The Case Against Private Disparate Impact Suits

Thom Lambert

University of Missouri School of Law, lambertt@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs

Part of the Civil Rights and Discrimination Commons, Environmental Law Commons, and the Legislation Commons

Recommended Citation

THE CASE AGAINST PRIVATE DISPARATE IMPACT SUITS

Thomas A. Lambert

I. INTRODUCTION

Residents of Chester, Pennsylvania were distraught. For the fifth time in a decade, their community had been selected to host a hazardous waste site. Indeed, a pattern seemed to be emerging. Between 1986 and 1996, the Pennsylvania Department of Environmental Protection (PADEP) issued seven permits for commercial waste facilities in Delaware County, the predominately white county in which Chester is located, and five of those facilities were sited in Chester, whose population is sixty-five percent African-American. The siting pattern reeked of "environmental racism"—the targeting of minority areas to host polluting and waste facilities. A group of Chester residents was determined to do something.

The residents weighed their options. Because PADEP, the state permitting agency, is a state actor, the residents could have sued the agency for violating the Fourteenth Amendment's Equal Protection Clause. The United States Supreme Court, however, has held that the Equal Protection Clause prohibits only intentional discrimination, and it would have been all but impossible for the residents to prove invidious discrimination by PADEP. There were, after all, a number of non-racist reasons for placing the new plant...
in Chester—chiefly, the availability of cheap property and Chester's proximity to Philadelphia. An Equal Protection suit, then, did not seem the way to go. Indeed, in the few reported environmental racism cases in which plaintiffs have sued for violation of the Fourteenth Amendment, the intent requirement has prevented plaintiffs from achieving meaningful relief.5

The residents' other option was to sue PADEP, which receives some federal funding, for violating Title VI of the 1964 Civil Rights Act. Title VI prohibits racial discrimination by federally funded entities.6 While the prohibition in the statute itself directly reaches only intentional discrimination,7 nearly every federal agency, including the Environmental Protection Agency (EPA), has adopted implementing regulations under Title VI that prohibit not only intentional discrimination but also "disparate impact"—i.e., agency actions that have the effect of discriminating on the basis of race, regardless of whether they were intended to do so.8 The Title VI


Courts have been more receptive to a finding of discriminatory intent when the issue has been unequal provision of municipal services. See, e.g., Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986) (holding that evidence of disparity in provision of services was sufficient to permit inference of discriminatory intent); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) (inferring discriminatory intent from government's knowledge of existing disparity in municipal services); Baker v. Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986) (holding same).

6 Title VI provides:
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.


7 See infra Part II (discussing Title VI reach).

8 See, e.g., 40 C.F.R. § 7.35(b) (1999) (providing by EPA regulation that "[a] recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex"); 34 C.F.R. § 100.3(b)(2) (1999) (stating, in Department of Education regulation, that recipients of federal funding 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 or a particular race, color, or national origin").
PRIVATE DISPARATE IMPACT SUITS

regulations would permit residents of Chester to establish unlawful discrimination by PADEP based solely on the fact that PADEP's decision to permit a hazardous waste facility in Chester had a disproportionate adverse effect on minorities. The residents thus would not need to prove any intent to discriminate.

The residents opted to pursue relief under Title VI. In an action styled Chester Residents Concerned for Quality Living v. Seif the residents sued PADEP, alleging violations of the Title VI prohibition against racial discrimination and the EPA regulations adopted to effectuate the statutory prohibition. The complaint alleged that PADEP's decision to permit the hazardous waste facility in Chester had the effect of discriminating against minority residents. The complaint did not allege intentional discrimination by PADEP.

The district court granted PADEP's motion to dismiss. It held that Title VI itself bars only intentional discrimination, which the plaintiffs did not allege, and that the disparate impact regulations adopted pursuant to Title VI are not enforceable through a private right of action. On appeal, the residents abandoned their claim based on Title VI itself and focused exclusively on the claim that PADEP violated the EPA's disparate impact rules. The residents were successful. The United States Court of Appeals for the Third


11 Id. at 928.
12 Chester Residents, 944 F. Supp. at 417.
13 The district court dismissed the plaintiffs' claim under Title VI itself (not the implementing regulations) without prejudice, offering the plaintiffs an opportunity to amend their complaint to allege intentional discrimination. The plaintiffs declined this offer. Chester Residents, 132 F.3d at 928.
GEORGIA LAW REVIEW

Circuit reversed the district court and held that there is an implied private right of action to enforce federal agencies' disparate impact regulations adopted pursuant to Title VI. PADEP then appealed to the United States Supreme Court, which granted certiorari but later dismissed the appeal and vacated the Third Circuit's opinion when the operating permit that started this brouhaha was revoked. The Court reasoned that the revocation of the permit rendered the appeal moot.

In Chester Residents, the Third Circuit became the first federal appeals court to address the availability of a Title VI action for plaintiffs claiming to be victims of environmental racism. While numerous commentators have suggested that the disparate impact regulations promulgated under Title VI, with their lower (i.e., non-existent) intent requirement, offer the best avenue of relief for victims of environmental disparity, the legal theory remained

---

14 Id. at 937.
16 Id. (citing United States v. Munsingwear, Inc., 340 U.S. 36 (1950)).
untested until Chester Residents.

But the opinion's reasoning and holding reached well beyond the environmental racism arena. The opinion also contains the first express holding by a federal appellate court that there is a private right of action to enforce the disparate impact regulations federal agencies have adopted pursuant to Title VI. Though numerous federal courts have implied that the disparate impact regulations are enforceable by private plaintiffs,\textsuperscript{19} no court prior to Chester Residents had conducted an in-depth analysis of Title VI's enforcement scheme and explicitly held that the Title VI regulations provide a private right of action.

Of course, the Supreme Court's grant of certiorari and subsequent vacatur of Chester Residents may have signaled that the Third Circuit erred in finding an implied private right of action to enforce the Title VI disparate impact regulations; at least one district court

\textsuperscript{19} See, e.g., Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) (permitting, without analysis, private right of action under Title VI implementing regulations and stating that "[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent"); City of Chicago v. Lindley, 66 F.3d 819, 827-29 (7th Cir. 1995) (acknowledging, without analysis, private right of action for disparate impact discrimination under Title VI implementing regulations); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (permitting plaintiffs to assert disparate impact claim under Title VI implementing regulations); Elston v. Board of Educ., 897 F.2d 1394, 1406-07 (11th Cir. 1993) (holding that district court properly applied disparate impact analysis to actions private plaintiffs challenged under Department of Education's Title VI regulations); Roberts v. Board of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (stating, in reviewing Title VI action by private plaintiff, that administrative regulations incorporating disparate impact standard were valid and ultimately concluding that "the district court did not err here in failing to require proof of discriminatory intent"); David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act."); Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986) (noting, in addressing claim brought by Mexican-American teachers alleging intentional discrimination in hiring, that "a Title VI action can now be maintained... in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that fall more harshly on one group than another"); Larry P. by Lucille P. v. Riles, 793 F.2d 969, 984 (9th Cir. 1984) (affirming judgment for private plaintiff on disparate impact claim following trial).
has so read the tea leaves. But the Third Circuit itself has not been dissuaded. After the vacatur of Chester Residents, the court, in Powell v. Ridge, reaffirmed the existence of a private right of action to enforce the disparate impact rules. The Third Circuit acknowledged the Chester Residents vacatur but insisted that its holding, which the court reaffirmed, was not radical at all. Indeed, the court reasoned, numerous courts have permitted private actions to enforce the disparate impact regulations.

The Third Circuit, however, was the first court to engage in any analysis of, and give explicit approval to, private actions enforcing federal agencies' Title VI regulations. In so doing, it paved the way for all sorts of private disparate impact suits, for every Cabinet department and about forty agencies have adopted Title VI regulations prohibiting disparate impact discrimination. If private citizens may sue to remedy all federal actions that have racially disproportionate effects, which is the logical result of the Third Circuit's holding in Powell and Chester Residents, then the federal courts will soon be flooded with claims of "discrimination" based on well-meaning (and perhaps objectively good) decisions that incidentally have a racially disparate impact.

This Article argues that the Third Circuit, and the courts that have implicitly approved private disparate impact suits, have erred in construing Title VI to permit private plaintiffs to sue federally funded entities for discrimination based on disparate impact alone.


21 189 F.3d 387 (3d Cir. 1999).

22 Id. at 396-400. The regulations at issue in Powell were promulgated by the United States Department of Education. Id. at 390. The regulations prohibit a funding recipient from "utiliz[ing] 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 program as respects individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (1999).

23 Powell, 189 F.3d at 399.

24 Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 n.13 (1983) (White, J., concurring). For examples of such regulations, see supra note 8 and sources cited therein (listing citations for various agencies' disparate impact regulations).
From a policy standpoint, permitting private disparate impact suits is a bad idea, for the threat of such suits will lead to deterrence of actions and decisions that have incidental disparate effects but are, on the whole, good. Decisions that have disparate racial effects ("disparity-causing decisions"), unlike intentionally discriminatory decisions, are not always undesirable, and private plaintiffs should not be empowered to stop all decisions that have disparate impacts. Instead, federal funding agencies should act as screeners, determining which disparity-causing decisions to punish. Agencies are institutionally well-suited to perform such a screening function.

In addition to these policy concerns, there is a strong legal case against permitting private suits to enforce federal agencies' disparate impact regulations. First of all, the rules are themselves invalid. Supreme Court dicta, which the lower courts have followed, suggest otherwise, but basic principles of administrative and constitutional law dictate that the regulations under Title VI cannot prohibit all disparate impacts if the statutory prohibition itself reaches only intentional discrimination. Even if the regulations were valid, however, private suits to enforce the regulations would not be appropriate. The statutory provision authorizing Title VI regulations does not provide for private suits, and there is insufficient evidence that Congress intended to provide a private right of action. Whereas federal courts previously inferred private rights of action freely in order to ensure that statutes achieved their ostensible remedial objectives, the Supreme Court has now rejected such a willy-nilly approach to implication. Hence, absent evidence of legislative intent to provide a private cause of action, courts may not permit private suits. Because there is no evidence that Congress intended to provide a private right of action to enforce agency regulations promulgated pursuant to Title VI—and there is, in fact, evidence to the contrary—private disparate impact suits are not legally warranted.

This Article proceeds as follows: Part II summarizes Title VI and the agency regulations promulgated thereunder. It also outlines current Title VI jurisprudence, highlighting the questions decided by the United States Supreme Court, those the Court has left open, and the trend among the lower courts to permit private actions to enforce agencies' disparate impact regulations. Part III argues that
policy considerations counsel against private actions to enforce the disparate impact rules. That Part first discusses how disparate impact is not absolutely undesirable and then, after considering several enforcement options, contends that a system of exclusive agency enforcement will best ensure that desirable disparity-causing decisions are not deterred. Part IV then analyzes whether private disparate impact suits are legitimate as a matter of positive law, concluding that the law does not permit such suits. Part IV.A argues that the disparate impact regulations are themselves invalid as legislative regulations (the only type of regulation that is privately enforceable), and Part IV.B contends that, even if the regulations are valid, there is no implied private right of action to enforce them.

II. TITLE VI AND ITS IMPLEMENTING REGULATIONS

Title VI of the Civil Rights Act of 1964 prohibits racial discrimination by federally funded entities. Section 601 of Title VI contains the primary prohibition, providing that "[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."25

Section 602 authorizes federal agencies to adopt regulations to effectuate the provisions of section 601. It states, in relevant part: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of § 601 of this title . . . by issuing rules, regulations, or orders of general applicability."26 Title VI thus includes a direct prohibition on racial discrimination by federally funded entities (section 601) and an enabling provision (section 602) empowering federal agencies to promulgate regulations to effectuate that prohibition.

26 Id. § 2000d-1.
In *Guardians Association v. Civil Service Commission of the City of New York*, a contentious case that resulted in five opinions, a majority of Justices concluded that Title VI direct prohibition on racial discrimination by federally funded entities (i.e., section 601) reaches only intentional discrimination. The seven Justices who so concluded relied on a prior Supreme Court holding that the Title VI prohibition is co-extensive with that of the Fourteenth Amendment to the United States Constitution, which the Court previously construed as prohibiting only intentional discrimination. A separate five-Justice coalition in *Guardians* concluded, however, that federal agencies may adopt regulations under section 602 that "effectuate the provisions" of section 601 by banning federally funded actions that, while not intentionally discriminatory, disproportionately affect minorities.

Two years after *Guardians*, the Supreme Court decided *Alexander v. Choate*, in which Justice Marshall, writing for a unanimous Court, stated in dicta that *Guardians* had held: (1) that Title VI itself prohibits only intentional discrimination, but (2) that the agency regulations promulgated under Title VI may ban unintentional disparate impact. Part IV of this Article argues that Justice Marshall's dictum incorrectly states *Guardians's* holding and that the agency regulations banning unintentional disparate impact cannot be valid. So far, however, the federal agencies (in adopting disparate impact regulations pursuant to Title VI) and the lower

---

28 The seven Justices were Chief Justice Burger and Justices Powell and Rehnquist (in a concurring opinion authored by Justice Powell, *id.* at 607), Justice O'Connor (in her own concurring opinion, *id.* at 612), and Justices Stevens, Brennan, and Blackmun (in a dissenting opinion by Justice Stevens, *id.* at 635).
29 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that Title VI's prohibition of racial discrimination is co-extensive with that of Fourteenth Amendment).
31 The five Justices were Justice White (in his own concurring opinion, *Guardians*, 463 U.S. at 593), Justice Marshall (in his own dissenting opinion, *id.* at 623), and Justices Stevens, Brennan, and Blackmun (in a dissenting opinion by Justice Stevens, *id.* at 644-45).
33 *Id.* at 293 ("First, the [Guardians] Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.").
34 See *supra* note 8 (listing citations for various agencies' disparate impact regulations).
courts (in recognizing the validity of the disparate impact regulations and permitting private suits to enforce them)\(^\text{35}\) have accepted without question Justice Marshall's construal of *Guardians's* holding. The prevailing view, then, is that section 601 of Title VI prohibits only intentional discrimination but that agency regulations under section 602, which agencies adopt "to effectuate the provisions of section 601," may ban all disparate impacts.

The Supreme Court has approved a private right of action to enforce section 601 of Title VI. In *Cannon v. University of Chicago*,\(^\text{36}\) the Court held that a private plaintiff could sue to enforce Title IX of the Civil Rights Act.\(^\text{37}\) In so concluding, the Court reasoned that Title IX—which contains language virtually identical to that of Title VI, differing only in that it prohibits discrimination "on the basis of sex" rather than "on the ground of race, color, or national origin"\(^\text{38}\)—is modeled after Title VI, which has been correctly interpreted as including an implied private cause of action.\(^\text{39}\) The Court thus indirectly approved the existence of a private right of action to enforce the Title VI prohibition of race discrimination by federally funded entities.

The issue before the *Cannon* Court was whether a private cause of action exists to enforce the Title IX (and thus Title VI) intentional discrimination prohibition (section 901 of Title IX and section 601 of Title VI). The Court did not address whether there is also a private right of action to enforce disparate impact regulations promulgated pursuant to section 902 of Title IX\(^\text{40}\) and section 602 of Title VI.\(^\text{41}\) The *Cannon* Court likely did not address this issue

\(^{35}\) See, e.g., *Powell v. Ridge*, 189 F.3d 387, 396-400 (3d Cir. 1999) (providing private right of action for disparate impact under title VI); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1202-03 (11th Cir. 1999) (stating same); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) (holding same); *New York Urban League v. City of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (stating same); *City of Chicago v. Lindley*, 66 F.3d 819, 827-29 (7th Cir. 1995) (holding same); *Elston v. Board of Educ.*, 817 F.2d 1394, 1406-07 (11th Cir. 1993) (stating same); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (holding same).

\(^{36}\) 441 U.S. 677 (1979).

\(^{37}\) Id. at 688-89.


\(^{39}\) *Cannon*, 441 U.S. at 694-700.

\(^{40}\) 20 U.S.C. § 1682.

because *Guardians* had not yet been decided, and there had thus been no suggestion that agency regulations under Titles VI and IX could reach further than the statutory prohibitions by banning disparate impact as well as intentional discrimination.

Despite the Supreme Court's silence on the issue of whether there is a private cause of action to enforce disparate impact regulations promulgated pursuant to section 602, the lower courts have permitted such private actions.42 Most of those courts—apparently assuming that because section 601 private suits are permitted, section 602 suits ought to be permitted as well43—have not engaged in an extended analysis of the question of whether there is a private right of action to enforce agencies' disparate impact regulations. Only two federal appellate courts have examined this issue with any rigor. First, the United States Court of Appeals for the Third Circuit analyzed a number of factors in concluding, in *Chester Residents* and *Powell*, that there is an implied private right of action to enforce the disparate impact regulations promulgated under Title VI.44 In addition, the United States Court of Appeals for the Eleventh Circuit, in *Sandoval v. Hagan*,45 analyzed the issue with some rigor and joined the Third Circuit in concluding that private disparate impact suits are authorized.46 The clear trend of the federal courts, then, is to

---

42 See, e.g., supra note 19 and sources cited therein (permitting private right of action under Title VI).

43 See *Mank, Is There a Private Cause of Action?,* supra note 18, at 53-58 (contending that "consistency with section 601 argues for inferring a congressional intent to create an implied right of action under section 602 of Title VI").


45 197 F.3d 484 (11th Cir. 1999).

46 The Third Circuit based its conclusion that there is a private right of action to enforce the disparate impact regulations on its reading of its own precedents (all of which were conclusory and did not involve in-depth consideration of the issue), the practice of other circuits (which have permitted private disparate impact suits without reflection), and its reading of several Supreme Court opinions. *Id.* at 502-07. The reasoning in the district court opinion, *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), which also held that the regulations are privately enforceable, was more novel. In addition to the *Chester Residents* court's arguments, which the *Sandoval* district court adopted verbatim, *id.* at 1255-62, and which this Article criticizes, *see infra* Part IV.B, the *Sandoval* district court relied on a novel, but unconvincing, "third-party beneficiary" argument in support of its conclusion that private plaintiffs may enforce agencies' disparate impact regulations. The court reasoned that private plaintiffs may sue to enforce the regulations because the rules, adopted under statutes
recognize an implied private right of action to enforce federal agencies' disparate impact regulations promulgated pursuant to section 602 of Title VI. Part III argues that this trend is misguided.

III. THE POLICY ARGUMENT AGAINST PRIVATE DISPARATE IMPACT SUITS

The previous commentators who have considered the question of whether the Title VI regulations are privately enforceable have concluded, in accordance with the practice of the lower courts, that there should be a private right of action to enforce agencies' disparate impact rules. Most of these commentators have considered this issue in light of environmental justice concerns. Searching for the easiest way to empower plaintiffs complaining of environmental racism, the commentators have argued that private

enacted pursuant to Congress's Spending Clause power, essentially state the terms of a contract between the funding agency and the regulatee, and disparately impacted private plaintiffs are third-party beneficiaries of that contract. Sandoval, 7 F. Supp. 2d at 1262-64. The district court noted that defendant regulatees typically agree to abide by the disparate impact regulations as a condition of receiving federal money. Id. at 1263-64. It concluded that when fund recipients breach the terms of this contract by taking an action that creates a disparate impact, disparately impacted individuals—the intended beneficiaries of the contract—have standing to sue to enforce the contract terms. Id.

The Sandoval district court's analysis is unpersuasive because it would render every Spending Clause statute—and numerous regulations promulgated pursuant to Spending Clause statutes—privately enforceable. It strains credibility to suppose that Congress intended every statute it adopted under the Spending Clause to permit private enforcement. Because congressional intent does, see infra Part IV.B.1, and should, see infra note 272, control whether a statute includes an implied private right of action, courts should not adopt the presumption that all Spending Clause statutes and regulations are privately enforceable. As with the disparate impact regulations under Title VI, there may be good reasons to restrict the power to enforce many Spending Clause statutes and rules to publicly accountable entities that have a measure of expertise. See generally infra Part III (arguing that policy considerations counsel against private actions). Thus, Sandoval's presumption that all statutory and regulatory provisions adopted pursuant to the Spending Clause are privately enforceable is both legally unjustified and unwise from a policy standpoint.

47 See, e.g., Carrasco, supra note 18, at 345-47 (advocating private right of action); Hill, supra note 18 (praising Third Circuit for permitting private enforcement of EPA's disparate impact rules in order to achieve environmental justice); Mank, Is There a Private Cause of Action?, supra note 18, at 48, 53 (promoting Third Circuit approach); Saleem, supra note 18, at 229 (arguing that a privately enforceable disparate impact standard is needed to protect victims of environmental racism); White, supra note 1, at 1183 (arguing same); Vig, supra note 18, at 929 (arguing same); Valerie P. Mahoney, Note, Environmental Justice: From Partial Victories to Complete Solutions, 21 Cardozo L. Rev. 361, 414 (1999) (praising Third Circuit in same fashion).
plaintiffs should be permitted to sue federally funded environmental agencies that make permitting decisions that disproportionately affect minority groups. The commentators' reasoning is rather simplistic: Disparate impact discrimination, they reason, is bad (and violative of agency regulations), so private plaintiffs should be empowered to stop it, just as they have been empowered to stop intentional discrimination.

I contend that the commentators who have argued in favor of private disparate impact suits (and the lower courts who have generally followed the commentators' suggestions) have erred in assuming that disparate impact discrimination should be treated the same as intentional discrimination. As I will show in this Part, disparity-causing decisions, unlike intentionally discriminatory decisions, are sometimes “good” on the whole and should not be deterred absolutely. Hence, administrative agencies should be given exclusive authority to enforce the disparate impact rules so that they may weed out “good” disparity-causing decisions. They are institutionally well-suited to perform this screening function.

---

48 See, e.g., Cole, Environmental Justice Litigation, supra note 18, at 531-33 (advocating private right of action); Copoly, supra note 18, at 180 (“By simultaneously filing a complaint [alleging a violation of the Title VI regulations] with the agency and initiating litigation against a funding recipient, . . . environmental justice plaintiffs can place considerable pressure upon a recipient . . . [and can] utilize the resources of the agency’s investigative powers while at the same time obtaining their ‘day in court.’”); Vig, supra note 18, at 929 (“[D]isparate impact alone is a harm in addition to, and separate from, intentional discrimination. . . . Therefore, making disparate impact more easily actionable is particularly needed and helpful in the environmental justice context.”); Mahoney, supra note 47, at 414 (“Undoubtedly, Title VI holds more promise for environmental justice litigants than do Equal Protection Clause claims, primarily due to its disparate impact standard (under the implementing regulations.).”). In particular, if future cases reiterate the Third Circuit’s reasoning in Chester Residents, citizens will be able to challenge siting decisions directly, thus increasing their credibility as worthy opponents for hazardous waste facility developers.”).

49 Both sections 601 [the intentional discrimination prohibition] and 602 [the provision enabling the disparate impact rules] serve the same dual purpose of combating discrimination by fund recipients and of protecting individual rights. If serving these dual purposes was sufficient in Cannon and Guardians to infer that Congress intended to create a private right of action under Titles IX and VI, it should be sufficient to infer the same intent under Section 602 of Title VI.

Mank, Is There a Private Cause of Action?, supra note 18, at 54; see also Carrasco, supra note 18, at 346-47 (reasoning that, as there is private right of action to enforce intentional discrimination ban, there should be private right of action to enforce disparate impact regulations).
Two broad but simple points underlie my policy argument. The first is the observation that legal rules, to varying degrees, occasionally misfire—that is, their strict application sometimes leads to undesirable results. As every first year law student learns, the “No Vehicles in the Park” law should not be used to ban, say, fire trucks or bicycles. The second point is that, given that rules sometimes misfire and that some do so more than others, the mechanisms we use to enforce particular rules should reflect the extent to which they are prone to misfire. Rules that almost never misfire should be easily enforced by a large class of potential enforcers (and perhaps we should offer a reward, beyond compensatory damages, to the enforcers); those that misfire more frequently should be more selectively enforced—perhaps exclusively by experts that are accountable to society as a whole. As I will show, other areas of law (in particular, negligence doctrine) display sensitivity to the need to limit the class of law enforcers in situations where technically violative behavior is nonetheless desirable on the whole.

