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ENVIRONMENTAL JUSTICE AND TITLE VI IN THE WAKE OF ALEXANDER v. SANDOVAL: DISPARATE-IMPACT REGULATIONS STILL VALID UNDER CHEVRON

DAVID J. GALALIS*

Abstract: Disparate-impact regulations promulgated by EPA pursuant to Title VI of the Civil Rights Act of 1964, until recently, had shown promise as a private legal tool to obtain redress from the disparate siting of environmental harms in minority communities. Alexander v. Sandoval, however, has held that there exists no private implied cause of action to enforce disparate-impact regulations. In so doing, the Court also strongly suggested that disparate-impact regulations, standing alone within EPA's own administrative enforcement process, were invalid exercises of administrative discretion under Title VI. The Court's implicit reasoning, based upon Regents of the University of California v. Bakke, is unpersuasive because, contrary to Sandoval's assertion, Bakke never held that there existed clear congressional intent to limit the scope of Title VI to intentional discrimination. Conversely, prior Supreme Court caselaw has never held that disparate-impact regulations are valid. Rather, an analysis under the holding of Chevron U.S.A. v. Natural Resources Defense Council is the only appropriate tool with which to prove the validity of disparate-impact regulations.

INTRODUCTION

Environmental justice is a movement that attempts to forge conceptual and legal connections between the fundamentally intertwined social problems of race/class discrimination and environmental protec-

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I would also like to acknowledge the formative influence of my family, along with my past professors and current colleagues at the College of the Holy Cross. This Note would not have been possible without the critical skills and motivating passion they continue to impart.

Ad Majorem Dei Gloriam.
Although civil rights and environmentalism are both viewed as progressive movements, many argue that their work has traditionally conflicted with one another. In recent decades, however, these ideological camps have recognized their common goals and approaches, giving rise to a hybrid, yet independent, environmental justice movement.

Civil rights advocates, and the more recently galvanized environmental justice movement, recognize that poor, minority communities are exposed to a disproportionately greater share of environmental hazards than affluent, Caucasian neighborhoods—not because of in-


2 See, e.g., Guana supra note 1, at 3 n.5; Kaswan, supra note 1, at 389 & n.2. "The historical tension between the civil rights and environmental movements has left the civil-rights-based environmental justice movement with an unsurpassing skepticism of environmental laws." Id. at 389; see also Richard J. Lazarus, Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection, 87 Nw. U. L. REV. 787, 788–89 (1993) [hereinafter Lazarus, Pursuing Environmental Justice]. Lazarus writes that during the emergence of environmentalism as a legally and politically potent force in the 1970s, "environmentalists were seen as ignoring both the 'urban environment' and the needs of the poor in favor of seeking government assistance to avoid the unpleasant externalities of the very system from which they themselves [had] already benefited so extensively." Id. at 788 (quoting Peter Marcuse, Conservation for Whom?, in ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA 73, 75 (James N. Smith ed., 1974)). It has been argued that this disturbing reality went unnoticed because 1970s environmentalism found its structural and moral grounding in the civil rights movement of previous decades. See id. at 789 & n.10. Accordingly, the cognitive dissonance aroused by the charge that the two progressive movements were at odds was possibly too great to allow recognition of this reality in the minds of many 1970s environmentalists. See id. at 789 & n.11.

3 Kaswan, supra note 1, at 389 ("The emergence of the environmental justice movement has prompted the traditional civil rights and environmental movements to confront each other's traditions, expectations, aspirations, and modes of action.").

vidious racism, but as a result of neutral decisions made within intrinsically biased decision-making structures. These “disparate impacts” can be observed in three contexts: (1) disparate siting and permitting of hazardous facilities; (2) disparate enforcement of environmental laws; and (3) disparate clean-up of contaminated sites. In seeking to alleviate and prevent environmental harm from accruing to poor, minority communities, environmental justice practitioners rely heavily upon private litigation, but also attempt to influence the way policymakers conduct their administrative decision-making. Additionally, negotiation has begun to emerge as a viable alternative for citizen groups seeking to prevent or minimize the environmental harm suffered by their communities.

Some recent litigation has focused on employing Title VI of the Civil Rights Act of 1964 (Title VI) and the Environmental Protection Agency (EPA) regulations enacted in accordance therewith. Title VI is divided into two operative parts: (1) section 601 creates a general prohibition against discrimination by barring recipients of federal money from subjecting beneficiaries to discrimination on the basis of race; and (2) section 602 directs that all federal agencies responsible for administering federal funds shall implement regulations that “effectuate the provisions of section 601.” In 1973, pursuant to the congressional mandate of section 602, EPA promulgated regulations that both prohibited intentional racial discrimination by recipients of EPA funding.

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5 See Guana, supra note 1, at 29–32.
6 See id. at 31–34.
7 See id. at 34–36.
8 See id. at 36–38.
9 See generally Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Miller v. City of Dallas, 2002 WL 230834 (N.D. Tex. Feb 14, 2002). Both cases provide a general introduction to the breadth of issues involved in environmental justice litigation, and illustrate the variety of claims that can be raised. For cases built specifically around Title VI causes of action, see infra Part I.B.2.
13 40 C.F.R. §§ 7.10–120.
16 40 C.F.R. §§ 7.30, 7.35(a).
as well as the use of "criteria or methods" having the effect of subjecting individuals to discrimination because of their race.17

The Title VI means toward achieving environmental justice, however, has been short lived.18 Initially, litigants attempted to directly enforce EPA's so-called "disparate-impact regulations" by claiming the existence of an implied private right of action.19 When the Supreme Court in Alexander v. Sandoval20 held that no implied private right of action existed to enforce these regulations, litigants turned to § 198321 to allege that siting decisions having a disparate impact deprived plaintiffs of federal rights secured under EPA disparate-impact regulations.22 This approach too has been severely curtailed, most recently by the Third Circuit,23 which held that EPA disparate-impact regulations create no right enforceable under § 1983.24 Although the Supreme Court has yet to decide whether disparate-impact regulations can create rights enforceable under § 1983,25 many commentators have signaled that Title VI has now been effectively foreclosed as a private avenue of attack in the litigious crusade toward environmental justice.26 Furthermore, Sandoval has been read to cast severe doubt upon the validity of Title VI disparate-impact regulations in and of themselves,27 which would eradicate any efforts to administratively enforce these regulations through agency processes.28

17 40 C.F.R. § 7.35(b). Throughout this Note, these, and similarly constructed regulations, are referred to as "disparate-impact regulations."
19 See infra Part I.B.2.
22 See infra Part I.B.2.d.
23 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) [South Camden III].
24 See infra Part I.B.2.d.
25 They have, however, come extremely close. See Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (holding that in order for spending legislation to create enforceable rights under § 1983, Congress must provide clear and unambiguous language indicating their intent to create individual rights against any state actor that accepts federal funds).
26 See Core, supra note 18, at 239-42.
27 See infra note 206 and accompanying text.
28 Over forty administrative agencies aside from EPA have promulgated disparate-impact regulations pursuant to their asserted authority under Title VI. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 619 (1983) (Marshall, J., dissenting). As such, the long-
This Note will argue, however, that while Sandoval\textsuperscript{29} and South Camden Citizens in Action v. New Jersey Department of Environmental Protection (South Camden III)\textsuperscript{30} have stripped Title VI regulations of both an implied right of action and § 1983 enforceable rights, EPA's Title VI regulations still remain valid federal law under well established principles of judicial deference to administrative interpretations of ambiguous statutes.\textsuperscript{31} Part I of this Note examines a brief history of disparate-impact environmental justice litigation. Part II next explores case law bearing upon the validity of disparate-impact regulations promulgated pursuant to Title VI. Part III.A then rejects the assumption that the validity of these regulations is already a settled issue, and Part III.B refutes the counter-assumption—implicitly sanctioned by Sandoval—that under prior case law such regulations are invalid. After having dismissed both these assumptions, Part III.C outlines a basic Chevron\textsuperscript{32} analysis of Title VI disparate impact regulations. Having done so, this Note ultimately concludes that Congress has not expressed a clear and unambiguous intent to limit the scope of Title VI to purposeful discrimination. Therefore, under the holding of Chevron U.S.A., a court is constrained to defer to permissible agency constructions of the statute.\textsuperscript{33} Assuming then that EPA's disparate-impact regulations are permissible constructions of Title VI, they are valid federal law, despite Sandoval's implied assertions to the contrary.

I. A BRIEF HISTORY OF ENVIRONMENTAL JUSTICE UNDER TITLE VI

A. The Structure of Title VI and EPA's Disparate-Impact Regulations

Title VI of the Civil Rights Act of 1964 was designed to prohibit racial discrimination by entities receiving federal financial assistance.\textsuperscript{34} Title VI is divided into two operative components: section 601 and section 602.\textsuperscript{35} Section 601 prohibits racial discrimination by recipients of federal funds.\textsuperscript{36} Section 602 gives this proscription effect by

\textsuperscript{29} Alexander v. Sandoval, 532 U.S. 275, 293 (2001).
\textsuperscript{30} South Camden III, 274 F.3d 771, 774 (3d Cir. 2001).
\textsuperscript{32} See id.
\textsuperscript{33} See id.
\textsuperscript{35} Id.
\textsuperscript{36} 42 U.S.C. § 2000d (2000) ("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
requiring that all agencies empowered to distribute federal funding issue regulations designed to "effectuate the provisions" of section 601. These regulations must also be "consistent with achievement of the objectives of the statute authorizing the financial assistance."

