 590 (White, J., plurality opinion).

[76] *Guardians*, 463 U.S. at 590, 623, 643.

The Court upheld the validity of the Title VI regulations prohibiting disparate impact discrimination, even though it found that the Title VI statute itself does not forbid such discrimination.[77] Failing to find an inconsistency between the regulations and the purpose of the statute and the legislative history, and noting that Title VI had been consistently administered for almost two decades without interference by Congress, the Court allowed the regulations to stand.[78] Thus, *Guardians* reaffirmed that only a showing of disparate impact was required for plaintiffs to prevail in a case brought under the Title VI regulations.[79]

In 1985, in *Alexander v. Choate*, the United States Supreme Court revisited the issue of disparate impact discrimination while deciding a case brought under the Rehabilitation Act of 1973.[80] The Court, looking to the standard under Title VI and citing *Guardians*, held that a claim based on a reduction in the number of annual days of hospital care covered in a state Medicaid program was not cognizable.[81] The *Alexander* Court reasoned that some acts of discrimination would be difficult or impossible to reach if limited to prohibition of intentional discrimination.[82] It confirmed *Guardians* as standing for the proposition that the Title VI regulations do not require a showing of discriminatory intent.[83] The Court reaffirmed, however, that intentional discrimination is necessary to show a violation of Title VI itself.[84] Thus, in *Alexander*, as it had in *Lau* and *Guardians* before, the Supreme Court held that the Title VI regulations prohibit disparate impact discrimination.[85]

The *Guardians* holding regarding intent, however, was not its only one; the case also clarified issues relating to available remedies under

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[77] *See id.* at 589–93, 607 n.27 (White, J., plurality opinion); *id.* at 627 (Brennan, J., dissenting); *id.* at 643 (Stevens, J., dissenting).

[78] *See id.* at 592–93, 607 n.27 (White, J., plurality opinion); *id.* at 627 (Brennan, J., dissenting); *id.* at 643 (Stevens, J., dissenting).

[79] *See id.* at 607 n.27 (White, J., plurality opinion).

[80] 469 U.S. 287, 289, 292 (1985).

[81] *Id.* at 289, 292–93 & n.7. In *Alexander*, plaintiffs claimed that a reduction in the number of inpatient hospital days paid for by the state Medicaid program from 20 to 14 had a disproportionate impact on the handicapped. *Id.* at 289. Defendants asserted that the Rehabilitation Act reached only purposeful discrimination. *Id.* at 292. The Court, while noting that extending the Act's protection to all cases of disparate impact could make the action unmanageable, found that the legislative history of the Rehabilitation Act showed an intent to extend it to cover some acts with a discriminatory impact against the handicapped. *See id.* at 296–98. Ultimately, the Court found that the discriminatory impact alleged in this case was not actionable under the Rehabilitation Act. *See id.* at 309.

[82] *Id.* at 293, 294.

[83] *Id.*

[84] *Id.* at 293.

[85] *See supra* notes 67–79 and accompanying text.

Title VI.[86] In *Guardians*, the Supreme Court held that compensatory relief is not available as a remedy for Title VI violations in private actions not involving intentional discrimination.[87] In a portion of the opinion written by Justice White and joined by Justice Rehnquist, Justice White reasoned that private actions seeking relief for violations of statutes such as Title VI, which are passed under Congress's power under the Spending Clause, are not ordinarily appropriate for monetary relief.[88] The two Justices also justified this result because receipt of federal funds under typical Spending Clause legislation is a consensual matter; the grantee weighs the benefits and burdens before accepting the funds and agrees to comply with the conditions attached to their receipt but is free to withdraw from the receipt of funds if unanticipated burdens arise.[89] Justice O'Connor denied the availability of compensatory relief in this case because she reasoned that the Title VI regulations prohibiting disparate impact were invalid.[90] Justice Powell and Chief Justice Burger reasoned that compensatory damages were not available because Congress did not intend to authorize a private right of action under Title VI and, therefore, the plaintiffs had no claim.[91] Thus, in Title VI cases relying only on a showing of disparate impact, the Court in *Guardians* limited recovery to equitable relief.[92]

In 1992, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that Title IX of the Education Amendments of 1972 ("Title IX"), a statute analogous to Title VI, allowed an award of monetary damages for an intentional violation of the statute.[93] The plaintiff, a female high school student, alleged continuing sexual harassment from a sports coach and teacher employed by the school system; she also alleged that the system, despite knowledge of what was occurring, had failed to halt the harassment.[94] The Court stated the general rule

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[86] *Guardians*, 463 U.S. at 607 n.27 (White, J., plurality opinion).

[87] *Id.* No majority explicitly addressed the issue of whether compensatory relief might be available in cases of Title VI violations demonstrating intentional discrimination. *See id.*

[88] *See id.* at 596. These Justices stated that this presumption against monetary relief could be overcome by persuasive evidence of contrary legislative intent, but failed to find any in the case of Title VI. *Id.* at 599, 602.

[89] *Id.* at 596.

[90] *Id.* at 615 (O'Connor, J., concurring).

[91] *Guardians*, 463 U.S. at 608–10 (Powell, J., concurring).

[92] *Id.* at 607 n.27.

[93] 112 S. Ct. 1028, 1031, 1032 (1992); *see* 20 U.S.C. §§ 1681–88 (1994); *see also Guardians*, 463 U.S. at 594 ("Congress understood that private remedies were available under Title VI, and . . . intended similar remedies to be available under Title IX."); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 836 (1993) (suggesting that, after *Franklin*, a damages remedy is now available under Title VI).

[94] *Franklin*, 112 S. Ct. at 1031.

that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action.[95] The Court found no intent by Congress to limit the application of this principle in the case of Title IX.[96] Thus, the *Franklin* Court held that money damages were available under Title IX on a showing of intentional discrimination.[97]

In addition to addressing the scope of conduct and remedies included in Title VI, courts have spoken on the issue of required burdens of proof.[98] In 1984, in *Larry P. v. Riles*, the United States Court of Appeals for the Ninth Circuit held that a plaintiff alleging a violation of the Title VI regulations must initially establish a prima facie case that the recipient of federal funds is acting in a manner that creates a discriminatory impact.[99] The burden then shifts to the defendant to establish that its plan is required by educational necessity.[100] In *Larry P.*, a class of black school children challenged the use of certain IQ tests to place them in special classes for the educable mentally retarded ("E.M.R.").[101] The school children argued that the use of the tests violated Title VI because it resulted in removal of a disproportionate number of black children from the regular educational program.[102] The Ninth Circuit held that the plaintiff had made a prima facie showing of discriminatory impact in the use of IQ tests and the defendant had failed to prove that the IQ tests were educationally necessary for their avowed purpose of predicting mental retardation.[103] The court derived its Title VI "educational necessity" test for the school setting from the test used in the Title VII employment context.[104] Under Title VII, a defendant may rebut a prima facie case by showing that the

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[95] *Id.* at 1035. It should be noted, however, that in this case the court explicitly found that equitable remedies were inadequate. *Id.* at 1038. Thus, the holding in *Franklin* may not apply where equitable remedies are adequate. *See id.*

[96] *Id.* at 1036–37. In addition, the Court rejected additional reasons not to apply the traditional presumption in favor of appropriate relief. *Id.* at 1037–38.

[97] *Id.* at 1038.

[98] *See supra* notes 67–96 and accompanying text; Elston v. Talladega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984).

[99] 793 F.2d at 982.

[100] *Id.* at 982 & n.9; Watson, *Reinvigorating Title VI*, *supra* note 2, at 965.

[101] *Larry P.*, 793 F.2d at 973, 983.

[102] *Id.* The *Larry P.* court generalized from "a manifest relationship to the employment in question" in the Title VII employment context to educational necessity in the employment context; the same logic leads to a test of necessity, or a "manifest relationship" to health care objectives in the health care context. *Id.* at 982 n.9; Latimore v. County of Contra Costa, No. C 94–1257, slip op. at 25 (N.D. Cal. Aug. 1, 1994); *see infra* notes 233–68 and accompanying text (discussing *Latimore*).

[103] *Larry P.*, 793 F.2d at 982–83.

[104] *Id.* at 982 n.9.

employment regulation has a "manifest relationship" to the employment in question.[105] Thus, in *Larry P.* the Ninth Circuit adopted a burden-shifting model, requiring that once a plaintiff has made a prima facie showing that an action creates a discriminatory impact, the defendant bears the burden of demonstrating that the action is manifestly related to a legitimate goal.[106]

In 1993, in *Elston v. Talladega County Board of Education*, the United States Court of Appeals for the Eleventh Circuit held that a school district had demonstrated a substantial legitimate justification for its decision to build a new elementary school in a particular location.[107] The court further held that this justification was sufficient to rebut a prima facie showing that the siting resulted in disparate adverse impact on minority students.[108] The plaintiffs, representing a class of black children and their parents, challenged the siting of an elementary school carried out by defendant public schools, who had a history of segregation but had since been declared "unitary."[109]

The *Elston* court also laid out the structure of a Title VI disparate impact challenge.[110] The court concluded that the plaintiff first must demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse impact on a group protected by Title VI.[111] The court noted that, by definition, the plaintiff's duty to show that a challenged practice has a disparate impact requires the plaintiff to demonstrate a causal link between the defendant's challenged practice and the disproportionate adverse effect identified.[112] To avoid liability, the court concluded, the defendant must then prove

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[105] *Id.*

[106] *See id.* at 982 & nn.9 & 10; Watson, *Reinvigorating Title VI*, *supra* note 2, at 965. The court rejected the defendant's contentions that the E.M.R. classes were actually a benefit for black children and, even if the impact was adverse, it was not caused by discriminatory criteria. *Larry P.*, 793 F.2d at 983.

[107] *See* 997 F.2d 1394, 1412–13 (11th Cir. 1993).

