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ARE TITLE VI'S DISPARATE IMPACT REGULATIONS VALID?

Bradford C. Mank*

I. INTRODUCTION

Congress passed its first piece of comprehensive civil rights legislation in the Civil Rights Act of 1964. Under Title VI of that Act, federal agencies may not provide funding to "recipient" programs that discriminate on the basis of race.1 The statutory language of Title VI is ambiguous about whether recipients are prohibited only from engaging in intentional discrimination, or whether recipients may behave in ways that cause unintentional, disparate impacts.2 Section 601 of Title VI states that "[n]o person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."3 It is unclear whether the term "discrimination" refers to intentional or unintentional discrimination.4 The statute's legislative history contains statements supporting both interpretations.5 While its Title VI cases are complex and not easy to summarize, the Supreme Court has interpreted section 601 of the statute to forbid intentional discrimination by programs or activities receiving federal financial assistance.6

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1. Section 601 of the statute provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000); see Bradford C. Mank, Title VI, in THE LAW OF ENVIRONMENTAL JUSTICE 23, 23-25 (Michael Gerrard ed., 1999) [hereinafter Mank, Title VI]; Bradford C. Mank, Is There a Private Cause of Action Under EPA's Title VI Regulations?, 24 COLUM. J. ENVTL. L. 1, 12 (1999) [hereinafter Mank, Private Cause of Action]; James H. Colopy, Note, The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964, 13 STAN. ENVTL. L.J. 125, 152-55 (1994). The typical intermediary recipient is a state or local agency that receives federal funding and then distributes the proceeds to individual beneficiaries. Id. at 134. The ultimate individual beneficiaries are exempt from Title VI.Id.


4. See Abernathy, supra note 2, at 21-23, 25-27; Mello, supra note 2, at 959.

5. See Abernathy, supra note 2, at 21-23, 25-27; Mello, supra note 2, at 959.

That interpretation, however, is not the end of the story. Additionally, section 602 of Title VI requires federal funding agencies to adopt and enforce regulations that prohibit recipients from engaging in discrimination and requires those regulations to be approved by the President. In 1964, a presidential task force developed standard Title VI regulations prohibiting recipients from using “criteria or methods of administration which have the effect of subjecting individuals to discrimination.” Since 1964, every federal agency has followed these model regulations to prohibit recipients from engaging in practices having discriminatory impacts. Because section 602 disparate impact regulations “forbid conduct that § 601 permits” there has been contro-

7. § 2000d-1 of Title VI states in part:
   Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.
   No such rule, regulation, or order shall become effective unless and until approved by the President.

42 U.S.C. § 2000d-1; Mank, Title VI, supra note 1, at 25; Mank, Private Cause of Action, supra note 1, at 12.
To facilitate the enforcement of the various § 602 regulations issued by various agencies, the Department of Justice has issued regulations concerning the implementation of Title VI requirements, including a requirement that agencies adopt procedures for monitoring a recipient's pre- and post-award compliance. See 28 C.F.R. § 42.405 (2000) (Department of Justice Regulations); 40 C.F.R. § 7.110-115 (2000) (EPA regulations); Michael Fisher, Environmental Racism Claims Brought Under Title VI of the Civil Rights Act 25 ENVTL. L. 285, 313 (1995); Mello, supra note 2, at 961 n.143. If it finds a recipient has engaged in discriminatory actions, an agency may refuse to award or continue assistance, or refer the matter to the Department of Justice for prosecution. See 40 C.F.R. § 7.130 (1994) (EPA regulations); Colopy, supra note 1, at 176-80; Fisher, supra note 2, at 313. However, if a recipient is found to have engaged in discriminatory practices, federal agencies almost always reach a settlement with a recipient to prevent such conduct in the future, but continue to provide funding. See Mank, Private Cause of Action, supra note 1, at 13; Mank, Title VI, supra note 1, at 25.

8. 45 C.F.R. § 80.3(b)(2) (1964) (emphasis added); see Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J.) (quoting 45 C.F.R. § 80.3(b)(2) (1964)); Mank, Private Cause of Action, supra note 1, at 13; Mank, Title VI, supra note 1, at 25; Sidney D. Watson, Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy 38 FORDHAM L. REV. 939, 947-48 (1990) (noting presidential task force in 1964 assisted federal agencies promulgate comparable disparate impact regulations under Title VI); Comment, Title VI of the Civil Rights Act of 1964—Implementation and Impact 36 GEO. WASH. L. REV. 824, 846 (1968). The task force included representatives from the White House, Department of Justice, the Civil Rights Commission, and Bureau of the Budget. Id. at 846 n.19.

9. Guardians, 463 U.S. at 618 (1983) (Marshall, J.) (recipients may not use “criteria or methods of administration which have the effect of subjecting individuals to discrimination” (quoting 45 C.F.R. § 80.3(b)(2) (1964))); id. at 592 n.13 (White, J.) (observing “every Cabinet department and about 40 agencies adopted Title VI regulations prohibiting disparate-impact discrimination.”) See Mank, Private Cause of Action, supra note 1, at 13; Mank, Title VI, supra note 1, at 25; Paul K. Sonn, Note, Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy, 101 YALE L.J. 1577, 1581 n.25 (1992) (listing Title VI regulations for several federal agencies); Watson, supra note 8, at 947-48.
versy about whether such regulations are valid. Nevertheless, the Supreme Court has indicated in several cases, at least in dicta, and arguably in language deserving precedential value, that agencies may promulgate regulations, pursuant to section 602 of Title VI, that prohibit practices creating unjustified discriminatory effects.

There are signs, however, that the Supreme Court may soon reject section 602 disparate impact regulations. In 2001, the Supreme Court in Alexander v. Sandoval held in a five-to-four decision that there is no private right of action to enforce disparate impact regulations promulgated under section 602 of Title VI. The majority concluded that neither section 602's language nor subsequent amendments to Title VI demonstrated congressional intent to establish a private cause of action to enforce section 602. Accordingly, Justice Scalia, writing for the majority, held that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists." While Sandoval only addressed whether there is a private cause of action to enforce disparate impact regulations and assumed that federal agencies may issue disparate impact regulations because no party in the case had challenged the validity of the regulations, Justice Scalia, in dicta, questioned whether disparate impact regulations under Title VI are consistent with the Supreme Court's determination that section 601 of the statute only prohibits intentional discrimination. He stated, "We 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." Justice Scalia conceded that prior decisions of the Court had suggested that section 602's disparate impact regulations

11. See infra notes 51-52, 62-82 and accompanying text.
13. Id. at 288-91.
14. Id. at 293.
15. See id. at 282.
16. Justice Scalia stated:
   
   [W]e 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. Though no opinion of this Court has held
   that, five Justices in Guardians voiced that view of the law at least as alternative grounds for their decisions . . . These statements are in considerable tension with the rule of Bakke and Guardians that § 601 forbids only intentional discrimination . . . but petitioners have not challenged the regulations here.
   