In a nutshell, my argument is that disparate impact, unlike intentional discrimination, is not always “bad,” and there may thus be a reason to permit more liberal enforcement of the Title VI intentional discrimination ban. To make this argument, I will first draw an analogy between disparate impact and “efficient negligence” and attempt to show that, just as the law aims to avoid overdeterrence of efficient (but not willful and wanton) negligence by limiting the class of individuals who may sue for negligence, the law should similarly avoid overdeterrence of disparate impact (but not intentional discrimination) by limiting who can sue for that type of “discrimination.” I will then explain why the enforcement option I favor—exclusive agency enforcement—is superior to competing enforcement schemes that permit private enforcement of the disparate impact rules. Finally, I will respond to criticisms of exclusive agency enforcement.

A. TAILORING THE ENFORCEMENT MECHANISM TO AVOID OVERDETERRENCE: AN ANALOGY TO EFFICIENT NEGLIGENCE

As noted, the law should reflect sensitivity to the extent to which a rule’s strict application leads to undesirable results (that is, to the
rule's tendency to misfire), and the rule's enforcement mechanism should be tailored accordingly. In Subparts III.A.2 and III.A.3 below, I demonstrate that agencies' disparate impact prohibitions, unlike the Title VI intentional discrimination ban, frequently misfire, and that courts should thus limit enforcement of the disparate impact rules to agency action so as to avoid deterrence of "good" disparity-causing decisions. First, however, I will briefly discuss how, in another area, the law limits the class of duty-enforcers in order to avoid overdeterrence of behavior that is, on the whole, desirable.

1. "Efficient Negligence" and Tort Doctrine's Response. As Dean Mark Grady has persuasively argued, some apparently negligent behavior is efficient, and other such behavior is inefficient.\(^5\) Inefficient negligence is easy to imagine; it occurs whenever a person consciously, and with indifference, fails to take a cost-effective precaution. An example is a driver who gets drunk and then drives eighty-miles-an-hour through a school zone.\(^6\) Efficient negligence, on the other hand, occurs when a cautious person, engaging in an activity that requires high-rate obligations (that is, obligations that occur again and again within a brief period of time, such as looking out for pedestrians, checking for traffic, or making repetitive inspections), just accidentally slips up because he is incapable of performing all his precautionary duties.\(^7\) An example of efficient negligence is "a driver who is unusually careful in looking for pedestrians and was so on the day that he accidentally ran into one."\(^8\)

Efficient negligence may actually be desirable because it is an inevitable by-product of wealth creation. As Dean Grady explains:

> Negligence law creates obligations that nobody could ever satisfy all of the time.... Given human nature, it would not maximize social wealth for people infallibly to observe their obligations of precaution. People who never make mistakes are

\(^6\) Id. at 402.
\(^7\) Id. at 400-01.
\(^8\) Id. at 402.
too busy not making mistakes to create much wealth, either for themselves or for others. 54

In other words, efficient negligence, though it has a downside, is not undesirable on the whole. Were we to punish it severely, we might stymie beneficial, wealth-creating activities. Tort law, then, should be careful not to overdeter apparently negligent behavior by deterring efficient, as well as inefficient, negligence.

Dean Grady contends that this need to deter inefficient negligence without deterring efficient negligence explains a number of nuances in the law of negligence. Most obviously, it explains the general rule that punitive damages are available only for intentional torts and "willful and wanton" negligence. 55 The idea, of course, is that intentional torts and willful and wanton negligence almost never create wealth (or have any net upside) and thus ought to be deterred absolutely. Efficient negligence, on the other hand, may actually create net social gains and thus should not be overdeterred with the "tax" of punitive damages. 56

54 Id. at 400. One might quarrel with Dean Grady's characterization of failure to take care because of other pressing demands as "negligence." If negligence is defined as failure to take a cost-effective precaution, such lapses may not be negligent at all: If the lapses are necessary to permit the actor to engage in activity that creates more wealth than the act of taking care, then the failure to take care is not cost-ineffective and is thus not negligent.

This nuance is not important to the argument presented here. The important points to glean from Dean Grady's article are: (1) that not all seemingly negligent behavior is, on the whole, bad; (2) that such "negligence" should not be deterred absolutely; and (3) that a number of tort doctrines can be explained as an attempt to avoid overdeterrence of this type of apparent negligence.

55 According to one survey, fourteen states require "malice," defined as intent to harm the plaintiff, before punitive damages may be awarded. ROBERT G. SCHLOEB ET AL., PUNITIVE DAMAGES 18-20 (1988). Another twenty-three states permit imposition of punitive damages only upon a showing of conscious indifference to risk or some similar mental state. Id. at 21-24. Eight states appear to permit punitive damages when the defendant has committed gross negligence, but many of these states also add a subjective element or make clear that the large deviation from due care is merely evidence of the defendant's wrongful mental state. Id. at 24-26. The Restatement suggests that punitive damages are available not when negligence is gross but when the defendant's conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908 (1979).

56 See Grady, supra note 50, at 417-19. Though he does not speak in terms of "efficient negligence" (and would likely reject Dean Grady's idea that negligence may be efficient), Judge Posner similarly makes the point that punitive damages for negligence would overdeter efficient behavior. Referring to the famous "Hand Formula," which defines negligence as a situation where the cost of accident prevention (B) is less than the probability of an accident
The need to avoid deterrence of efficient negligence also influences courts' decisions regarding to whom a duty of care is owed (and thus who may sue for negligence). Consider, for example, the famous duty case, *Ultramares Corp. v. Touche.* In *Ultramares,* the plaintiff suffered a financial loss when he relied on an accounting certification prepared by the defendant accounting firm for its own client, who borrowed from the plaintiff. The defendant, although it had a contract with its client the borrower, lacked a contract with the plaintiff who had made a bad loan in reliance on the defendant's negligently conducted audit. In denying the existence of a duty, the court, speaking through Judge Cardozo, emphasized that the defendant's negligence might have been efficient and that liability

(P) times the magnitude of loss resulting from the accident (L)—i.e., where B < PL, Judge Posner explains:

We would expect, and find, the law to be much more willing to award punitive damages in "real" intentional tort cases [i.e., those that resemble common law crimes and involve not a conflict between legitimate (productive) activities but a coerced transfer of wealth to the defendant in a setting of low transaction costs] than in cases, whether classified as intentional or unintentional, that lack the characteristics of a "real" intentional tort case, that is, that do not involve a pure coercive transfer. We know that in a strict liability case punitive damages would lead to overdeterrence. Less obviously, the same thing is true in a simple negligence case. Because of judicial mistake and the strict liability component in negligence, negligence cannot be completely avoided by spending B on care. So if PL is artificially raised by adding punitive damages to L, potential injurers will be induced to spend more than B on accident prevention, and that is inefficient. But since the gap between B and PL is so much larger in the "real" intentional tort case, the danger of deterring socially valuable conduct by making the damages award greater than L is minimized and other policies come to the fore, such as making sure that the damages award is an effective deterrent by resolving all doubts as to the plaintiff's actual damages in his favor; this can be done by adding a dollop of punitive damages to the estimate of his actual damages.


See Grady, *supra* note 50, at 403 ("If negligent behavior were always inefficient, negligence duties could be totally comprehensive. For, if negligent behavior were synonymous with inefficiency, defendants should always be encouraged to avoid inefficiency.").

174 N.E. 441 (N.Y. 1931).

Id. at 442-43.

Id.
would therefore entail an unmanageable insurance obligation for accountants. Judge Cardozo explained:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.61

The point is that we want a large, fast accounting industry, and as we must put up with some slip-ups in order to foster such an industry, we will not allow third parties to sue for blunders even if the blunders resulted from apparently negligent behavior. Ultramares thus illustrates how the need to avoid deterring efficient negligence has led courts to limit the number of individuals who may bring suit on account of a defendant's negligence.62

61 Id. at 444.
62 Dean Grady points to several other famous negligence cases in which courts similarly limited the class of plaintiffs in order to avoid deterring efficient negligence. Grady, supra note 50, at 404-07. In H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928), the court—again, speaking through Judge Cardozo—held that a water company with a city contract to supply water to fire hydrants was not liable to the owners of a warehouse that burned down when the defendant negligently allowed the water pressure to sink. The key to the decision seems to be the possibility that the negligence was efficient. Judge Cardozo explained that if the defendant's negligence had been clearly inefficient—if the water company had acted intentionally or recklessly—the case would have been different. See id. at 899 (“We do not need to determine now what remedy, if any, there might be if the defendant had withheld the water or reduced the pressure with a malicious intent to do injury to the plaintiff or another. We put aside also the problem that would arise if there had been reckless and wanton indifference to consequences measured and foreseen.”).

The court's allocation of the duty of care in Ryan v. New York Central R.R., 35 N.Y. 210 (1866), similarly seems to reflect a concern for not deterring efficient negligence. In that case, the defendant's locomotive negligently started a fire that spread to the plaintiff's house and burned it down. Id. In holding that the plaintiff could not sue the defendant, the court stressed, in essence, that the defendant's negligence might have been efficient and that people in the plaintiff's class were better insurers of the fire risk than was the defendant. The court explained:

To sustain such a claim as the present [where the plaintiff had nevertheless proved negligence on the part of the defendant], and to
2. The Possibility of Desirable Disparity-Causing Decisions. Just as some instances of apparently negligent behavior are, on the whole, good and should not be deterred absolutely, not every decision that has a disparate racial effect is undesirable. Indeed, some disparity-causing decisions are, on balance, "good" because they are necessary to attain other worthy objectives. All else being equal, basic notions of fairness and equality require that policymakers refrain from taking actions that have the effect of harming or benefiting members of one race over another. But all else is almost never equal. Nearly every policy decision a federally funded entity makes involves consideration of a number of important criteria, and those other criteria (besides racial equity in effects) will rarely line up equally when the agency is choosing between two options, one racially disparate and the other not.

Suppose, for example, that a federal agency is choosing between option A and option B. (Assume the only other option, option C, is to do nothing.) The agency is concerned about a number of issues—say, the ease of administration of the two options, the social wealth the options will produce, and the racial effects of the options. First assume that option A is extremely easy to administer (a "five" on a one-to-five scale), creates ten million dollars of social wealth, and has perfectly equitable racial results. Option B is harder to administer (a "three"), creates only $750,000 of social wealth, and adversely affects only Hispanic citizens. Obviously, policymakers should choose option A.

Now consider another set of options. This time option A is tough to administer (a "one") and creates relatively little wealth (one thousand dollars) but has perfectly equitable racial effects. Option B, on the other hand, is simple to administer (a "five") and creates

follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate. Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and ... oils are universally used ... and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires.

*Id.* at 216; see also Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81 (N.Y. 1963) (holding that manufacturer of faulty altimeter, who had clearly been negligent, owed no duty to plaintiff, whose decedent had been travelling on downed airplane).
ten billion dollars in social wealth, but has a slight disparate racial impact (eighteen percent of the one thousand people it adversely affects are African-Americans, and African-Americans make up only fifteen percent of the relevant population). Option B is probably the wiser choice, despite its slightly disproportionate adverse impact on African-Americans.

These are, of course, extreme examples. Most decisions by federally funded entities probably fall within a gray area in which the choice between avoiding disparity and pursuing other worthy objectives is much tougher. In such cases, the entity's best option may be C—do nothing. The extreme examples, however, do highlight the quite simple point of this discussion: Racial equality in end result is certainly an important criterion by which to judge the desirability of an action, decision, or policy, but it is by no means the only important criterion. Many times, options that fail to meet the "no disparate impact" criterion will do exceedingly well on other important criteria, and it is impossible to say, ex ante, that such options are bad and should not be pursued. To the contrary, they are like efficient negligence: They have a downside (disparate racial effects) but they are, on the whole, good. As in all of life, tradeoffs are ubiquitous.

Recent debates over novel uses of Title VI disparate impact regulations provide examples of good, or at least arguably good, decisions that have incidental disparate impacts. In the educational arena, policymakers and commentators have been debating whether high-stakes testing should be eliminated on the ground that it produces racially disparate results. The vast majority of American colleges, most of which receive federal funding, base admissions

---

63 See, e.g., Statements of Norman V. Cantu, Assistant Secretary for Civil Rights, and Linda Chavez, President of the Center for Equal Opportunity, Policies and Enforcement Activities of the Office for Civil Rights at the Department of Education: Hearings Before the House Subcommittee on Oversight and Investigations of the House Committee on Education and the Workforce, 1999 WL 20009189 (June 22, 1999) (containing statement of Linda Chavez, President of the Center for Equal Opportunity) [hereinafter Statements of Norman Cantu and Linda Chavez]; Symposium: Should Washington Police the Use of Standardized Assessment Tests?, INSIGHT MAGAZINE, Aug. 30, 1999, at 40 (presenting debate between Rep. Pete Hoekstra (no) and Monty Neill (yes), Executive Director of the National Center for Fair and Open Testing); Should the SAT Account for Race?, THE NEW REPUBLIC, Sept. 27, 1999, at 26 (containing debate between Professor Nathan Glazer (yes) and author Abigail Thernstrom (no)).
decisions, at least in part, on candidates' test scores. There is no question that use of the widely employed Scholastic Aptitude Test (SAT) in making admissions decisions has a disparate impact on some minority groups; African-Americans routinely do worse on the SAT than similarly situated white and Asian test-takers. All else being equal, then, colleges should choose another means of selecting among applicants.

As usual, however, all else is not equal. On two important criteria that colleges consider when determining what means they will use to select among applicants—administrative convenience and ability to predict future academic success—the SAT is simply unmatched; it is an extremely easy metric for colleges to use, and it is an excellent predictor of how a test-taker will perform in college.

So far, there is no practical alternative means by which colleges can obtain the important likelihood-of-success information the SAT conveys, though testing experts are attempting to design a test that measures future academic success without yielding racially disparate results. Being able to gauge applicants' future academic success permits colleges to maintain academic standards and avoid demoralizing students who are simply unable to compete with their

---

64 See Roger Clegg & Lenore Ostrowsky, Test Guidelines Will Coerce Colleges and Cheat Students, CHRON. HIGHER EDUC., July 2, 1999, at B8 (noting that 82% of four-year undergraduate institutions require admissions tests).
66 See Clegg & Ostrowsky, supra note 64 (“Yet how a student does on standardized tests such as the SAT and ACT remains the single best means of addressing future aptitude for learning.”); Stuart Taylor, Jr., Civil Rights Cops Aim at Educational Tests, NAT'L J., June 12, 1999, available in 1999 WL 8102577 (“A vast body of studies shows the SAT, when considered together with high school grades and other criteria (as is usual), to be the most reliable known predictor of academic success in college.”).
68 See Nathan Glazer, Should the SAT Account for Race? Yes., THE NEW REPUBLIC, Sept. 27, 1999, at 26 (discussing Educational Testing Service's development of “Strivers SAT,” which will “take into account a student's socioeconomic background and race, increasing the scores of those whose socioeconomic background or race is considered to put them at a disadvantage”).
Hence, continued use of the SAT is at least arguably good, even though use of the test has a disparate impact on some minority groups.

Indeed, the recent suggestion by the Department of Education Office of Civil Rights that use of the SAT might be illegal under the regulations implementing Title VI \textsuperscript{70} sparked a tremendous outcry from the education establishment\textsuperscript{71}—a group that typically displays serious concerns about minority under-representation in colleges.\textsuperscript{72} Educators realize that avoiding racial disparity is a very worthy goal, but it is not the only goal a college should pursue in making admissions decisions. Because of other important considerations, such as administrative convenience and the need to predict future academic success with accuracy, using testing devices such as the SAT is "good," even though doing so may have some incidental racially disparate effects.

The environmental permitting arena provides a second example of a type of decision that has disparate racial effects but is, on the


\textsuperscript{70} See Marc Berley, Good-bye to Merit, WASH. TIMES, Aug. 6, 1999, at A19 (noting Stance of Department of Education that "the use of any educational test which has a significant disparate impact... is discriminatory"); Clegg & Ostrowsky, supra note 65, at B8 (discussing draft guidelines, entitled "Nondiscrimination in High Stakes Testing," released by Education Department's Office of Civil Rights); John Leo, The Feds Strike Back, U.S. NEWS & WORLD REP., May 31, 1999, at 16 (noting that guidelines specify "that the use of any educational test which has a significant disparate impact on members of any particular race, national origin, or sex is discriminatory" unless the school using the test can prove otherwise).


\textsuperscript{72} See Statements of Norman Cantu and Linda Chavez, supra note 63 (noting that colleges routinely handicap standardized test scores of African-Americans and sometimes those of Hispanics in admissions in order to increase minority representation and referring to published studies documenting this trend); see also Center for Equal Opportunity Affirmative Action Publications (visited Dec. 13, 1999) \textless http://www.ceousa.org/html/racepub.html\textgreater (cataloging full text of studies documenting use of affirmative action to eliminate racial under-representation at service academies and at public universities in Minnesota, Virginia, Washington, California, North Carolina, and Colorado).
whole, good. Contrary to the claims of many environmental justice advocates (and to the reasoning of the decisions permitting private lawsuits to prevent disparate impacts caused by environmental permitting decisions), not every instance of racially disparate siting of polluting and waste facilities is bad. Facilities that pollute or store waste are, after all, big business. They may bring job opportunities, increased tax revenues, and numerous other benefits to their host communities. Of course, they may also bring inconveniences, stigma, and health risks. Given that each facility provides its community with a "mixed bag" of blessings and curses, it is impossible to say ex ante that polluting and waste facilities should not be sited in certain types of communities.

The fact is, siting a polluting or waste facility in a disproportionately minority community may actually be good for the community. This is because the owners of facilities, who generally face opposition to siting, frequently offer host communities lucrative compensation packages that mitigate the negative effects of hosting the facilities and thereby diminish local opposition. Such compensation packages—which, in economic terms, "internalize the externalities" created by the facilities—may leave the residents better off than they would have been had the facilities been sited elsewhere.

---


76 See TOM TETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 51-59 (3d ed. 1992) (discussing pollution as "negative externality"—negative because it is undesirable, and an externality because it affects those who are outside the process that creates it).

77 Consider, for example, the advantages minority residents of Sumter County, Alabama have reaped from Chemical Waste Management's controversial Emelle landfill. Because Sumter County residents are predominately African-American, outside observers frequently refer to the Emelle landfill as a prime example of despicable environmental racism. See A Place at the Table, SIERRA, May-June 1993, at 52 (arguing that the location of Emelle landfill is an example of environmental racism); Robert Bullard, The Threat of Environmental Racism, NAT. RESOURCES & ENV'T, Winter 1993, at 25 (noting threat of environmental racism present in location of plants like those in Emelle). In actuality, Emelle ended up in Sumter.
Because of the benefits polluting and waste facilities may provide their host communities, the majority of residents in non-white communities sometimes support siting in their neighborhood. For example, poll results showed that over seventy percent of the residents of St. James Parish, a predominately minority community in Louisiana, supported the siting of Shintech Incorporated's polyvinyl chloride manufacturing plant in the parish. St. James Parish, facing an unemployment rate of twelve percent (sixty

County because of the area's sparse population, arid climate, and location atop the Selma chalk formation—seven hundred feet of dense, natural chalk. See Lynn Blais, Environmental Racism Reconsidered, 75 N.C. L. REV. 75, 109 (1996) (noting that prior to Chemical Waste Management's decision to purchase the Emelle site, EPA had identified the property as one of ten most protective sites for disposal of hazardous waste). These factors, along with millions of dollars of state-of-the-art technology, make Emelle one of the world's safest landfills. See Charles McDermott, Balancing the Scales of Environmental Justice, 21 FORDHAM URB. L. J. 689, 697 (1994) (discussing location-specific factors making Emelle a perfect location for the facility).

The Emelle landfill has been an economic boon to Sumter County. See Tom Arrandale, When the Poor Cry NIMBY, GOVERNING, Sept. 1993, at 40 (noting statement of Robert Smith, black elementary school principal who was also chairman of Sumter County Commission, that "[f]inally, the landfill's been positive, very positive for the county," and reporting that in light of economic benefits the landfill has provided, the Commission has opposed state proposals that would have reduced amount of waste the Emelle landfill may accept). And the economic benefits have created other non-economic advantages. The landfill provides over four hundred jobs (sixty percent of which are held by county residents), a ten million dollar annual payroll, and a guaranteed $4.2 million in annual tax revenue. See McDermott, supra, at 697 (noting flow of revenue the Emelle landfill brings to minority community). This money has enabled the community to build a fire station and a town hall, improve schools, upgrade the health-care delivery system, and begin reversing rates of illiteracy and infant mortality. Since the landfill was built in 1977, economic growth in Sumter County has brought about improved health care and led to a dramatic decline in infant mortality rates. Id. at 698. For the years 1975-1977, the county's infant mortality rate was twenty-seven deaths per thousand, while the overall state average was 18.8 per thousand. For the years 1985-1987, the rate in Sumter County had fallen to 14.4 per thousand, while Alabama's was 12.7 per thousand. By 1991, when the state infant mortality rate stood at 11.4 per thousand, Sumter County's had fallen to 8.5 per thousand. Id. The county's impressive gains in public health cast doubt on the widespread notion that compensation packages to host communities require residents to sacrifice health for financial gain. They also illustrate the point that not all environmental permitting decisions that have a disparate impact are bad. The fact is, Sumter County was desperate for business, and the Emelle landfill provided economic growth that left residents better off than before. Thus, the decision to grant an operating permit to the facility was good, even though it did have a disparate impact on African-Americans.

See Sara Shipley, Race, Jobs, Pollution In Bayou Test Case, CHRISTIAN SCI. MONITOR, Jan. 1, 1998, at 1 (noting results of poll conducted by local NAACP). But see Chris Gray, Shintech Foes Live Closest to Site, Poll Says, NEW ORLEANS TIMES-PICAYUNE, Jan. 18, 1998, at A1 (reporting results of another poll showing that, while majority of parish residents supported construction of Shintech facility, 52% of parish residents living closest to the site opposed construction of facility).
percent in Convent, the town in which the facility was to be located), was desperate for jobs and tax revenue, and Shintech promised to provide 165 full-time jobs, 90 contract positions, and 1,800 temporary construction jobs, plus $500,000 for a job training program that would ensure that local residents were qualified to perform the jobs the plant would provide. Moreover, Shintech promised to pay its employees twelve dollars an hour plus benefits—definitely a step up from many residents' sugar cane farming jobs, which paid six dollars an hour with no benefits. The local support for the plant is therefore not surprising. Nor is the fact that the local chapter of the National Association for the Advancement of Colored People (NAACP) actively lobbied for the facility, and the state NAACP adopted a resolution in favor of siting the Shintech plant in St. James Parish.