[108] *Id.*

[109] *See id.* at 1400–01, 1407. The decision also deals with three other claims. *Id.* at 1413–14 (school board impermissibly failed to agree to send all students graduating from the proposed new elementary school to the same junior high and high school), 1416 (school board failed to require white children to attend the school to which they were assigned), 1423 (school board reassigned students who attended a school which was being closed in a discriminatory fashion). The analysis the court used on the siting claim, as well as the three additional ones, is similar; the decision regarding school siting, however, is most analogous to the health care cases discussed *infra*. *See id.*; *see also infra* notes 170–272 and accompanying text. Plaintiffs also made antidiscrimination claims under the Equal Protection Clause of the Fourteenth Amendment and other claims under the First Amendment and state law. *See Elston*, 997 F.2d at 1400.

[110] *Elston*, 997 F.2d at 1406–07.

[111] *Id.* at 1407.

[112] *Id.*

that there exists a "substantial legitimate justification" for the challenged practice.[113] The court further stated that if the defendant meets this rebuttal burden, the plaintiff will still prevail if he or she is able to show that a comparably effective alternative practice exists that would cause less disproportionality, or that the defendant's justification is a pretext for discrimination.[114] In intentional discrimination cases, in addition to proof of substantial disparate impact, courts allow circumstantial evidence of intent, such as any of the following: a history of discriminatory official actions; procedural and substantive departures from the norms generally followed by the decisionmaker; or discriminatory statements in the legislative or administrative history of the decision.[115] Thus, in *Elston*, the court described a three-stage structure for Title VI disparate impact cases.[116] The court then held that the defendant had prevailed at the second stage by showing a substantial legitimate justification for its decision about where to locate a public school.[117]

In sum, Title VI prohibits racial discrimination in the use of federal funds in a variety of contexts.[118] The regulations promulgated under Title VI provide the specific provisions for enforcement.[119] In addition, the courts have interpreted both Title VI and its regulations, further defining the scope of legal action.[120] Commentators consider Title VI to be a potentially effective tool in combating disparate impact in the use of federal funds.[121] They also note some shortcomings of Title VI, however, as it has been interpreted in cases dealing specifically with the location of health care facilities.[122]

II. The Health Care Facility Cases

Title VI does not explicitly make actions relating to health care facilities any different from other kinds of Title VI actions.[123] Commen-

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[113] *Id.*

[114] *Id.*

[115] *Elston*, 997 F.2d at 1406. The use of these types of evidence is derived from the Equal Protection context. *Id.*

[116] *See id.* at 1407.

[117] *See id.* at 1413.

[118] *See supra* notes 24–61 and accompanying text.

[119] *See supra* notes 31–61 and accompanying text.

[120] *See supra* notes 62–116 and accompanying text.

[121] Randall, *supra* note 1, at 192; Perkins, *supra* note 2, at 380; Wing, *supra* note 18, at 190.

[122] *See infra* notes 123–272 and accompanying text.

[123] *See* 42 U.S.C. § 2000d (1988); Wing, *supra* note 18, at 137. Wing, after analyzing the legislative history of Title VI, notes that eliminating discrimination in the delivery of health services was not a primary objective of Title VI or any of the other provisions of the Civil Rights

tators note that certain facts about health care, however, make it a valid area for specific focus.[124] Two early cases resolving private challenges to the closing or relocation of hospitals ended in judgments for the defendants.[125] One recent case in this area yielded the first preliminary victory for plaintiffs in actions of this kind;[126] another was dismissed before reaching the merits of the case.[127] Facts about health care in the United States illustrate the environment in which hospitals operate and in which the recent cases were brought.[128]

A. *The Health Care Industry and Hospital Management*

Health care in the United States is a huge industry; health care spending runs nearly $900 billion annually.[129] Current statistics estimate that Americans spend more than thirteen percent of gross domestic product ("GDP") on health care.[130] Based on the annual rate of growth, experts project that health care could increase to twenty percent of GDP by the year 2010.[131] The United States spends more per capita on health care than any other country in the advanced industrial world.[132]

The federal government has made a significant commitment to health care spending.[133] In 1992, for example, federal and state gov-

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Act. Wing, *supra* note 18, at 152. Wing concludes that the primary focus of the Title VI debate concerned its use as an administrative tool to deal effectively with the problem of school segregation. *Id.*

Title VI actions have received attention in other contexts as well. Lazarus, *supra* note 92, at 834 (environmental inequities); Paul K. Sonn, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After* Croson*: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1578 (1992) (construction projects); Jane Perkins, *Recognizing and Attacking Environmental Racism*, 26 CLEARINGHOUSE REV. 389, 389 (1992) (environmental racism).

[124] *See, e.g.*, Perkins, *supra* note 2, at 380; Randall, *supra* note 1, at 192; Watson, *Reinvigorating Title VI*, *supra* note 2, at 978; Wing, *supra* note 18, at 190; *infra* notes 125–50 and accompanying text.

[125] *See* NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1324 (3d Cir. 1981); Bryan v. Koch, 627 F.2d 612, 614 (2d Cir. 1980).

[126] *See* Latimore v. County of Contra Costa, No. C 94–1257, slip op. at 32–33 (N.D. Cal. Aug. 1, 1994).

[127] Mussington v. St. Luke's-Roosevelt Hosp. Ctr., 824 F. Supp. 427, 434 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (per curiam).

[128] *See infra* notes 129–68 and accompanying text.

[129] *See* MARC J. ROBERTS, YOUR MONEY OR YOUR LIFE: THE HEALTH CARE CRISIS EXPLAINED 110 (1993).

[130] *See id.* at 79.

[131] *Id.* at 80. That projection is based on an annual growth rate of nine percent for the years 1985 through 1991. *Id.*

[132] *Id.* at 78. For example, in 1991, the United States spent $2868 per capita, Canada spent $1915, Germany $1659 and Japan $1307. *Id.*

[133] Watson, *Reinvigorating Title VI*, *supra* note 2, at 973.

ernment spent more than $200 billion on Medicaid and Medicare alone.[134] Health care spending is the fastest growing part of the federal budget.[135] Forty percent of all personal health care expenditures come from government sources; only about one third are paid for by private insurance.[136] In fact, one out of every three dollars spent on health care in this country is received through a federal subsidy.[137] Thus, because the federal government so extensively subsidizes all health care services, discrimination in use of federal funds can have a significant adverse impact on minorities.[138]

Some independent requirements impose responsibilities on hospitals for nondiscriminatory care in addition to the Title VI scheme.[139] The Hill-Burton Act, enacted in 1946, created a community service obligation for participating health care facilities.[140] Congress intended it to provide federal financing for the construction and expansion of health care facilities in exchange for which these facilities agreed to open their doors to all, in perpetuity, without discrimination based on race, color or participation in the Medicaid program.[141] Commentators, however, observe that the obligation has exacted surprisingly little from hospitals and nursing homes.[142]

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[134] ROBERTS, *supra* note 129, at 11. In 1991, Medicare had approximately 35 million recipients and $120 billion in payments; Medicaid had about 25 million enrollees with $100 billion in payments. *Id.* at 51. More than 60% of Medicare spending and 25% of Medicaid spending goes to hospitals. *Id.* at 51–52.

[135] *See id.* at 11.

[136] *Id.* at 40.

[137] *See* Perkins, *supra* note 2, at 379 & n.87 (citing BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 100 (1992) (tbl. 142)). In total, federal funds pay for 41% of hospital care, 32% of nursing home care and 28% of doctors' fees. *Id.* (citing BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 100 (tbl. 141), 98 (tbl. 137)).

[138] *See* ROBERTS, *supra* note 129, at 40; Perkins, *supra* note 2, at 380; Watson, *Inner City*, *supra* note 2, at 1667; Watson, *Reinvigorating Title VI*, *supra* note 2, at 944.

[139] Kenneth R. Wing, *The Community Service Obligation of Hill-Burton Health Facilities*, 23 B.C. L. REV. 577, 578, 600 (1982) (requirement that hospitals receiving Hill-Burton funds provide charity care); *see also* Jane Perkins & Michael Dowell, *Tax Exemption for Health Care Facilities: Charity Care Enters the Picture*, 22 CLEARINGHOUSE REV. 247, 250–51 (1988) [hereinafter Perkins & Dowell, *Charity Care*] (requirement that hospitals receiving tax exempt status provide meaningful amounts of charity care); Jane Perkins & Michael Dowell, *Developments Regarding the Charitable Tax Exemption for Hospitals*, 19 CLEARINGHOUSE REV. 472, 472 (1985) [hereinafter Perkins & Dowell, *Developments*] (requirement that hospitals receiving tax exempt status under 26 U.S.C. § 501(c)(3) (1994) be operated for charitable purposes).

[140] *See* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 628 (2d ed. 1991); Perkins, *supra* note 2, at 380–81.

[141] 42 U.S.C. § 291c(e)(1) (1988); 42 C.F.R. § 124.603(a)(1) (1994); Perkins, *supra* note 2, at 380–81; *see also* Wing, *supra* note 139, at 600.

[142] Perkins, *supra* note 2, at 381; *see generally* Stan Dorn, et al., *Anti-Discrimination Provisions and Health Care Access: New Slants on Old Approaches*, 20 CLEARINGHOUSE REV. 439 (Summer

States also have an interest in the regulation of health care.[143] Some states regulate hospitals through a certificate of need program, which is designed to control construction of new facilities.[144] From the mid-1970s until the early 1980s, state and federal governments controlled health care costs primarily by restricting the supply of health care resources.[145] This was accomplished in large part through certificate of need programs that required hospitals to obtain government approval for capital investments.[146] In 1986, the federal government repealed its most important certificate of need program.[147] Approximately two-thirds of states have maintained some version of certificate of need programs.[148]

In addition to direct subsidies in the form of Medicare and Medicaid payments, tax-free status is another benefit conferred to many hospitals.[149] One justification for this practice is that nonprofit hospitals are supposed to provide free care for those unable to pay.[150] Today, however, many for-profit and nonprofit hospitals are run in an identical fashion.[151] Some commentators suggest that those who retain tax-free status be required to contribute more directly to the communities in which they are located.[152]

Today, almost all hospitals and nursing homes accept federal funds.[153] Therefore, they all come within the reach of Title VI's nondiscrimination requirement.[154] Despite the pervasiveness of federal subsidies of health care, however, health outcomes are not equal for minority and nonminority groups.[155]

1986). Administrative complaints and litigation can be used to enforce community service violations. *See* Perkins, *supra* note 2, at 381.