   Id. at 281-82.
17. See id. at 286 n.6 (quoting Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting).
are valid. He stated that "[t]hough no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions," and that "dictum in *Alexander v. Choate* is to the same effect." Despite this precedent, Justice Scalia argued that *Guardians*’ and *Alexander*’s approval of disparate impact regulations in section 602 of Title VI was "in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination." Many knowledgeable environmental leaders in industry, government, and the environmental justice movement itself believe that Justice Scalia’s dicta in *Sandoval* is a clear sign that the Court will soon reject the section 602 disparate impact regulations in Title VI.

This Essay, however, contends that section 602 disparate impact regulations in Title VI are valid because Congress has implicitly sanctioned their creation, and explicitly approved them in subsequent related statutes. Part II of this Essay discusses the legislative history of Title VI, which suggests that Congress intended to give administrative agencies discretion to define "discrimination" in their Title VI regulations as prohibiting either intentional conduct or actions having disparate impacts against racial minorities as long as the President approved such rules. Part III illustrates that five different Congresses have enacted four subsequent related statutes that explicitly incorporate Title VI disparate impact regulations as a model. In *Food & Drug Administration v. Brown & Williamson*, a majority of the Supreme Court, including Justice Scalia, used subsequent related statutes as a guide to interpret the authority of the Food and Drug Administration to regulate tobacco products. Similarly, the enactment of subsequent related statutes that explicitly incorporate Title VI's disparate impact regulations as a model provide strong evidence that the Court should interpret Title VI to authorize those regulations. This Essay concludes that, together, the evidence in Title VI’s legislative history and subsequent

19. *Id.* at 282 (citing *Alexander*, 469 U.S. at 293, 295, n.11).
20. *Id.* (citing *Guardians*, 463 U.S. at 612-13 (O'Connor, J., concurring in judgment)).
21. *See Activists' Appeal to High Court May Spell End for EPA Equity Rules*, ENVTL. POL'Y ALERT, May 1, 2002, at 40-41 (reporting "[i]ndustry officials, EPA sources and environmental justice attorneys all say the court likely will overturn EPA's bar on unintentional discrimination under Title VI").
22. *See Abernathy, suprana note 2, at 3, 28-32, 48-49, passim; see also Mello, suprana note 2, at 959-60 (discussing Professor Abernathy's interpretation of Title VI's legislative history).
23. *See infra* notes 111-15 and accompanying text.
25. *See infra* notes 135-40 and accompanying text.
related statutes supports the validity of Title VI disparate impact regulations despite the fact that the Supreme Court has limited section 601 to intentional discrimination.

II. TITLE VI AND THE SUPREME COURT: INTENTIONAL OR UNINTENTIONAL DISCRIMINATION?

A. Lau v. Nichols

During 1974, in *Lau v. Nichols*, the Supreme Court concluded that Title VI prohibited disparate impact discrimination by a school district that failed to provide English language instruction to students of Chinese ancestry. Justice Douglas's majority opinion apparently interpreted section 601 to preclude disparate impact discrimination. The *Lau* Court stated that it "relied solely on § 601" to reverse the Court of Appeals. The Court assumed that the Department of Health, Education and Welfare's (HEW) section 602 regulations were consistent with section 601. In *Lau*, the Title VI regulations at issue forbade funding recipients to take actions that had the effect of discriminating on the basis of race, color, or national origin. Summarizing the HEW regulations, the Court concluded that the regulation forbade disparate impact discrimination because "[d]iscrimination is barred which has that effect even though no purposeful design is present." The Court stated that the section 602 disparate impact regulations simply "[made] sure that recipients of federal aid . . . conduct[ed] any federally financed projects consistently with § 601." Accordingly, Justice Douglas's majority opinion in *Lau* indicated that both sections 601 and 602 prohibited disparate impact discrimination.

In a concurring opinion, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, questioned whether section 601 itself barred unintentional discrimination. He contended that "it [was] not entirely clear" that section 601 "standing alone, would render illegal the expenditure of federal funds on these schools." Nevertheless, he

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27. Id. at 566.
28. The regulations stated that a recipient may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 C.F.R. § 80.3(b)(2) (1977); *Lau*, 414 U.S. at 568.
30. Id. at 567.
31. Id. at 570 (Stewart, J., concurring in result).
concluded that the agency could prohibit disparate impact discrimination based on its section 602 regulations because those regulations were "reasonably related" to the goals of the statute. 32

B. Regents of California v. Bakke

During 1978, in Regents of California v. Bakke, 33 the Supreme Court apparently rejected Lau's "effects standard." In Bakke, the Court reviewed a decision of the California Supreme Court that had enjoined the University of California Medical School from "according any consideration to race in its admissions process." 34 The Court suggested that proof of intentional discrimination was necessary to establish a violation of the various civil rights statutes, including Title VI. 35 In his concurring opinion that provided the decisive fifth vote in the case and announced the judgment of the Court, Justice Powell stated that section 601 "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 36 Justice Brennan's plurality opinion, which was joined by Justices White, Marshall, and Blackmun appeared to agree that Title VI only prohibits behavior proscribed by the Constitution's Equal Protection Clause. 37 He stated that the legislative history of Title VI "reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government." 38 Justice Brennan also stated that "as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause." 39

The Bakke decision did not expressly overrule Lau, however, and did not necessarily reject Title VI regulations prohibiting disparate impact discrimination. 40 Justice Powell rejected the petitioner's argument that Lau prohibited affirmative action for racial or ethnic minorities because

33. See 438 U.S. 265, 318-19 (1978) (Powell); Colopy, supra note 1, at 158.
34. Bakke, 438 U.S. at 272
35. See id. at 318-19.
36. Id. at 287 (Powell, J.).
37. See id. at 323, 328, 332 (Brennan, White, Marshall, and Blackmun, JJ.).
38. Id. at 329 (plurality opinion of Brennan, White, Marshall, and Blackmun, JJ.).
39. Id. at 325.
40. See Mello, supra note 2, at 963-64.
the *Lau* "decision rested solely on the statute" as interpreted by the HEW to prohibit discriminatory effects and the "preference" at issue in the earlier decision had not denied any relevant benefit to anyone else. By contrast, the parties in *Bakke* had not addressed the applicability of Title VI, but "focused exclusively upon the validity of the special admissions program under the Equal Protection Clause." Justice Powell never suggested that *Lau* was no longer good law despite his view that Title VI "proscribed only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." He never addressed the validity of Title VI's regulations.