St. James Parish's experience is not unique. Black residents—including the local chapter of the NAACP—in Brooksville, Mississippi similarly supported construction of an incinerator and hazardous waste landfill in that town, and residents of the all-

---

79 See Shipley, supra note 78, at 1 (also noting that Louisiana's unemployment rate, by contrast, was six percent).
81 See Payne, supra note 80, at A9 (noting more favorable hourly wages available at waste disposal plants).
82 See State NAACP Takes Pro-Shintech Stance, ASSOCIATED PRESS POL. SERV., Sept. 22, 1997, available in 1997 WL 2551041 (indicating NAACP's support of Shintech landfill in St. James Parish). The context in which the Louisiana NAACP gave its support to the Shintech plant indicates that the plant was indeed a special case of beneficial environmental disparity. In a single meeting, the state NAACP voted to adopt separate resolutions that would: (1) back the Shintech plant, (2) request that the governor set up an environmental justice task force, and (3) ask the state attorney general to file lawsuits against industrial facilities polluting the air and water. Id. The fact that the organization approved the Shintech plant while simultaneously adopting "pro-environmental justice" resolutions indicates that even individuals sensitive to environmental equity concerns could see that Shintech was good for the local community, despite the disparate impacts caused.
83 In the early 1990s, Federated Technologies Industries (FTI) of Mississippi offered a compensation package to small, mostly African-American Brooksville in exchange for permission to build an incinerator and hazardous waste landfill. The company agreed to pay $250,000 every year into the county's general revenue fund and $50,000 a year for roadway construction and maintenance. FTI also agreed to build a civic center, finance a research center, and allot between seventy percent and eighty percent of the proposed facility's jobs to local residents, at starting wages of between seven and eight dollars an hour. Opposed by
black town of Robbins, Illinois, on Chicago's south side, overwhelm-
ingly supported hosting a waste-to-energy incinerator, despite the
claims of outside groups that Robbins was a victim of environmental
racism.\textsuperscript{84} The Mescalero Apaches in southern New Mexico have also
actively supported waste storage on their property.\textsuperscript{85} Minority

a group of local business owners, most of whom paid employees minimum wage or slightly
above, the local chapter of the NAACP actively lobbied for the plant's approval. See Lambert
& Boerner, supra note 73, at 221 n.81 (indicating division in community over location of work
facility); Keith Schneider,\textit{ Blacks Fighting Blacks on Plans for Dump Site,} N.Y. TIMES, Dec.
13, 1993, at A12 (noting division in community over plans for dump site).

\textsuperscript{84} See generally Lambert & Boerner, supra note 73, at 217-19 (discussing approval of local
residents for waste disposal plant despite claims of racism). In the late 1980s and early
1990s, officials in Robbins actively pursued the chance to host a large capacity waste facility
in the town. They did so largely out of desperation. The per capita income in the town (just
over $8,000 in 1990, U.S. BUREAU OF THE CENSUS, SOCIAL AND ECONOMIC CHARACTERIS-
TICS—ILLINOIS 20 (1993)) ranked 262 out of 263 communities in the Chicago metropolitan
area, and almost one-quarter of the town's families lived below the poverty line. See Bonnie
Miller Rubin,\textit{ Robbins Has Many Uses of Windfall,} CHICAGO TRIB., Dec. 2, 1994, at MSS1
(noting lack of economic development in Robbins). Between 1980 and 1991, the town's
population fell fifteen percent to eight thousand. U.S. BUREAU OF THE CENSUS, supra, at 20.
Robbins had no gas station, no bank, no laundromat, and no restaurant that stayed open past
six p.m. Police and fire protection operated at a bare minimum, and churches (thirty-four)
outnumbered tax-paying businesses (twenty-six). Rubin, supra.

Facing such dire circumstances, residents of Robbins were quite happy to host a large
waste-to-energy incinerator that promised to double the town's yearly revenue and fund
scholarships for local students. See Jon Jeter,\textit{ Poor Town that Sought Incinerator Finds More
Problems, Few Benefits; Environmentalists, State, Neighbors Foil Cash-for-Trash Plan,} WASH.
POST, Apr. 11, 1998, at A3 (noting conflict among local residents). Some even attended
hearings wearing hats proclaiming "Yes, In My Back Yard." Id.

Unfortunately, things did not work out as Robbins residents had hoped, but not
because they were duped by the company building the incinerator. Before the incinerator
even opened, the Illinois state legislature, under pressure from environmental groups,
repealed the state's "retail rate law," which had subsidized waste-to-energy incinerators like
the one built in Robbins. Id. Without the state subsidy, the Robbins incinerator has not been
able to turn a profit, and the promised compensation has not been forthcoming. Id. At
present, Foster-Wheeler, the company that operates the incinerator, is suing the State of
Illinois for repealing the retail rate law without "grandfathering in" the Robbins facility. Id.
Black officials in Robbins blame the state, not the incinerator company, for ruining its plan
to rejuvenate its economy with money from the incinerator. See Irene Brodie,\textit{ State Burns
Robbins in Incinerator Deal,} CHI. SUN-TIMES, Feb. 10, 1999, at 38 (letter to editor by black
mayor of Robbins, who contends that "[b]y taking away the funding upon which the
incinerator was built, the state is demonstrating its resolve to force the incinerator into
bankruptcy . . . [so that] all that Robbins will have left will be remnants of its noble efforts
to become self-sufficient").

\textsuperscript{85} On March 10, 1995, the Mescaleros voted to permit their tribal leaders to enter into
an agreement with approximately thirty utility companies to provide temporary storage for
the companies' radioactive waste until the United States Department of Energy's planned
Yucca Mountain permanent disposal facility is opened. George Johnson,\textit{ Nuclear Waste
Dump Gets Tribe's Approval in Re-Vote,} N.Y. TIMES, Mar. 11, 1995, at 6. The tribe expected
support for facility siting in St. James Parish, Brooksville, and Robbins, and on the Mescalero reservation debunks the myth that all environmental permitting decisions that create a disparate impact are bad. Indeed, when a facility is in compliance with all health-based regulations and its operation is supported by local residents and the facility owner, the "bad" outcome, it seems, would be to forbid the win-win situation that would result from siting the facility.

Use of the SAT and environmental permitting in minority communities, then, are two examples of arguably "good" disparity-causing measures that should not be banned. There are many others.86

---

86 For example, each of the following decisions or policies is arguably good but would likely have a racially disparate impact:

(1) a federally subsidized landlord's decision not to rent to drug addicts in a community where a disproportionate number of addicts are non-white, Roger Clegg, The Bad Law of "Disparate Impact," 138 PUB. INTEREST 79, 81 (2000);
(2) a college's rule prohibiting athletic participation by athletes who do not maintain a certain grade point average, cf. Cureton v. NCAA, 37 F. Supp. 2d 687, 715 (E.D. Pa.) (holding that athletes state case of disparate impact discrimination), rev'd on other grounds, 198 F.3d 107, 116 (3d Cir. 1999) (reversing on ground that Title VI does not apply because NCAA is not federal fund recipient);
(3) a public school's decision to serve milk at lunch (because a disproportionate number of African-American and Asian children are lactose-intolerant);
(4) the Corporation for Public Broadcasting's decision to fund National Public Radio (NPR) and public television (PBS) (because the listeners/viewers of NPR and PBS are disproportionately white);
(5) federal funding of local public transportation systems in most cities (because a disproportionate number of public transportation riders in most cities are non-white—a reverse disparate impact), cf. Mark Murray, Seeking Justice in Roads and Runways, NAT'L J., Mar. 4, 2000, available in 2000 WL 6436907 (cataloguing local transportation decisions that are potentially actionable under Title VI regulations); and
(6) the National Endowment for the Arts' decision to fund "high culture" (i.e., the sorts of exhibits that attract a disproportionately white crowd).

This list could continue for pages.
3. The Need to Limit the Class of Disparate Impact Plaintiffs in Order to Avoid Overdeterrence. Because not all disparity-causing decisions are undesirable, permitting private disparate impact suits is problematic. Permitting private enforcement of the disparate impact regulations will all but guarantee that “good” disparity-causing actions are not taken. A private right of action for mere disparate impact effectively allows a single aggrieved member of a disparately impacted class to stop an action or decision that has a racially disparate effect, even if the action or decision is, on the whole, beneficial. In essence, each member of the disparately affected group is given veto power, making it necessary for federally funded entities to achieve absolute consensus among the members of the disparately affected group before undertaking any action causing disparate impact. Obviously, requiring such consensus will make disparity-causing actions and decisions next to impossible.

Consider the problems private disparate impact suits cause in the environmental permitting arena. If each member of a disparately affected minority group may sue to stop the disparate impact, each member essentially has veto power over siting decisions. Hence, if just one member of the disparately impacted group opposes a project that every other member of the group supports, he may sue to block the project. Allowing private suits would thus make it very difficult to site industrial facilities in many areas of the country, where granting a pollution permit would (because minority residents outnumber white residents) cause a privately actionable disparate impact. Recognizing how this veto power could stymie industrial

---

87 If there is a justification defense—i.e., if courts may refuse to enjoin disparity-causing decisions that they deem to be “justified”—then private plaintiffs may have a harder time vetoing disparity-causing decisions. The disparate impact regulations themselves, however, include no justification defense (and thus differ from Title VII, which expressly exempts disparity-causing employment decisions that are taken as a matter of business necessity). See infra note 101 and accompanying text (listing citations to disparate impact regulations). Moreover, permitting court nullification through a general justification defense is, as a policy matter, less desirable than relying on agency nullification via prosecutorial discretion. See infra notes 106-115 and accompanying text (noting distinction and arguing for agency nullification over court nullification).

88 For example, if permitting a polluting facility in a city or county that has a higher minority population than the nation as a whole is a privately actionable disparate impact, then individual members of minority groups will be able to veto siting in all of Delaware and the District of Columbia; over ninety percent of the counties in Mississippi, South Carolina, and Louisiana; over seventy percent of the counties in Alabama, Georgia, and Maryland;
development (and "brownfields" redevelopment) in minority communities, the National Black Chamber of Commerce has filed amicus briefs asking courts not to permit private disparate impact suits to remedy alleged environmental disparity.

The case of the proposed Shintech facility in St. James Parish provides a compelling example of how much-needed industrial development may be halted by empowering each affected member of a disparately impacted minority group to enforce the disparate

roughly fifty percent of the counties in New Jersey, Arkansas, and Virginia; and the cities of Memphis, New York, Detroit, Jacksonville, Philadelphia, Chicago, and Houston. All of these cities and counties contain higher percentages of African-Americans than the national population as a whole. COUNTY AND CITY EXTRA (Deidre Gaquin & Mark S. Littman eds., 1998).

"Brownfields" are abandoned, inactive, or underutilized industrial sites that are difficult to redevelop because they may contain some historic contamination that poses minor health or environmental risks and requires potentially cost-prohibitive cleanup work." Brief of Amici Curiae Chamber of Commerce of the United States of America, National Black Chamber of Commerce, Inc., and Pennsylvania Chamber of Business and Industry in Support of Petitioners, at 22. Seif v. Chester Residents Concerned for Quality Living, 524 U.S. 915 (1998) (No. 97-1620) [hereinafter, Amicus Brief in Support of Chester Residents Petitioners]. Brownfields are generally located in urban areas and tend to be surrounded by minority and low-income communities. Id. Estimates of the number of such sites range from 130,000 to 425,000. Id. (citing General Accounting Office, Community Development: Reuse of Urban Industrial Sites, GAO/RCED-95-172, at 3 (June, 1995)). "A recent survey found over 20,000 brownfields sites in just 39 cities, with 'lost' tax revenues totaling hundreds of millions of dollars each year." Id. (citing UNITED STATES CONFERENCE OF MAYORS, IMPACT OF BROWNFIELDS ON U.S. CITIES: A 39-CITY SURVEY 1 (1996)). Congress has undertaken numerous initiatives aimed at encouraging brownfield redevelopment. See, e.g., Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 105-65, 111 Stat. 1372 (1997) (funding Superfund and authorizing EPA to provide funds to cities and counties to assess possibilities of brownfield remediation); H.R. CONF. REP. No. 105-297, at 34, 39 (1997) (authorizing economic development grants for brownfields and authorizing use of community development block grants for environmental cleanup and economic development related to brownfields). Many states have done the same. See Joel B. Eisen, "Brownfields of Dreams": Challenges and Limits of Voluntary Cleanup Programs and Incentives, 1996 U. ILL. L. REV. 883, 915 (noting that, by 1996, 29 states had statutes and regulations providing incentives for voluntary cleanup of contaminated sites). In addition, the states have declared that attracting active industrial facilities to brownfields in minority and low-income areas is an important public policy goal. See The Council of State Governments, A Resolution Regarding State Brownfields Initiatives (updated Dec. 8, 1996) <http://www.dep.state.pa.us/dep/DEPUTATE/AIRWASTE/WM/LANDREC/facts/Brownfields.htm> (recommending guidelines for brownfields programs). Of course, redeveloping brownfields into working industrial areas will require the issuance of environmental permits, and if private citizens may sue for disparate impact whenever a federally funded permitting agency grants an operating permit in a minority area, brownfield redevelopment efforts will be thwarted.

See Amicus Brief in Support of Chester Residents Petitioners, supra note 89 (arguing against private suits to remedy environmental disparity).
impact regulations (and thereby giving each individual a de facto veto right). The threat of a private disparate impact suit was largely responsible for thwarting the siting of the Shintech facility—a facility that most local residents (and the local and state chapters of the NAACP) supported.\textsuperscript{91} Despite such widespread local support, law students from the Tulane Environmental Law Clinic were able to find some minority residents who opposed the siting and thus were able credibly to threaten to file suit on behalf of those individuals under Title VI disparate impact regulations.\textsuperscript{92} Because the Title VI regulations absolutely prohibit disparate impacts,\textsuperscript{93} the Tulane students could have blocked Shintech’s permit, regardless of what benefits Shintech promised residents or what degree of local support it enjoyed. After months of trying (with the help of the local NAACP) to convince the Tulane clinic to drop its disparate impact attack, Shintech finally gave up and decided to site its facility elsewhere.\textsuperscript{94} The threat of a private disparate impact suit thus deterred a good disparity-causing decision. Had it been settled law that private individuals may not sue to stop mere disparate impacts, the Tulane students could not credibly have threatened to bring a private lawsuit against the state agency for permitting Shintech’s facility. Instead, they would have to convince the EPA to initiate action to stop the disparate impact—a task that would have been difficult, given the local support for the facility and the obvious benefits the plant would provide to its host community.

The threat of private disparate impact suits also endangers colleges’ continued use of standardized tests to make college admissions decisions—a practice that, while disparity-causing, is arguably good on the whole.\textsuperscript{95} Private plaintiffs have already brought a disparate impact suit against the University of California

\textsuperscript{91} See supra note 82 and accompanying text (noting support of NAACP).
\textsuperscript{92} Shintech Reaffirms Plan to Locate $700M Plant in Louisiana, CAP. MKT. REP., Jan. 16, 1998.
\textsuperscript{93} See infra note 101 (noting prohibition of disparate impacts).
\textsuperscript{94} See generally Activism on the Bayou: Shintech Case Redefines Outreach, CHEMICAL WEEK, May 26, 1999, available in 1999 WL 9309888 (describing environmental justice case involving Shintech).
\textsuperscript{95} See supra notes 63-72 and accompanying text (describing use of standardized tests).
PRIVATE DISPARATE IMPACT SUITS

at Berkeley and the logic of their case is unquestionable: Berkeley relies heavily on the SAT in making admissions decisions, and non-Asian minority test-takers, who routinely do worse than whites and Asians on the SAT, are disparately impacted by Berkeley's policies. Regardless of the soundness of Berkeley's admissions procedures, they do technically violate the disparate impact regulations, and if private plaintiffs may sue to enforce the regulations, Berkeley is in trouble. Indeed, one federal district court, which permitted a private disparate impact suit by African-American student athletes, recently enjoined the National Collegiate Athletic Association (NCAA) from imposing a minimum SAT score as a condition of freshman athletic eligibility. It is a very short step from this ruling to say that colleges generally may not use the SAT to make admissions decisions.

B. EXCLUSIVE ADMINISTRATIVE ENFORCEMENT AND COMPETING ENFORCEMENT OPTIONS

In essence, the argument presented here is in favor of an enforcement approach that permits “agency nullification” of the disparate impact regulations in order to avoid overdeterrence of disparity-causing decisions. The Shintech example shows that, just as the law limits the damages available for efficient negligence and restricts the class of plaintiffs who may sue for such negligence in order to avoid overdeterrence, it should similarly limit who may sue to stop disparity-causing decisions. Disparate impact, like some apparently negligent behavior, is often an inevitable result of actions that are, on the whole, desirable. Indeed, practically every decision a federally funded entity makes will have some disparate

---

96 See Berley, supra note 70, at A19 (noting lawsuit against Berkeley); Marcus, supra note 71, at A2 (arguing that federal guidelines of use of standardized tests will lead to legal challenges).
97 See Marcus, supra note 71, at A2 (describing lawsuit).
98 Cureton v. NCAA, 37 F. Supp. 2d 687, 715 (E.D. Pa.), rev'd on other grounds, 198 F.3d 107, 116 (3d Cir. 1999) (reversing on ground that Title VI did not apply because NCAA was not federal fund recipient).
impact (perhaps on white citizens—a "reverse" disparate impact). Thus, our mechanism for enforcing the disparate impact regulations should include some way to weed out the good disparity-causing decisions, which are like efficient negligence, from the bad ones, which are like willful and wanton negligence. If courts limit enforcement of the disparate impact regulations to agency action, then administrative agencies could perform a screening function, picking out the bad disparity-causing actions for prosecution but allowing the good ones (such as the decision to permit the Shintech plant) to slide by. In other words, agencies could engage in nullification when strict application of the disparate impact prohibition would lead to bad results. The law could thereby address the concern about deterring beneficial disparity-causing decisions. The following Subparts explain why exclusive administrative enforcement is superior to competing private enforcement options and demonstrate that the pathologies frequently besetting agencies given exclusive enforcement authority do not raise concerns in this context.

1. Superior to Private Enforcement of the Regulations as Drafted. The disparate impact regulations, as drafted, forbid all disparate impacts. Thus, any flexibility in the disparate impact ban must

---

99 Federal funding of public transportation in urban areas provides an example of "reverse" disparate impact that would appear to be actionable under the Title VI regulations. Assuming a disproportionate number of public transportation riders (i.e., beneficiaries) are members of racial minorities, the decision to use tax money to fund public transportation systems has a disproportionate adverse impact on white taxpayers.

100 Note that intentional discrimination, like an intentional tort, is always undesirable and thus ought to be deterred absolutely. The argument presented here is therefore fully consistent with Cannon v. University of Chicago, 441 U.S. 677 (1979), in which the Court held that there is a private right of action to enforce the Title VI intentional discrimination ban.

come from selective enforcement of the rules. A few moments' reflection reveals that agencies are better-suited than private citizens to engage in such selection. First, agencies are at least somewhat democratically accountable and are therefore likely to consider the interests of many different groups and individuals in determining which disparity-causing actions to prosecute. Private individuals, on the other hand, are completely unaccountable to the rest of society and will thus consider only their own private costs and benefits in determining whether to take steps to stop disparity-causing decisions.

(Dep't of Defense); 38 C.F.R. § 18.3(b)(2) (1999) (Dep't of Veterans Affairs); 40 C.F.R. § 7.35(b) (1999) (EPA); 45 C.F.R. § 80.3(b)(2) (1999) (Dep't of Health and Human Servs.); 45 C.F.R. § 611.3(b)(2) (Nat'l Science Found.); 45 C.F.R. § 1203.4(b)(2) (Corp. for Natl & Community Serv.); 49 C.F.R. § 21.5(b)(2) (1999) (Dep't of Transp.).

The President is ultimately responsible for how most federal administrative agencies perform their discretionary tasks, and the heads of agencies, who are under the President's direction, therefore tend to be responsive to constituents' needs and desires. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW § 1.7, at 25 (3d ed. 1994) ("[B]ureaucrats are accountable to the people through their relationship with politically accountable President."). As the Supreme Court explained in Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984):

[An] agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .

Id. at 865.

For an example of how democratic pressures may constrain an agency's—but not a private plaintiff's—overzealous enforcement of the disparate impact regulations, consider the Department of Education's recent ill-fated announcement that it might use the regulations to prohibit colleges from employing the SAT and similar standardized tests in making admissions decisions. Edward Blum & Marc Levin, Washington's War on Standardized Tests, WALL ST. J., May 22, 1999, at A22. The Department's statement that use of the SAT technically violates the disparate impact regulations was legally correct: Use of the SAT undoubtedly violates the rule prohibiting recipients of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (1999) (containing Department of Education's disparate impact rule). Enforcement of the regulations in this context, however, would have been unwise, see supra text accompanying notes 63–72 (discussing arguments against enforcement), and citizens let the Department know as much. The Department's implicit threat to enforce the regulations was subjected to intense media criticism. See, e.g., Blum & Levin, supra, at A22 (indicating criticism); supra notes 71-72 (indicating same). Congress immediately held hearings to consider the wisdom of the Department's proposed enforcement actions. See Statements of Norman Cantu and Linda Chavez, supra note 63. In light of these democratic pressures, the Department backed
In addition, agencies are better equipped to engage in the fact-finding necessary to make good decisions about which disparity-causing actions should be stopped. Whereas private individuals tend to be aware of only the costs and benefits they face as the result of a decision, administrative agencies, who are charged with preventing disparate impacts and achieving other regulatory objectives, take a more comprehensive, systematic view of the costs and benefits of various decisions and have the resources to engage in the factfinding necessary for analysis of societal costs and benefits. For example, an environmental permitting agency will be motivated and able to take account of any disparate impact caused by a permitting decision and of such factors as the need for the permit and the availability and cost of various alternatives; individuals, on the other hand, will not be privy to the agency's "big picture" view and will not be able to engage in sophisticated analysis of the societal costs and benefits of denying a permit. Thus, as long as the regulations forbid all disparate impacts, as they do now, agencies, with their superior democratic credentials and fact-finding abilities, should be in charge of deciding when the regulations should be enforced. Selective agency enforcement is the best way to work flexibility into the disparate impact rules so as to avoid deterrence of good disparity-causing decisions.

2. Superior to Private Enforcement with a General Justification Defense. An alternative approach to an exclusive administrative enforcement scheme in which agencies engage in nullification in appropriate cases would be to permit private suits for disparate impact but to allow the courts adjudicating such suits to throw out those that are based on disparate impacts that are somehow down, indicating that it would not enforce the disparate impact regulations against colleges that use standardized tests. Id.; see also supra note 66 (noting that Arthur Coleman, Deputy Assistant Secretary of Education, had insisted that Department of Education would not use Title VI to eliminate SAT use). By contrast, unaccountable private plaintiffs that sued the University of California at Berkeley for violating the disparate impact rules by using the SAT have not relented. Why should they? It is in their private interest to eliminate SAT use, and the concerns of the general public are, in their minds, irrelevant.

See supra note 101 (describing prohibition).
"justified."\textsuperscript{105} Under such an approach, courts could weed out the good disparity-causing decisions and ensure that only bad ones are punished.\textsuperscript{106} This seems to be the approach taken by a number of lower courts that have modeled their Title VI jurisprudence on Title VII cases.\textsuperscript{107} Following the Title VII burden-shifting scheme, courts could render inactionable all disparity-causing decisions that defendants showed to be justified (i.e., "good," on the whole), and there would be no need to worry about overdetering disparate impacts.

There are, however, several good reasons for favoring agency nullification (through prosecutorial discretion) over court nullification (through reading in a general justification defense). First of all, the text of the disparate impact regulations is absolute: It prohibits

\textsuperscript{105} See, e.g., NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1334 (3d Cir. 1981) (en banc) (stating that "challenged practice must not only affect disproportionately, it must do so unnecessarily"); Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 127 (S.D. Ohio 1984) ("Defendants are not per se prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification."); see also Mank, Environmental Justice, supra note 18, at 798-806 (discussing justification defense under Title VI); Gregory L. Maxim, The EPA's Title VI Bout—Remedying One Injustice With Another, 30 MCGEORGE L. REV. 1091, 1117-22 (1999) (same).