Pursuant to the congressional command of section 602, in 1973 EPA promulgated a regulation that prohibits recipients of EPA funds—state environmental protection agencies, for example—from using "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 . . . ." The regulation thereby alleviates the traditional plaintiff's burden of proving intent, which exists when bringing actions under the Fourteenth Amendment's Equal Protection Clause. Under EPA's so-called "disparate-impact regulations," proof of a disparate impact is alone sufficient to meet the plaintiff's burden. Given the difficulty of proving discriminatory intent, especially in the context of industrial permitting decisions, environmental justice practitioners have viewed EPA's disparate-impact regu-
lations as a new weapon against the effects of systemic environmental discrimination.44

B. Enforcement of EPA's Disparate-Impact Regulations

1. Administrative Enforcement

If a private individual believes he or she has suffered a discriminatory effect as a result of action taken by a recipient of EPA financial assistance, EPA's regulations allow that person to file a complaint with the EPA Office of Civil Rights (OCR).45 Upon filing, the complaint will be investigated for acceptance.46 If accepted, OCR will notify the alleged recipient violator and complainant and give the recipient a chance to respond to the complaint in writing, after which time informal resolution will be attempted.47 If a complaint cannot be resolved informally, OCR will then serve the recipient with "notice of preliminary finding of noncompliance," which will contain recommendations for achieving voluntary compliance.48 The recipient may then either agree to these recommendations, send a written rebuttal of the preliminary findings, or respond with an explanation stating that compliance can be achieved in a way other than that recommended by OCR.49 If the recipient does not take one of these actions, OCR will then send a formal written determination of noncompliance to the recipient.50 After this time, the recipient has ten days from receipt of the formal determination of noncompliance to attain compliance.51 After ten days, OCR may begin funding-termination procedures.52

OCR was created in 1993 in response to President William J. Clinton's Executive Order 12,898,53 which was designed to prod fed-

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44 See, e.g., Latham Worsham, supra note 4, at 644-46 (2000); Bradford C. Mank, Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs, 24 COLUM. J. ENVTL. L. 1, 12 (1999) ("Because plaintiffs have been unsuccessful thus far in winning environmental discrimination claims under the Equal Protection Clause, advocates have turned the focus to Title VI of the Civil Rights Act because it allows claims based on proof of unjustified disparate impacts.").
45 40 C.F.R. § 7.120 (2002).
46 Id. § 7.120(d)(1)(i).
47 Id. § 7.120(d)(1)(ii)–(d)(2)(i).
48 Id. § 7.115(c)(1)(i)–(ii).
49 Id. § 7.115(d)(1)–(2).
50 Id. § 7.115(d)(2).
52 Id.; id. § 7.130 (outlining procedures for funding termination).
eral agencies into taking affirmative steps toward meeting their Title VI obligations. Nevertheless, the OCR complaint process has been criticized as extremely inefficient. Between September, 1993 and August, 1998, OCR received fifty-eight complaints and responded to only four. Of these four, only one was decided on the merits. Environmental justice litigators have accordingly learned to look elsewhere for satisfaction of their clients' grievances by following two traditional paths to federal court: one path contemplates a suit based on an implied private right of action under EPA's disparate-impact regulations, and the other contemplates reliance upon § 1983. Both these paths, however, have been closed through a series of unfavorable federal court decisions.

2. Court Enforcement

There are two central questions that any private litigant needs to ask before asserting a cause of action under any statute: what behavior does the statute proscribe, and is the statute privately enforceable? With respect to Title VI, the Supreme Court first began to wrestle with these questions in Regents of the University of California v. Bakke and Cannon v. University of Chicago. Stating that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment," the Bakke Court appeared to declare that Title VI prohibited only intentional acts of discrimination. Later, in Cannon, the Court answered the second question and ruled that Title VI created a private right of action. In 1983, however, Guardians Association v. Civil Service Commission seemed to reopen the Bakke debate over whether intent was a necessary element of an implied Title VI right of action. Two years later in Alexander v.

54 Latham Worsham, supra note 4, at 647–48.
55 Id.
56 Id.
57 St. Francis Prayer Ctr. v. Mich. Dep't of Envtl. Quality, EPA File No. 5R-98-R5, http://www.epa.gov/civilrights/docs/ssdec_ir.pdf (last visited Oct. 26, 2003). This case, also known as Select Steel, was decided adversely to the plaintiffs. Id.
58 See infra Part I.B.2.a–b, d.
59 See infra Part I.B.2.c–d.
62 See Bakke, 438 U.S. at 287. But see discussion infra Part III.B.
63 Cannon, 441 U.S. at 694–703.
65 Id. at 583–607. In Guardians Association, a deeply divided Supreme Court handed down five conflicting and overlapping opinions on the scope of Title VI, rather than
Choate, the Court mercifully clarified the *Guardians Association* decision by identifying a “two pronged holding on the nature of the discrimination proscribed by Title VI [that had] emerged in [Guardians Association].” The *Choate* Court interpreted *Guardians Association* as having declared that “Title VI itself directly reach[es] only instances of intentional discrimination,”—and could be enforced privately according to the holding in *Cannon*—but that “actions having an unjustifiable disparate impact on minorities [could] be redressed through agency regulations designed to implement the purposes of Title VI.” The question still remained, however, as to whether these disparate-impact regulations could be enforced in court by private parties. The first case to take up that question in the arena of environmental justice was *Chester Residents Concerned for Quality Living v. Seif (Chester Residents).*

a. Chester Residents: *The First Court Victory for EPA’s Disparate-Impact Regulations*

*Chester Residents* involved a claim of disparate-impact discrimination against the Pennsylvania Department of Environmental Protection for issuing a permit to a waste processing facility in a predominantly black community. Plaintiffs alleged that the issuance of the permit violated EPA’s disparate-impact regulations. In ruling for the

unanimously accepting *Bakke’s* declaration of Title VI’s coextensiveness with the Equal Protection Clause. *Id.* (White, J.); *id.* at 607–12 (Powell, J., concurring); *id.* at 612–15 (O’Connor, J., concurring); *id.* at 615–35 (Marshall, J., dissenting); *id.* at 635–45 (Stevens, J., dissenting). Commenting upon the five opinions handed down, Justice Powell remarked, “[o]ur opinions today will further confuse rather than guide.” *Id.* at 608 (Powell, J., concurring).


67 *Id.* While an apparently simple opinion, *Choate*, in conjunction with *Bakke* and *Guardians Association*, has created immense confusion and debate regarding the scope and enforceability of Title VI. See discussion infra Part III.A–B.

68 See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 929–31 (3d Cir. 1997), vacated as moot, 524 U.S. 974 (1998) (declining to hold that *Guardians Association* and *Choate* had already created a private right of action to enforce disparate-impact regulations). The court wrote: "*Guardians* did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602." *Id.* at 929. The court also later writes, “we find no direct authority in *Alexander* [v. *Choate*] that either confirms or denies the existence of a private right of action.” *Id.* at 931; see also *Choate*, 469 U.S. at 289–309 (declining to explicitly address the issue of whether an implied right of action exists to enforce disparate-impact regulations).

69 132 F.3d at 932.

70 *Id.* at 927.

71 *Id.*
residents, the court first found that there was no Supreme Court precedent as to whether an implied right of action existed under EPA's disparate-impact regulations, nor any precedent within the Third Circuit.72 Instead, to determine whether such an implied right existed in the present case, the court relied on its own three-prong test for locating implied rights of action within regulations.73 Applying its test, the court held that private plaintiffs could maintain an action under disparate-impact regulations promulgated pursuant to Title VI.74 While on certiorari to the Supreme Court, however, Pennsylvania withdrew the challenged permits.75 The Supreme Court dismissed the case as moot and vacated the Third Circuit's decision,76 leaving the lower courts to continue in their almost universal trend of finding implied rights of action to enforce disparate-impact regulations promulgated under Title VI.77

b. South Camden I: The Last Court Victory for EPA's Disparate-Impact Regulations

The next significant case to imply a private right of action to enforce EPA's disparate-impact regulations—significant because it was the last—also emerged from the Third Circuit.78 South Camden Citizens in Action v. New Jersey Department of Environmental Protection (South Camden I)79 involved a particularly weighty illustration of disparate-impact discrimination. The complaint arose from the granting of a Clean Air Act permit to the St. Lawrence Cement Company (SLC) to operate a cement plant in the Waterfront South neighborhood of Camden.80 Out of the 2132 per-

72 Id. at 929-33.
73 Id. at 933-36. This test was built upon the Supreme Court's test for locating implied causes of action within statutes—the familiar Cort test. Id.; Cort v. Ash, 422 U.S. 66, 78-85 (1975).
75 Core, supra note 18, at 206 (2002).
77 See Core, supra note 18, at 205 & n.86 (citing cases also finding an implied right of action, both within and outside of the environmental justice context); see, e.g., Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999).
78 S. Camden Citizens in Action v. N.J. Dep't of Envil. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001) [South Camden I]. Five days later, the Supreme Court in Alexander v. Sandoval indirectly denied the South Camden I plaintiffs the only theory of their case by ruling upon an unrelated action also involving an implied cause of action asserted under the Department of Justice's own disparate-impact regulations. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001).
79 South Camden I, 145 F. Supp. 2d at 446.
80 Id. at 450-52.
sons living in Waterfront South, 91% were minorities—63% African-American, 28% Hispanic. Additionally, over half the residents in Waterfront South lived at or below the federal poverty line—the median household income in Waterfront South was $15,082. At the time the permit was granted, the tiny minority neighborhood was already home to five EPA-permitted industries, two Superfund sites, four sites suspected of releasing hazardous substances and was being investigated by EPA for possible addition to the Superfund list, and fifteen other contaminated sites as identified by the New Jersey Department of Environmental Protection (NJDEP). Not surprisingly, the residents of Waterfront South suffer alarmingly poor health.

Within this milieu, the permit granted to SLC allowed the plant to emit into the air cement dust, mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulphur oxides, and volatile organic compounds. Although the permitted amounts of each of these hazardous substances met EPA's National Ambient Air Quality Standards, testimony accepted into evidence indicated that due to the cumulative impact of the multiple permitted facilities in the Waterfront South neighborhood, addition of the new cement plant would increase the overall death rate, among other deleterious health effects, by at least 1.2%, and among individuals already suffering from cardiovascular and respiratory disease, by at least 1.6%.