While stating that Title VI is coextensive with the Constitution and stating that he had "serious doubts" about *Lau*’s reasoning, Justice Brennan’s opinion also cited *Lau* for the principle that section 602 regulations "are entitled to considerable deference in construing Title VI." His opinion favorably observed that the HEW’s Title VI regulations "require[ed]" affirmative measures to help minorities who had been subject to discrimination and "authoriz[ed]" voluntary affirmative action programs by federally funded institutions that had not been guilty of prior discrimination. While his reasoning might appear to be inconsistent, Justice Brennan’s underlying purpose in arguing that Title VI was limited to the Constitution was to reject the view that the statute prohibited affirmative action that was allowed under the Constitution. Accordingly, Justice Brennan’s opinion in *Bakke* did not preclude Title VI regulations prohibiting disparate impacts, although there are arguably inconsistencies in his opinion’s limitation of Title VI to the Constitution and approval of HEW’s disparate impact regulations.

### C. Guardians Ass’n v. Civil Service Commission

In 1983, in *Guardians Ass’n v. Civil Service Commission*, a deeply divided Supreme Court issued a complex multi-faceted opinion that held that

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42. Id. at 281 (Powell, J.); *Mello*, *supra* note 2, at 963.
44. *See Abernathy*, *supra* note 2, at 40 n.277.
45. *See id.* at 325, 328, 332 (Brennan, White, Marshall, and Blackmun, JJ.).
46. *See id.* at 342-43 (Brennan, White, Marshall, and Blackmun, JJ.).
47. *See id.* at 343 (Brennan, White, Marshall, and Blackmun, JJ.).
48. *See Abernathy*, *supra* note 2, at 41 n.280.
49. *Mello*, *supra* note 2, at 963-64.
50. Id.
proof of intentional discrimination is required under section 601 of Title VI, but also indicated that agencies implementing regulations under section 602 may prohibit disparate impact discrimination. The Guardians decision was complicated in part because it involved two related questions: first, the substantive standard for proving "discrimination" under Title VI, and, second, the remedies available to private plaintiffs who meet the standard under the statute. In Guardians, black and Hispanic members of the New York City Police Department filed suit alleging that several written examinations used by the Department to make initial hiring decisions and to decide layoffs among officers with equal seniority had a discriminatory impact on minority candidates and officers. Based on the Department of Labor’s Title VI regulations, which prohibited recipients from engaging in actions having racially disparate impacts, the district court for the Southern District of New York concluded that the plaintiffs’ evidence of discriminatory impact from the tests was sufficient to prove a violation of Title VI and awarded the plaintiffs compensatory relief. The Second Circuit reversed the district court’s decision, however, holding that Title VI required proof of discriminatory intent and, therefore, that courts could not award compensatory relief for recipient actions causing disparate impacts. The Supreme Court affirmed the Second Circuit by holding that compensatory relief was available to a private plaintiff from federal courts only if a plaintiff proved intentional discrimination, but five justices indicated that declaratory and injunctive relief were potential remedies against a recipient whose actions caused disparate impacts.

In Guardians, seven members of the Supreme Court agreed that proof of discriminatory intent is required by the statute in section 601. Justices White and Marshall each argued in separate concurring and dissenting opinions that section 601’s definition of "discrimination"

32. Id. at 584 n.2; Mank, Private Cause of Action, supra note 1, at 13-15.
33. Mello, supra note 2, at 965.
34. Guardians, 463 U.S. at 582; Mank, Private Cause of Action, supra note 1, at 14.
35. 29 C.F.R. § 31.3(c)(1).
37. See Guardians, 463 U.S. at 382; Guardians v. Civil Serv. Comm’n, 633 F.2d 232, 270 (2d Cir. 1980) (Kelleher, J., concurring); id. at 274 (Coiffin, J., concurring); Mank, Private Cause of Action, supra note 1, at 14.
38. See Guardians, 463 U.S. at 607 (opinion of White, J.) (only declaratory and injunctive relief appropriate); id. at 644-45 (Stevens, Brennan, and Blackmun, JJ., dissenting); id. at 624 (Marshall, J., dissenting) (would allow full compensation); Mello, supra note 2, at 965.
39. See Alexander v. Sandoval, 532 U.S. 275, 280 (2001); Guardians, 463 U.S. at 610-11 (Powell, J., concurring in judgment, joined by Burger, C.J. & Rehnquist, J.); id. at 612, 615 (O’Connor, J., concurring in judgment); id. at 642-45 (Stevens, dissenting, joined by Brennan & Blackmun, JJ.); Mank, Private Cause of Action, supra note 1, at 14; Colopy, supra note 1, at 159.
required a plaintiff to prove only that a recipient's actions caused disparate impacts. \(^{60}\) Only Justices Marshall and White explicitly stated that *Bakke* had not overruled *Lau*. \(^{61}\)

Despite *Guardians*’ limitation of section 601 to intentional discrimination, five members of the Court indicated that section 602 of Title VI permits federal agencies to promulgate regulations that prohibit disparate impact discrimination. \(^{62}\) Justice Stevens’s dissenting opinion, joined by Justices Brennan and Blackmun, argued that intentional discrimination is a necessary element under section 601 of Title VI, but that regulations under section 602 may incorporate a disparate impact standard: “[A]lthough the petitioners had to prove that the respondents’ actions were motivated by an invidious intent in order to prove a violation of [Title VI], they only had to show that the respondents’ actions were producing discriminatory effects in order to prove a violation of [the regulations].” \(^{63}\) Justice Stevens maintained that the disparate impact Title VI regulations at issue in the case were valid because the Court had upheld similar regulations in *Lau* and other cases, that the regulations had the “force of law” because they were reasonably related to the purposes of the statute, and that valid agency regulations having the force of law could be enforced under 42 U.S.C. § 1983. \(^{64}\) While it is not clear whether his dissenting opinion in *Guardians* would have allowed a private right of action to enforce section 602’s regulations, \(^{65}\) pursuant to section 1983, Justice Stevens would have awarded

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60. See *Guardians*, 463 U.S. at 584 & n.2, 589-93 (White, J.); id. at 615, 623 (Marshall, J., dissenting); *Mank, Private Cause of Action*, supra note 1, at 14, 15; *Mello*, supra note 2, at 965.

61. *Guardians*, 463 U.S. at 589-91 n.11 (opinion of White, J.) (arguing *Bakke* addressed only intentional discrimination and that Title VI may prohibit effects discrimination); id. at 624 (Marshall, J., dissenting) (arguing *Bakke*’s statement that Title VI was “coextensive” with the Equal Protection Clause was “clearly superfluous to the decision in that case”); *Mello*, supra note 2, at 963.