\textsuperscript{106} We might refer to this approach as nullification via a "court-enforced justification standard." The approach involves a standard because the substance of the justification defense is determined \textit{ex post} on a case-by-case basis, not \textit{ex ante} as a rule. See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE L. J. 557, 557 (1992) (defining rules and standards). The standard is court-enforced, because it is the court, not an administrative agency, that applies the justification defense. Cf. note 119, infra (describing agency-designed justification rule).

\textsuperscript{107} See, e.g., Powell v. Ridge, 189 F.3d 387, 393-94 (3d Cir. 1999). The court there explained:

[A] plaintiff in a Title VI disparate impact suit bears the initial burden of establishing a prima facie case that a facially neutral practice has resulted in a racial disparity. If the plaintiff meets that burden, then the defendant must establish a "substantial legitimate justification," or a "legitimate, nondiscriminatory reason," for the practice. Once the defendant meets its rebuttal burden, the plaintiff must then establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination.

\textit{Id.} (citations omitted); see also New York Urban League, Inc., v. City of New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (applying Title VII principles); City of Chicago v. Lindley, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995) (invoking same); Elston v. Board of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993) (applying same); Damian, 608 F. Supp. at 127 (invoking same).
actions that have disproportionate racial effects, and it does not exempt such actions if they are somehow justified.\textsuperscript{108} By contrast, Title VII, the law from which the lower courts have borrowed the burden-shifting regime that enables court nullification, expressly exempts disparity-causing employment decisions that are justified.\textsuperscript{109} As neither Title VI nor its implementing regulations include a justification defense, courts that recognize such a defense are engaging in unabashed judicial lawmaking.

In addition to this formalistic concern (which, of course, could be eliminated by amending the regulations), concerns about institutional competence favor agency nullification over court nullification. Agencies, with their specialized expertise, are better able than courts to determine (1) what is an actionable disparate impact, and (2) what is an adequate justification for a disparity-causing decision. The term "disparate impact" is deceptively simple-sounding; in actuality, it is often difficult to choose an appropriate comparison group for determining whether an action or decision genuinely has disparate racial effects.\textsuperscript{110} If the selected comparison group is over- or under-inclusive, strange results may follow. For example, amici in Chester Residents noted that under the logic of the disparity criterion presented in the plaintiffs' complaint, actionable disparate impact would have resulted if a federally funded agency permitted siting of a hazardous waste facility in Delaware; the District of Columbia; over ninety percent of the counties in Mississippi, South Carolina, and Louisiana; over seventy percent of the counties in

\textsuperscript{108} See supra note 101 (listing various disparate impact regulations with no exceptions).


\textsuperscript{110} Even Professor Bradford Mank, an advocate of private lawsuits to enforce the disparate impact regulations, admits that it is often difficult to determine what constitutes a disparity. Referring to the difficulties of determining whether there is genuine disparate impact in environmental permitting, he writes:

\begin{quote}
Defining the relevant affected population groups and comparison groups is more complicated in an environmental siting case. Depending on the facts in a particular case and type of pollution, the relevant populations could be those living within one mile of a facility, or several miles from the site. There are even more complex problems in measuring the risks of carcinogenic and noncarginogenic pollutants.
\end{quote}

\textit{Mank, Environmental Justice, supra} note 18, at 801.
PRIVATE DISPARATE IMPACT SUITS

Alabama, Georgia, and Maryland; roughly fifty percent of the counties in New Jersey, Arkansas, and Virginia; and the cities of Memphis, New York, Detroit, Jacksonville, Philadelphia, Chicago, and Houston.\textsuperscript{111} Nevertheless, the Third Circuit, ill-equipped to evaluate the demographic and statistical methodology underlying the plaintiffs' complaint, permitted the action to go forward, apparently determining that actionable disparity had been alleged.\textsuperscript{112} An environmental permitting agency that was accustomed to evaluating similar demographic and statistical arguments might well have determined that the plaintiffs' comparison group was over-inclusive.

Agencies are also likely to be better than courts at determining what is an adequate justification for a disparity-causing decision. As experts in the fields they oversee, agencies are well-equipped to distinguish legitimate proffered justifications from illegitimate ones. For example, the EPA is in a good position to evaluate claims of topographical necessity, such as that used to justify siting of the Emelle landfill in Sumter County, Alabama,\textsuperscript{113} and the Department of Education is well-equipped to evaluate the necessity of high-stakes testing procedures, like the SAT, that disproportionately affect minorities.

In addition, agencies are particularly well-suited to gauge the extent to which adversely affected racial and ethnic groups may consent to a disparity-causing action or decision. For example, because of their extensive interaction with the residents of Robbins, Illinois and St. James Parish, Louisiana through public hearings and community meetings, EPA officials were in a good position to evaluate the extent to which public consent could justify the disparity-creating decision to permit industrial facilities in those areas. Agencies also possess better democratic credentials than unaccountable federal courts and may thus be more sensitive to community sentiment when determining what is an actionable

\textsuperscript{111} Amicus Brief in Support of Chester Residents Petitioners, \textit{supra} note 89, at *17-18.
\textsuperscript{113} See \textit{supra} note 77 (discussing Emelle landfill).
disparate impact and what is an adequate justification for disparity.\textsuperscript{114}

Finally, agency nullification through prosecutorial discretion is likely to impose lower total administrative costs than court nullification through a justification defense. Under an agency nullification system, a party’s attempt to prosecute a good disparity-causing decision can be stopped fairly easily. When a party petitions the agency to enforce its disparate impact rules, the agency may simply look at the claim, weigh the competing concerns, and decide that nullification is appropriate.\textsuperscript{115} Under a court nullification system, the plaintiff’s frivolous claim must persist until at least the summary judgment stage. A court could not throw out the complaint on a motion to dismiss, because any complaint that alleges a disparate impact will have sufficiently stated a prima facie case.\textsuperscript{116} Even if the disparity at issue is plainly justified, the regulatee-defendant will not be able to get the action stopped until it submits a formal motion for summary judgment and establishes that, based on the summary judgment record, a rational jury could not return a verdict finding that the action was unjustified.\textsuperscript{117} In short, there is no way, in a court nullification system, to “nip in the bud” disparate impact prosecutions where the disparity at issue is obviously justified. By contrast, when agencies have exclusive authority to enforce or decline to enforce their disparate impact rules, they may quickly review disparate impact allegations and easily weed out those where the disparity is clearly justified. If this concern about frivolous disparate impact suits sounds academic, one

\textsuperscript{114} See supra note 103 (discussing democratic pressures in context of standardized testing).

\textsuperscript{115} The agency’s decision not to enforce the disparate impact regulations would not be subject to costly judicial review. See Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency’s decision not to take enforcement action should be presumed immune from judicial review . . . ."). Part III.D.3, infra, argues that this lack of ex post judicial review is not cause for concern.

\textsuperscript{116} See FED. R. CIV. P. 12(b)(6) (stating requirements for dismissing a complaint for failure to state claim upon which relief can be granted).

\textsuperscript{117} See FED. R. CIV. P. 56(c) (stating test for summary judgment).
need only consider some of the silly disparate impact actions that have been filed and litigated.118

To summarize, agency nullification through prosecutorial discretion is superior to court nullification through a justification defense because (1) there is no justification defense in the regulations (so recognition of one amounts to judicial lawmaking); (2) agencies are better suited to determine what is actionable disparate impact and what constitutes adequate justification; and (3) agency nullification is administratively more efficient because agencies, unlike courts, can "nip in the bud" disparate impact actions where the disparity is plainly justified.

3. Superior to Private Enforcement with an Elaborate, Agency-Crafted Justification Rule. But what about a system where the funding agency, not the court, takes control of the weeding out process but does so ex ante rather than ex post? That is, what if funding agencies beefed up their disparate impact rules to specify in advance what constitutes actionable disparity and what an adequate justification would be? This approach would seem to eliminate the problems inherent in leaving those determinations to institutionally incompetent courts.119 Agencies' institutional

---

118 See, e.g., New York City Envtl. Justice Alliance v. Giuliani, 50 F. Supp. 2d 250 (S.D.N.Y. 1999) (arguing that destruction of "community gardens" had disparate impact). Plaintiffs in that case argued that New York City was creating an unjustified disparate impact by destroying community gardens on city-owned property in minority areas in order to build housing for low-income residents. The court determined that there was a "tremendous" need for affordable housing in the areas where the community gardens were located, and it ultimately dismissed the suit on the ground that there is no private right of action to enforce the disparate impact regulations. Id. at 252-53. This is the only federal court in the country to have so held. But it is quite telling that this lawsuit got as far as it did. The plaintiffs' claims were really rather silly: They wanted to use the disparate impact rules to stop much-needed low-income housing from being constructed over gardens planted on city-owned plots that were in disproportionately minority neighborhoods. Any reasonable decisionmaker would have realized that the alleged disparate impact was justified. Had agency approval been a prerequisite to the action being brought, the complaint would have gone nowhere. But since the parties believed the court was the nullifier, the action went forward until the court rejected the complaint. If nullification happens via a court-enforced justification standard, actions such as this will have to proceed until at least the summary judgment stage, despite the fact that they are obviously frivolous.

119 We might refer to this approach as nullification via an "agency-designed justification rule." The justification defense is in the form of a rule because its substance is determined ex ante. See Kaplow, supra note 106 (defining rules and standards). It is agency-designed because an administrative agency, not an unaccountable, non-expert court, determines the substance of the justification defense. Cf. supra note 106 (describing "court-enforced
competence, then, does not necessarily support prohibiting private lawsuits to enforce the disparate impact regulations, for agencies could specify in their regulations what is a disparate impact and what is adequate justification for disparity, and courts could then just mechanically apply those rules in adjudicating private lawsuits.

The problem with this approach is that it is extremely difficult to state \textit{ex ante} what factors will render a disparity-causing decision justified and thus inactionable.\textsuperscript{120} Even in the narrow field of employment law, in which Congress has attempted to spell out a prospective "business necessity" rule for determining which disparity-causing employment decisions are justified and thus inactionable under Title VII,\textsuperscript{121} it has been impossible to state, \textit{ex ante}, what type of business necessity will justify disparity.\textsuperscript{122} It is even harder to make prospective rules about what disparities will be justified when the statute bans disparate impact in all areas—not just a narrow field like the employment context. Moreover, the rules stating what disparate impacts are justified would have to account for instances in which the affected individuals consent to the disparity, as in Robbins and St. James Parish. As consent is almost never present in the employment context—i.e., disparately affected groups almost never consent to their disparate treatment—there is no need to incorporate a consent defense into the broader business necessity justification. Outside the employment context, however, consent might be present and could provide a justification for disparate impacts. Agency rules delineating which


The inability of \textit{ex ante} constraints to foresee the myriad of contexts in which regulators will have to apply [agency] rules, along with the abstract nature of decisionmaking norms, make \textit{ex ante} constraints on agency discretion, constraints that prevent the agency from making policy or deviating from it once made, unlikely means of balancing the need for constraints against the need for regulatory flexibility.

\textit{Id.}


disparate impacts are justified and thus inactionable would therefore need to account for consent.

The point of this discussion is that, given the myriad ways in which disparate impacts may arise outside the employment context, it would be extremely difficult for agencies to specify, ex ante, which disparate impacts are "good" and should be permitted and which are "bad" and should be eliminated. It would thus be difficult for agencies to codify in advance a generally applicable justification defense that courts could then mechanically apply. Accordingly, agencies should be given discretion to make determinations about which disparate impacts are bad, and thus actionable, ex post (i.e., after the disparities arise or are proposed). They cannot play this screening role, however, if private plaintiffs may sue to enforce the disparate impact regulations. The need for agency nullification, then, favors banning private disparate impact suits.

C. RESPONSES TO CRITICISM OF EXCLUSIVE ADMINISTRATIVE ENFORCEMENT

Critics of the agency nullification approach I advocate will undoubtedly contend that private enforcement is necessary to guard against the pathologies to which agencies are susceptible. This Subpart briefly discusses three such pathologies and argues that they are not particularly troubling in this context.

123 In addition to emphasizing the agency pathologies addressed in this subpart, critics of exclusive agency enforcement may assert that, given agencies' limited enforcement resources, private enforcement is necessary as a supplement to agency enforcement. This "limited enforcement resources" argument is frequently used to justify private enforcement schemes, such as qui tam actions under the False Claims Act or private citizens' suits under environmental statutes. In this context, however, the argument is not persuasive because limited enforcement resources are not much of a constraint on an agency's ability to enforce its disparate impact rules. To enforce the disparate impact rules, the agency need not prosecute any claim, dig up any privately possessed information, or prove any point; it simply has to cut off funding to the offending fund recipient in the face of a readily observable disparate impact. Thus, this is not a situation, like a fraud action under the False Claims Act or an environmental violation subject to a citizens' suit, where enforcement is difficult and requires the collection of information possessed by private citizens. Accordingly, there is no need to permit private enforcement in order to supplement agencies' limited enforcement resources.
1. Capture. Critics are first likely to express concerns about agency "capture." Capture theory, developed in the 1960s and 1970s and now referred to almost reflexively by critics of agency enforcement discretion, asserts that "in carrying out broad legislative directives, agencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor." Agency capture is most likely to occur when a particular agency decision has "concentrated benefits and diffuse costs" or "concentrated costs and diffuse benefits"—that is, when a discrete group (the recipient of the concentrated benefit or burden) is particularly interested in the agency decision, and the general public, among whom the corresponding costs or benefits will be diffused, remains disinterested. Professor Richard Stewart explains why a situation of concentrated benefits (or costs) with diffuse costs (or benefits) will lead to agency capture:

Limited agency resources imply that agencies must depend on outside sources of information, policy development, and political support. This outside input comes primarily from organized interests, such as regulated firms, that have a substantial stake in the substance of agency policy and the resources to provide such input. By contrast, the personal stake in agency policy of an individual member of an unorganized interest,

---


such as a consumer, is normally too small to justify such representation.\textsuperscript{127}

An agency's decision on the issue of whether or not to enforce the disparate impact regulations in a particular case is not likely to fit in the "concentrated benefits (or costs)/diffused costs (or benefits)" category. This is because there will always be two discrete groups that will conversely benefit or suffer from whatever decision the agency makes. For instance, if the agency decides to enforce the regulations, the otherwise disparately impacted minority group will benefit (concentrated benefits), and the regulatee will suffer (concentrated costs). If the agency decides not to enforce the regulations, the regulatee will receive concentrated benefits, and the disparately impacted minority group will face concentrated costs. In short, the agency's decision to enforce or nullify the disparate impact regulations occurs within a "concentrated costs/concentrated benefits" context; neither the costs nor the benefits are diffused among the general public. Accordingly, there is no need to worry about one side lacking a sufficient incentive to lobby the agency for its desired outcome, and no side is likely to dominate—or capture—the agency.

2. \textit{Tunnel Vision}. Critics may also complain that agencies are ill-suited to retain exclusive power to enforce the disparate impact regulations because agencies are likely to develop "tunnel vision" with respect to their primary mandates and to ignore the regulations' mandate to avoid disparate impact. A number of theorists have posited that administrators, typically charged with enforcing a relatively limited and homogenous set of statutory mandates, are poorly equipped to take account of concerns outside their narrow areas of expertise.\textsuperscript{128} For example, an agency charged with protect

\textsuperscript{127} Stewart, supra note 125, at 1686.

\textsuperscript{128} See, e.g., Frank H. Easterbrook, Formalism, Functionalism, Ignorance, Judges, 22 Harv. J. L. & PUB. POL'Y 13, 19 (1998) ("Agencies start pursuing their own agendas, with tunnel vision adherence to the goal of their statute at the expense of other, equally worthy objectives."); Richard B. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 IOWA L. REV. 713, 763 (1977) (concluding that courts serve as important forums for complaints of individuals because agencies become obsessed with their mandates); cf. Stephen Breyer, BREAKING THE VICIOUS CIRCLE 11-19 (1993) (discussing different aspect of
ing the environment may ignore the degree to which the rules it adopts stifle economic growth, and an agency whose mandate is to oversee transportation projects is likely to pay insufficient attention to the environmental issues raised by various construction endeavors.

But the fact that agencies, in their zeal to fulfill their statutory mandates, may lose sight of the need to avoid disparate impact does not imply that there is a need for a private right to sue to stop disparate impact. Indeed, there are other ways to motivate agencies to consider the distributive effects of decisions regarding fund recipients. First of all, the disparate impact regulations themselves include detailed complaint procedures by which individuals may notify agencies of disparate impacts. It is thus not likely that agencies will be "unaware" of racial disparity resulting from the decisions of the fund recipients they oversee. In addition, orders from the President expressly direct federal agencies to take account of, and guard against, disparate impact resulting from decisions by federally funded entities. Finally, public interest groups and the tunnel vision—the tendency of agency, by focusing on single mission, to take its actions to their extremes).

129 See, e.g., 5 C.F.R. § 900.407(b) (1999) (containing Office of Personnel Management regulation providing that "[a]ny person who believes himself or any special class of persons to be subjected to discrimination prohibited by this subpart [which forbids disparity-causing decisions] may by himself or by a representative file with the Director . . . a written complaint"); 7 C.F.R. § 15.6 (1999) (including similar complaint procedure for Dep't of Agric.); 10 C.F.R. § 4.42 (1999) (Nuclear Regulatory Comm'n); 10 C.F.R. § 1040.104 (Dep't of Energy); 14 C.F.R. § 1250.106(b) (1999) (NASA); 15 C.F.R. § 8.8(a) (1999) (Dep't of Commerce); 18 C.F.R. § 705.7(b) (1999) (Water Resources Council); 18 C.F.R. § 1302.7(c) (Tenn. Valley Auth.); 22 C.F.R. § 141.6(b) (1999) (State Dep't); 22 C.F.R. § 209.7(b) (Agency for Intl Dev.); 24 C.F.R. § 1.7(b) (1999) (Dep't of Housing & Urban Dev.); 28 C.F.R. § 42.107(b) (1999) (Justice Dep't); 29 C.F.R. § 31.7(b) (1999) (Dep't of Labor); 32 C.F.R. § 195.8(b) (1999) (Dep't of Defense); 34 C.F.R. § 100.7(b) (1999) (Dep't of Educ.); 38 C.F.R. § 18.7(b) (1999) (Dep't of Veterans Affairs); 40 C.F.R. § 7.120 (1999) (Envtl Protection Agency); 45 C.F.R. § 80.7(b) (1999) (Dep't of Health & Human Servs.); 45 C.F.R. § 611.7(b) (Nat'l Science Found.); 45 C.F.R. § 1203.7(b) (Corp. for Nat'l & Community Serv.); 49 C.F.R. § 21.11(b) (1999) (Dep't of Transp.).

media have proven extremely responsive to complaints that particular federally funded decisions have a racially disparate effect. As noted above, the "victims" of a disparity-causing decision are a discrete group (i.e., members of a particular race). They are therefore usually represented by interest groups, such as the NAACP, and are thus able to complain to agencies and the media. Tunnel vision, like agency capture, is more likely to be a problem when the victims of the pathology are not part of a discrete group that is easily organized.

3. Unavailability of Ex Post Review. Finally, critics may contend that granting agencies exclusive power to enforce the disparate impact regulations is undesirable because there can then be no ex post check on an agency's decision not to enforce the rules. The Supreme Court has held that enforcement decisions, unless otherwise specified, are committed by law to agency discretion and are therefore immune from judicial review. Thus, these critics are technically correct; private plaintiffs may not sue agencies for failing to enforce the disparate impact rules, and there can therefore be no "official" judicial review of an agency's decision to nullify the rules. But, given that the Title VI intentional discrimination ban is vindicable by private plaintiffs, the lack of judicial review of a decision not to enforce the disparate impact rules is not troubling.

The need for judicial review of a decision not to enforce the disparate impact regulations really only arises when the disparate impact created by a fund recipient's decision is particularly egregious. In cases in which the disparate impact at issue is not particularly pronounced, a reviewing court would likely conclude that the agency declined to enforce the regulations because it decided that the disparity-causing decision was, on balance, a good decision. As Part III.B.2 showed, agencies are institutionally better suited than courts to determine when disparity-causing decisions are justified and should be allowed, so a reviewing court's decision to defer to the agency in cases of mild or moderate disparate impact would make sense. As we generally would want courts to defer to

---

Attorney General to agencies).

131 See Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("An agency's decision not to take enforcement action should be presumed immune from judicial review . . . .").
agencies' decisions not to enforce the disparate impact regulations in cases of mild or moderate disparate impact, the case for judicial review of agencies' enforcement decisions in such cases is tough to make. After all, permitting judicial review would simply increase litigation costs. Accordingly, for mild to moderate disparate impact cases, the lack of judicial review of agencies' enforcement decisions does not damage the case for exclusive agency enforcement.

In cases in which the disparate impact at issue is egregious, however, judicial review might be desirable as an ex post check on an agency's exercise of enforcement discretion, and the impossibility of such review arguably weakens the case for leaving enforcement decisions exclusively to agencies. But egregious cases are susceptible to de facto judicial review, even if the disparate impact regulations are enforceable only by agencies, because courts may view such cases as instances of intentional discrimination, which is privately vindicable.

Consider how such de facto judicial review would proceed: If an agency declines to enforce the disparate impact regulations in a case of extreme disparity, a private plaintiff, barred from suing the agency for failing to enforce the regulations, could sue the fund recipient, alleging that the extreme disparity gives rise to an inference of intentional discrimination. In a number of private suits based on intentional discrimination in violation of Title VI, courts have inferred intentional discrimination from a fund recipient's awareness, and disregard, of the extremely disparate results of its decision. Hence, egregious disparate impact cases—the only disparate impact cases in which judicial review is desirable—could be converted into intentional discrimination cases, and there could be an ex post check on agencies' decisions not to enforce the

132 Id.
133 See Cannon v. University of Chicago, 441 U.S. 677, 688-89 (1979) (holding that there is private right of action to enforce Title VI's ban on intentional discrimination).
134 Heckler, 470 U.S. at 832.
135 See, e.g., Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986) (holding that evidence of disparity in provision of services was sufficient to permit inference of discriminatory intent); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) (inferring discriminatory intent from government's knowledge of existing disparity in municipal services); Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986) (reaching same result).
disparate impact regulations.\textsuperscript{136} The lack of judicial review of agency enforcement decisions is therefore no reason to oppose a system of exclusive agency enforcement of the disparate impact regulations.

In sum, Part III has shown that permitting private disparate impact suits represents unsound public policy because disparity-causing decisions are sometimes, on the whole, good decisions. As such decisions should not be deterred absolutely, the law should not provide every disparately impacted individual a right of action to enforce the disparate impact ban. Instead, administrative agencies, whose democratic credentials and fact-finding abilities are superior to those of private individuals, should retain exclusive power to enforce or nullify the regulations. A system of exclusive agency enforcement is superior to an approach under which courts may nullify the regulations for "justified" disparity-causing decisions, because agencies are institutionally better suited than courts to determine what constitutes actionable disparity and which instances of disparity are justified. Moreover, agency nullification through prosecutorial discretion is administratively less costly than court nullification through a justification standard. Exclusive agency enforcement is also superior to private enforcement of the regulations with an elaborate justification defense, because the factors rendering a disparity-causing decision justified are impossible to codify \textit{ex ante}. The agency pathologies that frequently render exclusive agency enforcement undesirable in other contexts do not apply in the context at hand. Table A summarizes the enforcement options Part III has considered.