The court made two primary findings in granting plaintiff's motion for a preliminary injunction and vacating NJDEP's issuance of permits to SLC: (1) NJDEP's failure to consider evidence beyond SLC's compliance with technical emissions limitations, such as the totality of the circumstances within which the plant would operate—namely, the racial composition of the neighborhood and environmental burden already carried by the neighborhood—alone constituted a violation of EPA's Title VI regulations; and (2) the citizens had established a prima facie case of disparate-impact discrimination based on race and national origin—a violation of 40 C.F.R. § 7.35(b) for which they had standing to sue.
In reaching this decision, the district court first reiterated the Third Circuit’s holdings in *Chester Residents* and *Powell v. Ridge*\(^\text{90}\) that an implied private right of action existed to enforce disparate-impact regulations promulgated by EPA, and accordingly considered itself bound by these decisions.\(^\text{91}\) The *Camden I* court, however, made this declaration of *stare decisis* with an eye toward the future, noting that a pending Supreme Court decision could potentially overturn its ruling and earlier circuit court precedent allowing implied private rights of action under 40 C.F.R. § 7.35(b).\(^\text{92}\) Indeed, five days later, the Supreme Court in *Alexander v. Sandoval* swept the legs out from underneath the Third Circuit’s decision.\(^\text{93}\)

c. Sandoval Closes Avenues for Private Redress of Disparate-Impact Discrimination

*Sandoval* turned a significant amount of persuasive circuit court precedent on its head when it held that private individuals may not sue to enforce disparate-impact regulations.\(^\text{94}\) Justice Scalia, writing for the 5–4 majority, began with a reiteration of what the previous line of Supreme Court Title VI cases had thus far proclaimed: (1) "[p]rivate individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages";\(^\text{95}\) and (2) "§ 601 prohibits only intentional discrimination."\(^\text{96}\) The Court then went on to note that it had never held that a private right of action existed to enforce disparate-impact regulations.\(^\text{97}\)

Examining the question then as an issue of first impression, the Court first rebutted the argument that just because a private right of action exists to enforce Title VI’s section 601 prohibition against intentional discrimination, then by extension, a private right of action must exist to enforce disparate-impact regulations promulgated under

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\(^{90}\) 189 F.3d 387 (3d Cir. 1999).

\(^{91}\) *South Camden I*, 145 F. Supp. 2d at 473–74.

\(^{92}\) See id.


\(^{94}\) *Id.*

\(^{95}\) *Id.* at 279–80 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979)).


\(^{97}\) *Id.* at 282–84 (clarifying the holdings of *Cannon* and *Guardians Association*, which respondents assert had established a private right of action to enforce disparate-impact regulations). "Neither [*Guardians Association*], nor any other [case] in this Court, has held that the private right of action exists." *Id.* at 284.
I. The command of section 602.  The Court reasoned that it could not make this assumption because "disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits," and therefore [it is] clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations. Therefore, the only remaining statutory source from which an implied right of action to enforce disparate-impact regulations could arise would be section 602.

Turning then to the text and structure of section 602, the Court searched to see whether Congress intended to create a private right of action to enforce section 602. The search of section 602 "reveal[ed] no congressional intent to create a private right of action." The implicit reasoning was twofold. First, section 602 contains no "rights creating language." Whereas section 601 speaks directly of the persons it intends to benefit, "[section 602] focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." Such statutes that are "twice removed" create "no implication of an intent to confer rights on a particular class of persons." Second, the Court found that the administrative methods section 602 provides for enforcing regulations promulgated thereunder manifest a lack of congressional intent to

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98 Id. at 284-86.
99 This, and other comments in Sandoval, indicate the Supreme Court's unspoken view that disparate-impact regulations are not authorized under Title VI. See John Arthur Laufer, Note, Alexander v. Sandoval and Its Implications for Disparate Impact Regimes, 102 Colum. L. Rev. 1613, 1628-41 (2002) (explaining how Sandoval's "unofficial holding" was to invalidate disparate-impact regulations as beyond agency authority under Title VI). But see id. at 1630 (LavStudent, Alexander v. Sandoval (Cal. 1981)).

100 Sandoval, 532 U.S. at 285.
101 Id. at 286 ("[The right to enforce disparate-impact regulations] must come, if at all, from the independent force of § 602.").
102 Id. at 288 ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."). The dissent notes that this approach ignores the more searching four factor test the Court outlined in Cort v. Ash and used in that case, and several subsequent, to determine when it is appropriate to imply a private right of action from a statute. Id. at 311-12 (Stevens, J., dissenting); see also Cort v. Ash, 422 U.S. 66, 78-85 (1975).

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103 Id. at 289 ("Far from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuat[ing]' rights already created by § 601.").
104 See id. at 288.
105 See id. at 289.
106 Sandoval, 532 U.S. at 289 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).
create a private remedy.\(^{107}\) As such, because a regulation cannot create a private right of action not contemplated by its authorizing statute, there exists no private right of action to enforce disparate-impact regulations promulgated under section 602.\(^{108}\)

d. South Camden II and III: § 1983 Cannot Operate as an End-Run Around Sandoval

The Court’s unrelated decision in Sandoval implicitly overruled the decision reached five days earlier in South Camden I.\(^{109}\) The heretofore unanswered question had been resolved: private parties cannot bring suit to enforce Title VI disparate-impact regulations.\(^{110}\) Still unresolved, however, was the question of whether a suit could be brought against state actors under § 1983,\(^{111}\) under the theory that failure to abide by federal disparate-impact regulations is a prohibited deprivation of rights secured by federal law. In the afternoon of the day that Sandoval was decided, the South Camden I district judge asked the South Camden Citizens and NJDEP to brief that very question,\(^{112}\) and then ruled in South Camden Citizens in Action v. New Jersey Department of Environmental Protection (South Camden II) that § 1983 did, indeed, provide relief for a violation of EPA’s disparate-impact regulations.\(^{113}\)

As an initial matter, the district court reasoned that Sandoval had not foreclosed the possibility of asserting a § 1983 claim for denial of

\(^{107}\) Id. at 289–90. “The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” Id. at 290.

\(^{108}\) Id. at 291 (“[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.”).

\(^{109}\) Sandoval, 532 U.S. at 293.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

\(^{112}\) Id. Justice Stevens in his dissent in Sandoval had raised the possibility of private parties using the express cause of action created by Congress in § 1983 to seek redress for violations of section 602 regulations. See Sandoval, 532 U.S. at 299–300 (Stevens, J., dissenting).

\(^{113}\) South Camden II, 145 F. Supp. 2d at 509.
rights secured by EPA’s regulations because Sandoval had not specifically addressed that question or held otherwise. The court then went on to explain that in order to determine whether § 1983 was available to remedy a statutory violation, the plaintiff must “assert the violation of a federal right, not merely a violation of federal law.” In determining whether federal statutes create individual rights, courts typically apply the three-part analysis articulated in Blessing v. Freestone. Here, however, before being able to focus the Blessing test on an agency regulation, the court first had to address the threshold question of whether agencies are even capable of independently creating rights. According to the holding in Wright v. City of Roanoke and its progeny, the court reasoned that agencies were indeed capable of creating rights through their rule-making power. Turning then to a Blessing analysis of EPA’s section 602 regulations—and treating them as if they were statutes—the court held that they created a personal right to be free from disparate-impact discrimination. Accordingly, NJDEP’s failure to abide by EPA’s disparate-impact regulations created a deprivation of this right, and was therefore actionable under § 1983.

This victory was short lived, however, as the Third Circuit quickly reversed the district court’s decision and held that Sandoval had implicitly foreclosed the use of § 1983 to enforce EPA’s disparate-impact regulations. As an initial matter, the court distinguished Wright as involving a regulation that merely defined the specific right that Congress had already conferred via statute. Accordingly, the determination of whether a regulation contains a right enforceable under

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114 See id. at 513–19. The court undertook an examination of what Sandoval did and did not hold with Justice Scalia’s “admonition” clearly in mind that courts are “bound by holdings, not language.” Id. at 513.

115 Id. at 519 (quoting Blessing v. Freestone, 520 U.S. 329, 340 (1997) (citation omitted)).

116 Id. The three parts of the Blessing test are: (1) congressional intent that the provision benefit the plaintiff; (2) demonstration that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. Id. (citing Blessing, 520 U.S. at 340–41).

117 Id. at 526.


119 Id. at 535–47.

120 Id. at 549.

121 Id.

122 South Camden III, 274 F.3d 771, 774 (3d Cir. 2001).

123 Id. at 782–83 (citing Wright, 479 U.S. at 430–31 & n.11).
§ 1983 turns upon the question of whether that right had originally been created by statute, not whether the regulation itself creates the right according to a Blessing analysis.124

Using Sandoval as a guide, the court then examined whether section 602 creates a right against disparate-impact discrimination.125 Quoting Sandoval, the court stated, "§ 602 limits agencies to ‘effec­tuat[ing]’ rights already created by § 601."126 Therefore, the court reasoned that since Sandoval had already determined that the only right conferred by section 601 was a right to be free from intentional discrimination, section 602 did not create an additional right to be free from disparate-impact discrimination.127 "Accordingly," the court wrote, "if there is to be a privately enforceable right under Title VI to be free from disparate-impact discrimination, Congress, and not an administrative agency . . . must create this right."128

II. EXAMINING THE VALIDITY OF EPA’s DISPARATE-IMPACT REGULATIONS

Even though the Supreme Court has never explicitly addressed whether 40 C.F.R. § 7.35(b) creates an enforceable right under § 1983,129 many commentators have viewed Alexander v. Sandoval and South Camden

124 See id. at 782–83, 788–91.
125 See id. at 788–91.
126 See id. at 789 (citing Alexander v. Sandoval, 532 U.S. 275, 289 (2001)).
127 See id. at 789–91. Justice Stevens, dissenting in Sandoval, disagreed with this narrow reading of section 602's language. See infra note 292.
128 South Camden III, 274 F.3d at 790. This holding echoes language found in Sandoval: "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." Alexander v. Sandoval, 532 U.S. 275, 291 (2001).
129 As mentioned, however, in note 25, supra, a recent Supreme Court decision outside the Title VI context has effectively foreclosed § 1983 enforcement of any "right" to be free from disparate-impact discrimination. See Gonzaga Univ. v. Doe, 536 U.S. 273, 282–86 (2002). The Gonzaga Court, in ruling that the Family Educational Rights and Privacy Act’s nondisclosure provisions did not establish an individual right enforceable through § 1983, held the following: "[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." Id. at 283. The Court also held that, "the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute ‘confer[s] rights on a particular class of persons.’" Id. at 285 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)). Gonzaga thereby implicitly validated the Third Circuit’s approach of relying upon the Sandoval analysis in its search for § 1983 enforceable Title VI rights. See discussion supra Part I.B.2.d.
III as having signaled the end of private Title VI disparate-impact litiga­
tion. 130