62. *Guardians*, 463 U.S. at 584 & n.2, 391-95 (White, J., delivering judgment of the Court) (“The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, the Court of Appeals erred in requiring proof of discriminatory intent.”); id. at 635-39, 642-45 (Stevens, J., joined by Brennan & Blackmun, JJ.); id. at 623, 625-26, 634 (Marshall, J.); *Mank, Private Cause of Action*, supra note 1, at 14, 33-34; *Mello*, supra note 2, at 965-68; *Colopy*, supra note 1, at 159.

63. *Guardians*, 463 U.S. at 643 (Stevens, Brennan & Blackmun, JJ., dissenting); *Mank, Private Cause of Action*, supra note 1, at 14-15, 34.

64. See *Guardians*, 463 U.S. at 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting); Bradford Mank, *Using Section 1983 To Enforce Title VI’s § 602 Regulations*, 49 U. KAN. L. REV. 321, 341 (2001) (discussing Justice Stevens argument that Title VI’s disparate impact regulations are enforceable through 42 U.S.C. § 1983); *Mello*, supra note 2, at 965, 967-68 (same).

65. In his dissenting opinion in *Sanddollars v. Alexander*, Justice Stevens claimed that he believed at the time of his *Guardians*’ dissent that there was a private right of action under Title VI’s disparate impact regulations: “I thought then, as I do now, that a violation of regulations adopted pursuant to Title VI may be established by proof of discriminatory impact in a § 1983 action against state actors and also in an implied action against
the plaintiffs' compensation, including damages, for disparate impact discrimination prohibited by section 602's valid implementing regulations.66

Justices White and Marshall each would have allowed disparate impact suits under either sections 601 or 602.67 While his opinion primarily focused on his argument that the plaintiffs should be able to bring a discriminatory impact action through section 601,68 Justice White also maintained that the Department of Labor's section 602 disparate impact regulations were valid, stating that he "believe[s] that the regulations are valid, even assuming arguendo that Title VI, in and of itself, does not proscribe disparate-impact discrimination."69 Even if he were "wrong in concluding Bakke did not overrule Lau"70 concerning whether section 601 prohibited disparate impact discrimination, Justice White correctly observed that Bakke had never addressed whether Title VI would nevertheless allow agencies to promulgate disparate impact discrimination regulations.71 Justice White argued that Justice Stewart's Lau concurrence had appropriately concluded that the term "discrimination" in Title VI is ambiguous, and that agencies at least had the discretion to issue regulations barring disparate impact discrimination by recipients.72

Justice Marshall argued in his Guardians dissent that Bakke's limitation of Title VI to cases involving discriminatory intent did not preclude the Court from giving deference to the "long-standing" interpretation of every cabinet department and about forty federal agencies since 1964 that they had the authority to issue disparate impact discrimination regulations.73 Additionally, he observed that Congress was aware of these regulations, but had rejected several proposals to require proof of intentional discrimination.74 Even if the Court would not have reached private parties." 523 U.S. 273, 301 n.6 (Stevens, J., dissenting). However, Justice Scalia in his Sandoval majority opinion quoted a sentence from Justice Stevens' Guardians dissent implying that relief for violations of the regulation was available only under § 1983.Id. at 284 n.3. Justice Stevens contended that the majority had "misread[ ]" the meaning of that sentence. Id. at 301 n.6. Despite this controversy, it is fair to say that Justice Stevens's Guardians dissent never explicitly stated that there was a private right of action under Title VI's disparate impact regulations.

67. Id. at 584 & n.2, 589-93 (White, J.); id. at 615, 623 (Marshall, J, dissenting); Mank, Private Cause of Action, supra note 1, at 15, 33-34.
68. Guardians, 463 U.S. at 584, 589-93 (White, J., delivering judgment of the Court); Mank, Private Cause of Action, supra note 1, at 15, 33.
69. Guardians, 463 U.S. at 584 n.2 (White, J., delivering judgment of the Court).
70. Id. at 591 (White, J., delivering judgment of the Court).
71. Id. at 592 (White, J., delivering judgment of the Court).
72. Id.
73. Id. at 615, 617-20 (Marshall, J., dissenting).
74. Id.
the same interpretation had the issue first arisen before it, Justice Marshall argued, "A contemporaneous and consistent construction of a statute by those charged with its enforcement combined with congressional acquiescence "creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department . . . ."73 Accordingly, five members of the Guardians Court recognized the validity of disparate impact regulations under section 602 of Title VI.76

D. Alexander v. Choate

During 1985, in Alexander v. Choate,77 the Supreme Court examined whether evidence of disparate impact was sufficient to establish a prima facie case under section 504 of the Rehabilitation Act of 1973.78 Because section 504 of the Rehabilitation Act was based on Title VI and has nearly identical language, the Alexander Court carefully reviewed its Title VI decisions.79 The Alexander decision acknowledged that "Title VI itself directly reach[es] only instances of intentional discrimination."80 Nevertheless, Alexander unanimously interpreted Guardians to permit agencies to promulgate Title VI regulations that prohibit disparate impact discrimination: "The [Guardians] Court held that actions having an unjustifiable, disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."81 Furthermore, the Alexander Court suggested that Guardians should be interpreted to establish an implied private right of action for disparate impact under Title VI's implementing regulations:

Guardians, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in Guardians is

75. Id. at 615, 621 (Marshall, J., dissenting) (quoting Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932) (emphasis added by Justice Marshall)).
76. Guardians, 463 U.S. at 584 & n.2, 589-93 (White, J., delivering judgment of the Court); id. at 635-45 (Stevens, J., joined by Brennan & Blackmun, JJ.); id. at 615, 623-26, 634 (Marshall, J.); Chester Residents Concerned for Quality Living v. Scif, 132 F.3d 925, 930 (3d Cir. 1997) (cited as moot, 524 U.S. 974 (1998)).
79. Alexander, 469 U.S. at 295 n.11 (explaining that section 504 was originally proposed as an amendment to Title VI; see also U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 600 (1986) (section 504 and its regulations were modeled after Title VI)); Golopy, supra note 1, at 156-57 n.140. But see Consol. Rail Corp. v. Darrone, 465 U.S. 624, 632-33 n.13 (1984) (recognizing differences between Title VI and Section 504).
80. 469 U.S. at 293.
81. Id. at 293 (citing Guardians, 463 U.S. 582).
relevant to the interpretation of § 504, Guardians suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.\(^{82}\)

**E. Alexander v. Sandoval: Justice Stevens’s Dissent**

As discussed in the Introduction, Justice Scalia’s majority opinion in *Sandoval* questioned the validity of Title VI’s disparate impact regulations because Bakke and Guardians had stated that section 601 forbids only intentional discrimination.\(^{83}\) In his dissenting opinion in *Sandoval*, Justice Stevens, joined by Justices Souter, Breyer, and Ginsburg, argued that Title VI’s disparate impact regulations are valid despite section 601’s more limited scope. He agreed with Justice Stewart’s concurrence in *Lau* that section 602 regulations may go beyond section 601 if they reasonably effectuate the latter section’s anti-discrimination purposes.\(^{84}\) He argued that the statute’s text and legislative history demonstrated that Congress intended to give agencies the discretion to prohibit less overt forms of discrimination, including both unintentional discrimination and intentional discrimination that might be impossible to prove except through inference.\(^{85}\)