\textsuperscript{136} Indeed, in \textit{Chester Residents} itself, the court offered the plaintiffs an opportunity to amend their complaint to allege intentional discrimination rather than mere disparate impact. Seif v. Chester Residents Concerned for Quality Living, 624 U.S. 915, 928 (1998). The plaintiffs could have easily done so by stating in the complaint that the egregious nature of the disparity gave rise to an inference of intent to discriminate. They decided not to take the court up on its offer. \textit{Id}. 
### Table A:
**Options for Enforcing the Disparate Impact Regulations Agencies Have Adopted Pursuant to Title VI**

<table>
<thead>
<tr>
<th>Enforcement option</th>
<th>Nullification available</th>
<th>When does nullification occur?</th>
<th>Who decides whether nullification is appropriate?</th>
<th>Problems with the enforcement option</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Private enforcement of the regulations as drafted (no nullification)</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
<td>Ban on disparate impact is over-inclusive; “good” disparity-caused decisions are deterred.</td>
</tr>
<tr>
<td>II. Private enforcement with a general justification defense (nullification via a court-enforced justification standard)</td>
<td>Yes</td>
<td>Ex post</td>
<td>Court</td>
<td>(1) Court is not institutionally competent to determine which actionable disparate impacts are justified; (2) Court nullification is administratively more costly than agency nullification.</td>
</tr>
<tr>
<td>III. Private enforcement with an elaborate agency-crafted defense (nullification via an agency-crafted rule)</td>
<td>Yes</td>
<td>Ex ante</td>
<td>Agency</td>
<td>Factors rendering disparity-causing decisions “justified” are impossible to codify.</td>
</tr>
<tr>
<td>Exclusive agency enforcement-no private enforcement (nullification via an agency-enforced standard)</td>
<td>Yes</td>
<td>Ex post</td>
<td>Agency</td>
<td>Potential agency pathologies-capture, tunnel vision, no ex post review. As Part III.C shows, these are of little concern in this context.</td>
</tr>
</tbody>
</table>
IV. THE LEGAL CASE AGAINST PRIVATE DISPARATE IMPACT SUITS

Whereas Part III focused on why private disparate impact suits are a bad idea, this Part demonstrates why such suits are unjustified as a matter of positive law. First of all, they are legally infirm because the disparate impact regulations—certainly to the extent they purport to be legislative rules that bind private parties—are themselves invalid. Despite the lower courts' unquestioning acceptance of the validity of the disparate impact regulations, the Supreme Court has never actually held that the regulations are valid, and basic principles of administrative and constitutional law dictate otherwise. Part IV.A attacks the validity of the regulations.

In addition, even if the regulations were valid, implication of a private right of action to enforce the rules would be improper. The Supreme Court has now established that implication of such a right is unwarranted absent evidence of a congressional intent to permit private enforcement. As there is no competent evidence that Congress intended to provide a private right of action to enforce the regulations adopted pursuant to section 602 of Title VI (indeed, there is evidence to the contrary), the lower courts have erred in permitting private enforcement of the disparate impact rules. Part IV.B presents the argument that implication doctrine does not support a private right of action.

A. THE REGULATIONS ARE THEMSELVES INVALID

Perhaps the strongest legal argument against private disparate impact suits is that the regulations on which the suits are based are legally invalid. No lower court has questioned the validity of the regulations, most likely because the Supreme Court has stated in dicta that the regulations represent valid exercises of agency discretion. Careful analysis of the Supreme Court's decisions examining the disparate impact regulations indicates, however, that

---

137 See Alexander v. Choate, 469 U.S. 287, 292-93 (1985) (stating in dicta that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI").
the Court has never actually held that the regulations are valid, and basic principles of constitutional and administrative law indicate that the regulations must be invalid.

1. Guardians's Holding, Alexander's Dictum. The original source of the lower courts' mistaken belief that the Supreme Court has upheld agencies' disparate impact regulations under Title VI is the Justices' opinions in Guardians Ass'n v. Civil Service Commission.138 A careful reading of those opinions, however, reveals that the Court did not hold that the disparate impact regulations are valid, though five of the Justices did opine that such regulations are acceptable.

The issue in Guardians was narrow: Did Title VI entitle plaintiffs—black and Hispanic police officers—to a compensatory remedy (back seniority) for "discrimination" they suffered?139 The alleged discrimination was not intentional; the plaintiffs based their claim of discrimination on the police department's adoption of a "last hired, first fired" policy.140 The policy had a disparate adverse impact on black and Hispanic employees because officers were hired in order of their examination scores, and the examinations tended to favor white test-takers.141 The Second Circuit had denied the compensatory relief awarded by the district court on the grounds that Title VI is not violated absent discriminatory intent.142

In a decision that generated five opinions, the Supreme Court affirmed the Second Circuit's denial of compensatory damages.143 Four Justices—Chief Justice Burger, Justices Powell and Rehnquinst (in an opinion authored by Justice Powell),144 and Justice O'Connor

---

139 Id. at 585-89.
140 Id. at 585-86.
141 Id. at 586.
142 Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232 (2d. Cir. 1980), aff'd, 463 U.S. 582 (1982). All three members of the Second Circuit panel agreed that the award of compensatory damages could not be sustained, but the panel members divided on the rationale for their conclusion. Two judges concluded that the district court erred by concluding that Title VI does not require proof of discriminatory intent. Id. at 270 (Kelleher, J., concurring); id. at 274-75 (Coffrin, J., concurring). The third member of the panel, Judge Meskill, declined to reach the question of whether Title VI requires proof of discriminatory intent. Id. at 255. Instead, he concluded that the "compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI." Id.
143 Guardians, 463 U.S. at 584 (White, J., concurring) (announcing judgment of Court).
144 Id. at 607 (Powell, J., dissenting).
(in her own opinion)—concluded that affirmance was proper because Title VI prohibits only intentional discrimination. Justice O'Connor further asserted that, as Title VI forbids only intentional discrimination, federal agencies have no power to adopt implementing regulations that prohibit mere disparate impact. Chief Justice Burger and Justices Powell and Rehnquist expressly approved this portion of Justice O'Connor's opinion.

Four other Justices—Justices Stevens, Brennan, and Blackmun (in a dissenting opinion by Justice Stevens) and Justice Marshall (in his own dissenting opinion)—would have reversed the Second Circuit. Justice Marshall would have done so on the ground that Title VI prohibits disparate impact as well as intentional discrimination. Justices Stevens, Brennan, and Blackmun would have done so because, while Title VI itself reaches only intentional discrimination, the agency regulations under Title VI, which forbid disparate impact, are valid exercises of agency discretion and are authorized by the statute.

This split put Justice White, the remaining Justice, in the position of tie-breaker on the question of whether to affirm the Second Circuit's denial of compensatory relief for disparate impact resulting from the police department's policies. Justice White voted to affirm the Second Circuit's denial of compensatory damages on the ground that compensatory remedies under Title VI are available only if intentional discrimination is established. Justice White

145 Id. at 612 (O'Connor, J., concurring).
146 Id. at 610 (Powell, J., dissenting); id. at 612 (O'Connor, J., concurring).
147 Id. (O'Connor, J., concurring).
148 Id. at 611 n.5 (Powell, J., dissenting).
149 Id. at 635 (Stevens, J., dissenting).
150 Id. at 615 (Marshall, J., dissenting).
151 Id. at 635 (Stevens, J., dissenting); id. at 615 (Marshall, J., dissenting).
152 Id. at 623 (Marshall, J., dissenting) ("I would hold that Title VI bars practices that have a discriminatory impact and cannot be justified on legitimate grounds.").
153 Id. at 642 (Stevens, J., dissenting) ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim.").
154 Id. at 644-45 (Stevens, J., dissenting) (asserting that "an 'effects' regulation is an . . . appropriate means for an administrative agency to implement" Title VI prohibition on discrimination).
155 Id. at 593 (White, J., concurring) ("[T]he [compensatory] relief denied petitioners . . . is unavailable to them under Title VI, at least where no intentional discrimination has been proved, as is the case here.").
did not limit his opinion to this assertion, however. He further opined that Title VI's prohibition reaches disparate impact as well as intentional discrimination.\(^{156}\)

Tallying the Justices' positions indicates that seven Justices—Chief Justice Burger and Justices Powell, Rehnquist, O'Connor, Brennan, Stevens, and Blackmun—concluded that Title VI prohibits only intentional discrimination. Only Justices Marshall and White concluded that Title VI forbids disparate impact that is not intentional. On the issue of whether agency regulations may forbid disparate impact, five Justices—Justices Marshall, Brennan, Stevens, Blackmun, and White—concluded that they may, and four Justices—Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor—concluded that they may not. A cursory reading of the opinion, then, would suggest that the Court had held: (1) that Title VI prohibits only intentional discrimination, and (2) that agency regulations implementing Title VI may prohibit disparate impacts that are not intentional.

A mere tallying of positions announced in the opinions, however, fails to account for the fact that Justice White, the tiebreaker, voted to affirm the Second Circuit's denial of compensatory damages on the ground that compensatory relief is not available absent intentional discrimination.\(^{157}\) He also stated that Title VI forbids disparate impact,\(^{158}\) but that portion of his opinion was not necessary to his conclusion and is therefore dicta.\(^{159}\) The Supreme Court has explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the

\(^{156}\) Id. ("[I]t must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.").

\(^{157}\) Id. ("As an alternative ground for affirmance, respondents defend the judgment on the basis that there is no private right of action available under Title VI that will afford petitioners the relief that they seek. I agree . . . .").

\(^{158}\) Id. at 598.

\(^{159}\) A dictum is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." BLACK'S LAW DICTIONARY 1100 (7th ed. 1999) (defining "obiter dictum") (emphasis added).
Accordingly, Justice White's statements concerning the intent requirement under Title VI are not part of the "holding of the Court." The question of whether agency regulations under Title VI may forbid only disparate impact, not intentional discrimination, thus remains open. Table B tallies the Justices' votes on the various issues raised in *Guardians*.

<table>
<thead>
<tr>
<th>JUSTICE</th>
<th>Compensatory relief is available under Title VI only when discrimination is intentional. (The narrowest issue before the Court.)</th>
<th>Title VI bars only intentional discrimination.</th>
<th>The regulations under Title VI may prohibit unintentional disparate impact.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blackmun</td>
<td></td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Burger</td>
<td>Y(m)</td>
<td>Y(m)</td>
<td></td>
</tr>
<tr>
<td>Brennan</td>
<td></td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Marshall</td>
<td></td>
<td></td>
<td>Y</td>
</tr>
<tr>
<td>O'Connor</td>
<td>Y(m)</td>
<td>Y(m)</td>
<td></td>
</tr>
<tr>
<td>Powell</td>
<td>Y(m)</td>
<td>Y(m)</td>
<td></td>
</tr>
<tr>
<td>Rehnquist</td>
<td>Y(m)</td>
<td>Y(m)</td>
<td></td>
</tr>
<tr>
<td>Stevens</td>
<td></td>
<td>Y</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>Y(m)</td>
<td></td>
<td>Y(m)</td>
</tr>
<tr>
<td>TOTAL:</td>
<td>5 JUSTICES</td>
<td>7 JUSTICES</td>
<td>5 JUSTICES</td>
</tr>
<tr>
<td>TOTAL IN MAJORITY:</td>
<td>5 JUSTICES</td>
<td>4 JUSTICES</td>
<td>1 JUSTICE</td>
</tr>
</tbody>
</table>

Despite the fact that Justice White's approval of the disparate impact regulations was dictum, the lower courts have read *Guardians* as holding that such regulations are authorized by Title VI.\(^{161}\)

\(^{160}\) Marks v. United States, 430 U.S. 188, 193 (1977) (citation omitted).

\(^{161}\) See, e.g., New York Urban League, Inc., v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) ("[T]he [Guardians] Court concluded that Title VI delegated to federal agencies the authority to promulgate regulations incorporating a disparate impact standard."); Roberts v. Colorado Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (referring to "the additional holding of Guardians, that although Title VI itself requires proof of discriminatory intent, the administrative regulations [under Title VI] incorporating a disparate-impact standard are valid ") (quoting Guardians, 463 U.S. at 584 (White, J., concurring)).
Even the Supreme Court, in dicta in another case, mistakenly stated that *Guardians* held that agency regulations implementing Title VI may prohibit disparate impact as well as intentional discrimination. In *Alexander v. Choate*, the Court held that the State of Tennessee's reduction in annual inpatient hospital coverage did not constitute actionable discrimination under section 504 of the Rehabilitation Act of 1973. In addressing a threshold issue—whether proof of discriminatory animus is always required to prove a violation of the Rehabilitation Act and its implementing regulations—Justice Marshall, writing for a unanimous Court, discussed *Guardians'*s holding. He explained:

In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964, . . . which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.¹⁶⁴

In a wonderful example of dictum becoming “holding,” a number of lower courts have cited *Alexander*'s dictum as establishing that the Supreme Court has held (in *Guardians*) that disparate impact

---

¹⁶³ Id. at 309.
¹⁶⁴ Id. at 292-93 (emphasis added).
regulations under Title VI are valid. But the Guardians Court did not so hold! Justice White's statements approving a disparate impact standard were surplusage; they did not support his vote to affirm the Second Circuit's denial of compensatory relief, and they are therefore dicta that should not be considered in determining Guardians's holding.

Of course, under the rule of decision that generates this narrow reading of Guardians, the Guardians Court also did not hold that Title VI prohibits only intentional discrimination. Seven Justices—Chief Justice Burger and Justices Powell, Rehnquist, O'Connor, Brennan, Blackmun, and Stevens—stated that intentional

165 See, e.g., Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (indicating validity of regulations); Ferguson v. City of Charleston, 186 F.3d 489, 479 n.10 (4th Cir. 1999) (indicating same); City of Chicago v. Lindley, 66 F.3d 819, 827-28 (7th Cir. 1995) (indicating same); Elston v. Board of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993) (indicating same); Craft v. Board of Trustees, 793 F.2d 140, 142 (7th Cir. 1986) (indicating same).

166 There is a possible counter-argument against this narrow reading of Guardians's holding. As Justice White noted in his concurring opinion, the plaintiffs' petition for certiorari "claimed error solely on the basis that proof of discriminatory intent is not required to establish a Title VI violation." Guardians, 463 U.S. at 589 (White, J., concurring). Hence, in granting the plaintiffs' petition for certiorari, the Supreme Court essentially agreed to decide that issue. One might argue, then, that the section of Justice White's opinion discussing the Title VI intent requirement is not dicta; it is, rather, directly responsive to the sole question the Supreme Court implicitly agreed to answer in granting a writ of certiorari.

This argument, however, runs into constitutional difficulties. The Supreme Court has repeatedly asserted throughout its history that it does not render advisory opinions but instead merely settles concrete disputes between parties. See, e.g., Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1016 (1998) (noting that advisory opinions have been "disapproved by [the Supreme Court] from the beginning"); Hewitt v. Helms, 482 U.S. 755, 761 (1987) (noting that "[t]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute"); Muskrat v. United States, 219 U.S. 346, 361-62 (1911) (stating that Court is to determine only "actual controversies"); Hayburn's Case, 2 U.S. (Dall.) 409, 410 (1792) (stating that Court is only to decide issues before it). The contours of a holding, then, must be determined by asking "What decisions were necessary to resolve the concrete dispute between the parties?" not "What question was presented in the petition for certiorari?" Simply because a granted petition for certiorari construes the legal question presented more broadly than necessary does not mean the Court must, or is entitled to, answer the broad question posed if it need not reach the whole question in order to resolve the conflict between the parties. Otherwise, the Court would end up issuing advisory opinions as well as resolving cases and controversies. Article III of the United States Constitution limits the Court to performing the latter task. U.S. CONST. art. III, § 2, cl. 1; see also Hewitt, 482 U.S. at 761 (discussing "case or controversy" constraints on advisory opinions). Accordingly, Justice White's surplus statements—those not necessary to his decision to affirm the Second Circuit's denial of compensatory relief—should not be taken as "holding," regardless of how the issue on which the Court granted certiorari was stated.
discrimination was required, but three of those Justices—Justices Brennan, Blackmun, and Stevens—did so in dissent. Only four members of the majority asserted that Title VI forbids only intentional discrimination. As Justice White, the remaining member of the majority, voted to affirm on other grounds (and did not conclude that Title VI itself prohibits only intentional discrimination), the majority did not include at least five members who affirmed on the basis of a lack of discriminatory intent. Under the Court's rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds,' Guardians never held that Title VI prohibits only intentional discrimination.

This observation does not imply, however, that the Supreme Court has left open the question of whether Title VI forbids only intentional discrimination. To the contrary, it had already answered that question before Guardians was decided. In Regents of the University of California v. Bakke, another deeply divisive decision which generated five opinions, a majority of concurring Justices—Justice Powell (in his own opinion) and Justices Brennan, White, Marshall, and Blackmun (in an opinion by Justice Brennan)—concluded that Title VI proscribes only those racial classifications that would violate the Fourteenth Amendment's Equal Protection Clause. As the Court two years earlier held that the Fourteenth Amendment prohibits only intentional discrimination, not disparate impact, Bakke's holding that Title VI does not proscribe more than the

\[167\] Guardians, 463 U.S. at 607 (Powell, J., concurring); id. at 612 (O'Connor, J., concurring); id. at 635 (Stevens, J., dissenting).

\[168\] Id. at 635 (Stevens, J., dissenting).

\[169\] Id. at 607 (Powell, J., concurring); id. at 612 (O'Connor, J., concurring).

\[170\] Id. at 593 (concluding that "the [compensatory] relief denied petitioners . . . is unavailable to them under Title VI, at least where no intentional discrimination has been proved, as is the case here," but also that "Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination").

\[171\] See supra Table B.


\[174\] Id. at 287 (Powell, J., concurring); id. at 325 (Brennan, J., concurring).

Fourteenth Amendment necessarily implies that the statute does not forbid unintentional disparate impact. In Guardians, seven Justices merely made explicit this necessary implication of Bakke. The question of whether Title VI prohibits only intentional discrimination, then, is not open; the Bakke Court resolved that issue. On the other hand, the question of whether agency regulations promulgated under Title VI may prohibit unintentional disparate impact remains unaddressed.

2. Excessively Prohibitory Regulations: Legislative Constraints on Agency Rulemaking. Having recognized that, despite Alexander's dictum to the contrary, the Supreme Court has never squarely decided whether the disparate impact regulations under Title VI are valid, let us analyze that open issue. A few moments' reflection reveals that, if the statute itself prohibits only intentional discrimination, the regulations adopted "to effectuate the provisions of" the statute's prohibition must also be limited to proscribing intentional discrimination.

It is a basic principle of administrative law that federal administrative agencies are not legislative bodies with general lawmaking power. The Supreme Court has reaffirmed Bakke's holding that the Title VI prohibition extends no further than that of the Fourteenth Amendment (i.e., that Title VI reaches only intentional discrimination). In United States v. Fordice, 505 U.S. 717 (1992), petitioners complained that a recipient of federal funds had violated a Title VI regulation that required the recipient to "take affirmative action to overcome the effects of prior discrimination." Id. at 732 n.7 (quoting 34 C.F.R. § 100.3(b)(6)(i) (1991)). The Court found it unnecessary to consider that alleged violation in addition to the Equal Protection claim asserted. It reiterated that "[o]ur cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues in these cases as they are implicated under the Constitution." Id. (citations omitted). The Court thus suggested that if the Fourteenth Amendment did not require "affirmative action to overcome the effects of prior discrimination," neither could the regulations under Title VI. Id. at 732.

The Chester Residents court appeared troubled by Fordice's assertion that the Title VI regulations may reach no further than the Fourteenth Amendment. The court admitted that "[h]idden within the [Fordice] Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 931 n.9 (3d Cir. 1997). The court quickly brushed off its concern, however, noting that it "d[id] not believe that the Court would overturn Guardians and Alexander in such an oblique manner." Id. Of course, if Guardians and Alexander never actually held that the disparate impact regulations are valid, as this Article contends, then the Fordice footnote was not "overturning" anything; it was simply re-stating well-established law.

176 The Supreme Court has reaffirmed Bakke's holding that the Title VI prohibition extends no further than that of the Fourteenth Amendment (i.e., that Title VI reaches only intentional discrimination). In United States v. Fordice, 505 U.S. 717 (1992), petitioners complained that a recipient of federal funds had violated a Title VI regulation that required the recipient to "take affirmative action to overcome the effects of prior discrimination." Id. at 732 n.7 (quoting 34 C.F.R. § 100.3(b)(6)(i) (1991)). The Court found it unnecessary to consider that alleged violation in addition to the Equal Protection claim asserted. It reiterated that "[o]ur cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues in these cases as they are implicated under the Constitution." Id. (citations omitted). The Court thus suggested that if the Fourteenth Amendment did not require "affirmative action to overcome the effects of prior discrimination," neither could the regulations under Title VI. Id. at 732.

The Chester Residents court appeared troubled by Fordice's assertion that the Title VI regulations may reach no further than the Fourteenth Amendment. The court admitted that "[h]idden within the [Fordice] Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 931 n.9 (3d Cir. 1997). The court quickly brushed off its concern, however, noting that it "d[id] not believe that the Court would overturn Guardians and Alexander in such an oblique manner." Id. Of course, if Guardians and Alexander never actually held that the disparate impact regulations are valid, as this Article contends, then the Fordice footnote was not "overturning" anything; it was simply re-stating well-established law.
power. In making rules to administer a statute, they may not forbid behavior that could not possibly be proscribed by the enabling statute. They may "flesh out" the general proscriptions in an enabling statute, but they may not adopt rules that forbid activities that are clearly outside the sphere of behavior prohibited by the legislation. Otherwise, they would end up passing laws without abiding by the strictures set forth in Article I of the United States Constitution.

In *Ernst & Ernst v. Hochfelder*, the Supreme Court rejected the view that administrative agencies may adopt rules that forbid behavior falling outside the sphere of activity proscribed by the enabling statute. In that case, the Securities and Exchange Commission (SEC) argued that its Rule 10b-5, promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934, could forbid negligent conduct in connection with the sale or purchase of a

---

177 See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law."); *Dixon v. United States*, 381 U.S. 68, 74 (1965) (stating that power to administer statute is not the power to make law); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (stating that "[t]he power of an administrative officer or board to administer a federal statute is not the power to make law...").

178 See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.").

179 In *INS v. Chadha*, 462 U.S. 919 (1983), the Court emphasized that strict adherence to the legislative constraints on agency rulemaking is necessary to avoid violating Article I of the United States Constitution. The Court asserted that it is the fact that an agency’s rulemaking may not reach beyond its enabling legislation that permits the agency to engage in "quasi-legislative" rulemaking without abiding by the strictures of Article I, § 7:

The bicameral process is not necessary as a check on the Executive’s administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Article I, §§ 1, 7.

Id. at 953 n.16. The Court further explained:

Executive action under legislatively delegated authority that might resemble “legislative” action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

Id. The Court thus indicated that agency regulations more proscriptive than their enabling statutes would amount to legislation violative of Article I. Id.

security. The Court rejected this argument on the ground that the enabling statute itself, section 10(b), forbade only intentional acts—"any manipulative or deceptive device or contrivance." As the statute itself banned only intentional acts, a regulation promulgated thereunder could not forbid mere negligence, a less culpable behavior. The Court explained:

The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."... Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under section 10(b).}

---

181 Id. at 212. Section 10(b) of the Securities Exchange Act makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (1994). The SEC, acting pursuant to the power conferred by section 10(b), promulgated Rule 10b-5, which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1975). The SEC argued, and the Court agreed, that the language of subsections (b) and (c) of Rule 10b-5 proscribes negligent, as well as intentional, material misstatements and omissions. Ernst & Ernst, 425 U.S. at 212. The Court concluded, however, that such a rule would exceed the SEC's rulemaking power. Id. at 213-14. Accordingly, it held that Rule 10b-5 may not reach negligent misstatements and omissions. Id.