Assuming *arguendo* that the courts have been closed to private liti­
gants seeking enforcement of EPA's disparate-impact regulations, there
still exist extra-judicial means of leveraging these regulations for the
benefit of minority communities. Most clearly, administrative redress
through OCR, while ineffective in the past, still remains a potential
source of empowerment. For example, former Administrator Christine
Todd Whitman has signaled EPA's renewed commitment to Environ­
mental Justice. 131 Time will tell what effect this reaffirmation will have
upon the future of the OCR complaint process. In the meantime,
scholars have begun to seek alternative and novel applications for EPA's
disparate-impact regulations. 132

But before EPA's section 602 regulations can be useful to anyone
in any context, it is necessary to explore in detail the threshold issue
ignored by the previous line of cases: whether EPA's disparate-impact
regulations are in and of themselves valid law. In other words, does
EPA have the legal authority to terminate a recipient's funding under
40 C.F.R. § 7.35(b) if that recipient has used "criteria or methods of

130 See Lisa S. Core, supra note 18, at 239-42.
131 See Kevin A. Gaynor & Benjamin S. Lippard, Environmental Enforcement: Industry
(notting that in the summer of 2001, Administrator Whitman created a special task force
within the Office of Enforcement and Compliance Assurance to address OCR's backlog of
Title VI complaints).
132 In particular, two articles have recently noted that section 110(a)(2)(E) of the
Clean Air Act raises potentially sweeping environmental justice permitting implications.
George Hays & Nadia Wetzler, Federal Recognition of Variances: A Window into the Turbulent
Relationship Between Science and Law Under the Clean Air Act, 13 J. ENVTL. L. & LITIG. 115,
126-27 (1998); Richard J. Lazarus & Stephanie Tai, Integrating Environmental Justice into EPA
Permitting Authority, 26 ECOLOGY L.Q. 617, 632-33 (1999). Section 110 governs the submis­
sion of state implementation plans (SIPs) to the EPA, and describes the minimum re­
quirements that each SIP must meet in order to receive EPA approval. 42 U.S.C.
§ 7410(a)(2)(E) (2000). Section 110(a)(2)(E) requires that each SIP shall "provide neces­
sary assurances that the state . . . is not prohibited by any provision of Federal or State
law from carrying out such implementation plan or portion thereof." Id. Lazarus and Tai
write:
To the extent that Title VI of the Civil Rights Act constitutes "any provision of
Federal . . . law" within the meaning of Section 110(a)(2)(E), this CAA provi­
sion may provide EPA with both authority and responsibility to ensure that
SIPs, including their permitting provisions, do not result in the kind of dispa­
rate environmental results Title VI condemns.
Lazarus & Tai, supra, at 633 (emphasis added).
administering its program which have the effect of subjecting individuals to discrimination”?133

The validity of all administrative agency disparate-impact regulations have heretofore been largely justified on the basis of now questionable readings of *Guardians Association v. Civil Service Commission* and *Alexander v. Choate*.134 The Court in *Sandoval* has dismissed these readings, and implicitly called into doubt whether disparate-impact regulations promulgated pursuant to Title VI are valid exercises of administrative discretion.135 Accordingly, because the validity of disparate-impact regulations can no longer be supported by prior case law,136 all that remains as a means of evaluating their validity is an independent analysis according to basic principles of administrative law. It is to this discussion that we now turn.

A. Judicial Review of Administrative Interpretations—The Chevron Two-Step Analysis

*Chevron U.S.A. v. Natural Resources Defense Council*137 is a watershed case138 that stands for the principal of judicial deference to reasonable administrative interpretations of ambiguous statutes.139 *Chevron U.S.A.* arose out of a dispute concerning EPA’s definition of the statutory term “stationary source” contained within the Clean Air Act Amendments of 1977.140 The original Clean Air Act (CAA) of 1970 estab-

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133 40 C.F.R. § 7.35(b) (2002).
135 *See infra* notes 206, 230 and accompanying text.
136 *See discussion infra* Part IIIA.
138 The test that *Chevron* elucidated was not new, but firmly rooted in long established precedent. *See id.* at 843–46 & nn.12–14. Specifically, the Court noted that, “[t]he principle of deference to administrative interpretations ‘has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies . . . .’” *Id.* at 844. Further, “[i]f this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).
139 *See Chevron U.S.A.*, 467 U.S. at 842–44.
140 *Id.* at 839.
lished a cooperative federal-state enforcement framework that remains in effect today.\textsuperscript{141}

In 1977, faced with nonattainment of the National Ambient Air Quality Standards (NAAQS) in several states, Congress passed the Clean Air Act Amendments of 1977.\textsuperscript{142} Section 172(b)(6)\textsuperscript{143} of the amendments directed every state to create a State Implementation Plan (SIP) requiring every new "major stationary source" in a nonattainment area to receive a permit for construction and operation that certified the satisfaction of a set of stringent emissions criteria designed to bring the state's air quality into NAAQS thresholds.\textsuperscript{144} The source of the controversy, however, was that the statute did not define the meaning of the term "major stationary source" as found in section 172(b)(6).\textsuperscript{145} Accordingly, in 1981, EPA chose to define the term according to a "bubble concept."\textsuperscript{146} The bubble concept treated all pollutant-emitting activities belonging to a single industrial grouping and located on contiguous or adjacent property as a single "stationary source" for purposes of the section 172(b)(6) requirements.\textsuperscript{147} Under this plant-wide definition of "station-
ary source," an existing plant that contained several pollution-emitting devices is able to install or modify one piece of equipment without meeting the permit conditions of section 172(b)(6) so long as such modification does not result in a net increase in overall emissions from the plant.148

The Natural Resources Defense Council (NRDC) challenged149 EPA's "bubble concept" definition of "stationary source" as contrary to the purpose of the nonattainment program, which was to bring the air quality of nonattainment regions within NAAQS thresholds.150 The Court of Appeals for the District of Columbia agreed with NRDC, first deciding that (1) the statute "does not explicitly define what Congress envisioned as a 'stationary source ...'; and (2) the precise issue was not "squarely addressed in the legislative history."151 Accordingly, the court of appeals reasoned that "the purposes of the nonattainment program should guide" their decision.152 In the court's view, this purpose was to improve air quality.153 In light of earlier precedent, the court stated that the bubble concept was appropriate for programs designed to maintain air quality, but was inappropriate for a program designed to improve air quality.154

On review, the Supreme Court laid out the now familiar "Chevron two-step" analysis.155 To properly review an agency's regulation for validity, the court must ask two questions.156 First, has Congress directly spoken to the precise question at issue?157 If the intent of Congress is clear and unambiguously expressed, the court and agency are required to give it effect, and cannot impose their own construction.158

more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) . . . " 40 C.F.R. § 51 (j) (l)(ii) (1983).

148 Chevron U.S.A., 467 U.S. at 840. A stationary source is considered modified only if such modification results in an increase in emissions. 42 U.S.C. § 7411(4). Therefore, since an entire plant is considered a stationary source, if one component within the plant has an increase in emissions, but there are equivalent offsetting reductions elsewhere in the plant, the entire stationary source (i.e. the plant) has not been modified, and will not fall under the permitting requirements of section 172(b)(6), currently codified at 42 U.S.C. § 7502(b)(6).

149 The challenge was brought pursuant to 42 U.S.C. § 7607(b)(1).


151 Id. at 841 (citing Natural Res. Def. Council v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982)).

152 Id.

153 Id. at 841–42.

154 Id.

155 Id. at 842–43.

156 Chevron U.S.A., 467 U.S. at 842–43.

157 Id.

158 See id. at 842–43.
If, however, a court determines that the statute is "silent or ambiguous with respect to the specific issue"—or stated otherwise, that "Congress has not directly addressed the precise question at issue"—the court may not impose its own construction on the statute as it would in the absence of administrative interpretation. Instead, the court must move to the second step of the test and ask whether the agency regulation is a "permissible construction" of the statutory ambiguity. If the answer returned is yes, then the court is required to give the regulation deference. In deciding what constitutes a "permissible construction," the court does not have to agree with the construction employed by the agency, or find that the construction was the only one that could have been adopted—the construction need only be reasonable.

Applying the above test, the Court examined both the language of the statute and the legislative history, and concluded that the statute was silent as to the precise definition of "stationary source" and that Congress had not addressed the precise definition of the term in either floor or committee proceedings. Accordingly, the first step of the Chevron test was met: the intent of Congress as to the precise definition of "stationary source" had not been clearly and unambiguously expressed. Moving then to the second step of the test, the Court examined the competing policy interests of the Clean Air Act Amendments as identified in the legislative history—economic growth and environmental protection—and reasoned that EPA's interpretation of "stationary source" was a "permissible construction" in light of the competing policy choices between environmental protection and economic growth. As evidence of this fact, the Court noted that EPA's construction was supported by a reasonable belief that the regulation served both policy interests, pointing to EPA's rulemaking record, and several private studies contained therein. It was in this second step that the

159 Id. at 843. Indeed, this is the very error committed by the court of appeals: "The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition." Id.
160 Id. ("The question for the court is whether the agency's answer is based on a permissible construction of the statute.").
161 Id. at 843-44.
162 See Chevron U.S.A., 467 U.S. at 843 n.11.
163 Id. at 848-53, 859-64.
164 See id. at 842-43. The court below had also correctly arrived at this conclusion. See id. at 841 (citing Natural Res. Def. Council v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982)).
165 See id. at 863-65.
166 See id.
court of appeals had erred, by second guessing the wisdom of EPA’s construction, rather than simply examining the reasonableness of EPA’s view that its construction was permissible in the overall context of the Clean Air Act Amendments.167

B. Refining the Chevron Two-Step Analysis

1. Chevron Step One

In determining whether Congress has expressed its clear and unambiguous intent, or if the statute is instead silent or ambiguous with respect to a particular question, Chevron U.S.A. directs that the “traditional tools of statutory interpretation” are to be used.168 An overwhelming number of cases has helped define what these tools are, and how courts use them.169 Four of these cases are included for the purposes of this Note.