1. Title VI’s Legislative History Strongly Suggests that Congress Delegated to Administrative Agencies and the President the Issue of Whether the Section 602 Regulations Would Prohibit Intentional or Disparate Impact Discrimination

In a 1981 article, Professor Charles Abernathy carefully reviewed Title VI’s legislative history and concluded that Congress deliberately avoided the difficult issue of whether the statute required proof of intentional or effects discrimination. Instead, Congress delegated the issue of defining discrimination to the agency in charge of implementing each program, subject to section 602’s requirement that the President approve them and that the regulations must be “consistent” with the statute.\(^{86}\) Citing Professor Abernathy’s article, Justice Marshall

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82. *Id.* at 294 (footnote omitted).
84. *Id.* at 1529-30 (Stevens, J., dissenting).
85. *Id.*
86. The President must approve any regulations and they must be “consistent with achievement of the objectives of the statute authorizing the financial assistance.”*42 U.S.C. § 2000d-1* (2000); Guardians, 463 U.S. at 623 n.14 (Marshall, J., dissenting); Mello, *supra* note 2, at 955 n. 103, 971. In 1980, President Carter delegated that authority to the Attorney General and the Department of Justice has issued regulations to insure relatively uniform enforcement of the statute.*42 U.S.C. § 1-101 Exec. Order No. 12,230 (Nov. 2, 1980);
contended in his *Guardians* dissent, "The legislative history of Title VI fully confirms that Congress intended to delegate to the Executive Branch substantial leeway in interpreting the meaning of discrimination under Title VI." Justice Marshall observed that Congress had not defined the term "discrimination" in the statute, and argued that this congressional choice was deliberate as a means to give executive departments and agencies the freedom to define its meaning in accordance with their particular department or agency. He quoted then Attorney General Robert Kennedy's testimony to the House Judiciary Committee that Congress give agencies such discretion as long as they used section 601 "as a general criterion to follow." The *Alexander* Court appeared to accept Justice Marshall and Professor Abernathy's interpretation of Title VI's legislative history when it observed that Congress had "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted significant social problems, and were readily enough remedial, to warrant altering the practices of the federal grantees that had produced those impacts."

There are strong reasons to accept Professor Abernathy and Justice Marshall's interpretation of Title VI's legislative history as granting substantial deference to agencies in defining the term "discrimination." Most importantly, in 1964, shortly after the statute was enacted, a presidential task force developed disparate impact regulations for HEW, and then used these regulations as a model in drafting regulations for twenty-one additional agencies or commissions that all prohibited disparate impact discrimination. President Johnson approved the regulations and published them in the Federal Register. In *Guardians*, Justice Marshall properly observed that Title VI's disparate impact

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45 Fed. Reg. 72795 (1980) (delegating presidential authority to the Attorney General for approving Title VI regulations and reviewing agency's enforcement); Colopy, supra note 1, at 172 n.221; see generally 28 C.F.R. §§ 42.401-42.415 (2002) (Department of Justice regulations providing coordination of Title VI enforcement).


88. Id. at 615, 622 n.12 (Marshall, J., dissenting) (citing 110 Cong. Rec. 5612 (1964) (Sen. Ervin)); id. at 1619 (Rep. Abernathy); id. at 1632 (Rep. Dowdy); id. at 5251 (Sen. Talmadge); id. at 6052 (Sen. Sparkman).


90. Id. at 615, 623 (Marshall, J., dissenting) (citing Civil Rights: Hearings on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2740 (1963) (testimony of Attorney General Kennedy)).


regulations were entitled to substantial deference because they represent "a contemporaneous construction of a statute by those charged with setting the law in motion . . . ."94 Furthermore, under the Chevron doctrine, the Supreme Court defers to an agency's reasonable construction of an ambiguous statute,95 and, as Professor Abernathy demonstrates, the text and legislative history of Title VI are at least ambiguous about whether Congress intended to define the term "discrimination" as including intentional acts only or including actions having a disparate impact.96

Unfortunately, Justice Scalia is likely to dismiss Justice Marshall and Professor Abernathy's interpretation of Title VI's legislative history as irrelevant because, as a proponent of "textualist" interpretation, he routinely refuses to consider a statute's legislative history.97 Justice Scalia has argued that courts should refuse to consider a statute's legislative history because it is the text alone that is enacted by Congress and presented to the President for his signature or veto.98 For Justice Scalia, and probably Justice Thomas as well, who has usually agreed with the textualist approach,99 the fact that the text of section 602 does not explicitly authorize disparate impact regulations is likely decisive.

96. See supra notes 86-91 and accompanying text.
97. ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-37 (1997) (arguing that a judge should not use legislative history as a guide to statutory meaning because only statute's text provides meaning adopted by whole Congress; legislative history often reflects only minority of Congress); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990) (criticizing Justice Scalia's refusal to consider legislative history) [hereinafter Eskridge, New Textualism]; Gregory E. Maggs, Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia, 28 Conn. L. Rev. 393, 397-98 (1996) (defending Justice Scalia's refusal to consider legislative history).
evidence that agencies lack the authority to issue such regulations, especially in light of the Court's interpretation that section 601 is limited to intentional discrimination. Accordingly, Justice Scalia and Justice Thomas are likely to ignore the persuasive evidence in the statute's legislative history that Congress intended to delegate to administrative agencies the choice to adopt disparate impact regulations as long as they are "consistent" with the statute and the President approves them.

Many scholars and judges have criticized Justice Scalia and other textualists, however, for refusing to consider the important information about congressional intent and purpose that is often found only in a statute's legislative history. Most importantly, a majority of the Supreme Court continues to evaluate legislative history. Accordingly, the Court may still weigh the persuasive evidence in Title VI's legislative history that Congress gave federal agencies the discretion to decide whether to adopt disparate impact regulations.

Furthermore, if it invalidates Title VI's disparate impact regulations, the Supreme Court will be acting contrary to the settled expectations of most members of Congress since 1964. While courts are reluctant to conclude that legislative inaction alone is sufficient to approve an agency's interpretation of a statute, it is significant that since 1964 Congress has never repealed Title VI's widely adopted disparate impact regulations. Additionally, there is considerable evidence that many members of subsequent Congresses assumed that Title VI's disparate impact regulations are valid. Most notably, in the legislative history of the Civil Rights Restoration Act of 1987, which amended Title VI to provide that the statute's anti-discrimination provisions applied on an "institution-wide application" to include "all of the operations" of

a defendant, there is evidence that both Republican and Democratic members of Congress assumed that Title VI's disparate impact regulations are valid and can be enforced through an implied right of action. 108

The Supreme Court has generally been reluctant, however, to consider post-enactment legislative history. 109 For instance, the Supreme Court in Public Employees Retirement System of Ohio v. Betts declared that "[w]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." 110 Yet, a stronger argument for affirming Title VI's disparate impact regulations than legislative inaction or subsequent legislative history can be found in subsequent statutes in which Congress expressly adopted these regulations as a model.