[143] *See* FURROW ET AL., *supra* note 140, at 684; Perkins & Dowell, *Charity Care, supra* note 139, at 247; Perkins & Dowell, *Developments, supra* note 139, at 476.

[144] FURROW ET AL., *supra* note 140, at 682.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 684. That program was the National Health Resource Planning and Development Act of 1974, Public Law No. 93–641. *Id.*

[148] *Id.*

[149] Perkins & Dowell, *Developments, supra* note 139, at 472.

[150] *Id.*

[151] Perkins & Dowell, *Charity Care, supra* note 139, at 247.

[152] *Id.* at 250–51; Perkins & Dowell, *Developments, supra* note 139, at 478; *see also* Nina J. Crimm, *Evolutionary Forces: Changes in For-Profit and Not-For-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards*, 37 B.C. L. REV. 1, 103–10 (1995).

[153] *See* Watson, *Reinvigorating Title VI, supra* note 2, at 944. More than 6800 hospitals and 13,700 outpatient and primary care facilities receive federal financial assistance, primarily in the form of Medicaid and Medicare. *Id.* at 944 n.31.

[154] *Id.* at 944.

[155] *See* Perkins, *supra* note 2, at 379; *infra* notes 156–68 and accompanying text.

B. *Evidence of Unequal Health Outcomes for Minority Groups*

Despite the extensive use of federal funds and the antidiscrimination directive of Title VI, health care outcomes among racial groups are not equal.[156] Minorities, particularly poor, inner-city African Americans, have greater health care needs than whites.[157] Across a wide variety of measures, minority groups have poorer health outcomes than whites.[158] For example, Hispanics, who account for only 9% of the population, comprise 16.7% of AIDS cases[159] and are 4.3 times as likely as non-Hispanic whites to contract tuberculosis,[160] while Hispanic preschool children are seven times more likely than non-Hispanic white preschool children to contract measles.[161] In addition, African Americans, who account for 11.8% of the United States population, comprise 29.7% of AIDS cases.[162] People of color also suffer from generally higher rates of cancer, hypertension, alcohol and drug abuse, cardiovascular disease and diabetes.[163]

The most objective measure of health is the death rate.[164] African Americans have a rate of death more than fifty percent in excess of the death rate among European-Americans.[165] That translates into 60,000 excess deaths per year, compared to mortality rates of European-Americans.[166] Infant mortalities, or deaths during the first year of life, are 108% higher among African-American infants.[167] Commentators note

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[156] *See infra* notes 157–68 and accompanying text.

[157] *See* Watson, *Inner City*, *supra* note 2, at 1648.

[158] *See* Randall, *supra* note 1, at 131–43 (noting that African-Americans experience more illness than European-Americans and die at a significantly higher rate).

[159] Watson, *Inner City*, *supra* note 2, at 1649 n.16 (citing NATIONAL COMM'N ON AIDS, THE CHALLENGE OF HIV/AIDS IN COMMUNITIES OF COLOR 3–11(1992)).

[160] Metzger, *supra* note 2, at 32 (citing Ciro V. Sumaya, *Major Infectious Diseases Causing Excess Morbidity in the Hispanic Population*, *in* HEALTH POLICY AND THE HISPANIC 76, 81 (Antonio Furino ed., 1992)).

[161] Metzger, *supra* note 2, at 32 (citing NAT'L COALITION OF HISPANIC HEALTH & HUMAN SERVS. ORG., THE STATE OF HISPANIC HEALTH: 1992 EDITION 33 (1992) (Data are for 1989 from 35 reporting states and the District of Columbia. Measles cases per 100,000 population: Hispanic, 164.3; black, 86.6; white, 22.5.)).

[162] Watson, *Inner City*, *supra* note 2, at 1649 n.16.

[163] Trubek & Hoffman, *supra* note 14, at 1091–92.

[164] Randall, *supra* note 1, at 140.

[165] *Id.* at 141. The rate of excess deaths is calculated by taking the number of actual deaths observed in the minority population prior to age 70 and subtracting the number of deaths that would be predicted given the death rate of European-Americans. *See id.* The reported figures were a 53.12% excess death rate for African-American women and 52.67% rate for African-American men. *Id.*

[166] *Id.* at 142.

[167] *Id.* at 142–43.

that it is undeniable that health outcomes differ across racial groups.[168] Title VI regulations, by forbidding disparate impact, have the potential to narrow that gap; past plaintiffs have brought actions in an attempt to do so.[169]

C. *Pre-*Guardians *Hospital Cases*

Two cases prior to *Guardians* dealt with the issue of Title VI challenges to health care facilities.[170] In both cases, the plaintiffs failed in their claims despite evidence that the decision regarding the location of a health care facility had a disparate impact on them.[171] The cases illustrate the difficulties early plaintiffs had in Title VI health care actions.[172]

For example, in 1980, in *Bryan v. Koch*, the United States Court of Appeals for the Second Circuit held that the plaintiffs in a class action suit opposing the closing of a city hospital on the grounds that it would violate Title VI were not entitled to a preliminary injunction because there was no likelihood of prevailing on the merits.[173] In *Bryan*,

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[168] *See id.* at 131; *see also* Metzger, *supra* note 2, at 31; Perkins, *supra* note 2, at 377.

[169] *See* Perkins, *supra* note 2, at 380; Randall, *supra* note 1, at 192; Wing, *supra* note 18, at 190; *infra* notes 170–277 and accompanying text.

[170] *See* NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1324 (3d Cir. 1981); Bryan v. Koch, 627 F.2d 612, 614 (2d Cir. 1980). For some law journal articles discussing Title VI health care challenges prior to *Guardians*, see generally Horwich, *supra* note 4; Carol A. Cimkowski, Note, *Municipal Hospital Closings Under Title VI: A Requirement of Reasonable Justifications*, 9 FORDHAM URB. L.J. 943 (1981); John C. McBride, Note, *Title VI: The Impact/Intent Debate Enters the Municipal Services Arena*, 55 ST. JOHN'S L. REV. 124 (1980); Valerie A. Seiling, Note, *The Prima Facie Case and Remedies in Title VI Hospital Relocation Cases*, 65 CORNELL L. REV. 689 (1980); Zall, *supra* note 9.

[171] *Medical Ctr.*, 657 F.2d at 1324, 1326–28; *Bryan*, 627 F.2d at 616, 621. The court in *Medical Center* assumed without deciding that the plaintiffs had made a prima facie showing of disparate impact. 657 F.2d at 1324.

[172] *See Medical Ctr.*, 657 F.2d at 1324; *Bryan*, 627 F.2d at 621.

[173] 627 F.2d at 612–14. In denying the injunction, the Court of Appeals upheld the ruling of the trial court. *Id.* at 614. The opinion actually covers three related cases opposing the closing of the hospital: *Bryan v. Koch*, *District Council 37 v. Koch*, and *Boyd v. Harris*. *Id.* All three cases contained similar charges and the trial court denied the injunction for all three cases in the same opinion, 492 F. Supp. 212. *Id.* at 614–15.

Bryan v. Koch, the first case, is typical of all three. *See id.* The plaintiff class consisted of low income African-American and Hispanic residents of New York City who use the municipal hospital system. *Id.* at 614. Defendants were the City and State of New York, the City's Health and Hospital Corporation ("HHC"), the State Health Department, and various City and State officials including Mayor Koch. *Id.* The United States Department of Health and Human Services ("HHS") (formerly the Department of Health, Education and Welfare) was joined as a defendant but not charged with any violation of the law. *Id.* The federal government's initial position supported granting the preliminary injunction because it agreed with the Title VI allegations and a contention made in the Boyd suit that the closing should be deferred until completion of HHS's Title

a task force appointed by Mayor Koch recommended that New York close Sydenham, a hospital in the New York City municipal system, due to budget problems.[174] Sydenham was located in central Harlem and served a ninety-eight percent minority population.[175] The trial court denied the injunction, finding that there was no evidence that the City's decision to close Sydenham was racially motivated, that the evidence adequately established the City's justification for closing Sydenham, and that the availability of adequate alternate treatment for "most, if not all" of the persons served by Sydenham eliminated the element of irreparable harm necessary for a preliminary injunction to be granted.[176]

In evaluating the plaintiffs' appeal, the Second Circuit used a stricter standard for review of the denial of a preliminary injunction, in place of the traditional "abuse of discretion" standard, for two reasons: because the trial court's hearing resolved with virtual finality the merits of the plaintiffs' claims, and because the hospital closing was a significant event, unlikely to be altered once taken.[177] Ultimately, however, the court found that the City had sufficiently justified its decision to close Sydenham and upheld the lower court's denial of the injunction.[178]

VI investigation. *Id.* Both *District Council 37 v. Koch* and *Boyd v. Harris* were brought by similar plaintiff classes against the same or similar defendants. *Id.* at 614–15.

[174] *Bryan*, 627 F.2d at 614. The task force plan estimated that $30 million could be saved in fiscal 1981 by replacing some hospitals, reducing the number of beds in some, and closing two of the City's 17 municipal hospitals. *Id.* The City planned to have Sydenham's patients served in other hospitals. *Id.* at 617.

[175] *Id.* at 614.