182 Id. at 212-21.

183 Id. at 213-14 (citations omitted).
In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Supreme Court reiterated its general rule that agency regulations may not be more proscriptive than the enabling statutes under which they are promulgated. The *Central Bank* Court held that a private plaintiff may not bring suit under Rule 10b-5 against a defendant who aids or abets a securities law violation, because section 10(b) of the Securities Exchange Act, the statute authorizing Rule 10b-5, does not prohibit a class of behavior broad enough to encompass aiding and abetting. In so holding, the Court emphasized that the scope of conduct forbidden by securities regulations may not exceed that prohibited by the securities statutes. The Court explained:

[Congress] envisioned that the SEC would enforce the statutory prohibition through administrative and injunctive actions. . . . But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of section 10(b). To the contrary, our cases considering the scope of conduct prohibited by section 10(b) in private suits have emphasized adherence to the statutory language, "[t]he starting point in every case involving construction of a statute." . . . We have refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute.

Later in the opinion, the Court re-emphasized that the lower courts had erred in permitting the securities regulations to prohibit a broader category of conduct than the statutes under which they were adopted:

We reach the uncontroversial conclusion, accepted even by those courts recognizing a section 10(b) aiding and abetting cause of action, that the text of

---

185 Id. at 177.
186 Id. at 173 (citation omitted).
the 1934 Act does not itself reach those who aid and abet a section 10(b) violation. Unlike those courts, however, we think that conclusion resolves the case. It is inconsistent with settled methodology in section 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text.\textsuperscript{187}

\textit{Ernst & Ernst} and \textit{Central Bank} illustrate a basic principle of administrative law: Agencies charged with administering laws are not legislators and have no power to adopt rules that reach further than the statutes the agencies are charged with administering.\textsuperscript{188} This is not to say that agencies may not adopt rules that forbid conduct not expressly forbidden by an enabling statute; indeed, a primary function of administrative agencies is "gap-filling"—i.e., spelling out in detail the prohibitions that are implicit in a statute's text. The prohibition in the regulation, however, must be capable of fitting within the statutory prohibition. That is, it must be within the sphere of the statute's prohibitions. Otherwise, it is a nullity.\textsuperscript{189}

As Title VI itself prohibits only intentional discrimination,\textsuperscript{190} the regulations promulgated thereunder may not ban all agency actions that have a disparate impact. Otherwise, the sphere of the regulatory prohibition (any disparate impact, whether intentional or not) would be greater than that of the statutory prohibition (intentional discrimination), just as the regulatory prohibition in \textit{Ernst & Ernst} (all falsehoods, whether intentional or negligent) was greater than the statutory prohibition (intentional falsehoods). \textit{Ernst & Ernst} and \textit{Central Bank} stand for the proposition that a regulatory prohibition may not be so broad as to render the statutory prohibition under

\textsuperscript{187} \textit{Id.} at 177.


\textsuperscript{189} \textit{See} Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936) ("A regulation which does not [carry into effect the will of Congress as expressed by the statute], but operates to create a rule out of harmony with the statute, is a mere nullity.").

\textsuperscript{190} As noted above, \textit{Bakke} held that Title VI prohibitions were co-extensive with that of the Fourteenth Amendment, which prohibits only intentional discrimination. Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 265, 287 (1978) (Powell, J., concurring); \textit{id.} at 328 (Brennan, J., concurring).
which the regulations are promulgated a mere subset of the prohibited activity; to the extent the regulations reach conduct that is outside the statutory prohibition, they are invalid. Accordingly, the Title VI regulations banning unintentional disparate impact are invalid.

Justice Stevens, joined in Guardians by Justices Brennan and Blackmun, rejected the view that Title VI regulations may not prohibit conduct beyond the scope of the statute's prohibition. Though he concluded that Title VI itself prohibits only intentional discrimination, he reasoned that federal agencies may validly implement Title VI by forbidding disparate impacts, regardless of whether they are intentional. To reach this conclusion, he first appealed to principles of judicial deference to agency interpretations of law, and he then analogized agencies' power to regulate pursuant to statutory authority to Congress's power to legislate under constitutional authority. Both of his arguments fail to justify his conclusion that the disparate impact regulations are valid.

Justice Stevens first contended that the disparate impact regulations must "have the force of law" because they are "reasonably related to the purposes of the enabling statute." The principles of judicial deference to agency decisionmaking that were in place at that time may have made this "reasonable relation to purpose" inquiry the sole test for whether a regulation was a valid exercise of agency authority. The Court, however, has since established that reasonable relation to an enabling statute's purpose is not enough to render a regulation valid. The first step of the famous "Chevron two-step" asks whether, in fact, the statute is

---

192 Id. at 645.
193 Id. at 643.
194 Id. at 644-45.
195 Id. at 643 (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973)).
196 See Mourning, 411 U.S. at 369 (stating that "the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purpose of the enabling legislation'"); Chrysler Corp. v. Brown, 441 U.S. 281, 301-06 (1979) (stating that there must be a nexus between regulations and legislative authority delegated by Congress). See generally K. DAVIS, ADMINISTRATIVE LAW § 3.1 (3d ed. 1994) (discussing pre-Chevron standards for deferring to agency interpretations of statutes).
ambiguous on the issue addressed in the regulation—or, in other words, whether Congress, by leaving an ambiguity, delegated to the agency the task of filling in the gap by explaining what the ambiguity means. An inquiry into the reasonableness of the regulation or the agency interpretation of law is appropriate only if this first question is answered in the affirmative. If Congress has not left an ambiguity (and thereby implicitly delegated the task of gap-filling), then courts may not defer to a contrary agency regulation, regardless of how "reasonably related to the purposes of the enabling legislation" the regulation is. The Court's holding in Bakke forecloses any claim that the Title VI definition of discrimination is ambiguous: Bakke held that the Title VI prohibition is co-extensive with that of the Fourteenth Amendment and thus reaches only intentional discrimination. Accordingly, there is no ambiguity with respect to what type of discrimination Title VI prohibits, and the agency regulations that purport to "effectuate the provisions of" the Title VI intentional

---


When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly answered the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.


199 See Chevron, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); see also Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under Chevron is a congressional delegation of administrative authority.").

200 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J., concurring); id. at 328 (Brennan, J., concurring).

201 See Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that Fourteenth Amendment forbids only intentional discrimination).
discrimination prohibition by banning disparate impact are entitled to no deference, regardless of their "reasonable relation" to Title VI's "purposes." To use administrative law jargon, the disparate impact regulations fail under *Chevron* step one.

Justice Stevens's second argument in favor of the validity of the disparate impact regulations drew an analogy between the regulations and legislation enacted to implement constitutional provisions.\(^{202}\) He cited *City of Rome v. United States*,\(^{203}\) which held that even if section 1 of the Fifteenth Amendment prohibits only purposeful racial discrimination in voting rules, Congress may implement that prohibition by banning voting practices that are discriminatory in effect.\(^{204}\) He reasoned that, as Congress may implement a constitutional prohibition by enacting a prophylactic statute that bans a broader class of conduct than that prohibited by the Constitution, an agency must be able to adopt a prophylactic regulation that prohibits conduct not forbidden by a statute in order to achieve that statute's prohibition.\(^{205}\) In support of his reasoning, he cited a 1900 case, *Boske v. Comingore*,\(^{206}\) which he construed as holding that an administrative regulation's conformity to statutory authority is measured by the same standard as a statute's conformity to constitutional authority.\(^{207}\)


\(^{203}\) 446 U.S. 156 (1980).

\(^{204}\) Id. at 173.

\(^{205}\) *Guardians*, 463 U.S. at 644 (Stevens, J., dissenting).

\(^{206}\) 177 U.S. 459 (1900).

\(^{207}\) *Guardians*, 463 U.S. at 644 (Stevens, J., dissenting). Justice Stevens quoted the following passage from *Boske*:

In determining whether the regulations promulgated by [the Secretary of the Treasury] are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

*Id.* (quoting *Boske*, 177 U.S. at 470).
There are several problems with Justice Stevens's attempt to analogize regulations under a statute to legislation under a constitutional provision. First of all, Justice Stevens failed to appreciate that, while Congress has independent constitutional authority to enact any legislation that is "necessary and proper" for carrying into execution all powers vested by the Constitution in the United States government,\(^209\) administrative agencies, themselves creatures of statute, do not have general power to adopt any necessary and proper legislative rules and thus cannot regulate any further than their enabling statutes permit. In holding that Congress may, under section 2 of the Fifteenth Amendment, enact a statute banning voting practices having a discriminatory effect, even if section 1 of the Amendment prohibits only intentional discrimination,\(^209\) the City of Rome Court specifically referred to Congress's broad authority under the Necessary and Proper Clause.\(^210\) Administrative agencies charged with effectuating the provisions of the Title VI intentional discrimination ban do not have analogous authority to regulate as "necessary and proper." Indeed, the Constitution denies them such broad, general authority, for if they had such power, they could effectively legislate without abiding by the strictures of Article I, section 7 of the United States Constitution.\(^211\) And, as cases such as Ernst & Ernst and Central Bank illustrate,\(^212\) the Supreme Court has rejected the view that agencies may promulgate broader-than-

\(^{208}\) See U.S. CONST., art. I, § 8, cl. 18 (stating that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

\(^{209}\) The Fifteenth Amendment provides:

- **Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
- **Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV. The Court held that section 1 of the Amendment is violated only by intentional discrimination. City of Mobile v. Bolden, 446 U.S. 55, 61 (1980).

\(^{210}\) City of Rome v. United States, 446 U.S. 156, 175 (1980).

\(^{211}\) See supra note 179 and accompanying text (discussing constitutional constraints on legislative rulemaking).

\(^{212}\) See supra notes 181 to 190 and accompanying text (discussing cases).
necessary, prophylactic regulations in fleshing out a statutory prohibition.\footnote{213}

In addition, Justice Stevens's reliance on \textit{Boske} for the proposition that "an administrative regulation's conformity to statutory authority [is] to be measured by the same standard as a statute's conformity to constitutional authority"\footnote{214} is misplaced. The \textit{Boske} Court did not have occasion to decide whether an agency may regulate conduct outside the ambit of the enabling statute, for the directive of the enabling statute at issue in that case was extremely

\footnote{213}{A cursory reading of the Supreme Court's opinion in \textit{United States v. O'Hagan}, 521 U.S. 642 (1997), might seem to suggest that the Court has moved away from the position, articulated in \textit{Ernst & Ernst} and \textit{Central Bank}, that prophylactic regulations that exceed the prohibition of their enabling statute are invalid. But a close reading of \textit{O'Hagan} indicates that the enabling statute at issue in that case is distinguishable from the statute at issue in \textit{Ernst & Ernst} and \textit{Central Bank} and from the Title VI enabling provision (section 602 of Title VI, 42 U.S.C. § 2000d-1), and that \textit{O'Hagan} does not stand for the proposition that agencies possess general authority to adopt prophylactic, broader-than-necessary rules.}

\footnote{214}{\textit{Guardians Ass'n v. Civil Serv. Comm'n}, 463 U.S. 582, 644 (1983) (Stevens, J., dissenting).}
broad—certainly broad enough to encompass the regulation at issue. Indeed, the statutory authority for the regulation at issue in Boske conferred the general administrative power to adopt rules to carry out the functions of the agency.\textsuperscript{215} Thus, despite the dictum relied on by Justice Stevens, Boske cannot stand for the proposition that an agency may regulate beyond the proscriptions of a statute just as Congress may legislate beyond the Constitution’s proscriptions. Moreover, even if Boske had held that regulations may prohibit more behavior than their enabling statutes, such a holding would no longer be good law in light of cases such as Ernst & Ernst\textsuperscript{216} and Central Bank.\textsuperscript{217}

3. Legislative Rules Versus Internal Rules. While Justice Stevens’s Guardians dissent fails to establish the validity of generally binding disparate impact regulations, the opinion does hint at a persuasive argument in favor of the validity of such rules as internal agency rules. Title VI is a Spending Clause statute,\textsuperscript{218} and the regulations promulgated thereunder ultimately regulate agency spending. In essence, they assert merely that agencies may not fund entities that make decisions that have racially disproportionate effects. The regulations may thus be viewed as a means of agency prioritization—i.e., as guidelines that assist the agencies in determining how to allocate federal monies. To the extent the agencies have some discretion to decide whom to fund, the disparate impact regulations may represent a valid means of making allocative decisions.\textsuperscript{219} The regulations, then, may be valid because they are

\textsuperscript{215} See Boske v. Comingore, 177 U.S. 459, 467 (1900) (noting that statute at issue authorized Secretary of the Treasury “to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it” (internal citation omitted)).

\textsuperscript{216} Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) (holding that Rule 10b-5 cannot proscribe conduct not proscribed by section 10(b) of the Securities Exchange Act).

\textsuperscript{217} Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173-77 (1994) (holding that there is no Rule 10b-5 action for conduct not forbidden by section 10(b)).

\textsuperscript{218} Guardians, 463 U.S. at 598-99 (White, J., concurring); id. at 636-38 (Stevens, J., dissenting); Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998); Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398 (5th Cir. 1996).

\textsuperscript{219} A statute may, of course, mandate that agencies provide funds to certain entities, and the agencies then would not have discretion to deny funding on the basis of the disparate impact regulations.
adopted pursuant to funding agencies' inherent power to employ reasonable "screening devices" in allocating the money they have been given to manage. As Justice Stevens noted, the presumption of validity applicable to an agency regulation that is reasonably related to the purposes of enabling legislation is particularly strong "when [the] regulation does not seek to control the conduct of independent private parties, but merely defines the terms on which someone may seek federal money." Perhaps, then, the disparate impact regulations are valid, despite the fact that they are more prohibitory than Title VI itself, because they do not really derive their authority from Title VI. To speak in administrative law jargon, perhaps they are not "legislative rules," grounded in a statutory grant of rulemaking power, but are instead "general statements of policy" or "rules of agency organization, procedure, or practice," grounded in agencies' inherent authority to manage their internal affairs (i.e., to determine how they will allocate their limited budgets).

Courts, following the framework of section 553 of the Administrative Procedure Act, have distinguished legislative rules, which purport to bind private entities with the force of law, from three other types of rules—interpreting rules; general statements of policy; and rules of agency organization, procedure, or practice—which generally aim at guiding agencies in their exercise of discretion. Whereas a legislative rule is valid only if it is authorized by a grant

---

220 In debating Title VI, Congress was aware that agencies dispensing federal funds already had inherent "authority to refuse or terminate assistance for failure to comply with a variety of requirements imposed by . . . administrative action." 110 Cong. Rec. 6546 (1964) (remarks of Sen. Humphrey).

221 Guardians, 463 U.S. at 643 (Stevens, J., dissenting).

222 5 U.S.C. § 553(b) (1994) (exempting interpretive rules, general statements of policy, and rules of agency organization, practice, or procedure from Act's notice and comment requirements).

223 See Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law.").

224 See American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (noting that these three types of "internal" rules "express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities" (quoting Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980))).
of rulemaking authority from Congress, internal regulations guiding agencies in the exercise of their discretion do not necessarily require express congressional authorization. Hence, the disparate impact regulations may be valid internal rules.

There are two problems with this argument. First, the disparate impact rules do not fit very well within any of the “non-legislative rules” categories. The disparate impact regulations obviously could not be valid “interpretive rules,” for their interpretation of the discrimination prohibited by Title VI (i.e., disparate impact alone, regardless of intent) is legally incorrect. It is also doubtful that they could be valid “general statements of policy,” because they establish a binding norm and purport to be finally determinative of regulatees’ right to receive federal funds. As drafted, they do not even resemble “rules of agency organization, practice, or procedure,” for they focus primarily on regulatee, not agency, conduct. They are thus not mere “housekeeping regulations,” the type of regulations that the class of “rules of agency organization, practice, or procedure” normally encompasses.

Second, the disparate impact regulations claim on their face to be implementing Title VI. The EPA’s disparate impact regulations, for example, begin by stating, “This Part implements: Title VI of the

---

225 See Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."); 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 234 (3d ed. 1994) ("[A]n agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so."); supra Part IV.A.2.

226 See DAVIS & PIERCE, supra note 225, at 234 (noting that because interpretive rules “have no power to bind members of the public, but only the potential power to persuade a court, and since their issuance provides helpful guidance to the public, courts routinely conclude that agencies have the power to issue interpretative rules when Congress says nothing about such power").

227 See Pacific Gas, 506 F.2d at 38 (stating that "[a] general statement of policy ... does not establish a 'binding norm' ... [and] is not finally determinative of the issues or rights to which it is addressed").

228 See, e.g., 40 C.F.R. § 7.35(b) (1999) (stating, in EPA regulation, that "[a] recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex").

229 Bowen, 834 F.2d at 1045.
Civil Rights Act of 1964 . . . ." Accordingly, it is disingenuous to attempt to construe the regulations as internal agency rules authorized by the agencies' inherent power to determine their own budgeting priorities; the agencies themselves proved otherwise when they purported to be implementing Title VI.

Most importantly for my argument against private disparate impact suits, however, even if the regulations could be upheld as valid internal rules, they would be all but useless to private parties seeking to stop agency action that has a disparate impact. Private parties may not enforce internal agency rules, and the agencies may always choose to disregard their own rules. Indeed, a distinguishing characteristic of a non-legislative agency regulation is that it lacks the force and effect of law. Thus, while Justice Stevens may have correctly noted agencies' inherent power to exercise their budgeting discretion according to rules, his observation is cold comfort to those who would like to appeal to those rules to force agencies to take certain actions. If the disparate impact regulations are valid internal rules, then they are hortatory at best.

To summarize, Part IV.A has shown that, despite the reasoning of the lower courts and Supreme Court dicta to the contrary, the Supreme Court has never held that the disparate impact regulations under Title VI are valid. The issue of their validity is thus open. Basic principles of administrative law, derived from Article I's grant

---


231 See DAVIS & PIERCE, supra note 225, § 6.2, at 228 (stating that "[a] general statement of policy also is not judicially enforceable against an agency"); id. § 17.7, at 145-46 (discussing judicial non-enforceability of agencies' internal policies).

232 See id. § 6.2, at 228 (stating that "a valid legislative rule has the same binding effect as a statute; a general statement of policy has no binding effect on members of the public or on courts").
of legislative power exclusively to Congress, indicate that the regulations cannot be valid legislative rules—i.e., rules that have the force of law—because they are more prescriptive than their enabling statutes. The regulations also do not appear to be valid internal agency rules, and even if they were, they would be merely aspirational; private plaintiffs could not use them to force agencies to take particular actions.

C. IMPLICATION DOCTRINE PROHIBITS A PRIVATE RIGHT OF ACTION

Even if the disparate impact regulations were valid, however, a private right of action to enforce the regulations would not be legally justified. The Supreme Court has now established that solely legislative intent, properly defined, determines whether there is a private right of action to enforce a statute that does not expressly provide for private lawsuits. The courts holding that private plaintiffs may enforce Title VI disparate impact regulations erred in applying an implication test that is no longer applicable. Moreover, they accepted legally incompetent evidence of legislative intent and ignored legislative history suggesting that Congress intended the regulations under section 602 to be enforced only through agency action.\(^2\)\(^3\) Focusing exclusively on whether Congress intended to authorize private disparate impact suits, and considering only competent evidence of legislative intent, compel the conclusion that private disparate impact suits are not legally justified. The remainder of this Article describes and applies the Court’s legislative intent test for finding implied rights of action, concluding that private rights of action to enforce the disparate impact regulations are not legally warranted.

1. History and Description of the Legislative Intent Test. While the Supreme Court’s current test for determining whether an implied right of action exists focuses exclusively on the presence or absence of congressional intent to provide such a right, legislative intent has not always been the touchstone. Early in its history, the federal

\(^{233}\) The Sandoval district court’s alternative “third-party beneficiary” justification for private disparate impact suits also fails to justify creation of a private cause of action under section 602 of Title VI. See supra note 46 (criticizing “third-party beneficiary” rational).
judiciary was much more willing to find implied private rights of action, reasoning that, as individuals are generally entitled to adequate remedies for legal wrongs, courts should provide remedies when Congress has failed expressly to do so.\textsuperscript{234} The courts' focus in the early years of the Republic was on remedial adequacy; the early cases made little or no reference to legislative intent.\textsuperscript{235} Apparently, the federal courts did not believe their ability to infer a cause of action from a federal statute was dependent on the will of Congress.\textsuperscript{236} While some courts did begin to pay attention to notions of legislative intent and congressional purpose during the latter half of the nineteenth and the beginning of the twentieth centuries,\textsuperscript{237} the traditional view persisted, with courts continuing to posit private rights of action when Congress had indicated no adequate remedy for legal wrongs.\textsuperscript{238}

In addition to the cases inferring private rights of action on the basis of the need for adequate remedies, a number of federal cases relied on the "negligence per se" doctrine in finding private rights of action for violations of statutes not expressly providing for private

\textsuperscript{234} See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (allowing suit to compel Secretary of State to deliver plaintiff's commission to federal judge on grounds that every right withheld must have a remedy "and every injury its proper redress" because the applicable rule of law would be undermined unless plaintiff could sue for his commission); Bullard v. Bell, 4 F. Cas. 624, 639 (No. 2121) (C.C.N.H. 1817) (relying on Comyn's statement "that upon every statute made for the remedy of any injury, mischief, or grievance, an action lies . . . by implication; and that such action shall be a recompense to the party"). See generally Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action, 71 NOTRE DAME L. REV. 861, 864 (1996) (summarizing court's attempts in absence of congressional action).

\textsuperscript{235} Stabile, supra note 234, at 864.

\textsuperscript{236} Id.

\textsuperscript{237} See, e.g., Johnson v. Southern Pac. Co., 196 U.S. 1, 16-18 (1904) (relying on fact that purpose of statute was to protect railroad employees and travelers from injury); Groves v. Wimborne, 2 Q.B. 402 (1898) (allowing private claim based upon legislative intent); Atkinson v. Newcastle & Gateshead Waterworks Co., 2 Ex. D. 441, 448 (1877) (noting that whether action was available would depend upon "the purview of the legislature in the particular statute, and the language which they have there employed"); Stabile, supra note 234, at 865 n.15 (reliance on notions of legislative intent first arose in English courts).

\textsuperscript{238} See, e.g., Texas Pac. Ry. 6 v. Rigsby, 241 U.S. 33, 41-42 (1916) (holding that there was implied private cause of action pursuant to Safety Appliance Act, as wrong proscribed by that statute must have adjudicatory consequences); Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 569-70 (1930) (stating existence of statutory right implies the existence of all necessary and appropriate remedies).
enforcement.\textsuperscript{233} The theory underlying those cases was that violation of a federal statute is, by definition, failure to take reasonable care, so an aggrieved plaintiff may sue federal law violators for negligence.\textsuperscript{240} Of course, negligence per se actions differ somewhat from actions based directly on violation of a federal statute; the former actions are state law torts that are governed by state statutes of limitations and state substantive tort law and may be pursued in federal court only when there is an independent basis for federal jurisdiction, while the latter do not require proof of all the elements of negligence and are always appropriately adjudicated in federal court. Nonetheless, negligence per se actions based on violations of a federal statute resemble implied private rights of action in that they permit private enforcement of statutory commands and involve the federal courts in determining appropriate remedies for violations of federal statutes.

With the advent of the New Deal, and the accompanying proliferation of federal statutes,\textsuperscript{241} federal courts had many more opportunities to consider whether statutes contained implied private rights of action. The judiciary, facing a more active Congress, became increasingly passive, apparently deciding to rely to a greater extent on Congress to make express decisions about whether private rights of action are appropriate. For example, in the 1934 decision\textit{Moore v. Chesapeake & Ohio Railway Co.},\textsuperscript{242} the Supreme Court held that the adjudicatory consequences of the Federal Safety and Appliance Act were limited to those expressly provided by Congress.\textsuperscript{243} In so holding, it reversed its 1916 decision in \textit{Texas &


\textsuperscript{240} See, e.g., Lukaszewicz, 510 F. Supp. at 965 ("[T]he violation of such a regulation by one on whom it imposes a duty resulting in occurrence of the harm which the regulation was designed to prevent constitutes negligence per se . . . .").