III. IN SUBSEQUENT STATUTES, CONGRESS HAS RATIFIED SECTION 602'S DISPARATE IMPACT REGULATIONS

Congress has never explicitly ratified Title VI's disparate impact regulations when amending the statute itself. Several different Congresses, however, have explicitly endorsed the Title VI disparate impact regulations by requiring their adoption by different agencies when they enforce related anti-discrimination statutes governing specific government assistance programs. 111 For example, a statute enacted first

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108. See, e.g., H.R. REP. NO. 963, at 24 (1986) (observing that private right of action exists under both Title IX and its regulations); 134 CONG. REC. 4,257 (1988) (statement of Sen. Hatch) (predicting advocacy groups will file Title VI disparate impact suits in federal court); see also id. at 99-100 (1988) (statement of Sen. Hatch) (discussing enforcement of disparate impact suits by private parties); 130 CONG. REC. 18,879-80 (1984) (statement of Rep. Field) (considering Guardians and contending that "a State [will] be subject to private lawsuits because the tests have a disproportionate impact on minorities"); see Alexander v. Sandoval, 532 U.S. 275, 302 n.9 (Stevens, J., dissenting) (arguing legislative history of 1986 and 1987 amendments to Title V demonstrate that many members of Congress were aware that courts had implied private rights of action under section 602 disparate impact regulations); Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 934-35 & n.13 (3d Cir. 1997) (concluding that legislative history of Civil Rights Restoration Act of 1987 provided "some indication" that Congress intended to allow private right of action under section 602 of Title VI to enforce disparate impact regulations); Mackey v. Lanier Collections Agency & Serv., 486 U.S. 823, 838-40 (1988) (stating subsequent legislative history is of limited value because intent of Congress that enacted statute is controlling); Eskridge, supra note 93, at 221-22 (indicating that subsequent legislative history was considered least authoritative type of legislative history by Supreme Court in early 1980s, but that Burger Court considered such evidence on a number of occasions); Mank, Private Cause of Action, supra note 1, at 40-43 (discussing Chester's use of legislative history in Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988)).

109. Mackey v. Lanier Collections Agency & Serv., 486 U.S. 823, 838-40 (1988) (stating subsequent legislative history is of limited value because intent of Congress that enacted statute is controlling); Eskridge, supra note 93, at 221-22 (indicating that subsequent legislative history was considered least authoritative type of legislative history by Supreme Court in early 1980s, but that Burger Court considered such evidence on a number of occasions); Mank, Private Cause of Action, supra note 1, at 45 (arguing in recent years that Supreme Court is less likely to consider post-enactment legislative history).


111. See Luke Cole, Center on Race Poverty & the Environment, Olga Pomar, Camden Regional
by the 97th Congress in 1982 and then amended by the 103rd Congress in 1994 directs the Secretary of Transportation "to ensure that an individual is not excluded because of race, creed, color, national origin, or sex from participating" in any activities funded by federal aviation grants. Additionally, the statute requires the Secretary of Transportation to prescribe regulations "to carry out this section," which "shall be similar to those in effect under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)."\footnote{112} Similarly, the 95th Congress, in 1978, required federal agencies to guarantee that no person shall be excluded from participating in any activity or employment conducted pursuant to the Outer Continental Shelf Lands Act or the Outer Continental Shelf Lands Act Amendments of 1978 on the basis of race, creed, color, national origin, or sex. Moreover, the statute stated that each agency "shall promulgate such rules as it deems necessary to carry out the purposes of this section, and any rules promulgated under this section . . . shall be similar to those established and in effect under title VI and title VII of the Civil Rights Act of 1964."\footnote{113} Furthermore, the 93rd Congress enacted two statutes in 1973 and 1974 prohibiting any person from being subjected to discrimination on the basis of sex in programs receiving assistance by the Federal Highway Administration or under the Federal Energy Administration Act, explaining that "[t]his provision will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964."\footnote{114} Four other statutes contain similar provisions.\footnote{115}

The crucial question is how much weight should courts give to congressional use of Title VI disparate impact regulations in related statutes. If a subsequent statute or amendment to a statute clearly endorses a particular judicial or administrative interpretation of a


\footnote{112. 49 U.S.C. § 47123 (2000).}
\footnote{113. 43 U.S.C. § 1863.}
\footnote{115. See 15 U.S.C. § 719 (requiring promulgation of anti-discrimination rules similar to Title VI for Alaska Natural Gas Transportation); 40 U.S.C. § 476 (prohibiting sex discrimination in connection with management and disposal of federal property and requiring promulgation of anti-discrimination rules similar to Title VI); 42 U.S.C. § 3891 (prohibiting sex discrimination in connection with development of energy sources and requiring promulgation of anti-discrimination rules similar to Title VI); 42 U.S.C. § 6709 (prohibiting sex discrimination in connection with public works employment and requiring promulgation of anti-discrimination rules similar to Title VI).}
statute, then courts will recognize that interpretation as binding. Accordingly, if Congress had re-enacted Title VI and explicitly endorsed section 602's disparate impact regulations, then it would be clear that the regulations are valid. A more difficult case is if Congress had amended Title VI in a way that implicitly approved the disparate impact regulations. In that example, a court would need to carefully analyze how such an amendment affects the meaning of the prior statute. For example, because 1986 amendments to Title IX explicitly waived state's sovereign immunity to remedies both at law and equity, Justice Scalia conceded that this subsequent legislation validated judicial decisions establishing a private right of action under Title IX.

If Congress had simply re-enacted Title VI and had not explicitly referred to the disparate impact regulations adopted by virtually every agency, there are a number of cases that have held that Congress would be deemed to have adopted an agency's interpretation of a statute when, knowing of an agency's interpretation, the legislature re-enacts the statute without significant change. Similarly, the re-enactment of a statute which has been given a consistent judicial interpretation generally includes the settled judicial interpretation even though that interpretation is never explicitly mentioned if it is reasonable to assume that Congress was aware of that interpretation. The fact that


117. See Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Constructing 17 HARV. J.L. & PUB. POL'Y 401, 409 (1994) (discussing Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Superfund Amendments and Reauthorization Act (SARA) must be read in combination to hold state liable for damages in private suits over hazardous waste sites)).

118. Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a)(1), (2); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 78 (1992) (Scalia, J., concurring in judgment); see also id. at 72-73 (stating Congress's abrogation of States' sovereign Amendment immunity under Title IX in the Rehabilitation Act Amendments of 1986 "cannot be read except as a validation of Cannon's holding" that private right of action is available under the statute).


120. See Pierce v. Underwood, 487 U.S. 532, 567 (1988) (declining to apply "re-enactment" rule because of inconsistent judicial interpretation, but stating reenactment of statute with consistent judicial interpretation "generally includes the settled judicial interpretation"); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change") (dictum, but widely cited case); Eskridge, supra note 97, at 243-44, 311 (discussing Lorillard and reenactment rule).
Congress has explicitly adopted Title VI's disparate impact regulations for several related statutes is in some ways stronger evidence than when Congress merely re-adopts a statute without ever explicitly addressing a judicial interpretation or an agency’s interpretation of the statute or its regulations.

Because it is often helpful to consider related statutes when interpreting difficult or ambiguous statutory language, courts have developed the “in pari materia” canon of considering together related or similar statutes. Justice Scalia often considers related statutes in seeking to define a statutory text’s most likely meaning. For instance, in United Savs. Ass'n v. Timbers of Inwood Forest Associates, Justice Scalia argued that statutory interpretation is a “holistic endeavor” in which judges should consider the meaning of terms in a number of related statutes. Similarly, in United States v. Fausto, Justice Scalia stated, “This classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” On the other hand, Justice Scalia has also observed that courts should seek the original meaning of a statute at the time Congress enacted it instead of examining evidence about how subsequent Congresses might have interpreted its language. Perhaps

121. Buzbee, supra note 104, at 221-25 (discussing in pari materia canon, especially its use by Justice Scalia); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1039 (1989) (same); Bradford C. Mank, Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority and Defeance to Executive Agencies, 86 Ky. L.J. 527, 530 (1998); Michael E. Solimine, Removal, Remands and Reforming Federal Appellate Review, 38 Mo. L. Rev. 287, 299 (1993) (questioning in pari materia canon because Congress does not always consider entire statute when amending one part of multi-part section, and unrelated material is often placed next to each other in U.S. Code).

122. See W. Va. Hosps. v. Casey, 499 U.S. 83, 100 (1991); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (stating judges should interpret statutes by finding meaning “(1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated”); Pierce v. Underwood, 487 U.S. 552, 564-63 (1988) (finding meaning of term “substantially justified” in Equal Access to Justice Act based on use of “substantial” in Administrative Procedure Act and Rule 37 of the Federal Rules of Civil Procedure); Kungys v. United States, 483 U.S. 759, 769-70 (1988) (finding meaning of term “material” in the Immigration and Nationality Act of 1952 by examining its use in criminal statutes); Buzbee, supra note 104, at 221 nn.177, 179 (stating Justice Scalia often considers usage in other statutes); Eskridge, Jr., The New Textualism, supra note 97, at 661 (stating Justice Scalia often considers how word or phrase is used in other statutes).


124. Id. at 371.


126. Id. at 453 (Scalia, J.) (stating Civil Service Reform Act precludes judicial review of disciplinary measures against particular federal employees, even though provisions of Back Pay Act are to the contrary); Karkkainen, supra note 117, at 409.

127. Casey, 499 U.S. at 101 n.7 (“The ‘will of Congress’ we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment.”); William D. Popkin, Statutes in Court: The History and Theory of Statutory Interpretation 179-80 (1999) (noting that
the apparently contradictory approaches suggested by Justice Scalia can be reconciled if he means that a judge should first seek to find an unambiguous meaning in the original statute, but should look to related statutes if the original statute does not have a clear meaning. 128

There is often controversy about when and to what extent judges should consider related statutes in interpreting a statute. 129 In particular, some commentators have criticized Justice Scalia for making interstatutory textual comparisons, but refusing to consider whether a comparison is appropriate in light of their legislative history, historical content, or surrounding judicial decisions. 130 Whether it is appropriate to compare statutory provisions in different statutes depends on how closely related they are to each other. 131 Additionally, it depends on whether Congress intended courts to interpret them in conjunction. 132 Because Congress does not always explicitly address whether it intends one statute to be interpreted in light of another, judges must determine whether it is appropriate to assume that Congress is seeking to create a coherent body of law among several statutes. 133 Before undertaking interstatutory comparisons, courts should examine the statutes’ historical context, legislative intent, legislative histories, administrative developments, and relevant judicial precedents to determine if the statutes are sufficiently related to use one statute to define meaning in another. 134

In some recent cases, the Supreme Court has considered subsequent related statutes when interpreting an earlier statute. In Food & Drug

textualists generally focus on original meaning of statute, but contending judges should consider modern understandings if they involve issues that original Congress did not anticipate).

128. Casey, 499 U.S. at 100 ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."); infra note 143 and accompanying text.

129. See Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 867 (1986) (Stevens, J., dissenting) (arguing majority's comparison of two different provisions codified in the same statute, but enacted at different times, was inappropriate); United States v. Monia, 317 U.S. 424, 444 (1943) (Frankfurter, J., dissenting) (arguing majority inappropriately compared different statutes where there was no indication Congress intended comparison); Buzbee, supra note 104, at 223-25 (discussing danger of overusing in pari materia doctrine).

130. See, e.g., Buzbee, supra note 104, at 184-88, 190-93, 225, 248-49 (criticizing Supreme Court and especially Justice Scalia's use of statutory comparisons without adequate consideration of historical context, legislative history or judicial precedents).

131. See id. at 237 (arguing interstatutory references are "prone to judicial abuse" if there are no limits on which statutes may be cross-referenced).

132. See Popkin, supra note 127, at 1149-50 (criticizing Justice Scalia's assumption that statutes can be compared in the absence of any historical evidence Congress intended such a comparison).


134. See Buzbee, supra note 104, at 237-39, 242-49 (arguing courts should examine a variety of information about relationship between allegedly related statutes before making comparisons).
Administration v. Brown & Williamson Tobacco Corp.,
the Court interpreted a 1938 statute, the Food, Drug, and Cosmetic Act (FDCA), as being limited by several statutes enacted beginning in 1965 to regulate tobacco advertising even though the latter statutes did not explicitly refer to the 1938 statute. The Court stated that the meaning of one statute may be affected by other Acts, especially in circumstances in which a subsequent statute is more specific than a more general prior statute. Justice O’Connor stated as a general principle 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.” In particular, Justice O’Connor concluded:

In determining whether Congress has spoken directly to the FDA’s authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” United States v. Fausto, 484 U.S., at 453, 108 S.Ct. 668. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in United States v. Estate of Romani, “a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.” 523 U.S., at 530-531, 118 S.Ct. 1478.