[176] *Id.* at 615. The trial court stated that Title VI, like the Equal Protection Clause of the Fourteenth Amendment, condemns only conduct motivated by a "racially discriminatory purpose." *Id.* (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)). The court further found that even if a disparate impact theory was sufficient to constitute a prima facie Title VI violation, the City's justification of necessity was an adequate defense. *Id.*

[177] *Id.* at 616. Although the court stated its inclination to examine the injunction denial "somewhat more rigorously" than the usual abuse of discretion standard, it did not make explicit exactly what level of scrutiny it applied. *See id.* at 616–19. After discussing the standard for evaluation of the denial of the preliminary injunction, the court also discussed the appropriate standard under which to evaluate the plaintiffs' substantive claims, discriminatory intent or disparate impact. *See id.* at 616. The court, however, reached no conclusion on this issue. *Id.*

[178] *Id.* at 621. The City justified its choice to close Sydenham and another hospital from among the City's 17 hospitals by measuring it against a set of four criteria: (a) hospital size, scope of patient services and extent of usage; (b) patient access to comparable alternative facilities; (c) quality of plant and operations; and (d) present and predicted fiscal performance. *Id.* at 618. Plaintiffs argued unsuccessfully that given the disparate racial impact of the hospital's closing, it was defendants' duty to show that there were no available measures that would save equivalent money with less disproportionate impact. *Id.* They claimed that the city could save as much or

The Second Circuit found that neither Title VI nor the HHS regulations explicitly require a recipient of federal funds to consider alternatives to a proposed placement or closing of a public facility.[179] The court noted that under Title VI, inquiry into alternatives could frequently become too open-ended.[180] The court looked to Title VII for guidance as to the appropriate standard for Title VI challenges.[181] The court concluded that a wide-ranging consideration of alternatives was unnecessary in this case and that the City had sufficiently justified the appropriateness of its choice.[182] Given the decision to close a hospital, the court ruled that the proper consideration in this case was which of the municipal hospitals were appropriate for closing, not whether some alternative to closing a hospital might be better.[183] Thus,

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more without disparate racial impact by hospital mergers, regionalization of services, increasing Sydenham's services to reduce its deficit or increasing Medicaid reimbursement. *Id.*

[179] *Bryan*, 627 F.2d at 618. The court noted, however, that HHS had stated its belief that its regulations should be interpreted to require the consideration of alternatives. *Id.*

[180] *Id.* at 619. "The alternatives plaintiffs wish to have considered are more appropriate for examination by administrative, legislative, and other political processes than by the courts." *Id.*

[181] *Id.* In doing so it determined that an open-ended consideration of alternatives frequently might result in the court's substituting its judgment for that of the city's elected officials and appointed specialists. *Id.* The court noted that, on one hand, Title VII inquiries into alternatives are usually sharply focused on particular selection devices which, though facially neutral, have a disparate racial impact in selecting qualified employees. *See id.* The court expressed its concern that Title VI discussions of alternatives, in contrast, could easily become as large in scope as finding other ways in the administration of a city to save money. *See id.* The court was also concerned that such policy choices would be made without broad public participation and might not have the desired effect of benefiting the minority population. *Id.* Thus, the court chose a narrow alternatives analysis analogous to that used under Title VII. *Id.*

At least one commentator has argued that there are good reasons to analyze Title VI and Title VII actions differently. Watson, *Reinvigorating Title VI*, *supra* note 2, at 971–75. Watson argues that Congress enacted Title VII under the Commerce Clause to regulate private employment relationships against a common-law tradition of employment-at-will. *Id.* at 971–72. Because of this, Title VII incorporates provisions designed to ensure that it does not lead to undue governmental interference with private business. *Id.* In contrast, Congress enacted Title VI under the Spending Power, giving it more leverage to attach conditions to the use of federal funds. *See id.* at 972–73.

[182] *Bryan*, 627 F.2d at 619. Following that discussion, the court then discussed the standards for the issuance of a preliminary injunction while an administrative determination on the merits of the action was still pending. *Id.* at 620. Here the court failed to find an analogy to Title VII persuasive because Title VI plaintiffs are not required to pursue administrative inquiry before beginning a civil suit. *Id.* Under Title VII, plaintiffs in appropriate circumstances are granted a preliminary injunction pending investigation of discrimination charges by the Equal Employment Opportunities Commission ("EEOC") in order to maintain the status quo. *Id.* The court's reasoning was that Title VII plaintiffs are required to present their claim before the EEOC before proceeding with a civil action. *Id.* Because Title VI has no similar requirement, the court felt that there was no need to preserve the status quo through a preliminary injunction. *See id.*

[183] *See id.* at 619. The court did not consider alternatives to the closing that might have a less discriminatory impact, but accepted the proposition that "if any municipal hospitals are to be closed, plaintiffs do not dispute that Sydenham is an appropriate choice for closing." *See id.* at

the court held that the plaintiffs' showing did not entitle them to a preliminary injunction because the City had been forced into and made a difficult choice while planning in good faith for the hospital needs of those patients who were using Sydenham.[184]

Judge Kearse concurred in the court's opinion in part and dissented in part; he would have granted the injunction.[185] Judge Kearse noted that the City should be required, at minimum, to demonstrate that its decision was the product of a rational decision-making process, which he felt it had failed to do.[186] Judge Kearse reasoned that requiring a rational decision-making process would ensure not only that a defendant had substantive goals in mind, but also that the defendant's decision actually advanced the goals with some sense of the relative effectiveness of other courses of action.[187] Judge Kearse proposed a two-phase evaluation for determining the adequacy of the City's justification: the court would first examine the *process* by which the decision was reached and then inquire into the substantive *merits* of the decision.[188] Judge Kearse concluded that the City failed to show that its decision had a rational basis and thus found it unnecessary to consider the substance of that decision.[189] For that reason, Judge Kearse concluded that the majority should have granted the preliminary injunction.[190] In addition, Judge Kearse defended the disparate impact standard as appropriate for Title VI cases, finding support for it in precedent as well as the legislative history and the administrative regulations enforcing Title VI.[191] The majority in *Bryan*, however, denied a preliminary injunction against the closing of a city hospital because it found

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618–19. Thus plaintiffs' contentions that the City might save equivalent money by hospital mergers, regionalization of services, increasing Sydenham's services to reduce its deficit, or increasing Medicaid reimbursement, were not within the scope of the analysis. *Id.*

[184] *Id.* at 620.

[185] *Id.* at 621 (Kearse, J., concurring in part, dissenting in part). He concurred because he agreed with the majority that the plaintiffs had made a prima facie showing of disparate impact. *Id.* He dissented because he did not agree that the City adequately justified its decision to close the hospital. *Id.*

[186] *Id.* (Kearse, J., concurring in part, dissenting in part). Under this view, a rational decision-making process must include consideration of appropriate alternatives and a factual assessment of the effect of the alternatives. *Id.* at 623. Only where a defendant has shown that a rational basis for its decision existed would a court move on to evaluate the substantive merit of the decision. *Id.*

[187] *See Bryan*, 627 F.2d at 623 (Kearse, J., concurring in part, dissenting in part).

[188] *Id.* (Kearse, J., concurring in part, dissenting in part). Judge Kearse described this inquiry as limited enough to ensure that the court would not have to evaluate alternatives whose merits had not been adequately developed in the record. *Id.*

[189] *Id.* at 624 (Kearse, J., concurring in part, dissenting in part).

[190] *Id.* at 628 (Kearse, J., concurring in part, dissenting in part).

[191] *See id.* at 621–22 (Kearse, J., concurring in part, dissenting in part).

there was no likelihood that the plaintiffs would prevail on the merits of their civil rights case.[192]

In 1981, in *NAACP v. Medical Center, Inc.*, the United States Court of Appeals for the Third Circuit held that although disparate impacts of a neutral policy may be adequate to establish discrimination under Title VI, in this case the defendant medical center had produced adequate evidence to justify its relocation and reorganization plan.[193] Plaintiffs in the class action, representing minorities, handicapped and elderly persons, alleged that the relocation plan had a discriminatory impact on them.[194] Defendant, Wilmington Medical Center ("WMC"), asserted that the relocation and reorganization plan were necessary due to changed circumstances.[195] After studying about fifty plans for relocation and consolidation, the WMC board decided on Plan Omega.[196] The WMC board designed the plan to reduce the number of beds in downtown Wilmington and build a new 780-bed facility in the southwestern suburbs.[197] Plaintiffs opposed the plan, contending that the relocation would subject members of the class to inferior

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[192] *Bryan*, 627 F.2d at 614.

[193] 657 F.2d 1322, 1324 (3d Cir. 1981) (en banc). The complete procedural history of the case is complex, in part because the case was in litigation for five years. *Id.* The City of Wilmington was added as a plaintiff at the trial level, and an action under the Age Discrimination Act was amended to the complaint. *Id.* The plaintiff's appeal was heard initially by a panel and then reheard by the court en banc. *Id.*

For another discussion of the case, see Dennis R. Bartholomew, Recent Case, 27 VILL. L. REV. 797 (1981–82).

[194] *See Medical Ctr.*, 657 F.2d at 1324. Plaintiffs brought actions not only under Title VI, but also under the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Age Discrimination Act, 42 U.S.C. §§ 6101–07. *Id.* at 1324. This discussion will focus on the Title VI claims. The court found the analysis for all three issues similar, at least in regard to the impact test, because the Rehabilitation Act and Age Discrimination Act were both patterned after Title VI. *Id.* at 1331.

[195] *See id.* at 1325. Wilmington Medical Center ("WMC") was organized in 1965 by the merger of three hospitals and provided most of the nonprofit acute general hospital beds in New Castle County. *Id.* at 1324. Services were concentrated in Wilmington itself while the southwestern part of the county surrounding Newark, Delaware, was underserved. *Id.* WMC was struggling both with its physical plant and its budget. *Id.* at 1325. This, combined with both a population shift away from Wilmington to the southwestern suburbs and the possibility of a competing health care institution opening in that area, convinced WMC of the need for remedial action. *Id.* at 1325. In addition to WMC, defendants included the City of Wilmington and the Secretary of HEW. *Id.* at 1322.

[196] *Id.* at 1325.