In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (Sweet Home),170 the Supreme Court did not explicitly address Chevron step one,171 but did engage in a thorough application of the traditional tools of statutory interpretation that Chevron U.S.A. directs are to be

167 See id. at 845 ("[T]he question before [the court] was not whether in its view the [bubble] concept is ‘inappropriate’ in the general context of a program designed to improve air quality, but whether the Administrator’s view that it is appropriate in the context of this particular program is a reasonable one.").

When a challenge to an agency construction of a statutory provision . . . centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail . . .. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .

Id. at 866.


169 To be more exact, “overwhelming” translates into almost 7000 cases—the number of federal court decisions that have cited Chevron U.S.A. as of December 2001. Breyer et al., supra note 168, at 289.


171 See id. at 703–04. The Court implicitly held that the statute is ambiguous by stating: "Congress did not unambiguously manifest its intent to adopt respondents’ view . . . ." Id. The Court, however, did not engage in application of the traditional tools of statutory interpretation to decide this fact, so much as it used those tools to decide that the Secretary’s definition was a reasonable construction of the statute (Chevron step two). See id. at 697, 704. Whatever the correct reading of Sweet Home’s reasoning, the case nonetheless serves as an illustration of the tools that are to be used in Chevron step one. See Breyer et al., supra note 168, at 319, 363.
used in step one. Sweet Home was concerned with resolving the issue of whether the Secretary of the Interior’s definition of the Endangered Species Act’s (ESA) prohibition of “harm,” as including indirect, unintentional harm resulting from “significant habitat modification,” was within his authority under the ESA. In holding that the Secretary’s interpretation of the text was reasonable, the Court relied on three sources of support: (1) the ordinary understanding of the term in question as illustrated by dictionary definitions, (2) the underlying purpose of the statute, and (3) subsequent legislative action indicating congressional acquiescence to the Secretary’s then-existing interpretation. Furthermore, the Court found additional support from the legislative history of the Act for its conclusion that the Secretary’s definition rested on a permissible construction of the ESA.

An earlier case, MCI Telecommunications Corp. v. American Telephone & Telegraph Co., further explored the use of dictionary definitions in statutory interpretation. The dispute centered on the Communications Act’s phrase “modify any requirement.” The Federal Communications Commission interpreted this phrase, relying on a single divergent dictionary definition, as giving it the authority to completely exempt any long-distance carrier from the Communications Act’s tariff requirements. The Court reasoned that statutory ambiguity might exist when a selection between widely accepted alternative dictionary meanings can be made. Ambiguity is not created, however, in cases where the word in question is defined in a single, uniform manner in several dictionaries, and exists in only one dictionary with multiple alternative meanings. In such a situation, absent contrary indications provided by other tools of statutory construction, the meaning of the term is held to be that of universal dictionary usage, and agency deference is not appropriate.

172 See Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. at 697–708.
173 Id. at 690.
174 Id. at 697–98.
175 Id. at 698–700.
176 See id. at 700–01.
177 Id. at 704–08.
179 Id. at 220.
180 Id. at 220, 225–26.
181 Id. at 227.
182 See id. at 225–28.
183 See id.
In *Food & Drug Administration v. Brown & Williamson Tobacco*, the Court elaborated on the third tool of statutory construction used in *Sweet Home*—namely, subsequent legislative action—to find that Congress did not intend to grant the Food and Drug Administration (FDA) the authority to regulate tobacco products. The Court concluded that FDA authority to regulate tobacco would be inconsistent with the overall regulatory scheme established by the Food, Drug, and Cosmetic Act, as well as with subsequent tobacco-specific legislation enacted by Congress. The Court relied upon previous cases that had held that, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." The Court also drew upon a fundamental canon of statutory construction, "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

A set of tools similar to those used in *Sweet Home* were used in an earlier D.C. Circuit case, also involving environmental regulation. In *American Mining Congress v. United States Environmental Protection Agency*, petitioners argued that EPA’s redefinition of "solid waste," asserting Resource Conservation and Recovery Act (RCRA) jurisdiction over secondary materials reused within an ongoing industrial production process, was beyond EPA’s statutory authority. In reviewing RCRA, the court found that Congress had clearly expressed an intent that the statutory term “solid waste . . . be limited to materials that are ‘discarded’ by virtue of being disposed of, abandoned, or thrown away” and therefore, the challenged regulations were beyond statutory authority. The court arrived at this conclusion by utilizing four tools of statutory construction: (1) the language of the statute;
(2) the underlying purposes of the statute;\textsuperscript{193} (3) other provisions of the statute;\textsuperscript{194} and (4) the legislative history of the statute.\textsuperscript{195}

2. \textit{Chevron} Step Two

It is an almost universal assumption in administrative law that if a regulation passes \textit{Chevron} step one, then the agency will undoubtedly prevail on step two.\textsuperscript{196} Step one is where the battle occurs—to date, no Supreme Court decision has invalidated an agency rule on the ground that it fails step two by being an impermissible construction of an ambiguous statute.\textsuperscript{197}

A number of circuit courts, however, have overturned agency rulemakings as violative of step two.\textsuperscript{198} There are two competing conceptions of the scope of judicial review under step two, and are beyond the discussion of this Note.\textsuperscript{199} For the limited purposes here, however, it will be assumed that a future court inquiry into the validity of EPA's disparate-impact regulations will effectively begin and end with the decision that Title VI is ambiguous as to the meaning of "discrimination"—EPA passes step one, or alternatively, that the statute clearly expresses a congressional intent to limit the reach of Title VI to acts of intentional discrimination—EPA fails step one.\textsuperscript{200}

\textsuperscript{193} Id. at 1185–87. The court turned to this tool after expressing hesitance to "attribute decisive significance to the ordinary meaning of statutory language." Id. at 1184. Rather, the court accorded considerable, but not conclusive weight to the plain meaning of the statutory term "discarded." Id. at 1185.

\textsuperscript{194} Id. at 1187–89. "[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." Id. at 1187 (citing United States v. Morton, 467 U.S. 822, 828 (1984)). Further, the court added that "the structure of a statute, in short, is important in the sensitive task of divining Congress's meaning." Id.

\textsuperscript{195} Am. Mining Cong., 824 F.2d at 1190–93. The court, however, offers the proviso that legislative history is only useful in determining congressional intent in the presence of statutory ambiguity, and that where the statute itself is clear, legislative history bears weight only in the exceptional circumstances where the history clearly expresses an intent contrary to its language. Id. at 1190.

\textsuperscript{196} See \textsc{Breyer et al.}, supra note 168, at 290.

\textsuperscript{197} Id.

\textsuperscript{198} Id. at 290, 395–96.

\textsuperscript{199} Id. at 395–96.

\textsuperscript{200} For one possible \textit{Chevron} step-two analysis of 40 C.F.R. § 7.35(b), see Note. After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 HARV. L. REV. 1774, 1783-85 (2003).
III. Analysis: EPA’s Disparate-Impact Regulations Are A Valid Exercise of Regulatory Authority Under Title VI of the Civil Rights Act of 1964

Before undertaking a *Chevron* analysis of EPA’s disparate-impact regulations, the heretofore unrealized necessity of doing so requires elucidation. Despite many scholars’ pre-*Sandoval* assertions to the contrary, it is no longer sufficient to rest the validity of Title VI disparate-impact regulations upon dicta announced in *Guardians Association v. Civil Service Commission* and *Alexander v. Choate* given Alexander v. Sandoval’s thinly veiled hostility toward administrative assertions of authority to prohibit disparate impacts under sanction of Title VI.


202 Justice Stevens, dissenting in *Sandoval*, however, did point to the fact that a *Chevron* analysis would properly resolve the question of Title VI’s scope. See *Alexander v. Sandoval*, 532 U.S. 275, 309–10 (2001) (Stevens, J., dissenting). At least one case prior to *Sandoval* also noted the importance of *Chevron U.S.A.* in resolving the question of Title VI’s scope. *Harris v. James*, 127 F.3d 993, 1010 (11th Cir. 1997) (“determining the validity of the [disparate impact] regulation would require application of the analysis set out in [Chevron U.S.A.]”). Yet surprisingly, the author can find no cases that have actually set out to perform this analysis. A few scholars, however, have undertaken a *Chevron* analysis of Title VI. Barry Hill, *supra* note 134, at 507–16, was perhaps one of the first scholars to make such an attempt. His analysis, however, does not specifically employ the tools of statutory construction courts have used in performing *Chevron* analyses. *Hill, supra* note 134, at 507–09; *supra* Part II.B.1. Hill treats step two more extensively, but relies heavily upon the very line of cases subsequently called into question by *Sandoval*. See *id. at 509–16; Sandoval*, 532 U.S. at 281–82. A later, post-*Sandoval* student piece, offers a brief step-one analysis, and a step-two analysis rooted in caselaw-independent policy rationales. See *Note, supra* note 200, at 1782–85.

203 See *supra* note 134 (giving examples of literature that have used *Guardians Association* and *Choate* in support of the proposition that disparate-impact regulations are valid exercises of administrative authority under Title VI).