\textsuperscript{241} The New Deal resulted in a tremendous amount of federal legislation. By 1934, Congress had enacted 557 basic codes "covering everything from steel production to the corncob pipe industry." \textsc{Barbara Habenstreit, Changing America and the Supreme Court} 97 (1970).

\textsuperscript{242} 291 U.S. 205 (1934).

\textsuperscript{243} Id. at 214.
Pacific Railway v. Rigsby,244 which inferred a private right of action under that same statute.

The negligence per se approach to inferring private rights of action also declined in this period, particularly in the wake of Erie Railroad Co. v. Tompkins,245 in which the Supreme Court rejected the ability of federal courts to create substantive federal common law in diversity cases. Though Erie addressed only diversity cases and really had nothing to do with implication, it generally ended the previously expansive notion of federal courts' common-law power,246 and federal courts subsequently appeared less willing to borrow state law negligence concepts to justify inferring implied private causes of action from federal statutes.247

From the time Erie was decided until 1975, the Supreme Court generally exhibited greater reluctance toward finding implied private rights of action, particularly when the statute at issue provided an alternative enforcement mechanism.248 The Court, however, did continue to find implied rights of action when such rights appeared necessary to provide plaintiffs with some remedy.249 In the securities law context, the Court appeared particularly willing to find implied rights of action, even when there were alternative enforcement

---

244 241 U.S. 33 (1916).
245 304 U.S. 64 (1938).
248 Stabile, supra note 234, at 866 (citing Wheeldin v. Wheeler, 373 U.S. 647 (1963) (finding no private right of action under Civil Rights Act since suits against federal officials could have been maintained under state law)); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (holding that section 216(j) of Motor Carrier Act does not give shippers statutory right of action because statute only provides for agency enforcement and Congress did not adopt proposed amendment that would have permitted such suits); General Comm. v. Southern Pac. Co., 320 U.S. 338 (1943) (noting that Congress intended controversies about section 2 of the Railway Labor Act to be addressed by agencies or other tribunals); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943) (finding same).
mechanisms. The general trend, however, was toward relatively fewer implied rights of action.

In 1975, the Supreme Court decided Cort v. Ash, a case that would significantly affect the implied right of action doctrine. In declining to find an implied private right of action in a statute prohibiting political contributions by corporations, the Cort Court articulated four factors courts should consider in determining the availability of private rights of action: First, is the plaintiff a member of the class for whose especial benefit that statute was enacted? Second, is there any indication of legislative intent, explicit or implicit, either to create or deny a private remedy? Third, is implying such a remedy consistent with the underlying purpose of the legislative scheme? And fourth, is the plaintiff's cause of action one that was traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law? Though the Court's articulation of the Cort factors may have been intended to tighten up the requirements for finding an implied private right of action, the Cort test actually had the opposite effect: Private rights of action proliferated in the lower federal courts after the Cort test was announced.

Perhaps because reliance on the Cort factors was resulting in the discovery of so many implied rights of action, the Supreme Court soon moved away from reliance on the four factors toward the current test for discovering implied rights of action, which focuses exclusively on the second Cort factor—whether there is evidence that Congress intended to create a private right of action. This move

---

250 See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (holding that private cause of action was available under section 14(a) of the Securities Exchange Act of 1934, despite other means of redress available to plaintiff). See generally 1 ALAN R. BROMBERG & LEWIS B. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 2.2, at 462 (2d ed. 1994) (referring to same period as "expansion era" of inferring private causes of action); LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1058 (1983) (referring to decade prior to 1975 as "ebullient stage" of implied cause of action doctrine).

251 Stabile, supra note 234, at 866-67.


253 Id. at 78.

254 Mank, Is There a Private Course of Action?, supra note 18, at 27.

began in *Cannon v. University of Chicago*,\(^{256}\) where the Court, though examining each of the four *Cort* factors in determining that there is a private right of action to enforce Title IX's prohibition on intentional discrimination, expressly stated that the four factors are the means through which congressional intent is discerned.\(^ {257}\)

Subsequent Supreme Court decisions further confirmed that the *Cort* factors are relevant only insofar as they serve as proxies for legislative intent. For example, in *Touche Ross & Co. v. Redington*,\(^ {258}\) the Court began its inquiry into whether there is a private cause of action under section 17(a) of the Securities Exchange Act of 1934 by acknowledging that the issue of whether a private cause of action should be implied is "one of statutory construction."\(^ {259}\) The Court went on to explain that the *Cort* factors are important only to the extent that they indicate the presence or absence of congressional intent to authorize a private right of action:

It is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose . . . —are ones traditionally relied upon in determining legislative intent.\(^ {260}\)

The *Touche Ross* Court also definitively rejected the early view that judicial inference of private rights of action is appropriate in order to

\(^{256}\) 441 U.S. 677 (1979).

\(^{257}\) *Id.* at 688 (referring to "the four factors that *Cort* identifies as indicative of such an intent").

\(^{258}\) 442 U.S. 560 (1979).

\(^{259}\) *Id.* at 568.

\(^{260}\) *Id.* at 575-76.
provide remedies for legal injuries when Congress has failed to do so.\(^{261}\)

Shortly after *Touche Ross*, the Court decided *Transamerica Mortgage Advisors, Inc. v. Lewis* [hereinafter *TAMA*],\(^{262}\) in which it re-emphasized the primacy of legislative intent, stating that "[t]he dispositive question remains whether Congress intended to create any such [private] remedy. Having answered that question in the negative, our inquiry is at an end."\(^{263}\) The *TAMA* Court also discussed how legislative intent to create a private right of action could be discerned: Such an intent may appear in the legislative history, language, or structure of a statute, or it may be evident in the circumstances of the statute's enactment.\(^{264}\)

Without doubt, *Touche Ross* and *TAMA* signaled a change in the Court's approach to implied rights of action. According to Justice Scalia, those opinions "effectively overruled" *Cort*.\(^{265}\) A number of lower courts have recognized this "effective overruling"\(^{266}\) and have opined that the Court's new emphasis exclusively on legislative intent to create a private right of action is exclusive of legislative intent to create a private right of action.

\(^{261}\) *Id.* at 568 (" [T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted . . .") (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) (citation omitted)).


\(^{263}\) *Id.* at 24.

\(^{264}\) *Id.* at 18.


intent results in a more stringent test for implied private rights of action. Though more stringent, the current test is also simpler: A plaintiff may bring a private action, in the absence of express provision of such an action, only if he proves—from the legislative history, language or structure of the statute, or from the circumstances of the statute’s enactment—that Congress intended such private actions to be brought.

Despite the Supreme Court’s “effective overrul[ing]” of Cort, the courts that have expressly permitted private actions to enforce section 602 of Title VI have purported to apply the Cort factors in determining that private actions are appropriate. The remainder of this Part performs an implication analysis using the legislative intent test the Court has now embraced—the proper test for determining whether the section 602 regulations are privately enforceable.

---

267 See, e.g., Ruccolo, 1996 WL 735575, at *5 (referring to “less stringent Cort factors” and noting that “[a]s a result of the focus on congressional intent, it is more difficult to find an implied private cause of action”); Olopai, 1993 WL 384960, at *3 (noting that “the Supreme Court has essentially abandoned the four part test it established in Cort in favor of a test that is stricter, yet easier to apply”).

268 TAMA, 444 U.S. at 18.


270 See Thompson, 494 U.S. at 189 (Scalia, J., concurring) (asserting that Cort has effectively been overruled).


272 As the focus of Part IV of this Article is positive rather than normative, I have not focused on defending the legislative intent test for implication. However, as a number of scholars have criticized the Court’s exclusive focus on legislative intent, see, e.g., Richard W. Creswell, The Separation of Powers Implications of Implied Rights of Action, 34 Mercer L. Rev. 973, 986 (1983) (criticizing use of legislative intent); Stabile, supra note 234, at 877-912 (criticizing same); Bruce A. Boyer, Note, Howard v. Pierce: Implied Causes of Action and the Ongoing Vitality of Cort v. Ash, 80 NW. U. L. Rev. 722, 748-49 (1985) (making same criticism), I feel compelled to offer a brief defense of the legislative intent test. I contend that the Court’s exclusive focus on legislative intent in resolving implication questions is justifiable on constitutional and prudential grounds.

First of all, the test preserves the separation of powers that is the organizing principle of the structural Constitution. The Constitution vests legislative power in Congress, see U.S. Const. art. I, § 1, and judicial power in the courts, see U.S. Const. art. III, § 1. Restricting
2. Application of the Legislative Intent Test. Applying the legislative intent test to the implementing regulations federal agencies have adopted under section 602 of Title VI reveals that the regulations are not privately enforceable. There is insufficient judicial implication of private rights of action to statutes where there is competent evidence of legislative intent to permit such actions ensures that the courts do not usurp Congress's power to make federal law. See, e.g., Thompson v. Thompson, 484 U.S. 174, 188-91 (1988) (Scalia, J., concurring) (arguing that Court should be reluctant to imply cause of action too freely because doing so would abridge role of Congress by having Court act in both legislative and judicial capacity).

Critics of the legislative intent test contend that this argument relies upon a formalist conception of separation of powers that the Court has rejected. See, e.g., Creswell, supra, at 990-91 (noting literalist approach supplanted); Stabile, supra note 234, at 879-80 (noting that Court has abandoned literal application of separation of powers). Instead of strict formalism, they contend, courts deciding separation of powers cases have applied a functional analysis that asks whether action by one branch affects the ability of another branch to carry out its functions. E.g., Morrison v. Olson, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting); Nixon v. Fitzgerald, 457 U.S. 731, 760-61 (1982) (Burger, C.J., concurring) (noting that purpose of separation of powers is to prevent interference or intimidation from other branches). The critics argue that, from this functionalist perspective, there is no separation of powers problem when a court recognizes an implied right of action, for Congress could always amend the statute to exclude the private right of action if it disagreed with the court's implication of such a right. E.g., Creswell, supra, at 993. Because Congress possesses the power to make legislative corrections, the critics conclude, liberal implication does not adversely affect Congress's ability to carry out its functions.

But, to the extent courts "force" Congress to amend statutes to deny rights of action by liberally reading such private rights into the statutes, the courts do affect Congress's ability to carry out its functions—Congress has to devote scarce resources to correcting rogue courts. Moreover, Congress frequently may be unable, for a variety of practical reasons, to make legislative corrections to erroneous judicial decisions implying rights of action. See F. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 181 (1975) ("In the realities of the legislative process, almost no reliable inference of current intent could be drawn [from failure to correct an erroneous decision]. In many cases, the legislature is unaware of the relevant court decision. Even where it is fully aware of it, there are often reasons other than approval why a legislature remains silent or inactive."). In practice, then, activist implication adversely affects Congress's ability to legislate, even though, in theory, Congress can always override an erroneous decision granting a private right of action. The critics of formalism, ironically, are engaging in formalistic thinking themselves in assuming that a legislative correction will always be available.

In addition, the legislative intent test is justified on the prudential ground that it reflects institutional competence: Legislatures are better able than courts to determine how the statutes they enact are to be enforced. Legislatures, with their ability to hold hearings, commission studies, etc., are much better than courts at determining the effects of various enforcement mechanisms. They are well-suited to determine whether a private right of action will result in over-enforcement of a statute or will effectively supplement agency action to achieve an appropriate level of enforcement. Moreover, legislatures are politically accountable and must be sensitive to the level of enforcement the citizenry thinks is desirable. Liberal implication of private rights of action may upset the legislatively drawn balance between competing parties that desire differing levels of enforcement.
evidence that Congress intended to provide a private right to sue for violation of the enabling statute, and the lower courts have thus erred in permitting private disparate impact suits.

As a preliminary matter, it is important to note that the implication inquiry here is somewhat unique, because it is ultimately concerned not with whether there is an implied private right of action under a statute, but rather whether regulations adopted pursuant to a statute afford such a right. Nonetheless, the question of whether there is a private right of action to enforce the enabling statute necessarily precedes the question of whether the regulations themselves are privately enforceable in federal court, for only Congress (in its statutes), not federal agencies (in their regulations), may expand the scope of the federal courts' jurisdiction. Indeed, each of the three circuits that have expressly mapped out the process for determining whether there is a private right of action under a regulation has recognized that a threshold question is whether the enabling statute permits private enforcement. If the enabling statute does not permit a private right of action, then the regulations promulgated thereunder may not either. Thus, in applying the test for implication to the disparate impact regulations, we must first

273 See U.S. CONST. art. III, § 2; Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 807-08 (1986) (holding that federal question jurisdiction conferred under Article III, allowing federal courts to hear cases "arising under" federal statutes, is not self-executing, and federal courts have only such federal question jurisdiction as is given them by current congressional legislation).

274 See generally Gilbert Paul Carrasco, Public Wrongs, Private Rights: Private Attorneys General for Civil Rights, 9 VILL. ENVTL. L.J. 321, 329-39 (1998) (discussing tests employed by the Third, Fifth, and Ninth Circuits). The Third Circuit asks: (1) "whether the statute under which the [agency] rule was promulgated properly permits the implication of a private right of action," (2) "whether the agency rule is properly within the scope of the enabling statute," and (3) "whether implying a private right of action will further the purposes of the enabling statute." Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 947 (3d Cir. 1985). The Fifth Circuit simply applies the Cort factors to the regulation at issue. See Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 250-51 (5th Cir. 1997) (applying Cort factors in Title IX suit). It construes the second prong of Cort as asking whether Congress intended to create a private remedy under the governing statute and thereby ensures that the statutory question (i.e., did Congress intend the statute to permit private suits?) is prior to the regulatory question (i.e., may a private plaintiff sue to enforce a regulation under the statute?). Id. at 253. The Ninth Circuit asks: (1) whether "the [enabling] statute provides a private right of action as a matter of legislative intent," and (2) whether the regulation under the statute is "valid and furthers the substantive purposes of the enabling statute." See Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 536 (9th Cir. 1984) (holding private right of action exists under rules promulgated pursuant to Securities Exchange Act).
determine whether the statute enabling the regulations permits a private right of action.

It does not do so. The enabling statute under which the disparate impact regulations were promulgated is section 602 of Title VI. That provision first authorizes federally funded agencies to make rules "to effectuate the provisions of" section 601, which prohibits intentional discrimination by federally funded entities:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d [601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the objectives of the

275 The Powell court mistakenly identified the enabling statute as section 601 of Title VI, not section 602. The court reasoned:

[The regulation at issue here, although promulgated by the Department of Education under section 602 of Title VI, implements section 601 of Title VI. The Supreme Court precedent and our cases firmly establish that section 601 of Title VI gives rise to an implied right of action, at least for purposes of securing injunctive relief. It therefore follows that the first prong of Angelastro [which asks whether a private right of action exists under the statute under which the rule was promulgated] is satisfied.

Powell v. Ridge, 189 F.3d 387, 399 (3d Cir. 1999) (citations omitted). Without doubt, the disparate impact regulations are promulgated pursuant to section 602, not section 601. The agencies, then, get their quasi-legislative authority from section 602, and in order to determine whether the regulations are privately enforceable, we should begin by asking whether that provision of the statute is privately enforceable. In sweeping statutes that include a number of requirements and prohibitions, such as the Civil Rights Act of 1964, some provisions may be privately enforceable and others may not be. Courts cannot assume that because one section is privately enforceable, so is every other provision of the statute. This is particularly true in a case such as this, where one provision (section 601) includes a stricter intent requirement than the other (section 602); if Congress truly intended section 601 to apply only to intentional discrimination but meant for section 602 to reach all disparate impacts, intentional or not (an assumption this Article questions, see supra Part IV.A.2 arguing that Congress did not intend different reach for sections 601 and 602), then the fact that Congress meant for section 601 to be privately enforceable in no way implies that it meant for section 602—a provision that reaches more conduct—also to include a private right of action.
statute authorizing the financial assistance in connection with which the action is taken.\textsuperscript{276}

The provision then specifies, in significant detail, how compliance with the regulations is to be effected. Notably, it does not mention a private right of action to enforce the regulations:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, \ldots or (2) by any other means authorized by law: \textit{Provided, however}, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.\textsuperscript{277}

In the post-\textit{Touche Ross/TAMA} era, the question of whether this statutory provision supports a private right of action reduces to the question of whether there is evidence that Congress intended to

\textsuperscript{277} Id.
authorize such a right.\textsuperscript{278} The presumption is against implied private rights of action, so absent evidence suggesting that Congress intended to provide for private enforcement, courts may not imply private rights of action.\textsuperscript{279} Congressional intent to permit private actions may appear in the section 602 text, legislative history, or structure, or in the circumstances of the provision's enactment.\textsuperscript{280}

\textit{a. Text.} The text of section 602 does not indicate any intention on the part of Congress to provide for private enforcement of the rules agencies adopt pursuant to the section. Indeed, none of the three courts that have expressly held that there is a private right of action to enforce the section 602 regulations has found in the text of section 602 any evidence of legislative intent to provide for private enforcement. One might argue that Congress indicated such an intent in providing for enforcement "by any other means authorized by law,"\textsuperscript{281} but private enforcement of agency regulations is not "authorized by law"; no statute affirmatively indicates that private suits are permitted. Things would be different if the statute provided for enforcement "by any other means \textit{not prohibited by law}."\textsuperscript{282} The law does not affirmatively "prohibit" private suits, so a

\textsuperscript{278} Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979); TAMA, Inc. v. Lewis, 444 U.S. 11, 24 (1979); \textit{see also supra} Part IV.B.1 (demonstrating that question of whether provision supports private right of action is one of congressional intent).

\textsuperscript{279} \textit{See} Suter v. Artist M., 503 U.S. 347, 363-64 (1992) (holding burden is on party seeking to assert private right of action to produce evidence of congressional intent to provide such right).

\textsuperscript{280} TAMA, 444 U.S. at 18.

\textsuperscript{281} \textit{See} 42 U.S.C. \textsection{} 2000d-1 (1994) (providing for enforcement of agency regulations by denial or termination of funding after hearing or "by any other means authorized by law").

\textsuperscript{282} There is a difference between permitting actions "authorized by law" and permitting those "not prohibited by law." \textit{Compare} 42 U.S.C. \textsection{} 2000d-1 (providing for enforcement by "any other means authorized by law") \textit{with} Pub. L. No. 105-313, 112 Stat. 2964 (1998) (providing, at section 7(d), for "any other resolution process that is not prohibited by law"). In 42 U.S.C. \textsection{} 2000d, affirmative authorization somewhere in the law is required before the action is permitted; in Pub. L. No. 105-313, the action is permitted unless it is elsewhere prohibited. \textit{Cf.} West v. Costen, 558 F. Supp. 564, 582 (W.D. Va. 1983) (holding that phrase "permitted by law" in Fair Debt Collection Practices Act, 15 U.S.C. \textsection{} 1629f(1) (1994), does not mean "not prohibited by law" but instead requires affirmative authorization); Newman v. Checkrite Cal., Inc., 912 F. Supp. 1354, 1368 (E.D. Cal. 1995) (stating, in interpreting statutory language allowing charges "permitted by law" that "it does not follow . . . that any charges not prohibited by law are necessarily permitted," but that "as a matter of plain meaning, the word 'permitted' requires that defendants identify some state statute which 'permits,' i.e., authorizes or allows, in however general a fashion, the fees or charges in question").
statute to that effect would permit such suits. But the law also does not "authorize" private suits, so the "by any other means authorized by law" provision does not encompass such lawsuits. In addition, the legislative history of the "any other means" language indicates that the phrase refers to any other means at the agencies' disposal, as breach of contract suits brought by the agencies. The text of the statute, then, expressly provides for two types of enforcement: (1) denial or termination of funding by the agency after a hearing, or (2) other authorized legal proceedings. Neither of these options includes private enforcement. Basic principles of statutory construction—i.e., expressio unius est exclusio alterius (the mention of one thing implies the exclusion of another)—call for reading the text to forbid private enforcement.

The legislative history of the "by any other means authorized by law" language also indicates that it meant to approve means that had been affirmatively authorized by other legislation. 110 Cong. Rec. 7060 (1964). Asked what the "any other means" language means, Senator Pastore stated, "This language means that there shall be no repeal of laws which Congress has already enacted." Id. When asked, "Is the only purpose of that phrase to show that there is no repeal of existing law?", he responded, "Yes. I except, of course, the 'separate but equal' laws." Id. These statements by "one of the principal spokesmen for Title VI," United States v. Marion County Sch. Dist., 625 F.2d 607, 613 n.12 (5th Cir. 1980), indicate that the only "other means" referred to were those expressly provided for by statute.

In a long discussion of the meaning of the "by any other means authorized by law" language, Senator Pastore explained:

If voluntary means fail [to bring a fund recipient into compliance with the section 602 regulations], then the agency has a choice. On the one hand, it can terminate the grant, loan, or contract, refuse further payment under it, refuse to make a new grant or loan, or refuse to enter into a new contract. Alternatively, the agency may use "any other means authorized by law." This phrase does not confer any new authority. It simply makes it clear that Federal departments and agencies may carry out the purposes of title VI by using the powers they now have under the laws creating them or authorizing particular assistance programs.


Agencies may enter contracts with regulatees conditioning receipt of federal funds on compliance with Title VI regulations. The agencies may then institute breach of contract actions against regulatees who fail to comply with the regulations. As Senator Pastore explained, "Again, if an agency's nondiscrimination requirement is embodied in a contractual commitment, the agency may be able to bring suit to enforce its contract." 110 Cong. Rec. 7060 (1964); see also id. at 7066 (remarks of Sen. Ribicoff) (calling such suits "the most effective way for an agency to proceed"); Marion Co. Sch. Dist., 625 F.2d at 613 (holding that, in addition to instituting agency procedures to terminate or deny federal funding, federal agencies may sue in federal court to enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally funded schools).
PRIVATE DISPARATE IMPACT SUITS

enforcement.  

b. Legislative History. Finding in the text no evidence of legislative intent to provide a private right of action, the Chester Residents, Powell, and Sandoval courts focused their attention on the legislative history of section 602. They claimed to find there affirmative evidence of congressional intent to permit private enforcement. Examination of this “evidence,” however, indicates that it is incompetent; indeed, the legislative history the courts examined was that of a subsequent statute enacted by a different Congress! The Supreme Court has indicated that such “subsequent legislative history”—the term itself is an oxymoron—is of extremely limited value in attempting to ascertain the intention of an enacting Congress. Moreover, despite the Chester Residents court’s suggestion to the contrary, there is affirmative evidence in the legislative history of section 602 that Congress did not mean to permit private enforcement.

Each piece of legislative history that the Chester Residents and Sandoval courts pointed to as evincing an “intent to create a private right of action” to enforce the disparate impact regulations relates

---

285 See 73 AM. JUR. 2D Statutes § 211 (1999) (stating that, under expressio unius canon of construction, statute that provides for thing to be done in given manner “normally implies that it shall not be done in any other manner”).


288 See Chester Residents, 132 F.3d at 934 (stating that legislative history showing congressional intent to permit private enforcement of section 602 is “uncontroverted” and noting that “PADEP does not . . . cite to any statements in the Congressional Record or elsewhere that would undermine those” establishing that Congress intended private suits to enforce section 602); see also Sandoval, 7 F. Supp. 2d at 1259 (adopting this statement from Chester Residents).