[197] *Id.* After the district court ordered a review, HEW found discriminatory effects in the plan. *Id.* WMC then contracted to make modifications to ensure that Plan Omega would comply with Title VI and the Rehabilitation Act. *Id.* The modifications included providing shuttle bus service between the two facilities because no public transportation was available, renovating the urban plant, devising inpatient service plans for the two branches to prevent racial identifiability at either location, and operating the two facilities on a unitary basis. *Id.* HEW then withdrew its objections to Omega. *Id.*

health care and disproportionate travel burdens and alleging that WMC misallocated services between the two divisions.[198] The district court ultimately dismissed the plaintiffs' claims.[199]

The Third Circuit addressed several legal issues in the plaintiffs' appeal.[200] The court first ruled that a showing of disparate impact, even absent a showing of intentional discrimination, was enough to establish a claim under Title VI.[201] The court assumed, without deciding, that the plaintiffs had presented a prima facie case of disparate impact.[202] In deciding which standard is appropriate after the plaintiff has made out a prima facie case, the court looked to the reasoning in Title VII intentional discrimination cases that require that the ultimate burden of persuasion always remains with the plaintiff.[203] The circuit court agreed with the district court that the defendant had met the necessary burden and shown that its actions were appropriate because they served a legitimate goal.[204] The circuit court also agreed that none of the six alternative plans would serve WMC's needs.[205] For this reason the circuit court, like the district court, denied the plaintiffs' claims.[206] Thus, the *Medical Center* court held that the defendant had adequately rebutted the plaintiffs' prima facie case by showing that Plan Omega served a legitimate interest.[207]

Judge Adams concurred in the court's result but decided to write separately because of the different approach he used to reach his

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[198] *Id.* at 1326.

[199] *Medical Ctr.*, 657 F.2d at 1324. The district court found no evidence of discriminatory purpose. *Id.* at 1326. It also found that the plaintiffs had failed to present a prima facie case. *Id.* at 1326. In addition, the court noted that even if a showing of disparate impact had been made, the defendant had successfully rebutted the plaintiffs' contentions by demonstrating a bona fide need that could not be satisfied by any less discriminatory plan. *Id.* at 1326. Finally, the court found that the plaintiffs did not prove that any feasible alternative to Plan Omega was available. *Id.* at 1326.

[200] *Id.* at 1328.

[201] *Id.* In doing so, the court distinguished *Bakke* from *Lau*, as did *Guardians* a few years later. *See id.* at 1329–31; *supra* notes 75–76 and accompanying text. The court did not make the distinction, which arose in *Guardians*, between the Title VI regulations and Title VI itself. *See Medical Ctr.*, 657 F.2d at 1329–31.

[202] *Medical Ctr.*, 657 F.2d at 1324.

[203] *Id.* at 1333–37. The court rejected the plaintiffs' argument that there should be a different burden on the defendant when the charge is disparate impact as opposed to discriminatory intent. *Id.* at 1333. For a discussion of why such heavy reliance on Title VII for determining the standards in a Title VI case is inappropriate, see Watson, *Reinvigorating Title VI*, *supra* note 2, at 971–75, and discussion *supra* note 177.

[204] *Medical Ctr.*, 657 F.2d at 1337.

[205] *Id.*

[206] *See id.* at 1338.

[207] *Id.* at 1336–37.

result.[208] Judge Adams failed to find that the plaintiffs established a prima facie case and would have upheld the district court's judgment on that ground.[209] In contrast, Judge Gibbons dissented from the judgment because he concluded that the plaintiffs had shown a definite and measurable disparate impact.[210] He also disagreed with the majority's analogy between the defendant's burden in intentional discrimination cases and the burden used in disparate impact discrimination cases because the former places too great a burden on plaintiffs and thwarts the congressional intent behind Title VI.[211] A majority of the Third Circuit in *Medical Center* held, however, that even if plaintiffs had established a prima facie case of disparate impact, the defendant had produced adequate evidence to justify its relocation and reorganization plan.[212] Thus, despite findings of potential disparate impact, neither of the two hospital siting cases prior to *Guardians* resulted in liability for the defendants.[213]

D. Mussington *and* Latimore*: Two Recent Title VI Challenges*

Two recent cases, one in which the plaintiffs were successful and one in which they were not, illustrate developments in the law since *Guardians* and highlight difficulties that remain for plaintiffs.[214] In *Mussington v. St. Luke's-Roosevelt Hospital Center*, the United States District Court for the Southern District of New York dismissed a com-

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[208] *Id.* at 1338 (Adams, J., concurring).

[209] *Medical Ctr.*, 657 F.2d at 1338, 1340 (Adams, J., concurring).

[210] *Id.* at 1340 (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons agreed that Title VI prohibits disparate impact as well as intentional discrimination. *Id.* at 1340. He also agreed that plaintiffs had not established a prima facie violation of the Rehabilitation Act. *Id.* at 1340. Judge Gibbons found, however, that the district court made "several fundamental legal errors, which the majority opinion ignores" in finding that the plaintiffs had failed to make out a prima facie case under Title VI. *Id.* at 1341. In analyzing the evidence under three categories: accessibility, quality of care and racial identifiability, the dissent found evidence, disregarded by the trial court, sufficient to make out a prima facie case of disparate impact under Title VI. *See id.* at 1344–49. Judge Gibbons felt that the errors made in the trial court required a reversal and remand. *Id.* at 1352.

[211] *See id.* at 1352 (Gibbons, J., concurring in part and dissenting in part). The dissent argued that this holding "achieves an artificial symmetry, but at considerable cost to the prospects of eliminating all forms of discrimination which, as the opinion of the court confirms, was the impetus behind Title VI." *Id.* at 1352. Judge Gibbons reasoned that the nature of the action, where plaintiffs seek not to punish a wrongdoer but to correct for inadvertence, and the respective position of the parties justifies a heavier burden on defendants; he argued that the burden should be on the defendants to demonstrate the necessity of their plan. *See id.* at 1353–55 & n.25.

[212] *Id.* at 1324.

[213] *See id.* at 1324; Bryan v. Koch, 627 F.2d 612, 621 (2d Cir. 1980).

[214] *See* Latimore v. County of Contra Costa, No. C 94–1257, slip op. (N.D. Cal. Aug. 1 1994); Mussington v. St. Luke's-Roosevelt Hosp. Ctr., 824 F. Supp. 427 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (per curiam).

plaint alleging violations of Title VI on the grounds that it was time-barred.[215] Defendant St. Luke's-Roosevelt Hospital Center ("SLRHC") was a hospital composed of two separate facilities: St. Luke's and Roosevelt.[216] As a result of financial difficulties, the two merged in 1979.[217] As a result of further financial difficulties, SLRHC planned a number of long-range changes including consolidation of particular services at one or the other of the facilities.[218] The plaintiffs, both individuals and organizations, alleged that the shifting of services to the Roosevelt site would discriminate against Medicaid beneficiaries and minorities.[219] They sought declaratory judgment and injunctive relief.[220]

The defendants moved to dismiss various parts of the complaint on several grounds: the claims lacked ripeness, they lacked standing, they were barred by the statute of limitations, they were barred by laches, and the complaint failed to allege the elements of the causes of action.[221] The individual plaintiffs were granted standing by the court because they had alleged a sufficient threat of injury.[222] All the organizational plaintiffs, however, were denied standing on various grounds.[223] On the grounds of the statute of limitations and laches, the court ruled that the plaintiffs' claims were barred.[224] The court found

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[215] *See* 824 F. Supp. at 433, 434. The plaintiffs also made allegations under § 1983, the Hill-Burton Act, and Title II as well as analogous violations of state law. *Id.* at 429–30. These claims were all dismissed for various reasons, none of which reached the merits of the case. *See id.* at 434.

[216] *Id.* at 429.

[217] *Id.*

[218] *Id.* at 429. The defendant's plan included the consolidation of obstetric services ("OB"), previously located at both facilities, at Roosevelt. *Id.* The neonatal intensive care unit ("NICU") and pediatric inpatient care services were similarly to be consolidated at Roosevelt. *Id.* Finally, the number of general beds at St. Luke's was scheduled to be reduced by 212. *Id.* at 429, 430.

[219] *Id.* at 429. The plaintiffs consisted of low-income minority individuals, churches, and other organizations all located or living in the vicinity of St. Luke's. *Id.*

[220] *Mussington*, 824 F. Supp. at 429.

[221] *Id.* at 430. The court found the case ripe as to the pediatrics, OB and NICU allegations. *Id.* The plan to reduce the number of general beds had been deferred until at least 1995, did not constitute a current controversy, and thus was deemed by the court not to be ripe. *Id.*

[222] *Id.* at 431. Defendants claimed that because none of the plaintiffs had alleged a significant likelihood of need for OB, NICU or pediatric services in the near future, the requirement of personal injury or threat of injury necessary for standing had not been met. *Id.* at 430. The court did not accept this contention, finding that a reduction in health resources available to the plaintiffs constituted a threat of injury. *Id.* at 431.

[223] *Id.* at 431–32. The three church plaintiffs were denied standing because the interests sought to be protected were not sufficiently germane to their purpose. *Id.* at 431. Two of the organization plaintiffs had purposes too broad to confer standing. *Id.* The last organization plaintiff failed to claim that it had members threatened with injury such as to confer standing. *Id.* at 431–32.

[224] *See id.* at 433–34. The court applied the statute of limitations analysis to the plaintiffs' Title VI and § 1983 claims. *Id.* at 433. It applied the laches analysis to the claims for equitable

that, as to the three-year statute of limitations, the statute began to run when the opposed plan gained a significant degree of certainty.[225]

The court did not accept the plaintiffs' argument that the "continuing violation" exception was applicable because the alleged discrimination and the receipt of federal funds was ongoing.[226] According to the court, to benefit from the continuing violation doctrine the plaintiffs would have to show either a sequence of related discriminatory acts, at least one of which occurred during the limitations period, or a discriminatory system maintained during that period.[227] The court found, however, that the discriminatory act "central to the plaintiffs' claims" was the decision to relocate services, not the effects caused by that decision.[228] Thus, the violation could not be considered "continuing," and the statute of limitations barred the action.[229]

The court further concluded that laches similarly barred the plaintiffs from making claims that sought equitable remedies.[230] To successfully argue laches, the court held, the defendant must show both a lack of diligence by the plaintiff in failing to come forward earlier and prejudice to itself.[231] The plaintiffs argued that their vehement opposition to this plan in the public arena constituted reasonable diligence.[232] The court reasoned, however, that the plaintiffs' failure to take legal action prior to the filing of this suit meant that they had not adequately asserted their rights.[233] The court also found that, because

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relief. *Id.* at 433. The court did not explicitly address the issue of whether equitable relief was claimed by or might be available under Title VI. *See id.* at 432–34.