206 See *Sandoval*, 532 U.S. at 282 (“These statements [in *Guardians Association* and *Choate* that regulations promulgated under § 602 may validly proscribe activities having a disparate impact on racial groups] are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination . . .”); *infra* Part III.A. In a footnote responding to the dissent’s argument for the validity of disparate-impact regulations, *Sandoval* offers more proof of the majority’s unspoken invalidation of disparate-impact regulations: “[w]e cannot help observing, however, how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with § 601’ . . . when § 601 permits the very behavior that the regulations forbid.” *Id.* at 286 n.6; see also *Thomas A. Lambert, The Case Against Private Disparate Impact Suits*, 34 Ga. L. Rev. 1155, 1210–18 (2000) (arguing in accord with *Sandoval* that Bakke-indicates congressional intent to limit Title VI to a prohibition of discrimination that would violate the Equal Protection Clause, i.e. intentional discrimination, and therefore, according to the holding in *Chevron U.S.A.*, any regulation promulgated under Title VI must also be limited to prohibiting intentional discrimination); *Laufer, supra* note 99, at 1628–41 (2002) (ex-
On the other side of the argument, it is likewise insufficient to rely upon dicta announced in *Regents of the University of California v. Bakke*207 as a basis for concluding that Congress had announced its intent to limit Title VI's reach to acts of intentional discrimination.208

### A. The Supreme Court Has Never Decided the Issue of Disparate-Impact Regulation Validity

Neither the Supreme Court nor any lower court has directly and conclusively resolved the issue of the validity of section 602 disparate-impact regulations.209 There have been, however, several judicial opinions offered on the issue, most notably in *Guardians Association*210 and *Choate*,211 that create the impression that the debate has been firmly resolved.212 Yet in reality, neither the *Guardians Association* nor *Choate* Courts actually answered the question of regulatory validity.213 For example, in *Guardians Association*, five justices, including the lead author of the court’s opinion, Justice White, offered statements that agency regulations may properly forbid disparate-impact discrimination.214 Justice White’s statement, however, that “Title VI [regulations] reach[] unintentional, disparate impact discrimination as well as deliberate racial discrimination”215 was not necessary to his affirmance of the lower court’s denial of compensatory relief.216 Instead, he affirmed the lower court on the independent theory that Title VI can only provide compensatory relief when a showing of intentional dis-

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208 See infra Part III.B. But see Lambert, *supra* note 206, at 1210–18.
209 See Sandoval, 532 U.S. at 281–82 (“Though no opinion of this Court has held that [regulations promulgated under section 602 of Title VI may validly proscribe activities having a disparate impact on racial groups], five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions, and *dictum* in Alexander v. Choate is to the same effect.”) (emphasis added).
210 See Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 583–607 (1983) (White, J.); *id.* at 615–35 (Marshall, J., dissenting); *id.* at 635–45 (Stevens, J., dissenting).
212 See supra note 134. Commentators have traditionally relied upon the “holdings” of these cases to support the validity of disparate-impact regulations. See supra note 134 (giving examples of literature that have used *Guardians* and *Choate* in support of the proposition that disparate-impact regulations are valid exercises of administrative authority under Title VI).
215 *Guardians Ass’n*, 463 U.S. at 592–93.
216 *Id.* at 607; see Lambert, *supra* note 206, at 1206.
crimination is made. Therefore, Justice White’s opinion on the validity of disparate-impact regulations is capable of characterization as dicta, and even if not dicta, arguably does not constitute the holding of the Court. Nevertheless, a unanimous opinion in Choate later interpreted Guardians Association as having declared that, “actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI.” This misinterpretation of Guardians Association can also be characterized as dicta, because the strict holding of Choate is limited to the decision that Tennessee’s reduction in annual inpatient Medicaid coverage does not constitute discrimination under section 504 of the Rehabilitation Act of 1973. Chester Residents, South Camden I, and all future courts asked to resolve controversies involving disparate-impact regulations nevertheless accepted this erroneous reading of Guardians Association as a basis for rendering their own opinions. But in reality, not a single court to date has in fact been asked to directly address the specific question of the validity of section 602 disparate-impact regulations.

As further support that the validity issue remains unresolved, Sandoval explicitly declared that the Supreme Court had never decided whether or not disparate-impact regulations promulgated under section 602 were valid. But even though Sandoval considered

217 Guardians Ass’n, 463 U.S. at 593-607; see Lambert, supra note 206, at 1206.
218 See Lambert, supra note 206, at 1206 & n.159 (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).” (quoting BLACK’S LAW DICTIONARY 1100 (7th ed. 1999) (defining “obiter dictum”))).
219 Lambert, supra note 206, at 1206-07 (“When 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 narrowest grounds.’” (citing Marks v. United States, 430 U.S. 188, 193 (1977) (citation omitted))).
221 See Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001); Lambert, supra note 206, at 1208.
222 Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 929 (3d Cir. 1997) (“Guardians stands for at least two propositions . . . discriminatory effect regulations promulgated by agencies pursuant to section 602 are valid exercises of their authority under that section.”).
224 Laufer, supra note 99, at 1626 n.71.
225 Supra note 209.
226 Id.
the question open, the Court failed to resolve the question. It chose instead to assume the validity of the Department of Transportation’s (DOT) disparate-impact regulations for purposes of deciding the actual issue presented on certiorari: whether an implied right of action existed to enforce DOT’s section 602 regulations.

Though Sandoval maintained the appearance of leaving the validity question unresolved, in light of the entirety of Title VI jurisprudence from Bakke to Sandoval, it becomes apparent that the Court is extremely suspicious of disparate-impact regulations. It is to be expected then that at some point a court will be forced to squarely address the heretofore avoided question of whether disparate-impact regulations are valid exercises of administrative discretion under Title VI. The implicit reasoning of Sandoval, however, as foreshadowed by Lambert and explained by Laufer, is unpersuasive and legally insufficient to resolve that question.

B. Bakke Does Not Indicate Congressional Intent to Limit the Scope of Title VI to Acts of Intentional Discrimination

In seeking to summarily invalidate disparate-impact regulations, Thomas Lambert has said that “the question of whether Title VI prohibits only intentional discrimination . . . is not open; the Bakke Court resolved that issue.” In Bakke, a five-justice majority stated that, “in view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” Two years before Bakke, the Supreme Court in Washington v. Davis had held that the Fourteenth Amendment prohibits only intentional acts of discrimination, and not those actions merely having a disparate impact. Therefore, the ar-

227 Laufer, supra note 99, at 1629; supra note 209.
228 See Alexander v. Sandoval, 532 U.S. 275, 281 (2001) (“We must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”).
229 See supra note 206.
230 Such a scenario could conceivably occur in the context of an appeal of an EPA OCR enforcement action—specifically, a party appealing a finding by OCR that it had violated 40 C.F.R. § 7.35(b) could argue that EPA’s disparate-impact regulations are ultra vires, as indicated by a simple extension of the reasoning found in Sandoval and explained by Laufer. See Laufer, supra note 99, at 1628–41.
231 See supra note 206 and infra Part III.B.
232 Lambert, supra note 206, at 1211.
gument goes, by expressing its intent to limit the scope of Title VI to the Equal Protection Clause, Congress has clearly expressed its intent to limit Title VI to a prohibition of intentional discrimination. An agency challenged on its disparate-impact regulations thus fails Chevron step one. Carrying the analysis to its conclusion, in such a situation where 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." Disparate-impact regulations plainly go beyond what is in Lambert's eyes the "unambiguously expressed intent of Congress" that "Title VI ... proscribe only those racial classifications that would violate the Equal Protection Clause ...." and must therefore fail as beyond agency authority.

This reasoning is unpersuasive for the very same reason that Guardians Association and Choate cannot support the validity of disparate-impact regulations—Bakke only addressed the scope of Title VI as dicta. Lambert and the Sandoval Court fail to give weight to the Bakke Court's own words of caution: "[i]n this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause." Bakke addressed the scope of Title VI only because canons of judicial decision-making dictate that courts should avoid deciding issues according to constitutional interpretation when

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235 Lambert, supra note 206, at 1210–11, 1215–18. "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." Id. at 1217.
238 Bakke, 438 U.S. at 287.
239 See Lambert, supra note 206, at 1215–18.
240 This discussion in Bakke, 438 U.S. at 281, is consistent with the definition of dictum found in BLACK'S LAW DICTIONARY. See supra note 218; see also Charles F. Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 GEO. L.J. 1, 20 (1981) ("Bakke's statement that 'Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's was unnecessary for decision of the case."); Gil Kujovich, Desegregation in Higher Education: The Limits of a Judicial Remedy, 44 BUFF. L. REV. 1, 41 (1996) ("Bakke presented only the specific issue of whether Title VI prohibits race-based affirmative action when such action is permitted by the Constitution. The case did not require a decision on the general congruence between Title VI and the Constitution.").
they can instead rest their decisions upon statutory interpretation. The Bakke Court, however, after conducting its review of Title VI, found only that Congress intended Title VI to be coextensive with the Equal Protection Clause, bringing the Court back to where it began, at having to decide the broader constitutional issue of whether Equal Protection demanded the application of strict scrutiny to racial classifications designed for the benefit of insular minorities. Such a fruitless digression, moreover, leaves Bakke's words regarding Title VI sitting at the wayside of the opinion as mere dicta because the Bakke majority's pronouncement as to the scope of Title VI was unnecessary to the Court's ultimate conclusion that the Equal Protection Clause calls for strict scrutiny of all racial classifications regardless of motive. Therefore, although the Bakke Court might have said as much, it never held that Congress intended Title VI to prohibit only intentional discrimination. Accordingly, "the rule of Bakke and Guardians Association that section 601 forbids only intentional discrimination" appears to have been conjured out of thin air, rather than drawn from sound precedent.

Nevertheless, the same examination of Title VI's legislative history performed by the Bakke Court will undoubtedly be resurrected by those currently seeking to challenge the validity of disparate-impact regulations. The argument would point to Title VI's legislative history as unambiguously expressing congressional intent that Title VI be coextensive with the Equal Protection Clause. Assuming arguendo that the legislative history of Title VI cited by Bakke does indeed establish Congress's intention to draw Title VI along the Constitutional lines of the Fourteenth Amendment, it is a violation of temporal logic to point to Washington v. Davis as having incorporated the 88th Congress's conception of the scope of the Fourteenth Amendment, and therefore Title

242 Id. (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).  
243 See id. at 287-88.  
244 See supra note 218.  
245 See Bakke, 438 U.S. at 291-305.  
247 Id. at 282.  
248 Indeed, what the Bakke Court implicitly stated in dicta was that Congress clearly and unambiguously expressed its intent to limit Title VI to a prohibition of intentional discrimination. See Bakke, 438 U.S. at 281-87. This is a Chevron step one analysis. For the reasons outlined here, and in Part III.C.2. infra, however, the Bakke Court performed this analysis incorrectly.  
249 See Bakke, 438 U.S. at 281-87.
VI. This is for the simple reason that when the Civil Rights Act of 1964 was enacted, \textit{Washington v. Davis} and the doctrine of intent were still twelve years from existence. In 1964, the Equal Protection Clause was not yet recognized as clearly prohibitive of \textit{only} intentional discrimination.\footnote{Washington v. Davis, 426 U.S. 229, 244–45 (1976). The Court did draw attention to several jury selection cases in which they had previously indicated the necessity of proving intentional exclusion of blacks from jury pools to establish an Equal Protection violation. \textit{See id.} at 239–43. However, the Court also recognized a long line of appellate cases that had "expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." \textit{See id.} at 244–45. The Court then found it necessary to disagree explicitly with these cases and offer a policy analysis of why proof of discriminatory intent is a necessary component of showing an Equal Protection violation, thereby implicitly indicating that prior to \textit{Washington v. Davis}, the issue had not yet been conclusively settled. \textit{See id.} at 245–48. It can only be assumed then, that at the time the Civil Rights Act of 1964 was enacted, the judiciary had not yet reached consensus on the scope of Equal Protection.} Rather, during the time the Civil Rights Act of 1964 was debated and enacted, the scope of Equal Protection was a fiercely contested and unsettled question.\footnote{See \textit{supra} note 250; Abernathy, \textit{supra} note 240, at 8 (remarking that during congressional debate on Title VI, "the state of constitutional [Equal Protection] interpretation was continually evolving ").} Therefore, clear congressional intent to limit Title VI’s scope to a prohibition of intentional discrimination cannot be supported by pointing at scattered references in the legislative history to a then-ambiguous Equal Protection Clause.