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, wrote a vigorous dissent criticizing the majority’s use of subsequent statutes as a basis of interpretation because the later statutes did not purport to control or change the meaning of the earlier statute.

136. 21 U.S.C. §§ 360j(e), 393(b)(2).
139. Brown & Williamson, 529 U.S. at 153, 143 (citing Romani, 523 U.S. at 530-31; Fausto, 484 U.S. at 433).
140. See Brown & Williamson, 529 U.S. at 143.
141. See id. at 181-82 (Breyer, J., dissenting).
It may seem surprising that Justices Scalia and Thomas, who are both avowed textualists, would join the majority opinion in *Brown & Williamson* in light of its extensive use of subsequent statutes, including their legislative history, and the majority’s refusal to rely on the text of the 1938 statute. Yet the Court’s opinion is consistent with Justice Scalia’s approach to statutory interpretation that judges should consider related statutes and assume that Congress seeks to enact a coherent body of law. In *West Virginia Hospitals v. Casey*, Justice Scalia argued, “Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.” While he did not write a separate concurrence explaining his vote, Justice Scalia may have joined the Court’s decision in *Brown & Williamson* because he thought that the 1938 statute was ambiguous. Similarly, in *Gustafson v. Alloy Co., Inc.*, Justice Thomas’s dissenting opinion argued that judges should look at neighboring words “only in cases of ambiguity.” Again, while it is impossible to know Justice Thomas’s specific views in *Brown & Williamson* because he did not write a separate opinion, perhaps he thought the 1938 statute at issue was ambiguous and that the Court’s understanding would be helped by examining subsequent statutes.

The unusual facts in *Brown & Williamson* may have led the Court to rely so heavily on subsequent related statutes and it is possible that the Court would be reluctant in other cases to emphasize subsequent legislative actions to such a great extent. Yet, similarly, in *Amoco Production Co. v. Southern Ute Indian Tribe*, Justice Kennedy interpreted two statutes governing reservations of coal interests in light of subsequent statutory developments and concluded that the “limited nature of 1909 and 1910 Act reservations is confirmed by subsequent congressional enactments.” Applying *Brown & Williamson*’s approach

142. See Buzbee, supra note 104, at 194-200 (criticizing *Brown & Williamson*’s use of subsequent legislative history); Manning, *Non-Delegation Doctrine*, supra note 99, at 226-28 (observing that *Brown & Williamson*’s use of subsequent legislative history is “puzzling” in light of Supreme Court’s increasingly textualist approach to interpretation). But see infra notes 143-47 and accompanying text.

143. See supra notes 122-28 and accompanying text; infra note 145 and accompanying text.


145. Id. at 100.


147. Id. at 586 (Thomas, J., dissenting); Popkin, *supra* note 98, at 182-83 & n.74 (arguing Justice Thomas looks at related statutes or related words in same statute only if text at issue is ambiguous).


150. Id. at 877-78; Buzbee, *supra* note 104, at 202.
of considering the impact of subsequent related statutes, there is a strong argument that the four statutes adopting Title VI’s disparate impact regulations validate those regulations under Title VI itself.

CONCLUSION

In light of Justice Scalia’s critical dicta in Sandoval, the Supreme Court is likely to address the validity of Title VI’s disparate impact regulations in the near future. In South Camden Citizens in Action v. New Jersey Department of Environmental Protection,151 the Third Circuit, in a 2-1 decision, used dicta in Sandoval to conclude that Title VI only prohibits intentional discrimination, that the EPA’s Title VI regulations cannot be enforced through 42 U.S.C. § 1983 because the disparate impact regulations create greater rights than are established in statute, and held that the plaintiffs cannot use § 1983 to enforce Title VI’s disparate impact regulations.152 The plaintiff-appellants sought a writ of certiorari from the Supreme Court, but the Court denied the petition on June 24, 2002.153 While the Court followed its usual practice in not explaining why it denied a writ of certiorari in South Camden, on June 20, 2002, the Court in Gonzaga v. Doe154 narrowed the grounds for filing suit through 42 U.S.C. § 1983 by establishing a rule that spending legislation that provides federal funding to various state, local, and private recipients does not ordinarily create enforceable rights under § 1983 unless Congress demonstrates through clear and unambiguous statutory language that it intends to provide individual rights against any recipient that accepts federal funding. Although not directly on point, Gonzaga’s restrictive textualist approach to § 1983 suits is generally consistent with the Third Circuit’s refusal to allow plaintiffs to enforce Title VI disparate impact regulations through § 1983 because the statute does not explicitly authorize a prohibition against disparate impact discrimination. After Gonzaga, lower courts may be more reluctant to authorize plaintiffs to enforce Title VI disparate impact regulations through § 1983 in light of the Court’s confining approach to § 1983 suits.

151. 274 F.3d 771 (3d. Cir. 2001), cert. denied, 70 USLW 3669 (June 24, 2002).
153. No. 01-1547, 70 USLW 3669 (April 15, 2002), cert. denied, 70 USLW 3669 (June 24, 2002); Cole et al., supra note 111.
Even if private plaintiffs may no longer enforce Title VI disparate impact regulations through § 1983 or through a private right of action, the Court still needs to consider whether federal agencies may invoke penalties or terminate funding to recipients because of a finding of disparate impact discrimination. Every significant federal agency has disparate impact regulations pursuant to section 602 of Title VI. Eventually a recipient will appeal an adverse decision by a federal agency using disparate impact regulations and courts will have to address the issue.

Some believe that a majority of the present Court would reject Title VI’s section 602 disparate impact regulations if the Court decides to address the issue. Yet, especially in light of the four statutes that have explicitly adopted Title VI’s disparate impact regulations, there is a strong argument that Congress has ratified the interpretation of every federal agency to address the issue and the interpretation that the five Justices in the Guardians majority maintained, that these regulations are valid despite the suggestion in Bakke that the statute itself is limited to intentional discrimination. Title VI’s legislative history strongly suggests that Congress intended to give agencies wide latitude in adopting regulations, including regulations prohibiting disparate impact discrimination.

155. Pursuant to section 602 of Title VI, federal agencies must investigate complaints of discrimination and may impose sanctions if there is evidence of discriminatory impacts. See 42 U.S.C. § 2000d-1; Mank, Private Cause of Action, supra note 1, at 12-13, 20-22.

156. Mank, Private Cause of Action, supra note 1, at 13; supra notes 8-9, 92-94 and accompanying text.

157. Recipients of federal funding may seek judicial review of a decision by a federal agency to terminate or reduce funding. 42 U.S.C. § 2000d-2; Mank, Private Cause of Action, supra note 1, at 21.

158. Activists’ Appeal to High Court May Spell End for EPA Equity Rules, supra note 21, at 40-41.