[225] *See Mussington*, 824 F. Supp. at 433. In determining whether the challenged plan had reached a significant degree of certainty, the court examined the circumstances around the plan's development, adoption and approval. *Id.* at 432–33.

[226] *See id.* at 432–33.

[227] *See id.* at 433. The plaintiffs claimed that the violation continued as long as the hospital was receiving federal funds and planning to reduce services in a manner that created a discriminatory impact. *Id.* Alternatively, they claimed that as long as the Department of Health ("DOH") retained continued jurisdiction over the plan the statute of limitations period would not begin to expire. *Id.* The court found these contentions insufficient to alter the fact that the act central to the plaintiffs' claims was the decision to reduce services and the DOH approval of that plan. *Id.* Thus, the court rejected the contention that either the hospital, DOH or both had engaged in a sequence of discriminatory acts, without addressing the possibility that a hospital offering services in a way that produced a discriminatory effect could be considered a discriminatory system. *See id.*

[228] *Id.* at 433. The court did not articulate a rationale or provide a source for its apparent "central to the claims" test. *See id.* at 433. See *infra* notes 285–87 and accompanying text for a discussion of the *Mussington* court's use of the continuing violation doctrine.

[229] *Id.*

[230] *See Mussington*, 824 F. Supp. at 433–34.

[231] *Id.* at 433.

[232] *Id.* at 434.

[233] *See id.*

construction had nearly been completed and the changes demanded by the plaintiff would impose costs in the millions of dollars, allowing the claims would prejudice the defendant.[234] Thus, in *Mussington* the court held that the plaintiffs' discrimination claim must be dismissed before even reaching the merits.[235] *Mussington* illustrates some of the many obstacles that plaintiffs face in a Title VI action; in a more recent case, however, the plaintiffs had some success.[236]

In 1994, in *Latimore v. County of Contra Costa*, the United States District Court for the Northern District of California granted a preliminary injunction blocking the construction of a new hospital.[237] The plaintiffs alleged that the challenged plan would have a disparate impact on minority members of Contra Costa County, California.[238] The court granted the injunction, reasoning that the County's entire system of health care delivery had a discriminatory impact on minority residents of the County and that the contested plan would perpetuate that discrimination.[239] Thus, in *Latimore* the court held that plaintiffs were entitled to a preliminary injunction to prevent construction of a hospital with an alleged disparate impact.[240]

The controversy surrounded the proposed closing of Merrithew Hospital, a 179-bed acute-care facility in Central County, then in a state of disrepair, and the construction of a smaller 144-bed hospital on the same site.[241] The individual and organizational plaintiffs in this class action represented a group of indigent minority individuals and community churches located in the East and West County of Contra Costa

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[234] *See id.* at 434.

[235] *Mussington*, 824 F. Supp. at 434.

[236] *See supra* notes 211–31 and accompanying text; *infra* notes 237–71 and accompanying text.

[237] No. C 94–1257, slip op. at 32–33 (N.D. Cal. Aug. 1, 1994).

[238] *Id.* at 1–3.

[239] *Id.* at 29, 32–33. The court's order also denies the defendants' motion to dismiss. *Id.* at 2. Since the initial grant of a preliminary injunction, the court has ostensibly lifted the injunction due to changes in the policies of the county, but has yet to produce a written order. Telephone Interview with Bill Lee, attorney for the plaintiffs (Jan. 25, 1995).

[240] *Latimore*, No. C 94–1257, slip op. at 32–33.

[241] *Id.* at 3. Merrithew was built more than 110 years ago, and the demographics of the county have shifted significantly since that time. *Id.* at 11 n.10. Though the original siting of the hospital may have been appropriate and nondiscriminatory at that time, the plaintiffs contend that it now insufficiently serves the minority population. *Id.* at 3, 11 n.10.

The plaintiffs' claim is that not only the new hospital, but also the overall plan for the delivery of services will disproportionately underservice, and thus discriminate against, the County's minority population. *Id.* at 8. The fact that plaintiffs challenge a system of discrimination is important to their use of the continuing violation doctrine. *Id.* at 8–9. See *infra* notes 285–90 and accompanying text for a discussion of the continuing violation doctrine and its effect on the statute of limitations.

County, California.[242] The defendants included Contra Costa County, the Health Services Department of Contra Costa County, and the California Department of Health Services.[243] Defendants proposed a replacement hospital that would be funded by a bond issue.[244] Plaintiffs claimed that the defendants denied them access to County hospital services equal to that afforded to the primarily caucasian Central County residents.[245]

On April 13, 1993, plaintiffs filed an administrative complaint with the OCR alleging disparate impact on racial minorities in violation of Title VI regulations.[246] While that action was still pending, they filed for the preliminary injunction in the United States District Court for the Northern District of California.[247] On April 25, 1994, the OCR issued an opinion concluding that the County had complied with Title VI.[248] The plaintiffs continued their private action, alleging various civil rights violations.[249] The plaintiffs sought a preliminary injunction to prevent the beginning of construction on the new hospital until an acceptable alternative proposal could be adopted, while the defendants moved to dismiss the complaint.[250]

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[242] *Latimore*, No. C 94–1257, slip op. at 1. Contra Costa County is divided into four regions: the West County, East County, Central County and South County. *Id.* at 2–3.

[243] *Id.* at 2.

[244] *Id.* at 3.

[245] *Id.* The plaintiffs claim that Merrithew is inaccessible due to its location and a lack of adequate public transportation. *Id.* at 3 & n.4. They claim that the County's ethnic minority and indigent population are concentrated primarily in East and West County, while only a fraction of the County's MediCal-eligible residents live in Central County, and a majority of the Central County poor are white. *Id.* at 4.

[246] *Id.* at 4.

[247] *See Latimore*, No. C 94–1257, slip op. at 4.

[248] *Id.* OCR's conclusions stated that "the county is in compliance with Title VI with respect to the location of its public hospital." *Id.* Defendants relied heavily on the administrative findings as a defense of their proposed action. *See id.* at 22.

[249] *Id.* at 5. The plaintiffs' complaint alleges claims under: (1) Title VI of the Civil Rights Act of 1964 and the regulations promulgated thereunder; (2) the Civil Rights Act of 1866, 42 U.S.C. § 1981 (guaranteeing rights of minorities to contract); and (3) the Fourteenth Amendment to the United States Constitution (Equal Protection) under 42 U.S.C. § 1983. *Id.* Because the court found the Title VI claims a sufficient basis for granting the injunction, it did not reach the merits of the § 1981 and § 1983 claims. *Id.* at 27 n.21.

Plaintiffs also moved for, but were denied, a temporary restraining order ("TRO"). *Id.* at 5. Because the Complaint was filed on April 14, 1994, and construction on the hospital was not scheduled to begin until August 1994, the court found a lack of sufficient urgency to grant the TRO. *Id.* at 4. On June 7, 1994, the court heard oral argument on the plaintiffs' motion for a preliminary injunction and the defendants' 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. *Id.* at 5–6.

[250] *See id.* at 6.

On August 1, 1994, the district court ruled on both motions.[251] The court first denied the defendants' motion to dismiss.[252] The defendants unsuccessfully argued that the plaintiffs' claims were time-barred.[253] The court reasoned that because the plaintiffs were challenging the County's failure to provide equal access to hospital services, the plaintiffs' claims were timely under the continuing violation doctrine, which necessitates a showing only that a discriminatory system or policy operated at least in part within the limitations period.[254] The defendants also challenged the standing of the plaintiffs to bring this action.[255] The court concluded that the individual plaintiffs all had alleged sufficient injury in the denial of equal opportunity to obtain a state benefit to confer standing.[256] For these reasons the court denied the defendants' motion to dismiss.[257]

The court also granted the plaintiffs' motion for a preliminary injunction.[258] The injunction restrained the defendants from further construction and expenditure of construction or preconstruction funds until equal access to county hospital services was made available to the plaintiff class or the resolution of trial.[259] The court reasoned

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[251] *See id.* at 1, 32–33.

[252] *See Latimore*, No. C 94–1257, slip op. at 32. The motion was filed pursuant to Federal Rule of Civil Procedure 12(b)(6); it could only be granted if "it appears beyond a doubt that the plaintiff 'can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 6 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

[253] *Id.* at 7–8. The defendants attempted to fix the time that the plaintiffs' claims accrued as March 3, 1992, the date the County Board approved the new hospital, which would mean that the one-year statute of limitations would have tolled before the plaintiffs filed their complaint. *Id.* The defendants argued that the claim should be barred because more than one year had passed between the March 3, 1993, approval of the new hospital by the County Board and the April 14, 1994, filing of the plaintiffs complaint. *Id.* The court noted that where a federal civil rights statute does not contain a limitations period, the federal courts look to the forum state's statute of limitations for personal injury actions. *Id.* at 7 n.6. In this case, the California Code of Civil Procedure, § 340(3) fixed the statute of limitations for personal injury claims at one year. *Id.* However, the court rejected the statute of limitations defense. *Id.* at 8.

[254] *Id.* at 8–9. The defendants offered several arguments in opposition to the application of the continuing violations doctrine, all of which the court rejected. *Id.* at 10–11. First, they asserted that the doctrine did not apply because the plaintiffs did not establish a prima facie case of discriminatory impact. *Id.* at 10. Second, they claimed that improper conduct subsequent to the Board's approval of the new County hospital was merely a continuing effect of a discriminatory act. *Id.* Finally, the County contended that the doctrine does not apply because the decision to construct the new County hospital at the same site as the old one continued "a facially neutral system which has existed for 110 years." *Id.* at 11.

[255] *Id.* at 6; *see infra* note 256 and accompanying text.

[256] *Id.* at 12–13. The church plaintiffs were deemed not to have individualized standing but were granted organizational standing. *Id.* at 14, 17.

[257] *Latimore*, No. C 94–1257, slip op. at 6–17, 32.

[258] *Id.* at 32.