C. Chevron \textit{Step One Analysis: Title VI Is Ambiguous}

Having dismissed the arguments that \textit{Guardians Association} and \textit{Choate} establish the validity of disparate-impact regulations, and the counterargument that \textit{Bakke} indicates clear congressional intent to limit the scope of Title VI to intentional discrimination, we turn now to an independent analysis of EPA’s disparate-impact regulations, using four out of the five tools of statutory construction introduced in the preceding discussion:\footnote{\textit{Supra} Part II.B.1.} (1) the plain language of Title VI; (2) the legislative history of Title VI; (3) the underlying purpose of Title VI; and (4) subsequent legislative action after the enactment of Title VI. The statutory tool of examining statutory structure, employed in \textit{American Mining Congress},\footnote{\textit{Am. Mining Cong. v. United States Envtl. Prot. Agency}, 824 F.2d 1177 (D.C. Cir. 1987).} is implicit in the discussion of legislative history.
1. The Plain Language of Title VI

The Bakke Court observed that "the concept of 'discrimination' . . . is susceptible of varying interpretations."254 The plain language of Title VI, however, does not express a clear and unambiguous congressional intent to define that inherently ambiguous term according to either an effects standard or an intent standard.255 Examining section 601 specifically, the term "subjected to discrimination," just as the term "stationary source" in Chevron U.S.A., is left conspicuously undefined.256

Therefore, as in Sweet Home, a court would likely turn to the common dictionary definitions of "discrimination," "discriminate," and "discriminating" in an attempt to resolve the ambiguity.257 The Sweet Home Court defined "harm" according to Webster's Third New International Dictionary as "to cause hurt or damage to: injure."258 Just as this definition still leaves open the question of whether such injury must be intentional,259 so does the similarly worded definition of "discrimination" leave open the question of intent: "the act, practice, or an instance of discriminating categorically rather than individually."260 The word "discriminating" is further defined as "making a distinction,"261 which still leaves open the question of motivation or intent. The root word "discriminate" is no less ambiguous, being defined as "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit."262 Examining additional dictionaries, as did

254 Bakke, 438 U.S. at 284. Several other courts have made similar observations as to the ambiguity of the word "discrimination." See, e.g., Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (White, J.) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so."); Monteiro v. Tempe Union High School Dist., 158 F.3d 1022, 1033 (9th Cir. 1998) ("The term 'discrimination' as used in Title VI is, of course, notoriously ambiguous . . . .").


258 Id. at 697 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (Merriam-Webster, Inc. 1966)).

259 Id.

260 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (Merriam-Webster, Inc. 1986) [hereinafter WEBSTER'S]. Discrimination is also defined as "the according of differential treatment to persons of an alien race or religion (as by formal or informal restrictions imposed in regard to housing, employment, or use of public community facilities)." Id.

261 Id.

262 Id.
the Court in *MCI Telecommunications*, it is found that multiple lexicographers employ similarly ambiguous definitions.263 Contrary to the losing argument in *MCI Telecommunications*, where only a single source contained a deviant definition of the statutory term in question,264 “discrimination” is universally defined without limitation or restriction to only intentional acts.

In analyzing the definition of “harm,” the *Sweet Home* Court observed that the dictionary “does not include the word ‘directly’ or suggest in any way that only direct or *willful* action that leads to injury constitutes ‘harm.’”265 The same reasoning applies to an examination of “discrimination.” The definitions of “discriminate,” and the various forms thereof, do not include the word “intentional,” or in any way suggest that intent is necessary in order to “discriminate” or to be “subjected to discrimination.”266 Accordingly, just as the *Sweet Home* Court recognized the ability to unintentionally “cause hurt or damage” to an animal by destroying its habitat,267 so must the courts recognize the ability to unintentionally “make a difference in treatment . . . on a class . . . basis in disregard of individual merit,”268 by disregarding the racial compositions and existing environmental burdens of different communities across a state.

263 See *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–28 (1994); *The American Heritage Dictionary* 247 (4th ed. 2001) (“Discriminate: 1. To make a clear distinction; differentiate. 2. To make distinctions on the basis of preference or prejudice.”). While the second definition seems to contemplate intent, it in reality does not. Noticeably absent from this definition is any notion of knowledge of one’s preference or prejudice, or the intentional desire to exercise that preference to someone’s detriment. Just as one does not need to exercise intent in order to “harm” an animal, one does not need to exercise intent in order to make distinctions on the basis of preference or prejudice. Prejudice and preference can be subconscious and unrecognized. See also *Black’s Law Dictionary* 209 (2nd pocket ed. 2001) (“Discrimination, . . . 2. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.”) (emphasis added). This definition contemplates the very concept of unintentional, disparate-impact discrimination. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 426–36 (1971).


265 See *WEBSTER’S*, supra note 260, at 648.

266 See *Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. at 697–98, 699 n.12.

267 See *WEBSTER’S*, supra note 260, at 648 (definition of discrimination).
2. The Legislative History of Title VI

Extremely thorough accounts of Title VI's vast and procedurally complicated legislative history have been recounted elsewhere. For our purposes here, however, it will be sufficient to touch upon the overall theme of the debates and compromises surrounding the enactment of Title VI, rather than to recite the innumerable individual remarks made in committee and in floor debate. Using the contrary approach, the Bakke Court employed as their sole analytical technique the selective quotation of committee and floor remarks. This method of legislative analysis, particularly as applied to Title VI, has been criticized as having "dubious" value because, inter alia, it fails to take account of the complex "dance of legislation" that produced the final compromise version. This compromise arose from overall congressional acknowledgement of the inherent ambiguity contained in the word "discrimination," and indeed, several individual remarks acknowledge this understanding.

The meaningful conclusion to be drawn from the legislative history, however, is not that individual members disagreed as to what "discrimination" did, or should have meant, but that because of this very disagreement, Congress intentionally decided to leave the question statutorily unresolved. In the words of Chevron U.S.A., they "[did] not directly address[] the precise question at issue." Instead, the legislative history indicates that Congress intentionally placed the resolution.

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269 See, e.g., STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1017-1456 (Bernard Schwartz, ed. 1970); Abernathy, supra note 240, at 1-49.
270 Title VI was proposed and debated upon in a substantially different form from what was ultimately enacted into law. Abernathy, supra note 240, at 22 & n.148 (citing Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 659 (1963)).
271 Abernathy, supra note 240, at 22 (citing Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 155 (1965)).
272 Id. (citing E. REDMAN, THE DANCE OF LEGISLATION 10 (1973) (quoting Woodrow Wilson, CONGRESSIONAL GOVERNMENT 297 (1913))).
273 Abernathy also notes the minimal probative value of quotations from Title VI debate that refer to Constitutional principles, because members of Congress commonly employ Constitutional rhetoric merely to strengthen their arguments, and not necessarily to indicate their specific interpretation of a statute. See id.
274 Id.
275 Id. at 25 (citing H.R. REP. No. 88-914, at 106 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2473 (minority views of Reps. Poff and Cramer)). Several other members expressed concerns that "discrimination" might include "mere racial imbalance" (i.e., disparate impact). Id. at 25-26 & nn.173-74.
276 See Abernathy, supra note 240, at 26-32.
of the scope of Title VI in agency hands, to be determined according to
the needs of the programs administered by each agency.278

Professor Abernathy presents the following sequence of events: Sec-
retary Celebrezze of the Department of Health, Education, and Welfare
(HEW), while under cross-examination by the House Committee on the
Judiciary, Subcommittee Number Five, remarked that if HEW deter-
mined that the effects of “racial imbalance”279 in a school district created
the same problems as de jure segregation, then “steps [would] have to be
taken under Title VI.”280 Fear over a lack of rational basis upon which
that determination would take place led members of the Committee to
suggest that HEW present guidelines explaining exactly how the De-
partment would apply Title VI.281 Presumably in response to these fears
over arbitrary administrative interpretation of Title VI enforcement du-
ties, Title VI was subsequently amended in subcommittee to mandate
the administrative adoption, and presidential approval, of clear and specific
regulations that applied Title VI’s general antidiscrimination clause to
specific agency-funded programs.282

At the very least, a general confusion over how the word “discrimi-
nation” would be interpreted in practice, the failure of the Subcommit-
tee to reach any consensus, and their unwillingness to firmly resolve the
issue through specific statutory language indicate ambiguity and con-
gressional failure to address the precise question at issue.283 At the
most, when specific remarks regarding the final version of the bill are
considered, it could be argued additionally that Congress specifically
intended to leave resolution of the scope of “discrimination” to admin-
istrative discretion.284 For example, Attorney General Robert F. Ken-