289 Chester Residents, 132 F.3d at 933-34; Sandoval, 7 F. Supp. 2d at 1258-59. The Powell court did not delve into the legislative history of section 602 in a search for congressional intent to create a private right of action. Rather, the court (incorrectly) reasoned that the relevant inquiry was whether section 601, not section 602, created a private right of action, and, as the Supreme Court had already answered that question in the affirmative, see Cannon v. University of Chicago, 441 U.S. 677, 689-89 (1979) (finding implied right of action to enforce section 601 of Title VI), the Powell court saw no need to search the legislative history for a
to the Civil Rights Restoration Act of 1987, a statute enacted to amend an unrelated provision of the 1964 Civil Rights Act.\textsuperscript{290} First, a House report on an early version of the ultimately enacted bill referred to the "private right of action which allows a private individual or entity to provide the vehicle to test [certain] regulations in Title IX and their expanded meaning to their outermost limits."\textsuperscript{291} Second, statements of several legislators suggested that there is a private right of action based on violations of either Title VI or Title IX regulations.\textsuperscript{292} Finally, testimony at congressional hearings on congressional intent to permit private enforcement of section 602. \textit{See supra} note 275 (describing error of Powell court).

\textsuperscript{290} \textit{See} Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a (1994)). The purpose of the 1987 Act was to repudiate Grove City College v. Bell, 465 U.S. 555 (1984), a Supreme Court decision that applied the intended beneficiary doctrine to Title IX of the Civil Rights Act by holding that federal funds received by a subunit of an educational institution did not subject the entire institution to the non-discriminatory demands of the statute. Under the intended beneficiary rule, if a subunit did not receive federal funds, then the presumption was that participants in its activities were not the intended beneficiaries of the federal aid at issue. Though it was a Title IX case, Grove City essentially restricted standing in Title VI cases to intended beneficiaries because the language of Title IX was expressly modeled after Title VI and the Supreme Court had frequently relied on the construction of one title in interpreting the other. The 1987 Act repudiated Grove City by broadly defining the term "institution-wide basis" to include "all of the operations" of the recipient. Thus, under the 1987 Act, if a state or local government program receives federal assistance, then Title VI governs all operations of the agency administering the program. Mank, \textit{Is There a Private Course of Action?}, \textit{supra} note 18, at 42-43. Because the purpose of that Act was to address the Supreme Court's Grove City decision, not to ratify or create a private right of action under section 602 and its implementing regulations, the legislative history of the 1987 Act is irrelevant to the question at hand. Indeed, the official history of the Act explains that its amendments directly "address[ ] only the scope of coverage under Title VI, Title IX, section 504 [of the Rehabilitation Act], and Age Discrimination Act of recipients of federal financial assistance." S. REP. No. 100-64, at 28 (1988), \textit{reprinted} in 1988 U.S.C.C.A.N. 3, 30. Moreover, the official history cautions that statements of individual members of Congress "made during consideration of the earlier versions of this legislation . . . as well as the current versions, merely reflect the views of individual members of Congress. Such statements are not relevant to the interpretation of S.557." \textit{Id.} at 31; Mank, \textit{Is There a Private Course of Action?}, \textit{supra} note 18, at 43-44.


\textsuperscript{292} The \textit{Chester Residents} court noted Senator Hatch's statement that:

\begin{quote}
The failure to provide a particular share of contract opportunities to minority-owned businesses, for example, could lead Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI. . . . Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges.
\end{quote}
the 1987 Act indicated that witnesses believed there is a private right of action to enforce the regulations adopted pursuant to the 1964 Act. In particular, a memorandum by the Office of Management and Budget stated that office’s opinion that “every licensed attorney would be empowered to file suit to enforce the ‘effects test’ regulations of agencies, challenging practices in every aspect of every institution that receives any Federal assistance.”

The Chester Residents and Sandoval courts concluded that these items of legislative history were sufficient to establish a congressional intent to provide a private right of action to enforce the disparate impact regulations adopted pursuant to section 602. The courts apparently reasoned that the statements show that Congress knew, when it amended Title VI in 1987, that courts were interpreting the Act to permit private disparate impact suits. Because Congress did not amend the Act to forbid such private suits, the reasoning continues, it implicitly approved the lawsuits.

Even proponents of private rights of action to enforce the disparate impact regulations have acknowledged that the Chester Residents and Sandoval courts erred in looking to the legislative history of 1987 legislation to discern the intentions of the legislators that enacted the 1964 Civil Rights Act. Indeed, courts and commentators alike treat subsequent legislative history as the least reliable form of legislative history. For one thing, the meaning

---

Chester Residents, 132 F.3d at 934 n.13 (quoting 134 Cong. Rec. 4257 (1988) (remarks of Sen. Hatch)). The Chester Residents court also quoted Representative Fields: “If a greater percentage of minority than white students fail a bar exam or a medical exam, ... will a State be subject to private lawsuits because the tests have a disproportionate impact on minorities?” Chester Residents, 132 F.3d at 934 n.13 (quoting 130 Cong. Rec. 18880 (1984) (remarks of Rep. Fields)).


See Chester Residents, 132 F.3d at 934 (citing Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 527 (1984)).

See Mank, Is There a Private Course of Action?, supra note 18, at 43-45 (noting courts' error).

members of a subsequent Congress ascribe to previously enacted legislation is irrelevant because the subsequent Congress is a separate decisionmaking body that has no constitutional role in explaining or interpreting statutes that a prior body enacted. In addition, the possibility of strategic behavior by legislators raises prudential concerns about the reliability of subsequent congressional commentary for ascertaining the intent of the enacting legislature. For example, a member of a subsequent Congress, though he knows that the enacting Congress intended a meaning other than the one he desires, may nonetheless make floor statements or submit material to the Congressional Record suggesting that the meaning of the prior legislation is what the member desires. In addition, members of subsequent Congresses may, in attempting to paint a dire picture of the effects of pending legislation, misconstrue the effects of previously enacted legislation.

Indeed, the latter strategy may have influenced some of the statements the Chester Residents court pointed to as establishing that Congress intended the section 602 regulations to be privately enforceable. Senator Hatch and Representative Fields opined that the 1987 Act would make private lawsuits even more damaging, but they really may not have believed that such private suits are actually authorized by Title VI. As opponents of the 1987 Act, they were trying to show the disastrous results of adopting the legislation, and in order to paint the most damaging picture possible, they may have misstated their actual beliefs about what types of lawsuits Title VI permits. Hence, their statements, on which the Chester Residents
and Sandoval courts relied, are perhaps untrustworthy—as well as constitutionally irrelevant.

During recent years, the Supreme Court has become increasingly reluctant to consider post-enactment legislative history.300 For example, it announced, in Public Employees Retirement System of Ohio v. Betts,301 that “[w]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.”302 Accordingly, it seems clear that the Chester Residents and Sandoval courts erred in discerning a congressional intent to provide a private right of action to enforce the section 602 disparate impact regulations solely from the legislative history of a statute that was adopted twenty-three years after the statutory provision whose interpretation was at issue and that dealt with a wholly different subject.303

Not only did the Chester Residents and Sandoval courts improperly rely on incompetent evidence that Congress intended to permit private disparate impact suits, those courts also failed to acknowledge items in the legislative history of Title VI that affirmatively indicate that Congress did not envision private enforcement of the section 602 regulations. Addressing concerns of some southern Congressmen that Title VI remedies were too harsh, Representative Gill noted that section 603 only permits lawsuits by entities whose funding has been cut off under section 602, not by individuals who are the victims of agency action that violates section 602.304 In addition, a number of items in the legislative history to

300 See Mackey v. Lanier Collections Agency & Serv., Inc. 486 U.S. 825, 838-40 (1988) (discussing extensively limited value of subsequent legislative history); Eskridge, supra note 296, at 83-85 (arguing that Rehnquist Court has been more hostile to post-enactment legislative history than Burger Court). But see Franklin v. Gwinnett County Pub. Sch., 504 U.S. 60 (1992) (accepting congressional adoption, or acquiescence, by silence).
302 Id. at 168.
303 See supra note 290 (discussing the subject of the 1987 Civil Rights Restoration Act).
304 Representative Gill explained:

[T]itle VI provides very clearly that the person or the agency which is denied the money, if it desires, can go to the courts—to the Federal district court in the district where the question arises—and that court can determine whether or not the cutoff is in accord with law and whether or not it was properly done under this statute. Nowhere in this section do you find a comparable right of legal action.
section 602 indicate that Congress desired to preserve agencies' ability to respond with flexibility to violations of the Title VI regulations. The availability of private suits to enforce the regulations greatly hinders Congress's goal of flexible enforcement, for with private enforcement the agencies' option of declining to punish a violation of the regulations is eliminated; agencies lose the ability to ignore (or "nullify") the regulations in exceptional

for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim.


For example, in describing the enforcement provisions of Title VI to a subcommittee of the House Judiciary Committee, Attorney General Robert Kennedy explained:

Numerous proposals relating to this problem [of discrimination by federally funded entities] have been made in Congress in recent years. In general they have provided that Federal backing be withdrawn automatically and without exception from any program when discriminatory practices occur. The principle that these programs be nondiscriminatory is sound, but I think that a mandatory requirement that federal financial assistance be withdrawn is too sweeping. Title VI would specifically provide authority to the executive branch to withhold financial support in any program when discrimination is found, regardless of the provisions of existing law. However, the exercise of the authority would not be mandatory. This approach, I believe, is directed to the heart of the problem, yet will not force the government into inappropriate action in the exceptional situation which may arise.

Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong. 1381-82 (1964) (testimony of Att'y Gen. Kennedy); see also id. at 1644 (testimony of Sec'y Celebrezze, Dept of Health, Educ. & Welfare) ("Enactment of title VI of the bill before you will be a direction from Congress to discontinue support of programs that entail racial discrimination, placing discretionary power in the administrator as to the time and manner of implementation. ... A measure of discretion in the application of the provision is essential. ... We interpret title VI as permitting us to pinpoint withholding to the situations where discriminatory practices prevail."); id. at 1890 (statement of Rep. Celler, Chairman of Subcomm. No. 5 of the House Comm. on the Judiciary) ("[I]t strikes me that this provision of title VI offers wide discretion. There is no question about it. Those who want to give that kind of discretion will vote for title VI. Those who don't want to give that kind of discretion will vote against title VI ... You have a wholesale variety of cases; all manners and kinds of cases are going to crop up. You can't envision them in advance. You just therefore give the widest kind of discretion."); 110 Cong. Rec. 2467 (1964) (statement of Rep. Gill) ("I think you will note that flexibility and caution is the rule of this title VI. It allows the administrative agency to try to work out special problems and to ask for compliance. It sets no time limit in which this compliance must be achieved. I submit that if title VI errs it is on the side of mildness.")

See supra Part III.B.3 (explaining agency nullification).
situations. As Part III explained,\textsuperscript{307} while intentionally discriminatory actions by federally funded entities are always undesirable and ought to be deterred absolutely, some actions by federal fund recipients may have disparate racial impacts but nonetheless be desirable actions. Congress recognized that agencies may, at times, need to ignore technical violations of the regulations promulgated under section 602 in order to achieve another objective. Accordingly, members of Congress expressed concerns about preservation of enforcement flexibility.

Granting private individuals a right to sue to enforce the Title VI regulations runs contrary to Congress's apparent desire to maximize agency enforcement flexibility. Hence, contrary to the conclusion of \textit{Chester Residents} and \textit{Sandoval}, there is affirmative evidence in the legislative history of section 602 that Congress did not intend to take away agencies' nullification powers by providing a private right of action to enforce the section 602 regulations.\textsuperscript{308}

c. \textit{Statutory Structure.} Congress included an elaborate mechanism for enforcing the regulations agencies adopt under section 602, thereby indicating that it did not intend to provide for private enforcement of the regulations. Besides specifying that compliance shall be effected through denial or termination of funding (after opportunity for a hearing) or through any other means expressly authorized by law,\textsuperscript{309} section 602 provides that no enforcement action (denial of funding or other action) shall be taken until the funding agency has advised the regulatee of its

\textsuperscript{307} \textit{See supra} Part III (explaining that some decisions resulting in disparate impact are desirable).

\textsuperscript{308} There is no evidence in the legislative history of Title VI that Congress was concerned about preserving agency flexibility when it came to \textit{intentional} discrimination. Indeed, there would seem to be no need to grant agencies any power to nullify section 601 intentional discrimination prohibition, for intentional discrimination ought always to be deterred. Hence, the argument presented here (i.e., that evidence of a need to protect agency flexibility indicates that Congress did not want private enforcement) does not apply to section 601. I am in no way suggesting that \textit{Cannon v. University of Chicago}, 441 U.S. 677 (1979) (recognizing private right of action to sue for intentional discrimination), is at odds with the legislative history of Title VI.

\textsuperscript{309} 42 U.S.C. § 2000d-1 (1999) ("Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for a hearing, of a failure to comply with such requirement, \ldots or (2) by any other means authorized by law.").
noncompliance and has determined that compliance cannot be
effected by voluntary means.\textsuperscript{310} In addition, section 602 specifies
that funding denial or termination may not occur until thirty days
after the head of the funding agency has filed a written report of the
circumstances and grounds of such action with the congressional
committees having jurisdiction over the programs or activities that
were denied funding.\textsuperscript{311} The fact that Congress included in section
602 so detailed an enforcement scheme strongly suggests that it did
not intend to permit, in the alternative, private lawsuits to enforce
section 602.\textsuperscript{312} Indeed, when a statute contains an elaborate
remedial scheme, courts have been particularly reluctant to imply
additional remedies.\textsuperscript{313}

\textsuperscript{310} Id. ("[N]o such action shall be taken until the department or agency concerned has
advised the appropriate person or persons of the failure to comply with the requirement and
has determined that compliance cannot be secured by voluntary means.").

\textsuperscript{311} Id. ("In the case of any action terminating, or refusing to grant or continue, assistance
because of failure to comply with a requirement imposed pursuant to this section, the head
of the Federal department or agency shall file with the committees of the House and Senate
having legislative jurisdiction over the program or activity involved a full written report of the
circumstances and the grounds for such action. No such action shall become effective
until thirty days have elapsed after the filing of such report.").

\textsuperscript{312} This is really a variation on the expressio unius argument raised in Part IV.B.2.a
(addressing whether text of section 602 supports finding of legislative intent to permit private
lawsuits). The expression of one elaborate enforcement scheme implies the exclusion of
alternative means of enforcement. See supra note 286 and accompanying text (discussing
congressional intent to provide private enforcement of section 602).

\textsuperscript{313} See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S.
1, 13-15 (1981) (concluding that, given "unusually elaborate enforcement provisions" of
Federal Water Pollution Control Act, and in absence of strong evidence of contrary
congressional intent, Congress provided "precisely the remedies it considered appropriate");
case of antitrust laws); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77,
93-94 (1981) (holding that comprehensive character of Equal Pay Act and Title VII
presumptively evinces congressional intent not to authorize an implied remedy); TAMA, Inc.
v. Lewis, 444 U.S. 11, 19 (1979) (noting that where statute provides particular remedy, courts
"must be chary of reading others" in); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-74
(BNA) 1108, 1117 (C.D. Cal. 1984) (noting that private cause of action would undermine
(concluding that \$ 1983 claim was precluded because of "carefully tailored" statutory
enforcement scheme established by Education of the Handicapped Act); Great Am. Fed. Sav.
& Loan Ass'n v. Novotny, 442 U.S. 366 (1979) (noting that comprehensive remedial scheme
of Title VII of the Civil Rights Act of 1964 precludes bringing of private cause of action under
42 U.S.C. \$ 1985(3)).
The courts that have expressly approved private disparate impact suits rejected the argument that the structure of section 602 indicates that private suits are unwarranted. Deciding to follow (their understanding of) the "spirit" of section 602 rather than its "letter," the courts reasoned that section 602 procedural requirements are merely concerned with providing notice of enforcement action to defendant regulatees, a concern that is always met in private lawsuits. As the Chester Residents court explained:

The procedural requirements in section 602 provide a fund recipient with a form of notice that the agency has begun an investigation which may culminate in the termination of its funding. We note that a private lawsuit also affords a fund recipient similar notice. If the purpose of the requirements is to provide bare notice, private lawsuits are consistent with the legislative scheme of Title VI. Furthermore, unlike the EPA, private plaintiffs do not have the authority to terminate funding. As a result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (i.e., termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate. Based on the foregoing, we find that the implication of a private right of action would be consistent with the legislative scheme of Title VI.  

Besides the problems inherent in an interpretive approach that flouts plain text in favor of the "policy" underlying the text, the


315 For a lucid discussion of these problems, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).
reasoning presented above is flawed for another reason: It assumes that the sole purpose of section 602 procedural requirements is to provide notice to defendant regulatees, when a careful examination of the procedural requirements indicates that Congress probably had additional objectives in mind when it crafted the section 602 elaborate enforcement scheme. Indeed, in addition to ensuring that notice is provided, Congress may have been pursuing at least two other objectives that cannot be obtained through private lawsuits.

First of all, the structure of section 602 indicates that Congress was attempting to keep agencies involved in enforcement in order to utilize their expertise. Section 602 provisions do not aim simply to "provide bare notice." They also expressly state who must provide that notice: "[N]o such [enforcement] action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply" with the section 602 regulations. In a private lawsuit, the private plaintiff, by filing a complaint, "notifies" the fund recipient of its alleged noncompliance, but the funding department or agency may be completely out of the loop. The agency may never have an opportunity to discuss noncompliance with the regulatee that has been sued. Given that agencies possess a measure of expertise on what constitutes disparate impact in the areas they regulate or oversee and what alternatives may avoid such disparate impact, Congress wisely chose to specify that the "department or agency concerned" be the one to "advise[ ] the appropriate person or persons of the failure to comply with the requirement[s]" of the section 602 regulations.

In addition, the procedural requirements of section 602 aim to keep litigation costs in check by ensuring that litigation does not commence until serious efforts have been made to achieve voluntary compliance. The provisions state that "no [enforcement] action shall be taken until the department or agency concerned . . . has determined that compliance cannot be secured by voluntary means." Again, this requirement is aiming at more than simply providing bare notice to the regulatee. Congress was pursuing an efficiency

---

317 Id.
318 Id.
objective by ensuring that costly enforcement actions would not commence until the agency and the regulatee had reached a stalemate over voluntary compliance.

In short, the structure of section 602 indicates that Congress had in mind the "agency gatekeeping" objective argued for throughout this Article. In addition to providing notice, section 602 procedural requirements, by insisting on the involvement of the departments or agencies concerned and requiring a determination that voluntary compliance is infeasible, ensure that it is not too easy to enforce the disparate impact regulations. The requirements thereby attempt to avoid deterrence of "good" disparity-causing actions and decisions.

d. Circumstances of Enactment. The Supreme Court has indicated that legislative intent to provide a private right of action may appear in the circumstances of a statute's enactment, as well as in its text, legislative history, or structure. With section 602, no particular historical circumstances stand out as indicating a congressional intent to provide or deny a private right of action. But one "general" historical circumstance is always relevant: the view among courts at the time of enactment as to when implication of a private cause of action is appropriate. The idea is that Congress legislates with the common law background in mind and intends for its statutes to be interpreted in accordance with that background.

The question at hand, then, is how courts in 1964 viewed implication.

As Part IV.B.1 explained, between the time of the New Deal proliferation of federal statutes (coupled with Erie's abrogation of federal courts' general common law power) in the 1930s and Cort v. Ash in 1975, the Supreme Court generally denied private rights of action when other means were available to enforce the statutory

320 See supra note 234.
321 See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . ."); Siebert v. Conservative Party, 724 F.2d 334, 337 (2d Cir. 1983) ("Congress is presumed to be aware of the judicial background against which it legislates.").
322 See Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (holding that Federal courts should follow state common-law principles rather than develop and apply "general" common law).
duty at issue.\textsuperscript{324} The Court, however, did create implied private rights of action when they were thought to be necessary to grant a plaintiff a remedy.\textsuperscript{325} It thus appears that the prevailing view among the judiciary in 1964 was that private rights of action would be implied in order to provide \textit{some} remedy, but if an alternative remedy were available, the courts would not generally permit private enforcement without congressional approval.

This view of implication doctrine as understood in 1964 indicates that Congress likely did not intend to permit private lawsuits to enforce section 602 of Title VI. As Part IV.B.3.c discussed, section 602 includes an elaborate enforcement scheme that does not mention private lawsuits. Given the general tendency of post-\textit{Erie}/pre-\textit{Cort} courts not to imply private rights of action when other remedies were available, the 1964 Congress presumably knew that in spelling out a particular remedy for violations of section 602, it was foreclosing

\textsuperscript{324} See, e.g., Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) (holding there is no private right of action under Securities Investor Protection Act of 1970, which is enforceable by administrative proceedings and government suits); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (finding no private right of action under Rail Passenger Service Act of 1970 in light of Attorney General's express enforcement authority); Calhoon v. Harvey, 379 U.S. 134 (1964) (finding no private right of action to enforce Title IV of Labor-Management Reporting and Disclosure Act of 1959, given administrative remedies for enforcement); Wheeling v. Wheeler, 373 U.S. 647 (1963) (holding there is no private right of action under Civil Rights Act since suits against federal officials could have been maintained under state law); T.I.M.E., Inc. v. United States, 389 U.S. 191 (1965) (holding section 216(j) of Motor Carrier Act does not give shippers statutory cause of action since statute only provides for agency enforcement and since Congress failed to adopt recommended amendment that would have permitted such suits); General Comm. v. Southern Pac. Co., 320 U.S. 338 (1943) (concluding Congress intended that controversies about section 2 of Railway Labor Act be addressed by agencies or tribunals other than courts); Switchmen’s Union v. National Mediation Bd., 320 U.S. 297 (1943). \textit{See generally} Stabile, supra note 234, at 866-67. \textit{But see} J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964) (suggesting implication of private cause of action appropriate if private remedy would further larger policies and purpose of Congress and finding that private enforcement of section 14(a) of Securities Exchange Act was necessary supplement to public enforcement by SEC).

private lawsuits as a remedy. By contrast, section 601 of Title VI contains no express remedy, indicating that Congress was leaving the door open for courts to imply a private right of action as a remedy, which the Supreme Court did in *Cannon.*

To summarize, Subpart B has described and applied the Supreme Court's current "legislative intent" test for determining whether it is proper to infer a private right of action to enforce a statute that does not expressly provide for private enforcement. As neither the text, legislative history, structure of section 602, nor the context in which the provision was enacted indicates a congressional intention to provide a private right of action to enforce the agency regulations adopted thereunder, there is no such private right of action. The courts concluding otherwise have erred.

V. CONCLUSION

Rules sometimes misfire. In other words, strict application of well-intentioned policies or legal commands may occasionally lead to results that are, on the whole, undesirable. Given this fact, rulemakers should tailor enforcement mechanisms to account for the extent of the misfiring. Rules that almost never misfire should be easily enforced by a large class of potential enforcers; those that misfire more frequently should be more selectively enforced—perhaps exclusively by experts who are democratically accountable to society as a whole. Those experts could then nullify the prone-to-misfire rules in appropriate situations.

In this Article, I have attempted to show that, while the ban on intentional discrimination by federally funded entities almost never misfires and should thus be privately enforceable, federal agencies' rules banning disparate impact require selective enforcement. The best way to guarantee sound enforcement decisions is to leave such decisions to federal agencies themselves—politically accountable bodies that possess a measure of expertise on which disparity-causing decisions should be forbidden.

I have also attempted to demonstrate that private disparate impact suits are unwarranted as a matter of positive law. First of
all, the rules banning disparate impact—to the extent they are more prohibitory than their enabling statute—are legally invalid. Supreme Court suggestions to the contrary, I have shown, amount to dicta. If the disparate impact rules are valid at all, they must be merely internal regulations, which are not enforceable by parties outside the agencies. In addition, even if the rules were valid legislative regulations, they would not be privately enforceable because there is no evidence that Congress intended the statute enabling the rules (section 602 of Title VI) to include a private right of action. There is, in fact, evidence that Congress intended section 602 to be enforceable only by agency action.

In sum, then, the commentators that have argued for private disparate impact suits, and the courts that have permitted such suits, have adopted a position that is both unwise and legally unjustified. Considerations of policy and settled positive law argue against permitting private disparate impact suits.