[259] *See id.* at 32–33.

that the plaintiffs had met the necessary standard for the granting of a preliminary injunction by demonstrating the existence of serious questions going to the merits and showing that the balance of hardships tips sharply in the movant's favor.[260] Using the framework set forth in *Larry P.*, the court determined that the plaintiffs had demonstrated a prima facie case by showing that most of the County's minority population lived outside of Central County and was disproportionately disadvantaged by the centralization of services.[261] The court did not accept the defendants' proffered justification for the plan because it found that the County's plan to expand contractual arrangements with district and community hospitals was a "tacit admission" that decentralized services were necessary, but had not been implemented to equalize access to hospital services for the County's minority poor.[262] Because the defendants failed to carry their burden of proving necessity, the court did not require the plaintiffs to demonstrate the existence of other, less discriminatory alternatives.[263] Thus, the court concluded that the plaintiffs had made a prima facie showing of discriminatory impact and that the defendants had failed to rebut with a showing of necessity.[264]

The court then went on to discuss the balance of hardships.[265] In doing so, the court found that the balance of hardships in allowing the construction to move forward would fall squarely on the plaintiffs.[266] According to the court, the plaintiffs suffered significant injury and risk of injury due to lack of ready access to health care, which would be exacerbated by the plans to rebuild a new hospital at the same location.[267] According to the court, the harm to the defendants "pales by comparison" to the harm faced by the plaintiffs.[268] The court stated that an injunction served only to delay the construction of the hospital, not implement the plaintiffs' proposal, and thus would only result in

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[260] *Id.* at 31–32. The court noted that these formulations represent two points on a continuum where the required degree of irreparable harm necessary to secure an injunction increases as the probability of success decreases. *Id.* at 17–18. Plaintiffs need not show that they will succeed on the merits, but must at least show that their cause presents serious questions of law worthy of litigation with a fair chance of success on the merits. *Id.* at 18.

[261] *Id.* at 19–20, 21–22, 25. Plaintiffs also relied on an investigation by the Civil Rights Bureau of the California Department of Social Services concluding that the centralization of welfare services in Central County would place a disproportionate burden on minorities. *Id.* at 22.

[262] *Latimore*, No. C 94–1257, slip op. at 26–27.

[263] *Id.* at 27.

[264] *See id.* at 25, 27.

[265] *See id.* at 28.

[266] *Id.* at 30.

[267] *See Latimore*, No. C 94–1257, slip op. at 28–29.

[268] *Id.* at 30.

possible financial losses due to a temporary interruption of the construction.[269]

Thus, the *Latimore* court denied the defendants' motion to dismiss because the plaintiffs were within the statute of limitations and had standing for their complaint.[270] The court granted the plaintiffs' motion for a preliminary injunction because it found that they had made out a prima facie case of discriminatory impact that had been insufficiently rebutted by the defendant, giving the plaintiffs a chance of success on the merits; the court found, in addition, the balance of harm in the case tipped sharply in favor of the plaintiffs.[271] As a result, in *Latimore*, the United States District Court for the Northern District of California ordered the cessation of construction on the new hospital until Title VI claims alleging discriminatory impact of the plan were resolved.[272]

Title VI challenges to the location of health care facilities present an application of the general antidiscrimination rules of Title VI and its implementing regulations.[273] Under the framework set forth in *Larry P.*, plaintiffs seeking to prevail on violations of the Title VI regulations must allege, at a minimum, a disparate effect on them in the provision of health care due to the location of the facility being challenged.[274] If they are successful, the defendant must show that its actions were required by necessity, or in other words, had a manifest relationship to the health care objectives of the defendant.[275] Doing so shifts the burden back to the plaintiff to demonstrate that there is a less discriminatory option available that is comparably effective.[276] That general framework holds potential for both the elimination and perpetuation of facially neutral policies with a disparate impact on minorities as the law of Title VI continues to unfold.[277]

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[269] *See id.* at 30–31. Though defendants provided estimated losses for the complete termination of the construction project, which might range into millions of dollars, there were no specific facts about how much loss would result from a temporary interruption of construction. *Id.* at 31.

[270] *See supra* notes 248–53 and accompanying text.

[271] *See supra* notes 254–65 and accompanying text.

[272] *See Latimore*, No. C 94–1257, slip op. at 32–33.

[273] *See* 42 U.S.C. § 2000d (1988); NAACP v. Medical Ctr., Inc., 657 F.2d 1322 (3d Cir. 1981); Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980); *Latimore*, No. C 94–1257, slip op.; Mussington v. St. Luke's-Roosevelt Hosp. Ctr., 824 F. Supp. 427 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (per curiam); 45 C.F.R. § 80 (1994).

[274] *Latimore*, No. C 94–1257, slip op. at 19–24; Larry P. v. Riles, 793 F.2d 969, 982 & nn.9–10 (9th Cir. 1984).

[275] *Latimore*, No. C 94–1257, slip op. at 25–27.

[276] *Id.* at 27–28; Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).

[277] *See* Randall, *supra* note 1, at 192; Perkins, *supra* note 2, at 380; Wing, *supra* note 18, at 190; *infra* notes 278–311 and accompanying text.

III. Strengthening Title VI Actions: Lowering the Burden on Plaintiffs

To end discriminatory impact in federally funded health care facilities, as was intended by Congress, courts need to lower the burden on Title VI plaintiffs.[278] Doing so is in keeping not only with congressional intent, but also with the equitable nature of Title VI.[279] Allowing plaintiffs to make use of the continuing violation doctrine to satisfy the requirement of the statute of limitations is one way to decrease the burdens on plaintiffs.[280] Shifting the burden of persuasion relating to less discriminatory alternatives from plaintiffs to defendants in Title VI cases will further advance that goal.[281] In addition, to avoid an increased burden on future plaintiffs, the current split between the Title VI regulations and the Title VI statute itself should be abolished.[282] Doing so would appropriately decrease the burden on Title VI plaintiffs, making the action a more powerful tool for ending disparate impact in health care facilities that receive federal funds.

Commentators note that Title VI has great potential for eliminating discrimination in the use of federal funds.[283] They also note, however, that Title VI's potential has not been fully realized.[284] In fact, Title VI has not erased the substantial gap between the health outcomes of minority and nonminority groups in this country.[285] The current heavy burden on plaintiffs has done little to combat facially neutral policies with a disparate impact.[286] Proof of intentional discrimination in the health care context is likely to be difficult.[287] While the overall burden

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[278] *See* NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1352 (1981) (Gibbons, J., concurring in part and dissenting in part); Watson, *Reinvigorating Title VI*, *supra* note 2, at 941, 977. Lowering the burden on plaintiffs necessarily means raising the burden on Title VI defendants. *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 977. That is acceptable because, as Judge Gibbons noted in *Medical Center*, a Title VI action is more in the nature of correcting an inadvertence than punishing a wrongdoer. 657 F.2d at 1353 (Gibbons, J., concurring in part and dissenting in part). The persistence of discrimination leads to the conclusion that the present burden is too high. Randall, *supra* note 1, at 191; Watson, *Reinvigorating Title VI*, *supra* note 2, at 942.

[279] *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 941, 943–44.

[280] *See infra* notes 289–94 and accompanying text.

[281] *See infra* notes 295–304 and accompanying text.

[282] *See infra* notes 305–11 and accompanying text.

[283] Randall, *supra* note 1, at 185–86, 192; Perkins, *supra* note 2, at 380; Wing, *supra* note 18, at 190.

[284] *See* Randall, *supra* note 1, at 191; Watson, *Inner City*, *supra* note 2, at 1669; Watson, *Reinvigorating Title VI*, *supra* note 2, at 942.

[285] *See* Randall, *supra* note 1, at 192; Perkins, *supra* note 2, at 372–77, 380; Watson, *Inner City*, *supra* note 2, at 1649; Watson, *Reinvigorating Title VI*, *supra* note 2, at 942, 973–74.

[286] Watson, *Reinvigorating Title VI*, *supra* note 2, at 942, 978; *see* Randall, *supra* note 1, at 191.

[287] *See Medical Ctr.*, 657 F.2d at 1352–53 (Gibbons, J., concurring in part and dissenting in

on plaintiffs should be lowered, in order to justify a substantial reduction in the burden on the Title VI plaintiff courts should place some limitations on the action.[288] The following discussion attempts to strike a better balance between the goals of the statute and defendants' rights through three alterations in current Title VI doctrine: allowing plaintiffs to benefit from the continuing violation doctrine; removing the burden for plaintiffs to demonstrate the availability of less discriminatory alternatives to challenged plans; and eliminating the distinction between the Title VI regulations and Title VI itself.

A. *The Continuing Violation Doctrine*

Title VI plaintiffs should be allowed to take advantage of the continuing violation doctrine to more easily satisfy the requirements of statutes of limitation. The continuing violation doctrine allows plaintiffs who can show either a series of related acts, at least one of which occurs within the period of the statute, or a discriminatory system or policy that operated at least in part within the limitations period to satisfy the requirement of this doctrine.[289] Because the continuing operation of a hospital or other health care facility in a manner that has a disparate adverse impact constitutes the maintenance of a discriminatory system, courts should find that such activities meet the requirement of the continuing violation doctrine.[290] The court in *Mussington* incorrectly failed to do so, and as a result, the plaintiffs' claim

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part). This may be the result of both a reduction in overt intentional discrimination and the fact that health care providers who do intentionally discriminate have become wise enough to minimize direct evidence of their intent. *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 940–41.

[288] Title VI plaintiffs who rely only on a showing of disparate impact should not be allowed to recover compensatory damages. The harm demonstrated by disparate impact will likely be difficult to value. The potential for gaining monetary damages might also induce the filing of some frivolous claims. Limiting recovery to equitable relief helps ensure that only meritorious suits are brought by removing any personal financial incentive plaintiffs have. Most significantly, though, enforcing damage awards against recipients of federal funds will only decrease the resources available for health care services. In extreme cases, it might provoke recipients of federal funds to elect to cease receiving federal money, resulting in the loss of sorely needed health care services. Because the goal of Title VI is not to punish but to correct inadvertence, restricting relief to equitable remedies designed to correct inequities in the delivery of health care services adequately serves the purposes of the statute. *See Medical Ctr.*, 657 F.2d at 1353 (Gibbons, J., concurring in part and dissenting in part).