278 See Abernathy, supra note 240, at 29–30; see also Bradford C. Mank, Are Title VI’s Dis-
nathy’s conclusion that Congress intended to leave the precise meaning of discrimination
unresolved, and to instead delegate the issue to administrative discretion).
279 The then popular term for “disparate-impact discrimination.” Abernathy, supra
280 Id. at 27.
281 Id.
282 See id. at 28–30. This amendment exists as current section 602.
284 See Abernathy, supra note 240, at 29–30.
what they can or cannot do.\textsuperscript{285} Even more indicative of a clear congressional intent to avoid the issue and punt to agency discretion is the \textit{uncontested} House minority report on the final version of the bill, predicting administrative "rel[iance] upon [their] own construction of 'discrimination' as including the lack of racial balance."\textsuperscript{286} Also, in passing on the House bill, the Senate raised concerns over whether Title VI would permit regulations that corrected "racial imbalance." Instead of resolving this general question with clear and specific language, the Senate only addressed a narrower issue by prohibiting the use of school busing orders as a means of correcting racial imbalance.\textsuperscript{287}

3. The Purpose of Title VI

The underlying purpose behind the enactment of Title VI is less than enlightening in resolving the question of whether Congress addressed the precise scope of prohibited discrimination. \textit{American Mining Congress} directs that "the sense in which [a term] is used in a statute must be determined by reference to the purpose of the particular legislation."\textsuperscript{288} In \textit{American Mining Congress}, the court reviewed congressional findings of fact to determine that the purpose of RCRA was to eliminate the health risks posed by disposal of solid and hazardous waste when the disposal is done without careful planning and management.\textsuperscript{289} This narrowly tailored purpose lent guidance to the court as it sought to define the statutory term "discarded."\textsuperscript{290} The court reasoned that if Congress had been chiefly interested in eliminating the health risks of dumping, then Congress also clearly intended "discarded" to be confined to its ordinary meanings of "disposed" and "abandoned," rather than expanded to include in-process materials not destined for a landfill—and therefore not posing a present health risk.\textsuperscript{291}

The situation in Title VI is quite dissimilar because it involves an interesting paradox, illustrated by the \textit{Chester Residents} court's elucidation of the statute's dual purpose: "to: (1) combat discrimination by

\begin{itemize}
  \item \textsuperscript{285} \textit{Id.} at 30 \& n.209 (emphasis added).
  \item \textsuperscript{287} \textit{Id.} at 32.
  \item \textsuperscript{289} \textit{See id.} at 1185–86.
  \item \textsuperscript{290} \textit{See id.}
  \item \textsuperscript{291} \textit{See id.}
entities who receive federal funds; and (2) provide citizens with effective protection\(^292\) against discrimination.\(^293\) But “discrimination” is the very word whose contours we are interested in defining. The congressional purpose in enacting Title VI contains the exact same ambiguity as the statute itself, and therefore can not aid in our search for congressional intent.\(^294\)

4. Subsequent Legislative Action

Legislative enactments subsequent to the Civil Rights Act of 1964 do little to shed light on Congress’s original intent in enacting Title VI, but may arguably indicate congressional ratification of Title VI disparate-impact regulations.\(^295\) Crucial to this discussion is the opinion in *Brown & Williamson Tobacco* where the Court wrote that “[although at] the time a statute is enacted, it may have a range of plausi-

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\(^292\) Justice Stevens, dissenting in *Sandoval*, seizes upon this “prophylactic” purpose, and offers an alternative route around the obstacle to disparate-impact regulation validity created by *Sandoval*’s reading of *Bakke*’s dicta. *Alexander v. Sandoval*, 532 U.S. 275, 303–10 (2001) (Stevens, J., dissenting). Justice Stevens writes that “§ 602 ... grant[s] the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules is ... broader than that which would otherwise be prohibited [by section 601 acting alone].” *Id.* at 305. In other words, regardless of what conduct section 601 alone can be said to prohibit, section 602 expressly grants agencies the power to go beyond the strict contours of section 601 in order to effectuate Title VI’s “broad aspiration[s].” *See id.* at 306. According to Justice Stevens, the relationship of section 601 to section 602 can be viewed in two possible ways. The first conceptualization—and the one adopted by this Note and the *Sandoval* majority—is one where sections 601 and 602 “stand in isolation”—section 601 is the “meat” of the law, and section 602 merely “effectuates” the law as set out by section 601. *Id.* at 304. The second conceptualization—embraced by Justice Stevens—is one where sections 601 and 602 are part of an “integrated remedial scheme.” *Id.* If sections 601 and 602 are viewed as an “integrated remedial scheme,” then disparate-impact regulations, rather than going beyond the authority of section 601, “apply § 601’s prohibition on discrimination just as surely as the intentional discrimination regulations the majority concedes are privately enforceable.” *Id.* at 307. Whatever *Bakke* might have said in regard to the scope of section 601, then, becomes irrelevant in deciding upon the validity of a disparate-impact regulation—a disparate-impact regulation can arguably be found to be a valid furtherance of the broad anti-discriminatory aspirations of Title VI. *See id.* at 303–07.


\(^295\) Note that the “congressional ratification” argument for the validity of Title VI disparate-impact regulations, while still grounded in Title VI’s ambiguity, is technically distinct from the “administrative deference / Chevron” argument. *See Mank, supra* note 278, at 532–39 (discussing the congressional ratification argument in detail, and applying the opinion in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.* to that argument).
ble meanings . . . over time . . . subsequent acts can shape or focus those meanings."296

This canon of statutory construction seems particularly applicable to the ambiguity of Title VI, given the apparent breadth of Title VI's scope. "[T]he implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand."297 In Brown & Williamson Tobacco, the Court was faced with six separate pieces of tobacco-specific legislation enacted since the passage of the Food, Drug, and Cosmetic Act (FDCA).298 Reviewing these pieces of legislation,299 the Court uncovered a persistent stance by FDA that it lacked jurisdiction to regulate tobacco products.300 Accordingly, Congress over the years created a distinct tobacco regulatory scheme separate and apart from FDA.301 What this amounted to then, reasoned the Court, was congressional ratification of FDA's long held position that it lacked jurisdiction to regulate tobacco.302

An exactly opposite situation is seen in the history of Title VI. Immediately upon the statute's enactment, a presidential task force, in conjunction with the Department of Justice—which had helped draft the language of Title VI—promulgated model Title VI enforcement regulations barring the use of criteria or methods having a discriminatory impact.303 Every federal agency responsible for administering federal financial assistance—about forty—has subsequently adopted Title VI regulations embracing this effect-based standard.304

This long-held position of the executive branch—that the executive had the authority to prohibit disparate-impact discrimination under Title VI—has been ratified by subsequent antidiscrimination legislation in much the same way the subsequent tobacco legislation of

297 Id.
298 Id.
299 Id. at 143–55.
300 Id. at 155–56.
301 Id.
302 Brown & Williamson Tobacco, 529 U.S. at 156.
303 Mank, supra note 278, at 518 & n.8.
304 Id. at 518 & n.9.
Brown & Williamson Tobacco ratified FDA's rejection of authority to regulate tobacco.\textsuperscript{305}

Furthermore, an amendment to Title VI made immediately after its enactment may also indicate congressional ratification of Title VI disparate-impact regulations. Two out of the three early and major amendments to the Act merely made modifications to the funding termination procedures that agencies were required to follow, and did not in any way modify or alter section 601 of the original Act.\textsuperscript{306} The third amendment, however, popularly known as the Stennis Amendment,\textsuperscript{307} stated Congress's intention that the provisions of Title VI be applied equally to all states where discrimination in education is concerned.\textsuperscript{308} In doing so, the Stennis Amendment explicitly mentions de jure and de facto segregation, lending probative value to the argument that the 88th Congress could not have clearly intended to limit Title VI to intentional discrimination.\textsuperscript{309} If Title VI had prohibited only intentional discrimination, and limited agencies to the same, then the Stennis Amendment would not have stated that "guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 . . . dealing with . . . segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation."\textsuperscript{310} Rather, the explicit language of the Stennis Amendment indicates congressional acquiescence to Title VI disparate-impact regulations.

CONCLUSION

Environmental justice is a legal and social paradigm predicated upon the reality that environmental harm is not shared equally among

\textsuperscript{305} See Brown & Williamson Tobacco, 529 U.S. at 143–55; Mank, supra note 278, at 532–33 (discussing several pieces of antidiscrimination legislation that implicitly ratify Title VI disparate-impact regulations by requiring adoption of regulations "similar" to those adopted under Title VI. Such an implication is created because almost all Title VI regulations prohibit disparate impacts).


\textsuperscript{308} See Abernathy, supra note 240, at 35.


\textsuperscript{310} Id. (emphasis added).
communities, but rather, is disproportionately shouldered by poor, minority neighborhoods. The unequal distribution of environmental harm often occurs through government sanctioned permitting processes. The traditional difficulty in seeking redress for the discriminatory effects of environmental permitting is that environmental decisions are rarely made today with overt discriminatory animus. Rather, it is an economically, politically, and socially entrenched reality that these "blind" decisionmaking processes, left to themselves, will subject poor, minority communities to a disparate share of environmental harm as compared to surrounding affluent, Caucasian neighborhoods. So called "disparate-impact" regulations promulgated by EPA pursuant to Title VI initially showed promise as a legal tool to obtain redress from discriminatory effects. The Alexander v. Sandoval Court closed the door to private enforcement of disparate-impact regulations by taking away those regulations' implied cause of action and rejecting the existence of a § 1983 enforceable right against disparate-impact discrimination. In so doing, the Court also strongly suggested that disparate-impact regulations, standing alone within EPA's own administrative enforcement process, were invalid exercises of administrative discretion under Title VI. The Court's implicit reasoning, based upon Regents of the University of California v. Bakke, is unpersuasive because, contrary to Sandoval's assertion, Bakke never held that there existed clear congressional intent to limit the scope of Title VI to intentional discrimination. Conversely, the Guardians Association v. Civil Service Commission—Alexander v. Choate line of cases is incapable of standing for the proposition that disparate-impact regulations are valid law. Rather, Chevron U.S.A. v. Natural Resources Defense Council provides the only appropriate means of determining the validity of disparate-impact regulations. After working through a Chevron analysis, it is apparent that the 88th Congress never expressed a clear and unambiguous intent as to the scope of Title VI's anti-discrimination mandate. Because the 88th Congress did not precisely address whether "discrimination" embodied an intent or effects standard, under the holding of the Court's opinion in Chevron U.S.A., the judiciary must defer to EPA's permissibly constructed disparate-impact regulations. 40 C.F.R. 7.35(b) therefore remains valid federal law after Sandoval.