Title VI plaintiffs who are able to demonstrate intentional discrimination, however, should be entitled to greater relief. *See Guardians*, 463 U.S. at 607 n.27. Intentionally racist conduct justifies compensatory damages, and in extreme cases may even justify punitive damages.

[289] Latimore v. County of Contra Costa, No. C 94–1257, slip op. at 9 (N.D. Cal. Aug. 1, 1994); Mussington v. St. Luke's-Roosevelt Hosp. Ctr., 824 F. Supp. 427, 432–33 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (per curiam).

[290] *See Latimore*, No. C 94–1257, slip op. at 9. *But see Mussington*, 824 F. Supp. at 433.

of disparate impact was dismissed before reaching the merits.[291] In *Latimore*, however, the court properly allowed plaintiffs to take advantage of the continuing violation doctrine to satisfy the requirements of the statute of limitations.[292] As long as a health care facility continues to be operated in a discriminatory fashion, the continuing violation doctrine should be used to allow plaintiffs to challenge that facility.

Allowing plaintiffs to challenge any health care system operated in a discriminatory fashion is appropriate because it will better achieve the goals of the statute. More plaintiffs could use Title VI to seek an equal distribution of health care resources. The statute of limitations would no longer be an obstacle to plaintiffs. No undue hardship would be placed on defendants by doing this because the doctrine of laches would still operate to bar claims by plaintiffs who have unreasonably delayed seeking remedies in a way that causes prejudice to the defendant.[293] A defendant could demonstrate the existence of prejudice, for example, by showing that the plaintiffs had an opportunity to raise objections prior to the start of construction on a new facility but that they failed to do so.[294] Such prejudice would not exist, however, in a system that had long been administered in a discriminatory fashion if plaintiffs could demonstrate the existence of a less discriminatory alternative that equally served the defendants' interests. Thus, allowing Title VI plaintiffs to take advantage of the continuing violation doctrine to satisfy the statute of limitations will appropriately lower the burden on Title VI plaintiffs.

B. *Less Discriminatory Alternatives*

In addition to being able to benefit from the continuing violation doctrine, the Title VI plaintiff should not bear the burden of demon-

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[291] *See Mussington*, 824 F.Supp. at 433; *supra* notes 220–25 and accompanying text for a description of the *Mussington* court's analysis under the continuing violation doctrine.

[292] *Latimore*, No. C 94–1257, slip op. at 8–12.

[293] *See Mussington*, 824 F. Supp. at 433–34. The laches doctrine should be used sparingly to avoid a subversion of Title VI's goals. It should not become a convenient method of vitiating all Title VI liability for defendants who engage in discrimination. Laches is a particularly appropriate doctrine for use in Title VI cases; it is an equitable defense and Title VI is equitable in nature. *Guardians*, 463 U.S. at 600–01 (White, J., plurality opinion). The proper application of the laches doctrine can help ensure that Title VI challenges to the location of health care facilities do not become unfairly burdensome on defendants.

[294] *See Mussington*, 824 F. Supp. at 433–34. The *Mussington* court found the existence of prejudice where the plaintiffs did not file suit until after construction began. *Id.* That court incorrectly failed, however, to give any weight to the fact that the plaintiffs had vigorously opposed the challenged construction in the public forum more than two years before the plan was even officially adopted. *See id.*

strating the viability of a less discriminatory alternative to a challenged plan with a disparate impact.[295] Under the current framework articulated in Title VI cases, the plaintiff can rebut a defendant's showing of necessity by producing evidence that a less discriminatory alternative to the challenged plan is available.[296] Plaintiffs, however, may lack the expertise necessary to formulate alternative, less discriminatory plans with a high degree of specificity.[297] Further, they may not have adequate information with which to evaluate whether a less discriminatory plan will meet the legitimate goals of the defendant.[298] Defendants are thus likely to be in a better position to accomplish both of these tasks.[299]

For these reasons, the plaintiff should not have the burden of demonstrating the existence of a less discriminatory alternative to a challenged plan.[300] Plaintiffs should be required specifically to articulate one or more reasonable but less discriminatory alternatives. The defendant should then be required to demonstrate that those options either are not, in fact, less discriminatory or, alternatively, are substantially less effective in accomplishing the legitimate goals of the defendant.[301] Though the plaintiff would not be required to fully document the effect of alternative plans, the court should consider any relevant information that the plaintiff provides when evaluating whether a defendant has demonstrated the feasibility of less discriminatory alternatives. Despite speculation by some courts to the contrary, framing the burdens in this way would not undesirably broaden the scope of the courts' inquiry.[302] The inquiry would remain focused on the specific alternatives articulated by the plaintiffs.[303]

Removing this burden from plaintiffs would merely require defendants to demonstrate that none of the plaintiffs' proposals for less discriminatory options adequately serves their legitimate interests. To the extent that plaintiffs' proposals were given full consideration in the defendant's decision-making process, evidence that the process was

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[295] Watson, *Reinvigorating Title VI*, *supra* note 2, at 975.

[296] Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993); Watson, *Reinvigorating Title VI*, *supra* note 2, at 965.

[297] NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1355 (3d Cir. 1981) (Gibbons, J., concurring in part and dissenting in part); *see* Watson, *Reinvigorating Title VI*, *supra* note 2, at 977.

[298] *See Medical Ctr.*, 657 F.2d at 1355 (Gibbons, J., concurring in part and dissenting in part); Watson, *Reinvigorating Title VI*, *supra* note 2, at 977.

[299] *See Medical Ctr.*, 657 F.2d at 1355 (Gibbons, J., concurring in part and dissenting in part); Watson, *Reinvigorating Title VI*, *supra* note 2, at 977.

[300] *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 975–77.

[301] *Id.* at 977.

[302] *See* Bryan v. Koch, 627 F.2d 612, 618–19 (2d Cir. 1980).

[303] *See* Watson, *Reinvigorating Title VI*, *supra* note 2, at 977.

adequate and fair may be sufficient to meet this burden.[304] In effect, defendants would have to demonstrate not only the necessity of their actions in adopting the challenged plan, but also why the particular action chosen is the least discriminatory alternative that accomplishes their legitimate objectives. Thus, placing the burden on the defendant to demonstrate that no less discriminatory option is feasible appropriately meets the goals of Title VI.

C. *Split Between the Title VI Regulations and the Statute Itself*

In addition to lessening the burdens on Title VI plaintiffs, courts should also abolish the unjustified distinction that has been made between the Title VI regulations and the Title VI statute. In *Guardians*, the Supreme Court ruled that although Title VI itself does not prohibit disparate impact, the Title VI regulations do.[305] The Court had previously held that Congress delegated sufficient power to administrative agencies to enable them to prohibit disparate impact.[306] The Department of Health and Human Services has consistently enforced the regulations it promulgated to prohibit disparate impact.[307] Throughout the history of Title VI, Congress has neither acted to change nor expressed any disapproval of the disparate impact standard adopted by the regulations, thereby indicating its assent to the use of Title VI for that purpose.[308] The ability of Title VI plaintiffs to use the statute to challenge facially neutral policies with a disparate impact is the main strength of the Title VI action.[309] The ability of plaintiffs to use Title VI to reach acts with a disparate impact is essential both because the Equal Protection Clause of the Constitution does not reach unintentional discrimination, and because other antidiscrimination statutes that forbid disparate impact discrimination do not reach the health care context.[310]

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[304] *See Bryan*, 627 F.2d at 623–24 (Kearse, J., concurring in part and dissenting in part).

[305] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 n.27 (White, J., plurality opinion), 608 n.1 (Powell, J., concurring) (1983); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993); Larry P. v. Riles, 793 F.2d 969, 981–82 (9th Cir. 1984); Watson, *Reinvigorating Title VI*, *supra* note 2, at 952.

[306] Lau v. Nichols, 414 U.S. 563, 569 (1974).

[307] *Guardians*, 463 U.S. at 592 (White, J., plurality opinion); Watson, *Reinvigorating Title VI*, *supra* note 2, at 948.

[308] *See Guardians*, 463 U.S. at 592–93 (White, J., plurality opinion).

[309] *See* Randall, *supra* note 1, at 185; Perkins, *supra* note 2, at 379; Watson, *Reinvigorating Title VI*, *supra* note 2, at 942.

[310] *Elston*, 997 F.2d at 1406; *see supra* note 3.

Because the prohibition against disparate impact discrimination is attributed to the Title VI regulations, agency action might remove that protection in the future. Recent critical attention focused on affirmative action may indicate a turning away from the goal of eliminating disparate adverse impact in this country. A future administration could order that the regulations be rewritten to forbid intentional discrimination only, and the regulations would presumably be valid. Thus, plaintiffs would lose their opportunity to remedy health care discrimination on a showing of disparate impact. Such a significant reduction in plaintiffs' rights should not be permitted without action by Congress.[311] Thus, to avoid the possibility that someone might eliminate all disparate impact claims, courts should abolish the current distinction between the Title VI regulations and the statute itself. Furthermore, because of congressional intent to make Title VI a powerful tool to end discrimination in the use of federal funds and the difficulty plaintiffs have thus far had in using it for that purpose, in the context of health care facilities, courts should lower the burdens on Title VI plaintiffs, allowing them to more easily combat disparate impact in the location of health care facilities and the distribution of health care resources.

IV. CONCLUSION

Title VI challenges by private parties to the location of health care facilities have not yet lived up to their potential as a tool for ending discrimination in the use of federal funds. The recent debate over health care reform and the ongoing debates about welfare reform and affirmative action have brought increased attention to the health care industry and its use of federal funds. Change in some direction is likely in the near future. It is important to take this opportunity to ensure that any new distribution of health care services is more equitable for all segments of society than it has been in the past. Allowing enforcement of a private right of action under Title VI, with a reduced burden on plaintiffs and an increased burden on defendants, will help ensure that each new siting of a health care facility moves toward, rather than away from, a more even distribution of social resources.

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[311] *Cf. Guardians*, 463 U.S. at 592 (White, J., plurality opinion) (noting that the Court should give deference to the consistent administrative construction of the statute in the face of congressional silence).